

LAW OFFICE OF DANIEL HEMPEY
 A Law Corporation
 Daniel G. Hempey #7535
 Elif Z. Yarnall #8293
 3175 Elua Street, Suite C
 Lihue, HI 96766
 (808) 632-2444 (tel)
 (808) 632-2332 (fax)

5TH CIRCUIT COURT
 STATE OF HAWAII
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DANETTE FUJII
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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
 STATE OF HAWAII

| | | |
|-------------------------------|---|--------------------------------|
| DONN CARSWELL, GALE CARSWELL, |) | CIVIL NO. <u>06-10049</u> |
| FRANK O. HAY, PAUL T. |) | (Injunctive Relief) |
| MATSUNAGA, ARLENE Y. |) | (Declaratory Judgment) |
| MATSUNAGA, DOES 1-130 |) | |
| |) | |
| Plaintiffs |) | COMPLAINT; EXHIBITS; SUMMONS; |
| |) | MOTION FOR TEMPORARY |
| vs. |) | RESTRAINING ORDER AND |
| |) | PRELIMINARY INJUNCTION; NOTICE |
| DEPARTMENT OF LAND AND |) | OF MOTION; DECLARATION OF |
| NATURAL RESOURCES, STATE OF |) | COUNSEL . |
| HAWAII, INDIVIDUAL DOES 1-10, |) | |
| DOE PARTNERSHIPS 1-10, DOE |) | |
| CORPORATIONS 1-10 AND DOE |) | |
| ENTITIES 1-10, |) | |
| |) | |
| Defendants |) | |

COMPLAINT

Come now, DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL T. MATSUNAGA, ARLENE Y. MATSUNAGA, and Does 1-130 ("Plaintiffs"), through their undersigned attorneys, and hereby allege and aver as follows:

I do hereby certify that this is a full, true and correct copy of the original on file in this office.

[Signature]
 Clerk, Circuit Court, Fifth Circuit

JURISDICTION AND PARTIES

1. The Circuit Court of the Fifth Circuit has jurisdiction over this matter pursuant to, inter alia, Haw. Rev. Stat. §§ 603-21.5, 603-21.8, 661.1 and 91-14.
2. Venue is proper in this Court pursuant to Haw. Rev. Stat. § 603-36(5).
3. Plaintiffs Donn Carswell and Gale Carswell (“Carswells”) are residents of the County of Kauai, State of Hawaii.
4. Plaintiff Frank O. Hay (“Hay”) is a resident of the County of Kauai, State of Hawaii.
5. Plaintiffs Paul T. Matsunaga and Arlene Y. Matsunaga (“Matsunagas”) are residents of the County of Kauai, State of Hawaii.
6. Doe Plaintiffs are all owners of cabins in Koke’e and Waimea Canyon State Parks in the County of Kauai, State of Hawaii.

GENERAL BACKGROUND

7. Koke’e and Waimea Canyon State Parks on the island of Kauai are home to numerous historic cabins.
8. Upon information and belief, the first permanent and most historic recreational cabin at Koke’e was built about 1850.
9. In 1918, the Territorial Board of Agriculture and Forestry established forty seven camp sites along the Koke’e and Halemanu streams in what later became the Koke’e State Park.
10. Over time, the Territory of Hawaii established approximately 140 camp lots, many of which were built upon. In May 1952, the Governor of the Territory of Hawaii established Koke’e Park, Kauai, and forest reserve.
11. In 1965, the Senate of the State of Hawaii recognized that many “permittees” who had built on their lots in Koke’e had expended substantial sum for improvements on these lots. Therefore, the Senate in Senate Resolution No. 25, Third

Legislature, 1965, State of Hawaii requested the Department of Land and Natural Resources “to cancel the permits ... and lease said lots, provided that the present permittees are given preference when such leases are issued.”

12. In 1965, the law governing the disposition of State land was amended to provide for the direct issuance of leases for recreation residence purposes covering lots within parks, forest reserves, and other areas under executive control. That law is now Haw. Rev. Stat. § 171-44, which reads:

Notwithstanding any limitations to the contrary, the Board may lease, by direct negotiation and without recourse to public auction, lands within a state park or forest reserve and other lands set aside under executive orders for recreation residence use for a period not to exceed twenty years on such terms and conditions as may be prescribed by the board.

13. In 1965, the State directly negotiated leases with cabin owners in Koke’e and Waimea Canyon State Parks.

14. The first public auction for the leases in Koke’e was held in July of 1985.

FACTUAL ALLEGATIONS

15. Plaintiff Carswells are legal owners of a historic cabin located at Lot 61, Koke’e Camp Site Lots in Koke’e State Park on Kaua’i, Tax Map Key 1-4-04:28. Upon information and belief, the cabin was built in 1951, and the Carswells bought the cabin in 1965.

16. Plaintiff Hay paid for and is the legal owner of a historic cabin located at Lot 38, Koke’e Camp Site Lots in Koke’e State Park on Kaua’i, Tax Map Key 1-4-04:43.

