

**SB 2743**

**LATE  
TESTIMONY**



February 3, 2014

Senator Malama Solomon, Chair  
Senator Brickwood Galuteria, Vice Chair  
Senate Committee on Water and Land

Senator Maile S.L. Shimabukuro, Chair  
Senator Clayton Hee, Vice Chair  
Senate Committee on Hawaiian Affairs

**Comments and Concerns Regarding SB 2743, Relating to Kaho‘olawe Island Reserve (Authorizes a portion of the conveyance tax revenues to be paid into the Kaho‘olawe rehabilitation trust fund for the long-term rehabilitation and maintenance of the Kaho‘olawe island reserve. Repeals on the earlier of June 30, 2026 or upon federal and state recognition of the Sovereign Native Hawaiian entity.)**

**Monday, February 3, 2014, 1:15 p.m., in Conference Room 225**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF’s mission 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.

**SB 2743.** This bill proposes to authorize a portion of the conveyance tax revenues to be paid into the Kaho‘olawe rehabilitation trust fund (“KRTF”) for the long-term rehabilitation and maintenance of the Kaho‘olawe island reserve. Repeals on the earlier of June 30, 2026 or upon federal and state recognition of the Sovereign Native Hawaiian entity.

LURF supports the intent of this bill, which is to provide state funding to replenish the KRTF for the long-term rehabilitation and maintenance of the Kaho‘olawe island reserve. However, LURF believes that, similar to the Natural Area Reserve Fund (“NARF”) in 2013, the KRTF deserves to be fully funded through broad taxes on the public and the State General Fund, and not through the conveyance tax which targets only sellers of property, is unreliable, and fluctuates with the housing market. Based on the following reasons and considerations, LURF **opposes** SB 2743, because it would be an illegal use of conveyance tax funds, and respectfully requests that this bill be **held in Committee.**

## **Background.**

**The Hawaii Conveyance Tax was never intended as a revenue-generating tax to provide funding for non-conveyance tax-related funds.** Hawaii Revised Statutes (“HRS”), Chapter 247 (Conveyance Tax), was purposefully enacted in 1966 to provide the State Department of Taxation (“DoTax”) with informational data for the determination of market value of properties transferred, and to assist the DoTax in establishing real property assessed values. In short, the sole intent of the conveyance tax was originally to cover the administrative costs of collecting and assessing said informational data, which necessarily entails the recording of real estate transactions, as performed by the Bureau of Conveyances. As such, the conveyance tax should not be utilized as a vehicle to generate revenue, especially for non-conveyance tax-related funds and programs.

Since the enactment of HRS Chapter 247, however, the State Legislature has proposed, and has successfully implemented changes to the law 1) to allow application of conveyance tax revenue to a number of non-conveyance type uses (land conservation fund; rental housing trust fund; and NARF) to the point where there is no longer any clear nexus between the benefits sought by the original Act and the charges now proposed to be levied upon property-holding entities transferring ownership; and 2) also to increase the tax rates to the point where said revenues now appear to far exceed the initially stated purpose of, or need identified in the Act.

SB 2743, which proposes to fund the KRTF through conveyance taxes, without a sufficient nexus, and without demonstrating any effort to seek legal sources of funding, raises issues which are identical to the proposed funding NARF through conveyance taxes in 2013.

## **LURF's Position.**

1. **It is unnecessary to use of the conveyance tax to replenish special funds such as the KRTF (which are non-related to the conveyance tax).**
  - a. **Recognizing the importance of the long-term rehabilitation and maintenance of the Kaho'olawe island reserve, the 2014 Legislature should replenish funding for the KRTF through a State General Fund appropriation, just like it did for NARF in 2013.**

Last year, during the 2013 Regular Session, sufficient general funding for the NARF was successfully earmarked by this Legislature. Standing Committee Report No. 928 dated March 11, 2013, and relating to HB 200, HD1 (the State Budget for FY2014-2015), confirms that the Committee on Finance, recognizing the importance of projects that preserve the State's natural resources, appropriated \$8.5 million to the NARF. LURF supports funding for KRTF in 2014, through an appropriation from the State General Fund.

