



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

H.B. NO. 227, H.D. 1, RELATING TO TRESPASS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 1, 2011 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General provides the following comments regarding this bill.

The purpose of the bill is to strengthen trespass provisions by amending the offense of criminal trespass in the second degree, section 708-814, Hawaii Revised Statutes, to also prohibit a person from entering or remaining unlawfully on "unimproved or unused lands" that are fenced, enclosed, or clearly marked by signage.

The proposed new paragraph (d) of section 708-814(1), directed toward trespass on "unimproved lands or unused lands," is of concern because the phrase "unimproved lands or unused lands," is vague and likely to create issues in the application of the law. A person may not be able to tell whether land is "unimproved" or "unused." There could be many different uses for land. It could be used to graze livestock, or used as a passageway to other land. It could be used to transmit irrigation water. Land left fallow may or may not be considered "unused." Improvements may be made to land that may not be readily apparent. Land could be graded. Irrigation, sewer, or

electrical lines could be buried underground. Special ground cover, trees, or shrubbery could be planted.

Whether the land constitutes "unimproved lands or unused lands" may not be important for purposes of this bill, so long as the land is fenced, enclosed, or protected by clearly marked signage. It should be noted that section 708-814(1)(a) already prohibits a person from entering or remaining unlawfully on premises that are enclosed or fenced. Section 708-800 defines "premises" to include any building and any real property.

On page 1 of the bill, at lines 15-18, and page 2, at lines 1-3, the bill repeals provisions regarding "unimproved and apparently unused land" that probably should not be repealed. These provisions clarify that a person who enters upon "unimproved and apparently unused land," which is not fenced or enclosed, does so with license and privilege unless notice against trespass is provided in person or by signage.

On page 4 of the bill, at lines 17-21, section 708-814(1)(c)(iii), Hawaii Revised Statutes, has been amended to read as follows:

The agricultural lands: At the time of entry,
are fallow or have a visible presence of
livestock or a crop:

- (A) Under cultivation;
- (B) In the process of being harvested; or
- (C) That has been harvested.

We have concerns about the new underscored material. The term "fallow" is defined in a dictionary as "plowed and left unseeded for a season or more; uncultivated; not in use; or inactive." Lands that are "fallow" could include lands that are simply not being used, and which might not provide a trespasser with any appearance or indication of being agricultural lands.

We also have some concern about the addition of "livestock" into this provision. This provision refers to agricultural land

that is not fenced or enclosed, and which does not have any visible signage to provide notice that the land is private property. The proposed amendment suggests that the presence of any livestock on open land should provide sufficient notice that the land is private property that should not be entered. The concern, however, is that livestock left on unfenced land can wander anywhere. The criminal trespass offense should not be based on where an animal might wander.

Thank you for the opportunity to share our concerns.

**Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary**

March 1, 2011

H.B. No. 227, H.D.1: RELATING TO TRESPASS.

Chair Keith-Agaran and Members of the Committee:

We oppose the passage of H.B. No. 227, H.D. 1. While the intent of the bill is to ‘strengthen trespass provisions regarding a person who enters or remains unlawfully on unimproved or unused lands’, we don’t think the solution to this problem is to further criminalize this particular brand of trespass behavior, adding to the numbers of those incarcerated in our prisons and using the resources of already overextended court services.

The conduct this bill seeks to make a petty misdemeanor under HRS 708-814, punishable by up to 30 days jail and 6 months probation, is currently a violation under HRS 708-815, which carries no jail or probation. There would be a significant cost to add all defendants currently guilty of a violation to the class of persons who could be jailed or placed on probation. That cost is not addressed in this bill but must be considered during these particularly difficult economic times.

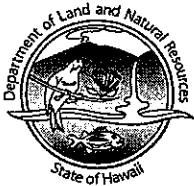
Aside from the cost, however, we do not agree with the reasoning that would criminalize entry or remaining unlawfully on unimproved or unused lands. It appears to us that this legislation could be used to target the homeless who are camped out on such property. While it is understandably frustrating to landowners and community members to have makeshift tent towns in their midst, the solution is not to increase the penalty for such conduct so that the homeless can be held in jail instead. A potential 30 day jail sentence is, by definition, not a long term solution, but will cost money that could be more effectively spent toward long-term efforts to address our homeless population.

We also object to the fact that this proposed upgrade of simple trespass to criminal trespass in the second degree, if it occurs on unimproved or unused lands, specifies no state of mind requirement. At the very least, it should require a “knowing” state of mind, though that would not cure our overall objection to this legislation.

Finally, we note that we have no objection to including “livestock” in the 708-814(c)(iii) but do object to including the reference to “fallow” land. Currently, agricultural land is given a greater protection than unimproved or unused land. The current wording of the statute is designed to ensure that it should be obvious to the passerby that land is “agricultural” if it is under cultivation, in the process of being harvested, or has been harvested. Land that lay “fallow” is not so obviously agricultural land. We do not support its inclusion in the 2nd degree offense.

