

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 7, 2013
2:02 PM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 175, HOUSE DRAFT 1
RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS**

House Bill 175, House Draft 1 proposes that ten million dollars (\$10,000,000.00) from the public land trust shall be expended by the Department of Hawaiian Home Lands ("DHHL") for development of farm and home ownership. Under this bill, the departments and agencies that use the lands within the public land trust are required to transfer two million, five hundred thousand dollars (\$2,500,000.00) of revenues collected per quarter to DHHL. While the Department of Land and Natural Resources (Department) is cognizant of the fiscal challenges DHHL and other state agencies must face, the Department nonetheless has serious reservations regarding this measure.

This bill serves to deprive the Department of a significant portion of revenue, resulting in a severe hindrance of the Department's ability to carry out its mission of effective public trust and natural resource management. The Department currently transfers twenty percent of all public land trust revenues to the Office of Hawaiian Affairs ("OHA"), as well as additional revenues to account for amounts owed to OHA by other state agencies that fail to contribute for various reasons. Revenues generated by the public land trust are used to fund various public purposes consistent with the Department's fiduciary obligations to protect, preserve and manage the State's natural resources, including open spaces, conservation and culturally significant lands, wildlife habitat, ocean recreation, aquatic resources, and so on. These revenues fund 100% of the operating expenses of both Land Division and the Office of Conservation and Coastal Lands, as well as three positions in the Commission of Water Resource Management, certain lifeguard services, the dam safety program, the geothermal program; as well as contribute to the protection of threatened and endangered species, eradication and control of invasive species, and to the cost of fighting wild land fires. Moreover, these funds are often used when emergency responses are required due to flooding, earthquakes, rock falls or other natural disasters.

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

ESTHER KIA'AINA
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
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Furthermore, the bill is ambiguous as to whether a one-time or annual payment to DHHL is required. While a one-time payment presents a significant fiscal challenge, depriving the Department of such a significant amount of revenue on an annual basis would effectively cripple the Department, resulting in a loss of both programs and personnel. Given the uncertainty regarding the availability of federal funds looming on the horizon, the generation and retention of the maximum amount of revenue possible remains a top priority of the Department.

The Department appreciates that the Administration has come in with a general fund request of \$14,688,526 for both Fiscal Years 2014 and 2015 to support the administrative and operating needs of DHHL. For its part, the Department looks forward to continue working with DHHL to achieve mutual objectives that serve the State's interest.



Testimony of
GLENN M. OKIMOTO
DIRECTOR

Deputy Directors
JADE T. BUTAY
FORD N. FUCHIGAMI
RANDY GRUNE
JADINE URASAKI

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 7, 2013
2:02 p.m.
State Capitol, Conference Room 325

H.B. 175, HD 1
RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS

House Committee on Judiciary

The Department of Transportation (DOT) **opposes** this bill due to its financial implications for the Harbors Division.

Presently, Act 178, SLH 2006 serves as the means for satisfying the State's obligation to provide the Office of Hawaiian Affairs (OHA) with a portion of the income and proceeds from the public land trust. Act 178 requires that in total, \$15.1 million be transferred annually to OHA. Governor's Executive Order No. 06-06 directed affected agencies to set aside 20% of public land trust receipts for quarterly transfer to OHA. In Fiscal Year 2012, the Harbors Division transferred \$9.2 million to OHA.

This bill will require that affected agencies collectively transfer an additional \$10.0 million annually to the Department of Hawaiian Home Lands (DHHL). The bill does not clarify how this additional amount will be allocated among the affected agencies. Assuming that the \$9.2 million transferred to OHA in FY 2012 was about 61% of the \$15.1 million required by Act 178, it is possible that DHHL or other parties will assume that the Harbors Division will be tasked to pay an additional obligation of \$6.1 million or 61% of the \$10.0 million annually.

