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January 5, 1984

MEMORANDUM

TO: Susumu Ono, Chairman
Board of Land and Natural Resources

FROM: William M. Tam, Deputy Attorney General

SUBJECT: Act 296 (Geothermal) Section 3(f), SLH 1983: Effect of "grandfather" provision on existing leases, permits and operations.

This is in response to your request of July 29, 1983, for an opinion regarding the effect of the "grandfathering" clause in Section 3(f) of Act 296, SLH 1983, which excludes geothermal exploration development and production taking place on the effective date of the Act from the Act's assessment requirements. In particular, you requested that the Attorney General's Office address five questions raised by Thermal Power Company in its letter of July 19, 1983.

Act 296, SLH 1983, (signed into law by the Governor on June 14, 1983) sets out both procedural and substantive standards for the location and siting of geothermal exploration and development in Hawaii. Subsection 3(f) of the Act provided:

> This Act shall not apply to any active exploration, development, or production of electrical energy from geothermal sources taking place on the effective date of the Act, provided that an expansion of such activities shall be carried out in compliance with its provisions.

FACTUAL BACKGROUND

We understand the facts to be as follows:

The Board of Land and Natural Resources has issued four Geothermal Mining Leases to:

		Acres	Effective Date
S-4602	Research Corporation of the University of Hawaii	4.1	June 19, 1979 10 yr primary 35 yr maximum
R-1	Bishop Estate Subleased to PGV	3846.7	March 1, 1980 10 yr primary 65 yr maximum
R-2	Kapoho Land and Development Co. Subleased to PGV	816.0	March 1, 1981 10 yr pirmary 65 yr maximum
R-3	Barnwell Geothermal Corporation	769.1	Sept. 1, 1981 10 yr primary 65 yr maximum

The Geothermal Mining Leases R-1 to R-3 allow the Lessees to "develop geothermal resources and geothermal by-products in and under" a defined geographical area. The leases also provide that "[n]o generating plants, buildings, structures, production equipment, metering systems, pipelines or roads for the production, sale or use of geothermal resources . . . shall be installed or constructed except on prior Lessor's approval or any other governmental agency having jurisdiction over such installation or construction." (See, for example, Lease R-1, paragraph 13w, p. 25). In addition, the Board approved but has not yet executed a new lease (R-4) to Puna Geothermal Venture at its August 27, 1982, meeting.

R-4	Puna Geothermal Venture	279.4 acres	Sept. 1, 1982 10 yr primary 65 yr maximum

Geothermal activity on agricultural or rural zoned land also require a Special Use Permit from the County and in the case of applications for more than 15 acres, the further approval of the State Land Use Commission. The following Special Use Permits have been issued by the County of Hawaii:

		Acres	Effective Date	Expires
SP 77-265 LUC 364	GEDCO: Opihikao TMK 1-3-01: 24 & 25	120	7/14/77	12/31/87
SP 78-307 LUC 392	HGP-A	4.1	2/7/79	productic ongoing
SP 79-333 LUC 411	GEDCO: Puuwaawaa	143	6/1/79	7/82
SP 80-347 LUC 460	Kapoho: Pohoiki TMK 1-4-02: 10	180	2/13/81	12/31/87
SP 468	Thermal Power: Kapoho 1 and 2 (2 wells) TMK 1-4-01: 2 & 19		10/15/80	10/15/86
SP 471	Barnwell: Lanipuna (6 wells) TMK 1-3-8: 6, 19, 23-32 1-3-9		12/16/80	12/31/87

Activities on conservation lands also require a conservation district use permit (CDUP). The Board granted a Conservation District Use Permit to Campbell Estate on February 25, 1983, to explore for geothermal resources within a restricted area of the Conservation District at Kahaualea, Puna, subject to a series of conditions. Campbell Estate has not applied for a mining lease or drilling permit to date.

