



Corporation, Joann Givens, Michael Givens, Sherill E. Miller, Robert T. Sweney, A.J. Toulon, Jr., Elizabeth Toulon, Waimea Garage, Ltd., Cecelia A. Williams, Harwood D. Williamson, Nancy H. Williamson, Cynthia Wilson, James Wilson and Does 1-113 (“Plaintiffs”), by and through their attorneys, Law Office of Daniel G. Hempey, respectfully move this Court as follows:

1. That pursuant to Rule 56 of the Hawaii Rules of Civil Procedure, summary judgment be rendered in their favor on Count One (Declaratory and Injunctive Relief under Takings Clauses) of their First Amended Complaint filed June 19, 2006, against Defendant Department of Land and Natural Resources, State of Hawaii, on the grounds that there are no genuine issues as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

2. That pursuant to Rule 56 of the Hawaii Rules of Civil Procedure, summary judgment be rendered in their favor on Count Two (Declaratory and Injunctive Relief under HRS Chapter 101 and Due Process Clause of Article I, Section 5 of the Hawai’i State Constitution) of their First Amended Complaint filed June 19, 2006, against Defendant Department of Land and Natural Resources, State of Hawaii, on the grounds that there are no genuine issues as to any material fact and that he is entitled to judgment as a matter of law.

3. That pursuant to Rule 56 of the Hawaii Rules of Civil Procedure, summary judgment be rendered in their favor on Count Three (Declaratory and Injunctive Relief under HRS Chapter 91) of their First Amended Complaint filed June 19, 2006, against Defendant Department of Land and Natural Resources, State of Hawaii, on the grounds that there are no genuine issues as to any material fact and that he is entitled to judgment as a matter of law.

4. That if summary judgment is not rendered in Plaintiffs’ favor, or for all relief requested, and a trial is necessary, that the Court, at the hearing on this Motion, by examining the pleadings and evidence presented, and by questioning counsel, ascertain what material facts are actually and in good faith controverted, making an order specifying the facts that appear without substantial controversy and direct such further proceedings in this action as are proper.

This Motion is based upon Rules 7 and 56 of the Hawaii Rules of Civil Procedure, the records and pleadings herein, the Memorandum, Declaration and Exhibits attached hereto, and such other matters as may be presented at the hearing hereof.

Dated: Lihue, Hawaii, June \_\_\_\_, 2006.

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Daniel G. Hempey  
Elif Z. Yarnall  
Attorneys for Plaintiffs

**IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
STATE OF HAWAI'I**

DONN CARSWELL, GALE CARSWELL,	)	CIVIL NO. 06-1-0049
FRANK O. HAY, PAUL T. MATSUNAGA,	)	(Injunctive Relief)
ARLINE Y. MATSUNAGA, PETER K.	)	(Declaratory Judgment)
BALDWIN, ERIK P. COOPERSMITH,	)	
FRANK W.N. COX, ELIZABETH	)	
DUNFORD, LEALANI CORPORATION,	)	NOTICE OF MOTION
JOANN GIVENS, MICHAEL GIVENS,	)	
SHERILL E. MILLER, ROBERT T.	)	Hearing Date: <u>July 6, 2006</u>
SWENEY, A.J. TOULON, JR., ELIZABETH	)	
TOULON, WAIMEA GARAGE, LTD.,	)	Hearing Time: <u>1:00 p.m.</u>
CECELIA A. WILLIAMS, HARWOOD D.	)	
WILLIAMSON, NANCY H.	)	Judge: <u>Hon. Kathleen N.A. Watanabe</u>
WILLIAMSON, CYNTHIA WILSON,	)	
JAMES WILSON, DOES 1-113	)	
	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
DEPARTMENT OF LAND AND	)	
NATURAL RESOURCES, STATE OF	)	
HAWAI'I, INDIVIDUAL DOES 1-10, DOE	)	
PARTNERSHIPS 1-10, DOE	)	
CORPORATIONS 1-10 AND DOE	)	
ENTITIES 1-10,	)	
	)	
Defendants	)	
_____	)	

**NOTICE OF MOTION**

TO:

William J. Wynhoff, Esq.  
Deputy Attorney General  
Department of the Attorney General  
465 King Street, Suite 300  
Honolulu, Hawaii 96813

PLEASE TAKE NOTICE that on July 6, 2006, at 1:00 p.m. or as soon thereafter as the matter may be heard before the Honorable Judge Kathleen N.A. Watanabe, Plaintiffs will move

for Summary Judgment on each Count of the Complaint, for the reasons set forth in the attached Memorandum and Declaration.

Dated: Lihue, Hawaii, June \_\_\_\_, 2006.

By \_\_\_\_\_  
Daniel G. Hempey  
Elif Z. Yarnall  
Attorneys for Plaintiffs

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**IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
STATE OF HAWAI'I**

DONN CARSWELL, GALE CARSWELL,	)	CIVIL NO. 06-1-0049
FRANK O. HAY, PAUL T. MATSUNAGA,	)	(Injunctive Relief)
ARLINE Y. MATSUNAGA, PETER K.	)	(Declaratory Judgment)
BALDWIN, ERIK P. COOPERSMITH,	)	
FRANK W.N. COX, ELIZABETH	)	
DUNFORD, LEALANI CORPORATION,	)	MEMORANDUM OF POINTS AND
JOANN GIVENS, MICHAEL GIVENS,	)	AUTHORITIES
SHERILL E. MILLER, ROBERT T.	)	
SWENEY, A.J. TOULON, JR., ELIZABETH	)	
TOULON, WAIMEA GARAGE, LTD.,	)	
CECELIA A. WILLIAMS, HARWOOD D.	)	
WILLIAMSON, NANCY H.	)	
WILLIAMSON, CYNTHIA WILSON,	)	
JAMES WILSON, DOES 1-113	)	
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
DEPARTMENT OF LAND AND	)	
NATURAL RESOURCES, STATE OF	)	
HAWAI'I, INDIVIDUAL DOES 1-10, DOE	)	
PARTNERSHIPS 1-10, DOE	)	
CORPORATIONS 1-10 AND DOE	)	
ENTITIES 1-10,	)	
	)	
Defendants	)	
	)	

