

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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Attorney for Plaintiff
David Brown

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

DAVID BROWN
Plaintiff,
vs.

) CV. NO. CV07 00556 **ACK**
)
)
)
) **LEK**

MELANIE CHINEN; BOB AWANA;) COMPLAINT;
LAURA THIELEN; PETER YOUNG;) EXHIBITS A-F;
ROBERT A MASUDA; NANCY) DEMAND FOR JURY TRIAL;
MCMAHON; MELISSA KIRKENDALL;) SUMMONS
ASHLEY CHINEN;)
DOES 1-20; STATE OF HAWAII,)
Defendants.)

Complaint

Nature of Case

1. This is a civil action, brought under the Civil Rights Act of 1871, 42 U.S.C. §§ 1981, 1983, 1985(2)(2002) and the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000(e), et seq. (hereinafter referred to as "Title VII").
Plaintiff seeks damages against certain government defendants for committing

acts, under color of state law, which deprived the Plaintiff of Federal Constitutional Civil Rights. These include freedom from retaliation.

2. After only nine months on the job with excellent job performance and with no replacement available, the State Historic Preservation Division (SHPD) did not renew Plaintiff BROWN's employment because Plaintiff BROWN voiced his opinion that numerous practices at SHPD were illegal, unethical, or culturally insensitive. Plaintiff alleges that Chinen, an unqualified political operative, was placed as administrator of the SHPD in order to fast track or stall developments for political gain at the cost of the archeological treasures and the cultural burial grounds of ancient Hawaiians. Chinen appears to work at the direction of Bob Awana and/or Laura Thielen with the passive indifference of Peter Young and Bob Masuda.

Jurisdiction and Venue

3. The court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343 (1) (2) and (3), providing jurisdiction for claims arising under a federal question, and for protection of civil rights, and under the Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.
4. Defendants are guilty under 42 U.S.C. §§ 1981, 1983, 1985, 1986 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e generally and 2000e-

3(a)(2002) specifically of abusing state power in a conspiracy to deny Plaintiff constitutional rights.

5. Plaintiff reserves the right to pursue a Worker's Comprehensive claim for any cause of action preempted by HRS 386.
6. The State of Hawaii has waived her sovereign immunity under HRS §662-2 and therefore the Court can hear tort claims against government agencies, to include claims based on negligence.
7. Venue is proper in the District of Hawaii pursuant to 28 U.S.C. § 1391 (b) and (c), as, upon information and belief, Defendants reside in the State of Hawaii, because the claims arose in this judicial district, and/or because Defendants are subject to personal jurisdiction at the time of this action.

Parties

8. Plaintiff DAVID BROWN has resided within the State of Hawaii at all times relevant to this Complaint and was a civilian employee of the State Historic Preservation Division located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.
9. Defendant MELANIE CHINEN was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the administrator of the

State Historic Preservation Division with offices located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.

10. Defendant LAURA THIELEN was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the director of the State Office of Planning, but is now the Chairperson of the Department of Land and Natural Resources with offices located at 601 Kamokila Blvd., Room 555, Kapolei, Hawaii 96707.

11. Defendant BOB AWANA was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the Chief of Staff for Governor Linda Lingle, Governor of the State of Hawaii.

12. Defendant PETER YOUNG was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the Chairperson of the Department of Land and Natural Resources with offices located at 1151 Punchbowl St. Honolulu, Hawaii 96813.

13. Defendant ROBERT A MASUDA was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the Deputy Director of the Department of Land and Natural Resources with offices located at 1151 Punchbowl St. Honolulu, Hawaii 96813.

14. Defendant NANCY MCMAHON was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the Kauai archeologist. Defendant MCMAHON also owns “Kauai Hummer Safari” located at 5532 Tapa St., Koloa Hawaii 96756-9518 with a website of <http://www.kauaihummersafari.com/>.

15. Defendant MELISSA KIRKENDALL was, at all times relevant to this Complaint, employed by the Defendant STATE OF HAWAII as the Maui Island Archeologist.

16. Defendant ASHLEY CHINEN is the daughter of Defendant MELANIE CHINEN. Her residence is unknown however Defendant ASHLEY CHINEN wrote on internet blogs that were published throughout the State of Hawaii

17. During all times relevant to this complaint, Defendant STATE OF HAWAII was the employer of Defendants MELANIE CHINEN, AWANA, YOUNG, MASUDA, MCMAHON, and KIRKENDALL. To every degree possible, whether included or not, Defendant STATE OF HAWAII should be considered a Defendant for each cause of action under Respondeat Superior or other theory of liability.

18. Defendant DOES 1-20 are other persons whose identity is presently unknown. By information and belief, during times relevant to this complaint DOES 1-20

were employed by Defendant STATE OF HAWAII, and/or resided in the State of Hawaii and were tortiously and causatively involved in the torts and constitutional violations that harmed DAVID BROWN.

Common Allegations

19. All allegations in this Complaint are based on information and belief and/or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

20. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, associate or otherwise of Does 1-20. Plaintiff is informed and believes, and on that basis alleges, that each fictitious Defendant was in some manner responsible, participated in or contributed to the matters and things in which Plaintiff complained herein and in some fashion has legal responsibility therefore. If the exact nature and identity of such fictitious Defendants' responsibility for participation in, and contribution to the matters and things herein alleged is ascertained by Plaintiff, Plaintiff will seek to amend this Complaint and all proceedings to set forth the same.

21. To the extent contrary to the allegations contained in this Complaint; and as an alternative theory, Plaintiff is informed, believes and thereon alleges, that at all times mentioned herein each of the Defendants was the agent and/or employee

of the Defendant agency; was at all times acting within the scope of such agency and/or employment; and actively participated in, or subsequently ratified and adopted, or both, each and all of the acts, conduct and/or omissions alleged with full knowledge of all of the facts and circumstances, including, but not limited to, full knowledge of each and all of the violations of the rights of the Plaintiff.

22. To the degree allowed by law, each Defendant who is a government official is being sued in both their private and official capacities.

Factual Allegations

23. Plaintiff became the Branch Chief Archeologist for the State of Hawaii on or about September 16, 2005 in the State Historic Preservation Department (SHPD)

24. Exhibit A contains a Position Description for the job of Branch Chief Archeologist for the State of Hawaii.

25. Plaintiff's yearly contract was not renewed so his last day of employment at SHPD was June 30, 2006.

26. Plaintiff was provided numerous pretextual and fabricated reasons that his contract was not renewed by SHPD in a Memorandum allegedly written on June 1, 2006 (see Exhibit B).
27. When Plaintiff took the job he was aware that SHPD had ongoing problems to include unequal treatment of developers, unethical acceptance of money, failure to safeguard artifacts in custody, and loose management of personnel allowing them to routinely misuse sick leave and overtime (see Exhibit C).
28. As of November 7, 2007, approximately 17 months after Plaintiff's contract was not renewed, SHPD is not fully staffed and has not yet found a replacement for Plaintiff's former position.
29. Since Defendant MELANIE CHINEN was appointed to SHPD on or about October 15, 2004, approximately 21 professionals have resigned from SHPD.
30. During Plaintiff's approximately nine months on the job he voiced concern and objection to numerous procedures which violated legal and ethical obligations when approving or denying archeological approval for projects to include:
- a. SUPERFERRY: On September 28, 2005, as documented in Exhibit D, before Kawaihae Harbor could be used by the Superferry, Plaintiff further voiced his concern to Defendant MELANIE CHINEN that the

Superferry should follow procedure in obtaining approvals and permits. None of the proposed procedures, however, were ever followed.

- b. WALMART: Plaintiff objected to Defendant MELANIE CHINEN coercing his involvement to represent CHINEN, SHPD and the STATE OF HAWAII in his capacity, as Plaintiff had no previous involvement or history in this case. CHINEN disclosed questionable actions by SHPD and the STATE OF HAWAII by not having a SHPD archaeologist trained in forensic/physical anthropology at the time.
- c. GENERAL GROWTH PROPERTIES: Defendant MELANIE CHINEN approved the archeological survey over Plaintiff's objection. During construction over 26 human remains were "inadvertently" found. A proper survey of the surrounding area would have revealed numerous significant archeological features, but records of these were either lost or "misplaced" in the SHPD library.
- d. HOKULIA: Plaintiff advised Defendant MELANIE CHINEN not to approve the permit because of a very high density and frequency of archeological resources and Iwi Kapuna but Defendant MELANIE CHINEN approved the permit.

- e. TURTLE BAY: Plaintiff noted that there was a very high probability of finding burials but was told by Defendant MELANIE CHINEN to work with Cultural Surveys Hawaii, Inc. to devise an archaeological inventory strategy to allow development of the property. Plaintiff advised Defendant MELANIE CHINEN against project approval, and despite community outcry, Defendant MELANIE CHINEN obstructed Plaintiff from further project involvement.
- f. KALOKO HEIGHTS: Plaintiff was directed by Defendant MELANIE CHINEN on or about May 15, 2006, to fast-track approval of the Grubbing/Grading permit to allow ground-disturbing activities in and around known archaeological features and burial sites in an archaeological landscape eligible for inclusion to the National Historic Register, prior to SHPD receipt and approval of the Burial Treatment Plan, Preservation Plan, Data Recovery Plan, and prior to completion of Data Recovery efforts. Defendant MELANIE CHINEN demanded Plaintiff write a letter of exception despite his objection to the development.
- g. DOWSETT HEIGHTS: Defendant MELANIE CHINEN demanded that three Archeological surveys be performed to find alleged

significant archeological features. When none were found and when Plaintiff recommended approval of the permit, Defendant MELANIE CHINEN further delayed the project causing financial harm to the developer.

31. Development of areas with significant archeological features is governed by, among others, various state statutes to include HRS §§ 6E, 84, 92F and 710; various administrative rules to include HAR §§ 13-275, 13-277, 13-278, 13-284; and state ethics rules.

32. Plaintiff and all Defendants are required to follow the laws passed by the legislature.

33. Plaintiff and Defendants are further obligated to follow the standards and ethics of the archeological profession.

34. Fast tracking and stalling projects violates the Hawaii State laws, administrative rules, state ethics and professional standards.

35. An important resource of any State Historic Preservation Division/Office across the United States is keeping a database and library of reports on locations with significant archeological features.

36. The library at the Hawaii SHPD is in shambles.

37. Every time Plaintiff attempted to fix the library and records, Defendant MELANIE CHINEN told him “that was not a priority.”

38. It is difficult if not impossible for an archeologist to find records of significant archeological features in an area if the records are missing or destroyed.

39. In Hawaii archeologists regularly miss known and unknown archeological features because the records and library at SHPD are not kept up to date.

40. Bones that are found inadvertently are often exhumed.

41. Not all bones exhumed by agents of SHPD are reinterred.

42. Bones under custody of SHPD are not stored according to museum curatorial standards.

43. Plaintiff asked Defendant MELANIE CHINEN to start a program whereby bones in SHPD custody would be handled according to museum curatorial standards.

44. Defendant MELANIE CHINEN stated handling bones according to museum curator standards was not a priority with the result that she prohibited Plaintiff from changing the storage standards for exhumed Iwi Kapuna.

TORTS BASED ON NEGLIGENCE under HRS §662-2.

To the degree that torts of negligence are preempted by any state statute, the facts of the following torts are relevant to the intentional and constitutional torts set forth further in this Complaint.

Count 1 Negligence—Management and Handling of Human Remains at SHPD

(Claim for Negligence against Defendants STATE OF HAWAII and MELANIE CHINEN in her individual and official capacities.)

45. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 44 above, as though specifically restated here, against Defendant MELANIE CHINEN and Defendant STATE OF HAWAII.

46. Plaintiff's responsibilities included exhuming, transporting, storing, inventorying, and assist in repatriating bones in a professional and culturally sensitive manner.

47. Human remains at SHPD were not stored according to museum curatorial standards to include:

- a. Bones on Kauai are kept outside in a metal container that is not sealed and exposed to the elements;
- b. Bones on Maui are kept in a closet;

c. Bones on the Big Island were kept in a bathroom closet with bathroom supplies such as plungers, toilet cleansers, and extra toilet paper.

48. Plaintiff asked Defendant MELANIE CHINEN several times to store these bones according to professional and culturally sensitive museum curatorial standards as per the requests of the various burial counsels.

49. Defendant MELANIE CHINEN was either ignorant of or deliberately indifferent to professional, ethical and culturally sensitive museum curatorial standards.

50. Defendant MELANIE CHINEN prohibited Plaintiff from correcting the situation and told him properly storing the human remains was not a priority and was not Plaintiff's concern.

51. Defendant MELANIE CHINEN owed Plaintiff a duty to do her job according to the professional, ethical and culturally sensitive standards.

52. Defendant MELANIE CHINEN owed Plaintiff a duty to allow him to do his job according to the professional, ethical and culturally sensitive standards.

53. By negligently storing the bones, Defendant MELANIE CHINEN breached her duty to Plaintiff.

54. By prohibiting Plaintiff from properly storing the bones, Defendant MELANIE CHINEN breached her duty to Plaintiff.

55. As a result of this breach, Plaintiff lost face in the Hawaiian community and was blamed as one who does not care about professional, ethical, legal, and culturally sensitive standards.

56. When Plaintiff started working at SHPD, there was no written procedures manual.

57. When Plaintiff started working at SHPD, there was no written job description for Plaintiff's position.

58. Defendant MELANIE CHINEN stated that the procedures of SHPD were institutional knowledge.

59. Defendant MELANIE CHINEN never informed Plaintiff about computer procedures.

60. On or about June 1, 2006, Defendant MELANIE CHINEN reprimanded Plaintiff for violating the computer procedures and subsequently refused to renew his contract.

61. Defendant MELANIE CHINEN never informed Plaintiff about who had the responsibilities of making policies that were implied in doing Plaintiff's job.

62. On or about June 1, 2006, Defendant MELANIE CHINEN reprimanded Plaintiff for violating policy making procedures and subsequently refused to renew his contract.

63. As a result of these breach of duties, Plaintiff's reputation was harmed which effects his future employment opportunities.

64. As a result of this these breach of duties, Plaintiff suffered emotional distress.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 2, Negligent Hiring, Training and Supervision by DLNR (Respondeat Superior)

(Claim for Negligent Hiring, Training and Supervision under theory of common law negligence against Defendant STATE OF HAWAII and Defendants YOUNG MASUDA, and DOES 1-20 in their individual and official capacities.)

65. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 64 above, as though specifically restated here, against Defendants YOUNG and MASUDA and DOES 1-20.

66. Although Defendant MELANIE CHINEN was appointed to her position by the Governor's Office, Defendants YOUNG and MASUDA and DOES 1-20 through their agents owed a duty to Plaintiff as an employee to screen and hire capable and qualified individuals to serve as supervisors. Defendant further owed a duty to persons situated as was the Plaintiff to properly oversee, train, educate, sensitize and direct supervisors and employees.

67. Defendants YOUNG and MASUDA and DOES 1-20 through their agents negligently hired, trained and supervised Defendant MELANIE CHINEN concerning her negligent management skills.

68. Defendants YOUNG and MASUDA and DOES 1-20 through their agents negligently hired, trained and supervised Defendant MELANIE CHINEN concerning the policy of competent supervision of employees.

69. Defendants YOUNG and MASUDA and DOES 1-20 through their agents negligently hired, trained and supervised Defendant MELANIE CHINEN concerning the constitutional rights of employees.

70. Defendants YOUNG and MASUDA and DOES 1-20 through their agents negligently hired, trained and supervised Defendant MELANIE CHINEN concerning the rights of employees to be free of retaliatory actions.

71. Defendants YOUNG and MASUDA and DOES 1-20 through their agents negligently hired, trained and supervised Defendant MELANIE CHINEN concerning the importance of employees being free from intentional infliction of emotional distress.

72. Defendants YOUNG and MASUDA and DOES 1-20, through their agents, by actions and omissions, established a policy that encouraged, acquiesced in, approved of, or was deliberately indifferent to the negligent hiring, training, and supervision.

73. As a proximate result of the negligent hiring, training, and supervision, unethical activities were allowed to go unchecked at the SHPD.

74. Plaintiff listed some of the unethical activities above to include paragraphs 30 and 37 among others more generally.

75. Defendants' actions show indifference to Plaintiff's rights to have a safe work environment.

76. Defendants' actions show indifference to Plaintiff's constitutional rights.

77. As a proximate result of the negligent hiring, training, and supervision of Defendants, Plaintiff suffered from the incompetent actions Defendant MELANIE CHINEN to include loss of constitutional rights, and retaliation.

78. As a proximate result of the negligence of defendants, Plaintiff's employment at SHPD was not renewed.

79. Defendants' actions were wanton, reckless, with malice, and without regard for Plaintiff's safety.

80. As a proximate result of the negligence of defendants, Plaintiff has suffered physical and emotional pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 3, Negligent Infliction of Emotional Distress

(Claim for Negligent Infliction of Emotional Distress against Defendants MELANIE CHINEN, YOUNG, MASUDA and DOES 1-20 in both their official and individual capacities for negligently causing Plaintiff emotional distress and thereby harming him physically.)

81. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 80 above, as though specifically restated here, against Defendants MELANIE

CHINEN, YOUNG, MASUDA and DOES 1-20 for negligently causing Plaintiff emotional distress.

82. Defendants negligently inflicted severe mental or emotional distress on Plaintiff.

83. The Defendants' conduct was negligent.

84. The acts of Defendants caused Plaintiff severe mental or emotional distress.

85. The emotional distress of Plaintiff caused by acts of Defendants caused physical harm to Plaintiff which included constant physical pain that will be proven at trial.

86. The emotional distress of Plaintiff was so severe that he was diagnosed with various acute and chronic physical conditions to be proven at trial.

87. Plaintiff was under care of doctors for his emotional and physical conditions.

88. The acts of Defendants exceeded any reasonable limit of social toleration or employment practices.

89. As a direct result of the negligent infliction of emotional distress, Plaintiff has suffered and will suffer severe, substantial and physical and emotional harm,

losses, injuries and damages, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendant for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

INTENTIONAL TORTS

Count 4, Defamation against Defendant MELANIE CHINEN

90. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 89 above, as though specifically restated here, against the Defendant MELANIE CHINEN.

91. On or about June 1, 2006, Defendant MELANIE CHINEN made false, hurtful, and malicious statements about Plaintiff that Defendant MELANIE CHINEN knew to be false during a meeting with Tim Lee which included the following:

“I explained that I had received complaints from all of his staff, the private archaeology community, and the Hawaiian community. I explained that the complaints stemmed from his changing policy single-handedly and inconsistently applying these changes.”

92. Numerous other false and malicious statements were made by Defendant MELANIE CHINEN in the "June 1, 2006" letter.
93. On or about April 20, 2007, Defendant MELANIE CHINEN made false, hurtful, and malicious statements about Plaintiff that Defendant MELANIE CHINEN knew to be false to the Honolulu Advertiser.
94. The contents of the June 1, 2006 were similar to the April 20, 2007 statement.
95. The defamatory statements made by Defendant MELANIE CHINEN directly concerned Plaintiff's ability to responsibly do his job.
96. The defamatory statements were clearly erroneous.
97. Defendant MELANIE CHINEN knew or should have known that the defamatory statements were clearly erroneous.
98. Defendant MELANIE CHINEN made the defamatory statements about Plaintiff so that it was broadcast to Tim Lee and then broadcast to the news media.
99. Eventually this defamatory statement was spread throughout SHPD and the general public.
100. On or about August 9, 2007, in an interview with the Hawaii Tribune Herald, Defendant MELANIE CHINEN said:

Chinen said she didn't renew Brown's contract, even though the position remains vacant because she's looking for "a better match for the requirements of the job."

"His statements are absolutely false, and I am greatly offended," Chinen said. "David has been accusing me of things even when he was employed here. We have always had rules whether David agrees with them or not."

101. Defendant made other defamatory statements to be proven at trial.
102. Defendant intentionally, knowingly, willfully, maliciously accused Plaintiff of wrong doing in order to intimidate and embarrass Plaintiff.
103. The derogatory accusations harmed Plaintiff's reputation and ability to work in his chosen profession.
104. Defendant's actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.
105. As a proximate result of the defamatory statements by Defendant, Plaintiff's contract to work was not renewed and he has not been able to find an equivalent job in his chosen profession.
106. As a proximate result of the defamation, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 5, Defamation against Defendants MCMAHON, KIRKENDALL, and ASHLEY CHINEN

107. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 106 above, as though specifically restated here, against the Defendants MCMAHON, KIRKENDALL, and ASHLEY CHINEN.

108. On or about December 9, 2006, Defendant KIRKENDALL made false, hurtful, and malicious statements about Plaintiff (see Exhibit E) that were published to various people to include Defendant MELANIE CHINEN, Mr. Charles Bayne, and then to others throughout the SHPD..

109. On or about June 1, 2006, Defendant MCMAHON made false, hurtful, and malicious statements about Plaintiff concerning Plaintiff being involved in a deceitful scheme to seek revenge against Defendant MELANIE CHINEN and to defraud the State of Hawaii of money with false claims of injury. These statements were published to Defendant MELANIE CHINEN and then to others throughout the SHPD.

110. On or about April 20, 2007, Defendant ASHLEY CHINEN made false, hurtful, and malicious statements about Plaintiff that Defendant ASHLEY CHINEN knew to be false. Defendant ASHLEY CHINEN called Plaintiff a “liar” and devalued Plaintiff’s subsequent job for a recycling company. These statements were made on an internet blog and thereby published throughout Hawaii.

111. Defendants made other defamatory statements to be proven at trial.

112. The defamatory statements made by Defendants directly concerned Plaintiff’s ability to responsibly do his job.

113. The defamatory statements were clearly erroneous.

114. Defendants knew or should have known that the defamatory statements were clearly erroneous.

115. Eventually all defamatory statements were spread throughout SHPD and the general public.

116. Defendants intentionally, knowingly, willfully, maliciously accused Plaintiff of wrong doing in order to intimidate and embarrass Plaintiff.

117. The derogatory accusations harmed Plaintiff’s reputation and ability to work in his chosen profession.

118. Defendants' actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.

119. As a proximate result of the defamatory statements by Defendant, Plaintiff's contract to work was not renewed and he has not been able to find an equivalent job in his chosen profession.

120. As a proximate result of the defamation, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 6, Conspiracy to Defame

Claim for Conspiracy against Defendants MELANIE CHINEN, MCMAHON, KIRKENDALL, ASHLEY CHINEN and DOES 1-20. Defendants are being sued in both their individual and official capacities.)

121. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 120 above, as though specifically restated here, against the Defendants

MELANIE CHINEN, MCMAHON, KIRKENDALL, ASHLEY CHINEN and
DOES 1-20.