The commercial harbors system operates as a financial enterprise and is required to generate revenues through user fees. As an issuer of Harbor System Revenue Bonds to finance its capital improvements program, the division must meet certain rate covenant tests as provided in its bond certificate each year and it undergoes annual credit reviews by the three predominant rating agencies, Moody's Investors Service, Standard & Poors, and Fitch Ratings. The imposition of an additional \$6.1 million in expenses will reduce net revenues and lower our

rate covenant results, which most likely will negatively impact the credit rating of Harbor System Revenue Bonds. Further, as additional bond sales are needed to finance the New Day Work Projects, the interest rates for those additional bonds will most likely be higher, thus placing our ability to issue additional debt in question.

We respect the legislature's role in setting public policies and defer to this body's important policy decision on the appropriate distribution of revenues derived from the public land trust. We believe, however, that it is important for the Legislature to consider the fiscal impacts before further mandating additional entitlements to revenues from the public land trust which are held in trust for all Hawaii residents. Dedicating an additional portion of revenues to DHHL, despite its merits, will reduce revenues to the division and have financial consequences which may negatively impact our ability to maintain and operate the commercial harbors system as well as to meet our obligations to holders of outstanding Harbor System Revenue Bonds.

Thank you for the opportunity to provide testimony.





State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512
Phone: (808) 973-9600 FAX: (808) 973-9613

TESTIMONY OF RUSSELL KOKUBUN
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEE ON JUDICIARY
Thursday, February 7, 2013
Room 325
2:02 p.m.

HOUSE BILL NO. 175, HOUSE DRAFT 1
RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS

Chairperson Rhoads, Vice Chair Har and Members of the Committee:

Thank you for the opportunity to provide testimony on House Bill No. 175, House Draft 1. The purpose of this measure is to direct \$10 million from the public land trust to the Department of Hawaiian Home Lands for the “development of farm and home ownership on as widespread a basis as possible.” The \$10 million is to be sourced from agencies that collect revenues from lands within the public land trust. The Department of Agriculture has very serious concerns as this measure will have a catastrophic effect on the Department of Agriculture’s budget and reverse our efforts to date to re-establish vital services to the agricultural industry that were adversely affected during the reduction-in-force of 2009.

The Department requests the Committee clarify whether Section 171-18, HRS, specifically the public trust purpose of “development of farm and home ownership on as widespread a basis as possible,” is limited to native Hawaiians and not the general public.

Thank you for the opportunity to submit testimony.





**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

No. 1 Capitol District Building, 250 South Hotel Street, 5th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804
Web site: www.hawaii.gov/dbedt

Telephone: (808) 586-2355
Fax: (808) 586-2377

NEIL ABERCROMBIE
GOVERNOR

RICHARD C. LIM
DIRECTOR

MARY ALICE EVANS
DEPUTY DIRECTOR

WRITTEN ONLY

Statement of
Richard C. Lim
Director

Department of Business, Economic Development, and Tourism
before the

House Committee on Judiciary

Thursday, February 7, 2013

2:00 PM

State Capitol, Conference Room 325

in consideration of

HB 175, HD 1 RELATING TO THE DEPARTMENT OF HAWAIIAN HOMELANDS.

Chair Rhoads, Vice Chair Har, and Members of the Committee:

HB No. 175, HD 1 requires state departments to transfer an aggregate of \$2,500,000 quarterly to DHHL for a total of \$10,000,000 per year.

The Department of Business, Economic Development, and Tourism, (DBEDT) has **strong reservations** regarding the financial impact on DBEDT programs. The bill does not quantify the amount each agency would be required to transfer.

Currently, Act 178, SLH 2006 is the instrument which satisfies the State's obligation to provide the Office of Hawaiian Affairs (OHA) with a 20 percent set aside from revenues generated from the public land trust. In fiscal year 2012, DBEDT's Foreign-Trade Zone Division transferred over \$17,300, and NELHA transferred over \$359,000, as required by Executive Order No. 06-06. HCDA will be submitting separate testimony on this measure.