**2. Based on the 2012 State Auditor's Report, the application of the Conveyance Tax revenue collected pursuant to SB 2743 to replenish the KRTF is arguably illegal and in violation of HRS Sections 37-52.3 and 37-52.4.**

LURF believes that the legal analysis of SB 2743 and the proposed conveyance tax funding of the KRTF would be identical to the legal analysis and State Auditor's 2012 findings relating to the conveyance tax funding of the NARF.

**Legal criteria for special funds.** The legal criteria for the establishment and continuance of special and revolving funds (including special funds such as KRTF and NARF), was enacted by the 2002 Legislature through Act 178, SLH 2002; HRS Sections 37-52.3 and 37-52.4. According to the law, in order to be approved for continuance, a special fund must:

- serve the purpose for which it was originally established;
- reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program (as opposed to serving primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process);
- provide an appropriate means of financing for the program or activity; and
- demonstrate the capacity to be financially self-sustaining.

The first and second criteria are nearly identical to those in Act 240, SLH 1990, codified in Section 23-11, HRS, which requires the State Auditor to review, each session, all legislative bills which propose to establish new special or revolving funds.

**2012 State Auditor's Report findings.** The 2012 Auditor's Report was issued in July, 2012, and applied the criteria in HRS Sections 37-52.3 and 37-52.4 to forty-seven (47) funds and accounts that were the subject of general fund transfer authorizations during FY2009, FY2010, and FY2011, including the NARF. The Report includes an analysis of the NARF (which LURF believes would also be applicable to the KRTF), and states:

“...the Natural Area Reserve Fund has minimal linkage between the benefits and the fund revenue, which comes from conveyance taxes paid on real estate transactions. The fund supports programs such as the Natural Area Partnership and Forest Stewardship programs, projects undertaken in accordance with watershed management plans, and the Youth Conservation Corps. Individuals that pay this tax may benefit from the Natural Area Reserves program, but so do other Hawai'i residents and visitors to the state.” (2012 Auditor's Report, p. 30)

The 2012 Auditor's Report concluded that the **NARF did not meet the criteria for continuance, because there was no clear link between the benefits sought and user or beneficiary charges**. The Auditor further concluded that **the NARF fund earmarked by the Legislature should be repealed and that the unencumbered balance should lapse to the General Fund**. LURF believes that this legal analysis of NARF funding through the conveyance tax, would be identical to the legal analysis of SB 2743, or any similar attempt to fund the KRTF through conveyance taxes.

In letters dated June 18, 2012 and June 22, 2012 commenting on the draft 2012 Auditor's Report, the State Director of Finance and the State Attorney General, respectively, stated that in general, they agreed with the Auditor's recommendations, and did not dispute or object to the Auditor's conclusion that the NARF did not meet the criteria for continuance as a special fund, and that the NARF should be repealed.

Despite the State Auditor's findings, SB 2743 is being proposed to replenish the KRTF, using conveyance tax revenues, even though the KRTF does **not** to have a clear link or nexus between the benefits sought and charges made upon the users or beneficiaries of the program. Thus, this measure is subject to legal challenge, and the State could be subject to a possible class-action lawsuit by all parties who paid Conveyance Taxes to finance the KRTF.

- 3. According to the 2012 State Auditor's Report, worthy programs (such as the KRTF) deserve funding through broad taxes on the public and the State General Fund, rather than through the Conveyance Tax which targets few, is unreliable, and fluctuates with the housing market.**

In its 2012 Report, the State Auditor also found that the beneficiaries of such special funds and conservation/ preservation programs are state residents as a whole, and such programs are so important that they **should be supported by funding from a broader tax on all state residents**, because of the broad state benefit.