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. THE STANDARD FOR GRANTING MOTIONS FOR SUMMARY JUDGMENT.**

Rule 56(c) of the Hawaii Rules of Civil Procedure provides, in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

“The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of

substantive law, entitles the moving party to judgment as a matter of law.” French v. Hawaii Pizza Hut, Inc., 105 Hawai’i 462, 470, 99 P.3d 1046, 1054 (Hawai’i 2004) *quoting* GECC Financial Corp. v. Jaffarian, 79 Hawai’i 516, 521904 P.2d 530, 535 (Haw.App. 1995) (citations omitted).

Once “the moving party satisfies its initial burden of production . . . the burden shift[s] to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” Id.

“A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.” Crichfield v. Grand Wailea Co., 6 P.3d 349, 355, 93 Haw. 477, 483 (Haw. 2000) *quoting* Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982).

## **II. PLAINTIFFS MEET THE STANDARD FOR SUMMARY JUDGMENT ON COUNT ONE (TAKINGS) OF THEIR COMPLAINT.**

### **A. ALL MATERIAL FACTS ARE UNCONTESTED.**

The following material facts are uncontested:

1. Plaintiffs Donn and Gale Carswell purchased and own a cabin that sits on State-owned land at the Koke’e Camp Site Lots on Kaua’i (Lot 61, Tax Map Key 1-4-04:28). A copy of the Purchase Agreement is attached as Exhibit “A.” See also attached Exhibit “B”, Affidavit of Donn Carswell.

2. Plaintiff Frank O. Hay purchased and owns a cabin that sits on State-owned land at the Koke’e Camp Site Lots on Kaua’i (Lot 38, Tax Map Key 1-4-04:43). See attached Exhibit “B”, Affidavit of Frank O. Hay.

3. Plaintiffs Paul and Arline Matsunaga purchased and own a cabin that sits on State-owned land at the Koke’e Camp Site Lots on Kaua’i (Lot 63, Tax Map Key 1-4-02:63). See attached Exhibit “B”, Affidavit of Paul T. Matsunaga.

4. Plaintiffs Baldwin, Williams and the Toulons jointly own a historic cabin located on the Koke’e Camp Site Lots in Koke’e State Park on Kaua’i, Tax Map Key 1-4-3:03. See attached Exhibit “B”, Affidavit of Peter Baldwin.

5. Plaintiff Cox inherited and is the legal owner of a historic cabin located on the Pu'u Ka Pele Park Lots in Waimea Canyon State Park on Kaua'i, Tax Map Key 1-4-02:47. See attached Exhibit "B", Affidavit of Frank Cox.

6. Plaintiff Coopersmith is the legal owner of a historic cabin located at Lot 29, Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:21. Coopersmith bought the cabin in 2000 for approximately \$12,000.00. See attached Exhibit "B", Affidavit of Erik Coopersmith.

7. Plaintiff Dunford inherited and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:03. See attached Exhibit "B", Affidavit of Elizabeth Dunford.

8. Plaintiff Lealani Corp. paid for and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:14. Robert C. French is President of Lealani Corp. See attached Exhibit "B", Affidavit of Robert C. French.

9. Plaintiffs Givenses paid for and are the legal owners of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-03:09. See attached Exhibit "B", Affidavit of Michael Givens.

10. Plaintiff Sweney paid for and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-02:68. See attached Exhibit "B", Affidavit of Robert T. Sweney.

11. Plaintiff Waimea Garage is the legal owner of a cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:24. Waimea Garage bought the cabin in 1985 for \$13,800.00. Will E. Miyake is the President of Waimea Garage. See attached Exhibit "B", Affidavit of Will E. Miyake.

12. Plaintiffs Williamsons inherited and are the legal owners of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-03:13. See attached Exhibit "B", Affidavit of Nancy Williamson.

13. Plaintiffs Wilsons paid for and are the legal owners of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:08. See attached Exhibit "B", Affidavit of Cynthia Wilson.

14. Throughout the last several decades, the State has admitted that Plaintiffs own their cabins on the leased land. See Exhibits C, D, E, F, G, H and I.

15. The cost of removing each of the subject cabins from Koke'e and rebuilding them is equal to or exceeds the value of each cabin. See Kikiaola Construction Co., Ltd. Takeoff Bids, attached as Exhibit "J"; Kikiaola Construction Co., Ltd. Proforma Bid, attached as Exhibit "K".

16. All Plaintiffs signed a lease with the State in 1985 ("The Lease"), or were assigned the Lease.

17. The Lease contained Paragraph 3 which reads:

"RESERVING UNTO LESSOR THE FOLLOWING:....:

3. Ownership of fixed improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater systems(s) located on the land prior to or on the commencement date of this lease, excluding (1) **any recreation-residence cabin, building or structure existing on the premises prior to the commencement date of this lease** which is not owned by Lessor and which has been purchased or acquired by Lessee(s) from the former occupant(s) of the premises and (2) those improvements constructed during the term of this lease, unless provided otherwise."