The Foreign-Trade Zone Division and NELHA are special funded and rely solely on revenues generated from operations and leases to support and maintain their programs and facilities. The imposition of any transfers to DHHL would reduce net operating funds and negatively impact the programs. Another concern is that lease revenues and program proceeds tend to decrease in economic recessions; however, the fixed amount of the proposed transfer could result in program reductions when the need for support to businesses is greatest.

Thank you for the opportunity to submit testimony on this bill.

TESTIMONY BY KALBERT K. YOUNG
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE HOUSE COMMITTEE ON JUDICIARY
ON
HOUSE BILL NO. 175, H.D. 1

February 7, 2013

RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS

House Bill No. 175, H.D. 1, provides the Department of Hawaiian Home Lands (DHHL) \$10 million of revenues derived from activities on the public land trust for an unspecified period for the development of farm and home ownership. The departments and agencies that use public land trust lands are required to transfer \$2.5 million per quarter to DHHL.

The Department of Budget and Finance has concerns with transferring an additional \$10 million from the departments and agencies that use public land trust lands. Pursuant to Act 178, SLH 2006, affected programs within the Departments of Accounting and General Services, Agriculture, Business, Economic Development and Tourism, Defense, Education, Land and Natural Resources, and University of Hawaii are already providing the Office of Hawaiian Affairs annually with \$15.1 million of revenues derived from activities on the public land trust. Requiring these programs to transfer an additional \$10 million could have adverse impacts on these programs' ability to provide necessary services and remain financially viable.

It is noted that the Administration has requested \$14,688,526 in general funds for FY 2013-14 and FY 2014-15 in the FB 13-15 Executive Budget for "administration and operating" expenses of the DHHL. The proposed \$10 million transfer would be in addition to funding provided to the DHHL in the Executive Budget.



HB175 HD1
RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS
House Committee on Judiciary

February 7, 2013

2:02 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on HB175 HD1, which would direct the Department of Hawaiian Home Lands (DHHL) to expend \$10,000,000 from the public land trust for farm and home ownership purposes and direct certain state departments to transfer to DHHL an aggregate amount of \$2,500,000 at the end of each fiscal quarter, provided the transfer is not prohibited by law.

OHA strongly supports DHHL and its mission and recognizes that DHHL's historical lack of funding has hindered its ability to provide timely and adequate housing options to Native Hawaiians. To this end, OHA has entered into a commitment to make \$3 million per year available to DHHL for a period of 30 years and has provided funding for many DHHL projects over the years. OHA applauds the legislature's efforts to find creative ways to fund DHHL and its important mission to provide homes and farmland to the indigenous people of these islands.

We are concerned, however, that the language of the bill is ambiguous and could lead to the same kind of confusion that has occurred in the past regarding OHA's pro rata share of the public land trust. In 1990, the Legislature defined revenue similarly to the definition of revenue in the present bill. Despite the definition (which was later invalidated by the Hawai'i Supreme Court), OHA's pro rata portion has been the subject of decades of litigation. Similar issues could be raised with respect to the method to determine the "funds derived from the public land trust" to which DHHL would be entitled to \$10,000,000.

Finally, we ask that the following provision be added to Section 1:

Nothing in this section shall diminish the revenues owed to the office of Hawaiian affairs pursuant to Act 178, session laws of Hawaii 2006, or any other law providing for the office of Hawaiian affairs' pro rata portion of the public land trust, pursuant to article XII, section 6, of Hawaii's constitution.

Mahalo for the opportunity to testify on this important measure.



HAWAII COMMUNITY
DEVELOPMENT AUTHORITY



KAKA
KALAELOA

Neil Abercrombie
Governor

Brian Lee
Chairperson

Anthony J. H. Ching
Executive Director

461 Cooke Street
Honolulu, Hawaii
96813

Telephone
(808) 594-0300

Facsimile
(808) 594-0299

E-Mail
contact@hcdaweb.org

Web site
www.hcdaweb.org

STATEMENT OF
ANTHONY J. H. CHING, EXECUTIVE DIRECTOR
HAWAII COMMUNITY DEVELOPMENT AUTHORITY

BEFORE THE
HOUSE COMMITTEE ON JUDICIARY

ON

Thursday, February 7, 2013

2:02 P.M.

