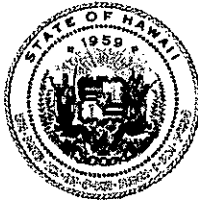


NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the House Committee on
JUDICIARY**

**Thursday, February 17, 2011
2:30 PM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 396
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS**

House Bill 396 would require certain council, board and commission members to take a training course by the Office of Hawaiian Affairs ("OHA") relating to native Hawaiian traditional and customary rights, natural resource protection and access rights, and public trust. Entities within the Department of Land and Natural Resources ("Department") that would be subject to this requirement would be the Board of Land and Natural Resources, the Commission on Water Resource Management, the Legacy Land Conservation Commission, the Natural Area Reserves Commission, and the Hawaii Historical Places Review Board. The Department has no objections to this measure and offers the following comments.

The Department is keenly aware of the need for the members of its boards and commissions to be properly educated and sensitive to the important subject matters that would serve as the focus of this proposed training course. However, all of the members of these boards and commissions fulfill an important public service by serving on a volunteer basis. The Department requests that OHA consider this while developing the training course as to avoid imposing too great a burden on the various board and commission members' time.

The Department notes that its general fund appropriations and special fund revenues have substantially decreased in recent years. In the past two years, the Department has lost at least 80 positions, which constitutes approximately 10% of the Department's workforce. The Department does note the bill tasks OHA with providing the entire scope of the training program, including the development, administration and most importantly, funding. The Department appreciates it is not tasked with this responsibility as it could cripple an already hobbling Department.

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAIHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



HB396
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS
House Committee on Judiciary

February 17, 2011

2:30 p.m.

Room 325

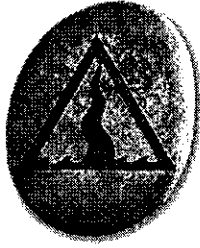
The Office of Hawaiian Affairs (OHA) strongly **SUPPORTS** HB 396, which is a bill in OHA's 2011 Legislative Package. This bill would require that certain council, board, and commission members attend a training course administered by OHA.

As entities of the State, certain councils, boards, and commissions administer public trust resources and programs that directly impact upon Native Hawaiian traditional and customary rights, natural resource protection and access rights, and the public trust. These entities have a duty to protect and preserve these rights and a fiduciary duty to administer the public trust in the interest of the beneficiaries, including native Hawaiians and Hawaiians.

As the principal public agency responsible for ensuring that other state agencies protect Native Hawaiian rights, OHA sees this bill as an important opportunity to work with state councils, boards, and commissions to enable them to execute their roles better informed of their fiduciary obligations to native Hawaiians and Hawaiians, and their responsibilities to protect Native Hawaiian rights and interests.

Given the broad range of expertise and experience of the individuals selected to serve on these state councils, boards, and commissions, OHA recognizes that many members on these key policy-making entities may not possess knowledge of the unique rights and responsibilities that relate to the Native Hawaiian community. This training course, which will incorporate resource individuals with legal, historical, and cultural expertise, is intended to address this deficiency.

OHA strongly urges the passage of HB396. Mahalo nui loa for allowing us to provide testimony.



Hanalei Watershed Hui

February 16, 2011

Re: HB 396
Hearing Before: JUDICIARY Committee
Room: 325

Hearing Date: 2/17/2011 2:30:00 PM

Testimony in strong support

Aloha Chair Keith –Agaran and Vice Chair Rhoads and committee members, the Hanalei Watershed Hui is a community based nonprofit organization implementing a locally developed Watershed Action Plan for the four ahupua'a of the Hanalei Bay watershed.

The Office of Hawaiian Affairs (OHA) has collaborated with and supported our community effort from day one. Our relationship is professional and very useful. As Hawaii's only American Heritage River, we have over a decade of experience in partnerships with government and non government organizations and agencies.

It is our strong opinion that OHA should be the principle public agency for consultation regarding Hawaiian issues. We need an experienced, efficient and respected guide to support and further our efforts to mālama 'āina. We need an agency with a credible history with our community that is responsive and capable.

We most certainly do not need more than one agency or organization to provide the guidance and collaboration we receive currently from OHA.

We are grateful for OHA's good service to Hanalei for many years and welcome their partnership in the future.

Me ka pono,

Maka'ala Ka'auoana
Executive Director

E malama kumu wai ~ Protect the source

5299C Kuhio Hwy, P. O. Box 1285, Hanalei, Kauai, HI 96714
Telephone/Facsimile (808) 826-1985 Email: hanaleiriver@hawaiian.net
www.hanaleiwatershedhui.org

The Hanalei Watershed Hui is an equal opportunity employer and provider.