18. The Lease contained Paragraph 9 which reads:

9. Improvements. That the Lessee shall not at any time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions as the Board may impose, including the requirement that such building, structure or improvement be constructed of new materials only. The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.

19. The Lease contained Paragraph 31 which reads:

31. Surrender. That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless provided otherwise. The Lessor may, at its option, on or about the end of the lease elect to retain the improvements or require the Lessee, at the Lessee's own expense, to remove such improvements and restore the premises to a condition satisfactory to the Lessor[.]

20. The Lease does not contain a term regarding compensation for the cabins.

21. The State is not proceeding pursuant to Haw. Rev. Stat. Chapter 101 to acquire Plaintiffs' cabins.

22. There is no clause in The Lease waiving just compensation pursuant to the United States Constitution.

23. There is no clause in The Lease waiving just compensation pursuant to the Hawai'i State Constitution.

**B. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

Plaintiffs are entitled to summary judgment on Count One because: (1) Plaintiffs indisputably have property rights in their cabins; (2) Plaintiffs never validly waived those property rights, including the right to just compensation under the federal and state constitutions.

**1. Plaintiffs Have Property Rights in Their Cabins.**

Plaintiff Miller's great-grandparents built her family's cabin in the 1920s. Her mother and father inherited the family cabin. Plaintiff Frank Cox's father built his cabin in circa 1935 and bequeathed it to Frank and his siblings. Plaintiffs Carswells bought their cabin in 1965 for \$5,000.00. Plaintiff Hay bought his cabin in 1975 for \$16,500.00. Plaintiffs Matsunagas bought their cabin in 1985 for approximately \$10,000. Each additional plaintiff paid for, and owns his or her cabin. The State claims that it is entitled to take ownership of the cabins, and pay nothing.

"The petitioner here has constructed the improvements and seeks only their fair market value. . . . [T]he Government [should not be allowed] to escape paying what a willing buyer would pay for the same property." Almota Farmers and Elevator Co. v. United States, 409 U.S. 470, 476 (1973).

In the takings context, property has been defined as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378 (U.S. 1945). See also Dolan v. City of Tigard, 512 U.S. 374, 384 (U.S. 1994) (referring to "essential sticks in the bundle of rights that are commonly characterized as property"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 176, (1979); Madison v. Graham, 316 F.3d 867, 870 (9th Cir. 2002).

James Madison put the point well in his essay on property: "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property, 1 NATIONAL GAZETTE, Mar. 29, 1792, at 174. Reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865). Take one of those rights -- one of

those sticks in the "bundle of sticks" we call "property" -- and you take something that belongs to the owner. Under the Fifth Amendment, compensation is due to that owner.

When the Plaintiffs' cabins are viewed through this framework of property, it is unquestionable that Plaintiffs have property rights in their cabins. Plaintiffs have exercised numerous "sticks" in the bundle of property rights with regard to their cabins. Moreover, State-generated documents repeatedly concede that plaintiffs maintain an ownership interest (a property right) in their cabins. Additionally, the State has conceded that Plaintiffs have the "right to remove" their cabin – and this too is a property right.

**a. The State Has Admitted That Plaintiffs Own, and Have Property Rights in, Their Cabins.**

The State has admitted in numerous documents that Plaintiffs "own" their cabins. See Exhibit "C" (Submittal to the Board of Land and Natural Resources from Sam Lee, referring to privately owned cabins); Exhibit "D" (Appraisal Report of John Child & Company, referring to "lessee owned cabin"); Exhibit "E" (Questionnaire drafted by State and filled out by Paul T. Matsunaga, giving incoming lessee option to "purchase the improvements, including existing dwelling, located on said premises from the present lessee/owner"); Exhibit "F" (Questionnaire drafted by State and filled out by Tsukasa Miyake, giving outgoing lessee option to "sell my/our owned improvements. . ."); Exhibit "G" (internal DLNR memorandum acknowledging that the outgoing lessee "has transacted a sale of his improvements to the incoming lessee"); Exhibit "H" (DLNR letter stating, "The ownership of the cabin has changed hands . . . from the present lessee, Tsukasa Miyake, to Mr. and Mrs. Paul Matsunaga"); and Exhibit "I" (DLNR Submittal stating, "it is important to recognize that all of the lots leased are improved with residences owned by the current lessees.").

Each plaintiff/leaseholder unambiguously owns his or her cabin and none have agreed to donate their cabins to the State. See Exhibit "B", affidavits of leaseholders.

**b. The Plaintiffs Have Exercised Property Rights in Their Cabins.**

If the plaintiff's affidavits of ownership, their undisputed rights to remove the cabins, and the State's own documents referring to plaintiffs' "ownership" are not sufficient evidence that Plaintiffs have property rights in their cabins, then we can turn to the actual practice of the plaintiffs and the State over the last twenty or more years, and show that plaintiffs have been

exercising property rights in their cabins, including the rights to buy and sell their cabins, inherit and devise them, possess and occupy the cabins, and even mortgage them.

Most plaintiffs purchased their cabins for valuable consideration, while others inherited or even built their cabins.

“[T]he right to pass on valuable property to one's heirs is itself a valuable right.” Youpee v. Babbitt, 67 F.3d 194, 197 (9th Cir. 1995) quoting Hodel v. Irving, 481 U.S. 704, 715 (1987). Here, several plaintiffs inherited their cabins. See Exhibit “B”, affidavits of Frank Cox, Elizabeth Dunford, and Nancy Williamson.