State Capitol, Conference Room 325

in consideration of

H.B. 175 /H.D. 1 – DEPARTMENT OF HAWAIIAN HOME LANDS.

Purpose: Directs that of the funds derived from the public land trust, \$10,000,000 shall be drawn from the Departments of Agriculture; Accounting and General Services; Business, Economic Development and Tourism; Education; Land & Natural Resources; and the Harbors Division of the Department of Transportation. The funds are not to be drawn from the pro rata portion to be distributed to the Office of Hawaiian Affairs (OHA).

Position: This testimony reflects my view only as the Authority has not had an opportunity to review and act on this measure.

The Hawaii Community Development Authority (HCDA) currently sets aside 20% of revenues derived from ceded lands. Since 2007, the amount paid to the OHA has included:

- 2007 - \$886,032 earned/\$177,207 paid
- 2008 - \$288,755 earned/\$57,751 paid
- 2009 - \$322,746 earned/\$64,549 paid
- 2010 - \$467,903 earned/\$93,583 paid
- 2011 - \$401,363 earned/\$80,273 paid
- 2012 - \$1,356,963 earned/\$271,393 paid

It is important to note that the 2012 payment included the 20% ceded lands payment and a one-time advance payment for use of a ceded lands parcel. Aside from this payment, the payments averaged \$94,672.

It is my understanding that ceded lands revenues are intended to support five program areas which includes:

1. Support of public education.
2. Betterment of conditions of Native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920.
3. Development of farm and home ownership.
4. Public Improvements.
5. Provisions of lands for public use.

As the HCDA regularly makes its mandated payment of a portion of the ceded lands revenues that it receives to the OHA, the agency deposits the rest of its earnings into the HCDA Leasing and Management subaccount. From this account, the HCDA develops housing projects such as the Halekauwila Place, supports the diversified agriculture program at the Heeia Community Development District, and constructs public parks such as the Kewalo Basin, Gateway, Kakaako Waterfront and Kolowalu Parks.

As the entire proceeds of the funds (not otherwise paid to OHA) is devoted to realizing the purposes outlined in the Organic Act, I am not sure if there is sufficient funds available that is derived from ceded lands under the control of the HCDA to support the payment to OHA, construct housing, develop public parks, contribute to diversified agriculture and also contribute to an additional payment to the Department of Hawaiian Home Lands.

It is therefore my position that there are insufficient funds that are generated from ceded lands that the HCDA controls to provide payments to OHA, contribute to the purposes attributed to the public land trust required by our enabling legislation, and contribute appropriate sums to meet the quota established in this measure. It should be noted that this position reflects my view point only as the Authority has not had an opportunity to review and act on this measure.

Thank you for the opportunity to provide comment in opposition to the passage of this measure.

Testimony of The Nature Conservancy of Hawai'i
Commenting on H.B. 175 HD1 Relating to the Department of Hawaiian Homelands
House Committee on Judiciary
Thursday, February 7, 2013, 2:02PM, Room 325

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of the lands and waters upon which life in these islands depends. The Conservancy has helped to protect nearly 200,000 acres of natural lands in Hawai'i. Today, we actively manage more than 32,000 acres in 10 nature preserves on Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy appreciates the intent of H.B. 175 HD1 to provide funding for the important farm and homeownership programs of the Department of Hawaiian Home Lands. However, we have serious concerns about the effect of the required transfer on the important programs of other agencies.

Since 2008, many of the critical resource management and invasive species prevention and control programs of the Department of Land and Natural Resources and the Department of Agriculture have been drastically reduced; some by as much as 50% as both general and special fund revenue has been cut. The result has been a backsliding in the State's ability to help care for the health of forests, streams, coastlines, and farmlands that provide benefits like fresh water and food for every person in Hawaii. Additional reductions in these programs as a result of this bill will add to the challenges faced by the DLNR and HDOA in protecting sources of fresh water and serving the agricultural community throughout the islands.

