TESTIMONY PRESENTED TO THE SENATE COMMITTEE ON WATER, LAND AND HAWAIIAN AFFAIRS
FEBRUARY 4, 1997

RE: Opposition to S.B. 8 relating to Land Use

Co-chair Iwase, Co-chair Solomon and Members of the Committee:

I ka ha’i ‘ano ‘ana i nā kumu hana o kelā palapala, ‘o ia ho’i S.B. 8, mea ‘ia maila, kū’e nā pono mau o nā kānaka maoli i nā pono ‘alodio. Mea ho’i ‘ia mai, aka’aka ‘ole ke ‘ano ‘alodio, kē hana ‘ia nā pono maoli. Akā na’e, ua kūkāla aku nei ke kaulana o nā pono ‘ōiwi mai ka wā kahiko. Wahia a HRS §1-1, ‘āpono ‘ia nā kānāwai ma’ama kē Pele kane no ke aupuni nei, koe na’e i nā manawa i kū mua ai ka hana ma’a ‘ōiwi. ‘Oia kū pa’a nā pono ‘ōiwi no na kau a kau (ā hiki loa i kēia lā) a he mana’o ‘e ke ‘ano ‘alodio i ho’opili hope ‘ia ai ma lalo o ia mau pono ‘ōiwi, mō akaaka wale ke kūlama o nā pono.

Me he ‘ino ka puka ‘ana mai o kēia palapala i hiki mai e ho’opio nā lama pono ‘ōiwi. Eia na’e, mālamalama mau ka ‘ā i mua. Mai kuhi he wahie ‘ole ko na kupa ‘ōiwi e ho’ā hou ho’i mai.

Mai ka wā i ho’onoho mua ‘ia ai ke ‘ano ‘alodio ma nā ‘āina nei, ‘ōlelo wale ‘ia i na kānāwai o ke aupuni nei, he pono, he kuleana ko nā kānaka ‘ōiwi i ka ho’ohana ‘ana i ia ‘āina (HRS §7-1). Inā hili hewa ka no’ono’o o nā haku o ua palapala (S.B.8) a nūnū maila lākou. ‘Akaaka ‘ole ke kuleana ‘O ko’u mana’o ho’i na’e, he akaaka ‘ole wale no, kē kuli i na kūō pono ola (i kūpina’i ‘ia i nā kānāwai o ka ‘āina nei) a māliu iki ‘ole ‘ia ai.

E māliu i nā pono maoli.

‘O wau nō,

(signed Kahikūkalā Hoe)

Kahikūkalā Hoe
48-140 Kamehameha Hwy.
Kāne’ohe, Hawai‘i 96744
239-6518

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APPENDIX D
Feb. 1, 1997

98-614 Kaimu Loop
'Aiea, Hi. 96701

Senator Randal Iwase
State Senate

Dear Senator Iwase,

I am writing in opposition to Senate Bill No. 8 requiring native Hawaiians to apply for a Certificate of Registration of Native Hawaiian Rights requesting permission to engage in traditional and customary practices on private property.

Senate Bill No. 8 gives the Hawai'i Land Use Commission full authority to determine the gathering rights of native Hawaiians, grants the land use commission with powers to impose conditions on native Hawaiian gathering practices, and requires the applicant to provide "by clear preponderance of evidence" unreasonable documentation of native Hawaiian traditional and customary cultural practices by their ancestors in a specific area. Due to legislation such as Senate Bill No. 8, development, and the introduction of foreign plants and animals, many of the areas that provided the materials for native Hawaiian cultural practices are now either eliminated or inaccessible, thereby forcing native Hawaiians to look for new gathering places.

In addition, Senate Bill No. 8 would require individual native Hawaiians to apply for numerous certificates in order to be able to gather the different types of materials necessary for their cultural practices. If everyone needed several permits for gathering in different area, the process would put unreasonable conditions on native Hawaiians in addition to burdening the duties of the land commission.

I urge you to vote against Senate Bill No. 8.

(signed Victoria Takamine)

Victoria Holt Takamine
kumu hula, Pua Ali'i ʻ Ilima
lecturer, University of Hawai'i
lecturer, Leeward Community College

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APPENDIX E
Feb. 5, 1997

Vicky Holt Takamine
98-614 Kaimu Loop
'Aiea, Hi. 96701

Sen. Randy Iwase, Co-chair
Sen. Malama Solomon, Co-chair
Water, Land and Hawaiian Affairs Committee

Aloha,

After listening to all the testimony in your previous hearing regarding Senate Bill No.8, I would like to add the following to my testimony.