Pursuant to existing Special Use Permits, the Board has issued the following drilling permits:

a. FNB No. 2 to Puuwaawaa Stream Co., (9/26/78: now expired).

b. HGP-A to Research Corporation, University of Hawaii (experimental production: completed; in production).

c. Ashida No. 1 to Geothermal Exploration & Dev. Corp. (1/10/80: now expired).

d. Lanipuna No. 1 to Barnwell Geothermal Corp. (1/20/81: still active).

e. Daiichi No. 1 to Geothermal Exploration & Dev. Corp. (3/2/81: now expired).

f. Lanipuna No. 2 to Barnwell Geothermal Corp. (3/4/81: now expired).

g. Lanipuna No. 3 to Barnwell Geothermal Corp. (3/4/81: now expired).

h. Kapoho State No. 1 to Puna Geothermal Venture (3/19/81: active).

i. Kapoho State No. 2 to Puna Geothermal Venture (1/8/82: active).

j. Lanipuna No. 6 to Barnwell Geothermal Corp (11/ /83: active).

Finally, the only party which has been given the legal authority by both the County and the State to develop and produce electrical energy is the RCUH project at the HGP-A site which currently produces about 3.5 MWe. No other entity has received both a lease and a land use permit to develop or produce geothermal energy.

ISSUES

In your request, you raised the following questions:

1. Pending completion of the processes for designating geothermal resource subzones, does Act 296 prohibit the Board from issuing (new) geothermal exploration permits pursuant to Subchapter 2 or geothermal mining leases pursuant to Subchapters 3, 4 and 5 of the Regulations for Leasing and Drilling of Geothermal Resources?

2. (a) Pending completion of the processes for designating geothermal resources subzones, does Act 296 deny lessees already holding geothermal mining leases underlying areas classified as agricultural the right to exercise, within the leased area, the exploration, development and other rights therein previously granted by the State?

(b) Assuming that the rights described in (a) above have not been abrogated and pending completion of the processes for designating geothermal resources subzones, can the Board continue to issue to existing lessees drilling, development and other permits and approvals pursuant to the geothermal regulations and the terms of the geothermal mining

lease, and can the counties continue to issue special use and other permits to existing geothermal mining lessees?

3. Assuming that the Board has designated a geothermal resources subzone in a district classified under H.R.S., Chapter 205, as rural or agricultural (in which districts geothermal development is not a permitted use), or with respect to an existing lease covering land in such classifications, do the special permit procedures described in H.R.S., Section 205, apply so as to enable a county planning commission to permit geothermal exploration and development in such district?

4. Assuming that the H.R.S., Section 205-6, special permit procedures apply and considering paragraph (c) on page 6 (and more particularly lines 14 through 16 of S.B. 903), has the requirements for Land Use Commission approval of specials for areas of land greater than 15 acres been abrogated by Act 296?

5. Must the Board complete an assessment of all areas in the State as a whole for the purpose of designating geothermal resource subzones before the Board proposes areas for designation, holds public hearings, and designates areas within particular counties as geothermal resource subzones?

DISCUSSION

Permit Process

Urban, rural and agricultural lands are under the jurisdiction of the county and require Special Use Permits (SUP). Special use permits for agricultural land over 15 acres require the additional approval of the State Land Use Commission pursuant to H.R.S., Chapter 205. Land use decisions involving conservation land are under the jurisdiction of the BLNR pursuant to H.R.S., Chapters 171 and 183. Geothermal mining operations and permits are governed by H.R.S., Chapter 182, and Title 13, Chapter 183 of the Rules and Regulations of the DLNR. State geothermal mining leases and State or County land use permits are the authorizing mechanisms which grant the specific legal rights which in turn allow geothermal activities to take place. In the case of geothermal mining lease applications, the Board must consider and determine that "the proposed mining use would be of greater benefit to the State than the existing or reasonably foreseeable future uses of the land." (DLNR Rule 13-183-43). In issuing a lease, the Board then determines and sets "special terms and conditions to be included in the lease to provide for orderly and optimum

geothermal development, to protect the environment, to permit use of the land for other purposes, and to protect other natural resources." (DLNR Rule 13-183-43).

Land use permits (CDUA and SUPs) are also subject to statutory conditions depending upon the land use classification and zoning.

