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STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the Senate Committee on
WAYS AND MEANS

Friday, February 28, 2014
10:00 AM
Hawai'i State Capitol, Conference Room 211

In consideration of
SENATE BILL 2125, SENATE DRAFT 1
RELATING TO MARINE LIFE CONSERVATION DISTRICT

Senate Bill 2125, Senate Draft 1, proposes to prohibit the taking or possession of aquatic life or fish feeding in the waters within two miles of an island with a population less than five hundred individuals and prohibits any person, except those currently domiciled on the island, from operating a tour boat, vessel, or jet ski, or riding a surfboard, kayak, zodiac, or other recreational craft. **The Department of Land and Natural Resources (Department) strongly supports the intent of this bill and stands ready to work with this committee on a management plan to provide for the protection of the natural resources around Ni'ihau.**

The Department is already working on an administrative rule for Ni'ihau. The rule process allows for the development of a more comprehensive and detailed management scheme, would provide more discussion opportunities in the local communities, and enable the Department to amend the rules as the need arises. We believe that we have sufficient statutory authority to achieve the intent of this legislation.

From: mailinglist@capitol.hawaii.gov
To: WAM Testimony
Cc: aalona73@me.com
Subject: *Submitted testimony for SB2125 on Feb 28, 2014 10:00AM*
Date: Thursday, February 27, 2014 3:00:03 PM

SB2125
Submitted on: 2/27/2014
Testimony for WAM on Feb 28, 2014 10:00AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
EDWIN RAY A'ALONA DELA CRUZ	Individual	Oppose	Yes

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
To: WAM Testimony
Cc: CaptMelWills@msn.com
Subject: Submitted testimony for SB2125 on Feb 28, 2014 10:00AM
Date: Thursday, February 27, 2014 1:46:34 PM

SB2125
Submitted on: 2/27/2014
Testimony for WAM on Feb 28, 2014 10:00AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Mel Wills III	Individual	Oppose	No

Comments: MEL WILLS III Holoholo Charters 4353 Waialo Rd./ PO Box 50940 Ele'ele , Kauai HI. 96705 808 635 5795 From: captmelwills@msn.com To: wamtestimony@capitol.hawaii.gov Subject: RE: Concerns about SB2125 S.D.1 Date: Mon, 17 Feb 2014 17:18:55 -1000 To: The Ways and Means Committee Attached is a letter to the Kauai legislators, In addition may I point out that the bill SB 2125 SD1 reads that it is "Relating To Marine Life Conservation District" There are no marine life conservation districts on Kauai or on Niihau or on Lehua. They are only on Oahu, Hawaii, and Maui If it were a Marine Life Conservation District then the following points from the Marine Managed Areas as listed under the State of Hawaii and the DLNR would apply. In Fisheries Management Areas, regulations may serve to resolve user conflict. Also it states, Listed under benefits of Conservation Districts * benefit the states economy through tourism and ocean recreation *create places where the public can enjoy the beauty of nature Also under the Regulations in MLCD's it states Fishing may be allowed subject to certain types of gear restrictions, which result from input received during the public meeting process. This implies that the "Public Meeting Process" is in fact required. Further more to be in compliance to be a Marine Life Conservation District you have to have public meetings. Now as for the amendment to the bill specifically the section 188 (3) No person shall operate a tour boat etc. The following testimony should make it very clear, this has been ruled on by the United States Court of Appeals , Ninth Circuit against the State of Hawaii and the DLNR. As ruled in the case in Hanalei Bay ,you cannot restrict coastwise trade in Federal Waters. Senator Ron Kouchi senkouchi@Capitol.hawaii.gov Representative James Tokioka reptokioka@capitol.hawaii.gov Representative Derek Kawakami repkawakami@capitol.hawaii.gov Representative Dee Morikawa repmorikawa@capitol.hawaii.gov Re: SB 2125 SD1 Dear Kauai Legislators, I feel compelled to write to express my concern about SB 2125, and the other similar bills being so rapidly introduced in the legislature this year. As you may know, I have operated a sailing tour business in the waters surrounding Kauai for the last 30 years. We have never run tours to Niihau, and have no intention to. However, the pending legislation, if passed, could set a precedent that would be unsettling and has gotten my attention. There are two long held concepts that the current bill would eviscerate. 1. Freedom of movement in the public space. The Hawaii constitution clearly provides for freedom of movement in the public space, as further expressed in