“[T]he right of landowners to exclude others from their property represents "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Madison v. Graham, 316 F.3d 867, 870 (9th Cir. 2002) quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982). Here, plaintiffs have the exclusive right to occupy their cabins. Plaintiffs own title to their cabins, and have exclusive control over who uses their cabins.

In sum, Plaintiffs clearly have property rights in their cabins. Not only has the State admitted this fact, it is apparent in the Plaintiffs’ exercise of different rights inherent to ownership.

## **2. The Federal and State Constitutions Prohibit Taking of Private Property Without Just Compensation.**

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation."

Article I, section 20 of the Hawai'i Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation."

The Takings Clause of the Fifth Amendment of the United States Constitution, is applicable to the States through the Fourteenth Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

## **3. The State’s Intended Acquisition of the Cabins is a Taking of Private Property.**

### **a. The residential-recreational cabins in Koke’e are protected by the Takings Clause.**

HRS § 101 et. seq governs takings generally, and §101-6 provides that property “which may be taken by virtue of this part includes all real estate belonging to any person, together with

all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature.”

The plain language of the HRS § 101-6 therefore contemplates that the cabins, if taken, would fall within the ambit of the statute. Furthermore, § 101-71 provides, in relevant part, that “Just compensation must be paid for personal property so taken.”

Additionally, Plaintiffs assert that whether their cabins are left in Koke’e and surrendered to the State without compensation, or whether they disassembled, moved out of Koke’e, and rebuilt on properly zoned land– the result is the same to the cabin owners: A complete and total loss of all value in the privately owned cabin. Compensation for this loss was not waived by paragraphs 9 or 31 in the leases.

**b. The concept of taking applies even if cabin owners “choose” to remove the cabins, because removal will result in a dramatic loss of the cabins’ value.**

“Because these fixtures diminish in value upon removal, a measure of damages less than their fair market value **for use in place** would constitute a substantial taking without just compensation.” Almota Farmers and Elevator Co. v. United States, 409 U.S. 470, 475 (1973) (emphasis added).

These cabins may be worth little more than salvage outside of Koke’e. The cost to move them from Koke’e may exceed their value, even in Koke’e. The law clearly requires that the use of the cabins, in Koke’e is a compensable property right.

“Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. **In the absence of a special agreement to the contrary**, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. **This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor. If the buildings or fixtures are attached to the real estate, they must be treated as real estate** in determining the total award. But in apportioning the award, they are treated as personal property and credited to the tenant.”

Almota, supra, 409 U.S. at 478 n.5 (emphasis added).

This is an important point. In the case at bar, the Government is specifically attempting to invoke the lessees’ right to remove their improvements to support its argument that it need not compensate lessees if they do not win the auction and leave their cabins in Koke’e. The

argument goes: “We don’t have to pay you for your cabin if you leave it behind, because you could have taken it away with you.”

This, however, is in direct violation of the U.S. Supreme Court’s directive in Almota. The law is clear – if the government assumes ownership of these cabins, it must pay the owners from whom it takes them – regardless of any “right to remove.” There are no material issues of fact that prevent the Court from following Almota.

“Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.” Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001). The so-called *right to remove* the cabins is only one of the rights plaintiffs have in their cabin. Plaintiffs *own* their cabins. Plaintiffs assert that the State cannot avoid compensation for taking the cabins by asserting that the owners have a “right to remove the cabins” before the transfer of leases. This right is illusory – it costs more to move a cabin than a cabin is worth and the collective exercise of the “right to remove” will have the effect of reducing several million dollars of value in these cabins to the token interest of salvage.

Almota plainly holds that the State may not evade its duty to compensate for taking a lessee’s property on State land by claiming that the lessee may avoid the “taking” by removing the property. Moreover, the cost to move the cabins generally neutralizes or exceeds the cabins’ value.

Plaintiff Hay’s cabin is assessed at \$51,000. See County of 2006 Assessed Values for TMK 1-4-04:43, attached as Exhibit “L”. However, it would cost Hay \$62,329.84 to move his cabin. See Kikiaola Construction Co., Ltd. Takeoff Bid, Job #4002, Dated June 3, 2006, attached as Exhibit “J”. Therefore, Hay would have to pay more than \$11,000 over the cabin’s assessed value to move it.

Plaintiffs Carswells’ cabin is assessed at \$32,600. See County of 2006 Assessed Values for TMK 1-4-04:28, attached as Exhibit “L”. It would cost the Carswells almost this much, \$30,796.48, to move their cabin – if it is even possible. See Kikiaola Construction Co., Ltd. Takeoff Bid, Job #4001, Dated June 3, 2006, attached as Exhibit “J”.

Plaintiffs Matsunagas’ cabin is assessed at \$45,000. See County of 2006 Assessed Values for TMK 1-4-02:63, attached as Exhibit “L”. However, it would cost the Matsunagas \$42,642.22 to move their cabin. See Kikiaola Construction Co., Ltd. Takeoff Bid, Job #4002, Dated June 3, 2006, attached as Exhibit “J”.

The average cost to relocate a residential dwelling on Kauai is \$109, 425.00. See Kikiaola Construction Co., Ltd. Structure Moving Proforma, attached as Exhibit “K”. Furthermore, there are special issues that arise when moving a structure from Koke’e such as road widening, the need to cut trees, and restricted routes out of Koke’e. See attached affidavit of Michael A. Faye.

