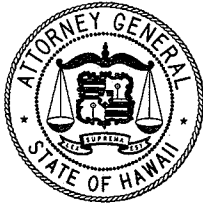


**TESTIMONY**

**SB 3**

**LATE**



**TESTIMONY OF THE STATE ATTORNEY GENERAL  
TWENTY-FOURTH LEGISLATURE, 2008**

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**LATE TESTIMONY**

**ON THE FOLLOWING MEASURE:**

S.B. NO. 3, RELATING TO KAHANA VALLEY STATE PARK.

**BEFORE THE:**

SENATE COMMITTEE ON WATER AND LAND

**DATE:** Monday, February 25, 2008      **TIME:** 2:45 PM

**LOCATION:** State Capitol Room 414  
*Deliver to: Committee Clerk, Room 228, 1 copy*

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or William J. Wynhoff, Deputy Attorney General

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Chair Hee and Members of the Committee:

The Department of Attorney General opposes this bill and believes it would be unconstitutional if enacted.

This bill would authorize issuance of long-term leases on additional parcels of land within Kahana Valley.

Article XI, section 5 of the Hawaii Constitution provides:

The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

No Hawaii case deals with article XI, section 5. One formal opinion from this department addresses it. In our Opinion No. 61-38, at page 2 (fn. omitted), we said:

[I]t is clear that once land was "owned by the State or under its control," the framers of the Constitution intended that it be distributed by means of general laws and to prohibit its dissipation "through private, or special laws". (Vol. 1, Proceedings of the Constitutional Convention of Hawaii, pp. 233, 336.)

The impetus for adoption of article XI, section 5 appears to have been "special land exchange deals or things of that nature which as we know in the past have definitely caused a considerable loss to the Territory." 2 Proceedings of the Constitutional Convention of Hawaii of 1950, at 631 (1961). The committee report refers to "dissipation of assets by land exchanges under private laws or by homestead laws governing a particular tract of land." Stand. Comm. Rep. No. 78, 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 233 (1960). Although land exchange deals and homestead laws governing particular tracts of land appear to have been foremost in the minds of the delegates to the 1950 Constitutional Convention, the constitutional proposal they agreed to was not limited to those transactions. The committee report instead states "in administering and disposing of the natural resources the legislature must do so by general law." Id. Intergovernmental transfers were the only exceptions provided. Id.

S.B. No. 3 is (plainly) the product of the exercise of legislative power and involves land owned by the State. The bill does not fall within the exception clause of article XI, section 5, because it does not involve an intergovernmental transfer.

S.B. No. 3 is not a general law because the bill singles out one parcel of land in a specific locale. We believe that S.B. No. 3 is an exercise of legislative power over the lands owned by the State by special, not general, law and is, therefore, unconstitutional. We opposed a similar bill, H.B. No. 1664, in 2006 for similar reasons.

It does not appear that this problem can be solved by amendment, because the title to the bill requires that it relate to Kahana Valley.

Aside from the problems with the constitutionality of the measure, the bill describes qualified lessees as "persons who reside and have continually lived in the state park since before 1987 in a culturally and appropriate manner and have served as caretakers of the state park." We know from past experience that this definition will be difficult to interpret and apply. What evidence could prove or disprove that a person has "continually" lived in the park since 1986? What about, for example, persons who lived elsewhere during time spent in military service or in college?

In addition, the phrases "culturally and appropriate manner" and "served as a caretaker of the state park" are inherently ambiguous. If these phrases are intended to impose additional qualifications beyond living in the park since 1986, they should be defined or clarified. During what part of the time must the person have been a caretaker of the park? How would the phrases apply to a person in his or her twenties who was a child during most of the relevant time?

The Department of Attorney General believes that this bill should be held.

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**(END)**