HRS chapter 115. “The purpose of this chapter is to guarantee the right of public access to the sea, shorelines, and inland recreational areas, and transit along the shorelines”. The beaches and waters surrounding Niihau, appear to be part of the State of Hawaii, and therefore, public space. This bill would eliminate any access by the public to the sea and shoreline surrounding Niihau. 2. Freedom of Navigation. The waters surrounding Niihau are indisputably under concurrent State and Federal jurisdiction. A number of years ago, the issue of a State ban of vessels operating upon navigable waters was decisively settled when the State of Hawaii attempted to eliminate commercial boating in Hanalei. In the State’s appeal of “Young vs. Coloma–Agaran”, attached for your convenience, the Federal Appeals Court held that a federal license granted to boaters, preempted the State ban and that the ban violated the Supremacy Clause of the Constitution: Despite the generality of the requirement for a coasting license, or perhaps because of it, courts have broadly construed the scope of the license. As early as 1824 in Gibbons v. Ogden, a coasting license has been held to unequivocally grant the authority to carry on the coasting trade. Id. at 212. The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from natural law and the Constitution confers absolute control of its regulation to congress. Id. at 211; cf. 58 Fed.Reg. 60256-01, 60258 (Nov. 15, 1993) (to be codified at 46 C.F.R. pts. 1 & 67) (“[T]he long-held policy of the Coast Guard [is] that the right to engage in the restricted trades is an entitlement that appertains to the vessel and arises as a matter of law upon meeting the requisite conditions.”). The Coast Guard's regulations reflect the law established in Gibbons that a coasting license “entitles a vessel to employment in unrestricted coastwise trade.” 46 C.F.R. § 67.19(a). And: The Supreme Court has recognized, however, that the right secured by a coasting license is not boundless. In Douglas v. Seacoast Products, Inc., it expressly noted “the negative implication of Gibbons: that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.” 431 U.S. 265, 277, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977). Thus, provided that such regulations do not conflict with federal law, a state maintains power to adopt such reasonable and nondiscriminatory laws. In short, vessels documented by the United States, through endorsement on the face of the federal license, are entitled to unrestricted coastwise navigation. They are, however subject to reasonable, nondiscriminatory, conservation and environmental measures duly promulgated by the States. To attempt to restrict the navigation of vessels in the waters a mile from the shore surrounding Niihau, because of the landowner’s concern that there may be some unverified depletion of the fish stocks in the near shore waters surrounding the island, seems to be overly broad, discriminatory, unrelated to a specific conservation or environmental purpose, and therefore in direct conflict with settled federal law. I am certainly not unsympathetic to the concerns raised at the legislature on Oahu by certain people from Niihau. At the same time, I am not aware of one public meeting between the owners/people of Niihau, and the people of Kauai being held on Kauai. It would seem reasonable to conduct a frank and open discussion among the stakeholders, on Kauai, that would bring all of the specific issues to light. It would also seem reasonable to, at the same time, conduct a scientific study surrounding the question of overfishing to document any specific problems. With the information garnered from these events, regulators should then be able to come up with “reasonable, nondiscriminatory conservation

and environmental protection measures” to address those findings, that could then be promulgated and implemented in a manner consistent with federal law. For instance, if it turns out that there are areas of Niihau subject to overfishing, the State may regulate fishing in those areas, as they routinely do in other areas around the State. For nearly every bay, beach, cove and inlet along these United States, certain members of the local populace, could for one reason or another make the case that “their” area was special, in need of protection, and seek to restrict vessels from accessing or transiting the adjacent waters. Since the 1800’s the Federal Government has defended the rights of the public to access these navigable waters, and consistently kept local municipalities from constructing regulatory breakwaters that limit peaceful navigation. If the landowner is seeking to maintain the fishery surrounding the island in a healthy and robust state, to insure an adequate supply of fish for the local population, I want to help. However, if the landowner is seeking to eliminate the public from respectfully enjoying the waters surrounding the island because he somehow just doesn’t want to see us out there, he will find no support here. We need your help to keep the public waters in the public’s hands. If I can provide any further information or clarification of my concerns about this matter, please don’t hesitate to contact meat your convenience at (808) 639-9720, or via email at drewke09@gmail.com. Respectfully, Andrew K. Evans United States Court of Appeals,Ninth Circuit. Ralph A. YOUNG, dba Hanalei Sport Fishing & Tours; Whitey's Boat Cruises, Inc., a Hawaii corporation dba Na Pali Catamarans; Robert F. Butler, Jr., dba Capt. Sundown Enterprises, Plaintiffs-Appellees, v. Gilbert COLOMA-AGARAN, in his capacity as Chairperson, Department of Land and Natural Resources, State of Hawaii; Mason Young, in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii; Vaughan E. Tyndizk, in his capacity as Kauai District Manager, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii, Defendants-Appellants. No. 02-15202. Argued and Submitted May 9, 2003. -- August 25, 2003 Before GOODWIN, RYMER, and T.G. NELSON, Circuit Judges. Yvonne Y. Izu, Deputy Attorney General, State of Hawaii, Honolulu, HI, for the defendants-appellants. Dennis Niles, Paul, Johnson, Park & Niles, Wailuku, HI, for plaintiffs-appellees Ralph A. Young& Whitey's Boat Cruises; Jack Schweigert, Honolulu, HI, for plaintiff-appellee Robert Butler, Jr. OPINION The district court granted summary judgment and a permanent injunction in favor of three commercial tour boat operators who challenged a state regulation that prohibits them from operating their tour boats in Hanalei Bay, located on the northern coast of Kauai. We affirm. I. BACKGROUND Ralph A. Young, Whitey's Boat Cruises, Inc., and Robert F. Butler are commercial tour boat operators conducting passenger tours from Hanalei Bay to the Na Pali coast on Kauai. In order to conduct boat tours in Hanalei Bay, the plaintiffs have held at least two types of licenses in the recent past: federal and state. The U.S. Coast Guard issued the plaintiffs' federal licenses (the “coasting licenses”) and these licenses include endorsements allowing licensees to engage in coastwise trade in the navigable waters of the United States, which include Hanalei Bay. The Hawaii Department of Land and Natural Resources' (the “Department”) administrative regulations require the plaintiffs to obtain state-issued commercial use permits (the “use permits”) to operate in Hanalei Bay. Until recently, state regulations limited the number of use permits issued and imposed certain conditions on the activities of the permittees