May I suggest that we establish a separate commission comprised of individuals who are:

1. familiar with the traditional and customary practices of native Hawaiians.
2. familiar with the resources necessary to ensure the continuation of those practices.

In addition, landowners and/or developers should

1. familiarize themselves with native Hawaiian customs.
2. identify, inventory and map out the resources available on their property.
3. propose a development plan that will ensure that these resources will be available for generations to come.

I think that the intent of the PASH decision was to encourage landowners and developers to familiarize themselves with the needs and customs of the Hawaiian people. They should not be looking at the amount of money that they are losing or hardships that they will incur because of the Supreme Court ruling, but how they can assimilate themselves into the Hawaiian way of life. Too often developers, come in, make big bucks then dig out with no thought of the impact their development will have on the future of Hawaii.

Mahalo,

(signed Vicky Holt Takamine)

Vicky Holt Takamine

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As a Hawaiian I strongly oppose SB No. 8. For reasons enumerated below, I recommend that this bill be rejected in its entirety.

My name is Malia Agtugawa. I am 25 years old and a law student at University of Hawai‘i. First and foremost, however, I am a Hawaiian and kua‘āina of Moloka‘i. We on Moloka‘i not only talk about Hawaiian traditional, customary, religious, and subsistence practices -- we live it. We are people who mālama ʻāina, or care for the land. It is from the sweat of our brow, bent backs, and bare feet placed firmly on the ground which make us kua‘āina. Each time we touch the earth and mālama, we affirm our connection to ʻāina as our ʻohana, our ancestor from whose bosom we are nourished. The kua‘āina of Moloka‘i have never forgotten their familial ties with the ʻāina. Moloka‘i is an island of 7,000 with the highest unemployment rate in the nation; yet no one is homeless, no one is starving. The reason is this -- we continue to live a traditional, subsistence lifestyle. We continue to maintain traditional ʻohana practices such as sharing food caught or cultivated with those, especially kupuna, who no longer can fish, hunt, and gather.

SB No. 8 serves to alienate my ʻohana and all Hawaiians from the land; reducing our rights to a piece of paper which can be extinguished by the whim of a governmental body made up of people who shall demand that Hawaiians define and justify themselves as a people, who are given authority to cheapen our practices by telling us what is "reasonable" and what is not as they attempt to balance the harms and the benefits, and who force us to reveal things which are sacred and can never be compromised.

Overview

SB No. 8 calls for an amendment to Chapter 205, Hawai‘i Revised Statutes. It requires people of Hawaiian ancestry, wishing to preserve their traditional and customary practices, to obtain a "certificate of registration" from the State Land Use Commission (LUC). The bill grants to the LUC "exclusive
authority to hear and resolve claims," to condition certificates of registration of
native Hawaiian rights so that they will not "interfere, impede, or hinder private
landowner's use or possession of undeveloped land." The LUC is given powers
to enact rules for registration and to require reasonable fees for certification. A
landowner may ask for a contested case hearing in opposition to a petitioner's
request. The private landowner may also petition the LUC for "termination or
modification of a certificate of registration" previously issued to a native
Hawaiian.

SB No. 8 Is Inconsistent With Judicial Precedents and Statutory and
Constitutional Guarantees

Article XII, Section 7 of the Hawai'i Constitution declares:

The State reaffirms and shall protect all rights, customarily and
traditionally exercised for cultural and religious purposes and
possessed by ahupua'a tenants who are descendants of native
Hawaiians who inhabited the Hawaiian Islands prior to 1778,
subject to the right of the State to regulate such rights.

Hawai'i Revised Statutes (HRS), Section 1-1 states:

The common law of England, as ascertained by English and
American decisions, is declared to be the common law of the
State of Hawai'i in all cases, except as otherwise expressly
provided by the Constitution or laws of the United States, or by
the laws of the State or fixed by Hawaiian judicial precedent, or
established by Hawaiian usage; provided that no person shall be
subject to criminal proceedings except as provided by the written
laws of the United States or of the State.

HRS, Section 7-1 which was originally the 1850 Kuleana Act states:

Where the landlords have obtained, or may hereinafter obtain,
alodial titles to their lands, the people on each of their lands
shall not be deprived of the right to take firewood, house-timber,
aho cord, thatch, or ki leaf, from the land on which they live, for
their own private use, but they shall not have a right to take such
articles to sell for profit. The people shall also have a right to
drinking water, and running water, and the right of way. The
springs of water, running water, and roads shall be free to all, on
all lands granted in fee simple; provided that this shall not be
applicable to wells and watercourses, which individuals have
made for their own use.