In each case, the act of relocating a cabin, in effect, takes away all of its value (as a Koke’e cabin), and, given the cost to remove, actually creates a negative value in what would otherwise be a valuable asset. Moreover, the absurd result of the current plan is that even if plaintiffs succeed in the next auction, they will have to remove their cabins prior to lease expiration in order to avoid losing ownership of their cabins to the State - without compensation. Presumably they would then be required to bring the cabin to current building code during re-assembly in Koke’e for the next 20 years.

"Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons -- avoidance of costly alterations, saving of brokerage commissions, **perhaps even ordinary decency on the part of landlords**. Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant -- the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. **The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term.**"

Almota, supra, 409 U.S. at 474 quoting United States v. Certain Property, Borough of Manhattan, 388 F.2d 596, 601-602 (emphasis added).

The State, as condemnor, is not entitled to assume that since plaintiffs can move their cabins, that (contrary to common experience) they will – leaving the State with no compensation to pay. While these leases do *permit* the removal of the cabins, the holding in Almota bears repeating: “This rule ... exists entirely for the protection of the tenant, and cannot be invoked by the condemnor.” Id. at 478 n.5.

#### **4. Plaintiffs are Entitled to Just Compensation.**

One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960).

Here, the government seeks to usurp ownership of millions of dollars in historic cabins, ostensibly<sup>1</sup> for “public use”, yet it wants the hundred or so families who actually built or paid for the cabins to bear the entire monetary burden of the transfer. This is simply not fair – and it was not waived by contract. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950), as it does from technical concepts of property law." Almota Farmers, *supra*, 409 U.S. at 478.

“When the government physically takes possession of an interest in property for some public purpose, it has a **categorical duty** to compensate the former owner [,] regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.” Brown v. Legal Foundation of Washington, 538 U.S. 216, 233 (2003) quoting Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321-323 (2002) (emphasis added).

It is a well established proposition in an eminent domain taking that “the owner is to be put in as good position as he would have occupied if his property had not been taken.” United States v. Miller, 317 U.S. 369, 373 (1943). See also United States v. New River Collieries Co., 262 U.S. 341 (1923); Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304 (1923).

As faithful stewards of the land in Koke’e for decades, plaintiffs are shocked that the State intends to “just take” their cabins, lease them to the highest bidders, and pay nothing in return – claiming that the constitutional right to be compensated was waived in a contract in which it was never mentioned.

## **5. Plaintiffs Never Waived Their Right to Be Compensated For the Value of Their Cabins.**

In the case at bar, the State’s argument rests entirely on a single assertion: that the plaintiffs waived the constitutional right to be compensated for their cabins when they signed leases in 1985, which contained a purported “surrender clause.” This argument fails as a matter

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<sup>1</sup> “Public Use” in this case seems to mean that the right to occupy Koke’e cabins goes to whoever will pay the State the most money. This also underscores an important point: plaintiffs are at a disadvantage in the public auction. In addition to bidding on the land lease, they are bidding to keep their cabins in Koke’e. In effect, they are bidding against themselves, whereas a bidder who does not own an existing cabin does not have that concern.

of law inasmuch as 1) there are no waivers of the right to receive monetary compensation for any “surrendered” cabins in any of the leases; 2) the leases were drafted by the State and contain ambiguous provisions with respect to disposition of the cabins at the end of the lease term; 3) waivers of constitutional rights must at a minimum be clear, knowing and voluntary; 4) the contract term is unenforceable because it is was not sufficiently definite and certain at the time it was signed; and 5) the alleged waiver of a constitutional right to was impermissibly required as a condition of leasing the subject land from the State in 1985.

**a. There Was No Knowing, Intelligent, Voluntary Waiver of the Constitutional Right to Just Compensation.**

The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

“Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.” College Sav. Bank, supra, 527 U.S. at 681 citing Edelman v. Jordan, 415 U.S. 651, 673 (1974).

In Fuentes v. Shevin, the United States Supreme Court, in assessing whether a waiver of a constitutional right was valid, asked whether the waiver was “voluntarily, intelligently, and knowingly” made. Fuentes v. Shevin, 407 U.S. 67, 94 (1972) citing D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972).

The Court in Fuentes stated that, foremost, “a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.” Fuentes, supra, 407 U.S., at 95 (emphasis added).

Here, the lease provisions regarding surrender of the cabins are not clear. Early paragraphs in the land lease discuss the fact that certain improvements on the land revert to the State at the end of the lease term. However, residential cabins are clearly excluded from the list of reverting improvements.

Paragraph 3 in the lease (describing what improvements on the land revert to the State) provides:

3. Ownership of fixed improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater systems(s) located on the land prior to or on the commencement date of this lease, **excluding (1) any recreation-residence cabin, building or structure** existing on the premises prior to the commencement date of this lease which is not owned by Lessor and which has been purchased or acquired by Lessee(s) from the former occupant(s) of the premises and (2) those improvements constructed during the term of this lease, unless provided otherwise.

However, paragraph 31 appears to state the contrary:

31. Surrender. That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, **together with all improvements existing or constructed thereon unless provided otherwise.** The Lessor may, at its option, on or about the end of the lease elect to retain the improvements or require the Lessee, at the Lessee's own expense, to remove such improvements and restore the premises to a condition satisfactory to the Lessor[.]

Both provisions contain the caveat "unless otherwise provided" and each provision is contradicted by the other. One provision seems to indicate that ownership of the cabins does not transfer to the State and the other indicates the contrary. This can hardly be said to be clear.