(e.g., setting numerical ceilings on passengers ferried and trips made). Among other conditions, the use permits contained an automatic termination provision in the event that the Department adopted an administrative rule prohibiting the permitted conduct. In October 2000, the state adopted the regulation at issue in this case (the "ban"). The ban states in relevant part: (1) No commercial vessel shall operate at or use the Hanalei River, Hanalei Bay ocean waters, or Anini Beach launching ramp for any commercial purposes without a commercial use permit. (2) No commercial use permits shall be issued for commercial vessels to operate at or on the Hanalei River or Hanalei Bay ocean waters, except that up to two commercial use permits may be issued for kayaks to operate on the Hanalei River or Hanalei Bay ocean waters. Haw. Admin. R. § 13-256-36. The Department notified the plaintiffs that their use permits would automatically expire on November 30, 2000, the effective date of the ban. On December 1, 2000, the plaintiffs filed their complaint seeking a declaratory judgment and injunctive relief on the ground that the ban violates the federal Constitution. Both parties moved for summary judgment. The district court granted a permanent injunction in favor of the plaintiffs, concluding that the ban violates the Supremacy Clause of the Constitution because it conflicts with federal licensing laws. The district court also found that the ban violates the Commerce Clause. II. DISCUSSION A. FEDERAL PREEMPTION Federal law may preempt state law in three ways: (1) federal law may explicitly preempt state law in a given area; 12017(2) federal law may implicitly preempt state law by dominating regulation in a given area; or (3) state law may actually conflict with federal law. Barber v. State of Hawaii, 42 F.3d 1185, 1189 (9th Cir.1994). In the instant case, the plaintiffs argue that the ban actually conflicts with, and therefore is preempted by, federal law. Actual conflict, or "conflict preemption," occurs "where it is impossible · to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (internal citation and quotation marks omitted); see also Service Eng'g Co. v. Emery, 100 F.3d 659, 661 (9th Cir.1996). To determine whether a conflict exists requires an understanding of both the federal and state regulations, as well as how they interact. See Perez v. Campbell, 402 U.S. 637, 644, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). 1. The Coasting Licenses The coasting licenses are issued pursuant to shipping laws set forth in title 46 of the United States Code. Section 12106 permits issuance of a coasting license to a vessel that (1) is eligible for documentation; (2) (A) was built in the United States; or (B) if not built in the United States, was captured in war by citizens of the United States and lawfully condemned as a prize ·; and (3) otherwise qualifies under laws of the United States to be employed in the coastwise trade. 46 U.S.C. § 12106(a). Eligibility for documentation turns largely on the ownership of the subject vessel. See 46 U.S.C. § 12102. A vessel must have a coasting license to be employed in the coastwise trade. 46 U.S.C. § 12106(b); 46 C.F.R. § 67.7. Coastwise trade includes the transportation of passengers. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 215-19, 6 L.Ed. 23 (1824). Despite the generality of the requirement for a coasting license, or perhaps because of it, courts have broadly construed the scope of the license. As early as 1824 in Gibbons v. Ogden, a coasting license has been held to unequivocally grant the authority to carry on the coasting trade. Id. at 212. The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from natural law

