

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
RUSSELL V. TSUJI  
FIRST DEPUTY  
KEN C. KAWAHARA  
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

Testimony of  
LAURA H. THIELEN  
Chairperson

Before the House Committee on  
WATER, LAND, & OCEAN RESOURCES

Monday, February 9, 2009  
9:00 a.m.  
State Capitol, Conference Room 325

In consideration of  
HOUSE BILL 665  
RELATING TO FORFEITURE

House Bill 665 relating to forfeiture clarifies that forfeiture laws apply to violations of conservation and resources statutes and rules and to protected caves, historic preservation and the Kaho'olawe island reserve. The Department of Land and Natural Resources (Department) supports this bill.

The Hawaii Supreme Court recently overturned our longstanding authority to utilize forfeiture as a method to ensure compliance with our natural, cultural and historic resources protection laws. The recommended amendments to existing forfeiture laws as identified in this bill will ensure that the forfeiture provision can once again be levied against chronic or egregious natural, cultural and/or historic resource related offenders.

Over time, the Department's Division of Conservation and Resources Enforcement, working closely with county prosecutors and the Department of the Attorney General (AGs), has judiciously used forfeiture to deter those considering violating state laws and to gain compliance from those actively violating the Department's statutes and administrative rules. As an example, a dive boat was seized as evidence after the owner of the boat and his friends were caught using clorox to catch over five hundred pounds of reef fish in an otherwise pristine area; a 4x4 pick up truck was seized as evidence and later forfeited after the owner was caught using the vehicle to spot and shoot game mammals at night in a restricted area; a large pickup truck was recovered as evidence after the owner was caught cutting and removing a number of ohia logs cut from trees located in a known Natural Area Reserve, in another case, a vehicle used to transport marijuana and other items associated with an illegal marijuana cultivation scheme on state land was forfeited to enhance our efforts to increase compliance with our laws protecting natural and cultural resources.

It is has been brought to the Department's attention that the Department of the Prosecuting Attorney of the City and County of Honolulu opposes passage of Senate Bill 580 for reasons identified in their testimony. The Department would like to clarify our current status on the issue of forfeiture with the following information. Based on the decision of the Hawaii Supreme Court, the Department intends to work closely with the AGs to amend various departmental administrative rules to ensure that our rules meet legal requirements identified in the recent Supreme Court Decision. In addition, the Department intends to work closely with the AGs and each of the four county prosecutors to continue to actively pursue forfeiture as a civil remedy to ensure compliance with our natural, cultural and historic resources protection laws. The Department believes that the remedies identified in this bill strengthens rather than diminishes our ability to use forfeiture as a law enforcement tool to ensure voluntary compliance of our resources protection laws.

## DEPARTMENT OF THE PROSECUTING ATTORNEY

**CITY AND COUNTY OF HONOLULU**

ALII PLACE  
1060 RICHARDS STREET • HONOLULU, HAWAII 96813  
PHONE: (808) 547-7400 • FAX: (808) 547-7515

For  
Feb 9

PETER B. CARLISLE  
PROSECUTING ATTORNEY



DOUGLAS S. CHIN  
FIRST DEPUTY PROSECUTING ATTORNEY

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

February 6, 2009

RE: H.B. 665; 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 opposition to Senate Bill 580, although the DPA supports the intent of this Bill. The companion to this Bill, S.B. No. 580, was heard on February 4, 2009 by the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs.

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) ("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 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." 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. In short, this Bill, as drafted, will 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 H.R.S. Section 712A-4(b). Therefore, this portion of the Bill is entirely unnecessary.

H.B. 665

Page 2

No amendment to 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 is surplusage.

Second, this Bill reflects a misunderstanding regarding 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 is ineffective. In this regard, the Bill does not 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 and DLNR has recently confirmed its intent to again participate in the Hawai'i forfeiture program after the problems identified 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 creates Double Jeopardy issues under both the State constitution (Tuiapuapua) 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

H.B. 665

Page 3

with an amendment of Chapters 187, 199 or 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, this Committee must necessarily also address the problems regarding the insufficiencies in Chapter 6K and the problems that Kaho'olawe Island Reserve Commission ("KIRC") sought to have remedied by this Bill. 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 will 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 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.

To resolve the multitude of legal infirmities evident in this Bill, the DPA suggests that the infirm provisions of this bill be deleted. The title of this Bill is broad enough that it can be used as a vehicle to correct the Chapter 6K problem with the following language:

"Chapter 6k is amended to add a new section to read as follows:

"In addition to criminal penalties to be imposed for violations of this Chapter or rules and regulations promulgated pursuant to this Chapter, violators may also be subject to the civil remedy of forfeiture pursuant to Chapter 712A."

KIRC rules can then be amended to include a similar provision.

In summary, this Bill, as drafted, will not eliminate legal obstacles to using forfeiture as an additional remedy. For these reasons, the Department of the Prosecuting Attorney opposes the passage of H.B. 665 but not its intent, and thanks you for this opportunity to testify.

**HISTORIC  
HAWAII  
FOUNDATION**

**VIA FAX:** 586-8504

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

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

**Committee Date:** Monday, February 9, 2009  
9:00 a.m.  
Conference Room 325

**Subject:** Support of HB665, Relating to Forfeiture

On behalf of Historic Hawai'i Foundation (HHF), I am writing to support HB665, 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.





**HB 665, RELATING TO FORFEITURE**

House Committee on Water, Land, and Ocean Resources

February 9, 2009

9:00 a.m.

Room: 325

---

The Office of Hawaiian Affairs (OHA) **SUPPORTS** House Bill 665, which would clarify that forfeiture laws apply to violations of conservation and resources statues and rules and to protect caves, historic preservation and the Kaho olawe 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 H.B. 665, and we thank the committee for the opportunity to testify.