APPENDIX G cont.
The constitutional provision and statutory language cited above have been interpreted by the Hawaii Supreme Court in several landmark cases. In Kalipi v. Hawaiian Trust Co., decided that gathering rights enumerate in HRS 7-1 could only be exercised on undeveloped lands by tenants actually residing within the ahupua'a. It found that to hold otherwise would fundamentally contradict western concepts of property; namely, the right to alienate and exclude. The Court also noted that there is the potential existence of Hawaiian rights beyond what is identified in HRS 7-1 if these additional practices fell within the penumbra of HRS 1-1 which acknowledges the supremacy of Hawaiian usage within the common law. The Court in Pele Defense Fund v. Paty expanded Kalipi by acknowledging that in certain instances other Hawaiians who are not residents of a particular ahupua'a may still have rights of access if it has been shown to have been traditionally and customarily practiced. The Court went even further in Public Access Shoreline Hawaii ("PASH"). It stated that any Hawaiian shall have a right to exercise traditional and customary practices on lands that are "less then fully developed" regardless of ahupua'a tenancy. It overruled the portion of the Kalipi opinion requiring that the land be undeveloped; it criticized Kalipi as placing too much weight on western property constructs and ignoring Hawaiian practices. The Court declared that the State may not attempt to regulate these rights and practices out of existence.

SB No. 8 Seeks to Protect Property Rights Which Have Never Existed In This Jurisdiction

The drafters of SB No. 8 justify the creation of this bill as necessary to resolving a "conflict between the property rights of private landowners of undeveloped land and the traditional and customary rights of native Hawaiians." In actuality, there is no spoken conflict and there never was. The Hawaii Supreme Court has spoken on numerous occasions on the unique property law in Hawaii and the important role which Article XII, Section 7 of the State Constitution, and HRS 1-1 and 7-1 play in this area of law. In PASH and the water cases, McBryde Sugar Co. v. Robinson, Robinson Sugar Co. v. Ariyoshi answers to certified questions, and Reppun v. Board of Water Supply the Hawaii Supreme Court was clear that when the land was distributed in the Mhele, the King's sovereign prerogatives were never extinguished. Every land acquired in fee had a reservation in favor of the hoa'ina. Thus, fee ownership in Hawaii was never seen as synonymous with American constructs and certain acts could not be deemed as taking within the language of the 5th amendment. Even the U.S. Supreme Court has deferred to the unique property law in Hawaii as being enforceable even against the federal government. (See Kaiser-Aetna, U.S. v. Fullard-Leo). The legislature's concern here is misplaced; how can it protect rights of private property owners, when these rights have never existed and have never been recognized in this jurisdiction?
S.B. 8 is Contrary to Judicial Interpretation and Violates the Separation of Powers Doctrine

Should the legislature enact this bill, it will be violating the Separation of Powers doctrine. The Court is the ultimate interpreter of the Constitution and Statutes and no branch of government may act in contravention of these laws. (See Marbury v Madison, Powell v. United States). If Hawaiian rights are constitutionally protected under Article XII, Section 7; the legislature cannot then create a law that would effectively regulate these rights out of existence. (See PASH)

Undeveloped Lands -- Improper, Rigid & Expansive Definition. The qualification that Hawaiian practices are only permissible on undeveloped lands is improper since the body of jurisprudence in Hawai‘i has stated that Hawaiian traditional and customary practices may still be exercised on lands that have been developed. (See PASH) Also the definition in this bills of undeveloped lands is too far reaching. It includes lands on which no "building, structure, or other improvement" exists or "for which a permit or approval" has not been granted. Furthermore, the term "improvements," within the meaning of the definition of undeveloped land includes, "without limitation, sidewalks, pathways, paved trails, golf course fairways and greens, recreational playing fields, and the installation of utilities." This definition serves to hinder Hawaiian custom to the point of extinguishing it. For example, as a Hawaiian I would not be able to walk on any kind of trail or pathway to get to a heiau on a mountain ridge which is privately owned since that would be deemed developed land. I would have to bring a machete and cut back the brush to get to the same spot; and even after I have made a rudimentary trail on my own, that would then be considered developed land and I would not be able to traverse it again. This kind of legislation goes too far to protect the landowner whose rights under Hawai‘i law are not absolute; and at the same time, it intrudes too much into Hawaiian custom and usage which have been given greater protection in our common, statutory, and constitutional law.