Applications for drilling permits are processed under DLNR rules in Title 13, Chapter 183, subchapter 8. Unlike leases which require the approval of the Board (DLNR Rule 13-183-43), drilling permits are issued by the Department under the Chairman's signature (DLNR Rule 13-183-65(b)) so long as they meet the standards and rules in Title 13, Chapter 183, and comply with federal, state and county laws. The rules covering drilling permits set technical and reporting requirements but no Board review or action is required. In this process a drilling permit for a specific site is customarily obtained just before drilling since that particular site's selection may depend upon the test results of the last well.

However, a geothermal exploratory program by its nature involves more than the act of drilling a specific well. It requires long range planning, a commitment of time, labor, money, and equipment and well-organized management that may span many years. With this framework in mind, let us return to the statutory language in Act 296 itself.

<u>Act 296, Section 3(f), and Vested Rights</u>

Section 3(f) of Act 296 states in relevant part that: "[t]his Act shall not apply to any active exploration, development or production taking place on the effective date of the Act, provided that any expansion of such activities shall be carried out in compliance with its provisions."

The Conference Committee Report (Number 60 to Senate Bill 903, S.D. 1, H.D. 2, C.D. 1) approved by the conferees on April 19, 1983, addressed only two sentences to this provision:

> "Your Committee is aware that there are developers within the State who currently have permits which allow active geothermal exploration or development and has specifically provided that the enactment of this bill is not intended to affect any of those ongoing activities or rights. Any further or future expansion of those geothermal exploration and development activities within the State will, however, have to comply

with the provisions of this bill upon its enactment." (Id. at p. 3).

The committee report's language that "the enactment of this bill is not intended to affect any of those ongoing activities or rights" clarifies at least some of the uncertainty in the phrase "active exploration . . . taking place." The reference to "those ongoing activities or rights" suggests that the Legislature understood that active exploration involves a program and not only the act of drilling a specific well. There is no suggestion in either the statutory language or the committee report that all geothermal activity should cease with the completion of whatever well happened to be under construction on June 14, 1983. Rather, the report recognizes existing "rights" and refers to "developers within the State who currently have permits which allow active geothermal exploration or development." The committee report acknowledges that activities already authorized by State and County permits may continue.

Indeed, a contrary view would disrupt previously established mutual agreements upon which very considerable expense and reliance has been placed. It would also artificially restrict and frustrate the express and natural meaning of the phrase "active exploration . . . taking place on the effective date of the Act. . . ." Yet the committee report also draws a line by stating that "[a]ny further or future expansion of geothermal exploration. . . ." is subject to the Act's provisions.

At a minimum, geothermal exploration, development or production taking place on June 14, 1983, must include those legal rights that the Lessees had acquired or vested by that date.

Vested Rights

The Hawaii Supreme Court has recently set out the standards to be considered in addressing when rights vest. In County of Kauai vs. Pacific Standard Life Insurance Company, et al., Hawaii Supreme Court No. 8367, decided October 14, 1982, (hereinafter "Nukolii") the Hawaii Supreme Court held that where final discretionary action by the government has not yet occurred, no claim for estoppel or vested rights would lie. But where final discretionary action by the government has taken place, an applicant may proceed without interference. In that case, a developer sought to build a hotel. Before all the necessary permits could be obtained, a county-wide referendum on the land's zoning classification was certified for the

November election. A building permit was secured after the referendum was certified but prior to the final vote. In the referendum the electorate rejected the land's zoning classification. Nonetheless, the hotel was built and a lawsuit followed. On appeal in the Hawaii Supreme Court, the developer claimed that his rights had vested with the issuance of the building permit prior to the vote. The court disagreed.

The court reviewed Denning v. County of Maui, 52 Haw. 653 (1971), and Allen v. City and County of Honolulu, 58 Haw. 432 (1977), where it had addressed two similar but distinct issues: vested rights and equitable estoppel.

> "Estoppel focuses on whether it would be inequitable to allow the government to repudicate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by government regulation." Allen, Id. at 435 in County of Kauai op cit at p. 8 (quoting Heeter, Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes, 1971 Urb. L. Ann. 63, 65).