Please consider these collateral effects of redirecting funds from one important purpose to another.

Thank you for the opportunity to testify on this bill.

BOARD OF TRUSTEES

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Association of Hawaiian Civic Clubs

P. O. Box 1135
Honolulu, Hawai`i 96807

Testimony of President Soulee Stroud

HOUSE JUDICIARY COMMITTEE

HOUSE BILL 175HD1 RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS

Thursday, February 7, 2013; 2:02pm; Room 325

Aloha Chairman Rhoads, Vice chair Har and members of the House Judiciary committee. The Association of Hawaiian Civic Clubs supports this version of HB175HD1 just as we did the original.

At our October, 2012 convention the delegates considered Resolution 12-07, URGING THE GOVERNOR AND THE STATE LEGISLATURE TO APPROPRIATE SUFFICIENT SUMS TO THE DEPARTMENT OF HAWAIIAN HOME LANDS.

These sums should be made available for home, agriculture, farm and ranch lot development and loans; rehabilitation projects and administration and operation of the department. Further, these sums for Hawaiian Home Lands should cause no harm to provisions made to the Office of Hawaiian Affairs whose constitutional and statutory mandate is much broader serving a larger population of beneficiaries.

Thank you for the opportunity to testify.

Contact: jalna.keala2@hawaiiantel.net

HOUSE OF REPRESENTATIVES, STATE OF HAWAII
TWENTY-SEVENTH STATE LEGISLATURE,
REGULAR SESSION OF 2013

COMMITTEE ON OCEAN, MARINE RESOURCES,
& HAWAIIAN AFFAIRS

COMMITTEE ON THE JUDICIARY
and
COMMITTEE ON FINANCE

Re: **H.B. No. 175, H.D. 1.** Relating to the Department of Hawaiian Home Lands ("DHHL").

TESTIMONY IN OPPOSITION by H. William Burgess, Attorney and Chairman, Aloha for All, Inc. Email: hwburgess@hawaii.rr.com

For Hearing Date: Thursday, February 07, 2013
Time: 2:02 p.m.
Place: Conference Room 325, State Capitol

Aloha Chairs, Vice Chairs, committee members, and members of the public.

I write in opposition to H.B. 175, H.D. 1, which calls for the State to transfer \$10 million of funds derived from the public land trust to DHHL to be expended by DHHL for the development of farm and home ownership.

The bill would require the Department of Agriculture and other State departments and agencies that collects revenue from the lands within the public land trust to transfer to DHHL an aggregate amount of \$2.5 million within thirty days of the close of each fiscal quarter; provided that the transfer is not prohibited by federal law.

Background of the public land trust

Hawaii's public land trust is sometimes referred to as the "ceded lands trust" and sometimes as the "§ 5(f) trust."

The Supreme Court of the State of Hawaii has held:

The history of the trust begins with the cession of sovereignty by the Republic of Hawaii under the "Joint Resolution To provide for annexing the Hawaiian Islands to the United States," 30 Stat. 750, adopted by Congress on July 7, 1898. Along with sovereignty, the Republic cede[d] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands ... belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining[.]” *Trustees of OHA v. Yamasaki*, 69 Hawaii 154, 159 (1987).

The resolution made “[t]he existing laws of the United States relative to public lands [inapplicable] to such lands in the Hawaiian Islands; but [stated] Congress ... shall enact special laws for their management and disposition.” *Id.*

Yamasaki further provided:

“That all revenue from or proceeds of the [public lands], except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” *Id.*

“The effect of [the foregoing language was] to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other purposes. 22 Op. Att’y Gen. 574 (1899)” *Id.*

“The concept that the public lands of Hawaii were impressed with a special trust, implicit in the joint resolution of annexation, See 22 Op. Atty Gen. 574, was reiterated in section 5(f) of the Admission Act.” *Id.* at 160.

