

STAND. COM. REP. NO.

602

Honolulu, Hawaii

Feb 14

, 1997

RE: H.B. No. 2207

H.D. 1

Honorable Joseph M. Souki
Speaker, House of Representatives
Nineteenth State Legislature
Regular Session of 1997
State of Hawaii

PERMANENT FILE

Sir:

Your Committee on Hawaiian Affairs, to which was referred
H.B. No. 2207 entitled:

"A BILL FOR AN ACT RELATING TO THE PUBLIC LAND TRUST,"

begs leave to report as follows:

The purpose of this bill, as received by your Committee, is to require that the first \$15 million of all revenue derived from the public land trust be expended by the Office of Hawaiian Affairs (OHA) for the betterment of the conditions of native Hawaiians.

Testimony in support of this measure was received from a private attorney who acts as general counsel for a title company. A private individual and the Oahu Council, Association of Hawaiian Civic Clubs submitted testimony opposing the bill. OHA presented testimony supporting the intent of the bill, while comments were received from the Department of the Attorney General and the Department of Budget and Finance.

Your Committee has substantially amended this bill to address broader issues relating to the public land trust. By way of background, at statehood the federal government transferred to the state over one million acres of land ceded to the federal government in 1898. Section 5(f) of the Admission Act provided that those lands and the "proceeds from the sale or other disposition of any such lands and the income therefrom" were to be held by the state as a "public trust" and utilized for "one or more" of five purposes: support of public schools and other

public educational institutions; betterment of the conditions of native Hawaiians (defined as 50% or more blood quantum); development of farm and home ownership; public improvements; and public use.

Initially, proceeds from this public land trust (also sometimes known as the ceded lands trust) were applied primarily to support public education. In 1978, however, as a result of the constitutional convention, the OHA was established and, under article XII, section 6 of the Constitution, empowered to "manage and administer the proceeds from the sale or other disposition of [certain assets] for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of [the public land trust.]" Article XII, section 4 of the Constitution also recognized the trust and provided that its beneficiaries included the "general public".

The details of implementation were left to the legislature. Act 273, Session Laws of Hawaii 1980 (Act 273, SLH 1980), codified in section 10-13.5, Hawaii Revised Statutes (as later amended), provided that twenty percent of revenue from the public land trust was to be expended by OHA for the betterment of the condition of native Hawaiians. Disputes subsequently arose between OHA and the state over the interpretation of Act 273, but in 1987, the Supreme Court of Hawaii, in OHA v. Yamasaki, essentially ruled that it was up to the legislature, not the courts, to provide resolution.

The subsequent years saw substantial efforts by the state and OHA to resolve outstanding ambiguities and disputes. The enactment of Act 304, Session Laws of Hawaii 1990 (Act 304, SLH 1990), attempted to clarify Act 273 by defining "revenue" and "public land trust" to specify what public land trust revenues were subject to partial allocation to OHA. Under what is now section 10-2, Hawaii Revised Statutes, the legislature essentially distinguished between revenues from "actual" uses of public land trust lands which were (a) sovereign in nature and to be retained by the state, and (b) "proprietary" in nature and partially allocable to the OHA.

OHA subsequently began receiving revenue payments from the state of in excess of \$10 million per year. Additionally, in 1993 the legislature authorized payment to OHA of almost \$135 million in resolution of amounts due back to the original enactment of Act 273. The investment of that lump-sum payment together with the partial reinvestment of dividends and interest and of subsequent annual revenues has seen the growth in OHA's corpus to roughly \$240 million today, sufficient to generate on its own roughly \$9 million in annual dividends and interest.

Nonetheless, the disputes between OHA and the state over various aspects of the public land trust continued. In 1994, OHA brought a number of suits against the state. In one, Circuit Court of the First Circuit, State of Hawaii Civil No. 94-0205-01, OHA claimed that it was entitled to a portion of rental housing, patient services and interest income receipts as well as revenues from duty free operations not located on public land trust lands. OHA did not allege a specific dollar amount, but it appears that the OHA claims in excess of \$100 million in principal back to 1980 plus accrued interest of approximately another \$75 million. In another, Civil No. 94-4207-11 (same court), OHA claimed that the state could not transfer lands in the public land trust from the department of land and natural resources to the housing finance and development corporation to complete public housing projects in Lahaina and Kealahou into which the state had already invested tens of millions of dollars.

In 1996, the court in preliminary rulings basically held in favor of OHA. The court's ruling in the former case not only exposes the state to a direct claim in the apparent amount of possibly hundreds of millions, but, as elicited in testimony, may result in future claims accruing to over \$1 billion. The court's ruling in the latter case not only forestalls two vital housing projects, but calls into question the state's basic ability to transfer public lands for public purposes.