More important – **neither lease provision waives any right to be compensated for any potential reversion to the State.** In fact, the State's prior practice left the firm impression that it intended to ensure just compensation to the leaseholders for any State-appropriated property. Accordingly, any alleged "waiver" the State may claim does not withstand constitutional scrutiny. In fact, no where in the Lease is the term "waiver" or the term "compensation" even used. For that matter, prospective lessees in 1985 in many cases signed the subject leases having no idea of the value of the cabin they are now being told they contracted away.

Where courts have found that objections to poor compensation for government taking of private property were waived by contract, the waiving party was clearly informed of the nature of the right waived and agreed to a specific formula for payment in lieu of just compensation. See, e.g., Albrecht v. United States, 329 U.S. 599, 603-604 (1947) ("Since these petitioners have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have 'just compensation,' in the constitutional sense, fixed by the courts, we must look to those terms for the measure of their compensation").

In addition to the fatal flaw of being unclear, several other factors indicate that the provision is not a valid waiver. In Fuentes, the Court found several replevin statutes unconstitutional because they worked a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from their possessor. Fuentes, *supra*, 407 U.S. at 96. In its reasoning on the waiver issue, the Court found dispositive that (1) there was “no bargaining over contractual terms between the parties;” (2) the parties were “far from equal in bargaining power;” (3) the purported waiver provision “was a printed part of a form sales contract and a necessary condition of the sale;” and (4) the State “made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.” Fuentes, *supra*, 407 U.S. at 95.

All these same factors are present here. First, lessees were not able to bargain with the State over the contractual terms. In fact, Plaintiff Donn Carswell initially refused to sign the Lease with the ambiguous surrender provision. He was told by the State that that would mean he would lose the right to lease with the State - even though he was the highest bidder. See Exhibit “B”, affidavit of Donn Carswell. This proves the second point, that the parties were far from equal in bargaining power. Third, the surrender provision was a printed part of the lease contract, and clearly a necessary condition of the lease, illustrated by the fact that the State threatened to revoke its acceptance of Carswell’s bid on the land lease if he objected to one provision -- Paragraph 31, the “Surrender” provision.

Most importantly, however, is the fact that the purported waiver is wholly unclear. It does not even mention whether there will be compensation for the cabins at the time of the surrender. There is no mention of a sale of cabins in the “lease”. The leases do not contemplate any specific values for the cabins, make no mention of the constitutional nature of the exchange and contain other provisions that run totally contrary to the surrender provisions. There was no constitutionally valid waiver, as a matter of law.

**b. Even If the Court Finds That Plaintiffs Agreed To Surrender Ownership of Their Cabins, Plaintiffs Never Waived Their Right To Be *Compensated*.**

None of the provisions in the leases at issue waive compensation to cabin owners in the event the government assumes ownership thereof.

Paragraph 3 in the lease makes no mention of the issue of compensation. Paragraph 9, which applies to new improvements only (not pre-existing cabins), contains no mention or any waiver of the constitutional right to compensation. Paragraph 9 provides:

9. Improvements. That the Lessee shall not at any time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions as the Board may impose, including the requirement that such building, structure or improvement be constructed of new materials only. **The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.** (emphasis added).

Likewise, Paragraph 31 addresses possession of the cabins; it does not address compensation. And as argued above, a waiver of a constitutional right cannot be implied. It must be explicit. College Sav. Bank, supra, 527 U.S. at 681.

Furthermore, the prior practice of the State indicated to Plaintiffs that they would be compensated for their cabins. The prior leases with the State, which expired in 1985 also contained a “Surrender” provision at Paragraph 28. Attached hereto as Exhibit “M”. However, since 1985 numerous cabins have been privately bought and sold. See, e.g., survey of outgoing lessee, attached hereto as Exhibit “F”. While in 1965, the leases were similar with regard to surrender provisions, the State then made no attempt to assume ownership (for free) at the end of the lease term. The ambiguity in the current lease, the total lack of any waiver of the right to be compensated for taken property and the past practice of the State combine to mandate the conclusion that there has been no constitutionally valid waiver of State and Federal Constitutional rights.

**c. Any Alleged Waiver Violates the Doctrine of Unconstitutional Conditions.**

Plaintiff Carswell has testified that in 1985 he objected to and requested the opportunity to negotiate paragraph 31 in the State’s proposed lease. See Exhibit “B”, affidavit of Donn Carswell. The State responded that Mr. Carswell had to sign the lease, as written, or lose the lease to the subject land. If the State is correct that the lease contained a valid waiver of the constitutional right to compensation, then the State, in effect, forced lessees to forfeit their property to the State without any compensation as a condition of leasing land from the State.

In Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), the Court held that "even though a person has no 'right' to a valuable governmental benefit," and even though the government may deny the benefit at its discretion, the government may not impose a choice between the government benefit and the exercise of a constitutionally guaranteed right. Id. at 597. "Such interference with constitutional rights is impermissible." Id.

In Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) the Ninth Circuit rejected an argument based on Honolulu Rapid Transit Co. v. Dolim, 459 F.2d 551 (1972). In Parks a developer requested that the City vacate certain streets pursuant to an ordinance that required the developer to pay just compensation to the City for lands it vacated. The City additionally demanded that the developer transfer ownership of certain geothermal wells as a condition of the vacation. The Court ruled that: 1) The taking of the geothermal wells was not related to a public use as required by the Constitution; and 2) the doctrine of unconstitutional conditions precluded the state from conditioning its vacation of the streets on the developer's giving the state property without just compensation. The Court relied on Perry v. Sindermann, supra, 408 U.S. 593 (1972) to find that the fact that the developer was free to reject the terms did not render the condition any less objectionable. Parks, 716 F.2d at 652.