Definition of traditional and customary practices is also legally improper and inconsistent with judicial analysis. The bill defines "traditional and customary" as "reasonable Hawaiian activities and usage" predating 1892 and "handed down and uniformly practiced by native Hawaiians on the specifically undeveloped land to further their culture and religious beliefs." The "uniformly practiced" segment of the current definition may be likened to Blackstone's definition of custom, that it must have been continuous and have existed from time immemorial. This kind of construction was rejected by the Hawai‘i Supreme court in PASH. The Court also overruled an early case, Oni v. Meek, which stated that custom must be measured against "the spirit of the present laws," and should there be a conflict, the custom must fail beneath judicial scrutiny. The Court provided a more flexible test for validation of a given

APPENDIX G cont.
custom; it stated that this custom must be "consistent ... [as] measured against other customs \[.\] certain ... if it is objectively defined and applied [rather than] subjectively determined; and ... [reasonable] ... [in that] there is no 'good legal reason' against it."

In essence, the Court recognized the living culture of Hawaiians as an evolving process rather than a stagnant one by which the only value we have as a people is what can be seen at the Bishop Museum. The Court in Palama v. Sheehan grappled with this question when it looked at whether an old easement over private property by which kuleana owners used could only be traversed by foot as in ancient times or if travel by automobile was permissible. The Court held that the easement could also include transportation by car since the spirit of the law and custom would still be maintained and since customs necessarily change with time.

Here, the proposed bill is too rigid and not grounded in reality. If a Hawaiian wants to hunt pig; does it mean that he cannot use his four wheel drive to reach the hunting grounds since in olden times hunters went by foot? Does it mean a hunter cannot use a gun, but must use a wooden spear instead? Another problem with this definition is that it does not take into account that Hawaiian customs differ by island and by district depending on the social and environmental conditions. The current definition wrongly assumes that all Hawaiians, on every island and every district, have a given "uniform practice."

Oppressive Certification Requirements. The bill requires that Hawaiians register for a certificate in order for their practices to be valid. This is a very haole way of thinking and is, in itself, inconsistent with Hawaiian custom. Hawaiians have always had a right of subsistence. We have a right to utilize the resources from the mountain to the sea. It is an inherent and fundamental right which existed even prior to the admission of Hawai‘i as the 50th State. The hoa‘aina rights of access, gathering, fishing, hunting, and religious exercise is a reservation on all lands owned in Hawai‘i and has never been extinguished. The registration requirement is also very insensitive to Hawaiian culture. By having to identify the subject property (almost in a sense of stating metes and bounds) and state the particular usage or custom practiced at the site, the State is essentially asking us to betray ourselves, our kupuna, and our entire belief system. If we are, for example, to mālama our ancestors' burial grounds, then we do not disclose the location or significance of the are for fear that other who are disrespectful or ignorant may unearth the bones, ransack them, and take away the mana from our kupuna. Places like this are sacred to us and it is a matter of duty to mālama them; regardless of what a piece of paper from the State Land Use Commission states. Our customary, religious, subsistence practices are not be compromised.
Heavy Economic Burden and Judicial Inefficiency In Certification Process, Administrative & Judicial Hearings. Compelling Hawaiians to register these rights, which shall be subject to "reasonable fees" in addition to potential exposure to expensive litigation in order to defend these rights through contested case proceedings and judicial appellate review, would put a great financial burden on Hawaiians. In addition to being legally flawed, the process of registration of Hawaiian customary and traditional rights would be too costly and judicially inefficient for both Hawaiians, private landowners, and the State. If these rights are already attached to the land and cannot be extinguished; then it makes more common and legal sense for the burden to be on the landowner to prove that his property is not subject to Hawaiian custom and usage. If the landowner is contemplating development of his land; then as he attempts to go through state and federal permitting requirements, he should also research into the matter of whether his land is important for the exercise of Hawaiian customary, traditional, religious, and subsistence practices. The State shall also fulfill its fiduciary responsibilities to Hawaiians by allowing Hawaiians a voice in this permitting process; much in the same way that the Hawai'i Supreme Court ordered the Hawai'i County Planning Commission to give Hawaiian members of PASH an opportunity to be heard on the issue of access and gathering practices on a parcel of land slated for resort development. It makes more sense to deal with this issue on a case-by-case basis rather than attempt to cheapen and simplify Hawaiian customary rights through a quick-and-dirty registration process.

This registration process, taken together with rigid and over broad requirements regarding definitions of traditional and customary practices and undeveloped lands, is a veiled attempt on the part of the legislature to effectively extinguish Hawaiian custom and usage rights. For the reasons stated above, I urge you to kill Senate Bill No.8.

(signed Malia Akutagawa)

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APPENDIX G cont.