

December 19, 1995
The Honorable Kali Watson
Chairman, Hawaiian Homes Commission
State of Hawaii
P.O. Box 1879
Honolulu, Hawaii 96805

Dear Mr. Watson:

Re: Application of Endangered Species Laws to Hawaiian Home Lands

This is in response to an inquiry by your predecessor as to whether federal and state endangered species laws apply to Hawaiian home lands. We have taken the liberty of rephrasing the question based on the relevant issue involved:

Do civil and criminal penalties on individual conduct specified in federal and/or state laws apply to the "taking" of threatened or endangered plants found on Hawaiian home lands?

We answer in the affirmative. For the reasons which follow, we are of the opinion that threatened and endangered plants are protected on Hawaiian home lands under the provisions of chapter 195D, Hawaii Revised Statutes ("HRS"), the state endangered species law, as well as under the provisions of the federal Endangered Species Act of 1973, Act of December 28, 1973, Pub.L. 93-205, 87 Stat. 884 ("ESA"), to the same extent that such plants are protected elsewhere in Hawaii. Anyone who "takes" threatened or endangered plants on Hawaiian home lands is subject to state and federal civil and criminal penalties.

As we understand the facts, the Department of Hawaiian Home Lands ("Department") issued a pastoral lease of 200 acres in 1991 to a qualified native Hawaiian. The lessee planned to graze cattle on the property, but about one-quarter of the lot was not suitable for grazing due to the presence of volcanic cinder cones. As a result, the lessee applied to the Hawaiian Homes Commission ("Commission") for permission to level the cones and sell the cinder for use as road material. ([top](#))

Although the lease has a specific clause allowing the Department to enter the property and mine cinder with no compensation to the lessee, the Department considered a plan whereby it and the lessee would split the profits from cinder sales. We understand that the Department reasoned that it could thereby realize profits for the trust without the cost of mining the cinder.

In 1994, employees of the federal Fish and Wildlife Service ("USFWS") and of the state Department of Land and Natural Resources ("DLNR"), on a routine conservation inspection of the cinder cones, discovered the presence of the largest known concentration of native nehe plants (*Lipochaeta venosa*), an endangered species. Thereafter, the USFWS recommended that the majority of the cinder cones be fenced to preserve the nehe and that nearby colonies of nehe be moved into the fenced area. It further recommended that cinder not be mined, because "there is no obvious way to protect the puu ecosystem and mine cinder."

The landmark decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1977), illustrates well the current opinion of the Supreme Court when the existence of endangered species is threatened by human activities. In that case, the risk of extinction to the lowly, but endangered, three-inch snail darter halted the nearly completed Tellico Dam in Tennessee. The Court noted that the federal Endangered Species Act of 1973 "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." 437 U.S. at 180. It went on to find that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184 (emphasis added). The legislative history of the ESA reveals a congressional intent to "afford first priority to the declared national policy of saving endangered species." *Id.* at 185. ([top](#))

Codified at 16 United States Code ("U.S.C.") sections 1531 to 1544, the ESA treats plant species differently from animal species. Section 1538(a) sets forth acts that are prohibited under the ESA. Section 1538(a)(1) refers specifically to threatened and endangered animals, while section 1538(a)(2) concerns threatened and endangered plants. Under section 1538(a)(1), with respect to threatened and endangered animals, it is unlawful to "take any such species within the United States or the territorial sea of the United States[.]" The prohibitions apply nationwide to all land and seas within the territorial borders of the United States. See *United States v. Billie*, 667 F. Supp. 1485, 1488 (S.D. Fla. 1987) (ESA prohibitions on the taking of any endangered animal species within the United States apply to noncommercial hunting of Florida panther on Seminole Indian reservation). ([top](#))

With respect to plant species, however, the ESA is of more limited application. It applies directly only to land under federal jurisdiction, but it may also be triggered where threatened or endangered plants are taken in knowing violation of a state law. Section 1538(a)(2)(B) makes it unlawful to:

[R]emove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law[.] ([top](#))

Each violation of this subparagraph carries civil penalties of not more than \$25,000 and criminal penalties of not more than \$50,000 in fines or imprisonment for not more than one year, or both, pursuant to 16 U.S.C. section 1540.