“Hawaiian” means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have thereafter continued to reside in Hawaii.”

The noun “native Hawaiian” means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands

previous to 1778.”

The government as trustee has the same fiduciary duty as private trustees.

Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1189 (1982) (the conduct of the government as trustee is measured by the same strict standard applicable to private trustees, citing *United States v. Mason*, 412 U.S. 391 (1973). See also *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991) citing the Restatement 2d of the Law of Trusts as applicable to conduct of the State of Hawaii as trustee of Hawaii’s public land trust.

The same considerations apply to OHA and its trustees and officials. Under *Price v. Akaka*, 928 F.2d 824, 827 (9th Cir. 1991), so long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied.

The United States Circuit Court of Appeals for the Ninth Circuit has held (“There is no free floating federal common law of trusts, but we have no doubt that we would have the power to formulate a body of law for the purpose of enforcing the Act if that were appropriate under the circumstances. No doubt that would not present insuperable difficulties, since the common law of trusts is well developed in this country and speaks with a good deal of uniformity across the length and breadth of the land.” (citations omitted)).

For example, HRS Chapter 554A, Uniform Trustees’ Powers Act “UTPA.”¹ “Except as specifically provided in the trust, the provisions of this chapter apply to any trust with a situs in Hawaii, whenever established.” HRS § 554A-8.

The UTPA, HRS §554A-5(b), allows a trustee to exercise a trust power, such as the power “to effect distributions of money and property,” only by court authorization “if the duty of the trustee and the trustee’s interest as trustee of another trust, conflict in the exercise of the trust power.”

The Restatement (Third) of Trusts § 66(b) underlines a trustees' affirmative duty to petition the court, "If a trustee knows or should know of circumstances that justify judicial action ... and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust."

Trust beneficiaries, as well as trustees, have standing to apply to the court for instructions regarding distributions to beneficiaries, as Petitioners seek here. Under Restatement (Third) of Trusts § 71, "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or *distribution* of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." (Emphasis added.)

Disregarding their fiduciary duties under the Equal Protection, Supremacy and other clauses of the Constitution and laws of the United State, the State of Hawaii and its officials, including the Governor, the board and officials of DHHL and the OHA Trustees, have sought, promoted, and lobbied for distributions of public lands trust monies and properties to OHA and DHHL for "native Hawaiian" beneficiaries at the expense of those beneficiaries who lack the favored racial ancestry.

Such conduct meets the definition of HRS §708-974 (Misapplication of entrusted property, a misdemeanor) and/or Theft, HRS §708-830(6)(a) (Failure to make required Disposition of funds, a felony). As a result, most of the trust beneficiaries for over three decades have been deprived of the benefit of over a \$ billion worth of public land trust funds and lands through 2012; and such unlawful deprivations would still continue to accrue under color of the law of the State of Hawaii if H.B. 175 is enacted.

The State's "bombshell" revelation. On June 4, 2008 in the Federal District Court in *Day v. Apoliona*, the State of Hawaii acknowledged and proved by the declarations of Georgina Kawamura, Director of B&F and other responsible State officials, that the public land trust costs the State every year many times more than the 1.2 million acres bring in; and that the disparity between trust expenses and trust revenues has occurred in every year since statehood in 1959.

Basic trust law as to distributions to beneficiaries. Except as otherwise

provided by the terms of the trust, the trustee's duty to pay income to beneficiaries is limited to paying the **net** income after deducting, from the revenues or gross income, the expenses properly incurred in the administration of the trust.

Why is that important? Because it means the hundreds of millions the State and its officials have caused to be distributed to OHA and DHHL from public land trust revenues exclusively "for the betterment of the conditions of native Hawaiian" beneficiaries over the last three decades (while making no distributions of money or lands exclusively for non-native Hawaiian beneficiaries) have all been improper diversions of trust funds held for the benefit of all the people of Hawaii.