122. Defendant MELANIE CHINEN recruited Defendants MCMAHON, KIRKENDALL, and ASHLEY CHINEN to defame Plaintiff by questioning his professional abilities so that she could have a pretextual reason to not rehire Plaintiff.
123. Defendants MELANIE CHINEN, MCMAHON, KIRKENDALL had similar defamatory content which indicates a coordinated script rather than independent action.
124. Defendants MELANIE CHINEN, MCMAHON, KIRKENDALL all said similar things against Plaintiff at a time when Plaintiff was filing for Workers Comprehensive benefits.
125. Part of the workers comprehensive hearings involved Plaintiff describing the negative practices and hostile work environment at SHPD.
126. Defendants MELANIE CHINEN, MCMAHON, KIRKENDALL had a common purpose of discrediting Plaintiff so that their own employment would not be threatened.

127. Defendant MELANIE CHINEN benefited from the conspiracy by retaining a job she would otherwise not be qualified for.
128. Defendant MCMAHON benefited from the conspiracy by being able to abuse sick leave.
129. Defendant KIRKENDALL benefited from the conspiracy by being able to operate her personal businesses which has various ethical conflicts with Hawaii ethic rules and laws.
130. Defendants MELANIE CHINEN, MCMAHON, KIRKENDALL had a common plan of using SHPD to fast track or stall projects for political reasons, often violating state statutes, state administrative rules, state ethics, professional archeological standards, and/or Hawaiian cultural values.
131. Defendants took steps to carry out their common plan by defaming Plaintiff and thus discrediting his criticism of SHPD.
132. Defendant ASHLEY CHINEN had no personal knowledge about Plaintiff.
133. Defendant ASHLEY CHINEN received all of her information about Plaintiff from her mother Defendant MELANIE CHINEN.
134. Defendant ASHLEY CHINEN participated in the common scheme of defaming Plaintiff to discredit his criticism of practices at SHPD.

135. Defendant ASHLEY CHINEN took steps to carry out the conspiracy by defaming Plaintiff on an Internet blog.
136. Defendants conspired together in unison, in concert and complicity to violate the Plaintiff's civil rights, to retaliate against Plaintiff and to harm Plaintiff emotionally and economically.
137. Defendants acted in complicity with all defendants to violate Plaintiff's civil rights, to retaliate against Plaintiff and to harm Plaintiff emotionally and economically.
138. Defendants, among other acts, coordinated and fabricated in unison, in concert and complicity false testimony that resulted in Plaintiff not being renewed for an additional year of employment.
139. Defendants' actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.
140. As a proximate result of the conspiracy by Defendants, Plaintiff's contract was not renewed and he has not been able to find equivalent work in his chosen profession.
141. As a proximate result of the conspiracy, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep,

worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 7, Conspiracy to Coerce to violate laws, ethics and standards

Claim for Conspiracy against Defendants MELANIE CHINEN, AWANA, THIELEN and DOES 1-20. Defendants are being sued in both their individual and official capacities.)

142. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 141 above, as though specifically restated here, against the Defendants MELANIE CHINEN, AWANA, THIELEN and DOES 1-20.

143. Defendant AWANA regularly would make phone calls to Defendant MELANIE CHINEN to tell Defendant MELANIE CHINEN what projects to fast track and what projects to hinder.

144. Plaintiff knew that Defendant AWANA regularly called because on several occasions Plaintiff heard Defendant AWANA on the phone and numerous times

Defendant MELANIE CHINEN would refer to Defendant AWANA as the one who called.

145. At other times Defendant MELANIE CHINEN would refer to such phone calls as “from the Governor’s office.”

146. After such conversations, Defendant MELANIE CHINEN would say that the governor’s office wanted the approval of certain projects to happen quicker.

147. As set forth above in 30, Plaintiff often objected to such approval based on ethical and legal reasons.

148. When Plaintiff objected, Defendant MELANIE CHINEN said or implied that Plaintiff would not be working at SHPD unless he became a “team player.”

149. On or about April, 2006, Plaintiff was called into Defendant MELANIE CHINEN and introduced to her “friend” Defendant LAURA THIELEN.

150. Defendants asked Plaintiff if he could provide an archeological report that would help a piece of land be rezoned without difficulty.

151. Defendant MELANIE CHINEN had not asked Plaintiff to research the land and he had no reason to know anything about the archeological features on the land.

152. Plaintiff stated that he would have to do a survey according to the laws and regulations and would have to see if the land had any archeological features before he could sign a report.

153. By their body language and voice tone, Defendants were not pleased with Plaintiff's answer and they asked him to leave the office.

154. Defendants have consulted and communicated at other times to discuss fast tracking projects.

155. Defendants had a common plan of using SHPD to fast track or stall projects for political reasons, often violating state statutes, state administrative rules, state ethics, professional archeological standards, and/or Hawaiian cultural values.

156. Defendants took steps to carry out their common plan by destroying the SHPD library.

157. Defendants took steps to carry out their common plan by rewarding employees who participated with their schemes with continued employment and overlooking poor job performance.

158. Defendants took steps to carry out their common plan by driving off through a hostile work environment or refusing employment to employees who would not participate with their schemes.
159. Defendants conspired together in unison, in concert and complicity to violate the Plaintiff's civil rights, to retaliate against Plaintiff and to harm Plaintiff emotionally and economically.
160. Defendants acted in complicity with all defendants to violate Plaintiff's civil rights, to retaliate against Plaintiff and to harm Plaintiff emotionally and economically.
161. Defendants, among other acts, coordinated and fabricated in unison, in concert and complicity false testimony that resulted in Plaintiff not being renewed for an additional year of employment.
162. Defendants' actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being.
163. As a proximate result of the conspiracy by Defendants, Plaintiff's contract was not renewed and he has not been able to find equivalent work in his chosen profession.

164. As a proximate result of the conspiracy, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

Count 8, Intentional Infliction of Emotional Distress

(Claim for Intentional Infliction of Emotional Distress against Defendant MELANIE CHINEN in both her individual and official capacities.)

165. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 164 above, and subsequent paragraphs as though specifically restated here, against all Defendants.

166. All facts pled above and subsequently under theories of negligence can alternately be viewed as intentional acts to cause emotional distress to Plaintiff.

167. When Plaintiff started work on September 16, 2006 he also began keeping a journal to track the significant events in any work day.

168. Soon into the job, the journal became a mechanism of tracking erratic behavior of Defendant MELANIE CHINEN.

169. On September 30, 2005 Defendant MELANIE CHINEN gave Plaintiff the follow suggestions on “management” procedures:

“You want to fuck with their minds, tell them to see you at such and such a time but don’t give them any idea about what it’s about. It’s mean but effective and will invoke fear.”

170. Throughout the nine months Plaintiff worked at SHPD, Defendant MELANIE CHINEN would use such emotionally distressing procedures on him.

171. One example of the outrageous emotional distress inflicted upon Plaintiff is that Defendant MELANIE CHINEN would violate legal, ethical, professional and cultural standards and then accuse Plaintiff of the acts that Defendant MELANIE CHINEN herself had violated.

172. One example of this behavior is Kaloko Heights that includes the following:

- a. Defendant MELANIE CHINEN made ad hoc policy decisions as in allowing grubbing and grading before SHPD received the finalized and approved Data Recovery Plain, Preservation Plan, and Burial

Treatment Plan for the project and after a high density of significant archeological features were found.

- b. Defendant MELANIE CHINEN demanded that Plaintiff write a letter for her to sign which authorized a grubbing and/or grading permit for Kaloko Heights. (See Exhibit F at 2-3).
- c. To coerce Plaintiff to write the letter, Defendant MELANIE CHINEN yelled at him, accused the entire Archaeology Branch of being insubordinate overall, and of failing to follow Defendant MELANIE CHINEN's directives. (See Exhibit F at 1).
- d. During his "exit evaluation," however, Defendant MELANIE CHINEN accused Plaintiff of developing ad hoc policies and being abusive to employees. (See Exhibit B).
- e. This behavior by Defendant MELANIE CHINEN is intentional crazy making whereby she erratically threatens and accuses Plaintiff and then later disciplines him for allegedly acting erratically.

173. Such "crazy making" and outrageous acts causing emotional distress will be proven at trial.

174. Plaintiff has knowledge of others who have been similarly treated by Defendant MELANIE CHINEN and apparently the “management style” as set forth in paragraph 169 is the modus operandi of Defendant MELANIE CHINEN.
175. Defendant recklessly inflicted severe mental or emotional distress on Plaintiff.
176. The Defendant’s conduct was intentional.
177. The acts of Defendant caused Plaintiff severe mental or emotional distress.
178. The acts of Defendant exceeded any reasonable limit of social toleration or employment practices.
179. Defendant’s actions were wanton, reckless, with malice, and without regard for Plaintiff’s emotional well being.
180. Defendant’s actions and omissions show a deliberate indifference to Plaintiff’s constitutional rights.
181. As a proximate result of the intentional act by Defendant, Plaintiff’s contract at SHPD was not renewed.

182. As a proximate result of the intentional infliction of emotional distress on the Plaintiff, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendant for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

CONSTITUTIONAL TORTS AND RELATED STATE CLAIMS

Count 9, Retaliatory in Violation of Public Policy, HRS § 378-62, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a)(2002), 1st Amendment, 14th Amendment Due Process Rights, 42 U.S.C. §§ 1983, 1985, 1986, and Monell

(Claim For Retaliation of Plaintiff for reporting wrongdoings under HRS § 378-62, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a)(2002), 14th Amendment Due Process Rights and 42 U.S.C. §§ 1983, 1985, 1986 against Defendants STATE OF HAWAII, MELANIE CHINEN, AWANA, THIELEN, YOUNG, MASUDA and DOES 1-20. Personal Defendants are sued in their official capacity under Title VII and in both their official and individual capacities under HRS § 378-62, the 1st and 14th Amendment and Monell.)

183. Plaintiff realleges each of the allegations set forth in paragraphs 1 through 182 above, as though specifically restated here, against the Defendants

MELANIE CHINEN, AWANA, THIELEN, YOUNG, MASUDA and DOES
1-20.

184. Plaintiff is protected by HRS § 378-62 from retaliation for speaking out against illegal, unethical and culturally insensitive practices as he did in the allegations above, specifically paragraphs 30 and 37.
185. Plaintiff is protected by 42 USC §1985(2) from retaliation by Defendants defaming Plaintiff and conspiring against Plaintiff to intimidate or discredit his right to object to illegal practices at SHPD and his intent to report the illegal, unethical and culturally insensitive matters to legislative and other governmental bodies, as he eventually did before the Hawaii State Legislature.
186. Plaintiff is protected by 42 USC §§ 1981 and 1983 from having his constitutional rights of freedom of speech and due process violated by retaliation, as he was being denied employment because he spoke out against illegal, unethical and culturally insensitive practices as he did in the allegations above, specifically paragraphs 30 and 37.
187. Plaintiff is protected by 42 USC § 1986 from government officials who had knowledge that Plaintiff's rights were being violated but who stood by and did nothing about the violations as he was by Defendants YOUNG, MASUDA and possibly others.

188. Plaintiff is protected by 14th Amendment Procedural Due Process Rights against Defendants filing false and pretextual allegations concerning Plaintiff's performance and false allegations of non-existent policies as in but not exclusive to Exhibit B.

189. Defendants retaliated against Plaintiff by fabricating false testimony for pretextual reasons to silence, intimidate, and discredit Plaintiff from making legitimate complaints about illegal, unethical and culturally insensitive practices by Defendants and at SHPD as he did in the allegations above, specifically paragraphs 30 and 37.