As explained in the 2012 Auditor's Report:

“Designating revenue for specific purposes flows from the “benefit theory” of public finance, which postulates that those who benefit from a program should pay for it. Revenue earmarking is more defensible when there is a clear benefit-user charge as opposed to when there is no such linkage and earmarking is used solely as a political shield to protect a program by providing it with an automatic means of support.” (2012 Auditor's Report, p. 28)

The Auditor's Report also found that the NARF fell into the category of a “revenue earmark” with “no clear benefit-user charge” and that the NARF “is used solely as a

political shield to protect a program by providing it with an automatic means of support.” (See 2012 Auditor’s Report, p. 28)

LURF believes that a legal review of SB 2743, would similarly find that the use of the conveyance tax to fund the KRTF is a “revenue earmark,” with “no clear benefit-user charge;” and that SB 2743 is being “used solely as a political shield to protect a program by providing it with an automatic means of support.”

Moreover, because the Conveyance Tax is dependent on activity in the real estate market, it is considered an undependable source and should not be relied upon to fund important programs such as NARF and KRTF.

#### 4. **SB 2743 would violate Act 130, (SLH 2013).**

During the 2013 legislative session, HB 504 (now Act 130 (SLH 2013)) also directly addressed the issue relating to use of special funds and reinforced the requirement that special and revolving funds must reflect a clear link between the program funded and the source of revenue. The principles underlying Act 130 are clear, and the measure settles without question, the fact that special, revolving, and trust funds must, amongst other things:

- a. **serve a need** as demonstrated by the purpose of the program to be supported by the fund; the scope of the program; and an **explanation of why the program cannot be implemented successfully under the general fund appropriation process;** and
- b. **reflect a clear nexus** between the benefits sought and charges made upon the program users or beneficiaries; or a clear link between the program and the sources of revenue, **as opposed to serving primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process.**

As applied to this case, Act 130 thus makes it unequivocally clear that it is improper to channel conveyance tax revenue obtained through assessments targeted solely at landowning entities to special, revolving, or trust funds/programs with no nexus or clear link to the sources of revenue.

Moreover, emphasis is put on the requirement that special funds be supported when and if at all possible, through the general fund appropriation process rather than through a means removed from the normal budget and appropriation process.

As stated above, in 2013, the conveyance tax was **not** increased and NARF was **not** provided with a larger percentage of the conveyance tax. Instead, \$8.5 million from the General Fund was appropriated for NARF during the 2013 legislative session through HB 200, HD1 (the State Budget for FY2014-2015).

Based on the above, LURF would support a General Fund appropriation for the KRTF in 2014 and in the future.

5. **SB 2743 is fatally flawed, because it does not indicate any attempts to comply with HRS Section 6K-9.5(a), which lists existing, alternative and more legally appropriate sources of funding for the KRTF.**

HRS Section 6K-9.5(a) specifically identifies several sources of funding for the KRTF and the rehabilitation and environmental restoration of the island of Kaho'olawe, or purposes consistent with this chapter. Under this section of the law, the possible sources of KRTF funding, are as follows:

- “(1) All moneys received from the federal government for the rehabilitation and environmental restoration of the island of Kaho'olawe or other purposes consistent with this chapter;
- (2) Any moneys appropriated by the legislature to the trust fund;
- (3) Any moneys received from grants, donations, or the proceeds from contributions; and
- (4) The interest or return on investments earned from the moneys in the trust fund.”

However, SB 2743 does **not** indicate any attempts to comply with HRS Section 6K-9.5(a), by seeking alternative sources of funding for the KRTF, and it does **not** include any audit or evaluation of the interest or return on investments earned from the moneys in the KRTF.

Given the “lack of a clear nexus” and what appears to be the lack of effort to fund the KRTF in compliance with HRS Section 6K-9.5(a), it seems clear that SB 2743 is illegal, because it serves “primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process,” in violation of Act 130 (SLH 2013).