Thus, no public land trust funds or lands should ever have been distributed to OHA or DHHL because the trust has never generated any net income from which distributions could lawfully have been made to any beneficiaries.

Neither the State, nor its officials nor its legislature has the power to modify or terminate the public land trust.
Trustees of Dartmouth College v. Woodward.

In 1819, Chief Justice John Marshall held that the charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, was a contract within the meaning of that clause of the Constitution of the United States (Art. I, §10), which declares, that no state shall make any law impairing the obligation of contracts. The state of Vermont was a principal donor to Dartmouth College. The lands given lie in that state and are of "great value." The State of New Hampshire also donated lands of "great value." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 574 (1819).

After the trustees had operated the college beneficially for nearly 50 years and after the American Revolution, the New Hampshire legislature, controlled by Republican supporters of Thomas Jefferson, passed a bill revising the charter of Dartmouth College, adding new trustees and a board of overseers. The trustees refused to accept the changes and filed suit to invalidate them. C.J. Marshall held that the royal charter had "every ingredient of a complete and legitimate contract." He ruled that the trustees were "one immortal being" whose powers continued forever

and could not be abridged by legislative acts. Hawaii's Ceded Lands Trust, for "educational and other public purposes" was also endowed with public lands and also founded with every ingredient of a complete and legitimate contract. On June 16, 1897 the Republic of Hawaii, by its proposed Treaty of Annexation, offered to cede to the United States its public lands (about 1.8 million acres formerly called the Crown lands and Government lands of the Kingdom of Hawaii) with the requirement that all revenue from or proceeds of the lands, except those used for civil, military or naval purposes of the United States or assigned for the use of local government, "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Another condition of the Republic's offer was that "The public debt of the Republic of Hawaii" was to be "assumed by the government of the United States, but the liability of the United States in this regard shall in no case exceed \$4,000,000."

A year later, on July 7, 1898, by the Newlands Resolution, the United States accepted the offer, expressly including the conditions that it hold the lands in trust and that it assume the debts accumulated by the Kingdom and Republic up to \$4 million.

As the Supreme Court of the United States held, "Where there is a charter, vesting proper powers of government in trustees or governors, they are visitors; and there is no control in anybody else; except only that the courts of equity or of law will interfere so far as to preserve the revenues, and prevent the perversion of the funds, and to keep the visitors within their prescribed bounds." *Id.*, 17 U.S. 565.

That basic legal principle of trust law enforcing contractual obligations undertaken by the sovereign, announced 194 years ago, is now embodied in Restatement (Third) of Trusts §64 (2003) current through August 2008, §64. Termination Or Modification By Trustee, Beneficiary, Or Third Party

(A) Except as provided in §§65 and 68, the trustee or beneficiaries of a trust have only such power to terminate the trust or to change its terms as is granted by the terms of the trust.

(B) The terms of a trust may grant a third party a power with respect to termination or modification of the trust; such a third-party power

is presumed to be held in a fiduciary capacity.

Since the Ceded Lands Trust gives no trustee, beneficiary or third party any right to modify or change the terms of the Ceded Lands Trust, as a matter of law, neither the State of Hawaii, nor the Hawaii Supreme Court, nor Congress, whether by the Apology resolution or any other law, has the power to impair the obligations to all the people of Hawaii undertaken by the United States in 1898 in the Annexation Act, and assumed by the State of Hawaii in 1959.

CONCLUSION

H.B. 175, H.D. 1 should be rejected or amended to require that DHHL and OHA forthwith restore to State control all funds and trust lands distributed to and still held or controlled by them, to be held and used impartially for the benefit of all the citizens of Hawaii, including but not limited to those of Hawaiian ancestry.

Thank you for considering my testimony.



H. WILLIAM BURGESS,

Honolulu, HI 96822.

Tel: 947-3234;

Cell: 372-3800;

Email: hwburgess@hawaii.rr.com

har2-Vincent

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HB175

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Submitted By	Organization	Testifier Position	Present at Hearing
Crystal Kia Paul	Individual	Support	No

Comments:

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