According to the legislative history of the 1988 amendment to the ESA, which increased protection for plant species:

The basis for this differential treatment of plants and animals under the Act apparently was the recognition that landowners traditionally have been accorded greater rights with respect to plants growing on their lands than with respect to animals. The amendment made to the Act . . . does not interfere with the rights traditionally accorded landowners but instead reinforces them in a way that also benefits the conservation of endangered plant species. ([top](#))

S. Rep. No. 240, 100th Cong., 1st Sess. 12, reprinted in 1988 U.S.C.C.A.N. 2700, 2711.

Although Hawaiian home lands are not "areas under Federal jurisdiction[.]" application of federal law with respect to threatened and endangered plants found on Hawaiian home lands may be triggered by the provisions of 16 U.S.C. section 1538(a)(2)(B) making it unlawful to "remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State" (emphasis added).

The Hawaii Endangered Species Act, codified at chapter 195D, HRS, was enacted by Act 65, 1975 Haw. Sess. Laws 111, in response to the federal enactment of the Endangered Species Act of 1973. Section 195D-4(e) states in relevant part as follows:

(e) Prohibited acts. With respect to any endangered species of . . . land plant, it is unlawful . . . for any person subject to the jurisdiction of this State to:

. . . .

(2) Take any such species within this State[.] ([top](#))

The definitions of the terms "person" and "take" are relevant in applying section 195D-4(e) to individual conduct affecting threatened and endangered species found on Hawaiian home lands.

For purposes of chapter 195D, the term "person" includes individual lessees, as well as trespassers, the Department and its employees, and the members of the Commission. Section 195D-2 defines "person" as "an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the federal government, of any state or political subdivision thereof, or of any foreign government" (emphasis added). Again, for purposes of chapter 195D, the term "take" is defined in section 195D-2 to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect endangered or threatened species of aquatic life or wildlife, or to cut, collect, uproot, destroy, injure, or possess endangered or threatened species of aquatic life or land plants, or to attempt to engage in any such conduct."¹

Violations of chapter 195D will result in criminal sanctions, just as criminal sanctions are specified for violations of the ESA. Section 195D-9 states in relevant part that "[a]ny person who violates any of the provisions of this chapter or the provisions of any rule adopted hereunder shall be guilty of a misdemeanor."

The Attorney General long ago opined that "no state statute or county ordinance or county charter provision can affect [Hawaiian home] lands unless in conformity with the Hawaiian Homes Commission Act of 1920, which was adopted as a compact with the United States as a provision of the Constitution of the State of Hawaii." Haw. Att'y Gen. Op. No. 72-21 (note at page 2); *Keukaha-Panaewa Community Ass'n. v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1226-27 (9th Cir. 1978) (Keukaha I) (the Hawaiian Homes Commission Act, 1920, is an integral part of the Hawaii State Constitution). ([top](#))

We do not believe, however, that all general regulatory statutes or ordinances are inapplicable to Hawaiian home lands. Only those laws that are in conflict with the provisions of the Hawaiian Homes Commission Act of 1920, as amended, Act of July 9, 1921, c. 42, 42 Stat. 108 ("HHCA"), do not apply, primarily those in conflict with the Commission's trust responsibility to manage and dispose of Hawaiian home lands. *State v. Jim*, Nos. 18404 & 18405 (Haw. November 30, 1995) (copy attached); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982) (Hawaiian Homes Commission received exclusive control of Hawaiian home lands by section 204 of the HHCA² and is the specific state entity obligated to implement the fiduciary duty under the HHCA on behalf of eligible native Hawaiians). ([top](#))