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HOUSE BILL 396 RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 17, 2011
TIME: 2:30 p.m.
PLACE: Conference Room 325

Chairperson Keith-Agaran, Vice-Chairperson Rhoads and members of the House Committee on Judiciary. Aloha. My name is Moses Haia and I am the Executive Director of the Native Hawaiian Legal Corporation (NHLC). Thank you for this opportunity to provide testimony in support of House Bill 396, relating to the Office of Hawaiian Affairs.

NHLC is a non-profit, public interest law firm which endeavors to provide low cost legal assistance to Native Hawaiian individuals, families and communities in their individual and collective efforts to preserve their traditional Hawaiian way of life. HB 396 seeks to provide training and education to the members of appropriate councils, boards, and commissions about native Hawaiian and Hawaiian traditional and customary rights, natural resource protection and access rights, and the public trust.

The cases undertaken by NHLC include assertion of ahupua'a tenants' and kuleana rights; access and water rights; protection and preservation of traditional and customary practices; and, the protection of historic sites, including burials. In many cases, a council, board, or commission of the state or a political subdivision of the state presides over these issues. It is, therefore, critical that the members of these entities have a working understanding of the laws relevant to these matters. It is perhaps even more critical that these members understand the important underpinning of these laws; the history of Hawaii. This history, after all, provides the very basis for the decision making authority of each council, board, and commission as well as the particular legal context within which they must make decisions on behalf of the public at large.

The history of customs, traditions, and the laws that apply today are unique to Hawai'i and do not fit entirely within a western framework. The Hawaiian scholar David Malo notes, "the king was over all the people; he was the supreme executive, so long, however, as he did right." See, David Malo, *Hawaiian Antiquities*, 53 (Bishop Museum Press, 1951 ed.). Malo also confirms that the ruling chiefs were bound by trust to see to the welfare of the people and the land. Along with the power and authority to distribute the assets of the kingdom, the chiefs had the duties of trustees, obligated to ensure the

Services made possible with major funding from the Office of Hawaiian Affairs.

beneficial use of the land for all of the people. The ancient Hawaiian regulations regarding water and land grew out of this concept of mutual benefit and sharing. *Id.* at 195.

In the following passage from Reppun v. Board of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982) (“*Reppun*”), the Hawai‘i Supreme Court captures the essence of the problem when pre-western contact Hawaiian history is interpreted and explained through a western lense:

The western doctrine of “property” has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others and the right to transfer the property with consent of the “owner”. In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-[Mahele] judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, **the creation of private and exclusive interests in water, within the context of western concepts of property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.**

Id. at 547, 656 P.2d at 68. (Emphasis added).

Thirteen years later, the Hawai‘i Supreme Court noted, “[a]lthough the court in *Reppun* focused on interests in water, its discussion of the development of Hawaiian property rights was enlightening” when dealing with the exercise of traditional and customary native Hawaiian practices. Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission, 79 Hawai‘i 425, 443, 903 P.2d 1246, 1264 (1995) (“*Kohanaiki*”).

As the Court further acknowledged in *Reppun*, 65 Hawai‘i at 542, 656 P.2d at 65, and subsequently reaffirmed in *Kohanaiki*, 79 Hawai‘i 425, 443, 903 P.2d 1246, 1264 (1995):

In 1840 the first constitution of the Kingdom of [Hawai‘i] proclaimed that although **all property** belonged to the crown ‘it was **not his private property**. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property.’ [Hawai‘i Const. Of 1840 in Fundamental Laws of Hawaii 3 (1904)]. Thus, prior to the [Mahele], all land remained in the **public domain**. However, other laws passed during the same period lay the foundation for the eventual imposition of private property rights in land by limiting the King’s and landlords heretofore unregulated authority to disseize one to whom land had been granted and **insuring certain rights of the common people and lesser lords**. (Emphasis added).

Furthermore, after a thorough review and careful analysis of the development of the western concept of private property in Hawai‘i, the *Kohanaiki* Court noted with great import that:

Provisions of the law requiring the landlord’s consent [before the common people could go to the mountains and the seas] were repealed...because ‘many difficulties and complaints have arisen from the bad feeling

existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them.'

Id. at 446, 903 P.2d, at 1267.

These and other historical realities led the *Kohanaiki* Court to logically conclude that "the western concept of exclusivity is not universally applicable in Hawai'i...In other words, the issuance of a Hawaiian land patent confirmed a *limited* property interest as compared with typical land patents governed by western concepts of property." *Id.* at 447, 903 P.2d, at 1268 (emphasis added).

