

ACT 241

S.B. NO. 2898

A Bill for an Act Relating to Cave Protection.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that caves are unique landforms that often contain irreplaceable resources of immense cultural, spiritual, aesthetic, and scientific value. These cultural and spiritual resources, including human burials and other evidence of native Hawaiian use and their associated traditions, are in need of greater protection. The preservation of these cultural resources is paramount for their survival for future generations, and they are also a valuable part of Hawaii's heritage. The biological and geological resources include unique subterranean ecosystems inhabited by specialized organisms, the associated native flora and fauna living within entrances, mineral and bedrock formations, and paleontological or fossil deposits. Fossil deposits, which include remains of plants, animals, and surface debris preserved in caves, provide a unique record of the past climate and biota of the islands. Since all of these resources are vulnerable to destruction, their protection is warranted.

The purpose of this Act is to protect unique cultural and natural resources found in caves. This Act is not intended to limit other laws, such as chapters 6E, 340E, and 342D of the Hawaii Revised Statutes, which address historic preservation and water quality.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

**“CHAPTER
PROTECTION OF CAVES**

§ -1 Definitions. As used in this chapter:

“Board” means the board of land and natural resources.

“Cave” means any naturally occurring void, cavity, recess, or system of interconnected passages large enough for human entry, occurring beneath the surface of the earth or within a cliff or ledge, including the cave resources therein, whether or not an entrance exists or is natural or artificial, and that is of archeological, geological, biological, or cultural significance. The term includes such forms as a lava tube, natural pit, sinkhole, underwater cave, or other feature that is an extension of the entrance.

“Cave life” means any living native plant, animal, fungus, or microorganism occurring naturally in caves or in cave entrances or entrance pits.

“Cave resource” means any material or substance occurring in caves, such as native animal life, native plant life, evidence of past human use over fifty years old, and tangible and intangible attributes associated with cultural traditions over fifty years old, paleontological deposits, sediments, minerals, speleogens, and speleothems. This includes historic properties as defined in chapter 6E.

“Commercial entry” means an activity undertaken to exhibit a cave for which compensation is received by any person for goods, services, or both, rendered to customers or participants in that use or activity. Commercial entry includes activities whose base of operations are outside the boundaries of the premises, or provide transportation to or from the premises. Any person receiving compensation in conjunction with a use or activity who seeks to qualify as non-commercial shall have the burden of establishing to the satisfaction of the department that the fee or charge is strictly a sharing of actual expenses of the use or activity. A not-for-profit organization that charges only a nominal fee to cover administrative costs and conducts a use or activity at a frequency or magnitude that does not significantly contribute to the degradation of the cave and its resources is not conducting a commercial entry.

“Construction context” means all permitted land-altering activities necessary to construct any and all manner of improvements on the surface of a property including but not limited to foundations, basements, roads, and buildings. The term also means all permitted land-altering activities necessary to construct subsurface tunnels for highways and utilities.

“Department” means the department of land and natural resources.

“Educational purposes” means entrance into a cave by faculty or staff and students of recognized educational institutions for the purpose of education relating to some aspect of the cave, including but not restricted to cave geology, mineralogy, hydrology, biology, archaeology, paleontology, management, and hazards.

“Gate” means any structure or device located to limit, control, or prohibit access to, or entry to, any portion of a cave.

“Owner” means the persons who hold title to or are in possession of the land on or under which a cave is located, or the persons’ lessee or agent. The term also

includes an agency that holds title to, manages, or controls public land on or under which a cave is located.

“Paleontological deposit” means any remains or fossils of life forms or surface debris that are over fifty years of age and provide a record of past climates and biota.

“Person” shall be as defined in section 1-19.

“Scientific purposes” means research, or exploration, or both, conducted by persons affiliated with recognized scientific organizations with the intent to advance knowledge and to publish the results of exploration or research in an appropriate medium.

“Speleogen” means relief features on the walls, ceiling, or floor of any cave.

“Speleothem” means any secondary natural mineral formation or deposit occurring in a cave, including any stalactite, stalagmite, helictite, cave flower, flowstone, concretion, drapery, rimstone, or formation of clay or other sediment.