190. Defendant STATE OF HAWAII is liable under Monell because the policy of using SHPD as a mechanism for illegal purposes was a policy approved of by Defendants AWANA, THIELEN and MELANIE CHINEN, and acquiesced to by Defendants YOUNG and MASUDA.

191. The policy was so prevalent that some 21 professionals resigned from SHPD under the management of Defendant MELANIE CHINEN.

192. Defendants consciously choose to pursue the illegal and negligent handling of historic resources rather than the legal, ethical and culturally sensitive policies promoted by Plaintiff above.

193. Defendants took the above retaliatory actions with an improper motive to interfere with the Plaintiff's rights under Hawaii State law.
194. Defendants' actions were not equitable:
195. Defendants used their authority as government actors to carry out this violation of Plaintiff's constitutional rights.
196. Defendants' discrimination is part of a widespread management program within SHPD whereby individuals are promoted and rewarded for allegiance to the top level of management rather than by qualifications and competence.
197. This unethical management program is well known within SHPD and the community.
198. This unethical management program intimidates other wronged individuals or witnesses to wrongs to come forward.
199. Defendants' actions were wanton, reckless, with malice, and without regard for Plaintiff's emotional well being thereby showing malice and/or deliberate indifference.
200. Defendants' actions and omissions show a deliberate indifference to Plaintiff's constitutional rights.

201. As a proximate result of the retaliation, Plaintiff's job was not renewed beyond June 30, 2006.

202. As a proximate result of the retaliation, Plaintiff has suffered emotional and physical pain and suffering, humiliation, great embarrassment, loss of sleep, worry, anxiety, emotional distress, loss of pay, loss of reputation, and loss of future earning capacity.

Wherefore, Plaintiff demands judgment against the Defendants individually, jointly and severally for compensatory, punitive damages, attorney fees, together with costs and interest and such other relief as the court may deem reasonable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, by counsel, prays this honorable Court to grant judgment against Defendants individually, jointly and severally to include special, general, injunctive relief and other remedies as follows:

- 1) Reinstatement, instatement, promotion, or front pay in lieu of job changes.
- 2) General and special damages, amount to be proven at trial, for loss of reputation, loss of future pay, loss of earning capacity, physical injuries and emotional distress against all Defendants individually, jointly and severally.
- 3) Award compensatory damages to Plaintiff to include medical expenses, past and future, consequential damages, against all Defendants individually,

- jointly and severally, and each of them, under each count above in an amount commensurate with losses suffered but which is presently unknown;
- 4) Award exemplary/punitive damages to Plaintiff, except where disallowed by statute, against all Defendants, to include State Actors who are found to be acting in their private capacity, amount to be proven at time of trial;
 - 5) Award reasonable attorney's fees and costs of this action under HRS § 378-64, 42 USC §§ 1981, 1983, 1985, 1986, 1988, contract law or other applicable statute or legal theory;
 - 6) Injunctive relief in the form of enjoining all relevant parts of the STATE OF HAWAII from continuing the policies complained of above to include negligent policy concerning handling of human remains, negligent supervision, retaliation, and/or indifference to civil rights.
 - 7) Declaratory relief to remedy some of the harm done to Plaintiff's reputation; and Grant all other just and proper relief.

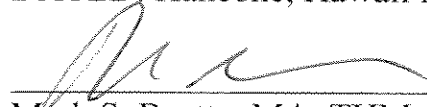
Certification

The matter in controversy within this Complaint is not the subject of any other action pending in any other Court or any arbitration proceeding.

Exhibits

- A. Job description for Branch Chief Archeologist for the State of Hawaii
- B. June 1, 2006 Memorandum “evaluating,” defaming, and firing David Brown
- C. Report No. 02-20, December 2002, Audit of the State Historic Preservation Division
- D. Minutes from September 28, 2005 Superferry meeting.
- E. Letter from Melissa Kirkendall December 9, 2006
- F. Letters involving Kaloko Heights

DATED: Kaneohe, Hawaii November 7, 2007

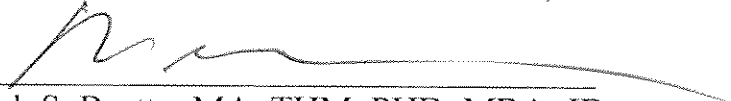


Mark S. Beatty, MA, THM, PHD, MBA, JD
Attorney for Plaintiff

Demand for a Jury Trial

Plaintiff David Brown demands a trial by jury on all issues as are set forth.

DATED: Kaneohe, Hawaii November 7, 2007



Mark S. Beatty, MA, THM, PHD, MBA, JD
Attorney for Plaintiff

Archaeological Branch Chief
Historic Preservation Specialist ~~IV~~ III
Position No. 7260E 100530

EXHIBIT "4"

I. INTRODUCTION

A. Organizational Location:

State Historic Preservation Division, Department of Land and Natural Resources, Honolulu, O'ahu.

B. Organizational Unit Function:

This position is responsible for administering and directing the Archaeological Branch of the State Historic Preservation Division.

Chapter 6E, HRS, gives historic preservation responsibilities to the Department of Land and Natural Resources, including: develop a state-wide survey of historic properties, prepare information for a register of such properties, develop a preservation plan and accompanying budget and land use recommendations, provide for matching grants-in-aid to political subdivisions, and public and private agencies for projects, seek technical assistance and funds from the federal government, coordinate the evaluation and management of burial sites, regulate archaeological activities throughout the State, review and provide written concurrence/recommendations for projects which may have an effect upon a historic property, and employ sufficient professional and technical staff for the purposes of this chapter without regard to Chapters 76 and 77.

The federal program under the National Historic Preservation Act, as amended, includes similar survey, register, review work and historic planning requirements and through Federal Fiscal Year 1989 has awarded to Hawaii approximately \$5,000,000.00 in grants-in-aid funds. In order to continue in this federal program, 36 Code of Federal Regulations 61.3 required that no later than October 1, 1978, the professional staff working under the direction of the State Historic Preservation Officer "shall include at least one full-time professional in each of the following disciplines: history, archaeology, architectural history, and historical architecture." The professional staff shall meet qualification standards prescribed by 36 Code of Federal Regulations 61.4 and its Appendix A and professional staff credentials shall be submitted to the Secretary of the Interior for review and approval.

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Exhibit A

C. Position Function: Archaeological Branch Chief

The department has positions to meet the minimum professional staff requirements of 36 CFR 61.3 and the incumbents to these positions also meet the standards of 36 CFR Appendix A. When this position is filled by other than a member of the required professional staff, insure that the professional staff requirements are maintained.

II. MAJOR DUTIES AND RESPONSIBILITIES

Responsible for the Statewide archaeological program.

A. Administrative 10%

Initiate, formulate and recommend policies which affect the immediate activities of the Archaeological Branch.

Develop a schedule and plan of operations for the Archaeological Branch.

Direct investigations and reviews, evaluate and make recommendations for areas of archaeological importance; recommend standards and priorities for historic preservation projects.

Recommend, by drafting or supervising drafting of, regulations and amendments; recommend, by drafting or supervising drafting of legislative bill, legislation affecting historic preservation; prepare comments on bills and resolutions by the legislature or Congress.

Draft departmental and Governor's correspondence relating to archaeology.

Recommend, by drafting or supervising drafting of, contracts requiring special skills or professional competency in the execution of a task.

Review, edit, and revise to final draft form all reports and documents emanating from the Archaeological Branch.

B. Planning, Programming and Budgeting 20%

Provide, by drafting or supervising drafting of, information for plans as proposals for short and long term goals and objectives to enhance historic preservation in Hawaii. Devise a strategy that systematically prioritizes the statewide survey of archaeological properties and allows for more expeditious decision making during the review process.

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Direct Archaeological Branch activities related to the protection and preservation of archaeological areas, and enforcement of laws and regulations within those areas.

Prepare, submit and present Branch budget and capital improvement requirements to the Director of the Division, SHPO, or Board, as applicable, and the legislature.

C. Review Work 20%

Review and oversee the archaeological review of conservation district use applications, EIS statements, State Clearing House Reviews and other requests to construct, alter or improve any historic sites as required by state law. Review and oversee the archaeological review of federal or federally financed or licensed projects for their effect on sites on or eligible for inclusion in the National Register or required by federal regulations. Negotiate with property owners and governmental planners historic preservation stipulations.

Attend meetings of the various Island Burial Councils to answer questions, explain or amplify upon subjects under consideration.

D. Inventory Work 5%

Prioritize, direct and oversee the entering of archaeological sites into the statewide inventory of historic properties. Synthesize previously existing inventory information. Help maintain this inventory for public and governmental use.

E. Register Nomination 5%

Direct the preparation of and prepare nomination forms through research and write archaeological studies of sites, districts, and themes employing established professional methods and techniques including: locating and evaluating evidence from documentary, oral, pictorial, artifactual, field studies, and/or other sources; analyzing historical facts, and present the results in narrative form for the Hawaii and National Registers and coordinate with other staff members as appropriate. Ensure the content and professional quality of the nomination forms, including those where work is done by others under contract or otherwise.

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Attend meetings of the Hawaii Historic Places Review Board to answer questions, explain or amplify the site nomination.

F. Public Information 20%

Establish and maintain cooperative relationships with federal, county, state and community organizations; represent the department in meeting with civic organizations, government agencies, and the general public in matters involving the historic preservation program.

Provide technical advice regarding historic preservation to agencies and organizations and the general public through appropriate media.

Participate in regional, national, and international historic preservation conferences, workshops and colloquia.

G. Grants Program 5%

Analyze information and physical plans for restoration and other projects carried out under the grants program to ensure archaeological integrity of the projects. Coordinate this with the historian, archaeologist, historic architect or architectural historian as appropriate.

Review and make prioritization recommendations for sub-grant applications; prepare and process and oversee the preparation and processing of sub-grantee applications and contracts; inspect and monitor and oversee the inspection and monitoring of contract work; verify payment requests; and provide input during audit.

Prepare review analysis information and recommendations in writing for the Department, the State Historic Preservation Officer, and State Historic Preservation Division Director, as appropriate.

H. Field Work 5%

Oversee and conduct field (out-of-office) work as necessary to locate, record and evaluate archaeological sites, places and objects throughout the state.

I. Supervisory 10%

Provide supervision of Branch staff including distribution of work load, determination of the Branch's priorities, and assignments of special duties and responsibilities to carry out the program activities.

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III CONTROLS OVER THE POSITION

Supervisor:

, Director, State Historic Preservation Division
Position No. , EM 5

Positions supervised are:

Historic Preservation Specialist III, SR-24, No. 5052E(T), No. 5054E, No. 19472E, No. 24118E and No. 25358E(T)

The Historic Preservation Division Operations Manual and National Register Program Guidelines (NPS-49), and "How to Complete National Register Forms," provide guidelines. State and Federal laws and regulations govern review procedures. Work loads, priorities, and assignment of duties and responsibilities not described in II, but necessary to fulfill the intent of I, will be assigned by the supervisor as necessary. The person in this position must be able to work independently in research in the field and with archaeological materials, deal with the public effectively and coordinate work with other professionals on the staff and with other government agencies. Percentages shown are approximate time spent which may vary considerably at the discretion of the supervisor.

IV QUALIFICATION REQUIREMENTS OF THE WORK

The minimum professional qualifications for the Archaeological Branch Chief, Historic Preservation Specialist IV, are:

A graduate degree in archaeology; plus

- [1] At least five years of Hawaiian or Pacific archaeological field experience as a principal investigator;
- [2] A demonstrated record of publication in the field.