The State and its political subdivisions, which now stand in the shoes of the King, must, in conformance with their fiduciary duties as trustees of the public trust, act in the best interests of the people. Hawaii Revised Statutes ("HRS") § 1-1, confirms that the common law of Hawai'i is ultimately subject to Hawaiian usage unless modified by case law, statute or the constitution.¹ To a large extent, the current form of Article XII, § 7 of Hawai'i's Constitution is a reflection of the state's responsibility when it comes to custom and usage.

Article XII, § 7 of the Constitution of Hawaii confirms that all state councils, commissions, and boards must consider those rights traditionally and customarily exercised for subsistence, cultural, and religious purposes in the exercise of their regulatory authority. *Kohanaiki*, 79 Haw. at 451. Essentially, these rights, imbued with constitutional protection, are a part of the public trust. As such, these public agencies, are "obligated to protect the reasonable exercise of [these rights] to the extent feasible." *Id.* at 450, n. 43, 903 P.2d at 1271, n. 43. While these rights are subject to reasonable regulation, agencies may not regulate them "out of existence." *Id.* at 451, 903 P.2d at 1272.

Accordingly, the *Kohanaiki* Court explained that "HRS § 1-1 represents the codification of the doctrine of custom *as it applies in our State*."² The *Kohanaiki* Court examined HRS § 1-1 and its predecessors and essentially concluded that Hawaiian usage or custom has always had primacy over English and American common law.³ In other words, unlike other legal systems that are also based (at least in part) upon Anglo-Saxon traditions, that common law does not have chronological priority in Hawai'i.⁴

¹ See, *Kohanaiki*, 79 Haw. at 437 n.21, 903 P.2d at 1258 n.21 (tracing this provision to the Laws of 1892, ch. LVII, § 5, but acknowledging that the native usages and customs in regard to landed tenures were preserved throughout the historical development of the kingdom's written laws); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (quoting the Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7, which constrained the Land Commission's power to quiet title "in accordance with . . . native usages in regard to landed tenures").

² 79 Hawai'i at 447, 903 P.2d at 1268 (emphasis in original).

³ See David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Hawai'i Bar Journal 23-26 (1998).

⁴ 79 Hawai'i at 441 n.26, 903 P.2d at 1262 n.26 (citing Blackstone).

Given the above, any member of a council, board or commission with the authority to make decisions impacting native Hawaiian rights has, at a minimum, a moral obligation to endeavor to truly understand the significance Hawaiian history plays in the formation, enactment and enforcement of our laws. Each one of them also has a legal duty as a public trustee to have a working knowledge of the laws and rights that arise out of that history. Truly understanding the importance and primacy of the above will provide these entities with the ability and capacity to arrive at balanced, informed decisions. It is then incumbent upon them to do so and not let politics undermine the process. Mahalo for the opportunity to provide our input on this very important subject.

ASSOCIATION OF HAWAIIAN CIVIC CLUBS

Testimony in support of
House Bill 396 (HSCR221)
Relating to the Office of Hawaiian Affairs

House Committee on Judiciary
Thu.; February 17, 2011; 2:30p; Rm. 325

Aloha Chairman Keith-Agaran, vice chair Rhoads and members of the House Judiciary Committee. The Association of Hawaiian Civic Clubs is pleased to lend its support to this bill.

This is one of several bills introduced by the Office of Hawaiian Affairs, and on January 22, 2011 the Association Board of Directors met and reviewed the summaries of the OHA bills. The Board represents all the councils and all sixty component clubs of our organization, and voted unanimously to support the OHA legislative package.

This particular OHA bill would amend Chapter 10 of the Hawaii Revised Statutes to add a section that **requires training on Native Hawaiian and Traditional and Customary Rights, Native Hawaiian and Hawaiian Natural Resource Protection and Access Rights, and the State's Obligations under the Public Trust.**

Training of this kind is long over-due, given the dynamics of a changing population in Hawaii. While we support this measure, we will not stand idly by but offer our support to the Office of Hawaiian Affairs and assist wherever we can be useful in this effort.

Thank you for the opportunity to testify and we urge the passage of this bill.



O`ahu Council
Association of Hawaiian Civic Clubs
P. O. Box 37874
Honolulu, HI 96837-1122

February 17, 2011
House Judiciary Committee Hearing

TESTIMONY IN SUPPORT OF H.B. 396
Relating to the Office of Hawaiian Affairs

Aloha mai kakou. My name is Mahealani Cypher, president of the O`ahu Council, Association of Hawaiian Civic Clubs. Our Council's membership is comprised of 26 Hawaiian civic clubs located on the island of O`ahu.

