THE SENATE
THE NINETEENTH LEGISLATURE
REGULAR SESSION OF 1997

COMMITTEE ON WATER, LAND AND HAWAIIAN AFFAIRS

HEARING DATE/TIME: FEBRUARY 4, 1997 1:00 P.M.

COPIES NEEDED: 25

RE: SENATE BILL 8 - RELATING TO LAND USE

Aloha Chair Solomon and Iwase and members of Committee:

My name is Moses Haia. I am a staff attorney for the Native Hawaiian Advisory Council (NHAC). NHAC strongly opposes the passage of Senate Bill 8 out of this committee.

The bill's stated purpose is "to provide landowners with reassurance regarding the status of their title while preserving the rights of native Hawaiians to continue to engage in traditional and customary practices on undeveloped lands." The bill, however, attempts to provide this reassurance by imposing unreasonable limitations and restrictions on the exercise of traditional and customary Hawaiian activities. So, rather than fulfilling the state's mandate to "preserve" and protect legitimate traditionally and customarily exercised Hawaiian activities to the extent feasible as required by Article XII, Sec. 7 of Hawai'i's Constitution, passage of this culturally insensitive bill would:

----unreasonably, and in some instances summarily, block the exercise of any and all otherwise legitimate traditional and customary Hawaiian activities which do not meet certain inappropriate requirements;

For example, this bill suggests, inappropriately, that a person who wishes to assert his or her traditional and customary gathering rights in a particular area must somehow prove that those rights have been
continuously practiced. Many Hawaiians have very limited financial resources. Having to satisfy a registration requirement for each and every cultural practice which requires access to undeveloped land is onerous and unnecessary. For any individual actively engaged in the practice of tradition and custom, this could require the registration of hundreds of practices, every material that is gathered, every practice that involves crossing through a piece of land would be implicated. Moreover, as the Hawai‘i Supreme Court declared in *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Haw. 425, 450 (1995) (KOHANAIKI), "continuous exercise is not absolutely required to maintain the validity of a custom[]. [T]he right of each ahupua‘a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site[]." *Id.*

---unreasonably limit their nature and extent, the class of persons entitled to their exercise, and the land upon which they may be exercised;

The exercise of traditional activities is not restricted to "undeveloped lands." These activities may be practiced on less than fully developed or on not yet fully developed lands with state protection to the extent feasible, and, if not inconsistent with the rights of private landowners, on fully developed land. Additionally, the KOHANAIKI court did not expressly limit the exercise of these activities to persons who are "descendants of native Hawaiians who inhabited the islands prior to 1778[]." *Id.* at 438, 440.

And, a requirement for uniformity of practice has no valid basis. As the court points out, "the precise nature and scope of [these] rights . . . depend upon the particular circumstances of each case." *Id.* at 438, 440.

---callously and wrongfully allow the termination or further limitation of certified exercises when they interfere with a landowner's desires.

This bill does not preserve traditionally and customarily exercised Hawaiian activities. Rather, it attempts to transform the status of these activities from rights to privileges and, ultimately and in every circumstance, allows their full and final extinguishment for any

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number of inadequate reasons. This bill clearly places undue 
emphasis on non-Hawaiian principles of land ownership. The 
KOHANAKI court stated that "[s]uch an approach would reflect an 
unjustifiable lack of respect for gathering activities as an acceptable 
cultural usage in pre-modern Hawai‘i, which can also be successfully 
incorporated in the context of our current culture." Id. at 451. As the 
court in KOHANAKI instructed, "the State is authorized to impose 
appropriate regulations to govern the exercise of native Hawaiian 
rights in conjunction with permits issued for the development of land 
previously undeveloped or not yet fully developed." Id. (emphasis 
added).

Apart from its constitutional shortcomings, this bill's imposition of non-Hawaiian 
values and judgments on things Hawaiian demonstrates a deep-seated, matter of fact lack of respect 
for a people and their heritage. This "registration" process attempts to extract from things Hawaiian 
the very "mana" that makes them Hawaiian. The types of activities targeted by this legislation are, 
by custom, self-regulating. The process which this bill attempts to impose is not reasonable and is a 
thinly veiled attempt to extinguish the constitutionally protected rights of Hawaiians to engage in 
traditional practices.