Knowledge of: State and Federal legislation, rules and regulations governing the historic preservation program; principles and practices of historic preservation management.

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Ability to: Establish and maintain effective working relationships with other agencies, professional or lay groups, public officials, and the general public; supervise and direct the Statewide archaeological program; express ideas in a clear and concise manner and prepare clear and comprehensive reports.

Employee must be physically able to participate in rough terrain field work. A State of Hawaii driver's license is desirable.

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OVERVIEW

Audit of the State Historic Preservation Division of the Department of Land and Natural Resources

Report No. 02-20, December 2002

Summary

The Department of Land and Natural Resources' Historic Preservation Division is entrusted with protecting Hawaii's unique cultural and historic resources. During FY2001-02, the division spent nearly \$1.4 million to administer the department's historic preservation program. Division responsibilities include identifying, evaluating, registering, regulating, interpreting, acquiring, and managing historic or cultural properties. Historic properties include burial sites, traditional cultural places, architectural structures, and objects such as locomotives. Senate Concurrent Resolution No. 79, Senate Draft 1 of the 2002 Regular Session requested the Auditor to conduct a programmatic and financial audit of the division.

We assessed the effectiveness with which the State Historic Preservation Division is managed to achieve its mission. We also assessed whether the division manages its financial resources effectively.

The division's regulatory activities include review of development proposals to assess the effect of change on historic and cultural sites. The review process assists a determination of what preservation efforts, if any, will be required of developers. We found that untimely and inconsistent archaeological reviews compromised the division's ability to protect Hawaii's unique historic sites and artifacts. Projects were delayed for months and sometimes years. One developer lost \$200,000 in loan interest payments as a result of project delays. We also found that diverse standards are applied when reviewing the archaeological reports. Disparate review standards threaten the division's ability to protect historic sites.

Inconsistent standards also plague the division's burial program. In one case, a division employee gave differing explanations as to how he arrived at the decision to relocate human skeletal remains at an upscale development project. The explanations are especially troublesome since the staff person, who is also a church minister, accepted a \$1,000 check from the project developer. The funds were allegedly for the employee's church, but made out to the employee/minister personally. The employee's acceptance of the check creates a potential conflict of interest and raises ethical concerns.

The division also failed to ensure the safekeeping of historical artifacts in its custody. For example, the division did not have an inventory of architectural and art pieces collected from demolished or renovated sites, including Iolani Palace and the Hawaii Theater. Furthermore, the division's inventory of human skeletal remains is piecemeal and does not routinely provide geographical information required by the Native American Graves Protection and Repatriation Act. The inadequate inventory of human skeletal remains coupled with overcrowded storage conditions makes it difficult for the division to account for all remains and to ensure their timely re-interment.

The department chair and division administrator also failed to uphold their trust duties when they allowed division employees to misuse and exploit the division's limited resources. Staff appear to routinely misuse sick leave and were paid overtime that was

Exhibit C

either unjustified or not approved. Division employees came forward under Hawaii's Whistleblower Protection Act and alleged that staff were abusing sick leave, vacation leave, overtime, and tampering with government records. The department failed to adequately investigate the allegations. In fact, the department allowed the staff in question to retain custody of the department leave records despite allegations that they were tampering with these records.

The administrator also allowed staff to engage in outside employment during state time. For example, the archaeology branch chief routinely teaches courses at the University of Hawaii during his normal work hours without using any leave. As a result, the department paid the chief \$3,665.88 for time he actually spent teaching seven university courses. The university paid him \$29,484.19 for teaching the courses. Similarly, the Kauai archaeologist used state time to perform work for an outside employer.

The division also failed to adequately protect state property from fraud, waste, and theft. The division's master list of state property is unreliable and does not account for all items in its custody. The division was unable to account for all items we randomly selected from the master list. Moreover, inadequate controls failed to ensure that state vehicles and gasoline charge cards are limited to official business.

The division administrator's cavalier management style has put the State to risk of losing federal grants, which comprise 40 percent of the division's funding. The administrator caused the State to lose over \$65,000 when he failed to subgrant these federal funds to local certified governments as required by federal law. Furthermore, the division did not prioritize the adoption of administrative rules that would allow it to collect user fees authorized by the 1998 Legislature. The administrator estimated that \$60,000 to \$100,000 could have been collected annually had the fees been adopted.

Recommendations and Response

We recommended that the governor intervene to ensure that the management of the State Historic Preservation Division is improved. We also recommended that the department chair and division administrator take steps to improve the protection of the state's historic properties and to prevent the misuse, abuse and theft of the division's limited resources.

Although the department questioned the credibility of our audit report, it did not take exception to any of our audit recommendations. Rather, it agreed to generally implement these recommendations, but reported that the implementation of many of our "well intended recommendations either will require additional resources or will lead to deficiencies in other vital program areas."

The department's allegations that our report contains many factual errors and is culturally insensitive are without merit. The department's statements are an attempt to discredit our audit findings. In addition, we note that the department's response seeks to defend against our findings by offering new information. We will not address the department's newly introduced information because it was not evaluated during the audit process.

Marion M. Higa
State Auditor
State of Hawaii

Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813
(808) 587-0800
FAX (808) 587-0830

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
HISTORIC PRESERVATION DIVISION

601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
ROBERT MASUDA
DEPUTY DIRECTOR - LAND
DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND DOMESTIC LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAOLOAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Memorandum
June 1, 2006

EXHIBIT " 2 "

TO: File
FROM: Melanie Chinen, Administrator
SUBJECT: Meeting with David Brown, Archaeology Branch Chief on 6/1/06

Staff Present:

Melanie Chinen, Administrator
Timothy Lee, Administrative Assistant
David Brown, Archaeology Branch Chief

Purpose of Meeting:

This meeting was held to provide David Brown the opportunity to present the Administrator with an assessment of the work of the Archaeology Branch, and to allow the Administrator to share concerns based on her observations and complaints received from the private regulated firms, Hawaiian community, and his subordinate staff.

Summary of Discussion:

The group met at approximately 11 a.m. on June 1, 2006 in my office (M. Chinen). I began the meeting by asking Mr. Brown to explain where his staff were in addressing the backlog of reports. Mr. Brown responded that his team had made tremendous strides in addressing the backlog and that they were getting positive responses from the community. In particular, he referred to the work of archaeologist Chris Monahan and indicated that Monahan had eliminated the Oahu backlog. When asked what the total

Exhibit B

backlog count was statewide he responded that he did not have this information.

He also added that archaeologists Melissa Kirkendall (Maui) and Nancy McMahon (Kauai) were submitting substandard reviews which required his oversight and review. Mr. Brown indicated that they needed to order inventory survey plans. I then explained that I had questions regarding this issue and would like to more fully discuss this issue later in the conversation.

I then asked Mr. Brown to give me his assessment of his relationships with his team members, the private archaeology community and the Hawaiian community. Mr. Brown reported he had great relationships on all three fronts and stated he constantly received positive feedback from the community.

I explained that I had received complaints from all of his staff, the private archaeology community, and the Hawaiian community. I explained that the complaints stemmed from his changing policy single-handedly and inconsistently applying these changes. I brought up the issue of requiring archaeology inventory survey plans (ISPs). Mr. Brown indicated it is required by the rules. I asked is it a requirement or allowed? He could not answer and stated he would need to read the rules. I told Mr. Brown he could not make policy changes on his own and that I had constantly been reminding him of the need to discuss any proposed changes with me. I explained that his professional staff felt belittled by him and that their opinion did not matter. They had expressed to me that they felt they could not offer their opinions because he is perceived as doing things his way only. I explained that he could not be a leader if his team refused to follow.

I informed Mr. Brown that I noticed a pattern of letters coming in for my signature that suddenly requested inventory survey plans (ISPs), but I could not determine what his criteria was in ordering these plans. I asked him to explain what his criteria was. Mr. Brown explained that he wanted to protect burials so if burials had been found near the site he automatically required an ISP. I asked him whether this had been discussed with his staff which he answered in the negative. I explained that we have never required ISPs and his doing so is a policy change without proper authorization from me. I also indicated I signed these letters realizing that doing so may result in complaints from the regulated community. I told him I signed off as these letters as they had been written over three weeks ago without being processed by him. I signed off in the interest of time and alerted his staff to the possibility of incoming complaints regarding his change in direction. I told him that his staff were advised that should they receive a complaint they were to let the complainant know that I would reconsider our letter and revise our response if necessary. I told him his staff were already receiving complaints and that we were having to revise letters. I explained that his action created additional work for others, and caused the private

archaeology community to view us with suspicion. I explained that no major policy change would be made until the archaeology workgroup completed their monthly meetings and gave our office a report of their recommendations in streamlining the process and improving archaeology in Hawaii. To make changes without the workgroup's input discredits the purpose of this group and would result in our not being taken seriously. I reminded Mr. Brown that we are putting many financial and staff resources into the workgroup and that I am serious about this group. Mr. Brown said he understood and stated he never thought how his decision could affect others including those sitting on the workgroup. I also explained that his requirement for ISPs was not uniform making it look like we arbitrarily and capriciously setting policy based on whose work we are reviewing. I explained that this could result in personal liability as well as liability to division.

I then asked Mr. Brown to explain why he changed the folder set up on the T drive when I specifically told him no one was to make changes without my written approval. He admitted making the change and said he did so to improve the set up. I explained that was not his decision to make alone and that I had spent hours with the department's IT staff setting the folder system up. I told him that I was concerned that he continually disobeys my directives and that I questioned whether he did so thinking I would not find out or whether he did not care. I explained that effective today (6/1/06) he had "read only" access to the archaeology group files. I explained that I had no choice but to make this decision because he continually changes the system set up without proper authority. I asked him what he would do if he were in my seat and he responded "The same as you." I explained that my job was to protect our data and IT systems, and that if I felt they were being jeopardized in anyway I needed to take action to protect it. I then stated that my biggest concern with him was my inability to have trust and confidence in him given his pattern of repeated failure to carry out directives, his repeated practice of changing division policies, our database, and IT set-up without proper authorization. I explained we had met on this issue many times and that I do not see a change in his behavior.

I concluded our meeting by informing Mr. Brown that he needed to think about whether he is capable of and willing to carry out the duties of the Branch Chief. Mr. Brown said he wanted to be part of our team and help me make the needed changes to our division.

Agenda

Kawaihae Harbor/Area Concerns

9/28/05 Meeting
State Capitol, Rm. 309

- I. Opening Remarks Cindy Evans
- II. Agency Intro/Update Attending Agency Rep.
- III. Individual Exercise Cindy Evans
 - A. Mapping
 - B. Interactive – Flow Chart
 - 1. Time Line prospective
- IV. Sharing/Strategy Session All participants
 - A. Collaboration
 - B. Partnerships
 - C. Role of Congress
 - D. Role of State Government
 - E. Role of City/County Government
- V. Closing

Exhibit D

1. Introduction

1.1 Purpose

The State of Hawaii, Department of Land and Natural Resources (DLNR), is the owner of approximately 1.32 acres of land in Kawaihae 1st, South Kohala, Island of Hawaii, Tax Map Key: (3) 6-1-3: 15. The subject property is currently vacant and DLNR intends to submit a change of zone application to the Hawaii County Planning Department to allow for light industrial or mixed commercial/industrial uses. Once the property is rezoned, DLNR intends to offer a long-term lease or leases over the property for sale by public auction. The purpose of this Environmental Assessment is to comply with the requirements of Chapter 343, Hawaii Revised Statutes (HRS) which are triggered by the use of State land.