Similarly, in the case at bar, the State is claiming that Plaintiffs waived a valuable right – only after it forced the purported waiver as a condition of leasing State land. As in Parks, the law requires the Courts to reject such a practice.

#### **d. The Lease Term is Ambiguous**

The State bases its defense on a contracts argument – alleging that Plaintiffs contracted away ownership of their cabins and their rights to compensation when they signed the subject leases with the State. The purported waiver cannot be enforced because it is ambiguous.

A word or phrase within a contract is ambiguous if, examining the word or phrase in the context of the entire contract, the word or phrase is reasonably susceptible to more than one meaning; in other words, an ambiguity is found to exist only when the contract, taken as a whole, is reasonably subject to differing interpretation. United Truck Rental Equipment Leasing, Inc. v. Kleenco Corp., 84 Hawai'i 86, 992, 29 P.2d 99, 105 (Haw. App. 1996) (internal citations omitted).

Here, the contract term regarding surrender is ambiguous and reasonably subject to differing interpretation: Paragraph 3 of the Lease appears to plainly state that the recreational

residence cabins do not revert to the State. However, paragraph 31 appears to state the contrary. Both lease provisions contradict each other and contain the caveat “unless otherwise provided. This is an obvious ambiguity.

Doubts arising from ambiguity of language in a contract are resolved against the drafter. Gushiken v. Shell Oil Co., 35 Haw. 402, 409 (Haw.Terr. 1940). See also Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Haw. 300, 944 P.2d 97 (Haw.App. 1997) (“[I]t is a generally accepted principle that any ambiguity in [l]anguage will be interpreted against the drafter”); Restatement (Second) of Contracts §206.

Here, attorneys for the State drafted the lease. Therefore, the ambiguity created by the conflict between paragraphs 3, 9 and 31 regarding reversion of buildings to the State should be resolved in favor of the lessees. They certainly should not be construed to imply a waiver of compensation that is never actually mentioned.

**e. The Purported “Waiver” is Not Sufficiently Certain and Definite.**

“It is an elementary rule of contract law that there must be mutual assent or a meeting of the minds on all essential elements or terms in order to create a binding contract.” Malani v. Clapp, 56 Haw. 507, 510, 542 P.2d 1265, 1267 (1975). “A contract to lease will be deemed to be sufficiently definite and capable of enforcement where it contains the names of the parties, a description of the property to be leased, the amount of rental to be paid, the terms of payment, the duration of the lease, and no further negotiations as to other provisions are contemplated.” Id. citing Francone v. McClay, 41 Haw. 72 (1955).

Here, numerous lessees were forced to (purportedly) agree to surrender their cabins to the State in 1985 before they knew the value of the cabin or had contracted for the cabin. How could a leaseholder know what his or her cabin would be worth twenty years later? Therefore, the value of property the lessee was agreeing to surrender to the State was uncertain at the time he or she entered into the lease - meaning the amount of consideration being promised by the lessee may have been sufficiently uncertain to prevent “mutual assent or a meeting of the minds on all essential elements or terms,” Malani v. Clapp, *supra*, 56 Haw. at 510.

Furthermore, additional negotiations were contemplated when the lessees signed the Lease, in that they still had to negotiate to purchase the cabins on the leased land from the previous cabin owners. The outcome of these negotiations would impact the meaning of terms in

the lease, specifically, the value of property that the lessees were allegedly being forced to agree to surrender to the State.

Finally, the fact that the BLNR was discussing whether or not lessees would be compensated for their cabins up until the February 10, 2006 Board meeting is a testament to the ambiguity of the Lease terms.

#### **6. Petitioners Are Entitled to Attorney's Fees.**

28 USCS § 2412(d) does not replace, but rather supplements, the attorney fee award provision of 42 USCS § 4654 [HRS § 101-27]. US v. 329.73 Acres of Land, 678 F.2d 21, 23 (5th Cir. 1982). § 2412(d) extends fee awards to cases where the government acquired property, but the landowner won greater compensation than originally offered. Id. § 2412 exists "to prevent private individuals from being deterred from challenging government action because of the threat of high litigation expenses." US v. 101.80 Acres of Land, 716 F.2d 714, 720 (9th Cir. 1983).

The application of § 2412, as opposed to § 4654, turns on the condemnee's status as a prevailing party. Id. at 722. Where the issue is the government's right to take the property, and that right is successfully established, then it is the prevailing party. 341.45 Acres of Land, 751 F.2d at 937. Where the issue is the amount of compensation to which the condemnee is entitled, and the court award very substantially exceeds the amount of the original offer, the condemnee is the prevailing party. Id. A de minimus standard of gain must, however, be granted by the court in order for a party to be considered prevailing. Id. at 938. Furthermore, the term "prevailing party" is not limited to the victor of a trial on the merits, but encompasses the winner of a favorable settlement or one who has not prevailed on all issues. See Id. at 936; US v. 101.80 Acres, 716 F.2d at 722 (§ 2412's intent is to award attorney's fees to qualified prevailing parties).

Attorneys fees are appropriate, however, only where the position of the government is not "substantially justified," as determined by the reasonableness of its actions. US v. 101.80 Acres, 716 F.2d. at 727-728; Hoang Ha v. Schweiker, 707 F.2d 1104, 1106 (9th Cir. 1983). Where the legal process was necessary to secure just compensation, the court held that the landowners were prevailing parties when they were awarded just compensation far above that originally offered. US v. 101.80 Acres, 716 F.2d at 728.

