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LATE TESTIMONY
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THE HONORABLE REPRESENTATIVE KEN ITO, CHAIR
HOUSE COMMITTEE ON WATER, LAND AND
OCEAN RESOURCES
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

March 16, 2009

RE: S.B. 580, SD2; RELATING TO FORFEITURE

Chair Ito and members of the House Committee on Water, Land and Ocean Resources, the Department of the Prosecuting Attorney ("DPA") submits the following testimony in support of Senate Bill 580, Senate Draft 2.

This Bill was originally heard by the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs on February 4, 2009 during which the DPA submitted extensive written and oral testimony explaining the legal infirmities of the measure as originally drafted. The DPA also explained the ramifications of Carlisle v. One Boat, et als (Dang Van Tran), S.C. 26995 (November 17, 2008) ("One Boat") and explained the remedies that the Kaho'olawe Island Reserve Commission ("KIRC") and the Department of Land and Natural Resources ("DLNR") must follow to resolve the adequately address the concerns raised by the Hawaii Supreme Court in One Boat while enabling DLNR and KIRC to participate in the Hawaii asset forfeiture program.

DLNR believes that a quick "legislative fix" as found in S.B. 580 would resolve its problems resulting from One Boat. However, the DPA made it clear that S.B. 580 in its original form created numerous problems that could jeopardize the constitutionality of the Omnibus Asset Forfeiture Act ("H.R.S. Chapter 712A") and the integrity of the State forfeiture program, and as a result would not enable DLNR to continue its participation in the State forfeiture program. The only "fix" for the problems faced by both DLNR and KIRC was an amendment to KIRC's H.R.S. Chapter 6K and amendments to the administrative rules of both KIRC and DLNR. The DPA notes that DLNR was informed of its need to amend its rules since November, 2008, immediately after One Boat was issued.

Immediately following this hearing, the DPA worked with Chair Hee's Committee resulting in this S.D. 1 which successfully addresses in large part, KIRC's lack of statutory authority to participate in the State forfeiture program as an additional civil

remedy applicable to KIRC rule violations. DLNR already had that statutory authority rendering S.B. 580 in its original form unnecessary for this purpose. It is now up to KIRC and DLNR to do what is necessary to amend their respective administrative rules. No "legislative fix" can relieve them of this. Subsequent deliberation by the Senate Committee on Judiciary and Government Operations resulted in SD2 which provides the needed "fix" for KIRC without creating the plethora of legal complications created by the original SB 580 and other proposals submitted by DLNR.

To establish a historical perspective regarding S.B. 580, this measure apparently arose out of the Hawaii Supreme Court's November 17, 2008 decision in One Boat and the resultant return of a helicopter that was to its owner that had been seized for forfeiture after landing on Kaho'olawe without the requisite authority. DPA notes that every county, including the City and County of Honolulu, terminated forfeiture cases from the Department of Land and Natural Resources ("DLNR"), Division of Conservation and Resources Enforcement ("DOCARE") as the result of One Boat.

The stated purpose of S.B. 580 was to clarify "that the forfeiture laws apply to violations of conservation and resources statutes and rules to protect caves, historic preservation, and the Kaho'olawe island reserve." However, it not only failed to address the concerns of the Hawaii Supreme Court, but also failed to accomplish its stated purpose, is unnecessary and possibly constitutionally infirm. In short, S.B. 580 as originally drafted did not eliminate legal obstacles to using forfeiture as an additional remedy under either Title 12 of Chapter 6K for the following reasons.

First, the Omnibus Forfeiture Act, H.R.S. Chapter 712A, and in particular H.R.S. Section 712A-4(a) clearly provides the necessary authority to establish additional covered offenses without amending other sections of H.R.S. Chapter 712A, rendering this portion of the Bill entirely unnecessary.

No amendment to H.R.S. Chapter 712A will be helpful. Chapter 712A is a statute of general applicability. Because of this, it includes 712A-4(a) which allows the addition of forfeiture in more specifically applicable laws by amending those laws directly, e.g. the amendment of Chapter 134 by adding new section 134-26 allowing the forfeiture of vehicles used to transport loaded firearms on public highways. Moreover, Sections 712A-4(b) and (c) do not cover petty misdemeanors. That can only be done by including forfeiture in DLNR's administrative rules. Nor will amending Chapter 187A assist DLNR. DLNR already has the general language in Section 199-7. What DLNR needs now is notice to the public in its rules. In this regard, this Bill was surplusage.

