THE PELE DEFENSE FUND
POST OFFICE BOX 404 • VOLCANO, HAWAII 96785

TESTIMONY IN SUPPORT OF S.B. 2212, S.D. 2, H.D. 1 AN ACT RELATING TO GOVERNMENT MINERAL RIGHTS

Chairperson Joseph Souki and members of the House Finance Committee, I am Dr. Davianna Pomaika'i McGregor with the University of Hawai'i Ethnic Studies Program and am testifying for the Pele Defense Fund (PDF) in favor of S.B. 2212, S.D. 2, H.D.1.

The Pele Defense Fund opposes geothermal energy development on the Big Island of Hawai'i primarily for Native Hawaiian religious and cultural reasons. However, this committee need not share our unique view of geothermal development to see that it is timely for the Hawai'i legislature to examine all aspects of geothermal energy development with extreme care and caution. A number of laws have been enacted in recent years for the purpose of promoting geothermal energy development which are not in the best interests of the State of Hawai'i from an economic, environmental, or social perspective, and which do not appear to have received sufficient legislative scrutiny at the time they were enacted. H.R.S. 182-7, which S.B. 2212 would amend, is just such a law. It should not be amended, it should be repealed. However, since S.B. 2212, not H.R.S. 182-7, is currently in this committee for consideration, I will confine my prepared comments to S.B. 2212, S.D.2, H.D. 1.

In its current form, as ammended by the House Committees on Planning, Energy, and Envirionmental Protection and Economic Development and Hawaiian Affairs, the bill will allow legislative oversight of any decision by the Department of Land and Natural Resources to waive royalty payments by developers of minerals to the State of Hawai'i. This would establish a practice by the State of Hawai'i which would be consistent with that of other states in the U.S. No other state allows the land mgt. agency to make decisions on waiving mineral royalties. that remain w/in the purview of the legislature.

- Just for the record of this committee, I would like to point out that the sections of S.B. 2212, S.D. 1 which would have created a community assistance fund would have created a number of legal problems:

(a) The community assistance fund appeared to be a way of providing free insurance to geothermal developers at the expense of the state. We do not believe any other industry in the state has, or should have, the benefit of this kind of subsidy.

(b) State statutory and common law already provides remedies for the kinds of claims that might arise and be made against the community assitance fund. These claims include inverse condemnation (by state action), public or private nuisance, negligence, toxic torts, and trespass. Existing state laws, state agencies, and the state court system are already established to receive and process such claims.

(c) Creation and funding of the community assistance fund would create a kind of special claims court to receive claims of damages arising from geothermal development activities. A special forum for geothermal claims is neither desirable nor adequate. Some number of persons will have to be hired and paid to do what

the state legislature and the common law have already done; define recoverable claims (causes of action), define the scope of jurisdiction, determine the applicable measure(s) of damages, and determine the effect of any award on subsequent claims or claims in other forums (res judicata and collateral estoppel), such as the regular state court system. These issues are very technical and complex. Existing common law and statutory rules governing these issues represent the accumulated experience and wisdom of a millennium of the Anglo-American legal tradition.

(e) The question of appeal from the rejection of a claim by the community assistance fund has not been addressed.

(f) The community assistance fund could become a kind of legal nightmare. As a means of compensating for damages caused by geothermal development to people and property it is both highly inefficient (because a whole new court system must be created) and inadequate. Based on the experience with the state's HGP-A geothermal plant which operated in Puna from 1980 to 1989, a large number of landowners might seek compensation for relocation, adverse effects on health, and nuisance impacts. Relocation of just one such person, including land costs, could easily exceed the amount of the Fund (initially just $60,000 contributed by Puna Geothermal Venture pursuant to condition 51 of GRP 87-1 plus an unknown amount of "net revenues' to the state from the operation of HGP-A). How will priorities be decided? What is the effect on the legal rights of a person who makes a claim to the Fund which is denied? Does denial of a claim by the Fund preclude filing the same claim in a regular court of law? What is the effect on the legal

rights of a person who makes a claim to the Fund which is granted? Is such a person legally precluded from suing the geothermal developer or the state in a regular court of law on the same claim?

<u>Conclusion</u>

The Hawai'i state legislature should not establish a community assistance fund until the relationship of such a fund to the existing state legal system has been formally reviewed and commented upon by the Office of the Attorney General and the Administrative Office of the Courts. Thank you.

Comunity should be compensated / a Fund is not an adequate means of doing this, / indicates the liability assumed by the state / county by going geo at Kapoho. — Dr [illegible] /

20% actually goes to OHA

WH not sure