

TESTIMONY

SB 580

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE,
AND HAWAIIAN AFFAIRS
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

February 2, 2009

RE: S.B. 580; RELATING TO FORFEITURE

Chair Hee and members of the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs, the Department of the Prosecuting Attorney submits the following testimony in opposition to Senate Bill 580.

The stated purpose of this Bill is 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.” This Bill apparently arose out of the recent Hawaii Supreme Court’s decision in Carlisle v. One Boat, et als (Dang Van Tran), S.C. 26995 (November 17, 2008). However, this Bill not only fails to address the concerns of the Hawaii Supreme Court, but also fails to accomplish its stated purpose, is unnecessary and possibly constitutionally infirm.

The Department of the Prosecuting Attorney litigated One Boat from its inception as an administrative forfeiture action to its completion more than seven (7) years later before that Hawaii Supreme Court. During oral argument of this appeal before the Hawaii Supreme Court, the Hawaii Supreme Court Justices made it clear that a remedy rests, not with an amendment of Chapters 187, 199 or 712A of the Hawaii Revised Statutes (“H.R.S.”) but with an revision of administrative rules governing conservation and resources violations enforced by the Department of Land and Natural Resources (“DLNR”) Division of Conservation and Resources Enforcement (“DOCARE”). The Department of the Prosecuting Attorney agrees, and opposes this Bill for several 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 H.R.S. Section 712A-4(b). Therefore, this portion of the Bill is entirely unnecessary.

Second, this Bill reflects a significant lack of understanding regarding the purpose and function of H.R.S. Chapter 712A. A law enforcement agency's participation in the Hawaii forfeiture program is entirely voluntary. A law enforcement agency such as DOCARE or the Department of the Prosecuting Attorney 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. Therefore, even if DOCARE rules are amended to include the violations envisioned by this Bill, forfeiture may be declined by either DOCARE or the Department of the Prosecuting Attorney because of overriding law enforcement concerns or strategies. Therefore, this Bill is ineffective.

Third, a law enforcement agency must decide, as a matter of policy, whether to participate in the forfeiture program. Forfeiture requires the commitment of resources that a particular agency may not have or be able to utilize for this purpose. This is necessarily an executive function. It may be viewed as a violation of the constitutional separation of powers for the Legislature to mandate that an executive agency adopt an internal policy of this kind. Therefore, this Bill may also be legally infirm.

After One Boat was issued, the Department of the Prosecuting Attorney conferred with the Attorney General, DLNR and DOCARE. DOCARE has temporarily terminated its participation in the forfeiture program in part because it lacks sufficient funding and staffing to adequately address its law enforcement concerns, even without the added burden of forfeiture. DLNR must now determine as a matter of policy whether it is fiscally responsible to adopt a policy allowing for its participation in the forfeiture program. Should DLNR determine that participation is warranted, 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 a "legislative fix".

For these reasons, the Department of the Prosecuting Attorney opposes the passage of S.B. 580 and thank you for the opportunity to testify.

VIA EMAIL: **WTLtestimony@capitol.hawaii.gov**

To: Senator Clayton Hee, Chair
 Senator Jill N. Tokuda, Vice Chair
 Committee on Water, Land, Agriculture and Hawaiian Affairs

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, Relating to Forfeiture**

On behalf of Historic Hawai'i Foundation (HHF), I am writing to support SB580, 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.

THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009

COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair

DATE: Wednesday, February 4, 2009
TIME: 2:45 p.m.
PLACE: State Capitol --- Conference Room 229
415 South Beretania Street

ALOHA, MY NAME IS: LEONA M. KALIMA

I AM IN SUPPORT OF THE FOLLOWING SENATE BILLS.....MAHALO

SB 580

RELATING TO FORFEITURE.

Clarifies that the forfeiture laws apply to violations of conservation and resources statutes and rules and to protection of caves, historic preservation, and the Kaho'olawe island reserve.

SB 582

RELATING TO KULEANA LANDS.

Makes the office of Hawaiian affairs the trustee of any unclaimed kuleana lands. Prohibits quieting title to kuleana lands or claiming kuleana lands by adverse possession.

SB 1085

RELATING TO CEDED LANDS.

Prohibits the board of land and natural resources from selling, exchanging, or otherwise alienating ceded lands in the public land trust.

SB 475

RELATING TO LANDS CONTROLLED BY THE STATE.

Prohibits the sale or exchange of certain public lands considered to be ceded lands. Expires on decision of U.S. Supreme Court on pending appeal of related case.

SB 476

RELATING TO LANDS CONTROLLED BY THE STATE.

Requires two-thirds majority vote of the legislature to adopt concurrent resolution to sell or exchange certain public lands.



SB 580, RELATING TO FORFEITURE

Senate Committee on Water, Land, Agriculture, and Hawaiian
Affairs

February 4, 2009
Room: 229

2:45 p.m.

The Office of Hawaiian Affairs (OHA) **SUPPORTS** Senate Bill 580, which would clarify that forfeiture laws apply to violations of conservation and resources statues and rules and to protect caves, historic preservation and the Kahōyolawe Island Reserve.

It is imperative that the state do everything in its power to protect Hawai'i's treasured natural and cultural resources. The ability to apply forfeiture penalties to the violations listed in the bill would serve as both a critical tool to preserve the resources of the state and a major deterrent to those who would harm our environment and cultural resources.

This bill provides further clarity to enforcement officers that they have the authority to take away personal property that is being used by perpetrators of Hawai'i's appropriately stringent laws protecting the conservation and protection of our natural and cultural resources.

OHA respectfully urges the committee to PASS S.B. 580, and we thank the committee for the opportunity to testify.

TESTIMONY

SB 580

(END)