We are in strong support of House Bill 396, which would require certain council, board and commission members to undertake special training offered by the Office of Hawaiian Affairs (OHA) relating to native Hawaiian traditional and customary rights, natural resource protection and access rights, and the public trust. This is maika`i.

We believe that these individuals would benefit greatly from enlightenment, education, and enhanced sensitivity to the culture of our native Hawaiian people, hosts here in the islands.

Our kupuna kahiko have left us with a rich and powerful legacy of cultural values and practices that, in our view, offer solutions to many of the problems faced in our government and society today. We offer our kokua, as the Hawaiian Civic Clubs of O`ahu, to support this cultural training in whatever ways are needed.

We urge your support for this bill.

Mahalo for this opportunity to offer our mana`o.

Mahealani Cypher

Ph. (808) 226-4195
Email: malama pono@aol.com



KO`OLAUPOKO HAWAIIAN CIVIC CLUB

February 8, 2011

TESTIMONY

TO: Rep. Faye P. Hanohano, Chair/And Members
Committee on Hawaiian Affairs
House of Representatives

FROM: Alice P. Hewett, President *Alice P Hewett*
Ko'olaupoko Hawaiian Civic Club

RE: H.B. 396 – Relating to the Office of Hawaiian Affairs

Aloha mai kakou!

The Ko'olaupoko Hawaiian Civic Club strongly supports H.B. 396, which would require certain council, board and commission members to undertake a training course to help them understand native Hawaiian traditional and customary rights, natural resource protection and access rights, and the public trust. This training is long overdue and would, in our view, be beneficial not just to these various state appointees but even to the members of the State Legislature.

A few years ago, we encountered a situation with one of the state department heads who, though of native Hawaiian ancestry, was unprepared and ill-equipped to work with native Hawaiians on cultural issues for properties under his kuleana. If he had been given the opportunity to raise his awareness, knowledge and understanding of our culture, perhaps he could have avoided the conflict that resulted from his actions.

We urge your committee to pass this bill and forward it to the House floor for approval.

Mahalo for this opportunity to offer our mana'o.

P. O. Box 664
Kaneohe, HI 96744
Ph. (808) 235-8111
koolaupokohcc.org

testimony for Thursday

Tracy A Ryan [tracyar@hawaiiantel.net]

Sent: Sunday, February 13, 2011 8:00 AM

To: JUDtestimony

TESTIMONY

The Libertarian Party of Hawaii
c/o 1658 Liholiho St #205
Honolulu, HI 96822

February 5, 2011

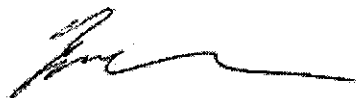
RE: HB 396 to be heard Thursday, February17, 2011 at 2:30 PM in conference room 325.

To the members of the House Committee on Judiciary

We oppose passage of HB 396. The goal of assisting members of boards and commissions in understanding Hawaiian issues that may be relevant to their work is a reasonable one. Turning over control of the process to a political organization which is involved in many controversies over Hawaiian rights and sovereignty is not a well considered path to achieve this.

The OHA version is not everyone's version. Court cases have gone against them on blood quantum tests. Hawaiian independence organizations and many educated non-Hawaiians have been deeply critical of their stance on the Akaka Bill. In short OHA's politics have made them the wrong group for the task suggested by HB 396.

Sincerely:



Tracy Ryan
Oahu County Chair
The Libertarian Party of Hawaii

Testimony for HB396 on 2/17/2011 2:30:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Saturday, February 12, 2011 7:13 AM**To:** JUDtestimony**Cc:** Ken_Conklin@yahoo.com

Testimony for JUD 2/17/2011 2:30:00 PM HB396

Conference room: 325

Testifier position: oppose

Testifier will be present: No

Submitted by: Kenneth R. Conklin, Ph.D.

Organization: Individual

Address:

Phone:

E-mail: Ken_Conklin@yahoo.com

Submitted on: 2/12/2011

Comments:

I oppose HB396 for at least the following three reasons.