17. Plaintiffs Matsunagas paid for and are the legal owners of a historic cabin located at Lot 63, Koke’e Camp Site Lots in Waimea State Park on Kaua’i, Tax Map Key 1-4-02:63.

18. Plaintiff Does are legal owners of cabins located in Koke'e State Park and Waimea State Parks on Kaua'i.

19. Respondent State of Hawai'i owns the land on which Plaintiffs Carswells' cabin is located.

20. Respondent State of Hawai'i owns the land on which Plaintiff Hay's cabin is located.

21. Respondent State of Hawai'i owns the land on which Plaintiffs Matsunagas' cabin is located.

22. Respondent State of Hawai'i owns the land on which Doe Plaintiffs' cabins are located.

23. On or about December 1985, the State leased the lots on which Plaintiffs' cabins sit for a period of 20 years ("the lease"). A copy of the lease is attached as Exhibit "A".

24. The lease was drafted by the State.

25. Plaintiffs Carswells executed a lease with the State identical in terms except for price, name and location.

26. Plaintiff Hay executed a lease with the State identical in terms except for price, name and location.

27. Plaintiffs Matsunagas executed a lease with the State identical in terms except for price, name and location.

28. Doe Plaintiffs executed leases with the State identical in terms except for price, name and location.

29. Sometime prior to the expiration of the lease term as defined in Exhibit A (December 2005), the State decided to extend the lease one year, through December 2006.

30. On or about February 10, 2006, the Board of Land and Natural Resources (“BLNR”) held a meeting to discuss and decide, among other things, issues related to the leases in Koke’e and Waimea Canyon State Parks.

31. The Agenda of the February 10, 2006 Board meeting gave notice that the Koke’e Lease issue would be addressed as: “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 “B”.

32. On or about February 10, 2006, the State, through the BLNR, decided that prior to expiration of the leases in December 2006, the State would re-lease the land on which Plaintiffs’ cabins sit beginning January 1, 2007.

33. At the same meeting, the BLNR announced that new leases would go to the highest bidder in a public auction.

34. After the meeting, BLNR staff indicated that the public auction would be held sometime in the fall of 2006.

35. At the February 10, 2006 meeting, the BLNR also discussed the issue of compensation to current cabin owners/lease holders.

36. On or before the February 10, 2006 BLNR meeting, the state announced that it would take ownership of all cabins on the leased land that are not removed by the end of the lease term December 2006.

37. On or before the February 10, 2006 BLNR meeting, the State announced that it would not pay any compensation to plaintiff cabin owners who effectively surrendered their cabins to the state by failing to remove them prior to the expiration of the lease term in December 2006.

38. Prior to the February 10, 2006 BLNR meeting, the State further announced that cabin owners who did not wish for their cabins to revert to the State without

compensation had the right to remove the cabins from the subject leased lands at the cabin owners' expense.

39. Upon information and belief, any cabin owner wishing to remove and rebuild their cabin would be required to obtain a Conservation District Use Application ("CDUA") and a building permit.

40. Upon information and belief, the Department of Land and Natural Resources has 180 days, or approximately six (6) months to consider a CDUA application.

41. Upon information and belief, to move some of the cabins will require grading and road preparation.

42. Upon information and belief, it would take a minimum of one week to move a cabin to a new location.

43. Upon information and belief, there are very few companies on the island of Kauai that are qualified to remove historic cabins such as those at issue in this case.

44. Upon information and belief, given the small number of professional house movers available on Kauai, it would be impossible for each plaintiff to remove the cabins that they own between the time of the auction and the December 2006 deadline.

45. Upon information and belief, it would take time well beyond the December 2006 deadline to effect the removal of each cabin by Plaintiffs (including Does).

46. Upon information and belief, it would be physically impossible to remove and rebuild several of the Plaintiff owned cabins, including Plaintiffs Carswells' cabin.

47. Upon information and belief, the cost of removing the subject cabins (those cabins which could be removed and rebuilt) exceeds the fair market value of said cabins.

48. The “option” of surrendering the cabins to the State for no compensation is an unconstitutional taking within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 20 of the Hawai’i Constitution.

49. The “option” of removing the cabins prior to December 2006 is an unconstitutional taking in as much as it would be physically impossible for plaintiffs to remove their cabins between the public auction and the expiration of the leases.

50. Similarly, the “option” of removing the roughly one hundred (100) cabins in Koke’e in a timely manner is impossible.

51. Upon information and belief, the cost of removing and rebuilding the subject cabins (those which can be removed and rebuilt) exceeds the fair market value of said cabins.

52. The “option” of removing the cabins prior to December 2006 is an unconstitutional taking because the effect on plaintiffs is a total loss of value in their cabins.

53. Any of the “options” offered by the State results in an unconstitutional taking within the meaning of Fifth Amendment to the United States Constitution and Article I, section 20 of the Hawai’i Constitution.

54. Plaintiffs have not waived their right to be compensated in the event the State of Hawai’i assumes ownership.

55. Plaintiffs have not waived their right to be compensated for the cost of removing and rebuilding the cabins.

56. Plaintiffs have not waived their right to be compensated in the event that it is physically impossible to remove the cabins within the time constraint imposed by the State.