§ -2 Prohibitions. (a) It shall be unlawful for any person to intentionally, knowingly, or recklessly break, break off, crack, carve upon, write, burn, or otherwise mark upon, remove, or in any manner destroy, disturb, deface, mar, or harm the surfaces of any cave, or the cave resources within the cave, whether attached or broken, including speleothems, speleogens, and sedimentary deposits, without the owner’s written permission being first obtained.

(b) It shall be unlawful for any person to break, force, tamper with, or otherwise disturb a gate to any cave, even though entrance thereto may not be gained, without the owner’s permission being first obtained.

(c) It shall be unlawful for any person to remove, deface, or tamper with a sign stating that a cave is posted or citing provisions of this chapter.

(d) It shall be unlawful for any person to take, appropriate, excavate, injure, destroy, or alter any paleontological deposit, which may be found in a cave without the owner’s written permission being first obtained.

(e) This section shall not apply to caves inadvertently encountered within the normal course of a construction context; provided that any cave protection measures imposed through the environmental review process under chapter 343, Hawaii Revised Statutes, or any land use permit conditions shall be followed.

§ -3 Pollution. (a) It shall be unlawful for any person to store, dump, dispose of, or otherwise place any refuse, garbage, dead animals, sewage, litter, or toxic substances in any cave or cave entrance; provided that:

(1) Any cesspool or leach field that is otherwise legal and existing on the effective date of this section shall continue to be lawful as a non-conforming use or facility;

(2) The nonconforming use or facility shall not be expanded or reconstructed; and

(3) New septic systems may be installed in proximity to caves; provided they use solid tanks and surface leach fields so as not to permit sewage to flow into the cave and otherwise conform to existing laws and regulations.

(b) It shall be unlawful to intentionally, knowingly, or recklessly burn within a cave or cave entrance any material that produces any smoke, engine exhaust, or gas substantially harmful to any naturally occurring organisms in any cave; provided that this shall not apply to caves encountered within the normal course of a construction context.

§ -4 Disturbance of native organisms. (a) It shall be unlawful for any person to intentionally, knowingly, or recklessly remove, kill, or substantially harm

any native or endemic organisms within any cave except as provided by a scientific permit obtained from the appropriate agency. This is not intended to restrict normal fishing and gathering in accordance with existing laws.

(b) This section shall not apply to caves encountered within the normal course of a construction context; provided that any cave protection mitigative measures disclosed through environmental review under chapter 343 and land use permitting processes shall be adhered to.

(c) This section shall not in any way prohibit or constrain surface activities on the land above a cave.

§ -5 **Sale.** It shall be unlawful for any person to sell or offer for sale speleothems and speleogens removed from caves.

§ -6 **Commercial entry.** (a) Any person allowing or establishing commercial entry to a cave shall obtain from the board a permit to open the cave for public entry. The department shall charge a reasonable permit processing fee and adopt rules pursuant to chapter 91 necessary to carry out the purposes of this section.

(b) Any person that receives compensation in conjunction with a use or activity and seeks to be excluded from the permit requirement under subsection (a) shall have the burden of establishing to the satisfaction of the department that its use or activity does not constitute a commercial entry under this chapter.

(c) Commercial entry to caves shall be limited to operations in place at the time of the passage of this Act; provided the operations are in compliance with all applicable state and county statutes, ordinances, and rules. No new operations may be established until the adoption of rules by the department to implement this section.

(d) Any person allowing commercial entry at the time of the passage of this Act shall file a declaration of the person's use with the department within sixty days of the enactment of this Act. Existing operations, as recognized by the department through the declaration, within one year of the adoption of rules by the department, shall conform to the rules and all applicable state and county statutes, ordinances, and rules.

§ -7 **Access.** No person may enter or traverse a cave, or any segment thereof, without the property owner's prior written consent.

§ -8 **Burial discovery.** Anyone traversing a cave who discovers a burial site shall immediately cease their activity and leave the cave. The discovery shall be reported as soon as possible to the department. The department shall follow the procedures described in section 6E-43.6.