1. This bill authorizes OHA to exercise power over all or most state agencies. It elevates OHA to a position of superiority over other agencies of the State of Hawaii, by forcing employees of those agencies to place themselves under the authority of OHA, where OHA will determine the contents of the courses they are required to take, and OHA will be the sole judge of whether those employees have learned the subject matter and have shown proper deference to the political views of OHA, as a requirement for keeping their jobs. This bill forces government employees to submit to political indoctrination -- brainwashing -- in the views of OHA, many of which are highly controversial, morally reprehensible, and probably unconstitutional.
2. This bill establishes a particular religion as the government-approved religion which government employees are required to learn and reverence. Only a few weeks ago the Senate made the decision to abolish the custom of opening each day's business with a religious invocation. The Senate made that decision because of concerns that such invocations violate the "establishment" clause of the First Amendment to the U.S. Constitution. The Hawaiian religion is the only one to be given special deference under the terms of this bill; thus this bill would be an establishment of religion. For example, when the State of Hawaii provides grants or other aid to institutions which are predominantly oriented to a particular religion (such as Catholic Charities), then, under the theory of this bill, there should be a requirement that all state employees who conduct relations with that institution to implement the terms of that grant must undergo a training program designed and taught by that institution to ensure that the government employees are knowledgeable and deferential to the religious views of that institution (such as the Doctrine of Trans-substantiation, the Doctrine of the Virgin Birth, etc.).
3. I would point out that in 1819, the year before the American missionaries came to Hawaii, the sovereign King Liholiho Kamehameha II, with his regent stepmother Queen Ka'ahumanu, and with Kahuna Nui (High Priest) Hewahewa, exercised sovereignty on behalf of all native Hawaiians to abolish the ancient religion, and ordered the destruction of the heiaus and burning of idols. Today's ethnic Hawaiians disrespect the decision of their ali'is and ancestors by trying to resurrect the ancient religion. By seeking to elevate that ancient religion above all other religions, they disrespect the right to freedom of religion possessed by all Americans. This committee should not disrespect the multiracial, multicultural people of Hawaii by passing this bill.

Testimony for HB396 on 2/17/2011 2:30:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, February 14, 2011 9:23 AM

To: JUDtestimony

Cc: garrysmith@juno.com

Testimony for JUD 2/17/2011 2:30:00 PM HB396

Conference room: 325

Testifier position: oppose

Testifier will be present: Yes

Submitted by: Garry P. Smith

Organization: Individual

Address:

Phone:

E-mail: garrysmith@juno.com

Submitted on: 2/14/2011

Comments:

The overriding problem with this bill is it does not address who will determine the content of the "briefings". Certainly there is a lot of confusion and incorrect information concerning "rights and customary practices". If the briefer determines what is legal and not legal and tells the audience, who is to say that it will be correct? This bill will give the power of determining by the speaker what is law and what isn't law. This is inappropriate. This also creates another layer of beaurocracy that cannot be monitored by anyone.

LEIALOHA "ROCKY" KALUHIWA

P. O. Box 4870

Kaneohe, HI 96744

Ph. 286-7955

February 16, 2011

To: Rep. Gilbert S.C. Keith-Agarari, Chair/And Members
House Committee on Judiciary

From: Leialoha Kaluhiwa 
Kupa`aina, He`eia Ahupua`a

Subject: Testimony in Support – H.B. 396 – Relating to the Office of Hawaiian Affairs
(Amendment suggested)

Aloha Kakou!

My name is Leialoha "Rocky" Kaluhiwa, and I am speaking in favor of H.B. 396, which would have OHA provide Hawaiian protocol training for certain council, board and commission members. One amendment I suggest is that you include certain state department heads in this list of those recommended for training.

I brought this subject up to OHA, as well as our Hawaiian Senator Akaka, about five years ago when I saw something of great concern happening before my very eyes, that I thought could have been avoided if the department head in question had proper training and sensitivity.

One day, while driving on the H-3 highway, I looked down into Haiku Valley and saw a bulldozer clearing an area that is known to us as Kanehekili. Kanehekili, sometimes known as Kahekili, is a heiau built to honor the god Kanehekili, who was the god of thunder and lightning. I called DLNR to investigate this, and it ceased to continue right after that.

I approached DHHL, who had given this person a lease agreement to build a Chinese temple on the site, not knowing what this place meant to us Kupa`aina, neither did DHHL. Well, needless to say, it rained and stormed heavily for 40 days and 40 nights after that. There were floods, lightning and thunder everywhere in our islands.

The moral of this story is the lease should not have been given to build a Chinese temple without at least conferring with kupa`aina or in a public hearing – make sure you have traditional maps or input to where proposed projects will be sited on "public" lands. The temple could have been built elsewhere in the valley, if that department had taken the time to work with our kupa`aina and kupuna who were knowledgeable about the sites in the valley.

And then the community had a working group to design an interpretive plan for the valley, to include two charter schools which would compete to build a charter school on the property. The working group was never consulted. And the lease was given to the school that was serving students outside of our ahupua`a, while the school which was within our area was never consulted or invited. Our kupuna lives on in our ahupua`a. Common practices of native Hawaiians should also be the first order of priority when dealing with proposed uses of public lands.

I urge you to pass this bill out of committee, with the suggested amendment.

Mahalo.