57. The 1985 lease contains ambiguous terms as it relates to the disposition of the subject cabins at the end of the lease term.

58. To the extent that the State may have attempted to induce Plaintiffs to waive their right to compensation, such waivers must fail because: a) Plaintiffs were never informed of the constitutional dimension of any alleged waiver; and b) any alleged waiver (by contract or otherwise) is unintelligible and ambiguous.

59. Plaintiffs have a constitutional right to be justly compensated in the event that the State takes their property.

60. When the State's action results in a total loss of value in property, it is a Taking which requires compensation. Brown v. Legal Found., 538 U.S. 216, 234 (2003) quoting Yee v. Escondido, 503 U.S. 519, 523 (1992).

61. Waiver of a constitutional right must be voluntary, knowing and intelligent. Fuentes v. Shevin, 407 U.S. 67, 94, 95 (1972).

62. Plaintiffs have not knowing and intelligently waived their constitutional right to be justly compensated.

63. On or about February 21, 2006, Plaintiffs requested a contested hearing by the BLNR to address compensation issue. Attached as Exhibit C.

64. On or about March 10, 2006, the BLNR denied the request for a contested case hearing.

65. Notice of the BLNR's decision to deny the request for a contested case hearing was sent to Plaintiff Carswell on March 15, 2006.

COUNT ONE: DECLARATORY AND INJUNCTIVE RELIEF

66. Plaintiffs reallege each and every allegation contained in the preceding paragraphs with the same force and effect as if here set forth in full.

67. The actions of the state set forth above constitute a taking of Plaintiffs property under the Fifth Amendment to the United States Constitution, Article I, section 20 of the Hawai'i Constitution, and relevant case law.

68. The taking of Plaintiffs cabins is not for a public purpose under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, section 20 of the Hawai'i Constitution, and relevant case law.

69. Under any "option" set forth above by the state, unless the state pays fair market value to cabin owners, the state is violating the requirement to give just compensation under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, section 20 of the Hawai'i Constitution, and relevant case law.

70. BLNR meeting did not properly notice, as alleged in Paragraph 31, that issues related to taking and compensation thereof would be discussed at the February 10, 2006 meeting.

71. Plaintiffs were entitled to notice under Haw. Rev. Stat. Chapter 91 before the BLNR discussed and decided the issues of compensation.

72. Therefore, Plaintiffs request declaratory and injunctive relief as follows:

- a. Plaintiffs request a declaration that the State may not proceed to auction the subject leases without giving cabin owners a reasonable amount of time to remove their cabins.
- b. Plaintiffs request a declaration that the State must pay just compensation (fair market value) to Plaintiffs whose cabins are taken.
- c. Plaintiffs request a declaration which determines the nature and elements of compensation.
- d. Plaintiffs request a declaration that any decision regarding the disposition of the subject cabins and lack of compensation thereof that the BLNR made at the February 10, 2006 meeting is void due to improper notice.

WHEREFORE, Plaintiffs respectfully requests the following relief:

- a. That the Court award such declaratory and injunctive relief as pleaded herein; and
- b. That the Court award such other and further relief as is just and equitable.

Dated: Lihue, Hawai'i, April ____, 2006.

By _____
Daniel G. Hempey
Elif Z. Yarnall
Attorneys for Plaintiffs

LAW OFFICE OF DANIEL HEMPEY
 A Law Corporation
 Daniel G. Hempey #7535
 Elif Z. Yarnall #8293
 3175 Elua Street, Suite C
 Lihue, HI 96766
 (808) 632-2444 (tel)
 (808) 632-2332 (fax)

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| FRANK O. HAY, PAUL MATSUNAGA, |) | (Injunctive Relief) |
| ARLENE Y. MATSUNAGA, DOES 1-130 |) | (Declaratory Judgment) |
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| DEPARTMENT OF LAND AND |) | PRELIMINARY INJUNCTION; |
| NATURAL RESOURCES, STATE OF |) | AFFIDAVIT IN SUPPORT OF MOTION |
| HAWAII, INDIVIDUAL DOES 1-10, |) | FOR TEMPORARY RESTRAINING |
| DOE PARTNERSHIPS 1-10, DOE |) | ORDER AND PRELIMINARY |
| CORPORATIONS 1-10 AND DOE |) | INJUNCTION; NOTICE OF MOTION |
| ENTITIES 1-10, |) | |
| |) | |
| Defendants |) | |
| _____ |) | |

THE STATE OF HAWAII:

To the above-named Defendants:

You are summoned and required to serve upon Law Office of Daniel G. Hempey, attorneys for Plaintiffs DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL MATSUNAGA, ARLENE Y. MATSUNAGA and DOES 1-130, an answer to the Third Party Complaint, which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail

to do so, judgment by default will be taken against you for the relief demanded in said complaint.

This Summons shall not be personally delivered between the hours 10:00 pm and 6:00 am on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Lihue, Kaua'i, Hawai'i: _____.

CLERK OF THE ABOVE-ENTITLED COURT