1.2 Identification of Proposing Agency

Mr. Peter Young is the Chairperson of the Board of Land and Natural Resources. The mailing address for the Department of Land and Natural Resources is P.O. Box 621, Honolulu, Hawaii 96809.

1.3 Identification of Approving Agency

In accordance with Chapter 343, HRS, the Department of Land and Natural Resources is the appropriate accepting authority of the Environmental Assessment.

1.4 Technical Description

Tax Map Key No. (3) 6-1-3: 15 is an undeveloped parcel consisting of approximately 1.32 acres of land situated within Kawaihae 1st, South Kohala, Island of Hawaii. The property is located approximately 1,200 feet northwest of the junction between the Kawaihae Road and the Kawaihae-Mahukona Road. (Please see the attached location map and tax plat map) The elevation of the subject property is approximately 10 to 35 feet above mean sea level with the gradient sloping in a southwest direction towards the ocean.

The subject property is currently vacant and zoned Open (O). DLNR will submit a change of zone application to the Hawaii County Planning Department to allow for light industrial or mixed commercial/industrial uses (i.e., MCX zoning district) which is consistent with the Industrial designation in the County General Plan. Upon approval of the change of zone request, DLNR intends to offer a long-term lease over the property by public auction.

The industrial-commercial mixed use district (MCX) is intended to "provide for areas of diversified businesses and employment opportunities by permitting a broad range of uses, without exposing non-industrial uses to unsafe and unhealthy environments. This district is intended to promote and maintain a viable mix of light industrial and commercial uses." (Section 25-5-130, Chapter 25, Zoning Code, Hawaii County Code) A complete list of uses permitted in the MCX district is provided in Appendix A.

RECEIVED
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MEMO

2005 OCT 21 17:45:59

TO: 9/28/05 Participants/Email Listing
FROM: Rep. Cindy Evans
DATE: October 19, 2005
SUBJECT: Minutes of the September 28, 2005 Kawaihae Meeting

Enclosed is a draft of the Minutes to the September 28, 2005 Kawaihae Meeting. Pursuant to my email letter sent out to all those on the email list, once you receive the draft copy, you have a week to review and modify any of your remarks for accuracy.

Should you have any questions, please feel free to contact my office.

Tommie Sukanuma
Office Manager
Representative Cindy Evans
State Capitol, Rm. 311
sukanuma@capitol.hawaii.gov
Tel: (808)586-8510

NOTES FROM MEETING ON KAWAIHAE HARBOR, WEST HAWAII

September 28, 2005, 2:00 pm – 4:45 pm

State Capitol Building, Room 309

Representative Cindy Evans convened the meeting at 2 pm.

She explained that today's issue is the current status of Kawaihae Harbor region and the future changes that will occur, and the impact it may cause to the area due to harbor improvements, traffic congestion, and housing development.

She further explained that as she became more familiar with the area, she gathered different documents such as the 2020 Master Plan, the Storm Surge Plan, and the South Small Boat Harbor Plan, which details the changes to Kawaihae Harbor to accommodate different uses, such as the Superferry and the Stryker Brigade. While many state agencies are active in their respective jurisdictional areas, there are no cumulative timelines, priority lists, or plans to ensure that institutional memory is not lost over time, as the changes could span many years.

She clarified that the purpose of today's meeting of all the stakeholders was to share information and to facilitate a collaborative and coordinated effort in the contemplated changes to the Kawaihae Harbor region, thereby avoiding duplicative and conflicting actions.

Finally, Representative Evans asked each of the attendees to identify their respective offices and activities in connection with the Kawaihae Harbor region.

DEAN A. NAKANO, Acting Deputy Director (808) 587-0214
Division of Water Resources Management, Department of Land and Natural Resources (DLNR)

The Water Commission did not have any specific plans for Kawaihae Harbor at this time. This agency has broader oversight to ensure the adequacy, efficiency, and quality protection of groundwater throughout the state. The state plan for water use is set forth in the 2003 State Water Projects Plan. However, all development projects must pass certain water requirements. Therefore, coordination between the agencies is required in that regard. The water requirements cover eight components, including water protection (Department of Health [DOH]), water quality (DOH), agricultural use (Department of Agriculture [DOA]), water projects (DLNR). The agency also coordinates water planning with each of the counties.

PAT MCMILLAN, Attending on behalf of Captain Manson Brown
Department of Homeland Security

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The Coast Guard does not have any particular projects for Kawaihae Harbor. It may have a role in determining the boundaries of a new security zone when the Superferry service is commenced. As part of the Superferry planning, it may receive the plan from the harbor operator for Coast Guard review and approval. The Coast Guard is anticipating a reduced security zone for Kawaihae Harbor because of the concentrated concurrent uses of the facilities around the Superferry docking area. It may have to change security measures to adjust to the reduced security zone.

BEN HENDERSON, Deputy (808) 586-3802
Office of the Chairman, Department of Hawaiian Home Lands (DHHL)

The Mauka Master Plan from the early 1990's calls for 200 new homesteads and industrial subdivisions in the mauka portion of the subject area. A key element of this plan is to realign the Akoni Pule Highway and move the Old Government Road to above the Harbor. DHHL is conducting discussions in relation to the Bypass Road, and concentrating on the Waimea area instead of the Kawaihae area. Because there is a problem with obtaining water, they are moving slowly. For example, it was discovered that a well recently dug up by DLNR only provided brackish water. It may need to find another source of water, such as Kohala Ranch, or find its own source of water. DHHL is also interested in protecting the archaeological resources of the area. As there are burial sites all around the area, care needs to be taken in developing the area.

AARON SETOGAWA, Planning Consultant for Department of Transportation (DOT)
Edward K. Noda & Associates, Inc.

The consultants are currently working on a project to move the Kawaihae Bypass Road to go around Waimea and Kawaihae to reduce the traffic congestion on the Bypass Road. To date, they have met with the Waimea Community Association and the Kawaihae Village Association, county agencies such as the Police and Fire Departments, and the National Park Service. They are planning to complete the alternatives analysis, which will set forth different alternative routes the new road could take, by the end of 2005. They expect to complete the state Environmental Impact Statement (EIS) by the end of 2006. On the federal level, an "environmental notice," not an EIS will be issued. The new road is expected to be a four lane highway. The exact location where the new road will be placed is not known yet, as the alternatives analysis and EIS need to be completed and analyzed first.

When informed by Jo Tanimoto from the Office of Hawaiian Affairs (OHA) that she is a resident of Kawaihae but did not receive any notices about the Kawaihae Village Association meeting, Setogawa acknowledged that signs were posted in the area, but no notice was placed in the newspaper. He reassured her that an OHA representative was present at the meeting, and that notices will be placed in the newspapers in the future. Lance Foster from OHA then noted that it was important to get involved from the beginning, regardless of whether there are future meetings, because having input from the starting stages will eliminate corrections and plan changes in the late stages of

planning, and help make the process more efficient and comprehensive the first time around.

LES GOYA, Project Manager
Queen Emma Foundation

The Queen Emma Foundation owns roughly 10,000 acres of ahupuaa land adjacent to the Hawaiian Home Lands location. Because the Foundation's current focus is on Oahu lands, in particular to support the medical center, there are no current plans to develop the property. However, it is looking into conservation efforts of the mauka areas, such as reforestation. It is collaborating with some community groups, including the Kohala Mountain Watershed Partnership. As for the makai area, there has been little planning to date.

When asked by Jo Tanimoto of OHA what the Foundation will do if the highway is routed to go through their land, Goya replied that the Foundation will get involved when such plans move forward.

DAVID L. BROWN II, Branch Chief (808) 692-8026
Archaeological Branch, State Historic Preservation Division, DLNR

While no harbor plans, road plans, signage, nor parking plans for the Superferry have been reviewed by the Branch so far, the State Historic Preservation Division will be actively involved with determining preservation measures for archaeological sites in the development area such as heiaus. The area should be resurveyed because the current report is over ten years old, and many archaeological discoveries have been made in the past ten years. Further, Brown noted his desire for involvement by DHHL and the various Hawaiian associations in the area.

LT. COL. KIMBERLY RAPACZ, U.S. Army
Pohakuloa Training Area (PTA)

PTA provides logistical support for training units that were transferred from the Kaneohe Training Area to PTA. They do not expect the increased infrastructure resulting from the new developments around the Kawaihae area to affect their operations. However, while there is a private road for convoys, convoy routing is one issue that should be discussed. PTA has a seven-acre staging area for equipment from logistical support vehicles, so PTA should not be burdening other uses.

When questioned by Representative Evans about the need for a buffer around the fence that separates PTA from the recreational area of the Harbor, Lt. Col. Rapacz confirmed that a five-foot fence is necessary around the fence for security reasons. She noted that the property upon which the surf park is located is owned by a corporation, which has issued a temporary permit to use the area for recreational use. If the surf park needs to be maintained due to development, the corporation would be responsible for the maintenance.

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RICHARD RICE, Administrator (808) 587-1966
Division of Boating and Ocean Recreation, DLNR

The Division just received funding in the amount of \$2.7 million from the Legislature. The first stage of the project will be to construct a boat ramp, comfort station, and floating dock facility. The dock facility should go from the YMCA camp to two-thirds way where the natural ramp starts. They hope to make the facilities sufficient to accommodate a minimum of 40 vessels, with room to expand.

When asked by Jo Tanimoto about plans to fix the North Basin, Rice replied that if anything, the shallow area in the north basin should be maintained by the canoe club, as the north has been all but abandoned by boats. At this point in time, the focus is on developing the South Basin where 23 boats currently reside, rather than the north.

LARRY YAMAMOTO, Acting State Conservationist (808) 541-2600
Natural Resources Conservation Service, U.S. Department of Agriculture (USDA)

There are no particular active plans at the moment. Because the watershed feeds into the Kawaihae Harbor, USDA has ongoing programs to prevent erosion, floods, and to maintain agricultural water. They are planning restoration for the upper stretches.

When asked by Representative Evans if the USDA could be a funding source, Yamamoto replied that USDA is a government agency that helps solve problems, so if there is a complaint, the USDA may provide funding. However, USDA is only responsible for implementing, and after implementation, someone else must be responsible for the maintenance.

Representative Evans also inquired about the silt over Shark Heiau caused by water runoff, which upset the community, and whether USDA was going to do anything to prevent silt when the highway is moved. Yamamoto replied that USDA offers technical assistance, and can plant vegetation once the highway is moved, to prevent runoff.

LLOYD NEKOBA (808) 541-2570
Office of U.S. Representative Neil Abercrombie

The Office deferred to the Office of Representative Ed Case, who is the area Representative. This Office was only concerned with the armed forces aspect of the area.

MIKE KITAMURA, State Director (808) 935-1114
Office of U.S. Senator Daniel K. Akaka

There are no specific projects at this time. The Office attended just to take in information and relay it to the Senator. There is potential for funding, as add-ons may be made onto the appropriation bills.

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LANCE FOSTER, Director, Native Rights, Preservation, Culture & Land (808) 594-1904
Beneficiary Advocacy, OHA

OHA mainly reviews federal, state, and county planning documents. Traditional rights cannot be practiced without the appropriate resources. OHA will also look at social impact statements as well.