and the Constitution confers absolute control of its regulation to congress. Id. at 211; cf. 58 Fed.Reg. 60256-01, 60258 (Nov. 15, 1993) (to be codified at 46 C.F.R. pts. 1 & 67) ("[T]he long-held policy of the Coast Guard [is] that the right to engage in the restricted trades is an entitlement that appertains to the vessel and arises as a matter of law upon meeting the requisite conditions."). The Coast Guard's regulations reflect the law established in Gibbons that a coasting license "entitles a vessel to employment in unrestricted coastwise trade." 46 C.F.R. § 67.19(a). Since the Gibbons decision, several courts have considered federal regulation of navigation and trade licensing on navigable waters. It is well-settled that "[a] state may not exclude from its waters a ship operating under a federal license." Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 447, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960); see also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) ("That no State may completely exclude federally licensed commerce is indisputable·"). The Supreme Court has recognized, however, that the right secured by a coasting license is not boundless. In Douglas v. Seacoast Products, Inc., it expressly noted "the negative implication of Gibbons: that States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." 431 U.S. 265, 277, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977). Thus, provided that such regulations do not conflict with federal law, a state maintains power to adopt such reasonable and nondiscriminatory laws. 2. Hawaii's Ban We must analyze the Department's ban against this backdrop of expansive federal regulation of navigation and commerce. Hawaii began regulating the use of Hanalei Bay in the mid-1980s in response to user conflicts occurring on the north shore of Kauai. In 1988, a permitting system for up to fifteen commercial vessels was established under the supervision of the Hawaii Department of Transportation. In 1992, the Department of Land and Natural Resources assumed management of Hanalei Bay without any change to the relevant regulations (although by 1999, the number of use permits issued had dwindled to five). In 1999, the state considered a proposal to prohibit commercial boating in Hanalei Bay. A report from the public hearing on the proposal indicates that regulators were concerned about putting to rest "years of turmoil" over tourist activities in Hanalei, as well as maintaining the natural beauty of the Hanalei area. Comments from the public were by and large hostile to continued commercial tour boat activities in Hanalei Bay. Approximately five months later, the ban took effect and the Department revoked the plaintiffs' use permits.1 3. Conflict Preemption Analysis We conclude that the ban, in conjunction with the relevant federal shipping laws, violates the Supremacy Clause. Simply stated, the ban completely excludes the plaintiffs from conducting their federally-licensed tour boat businesses in Hanalei Bay. We are sympathetic to the challenges posed by the user conflicts occurring in the bay. We hold, however, that the state's refusal to issue use permits under any conditions has effectively rendered it impossible for the plaintiffs to comply with both federal and state law in order to ply their trade. See Florida Lime, 373 U.S. at 142-43, 83 S.Ct. 1210. The state argues that the Department was exercising the state's police power to alleviate user conflicts at Hanalei when it adopted the ban. Indeed, the Supreme Court has held that "[i]n the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." Huron Portland, 362 U.S. at 442, 80 S.Ct. 813. However, the Court went on to point out

the “basic limitations” of such power: “Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action.” Id. at 443, 80 S.Ct. 813 (emphasis added). Thus, even if the ban is an exercise of concurrent power, the state's contention is immaterial to our analysis; as we have explained above, the ban actually conflicts with the federal licensing scheme. III. CONCLUSION Finally, we note that our holding is consistent with the Fourth Circuit's recent decision in Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316, 348 (4th Cir.2001), cert. denied, 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 142 (2002), where that court struck down a Virginia statute that prohibits barges from transporting municipal waste on the Rappahanock, James, and York Rivers. In an attempt to distinguish this case from Waste Management, the state insists that Hanalei Bay is an insignificant body of water compared to the three rivers at issue in that case. This argument may support the state's position under a Commerce Clause analysis, but it is of no avail in our preemption analysis. Because we affirm the judgment of the district court under preemption analysis, we decline to consider whether the ban violates the Commerce Clause. AFFIRMED. GOODWIN, Circuit Judge.

From: mailinglist@capitol.hawaii.gov
To: WAM Testimony
Cc: mitchel@navatekltd.com
Subject: Submitted testimony for SB2125 on Feb 28, 2014 10:00AM
Date: Thursday, February 27, 2014 2:10:56 PM

SB2125
Submitted on: 2/27/2014
Testimony for WAM on Feb 28, 2014 10:00AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Mitchel Kagawa	Individual	Oppose	No

Comments: Senators, My name is Mitchel Kagawa, a former resident of Kauai, and I STRONGLY oppose SB2125! Last I checked Niihau was one of the "Hawaii"an Islands. As such, the resources on and around that Island belong to the people of the "State" of Hawaii. You are trying to pass legislation that states only people on Niihau can fish, dive, and surf in the oceans on that island. What is I were to ask that you pass legislation that states only Oahu residents can surf Pipeline on Oahu's north shore? What if I were to ask you to pass legislation that states only people on Kauai could drink water that rains down on Mt. Waialeale? This legislation is discriminatory and in my eyes ILLEGAL. You need to kill this bill or at least defer it and have the attorney general's office have a look at it. Sincerly, Mitchel Kagawa