This bill would require that one request permission prior to exercising these 
constitutionally protected rights on privately owned "undeveloped land". Set aside for the moment 
the fact that the KOHANAKI court confirmed that access is guaranteed on undeveloped land and 
that this bill runs afoul of that guarantee. Set aside also for the moment the onerous, and likely 
insurmountable, burden this bill places on Hawaiians seeking to engage in traditional activities. A 
permission requirement is not an aspect of custom and tradition associated with these activities. 
Customarily, one who sought to engage in these activities was not required to seek permission 
beforehand. Customarily, a person accessing mauka to gather would ask permission only if that 
person was met in the course of their activities. Traditionally, rather than seeking permission, one 
might announce their presence and intention by speaking or talking loudly, or leaving ho’okupu, 
ceremonial markers, to let others know of their presence and exercise of the activity. Clearly and for 
good reason, the conduct of one in the exercise of traditional and customary activities is, as a matter 
of custom, self-regulating. These cultural practices are designed to maintain order, harmony, balance, 
and respect for the resources and the deities associated with those resources. Imposing the proposed 
process of registration would create a significant and insurmountable barrier to these customs and 
practices. The cultural, religious, and spiritual significance of these customs are being shown great 
disrespect and treated as if they were inconsequential. These activities are not mere recreation or past 
time.

The provisions of this bill provide a powerful tool of harassment for landowners 
displeased with traditional and customary activity on their land. Assuming that an applicant

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successfully maneuvers all of the preliminary stumbling blocks to filing a petition, which is perhaps a more than optimistic assumption and assuming further that the applicant also prevails in obtaining certification, the landowner may then immediately invoke the termination or modification process as outlined in ss. 205-D. The practitioner, after receiving notice of the landowners' request and within some presently unspecified time, is then required to respond to the landowners' request and also to request a contested case hearing. Thereafter, the commission holds a public hearing. It is unclear whether this public hearing serves as the contested case or whether the public hearing will determine the necessity of a contested case. In any event, the practitioner is forced to undergo further unreasonable scrutiny and incur additional expenses despite adherence to the process and certification of the activity. The bill provides a vehicle for continually harassing someone whose activity should be protected under Article XII, section 7 of Hawaiʻi's Constitution.

In another vein, you are probably well aware of the the water use declaration and registration process which was required by the passage in 1988 of the State Water Code. Water users were required to register their water use(s) as of May 29, 1989. The staff of the Commission on Water Resource Management was deluged with filings. Nearly eight years have passed since the filing deadline, the Commission has not completed its certification process, and in fact determined it would not process most of the declarations.

Against this backdrop, let's consider this bill's requirement that a valid petition for certification of registration be filed before a building or grading permit is issued. Envision, if you will, thousands of applicants racing to file petitions on the justified fear that their activity may fall victim to a previously issued building or grading permit. The bill begs such a response.

It also does not appear that anyone seriously considered what this bill may require one to do to continue a traditional and customary activity. Take for instance, accessing someone's undeveloped land to gather the noni plant for medicinal purposes. Let us assume that, prior to this bill, there was never any confrontation between the landowner(s) and the traditional gatherer. The activity was "successfully incorporated in the context of our current culture." Let's also assume that the traditional gatherer practiced the activity by walking through more than one parcel of private property because the activity was not confined to one specific area on one parcel. According to this bill, our practitioner must now initiate research to provide a description of the land or portions of land where the practice occurs. Will he or she be required to undertake surveys of the parcels, specifically identify the area(s) where the noni plants grow, determine boundary lines between and among the various parcels? Will the landowners be required to obtain title searches to establish that, but for the applicant's claim, they hold title free and clear? What has been a reasonable and quiet activity now assumes quite different proportions.
Moreover, if this bill really intends to provide title certainty, it is unclear how that will be achieved. At best, it merely confirms the existence and exercise of a reasonable traditional and customary activity on a specific parcel and denies the exercise of non-traditional or unreasonable activities. In what way will this make a title insurance company change its policies? How will passage of this bill eliminate any hesitation on the part of title insurers? Title to the property is now, in no uncertain terms, subject to traditional and customary activities. A registration/certification process cannot extinguish rights guaranteed by the Constitution. Under the guise of a registration program, this blatant attempt to confront and extinguish traditional and customary practices is unconstitutional and should be rejected without further consideration.