In *State v. Jim*, the Hawaii Supreme Court reviewed the authority of state and county officials to make arrests on Hawaiian home lands. Appellants had been arrested and convicted of criminal trespass at Prince Kuhio Plaza, a shopping center situated on Hawaiian home lands in Hilo. The court acknowledged limitations on the power of the executive branch of the State government over Hawaiian home lands set forth in section 206, HHCA.³ It found, however, that section 206 was never intended, as argued by the Appellants in *State v. Jim*, to limit the police power of the State to make arrests on Hawaiian home lands in the absence of express authorization under the HHCA, with congressional consent. *State v. Jim*, at 6-7. The court concluded as follows: ([top](#))

The exercise of the State's inherent police power does not necessarily conflict with the responsibility to manage and dispose of these trust lands. . . . Absent a demonstrable intent to restrict the government's authority to enforce State and county (formerly territorial) criminal laws on Hawaiian home lands, we are unwilling to hold that HHCA 206 precludes the enforcement of such laws.

Id. at 8-9.

As we noted above, the ESA and chapter 195D impose criminal sanctions for violations. Moreover, we have found no "demonstrable intent to restrict the government's authority to enforce" chapter 195D on Hawaiian home lands. *Id.* at 9. Section 195D-4(e), HRS, makes it "unlawful . . . for any person subject to the jurisdiction of this State to . . . take any [endangered] species within this

State" (emphases added). Since lessees of Hawaiian home lands are "persons" within the definition of section 195D-2 and are subject to the State's jurisdiction, their individual conduct in "taking" protected plants anywhere within the State, including on Hawaiian home lands, is subject to the criminal penalties of section 195D-9. ([top](#))

Moreover, for the purposes of chapter 195D, the term "person" as defined in section 195D-2 also includes any "officer, employee, agent, department, or instrumentality of the federal government, of any state or political subdivision." Therefore, the criminal penalties set forth in section 195D-9 also apply to individual employees and agents of the Hawaiian Homes Commission and the Department of Hawaiian Home Lands, as well as the members of the Hawaiian Homes Commission.

We believe that the prohibitions on "taking" threatened and endangered plants under chapter 195D are not necessarily in conflict with the Commission's responsibility to manage and dispose of these trust lands. The Hawaii Endangered Species Act, chapter 195D, HRS, with its imposition of prohibitions and criminal sanctions on personal conduct, protects threatened and endangered plants found on Hawaiian home lands to the same extent that they are protected throughout Hawaii. No one may "take" threatened or endangered plants found on Hawaiian home lands. ([top](#))

Grading homestead lots, grazing cattle, mining cinder, or any other activity in an area on Hawaiian home lands where threatened or endangered plants are known to exist may constitute violations of chapter 195D with respect to any of the plants "taken" in the process. Penalties for violations are applicable to beneficiaries, trespassers, the Department and its employees, and the members of the Hawaiian Homes Commission alike. This, in turn, may trigger the applicability of the federal Endangered Species Act of 1973, with its civil and criminal penalties, since, pursuant to 16 U.S.C. section 1538(a)(2), the ESA comes into play when plants are taken in knowing violation of a state statute. ([top](#))

Please feel free to call us should you have any questions or comments with respect to the above.

Very truly yours,

Clayton Lee Crowell
Deputy Attorney General

APPROVED:

Margery S. Bronster
Attorney General

Attachment

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¹We note that the definition of "take" for purposes of chapter 195D renders the prohibited acts under Hawaii law more expansive than those listed in the ESA. Nevertheless, a "knowing violation" of chapter 195D will trigger the provisions of the ESA. 16 U.S.C. section 1538(a)(2)(B). ([back to document](#)) ([top](#))

²Section 204, HHCA, states in pertinent part that "[u]pon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act" (emphasis added). ([back to document](#))

³Section 204, HHCA, provides that "[t]he powers and duties of the governor and the board of land and natural resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title" (emphasis added). ([back to document](#)) ([top](#))