These claims and the continuing uncertainty over whether other claims may be brought have also negatively impacted the state's basic ability to borrow money in the bond markets on terms favorable to the state. State bond issuance statements now routinely itemize the pending litigations as a matter of required disclosure to potential bond purchasers. The principal bond rating agencies cite the litigation in their public comments. Any resulting downgrade in the state's bond rating may carry with it higher interest payments which would worsen the state's already difficult financial situation.

Additionally, in 1996 the Inspector General of the U. S. Department of Transportation reported that the state's payments to OHA of a portion of the revenues generated by airport operations constituted an unauthorized diversion of airport revenues for non-airport purposes, and recommended reimbursement of almost \$30 million in prior payments and lost interest. Although that report is under review, its potential consequences in terms of the possible reimbursement obligation and loss of federal airport funding has caused the governor to escrow revenues from the airports which in prior years were paid to OHA

until final resolution. Because those revenues accounted for almost one half of OHA's total annual public land trust revenues, the impact on OHA has been substantial.

It is obvious to your Committee that the present situation is untenable. It is untenable to OHA because, among other reasons, the lack of a predictable revenue stream prevents realistic planning and delivery of services to its beneficiaries and hinders its own bond issuance and other financial efforts. It is equally untenable to the state for much the same reasons. And it is untenable to both because they are entangled in a classic litigation spiral which prevents reasonable settlement of outstanding differences, all to the detriment of the public, both Hawaiian and non-Hawaiian.

It is also obvious to your Committee that the court, in its rulings in the outstanding disputes thus far, has misinterpreted legislative intent or, where that intent was not sufficiently demonstrated, has not properly extrapolated legislative purpose. Your Committee notes that the issues addressed by the court relate almost exclusively to state statutes and are better resolved by the legislature than the courts.

Your Committee has utilized this measure as a vehicle to incorporate various provisions from other bills and suggestions from testifiers, including OHA, all toward the overall goal of providing a mechanism for the prompt settlement of outstanding disputes out of court and the fashioning of a permanent global resolution for implementation by the legislature. Your Committee's specific goals, reflected in specific amendments to the measure, include the following:

- (1) Providing extensive findings to facilitate the clear discernment of legislative purpose;
- (2) Setting up a mechanism to clear up apparent ambiguity over exactly which lands constitute public land trust lands;
- (3) Redefining revenue to clarify the proprietary versus sovereign function distinction, correct the court's misinterpretation, and address specific concerns primarily involving airport and other federally-impacted operations;
- (4) Establishing a more centralized accounting and payment mechanism for covered revenues;

- (5) Providing for a specific and predictable interim funding level for OHA which your Committee anticipates will be equivalent at least to prior revenue levels;
- (6) Establishing a committee consisting, at OHA's request, of an equal number of members appointed by the governor and OHA and charged with reporting back to the 1998 legislature on how best to effect a permanent global resolution of all issues; and
- (7) Placing a moratorium on the conveyance by the state of public land trust lands, except for certain conveyances including the Lahaina and Kealakehe projects and any set asides to OHA, during the commission's deliberations and the legislature's evaluation.

Your Committee has also explicitly provided for the retroactive effect of relevant provisions of this measure.

Your Committee believes that this bill, as amended, fairly addresses the immediate concerns of the various parties with respect to the public land trust and provides the best approach to a lasting solution. In doing so, your Committee believes, a crucial link in your Committee's overall goal of greater self-sufficiency and self-determination for the Hawaiian community and of final resolution in the broader context will be forged.

As affirmed by the record of votes of the members of your Committee on Hawaiian Affairs that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 2207, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 2207, H.D. 1, and be referred to the Committee on Finance.

Respectfully submitted on
behalf of the members of the
Committee on Hawaiian Affairs,

Ed Case
ED CASE, Chair

State of Hawaii
House of Representatives
The Nineteenth Legislature

Record of Votes of the Committee on Hawaiian Affairs

Bill/Resolution No.: HB 2207		Date: February 13, 1997		
Committee Referral: HAW, FIN		<input type="checkbox"/> The committee is reconsidering its previous decision on this measure.		
The recommendation is to: <input type="checkbox"/> Pass, unamended <input checked="" type="checkbox"/> Pass, with amendments <input type="checkbox"/> Hold <input type="checkbox"/> Recommit				
HAW Members	Ayes	Ayes (WR)	Nays	Excused
1. CASE, Ed (C) 225	✓			
2. SUZUKI, Nathan (VC) 390	✓			
3. YAMANE, Brian Y. 440	✓			
4. KAWANANAKOA, Quentin K. 295			✓	
TOTAL	3		1	
The measure is: <input type="checkbox"/> Passed, unamended <input checked="" type="checkbox"/> Passed, with amendments <input type="checkbox"/> Recommitted <input type="checkbox"/> Held If joint referral, _____ did not support recommendation. <div style="text-align: center; font-size: small;">committee acronym(s)</div>				
Vice Chair's or designee's signature: <i>Nathan Suzuki</i>				
Distribution: <input type="checkbox"/> If passed, attach to Committee Report <input type="checkbox"/> Data Entry				