LINDA DELA CRUZ, Trustee representing Island of Hawaii (808) 594-1855
OHA

Many changes are being brought about in the Kawaihae Harbor area, but people are not considering how to coordinate the infrastructure with the changes. For example, the road to get people in and out of the Harbor, water for the community on the hill, where the fishermen will fish when the Superferry, Stryker Brigade, and woodchip vessels all start coming into the Harbor. Development must be done reasonably. An EIS, not an Environmental Assessment (EA) should be done before developing the area.

JO TANIMOTO
OHA

Jo Tanimoto resides in Kawaihae. She was a lessee in Kawaihae before it even had infrastructure. She stated that the proposed changes to the Harbor will impact the Kawaihae community, in terms of traffic at the intersection, helicopters, fires, erosion, water, emergency service accessibility, population, etc. However, the community is not being invited to join in the planning process. The changes will not bring improvement to the Kawaihae community, only impact it. Therefore, all of the agencies should involve the Kawaihae community more in the planning process.

JEFF OVERTON, AICP, Chief Environmental Planner (808) 523-5866
Group 70 International, Inc. (Group 70)

1. The projects started in 2003 to clear the nearshore silt. The project is now on hold pending additional funding. This project was not planned to be a holistic watershed recovery plan for the Waimea Water Conservation District. A Cultural Impact Assessment must be done on both the state and federal levels. A National Historic Preservation Act of 1966 (NHPA) Section 106 Consultation must also be completed, and was partially done some years ago. An EA has been completed.
2. Group 70 is preparing an EIS for the U.S. Army Corps of Engineers for navigational improvements to the Kawaihae Deep Draft Harbor. Agencies that are involved in this study are the Harbors Division of the State DOT and the U.S. Army Corps of Engineers. The cost is being split 50-50. The modifications are needed to accommodate the vessel that will be used to transport the woodchips, and for the army to use the Logistical Support Vehicles location. The Small Boat

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Harbor is not part of the project, but because it will be impacted, it cannot be ignored. In 2003, an EIS Preparation Notice was completed. Also in 2003, a public scoping meeting was held in Waimea. About 25 people attended the meeting. However, the proposed project has changed and there is no longer a need to dredge the Harbor because the woodchip vessel was changed.

3. Finally, Group 70 is looking at alternatives to change the existing breakwater to improve the Harbor to protect it from wave impacts. There are several alternatives being discussed as to the placement of the new breakwater. It is difficult to determine where to place the breakwater, because if the entrance is too small, the ships will not be able to enter the Harbor because of the wave energy. Group 70 must conduct a cost-benefit analysis for the Superferry also, so the Harbor can be used as many days in a year as possible. However, even with the improvement, the wave impacts will not be eliminated completely. The benefit will be an additional 12 to 20 days the Harbor will be in use, per year. Depending on the alternative chosen, some structures may make the wave impacts worse.

NANI SHIMABUKU, Assistant Project Manager (808) 438-0881
U.S. Army Corps of Engineer Division, Department of the Army, Pacific

Funds in the amount of \$225,000 have been requested in the Senate Bill to share with DOT to continue with the feasibility study of extending the breakwater to reduce wave surges. Whether they will get the funds will depend on the projections for the Superferry. They are waiting for the operational agreement between the State of Hawaii and the Superferry. The loan guarantee was pushed back. Once they get the loan guarantee signed, they can obtain private financing and get a DOT contract to construct ramps. They are also awaiting Senate approval of the \$400,000 appropriation for Pelekane Bay. They will find out early next year. There have been no funds for the last couple of years.

Lt. Col. Rapacz added that as for the Stryker Brigade, there is an Army project to acquire roads and easements of about 23,000 acres between Kawaihae and PTA (but closer to PTA), located on Parker Ranch properties, because the Army is finding it difficult to subdivide the lands without those parcels. They are meeting with landowners and users to discuss their concerns, such as fire, dust, erosion, culture, natural resources, and recreational use access. However, because this is not in the five-year budget, nothing will happen within the next five years, and there are no plans to change Army use of Kawaihae Harbor.

Representative Evans inquired about the North breakwater. Shimabuku replied that the Corps did not build that breakwater, and is outside of the scope of the project.

LINDA CHINN, Administrator (808) 586-3823
Land Division, DHHL

No major development will be planned for Hawaiian Home Lands until the water source problem is resolved.

BARRY FUKUNAGA, Deputy Director (808) 587-3651
Department of Transportation (DOT)

As for the Superferry, the loan is expected to close in the middle of October. The timing of the loan will affect the shipbuilder. Everything is predicated on the federal loan guarantee, after which time the equity partners will come in with the money. The State will sign a three-party agreement. The legal challenge to the loan guarantee is the EIS challenge under the National Environmental Policy Act. Judge Gillmor is to rule on the case this week. The Kawaihae portion of the Superferry route will be forestalled until September or October 2008. The system itself is scheduled to start spring 2007, between Honolulu (Pier 1) and Nawiliili. There may not be any service during the winter months, but is expected to be a popular means of transportation during the summer. The Honolulu-Kawaihae leg, when it starts, should run every other day.

As for the woodchips, the chips are to be milled in the north, and will be stored at Kawaihae Harbor for storage until they are ready to ship. Every five weeks, a vessel will transport the chips from Kawaihae Harbor. The chips will be transported from land onto the vessel using a conveyer belt that deposits the chips into the storage bin of the vessel. This loading process will take about five days. The length of the loading process creates a conflict with the docking of other ships that need to use the Harbor, such as the Superferry. The woodchip vessel may have to stop loading, and temporarily move out of the way to allow the passengers on the Superferry to load/unload. In that event, the woodchip vessel may take even longer to load. Further, the area by the surf park will need more security. It must be cleared of recreational use and of civilian presence.

Finally, there are problems with traffic from the other side of the island to get to this Harbor. The problem with the planned Bypass Road is that the completion of the Bypass Road is not expected before the expanded use of the Harbor will begin.

Planning needs more coordination. DOT has not seen any plans, but has only heard of intentions.

Lance Foster of OHA commented that human activity always has an impact. The fishermen, Superferry, and bottled water industry will need more roads, service industry, and more water for consumption. The responsible approach is to look at the plans in a regional sense, not locally. It is selfish not to think of the future generations.

When asked by Dela Cruz of OHA whether Hilo Harbor could be used until the infrastructure to accommodate the Superferry at Kawaihae Harbor was ready, Fukunaga replied that Hilo Harbor is not as desired as Kawaihae Harbor because you must drive another five hours from Hilo Harbor to get to West Hawaii. Representative Evans also noted that Hilo Harbor is reaching its capacity. The proposed changes to Kawaihae Harbor should be planned so it will be big enough to grow into, with the petrochemicals,

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gasoline storage, and staging area for the cars boarding the Superferry to be taken into consideration. Fukunaga also commented that this is the time for the Island of Hawaii to think about what their policy is going to be. For example, Hilo loves cruise ships, and welcomes them, resulting in congestion in the Harbor. Maui is taking a stricter stance and is turning away cruise ships.

Fukunaga also raised the issue of wind farms. Foster commented that there are many outside interests out to make money in Hawaii, but that we should not bend over backwards trying to accommodate all of them.

Fukunaga also commented that when putting together a Harbor Master Plan, the view must be broadened to look at gas storage and jet air fuel storage. Since there is no more room around the Harbor, they are already having gas storage go to the Hawaiian Home Lands. However, the gas would have to be transported by truck from the Home Lands to the Harbor when needed for use. Piecemeal plans will not work.

As for the Kawaihae Bypass Road, DOT is developing alternatives at this time. The alternatives must go through the public hearing process. DOT is also proceeding with the Waimea Bypass Road. They have the EIS, however, there is a problem with two Hawaiian Home Lands. It will take another four to five years. Queen Kaahumanu Highway is to be expanded into a four-lane highway from Henry Street (Palani) to Harbor Hoonokahau at the Kona Airport. The intersection at Queen Kaahumanu and Kawaihae Road needs a light and a dedicated right turn lane. However, because they must be justified legally with a traffic warrant study, it will take a while to get input from all the agencies. DOT will put them in when the study is done.

Representative Evans inquired about the military's needs to realign their road if they have to cross over the new highway, especially with the increasing convoys and shipments of bottled water. Lt. Col. Rapacz of PTA responded that the military will decide when the time comes, but she will also ask her transformation contact. Shimabuku of the Army Corps added that the convoys have a separate road, but some parts overlap with the public road.

Representative Evans raised the concern of some that Heiau Park will be reduced by the alignment road. Kitamura of Senator Akaka's Office added that the John Young house site is more important than the beach side of the park. However, Foster asserted that the significance of the park is not just in the house structure, but as a whole, including the trails around the house.

ALVIN TAKESHITA, Engineering Program Manager (808) 692-7670
Traffic Branch, Highways Division, DOT

The Branch is proceeding with a two-prong plan:

1. As a long range plan, the Branch is planning the bypass road; and

2. To fix spot problems, they are going to make operational improvements such as the Queen Kaahumanu Road-Kawaihae Road intersection.

LENORE NAKAMA, Staff member
Commission on Water Resource Management, DLNR

The Commission is considering long-range regional water use issues.

LARRY KONDO
Civil Defense

Civil Defense deals with the civil defense aspect of the area. If there is an evacuation of the area, the entire area will be gridlocked. Civil Defense is currently awaiting tsunami impact models. They are also studying the breakwater acceleration point. They will coordinate with others and share our information. They are also considering how to secure stored items. A tsunami would have impacts over an 18- to 22-foot high and half-mile in area. They also need to think about how to minimize damage on the walk area. There are a number of gap areas on the Big Island. When the EIS is reviewed, they should think about these natural hazard issues. Civil Defense is also working on a project in Puako'o to increase shelters, because there is nothing in the Kawaihae area, not even community centers, for evacuation purposes.

There is a Memorandum of Understanding (MOU) between the military and the State for emergency response, however, the Governor must declare a "state of emergency" for the MOU to be operational. There are also individual agreements between the counties and the military.

Civil Defense is also encouraging DLNR to develop an evacuation plan in the event of a natural disaster.

AARON LEONG, Legislative Assistant (808) 541-2877
Office of U.S. Senator Daniel K. Inouye

The deadline for requests for earmarks is in January. Although DOT is planning a lot of projects, they must prioritize. The Office is taking a wait-and-see stance right now, because if there is no funding, they cannot do anything. Fukunaga mentioned that the cost of energy must be considered, and that the agencies should work together so that the cost of energy is not wasted by inefficiency. Fukunaga also commented that the Big Island has an advantage in terms of emergency planning, because there are higher lands. However, their disadvantage is the congestion.

When asked by Representative Evans what their priority is in terms of funding, Leong replied that it would be relative to other priorities, since it must look in terms of Hawaii as a whole, not just the Big Island. If there are urgent needs to be met in Lanai, for example, then West Hawaii will no longer be a priority.

TO: Mr. Charles Bayne
FAX: 808 587-0888

EXHIBIT "9"

FROM: Dr. Melissa Kirkendall
FAX: 808 243-5838

Mr. Bayne,

I have been Maui Lead Archaeologist since March of 2006. During that time I have worked with many different people, and have experienced two different Branch Chiefs within our division. I have always enjoyed my position, and have an easy time getting along with people of differing management styles. When Mr. Brown came on, I was hopeful that our division would have someone eager to learn, knowing that he was stepping into a position that would necessitate a wide variety of communication skills; dealing with the staff, the public, developers, etc. I wish to attest to his "management style" in direct interactions with me. In general, Mr. Brown behaved unprofessionally as a manager, denigrating staff, reducing communication between staff, and producing a demoralizing work environment. The following provides specifics.