## **Conclusion**

In sum, Plaintiffs are entitled to summary judgment on Count One because: (1) Plaintiffs indisputably have property rights in their cabins; (2) Plaintiffs never validly waived those property rights, including the right to just compensation under the federal and state constitutions.

The State seems to imply that it is a passive bystander in the drama and turmoil it has created for the nearly one hundred families faced with losing valuable property. However, the State's position belies a very conscious and purposeful intention to obtain private property without being constrained by constitutional safeguards. The State should not be allowed to intentionally cause a citizen to unknowingly give up his or her constitutional right to be compensated. And just as important, the State should not be allowed to gain enormous financial benefit from its own failure to honor constitutional safeguards so fundamental to our democracy.

Plaintiffs, therefore urge this Court to grant their Cross-Motion for Summary Judgment on Count One of the Complaint (Takings).

### **III. PLAINTIFFS MEET THE STANDARD FOR SUMMARY JUDGMENT ON COUNT TWO OF THEIR COMPLAINT (HAW. REV. STAT. CHAPTER 101).**

It is uncontested that the State has not followed procedures pursuant to Haw. Rev. Stat. Chapter 101 with regard to Plaintiffs' cabins. Therefore, if the Court finds that the State is taking plaintiffs' property, plaintiffs are entitled to judgment as a matter of law to a declaration that the State has violated HRS Chapter 101 and plaintiffs' due process rights.

### **IV. PLAINTIFFS MEET THE STANDARD FOR SUMMARY JUDGMENT ON COUNT THREE OF THEIR COMPLAINT (HAW. REV. STAT. CHAPTER 91).**

#### **A. ALL MATERIAL FACTS ARE UNCONTESTED.**

The following material facts are uncontested:

1. The State was required to give Notice pursuant to HRS Chapter 91.
2. The Agenda of the February 10, 2006 Board Meeting read, in relevant part: "Request Approval for Disposition of Recreation Residence Leases at Puu Ka Pele, Halemanu, and Koke'e Camp Lots through Direct Negotiations, and Drawing, Koke'e and Waimea Canyon State Parks, Waimea, Kauai." Attached as Exhibit "N".
3. The above Agenda did not give notice that compensation for cabins would be discussed at the February 10, 2006 meeting.

4. At the February 10, 2006 meeting, the Board heard testimony and made a ruling that current lessees would not be paid compensation for the value of the improvements on the lease lots.

**B. PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

Both Hawaii Administrative Rule §13-1-22(b)(3) and the Hawaii Administrative Procedure Act (“HAPA”), Haw. Rev. Stat. § 91-3(a)(1), govern and require notice of the substance of a proposed administrative rulemaking, including all BLNR rulemaking.

“That a State agency like the Board of Land and Natural Resources ‘must conform to the requirements of HAPA when acting in either a rule making capacity (quasi-legislative), or in the adjudication of a contested case (quasi-judicial)’ is unquestionable.” Sharma v. State, Dept. of Land and Natural Resources, 66 Haw. 632, 636 (1983) (citations omitted).

The purpose of these procedural requirements are to ensure fair opportunity for those affected by an agency’s decision to have input into the decision making process: “These procedural requirements ensure fairness by providing public notice, an opportunity for all interested parties to be heard, full factual development and the opportunity for continuing comment on the proposed action before a final determination is made.” Aluli v. Lewin, 828 P.2d 802, 804, 73 Haw. 56, 59 (1992) (citations omitted).

Here, the Agenda notice for the February 10<sup>th</sup> Board meeting did not give adequate notice that the issue of compensation to current cabin owners by the State for losses of cabins would be discussed. Had the public been aware that compensation would be discussed, there would have been an opportunity for public input as to these issues. However, because of inadequate notice, the public was barred from input on this point in contradiction to the Sharma v. State, Dept. of Land and Natural Resources and Aluli v. Lewin line of cases.

Therefore, Plaintiffs should be granted summary judgment under HRS Chapter 91.

**CONCLUSION**

In conclusion, Plaintiffs respectfully requests this Court enter summary judgment on all Counts in the Complaint. If summary judgment is not rendered in Plaintiffs’ favor, Plaintiffs request the Court ascertain what material facts actually controverted, and make an order specifying the facts that appear without substantial controversy.

**EXHIBITS IN SUPPORT OF MOTION**



**IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT  
STATE OF HAWAI'I**

DONN CARSWELL, GALE CARSWELL,	)	CIVIL NO. 06-1-0049
FRANK O. HAY, PAUL T. MATSUNAGA,	)	(Injunctive Relief)
ARLINE Y. MATSUNAGA, ET. AL.	)	(Declaratory Judgment)
	)	
	)	
Plaintiffs	)	CERTIFICATE OF SERVICE
	)	
vs.	)	<b>[RE: PLAINTIFFS' CROSS-</b>
	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT]</b>
DEPARTMENT OF LAND AND	)	
NATURAL RESOURCES, STATE OF	)	
HAWAI'I, INDIVIDUAL DOES 1-10, DOE	)	
PARTNERSHIPS 1-10, DOE	)	
CORPORATIONS 1-10 AND DOE	)	
ENTITIES 1-10,	)	
	)	
Defendants	)	
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on June \_\_\_\_, 2006, I delivered via first class U.S. mail, postage prepaid, the above captioned documents to:

William J. Wynhoff, Esq.  
Deputy Attorney General  
Department of the Attorney General  
465 King Street, Suite 300  
Honolulu, Hawaii 96813

Dated: Lihue, Hawai'i, June \_\_\_\_, 2006.

By \_\_\_\_\_  
Elif Yarnall