For these reasons, we do not support this legislation. Thank for the opportunity to comment on this measure.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the House Committee on
JUDICIARY**

**Tuesday, March 1, 2011
Time 2:00 P.M.
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 227, HOUSE DRAFT 1
RELATING TO TRESPASS**

House Bill 227 House Draft 1 proposes to strengthen trespass provisions regarding a person who enters or remains unlawfully on unimproved or unused land by adding entering and remaining on unimproved or unused land that is fenced or enclosed, or with a "private property" sign, to the offense of criminal trespass in the second degree. The Department of Land and Natural Resources (Department) supports this bill and recommends following amendment.

In its current form, this measure provides two alternatives to private property owners to protect their property from trespass – physical barriers designed to exclude intruders and appropriate signage. The Department believes that government entities should be afforded the same degree of protection from unlawful trespass as private property owners. To that end, the Department recommends the following amendment to the first sentence of proposed Section 708-814(d)(ii) in SECTION 2 of the bill:

"(ii) Have a sign or signs displayed on the unenclosed, unimproved, or unused land sufficient to give reasonable notice and reads as follows: "Private Property" or "Government Property – No Trespass," as appropriate."

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUYH. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



HB 227 HD 1
RELATING TO TRESPASSING
House Committee on Judiciary

March 1, 2011

2:00 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB 227 HD1 as drafted, because of the bill's possible implications to the exercise of traditional and customary Native Hawaiian practices.

Native Hawaiians enter onto unimproved and unused lands to exercise their traditional and customary practices, sometimes without receiving an explicit invitation from the landowner. HB 227 HD1 seeks to ensure that criminal trespass in the second degree applies to persons that enter onto unimproved lands that are fenced or otherwise enclosed, or have signs to give reasonable notice of private property. It would also remove the presumption that a person entering unfenced, unimproved and apparently unused land does so with privilege unless personal notice is communicated by the owner of the land. Although Native Hawaiian traditional and customary practitioners would be able to use their constitutionally protected traditional and customary rights as a defense to trespassing, having to prove these rights as a defense to a criminal prosecution is overly burdensome, particularly when the recognition of entry for traditional and customary practices can be reasonably accommodated within the statute.

OHA would not oppose HB 227 HD1 if the following amendments were made to recognize and protect Native Hawaiian traditional and customary rights:

- Replace the bill's language on page 1, lines 4-6, with:

HRS § 708-800. "Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to do so, such as a person who is exercising a traditional and customary practice pursuant to Haw. Const. Art. XII § 7, HRS § 1-1, and/or HRS § 7-1.

- Replace the bill's language on page 4, lines 1-5, with:

HRS § 708-814(c). The person enters or remains unlawfully on

agricultural lands without the permission of the owner of the land, the owner's agent, or the person in lawful possession of the land, or without the privilege to otherwise do so, and the agricultural lands:

- Replace the bill's language on page 5, lines 1-4, with:

HRS § 708-814(d). "The person enters or remains unlawfully on unimproved lands or unused lands without the permission of the owner of the land, the owner's agent, or the person in lawful possession of the land, or without the privilege to otherwise do so, and the lands:"

OHA urges the committee to HOLD HB 227 HD1 as drafted. However, OHA would not oppose HB 227 HD1 with the aforementioned amendments. Mahalo nui loa for the opportunity to testify.



KAMEHAMEHA SCHOOLS

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY

Hearing Date: Tuesday, February 22, 2011
2:00 p.m., Conference Room 325

Good Afternoon Chair Keith-Agaran, Vice Chair Rhoads and Committee Members:

RE: Testimony in Support of House Bill No. 227 HD1 - Relating to Trespass

I am Kapu C. Smith, Senior Land Asset Manager for Kamehameha Schools' Kawaiiloa Plantation in Waialua, Oahu. I am here to testify in support of HB 227. As with many other landowners, we face daily trespass by those who ignore our private property signs, cut our gates, steal from our tenants, illegally hunt, dump construction and household waste, damage our water systems by riding dirt bikes, ATV's or cars along the banks of the irrigation ditches or reservoirs, intimidate our farmers or workers because they are armed, and threaten those who confront them.

Despite this, the current law requires the landowner of agricultural land to **personally notice the trespasser before he/she can be charged with criminal trespass**. It doesn't recognize that the trespassers are normally armed, have hunting dogs, are confronting us miles away from town or police support and know they will not be charged with criminal trespass without written notification. As a result, they continue to trespass without fear of any consequence.

Thank you for the opportunity to testify in support of HB 227 HD1.



Hawaii Cattlemen's Council, Inc.

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HOUSE COMMITTEE ON JUDICIARY

Tuesday March 1, 2011, 2:00 p.m. Room #325

HB 227 HD 1 RELATING TO TRESPASS

Strengthens trespass provisions regarding a person who enters or remains unlawfully on unimproved or unused land; adds entering and remaining on unimproved or unused land that is fenced or enclosed, or with a "private property" sign, to the offense of criminal trespass in the second degree.

Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee:

My name is Alan Gottlieb, and I am a rancher and the Government Affairs Chair for the Hawaii Cattlemen's Council. The Hawaii Cattlemen's Council, Inc. (HCC) is the Statewide umbrella organization comprised of the five county level Cattlemen's Associations. Our 130+ member ranchers represent over 60,000 head of beef cows; more than 75% of all the beef cows in the State. Ranchers are the stewards of approximately 25% of the State's total land mass.

The Hawaii Cattlemen's Council **strongly supports** **HB 227 HD1**.

Trespassing crimes are very serious to cattle ranchers and other agricultural commodities across the state. Trespassers cause damage to property, increase liability to operators, and pose a serious threat to our food safety issues. This past year, there have been several incidents where trespassing vandals destroyed papaya farms on Oahu and the Big Island, costing farmers tens of thousands of dollars.

The language in HB 227 HD1 would extend current trespass laws to include unimproved or vacant lands. Ranchers and farmers often have both improved lands and unimproved or vacant lands, and even if the trespass occurs on the vacant lands, we suffer similar harm, vandalism and liability as we do on our improved lands.

Thank you for giving me the opportunity to testify in favor of this very important issue.



LAND USE RESEARCH
FOUNDATION OF HAWAII

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March 1, 2011

Representative Gilbert S.C. Keith-Agaran, Chair and Representative Karl Rhoads, Vice Chair
House Committee on Judiciary

Support for HB 227, HD1 (Relating to Trespass; Unused Land).

Tuesday, March 1, 2011 at 2:00 p.m. in CR 325

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to provide testimony **in support of HB 227, HD 1** and to offer comments.

HB 227, HD 1. This bill strengthens the trespass provisions contained in Hawaii Revised Statutes (HRS), Section 708-800 by deleting language from the definition of "enter or remain unlawfully," which previously exempted entry onto unimproved/unused land as a criminal act unless such land is fenced or enclosed, or notice of trespass is personally communicated or posted by the land owner. The bill also includes entering and remaining on 1) agricultural lands that are fallow or have a visible presence of livestock or a crop; and 2) unimproved or unused land which are fenced or enclosed, or posted with a "private property" sign, to the offense of criminal trespass in the second degree under HRS Section 708-814(1).

LURF's Position. The revisions to the HRS trespass laws proposed by this bill help to protect owners and occupants of unimproved/unused land (including agricultural land which is fallow or has a visible presence of livestock or a crop), who have been long exposed to liability resulting from injury or death of persons who commit the offense of criminal trespass onto the property, by making it "unlawful" for persons to enter or remain on such property regardless of whether they have or have not received notification (personally, or by signage) against trespass. Any person who enters or remains "unlawfully" on unimproved/unused lands would, by the proposed amendment, be committing criminal trespass in the second degree if the lands are closed to exclude intruders, or have a sign or signs providing reasonable notice that the lands are private property.

LURF believes that this bill represents a fair, equitable and reasonable balance between the landowner's duties, rights and responsibilities, and the rights of a trespasser if injury or death occurs on unimproved or unused private property.

Owners of unimproved and unused lands, including farmers and ranchers, have, over the years, continued to experience problems with trespass, yet have been defenseless against claims by trespassers for incidents and injuries suffered on agricultural lands, and have, in fact, had to protect trespassers from loss and injury despite their illegal entry.

LURF therefore **supports HB 227, HD 1** and respectfully urges your favorable consideration of this bill. Thank you for the opportunity to present testimony regarding this matter.



Hawaii Farm Bureau
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HOUSE COMMITTEE ON JUDICIARY

March 1, 2011

2 pm

Room 325

Relating to Trespass

HB 227 HD1

Aloha Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

The Hawaii Farm Bureau, on behalf of our commercial farm and ranch families and organizations across the State, is in **strong support** of HB 227 HD1, which strengthens trespass provisions. We would also like to incorporate the language of HB 226 HD1 into this bill.

Farmers and ranchers need your help.

Farms and ranches across the State are being used without permission from owners for hiking, hunting, dirt biking, and worse---illegal activities. Our hard-earned crops are stolen, our livestock endangered by cut fences, and we are used as a rubbish dump, a place to abuse alcohol and drugs and to commit other crimes.

This bill would also make trespassing on unimproved lands that are fenced or otherwise enclosed or have clearly noticeable signs, a petty misdemeanor. We hope that this will serve as a deterrent to those who would otherwise ignore fencing and signage.

We respectfully request that you add the contents of HB 226 HD1 to this measure, as in HB 227, Proposed HD2 below. HB 226 provides that landowners are not liable to trespassers, unless the landowner intentionally or through gross negligence caused the injury, death, loss, or damage to the trespasser. This language is necessary because not only are there individuals who trespass and cause property damage; there are those who hurt themselves, and then threaten to sue the farmers and ranchers for their injuries. We cannot afford to lose everything we work so hard to create, in litigation or settlement proceedings with those who flagrantly ignore the law and then blame others for the consequences.

Thank you very much for your help to protect the viability of the farmers and ranchers of Hawaii who would like to continue to supply our residents and visitors with the bounty of our lands and help Hawaii move toward food self-sufficiency. We would be pleased to work with the Committee on language to accomplish this goal.