§ -9 **Liability.** (a) An owner of a cave who either directly or indirectly invites or permits without charge any person to use the cave for educational, native Hawaiian cultural, or scientific purposes does not:

- (1) Extend any assurance that the premises are safe for any purpose;
 - (2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;
 - (3) Assume responsibility for, or incur liability for, any injury to person or property caused by an act of omission or commission of those persons; or
 - (4) Assume responsibility for, or incur liability for, any injury to any person or persons who enter the premises in response to an injured educational, native Hawaiian cultural, or scientific user.
- (b) Nothing in this section shall be construed to:

- (1) Create a duty of care or ground of liability for injury to persons or property; or
 - (2) Relieve any person using the cave of another for educational, native Hawaiian cultural, or scientific purposes from any obligation which the person may have in the absence of this section to exercise care in the person's use of that cave and in the person's activities therein, or from the legal consequences of failure to employ such care; or
 - (3) Limit the effect of chapter 520.
- (c) Nothing in this section limits in any way any liability which otherwise

exists:

- (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for wilful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates; and
- (2) For injury suffered in any case where the owner of a cave charges a fee to any person who enters or uses the cave for educational, native Hawaiian cultural, or scientific purposes, except that in the case of land leased to the State or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

§ -10 Confidentiality. (a) Where the department determines in consultation with the owner that dissemination of knowledge of cave location or resources could be detrimental to their protection, then the government information on the cave location and sensitive resources shall be kept confidential.

(b) Notwithstanding subsection (a), where an owner still believes that dissemination of knowledge or cave location or resources could be detrimental to their protection, then the department shall keep all government information on the cave location and sensitive cave resources confidential.

§ -11 General administrative penalties. (a) Except as otherwise provided by law, the board or its authorized representative by proper delegation, with respect to a violation of this chapter or any rule adopted or permit issued in accordance with this chapter, may:

- (1) Set, pursuant to subsection (b), charge, and collect administrative fines or bring legal action to recover administrative fees and costs, as documented by receipts or affidavit, including attorneys' fees and costs; or
 - (2) Bring legal action to recover administrative fines, fees, and costs, including attorneys' fees and costs, payment for damages, or for the cost to correct damages, resulting from violation of this chapter or any rule adopted or permit issued in accordance with this chapter.
- (b) Administrative fines shall be as follows:
- (1) For a first violation, a fine of not more than \$10,000 for each separate offense;
 - (2) For a second violation within five years of a previous violation, a fine of not more than \$15,000; and
 - (3) For a third or subsequent violation within five years of the last violation, a fine of not more than \$30,000.

§ -12 Criminal penalties. (a) In addition to any other penalties, any person who intentionally, knowingly, or recklessly violates this chapter, any rule adopted pursuant to this chapter, or the terms and conditions of any permit issued in

accordance with this chapter shall be guilty of a petty misdemeanor and shall be fined not less than:

- (1) \$1,000 for a first offense; and
- (2) \$1,500 for any subsequent offense.

(b) Intentional, knowing, or reckless damage, destruction, removal, taking, sale, or illegal possession of each specimen of cave resource shall be subject to a fine of not less than:

- (1) \$1,000 for a first offense; and
- (2) \$1,500 for any subsequent offense.

Each day of continued violation under this chapter shall constitute a distinct and separate offense for which the violator may be punished. Equipment used by the violator in the course or furtherance of the violation shall be subject to seizure and disposition by the State without compensation to its owner or owners. Penalties under this section shall not limit the imposition of penalties pursuant to chapter 6E.

- (c) The fines specified in this section shall not be suspended or waived.

§ -13 Penalties cumulative. (a) Any criminal action against a person for any violation of this chapter or any rule adopted pursuant to this chapter shall not be deemed to preclude the State from pursuing civil legal action to recover administrative fines and costs against that person. Any civil legal action against a person to recover administrative fines and costs for any violation of this chapter or any rule adopted pursuant to this chapter shall not be deemed to preclude the State from pursuing any criminal action against the person.

(b) Penalties under this section shall not limit the imposition of penalties pursuant to chapter 6E.’’

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 5. This Act shall take effect upon its approval.

(Approved June 28, 2002.)

Note

- 1. So in original.