State agencies are "obligated to protect customary and traditional rights to the extent feasible under the Hawai'i Constitution and relevant statutes." This bill attempts to shift the burden onto the individual person who wishes to practice his or her customs and traditions. It establishes a process that unreasonably burdens such individuals.

Almost fifteen years ago in Kalipi v. Hawaiian Trust Co. (1982) the court affirmed the gathering rights of an individual. Ten years later, in Pele Defense Fund v. Paty (1992), the court again considered gathering practices, noting that the "precise nature and scope of the rights . . . would, of course, depend upon the particular circumstances of each case." In the balance of interests between private property and tradition and custom, the court held that private property owners have the right to exclude persons pursuing non-traditional activities. However, with respect to traditional and customary practices, the balance shifts and the reasonable exercise of ancient Hawaiian usage is entitled to protection." The western concept of exclusivity may apply vis à vis non-traditional activities, but it is not available to exclude persons who are engaged in traditional practices.

This bill attempts to expand concepts of exclusivity. This once again reminds me that, in the words of the KOHANAIKI court, it is not appropriate to "place undue emphasis on non-Hawaiian principles of land ownership. . . . Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i." Senate Bill 8 is just such an approach. It should be laid to rest here and now. Mahalo for the opportunity to speak in strong opposition to the passage of this bill.

Me ka pono,
Native Hawaiian Advisory Council

Moses K. N. Haia III, Esq.
Community Liaison

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INFORMATION TO SUPPORT WATER CLAIM

1. Are you the owner of the property? If not, on what basis do you have possession of the property?

   Landowner’s Name: ______________________________________
   Address: ________________________________________________
   _______________________________________________________
   _______________________________________________________
   Phone: ______________________________

2. Is this parcel a kuleana?

3. Do you claim appurtenant rights?

4. When was this parcel created or subdivided from surrounding lands?

5. What is the Royal or Government Patent number?

6. Is this land in taro production?

7. If not currently, was it ever in taro production? If yes, when? What evidence do you have to show that the land was in taro production at one time? Please attach documentary evidence.

8. What documentary evidence (if any) do you have showing how this property was used in the:

   1850s?

   1860s?
Water Delivery to the Property

9. Please make a simple but clear sketch showing the property in question and how it receives/received water.

10. Is the property adjacent to or does it touch an existing stream? If yes, what is the name of the stream? If several streams flow through the subject parcel, please provide a map showing them all.

11. Is this property served by an auwai? If not currently served, was it ever served by an auwai at one time? When was the auwai closed and by whom?

12. If the property is/was served by an auwai, where does/did the auwai connect to a stream? Please make a sketch and provide detailed descriptions.

13. Over whose lands does/did the auwai pass?

14. To the best of your knowledge, did you or any of your predecessors in interest ever accept water by ditch or pipe in substitution of a previously existing auwai?

15. To the best of your knowledge, did any of the previous owners of your property sell the water rights to another party?

I certify that the foregoing is true & correct to the best of my knowledge and that if there are any misrepresentations the claim may be rejected.

_________________________  ______________________
Name (Print)                  Signature

Eff:  3/15/94
File:  ISWC Form

APPENDIX I cont.
100TH ANNIVERSARY OF THE OVERTHROW OF THE HAWAIIAN KINGDOM

Public Law 103-150
103rd Congress
Joint Resolution

To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

Whereas the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;

Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government: "I Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom. "That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John

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L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government. "Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands." Done at Honolulu this 17th day of January, A.D. 1893.

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms;

Whereas, on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893 concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas President Cleveland further concluded that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy;

Whereas the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas the Committee and its chairman, Senator John Morgan conducted hearings in Washington, D.C., from December 27, 1893 through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

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Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

Whereas the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people;

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions;

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies;

Whereas the Eighteenth General Synod of the United Church of Christ in recognition of the denomination’s historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the Native Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the Native Hawaiians; and

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION I. ACKNOWLEDGMENT AND APOLOGY.

The Congress—

1. on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

2. recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

3. apologizes to Native Hawaiians on behalf of the people of the United States for the
overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

4. expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

5. urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.

SEC. 2. DEFINITIONS.

As used in this Joint Resolution, the term "Native Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

SEC. 3. DISCLAIMER

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.


LEGISLATIVE HISTORY—S.J. Res. 19:
SENATE REPORTS: No. 103-126 (Select Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 139 (1993):
Oct. 27, considered and passed Senate.
Nov. 15, considered and passed House.

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