First, Mr. Brown at no time engaged the staff to discuss what we do or how we do it on a daily, weekly, or monthly basis. He immediately initiated changes to our procedures that had the effect of creating bottlenecks in our direct ability to do our jobs. As an example, he spent much time developing "templates" which we were required to use on our correspondence. The standardization of such is not the issue. What Mr. Brown did was continually revise the template, so that our correspondence was delayed as we "corrected" what was done on a previous template. I currently have four of the six template versions, each with very minor changes. If we did not follow the new template (all of which were created within a two to three month time) we were reprimanded.

My attempts to assist him by providing insight that I have acquired over the years was met with overt resistance. In general, because we had relatively inexperienced staff, I would send detailed explanations for certain actions to all of my colleagues in the archaeology branch. In my experience, if one person has a question, it is possible that others may have the same question, and we can only benefit from the communication. I was told by Mr. Brown, in explicit terms, that I was to send emails only to him. I was not to cc: anyone else in the division. Other employees also resented this, as it facilitated a closure in the lines of communication.

Mr. Brown's emails were generally rude. Specific comments included ungrounded accusations and threats. The following quote was from an email sent shortly after he was hired, before we had ever spoken or met "*You have embarrassed me and may have caused irreversible harm to the fragile trust we have with the Hawaiian community. I will not tolerate insubordination [sic], disrespectful behavior, nor [sic] incompetence. Need I remind you that you are a Ph.D. and professional?*" This was in response to a discussion that he did not witness, and was based on hear say. When I questioned the Hawaiian community, they assured me that his attack was groundless. In another case, he accused me (in an email) of withholding information on an issue about which I had no knowledge, rather than calling, discussing the situation, and finding out exactly what I knew about the case. "*What is the scoop about that adze? When were you*"

Exhibit E

planning on informing me about it? I am just now finding out that it's in your possession.... What gives and why haven't you told me about this, Melissa?" I did not have the object in question, had heard nothing about it, and deeply resented his implication. The bottom line, is that Mr. Brown was inclined to accuse, and then find out the truth. Unfortunately no apologies were forthcoming, and no remorse was evident. The tone all his email was always perceived as accusatory, rude, and unnecessary.

I began working approved overtime in January of 2006 in an effort to assist our division in reducing backlog created by vacant positions. In February, after turning in an overtime form, Mr. Brown accused me of dishonesty. I had indicated on my overtime form precisely what was under review, and his words were *"it couldn't have taken you that long to review it"* and he denied my overtime request. The review involved following up on old records, older reports, prior to completing the review. His accusation was uncalled for. As a professional, with integrity, I resented any implication on his part that I would even *consider* being less than honest on official state paperwork. I also resented his questioning of my ethical integrity.

My contacts with Mr. Brown were limited to formalities after that. He required that I call him every single day, email him with precisely what was done, and keep a detailed list. I have always kept detailed records of my work performed phone calls received/returned, but the requirement to call him daily was over the top, demanding, and unprofessional of him as a "manager", in addition to being unproductive.

As much as I love my job, and intend to stay in it indefinitely, it was at that point that I actively began entertaining notions of leaving my position. This would have been with much sadness, as I have built many bridges with the public, County of Maui employees, as well as my DLNR counterparts. I was relieved when it was suggested "through the grapevine" that Mr. Brown's contract would not be renewed. Since he has left, my own productivity has gone up, my stress level has declined, and I again enjoy my job to the extent that I always have. I understand others in the division feel the same. I am committed to the State Historic Preservation Division.

I appreciate the opportunity to voice these concerns. Hopefully my comments have been specific enough to demonstrate the abusive management style of Mr. Brown. The saving grace for me was that I was located on a separate island, limiting face to face contact.

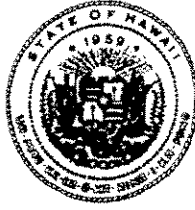
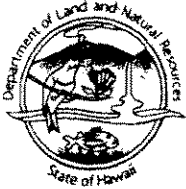
Thank you for your time.

Sincerely,



Melissa A. Kirkendall, Ph.D.
Lead Archaeologist, Maui, Lana'i and Kaho'olawe
State Historic Preservation Division

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION
601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
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COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

May 15, 2006

**SUBJECT Kaloko Heights-Approval of a Grading/Grubbing Permit against HARs
Kohanaiki and Kaloko Ahupua'a, North Kona District, Island of Hawai'i
TMK: (3) 7-3-009:032**

I, David Lawrence Brown, was verbally directed today (May 15, 2006 at approx. 3:00) by my Administrator, Melanie Chinen, against my professional advice, better judgment, and the established HARs, to author a letter which will allow Stanford Carr Development, LLC to begin grubbing/grading activities at Kaloko Heights, LLC, Hawaii, prior to SHPD receipt of the finalized and approved Data Recovery Plan, Preservation Plan, and Burial Treatment Plan for the project. Likewise, the Data Recovery work has not been completed.

Ms. Chinen yelled at me that under my direction, the Archaeology Branch has been insubordinate overall, especially in our following her directives, and in regards to the Kaloko Heights project. That we have failed to expedite the review of the plans, that we should have already signed the grubbing/grading permit and that we are intentionally holding up the project.

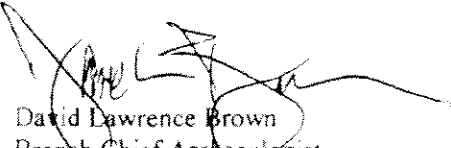
These statements are false. Under my direction, my staff has made every effort to follow the HARs and to ensure that appropriate data recovery measures, preservation measures, and burial treatments are finalized and approved, and that the data recovery is completed, before the implementation of any ground disturbing activities associated with the project. The contracting agency archaeologist (Tom Wolforth of SCS, Inc.) informs me of his inability to expedite our requests for revisions. He is currently working on the revisions as outlined in our correspondence letters (0602MM02 and 0602MM03).

The completed permit stipulations letter has been emailed to Ms. Chinen for review and is pending signature.

The grading/grubbing permit is awaiting signature at our Hawaii Section office in Kailua-Kona.

The grubbing/grading permit should not be approved by SHPD, nor should any ground disturbing construction activities begin at Kaloko Heights, until the finalized plans (data recovery, preservation, and burial treatment) have gone through the established Hawaii Administrative Rules review and approval process and the data recovery has been completed.

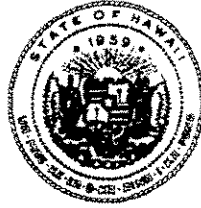
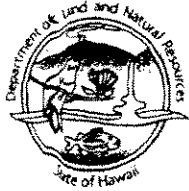
I attest that these statements are true and correct.


David Lawrence Brown
Branch Chief Archaeologist
State Historic Preservation Division

DB

Exhibit F

LINDA LINGLE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE HISTORIC PRESERVATION DIVISION
601 KAMOKILA BOULEVARD, ROOM 555
KAPOLEI, HAWAII 96707

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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

May 17, 2006

Paul Kay
73-5574 Maiiau Street #11B
Kailua-Kona, Hawai'i 96740

LOG NO: 2006.1555
DOC NO: 0605DB01
Archaeology

Dear Mr. Kay:

**SUBJECT: Chapter 6E-42 Historic Preservation Review –
Grubbing and/or Grading Permit for Kaloko Heights, LLC
Kaloko and Kohanaiki Ahupua'a, North Kona District, Island of Hawai'i
TMK: (3) 7-3-009:032**

We are in receipt of your request for approval of a grubbing and/or grading permit for Kaloko Heights.

The Data Recovery Plan addresses data recovery research questions and proposed methodologies for investigations at twenty-six (26) archaeological sites, while the Preservation Plan proposes interim and long-term preservation measures for eleven (11) non-burial sites, one *heiau* with a burial, and six burial sites. A separate Burial Treatment Plan additionally addresses preservation proposals for the one *heiau* with a burial, and the six burial sites.

Twenty-six sites are recommended for data recovery (10690, 10693, 10694, 10700, 10705, 10706, 10721, 10729, 10730, 10732, 10734, 10735, 10737, 10742, 10743, 10751, 10753, 10755, 10756, 10757, 10758, 10763, 10764, 10767, 10768, and 10778). These sites focus on the Kohanaiki Homesteads and several pre-Contact permanent habitation sites.

The preservation sites are: three of the Kohanaiki Homesteads (10741, 10745, and 10749), four water source caves (10692, 10718, 10725, and 10746), two permanent habitation sites (10691 and 10695), an *ahupua'a* boundary wall (10709), and two *heiau* (10702 and 10736).

There are seven sites with burials in the project area. All of the burials will be preserved in place (10736, 10701, 10717, 10722, 10728, 10740, and 10754).

Since the finalized plans have not been approved by SHPD and data recovery has not been completed, the implementation of any grubbing and/or grading permit will be contingent on the strict adherence to the following stipulations, with the direct supervision of a qualified archaeologist. Kaloko Heights Associates, LLC will be held responsible for the implementation of and adherence to these stipulations:

Mr. Kay
Page 2

All Interim Buffer Zones will be established prior to the onset of any ground disturbing activities. Absolutely no ground disturbing activities will take place within the established Interim Buffer Zones. Removal of vegetation within established Interim Buffer Zones will not take place without SHPD approval of an Archaeological Monitoring Plan that specifically covers the methodology for vegetation removal within these sensitive zones.

- 1) Upon the completion of the establishment of all Interim Buffer Zones, and prior to the onset of any ground disturbing activities, SHPD Lead Hawaii Archaeologist, Dr. Julie Taomia, will be notified to conduct an on-site inspection with the qualified archaeologist to confirm the placement and adequacy of the Interim Buffer Zones. The qualified archaeologist will conduct a pre-construction briefing of the hired construction firm, and an archaeological monitor will be on-site during ground altering activities.
- 2) **Data Recovery Sites.** All data recovery sites will be surrounded with orange construction fencing that will be a minimum of 20 feet from the site boundary or exterior feature(s) edge. These boundaries and distances will be delineated and established by the qualified archaeologist. The orange fencing will remain in place until data recovery tasks are completed.
- 3) **Preservation Sites.** All preservation sites, except where noted below, will be surrounded with orange construction fencing that will be a minimum of 20 feet from the outer edge of the proposed preservation easement as depicted in the Revised Preservation Plan (May 2006, SCS 541-Preservation-2). The orange fencing will remain in place until Phase II preservation tasks are completed.

Exceptions to the 20 feet interim buffer are at site 10709 and the western (and only the western) walls of the Kohanaiki Homestead Park. In these two instances; the interim buffer coincides with the preservation easement boundary as per the Revised Preservation Plan (May 2006, SCS 541-Preservation-2).

- 4) **Burial Sites.** All burial sites will be surrounded with orange construction fencing that will be a minimum of 50 feet from the outer perimeter of the burial feature. For instances where burials are in stone features on ground feature, that 50 feet will be measured from the outer edge of the stone feature. For those burials that are within caves, that 50 feet will be measured from the outer edge of the cultural perimeter of the cave as it is projected to the ground surface.

Interim protective measures will be maintained until the Burial Treatment Plan is appropriately ratified, and SHPD has provided written notification that the treatments have been appropriately implemented.

We anticipate your full cooperation and strict adherence to these stipulations. If you have any questions or concerns, please contact the State Historic Preservation Division at (808) 692-8015.

Aloha,

Melanie Chinen, Administrator
State Historic Preservation Division

DB:mc

cc: Tom Wolforth, SCS, Inc., 1564 Leilehua St., Hilo, HI 96720
Dr. Julie Taomia