In lieu of improperly funding the KRTF through conveyance taxes which only target sellers of property, other possible legitimate means to fund the KRTF should be explored, including the following:

- a. Consistent with HRS Section 6K-9.5(a)(1), funding support could be available through other federal programs or grants from private foundations which support soil conservation projects and related activities;
- b. Consistent with HRS Section 6K-9.5(a)(1), funding support could be available through other federal programs or grants which support innovative programs that emphasize ancestral and traditional knowledge or utilize a cultural approach of respect and connectivity to the environment, and integrate ancient and modern resource management techniques;
- c. Consistent with HRS Section 6K-9.5(a)(3), funding support could be available through other grants, donations, or proceeds from contributions from private organizations or foundations which support soil conservation projects and related activities;
- d. Consistent with HRS Section 6K-9.5(a)(3), funding support could be available through other grants, donations, or proceeds from contributions from private organizations or foundations which support and innovative programs that emphasize ancestral and traditional knowledge or utilize a cultural approach of respect and connectivity to the environment, and integrate ancient and modern resource management techniques;
- e. Consistent with HRS Section 6K-9.5(a)(3), funding support could be available through other grants, donations, or proceeds from contributions, such as voluntary donations by rental car lessors or hotel room guests (e.g., HB 760, HD1, SD1, carried over from the 2013 Regular Session and which proposes to require lessors of rental motor vehicles to include an option to the lessee in the motor vehicle agreement to contribute a sum to the Department of Land and Natural Resources for the preservation of the environment); and
- f. Consistent with HRS Section 6K-9.5(a)(3), funding support could be available through other grants, donations, or proceeds from contributions, such as an income tax refund check-off box (which was proposed in 2013 by HB 571 and carried over to the 2014 Regular Session, to permit all Hawaii taxpayers to voluntarily designate a specified amount of the taxpayer's income tax refund to be deposited into the State's Early Learning Trust Fund).

Given the failure to comply with the "clear nexus" and "clear link" requirements for special and revolving funds, and also given that sufficient general funding and alternative methods to secure revenues for these funds exist, expansions and deviations of HRS Chapter 247 which go beyond the scope of the original intent of the conveyance tax law are concerning. Since this proposed bill, appears to



unlawfully target only the sellers of real property in the State, it could be characterized as imposing an improper penalty, hidden tax, or surcharge, which may be subject to legal challenge.

6. **If SB 2743 is passed, it should exempt landowners that build and sell affordable housing, or that otherwise provide substantial support for the programs which are similar to those intended to be funded by this bill.**

It is ironic and unfair that the entities which will be hardest hit by this bill are Hawaii's large landowners that build and sell affordable housing, are stewards of the land, and are the leading partners in, and contributors to programs which are similar to the conservation and cultural preservation purposes intended to be funded by this bill. At the very least, this bill should exempt those landowners that build and sell affordable housing, those that support and participate in conservation and watershed programs, or those that provide innovative programs that emphasize ancestral and traditional knowledge or utilize a cultural approach of respect and connectivity to the environment, and integrate ancient and modern resource management techniques.

For the reasons stated above, LURF supports the continued funding of the KRTF through General Fund appropriations, but must respectfully ask that you consider **holding SB 2743 in this Committee.**

Thank you for the opportunity to provide comments regarding this proposed measure.

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**SB2743**

Submitted on: 2/4/2014

Testimony for WTL/HWN on Feb 5, 2014 14:45PM in Conference Room 224

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
James Bruch	Individual	Support	No

Comments:

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**Date:** Monday, February 03, 2014 10:55:49 AM

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**SB2743**

Submitted on: 2/3/2014

Testimony for WTL/HWN on Feb 3, 2014 13:15PM in Conference Room 225

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Carol-Marie K. Lee	Individual	Support	No

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**SB2743**

Submitted on: 2/3/2014

Testimony for WTL/HWN on Feb 3, 2014 13:15PM in Conference Room 225

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Charles R. Lindsey	Individual	Support	No

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**SB2743**

Submitted on: 2/3/2014

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<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Joshua Kaakua	Protect Kahoolawe Ohana	Support	Yes

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**SB2743**

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<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lopaka White	Individual	Support	No

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**SB2743**

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<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mei Mailou-Santos	Individual	Support	No

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