Second, this Bill reflected a misunderstanding of the purpose and function of H.R.S. Chapter 712A and the State forfeiture program. A law enforcement agency's participation in the State forfeiture program is entirely voluntary. A law enforcement agency such as DOCARE or the DPA may, at any time, elect not to participate in the program generally, or may choose not to accept a particular forfeiture case. This is essential because forfeiture is a separate civil remedy available to law enforcement, but can not be used as a substitute for criminal enforcement. Nor can attorneys involved in

the forfeiture process ethically use the civil forfeiture process to gain an advantage in criminal enforcement. In short, even if DOCARE rules are amended to include the violations envisioned by this Bill, forfeiture may be declined by either DOCARE or the DPA because of overriding law enforcement concerns or strategies. Therefore, this Bill was ineffective to resolve issues raised by One Boat.

Third, a law enforcement agency must decide, as a matter of policy, whether to participate in the forfeiture program. After One Boat was issued, the DPA conferred with the Attorney General, DLNR and DOCARE. DOCARE temporarily terminated its participation in the State forfeiture program but intends to again participate in the Hawai'i after legal impediments raised by One Boat are addressed. All parties to One Boat agree, that the Hawaii Supreme Court's concerns will be best, and most efficiently, correctly and appropriately addressed with an amendment to the administrative rules governing land and natural resources violations and not through this Bill.

Fourth, each and every proposed amendment in this Bill created Double Jeopardy issues under both the State constitution (Tuipuapua) and the federal constitution (Usury and progeny). Forfeiture is a specialized area of the law. It must always be remembered that as a matter of law, civil forfeiture is not a penalty but is a tool. Its purpose is to allow law enforcement to offset, at least in part, the use of law enforcement resources in enforcing the law.

Fifth, in One Boat, the Hawai'i Supreme Court clearly stated its concern regarding the continued preservation and protection of our ecological and natural resources and provided us with a blue print to make this happen. The DPA litigated One Boat from its inception as an administrative forfeiture action to its completion more than nine (9) years later before that Hawaii Supreme Court. During oral argument of this appeal, the Hawaii Supreme Court Justices made it clear that a remedy rests, not with an amendment of Chapters 187, 199, but with a revision of administrative rules governing conservation and resources violations enforced by the DOCARE.

DLNR-enforced violations are defined by administrative rule. The Supreme Court's concern was that while these rules define the offenses, they do not provide notice of the penalties or other civil remedies that can be imposed. In short, the legal authority that defines the offense must also include notice to the public of the penalties and other civil remedies that can be imposed. As noted by Chief Justice Moon, DLNR had included such notice in its hunting rules but not in its other rules. Why not? Clearly, this can be done readily. As drafted, this Bill does not resolve the Hawai'i Supreme Court's concerns and does not provide DLNR with the needed legal authority to utilize the civil remedy of forfeiture.

Sixth, the Committee necessarily needed to also address the problems regarding the insufficiencies in Chapter 6K and KIRC's concerns. KIRC's problems as a result of One Boat are similar to those of DLNR, generally, but are not identical. However, KIRC would use the One Boat solution to address its own enforcement issues. This Bill did not correct the problems faced by both DLNR and KIRC. However, as with DLNR, the fix necessary for KIRC is very simple and straight-forward.

The One Boat opinion is helpful because now we know we need BOTH the general enabling statutory language and notice in the administrative rules that define

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offenses that may be affected by civil forfeiture. Unlike Title 12, Chapter 6K does not have enabling language and this Bill does not provide such language. The DPA has worked with Chair Hee's committee to address all of the concerns that have been raised, resulting in S.B. 580 S.D.2.

The DPA has always been ready and able to assist DLNR and KIRC with rule amendment language that would assure their abilities to participate in the State forfeiture Program. However, if the original version of S.B. 580 is passed, any forfeiture cases brought by DLNR and KIRC to the county prosecutors may have to be declined to avoid damage to the constitutionality of H.R.S. Chapter 712A, the integrity of the State forfeiture program, and other civil liability.

Thank you for the opportunity to submit testimony in support of S.B. 580 S.D.2.

LATE TESTIMONY

VIA WEB: http://www.capitol.hawaii.gov/emailtestimony

To: Rep. Ken Ito, Chair
Rep. Sharon E. Har, Vice Chair
Committee on Water, Land and Ocean Resources

From: Kiersten Faulkner
Executive Director, Historic Hawai'i Foundation

Committee Date: Wednesday, February 4, 2009
2:45 pm
Conference Room 229

Subject: **Support of SB580 SD2, Relating to Forfeiture**

On behalf of Historic Hawai'i Foundation (HHF), I am writing to support SB580 SD2, which clarifies that forfeiture laws apply to violations of conservation and resource statutes and rules and to protection of caves, historic preservation, and the Kaho'olawe Island Reserve.

HHF supports efforts to preserve and protect the historic and cultural resources of the Hawaiian islands. All tools and mechanisms that allow for enforcement of historic preservation laws should be available to the State as it implements preservation statutes and rules.

Since 1974, Historic Hawai'i Foundation has been a statewide leader for historic preservation. HHF works to preserve Hawai'i's unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, economic viability and environmental sustainability of the state.