The court held that the permit system controlled development until the petition for a referendum was certified:

> "[i]f a developer has not received final discretionary action under the permit system before the referendum mechanism is operative, then the estoppel analysis will recognize that timely intervention of the referendum procedure has made discretionary approval or disapproval of the underlying zoning an integral part of the development process as applied to that project."

While there is no referendum in the present situation, Act 296 did establish a cutoff date (June 14, 1983) for approval of geothermal activities not already taking place. The Nukolii test requires us to look then at what final discretionary acts by the government had occurred by June 14, 1983.

Since the granting of a lease, a special use permit, or a conservation district use permit is an executive action involving policy choices by the Board or a Planning Commission, it is clearly a discretionary act. By law, a lease or permit disposition is not mandated; rather it is allowed only after the independent judgment and affirmative majority vote of the

Board or a Commission. In contrast, the issuance of minor permits for activities already authorized by a lease and special use permit or CDUP is more administrative in nature and has been delegated to the Department subject to certain preestablished standards. While they may be rejected for noncompliance with these standards, they do not present discretionary choices committed by law to judgment alone.

Development

Under section 3(f), any "expansion of activities" taking place on June 14, 1983, (the effective date of the Act) is subject to the assessment and subzone designation requirements of Act 296.

In order to understand what constitutes an "expansion" of activities, it is first necessary to review exactly what activities were taking place on June 14, 1983. Prior to June 14, 1983, the State and the County had approved the leases and permits listed above. However, except for the HGP-A project already in production, no permit to develop or produce electrical energy had been approved. Consequently, no development activites could have been taking place on that date. While the State in its proprietary capacity had entered into geothermal mining leases regarding mineral rights, neither the State nor the County in thier sovereign capacity had issued any land use permits for development. All of the Special Use Permits issued by the County of Hawaii and the Conservation District Use Permit issued by the Board of Land and Natural Resources are expressly limited to exploratory well drilling. For development to proceed, a lessee will need to obtain a new SUP from the County (for agricultural or rural zoned land) or a CDUA from the Board (for conservation land). Thus, while development would appear natural in those areas with successful exploratory wells, no development rights had been granted as of June 14, 1983, and development could not have been taken place on that date. Therefore, development rights are clearly an expansion of those activities taking place on June 14, 1983 and the subzone designation requirementsof Act 296 must be met before any State or County development authorization may be granted.

Moreover, an expansion of activities may include geographic as well as programmatic changes. Therefore, we turn next to the question of exploration.

Exploration

In contrast to any "expansion of activities," the requirements of Act 296 do not apply to "active exploration . . . taking place . . . on the effective date of this Act (June 14, 1983)."

1. Drilling Permits

The State and the county have both made discretionary decisions to grant leases and permits for defined geothermal exploration programs. While the issuance of drilling permit would appear to be an administrative and ministerial act rather than one committed by law to discretion, we need not reach the question of final discretionary action since Act 296 by its language does not apply to active geothermal exploration (which under the committee report's language suggests a program of drilling already authorized by land use permit and lease) taking place on the effective date of the Act. Therefore, drilling permits for areas already authorized by permit and lease may continue to be issued.

2. New Geographic Areas

The Act's prohibition against expansion of activities until subzones are designated appears to exclude any discretely new geographical areas that do not now have existing legal authorization. Thus, the State may not issue new leases for areas not already granted land use permits. Similarly, the Counties may not issue a new special use permit, nor the Board a new CDUA, for discretely new areas not presently covered by those permits. This does not mean that modifications in the conditions on existing permits are prohibited; only that new geographic areas are prohibited.

With this background, we can now specifically address the five questions you raised in your request.

First, although four geothermal mining leases have been issued, a mining lease alone does not constitute a right to develop. A land use permit is also required. All of the existing land use permits are for exploration only; none (except HGP-A) authorize any development. Either the State or the County would need to approve a new permit for development (a CDUA for conservation land or a SUP for agricultural or rural land). Likewise, exploration in discretely new geographic areas would require a new SUP or CDUA and would constitute an expansion of existing activities.

Therefore, new exploration permits under Title 13, Chapter 183, Subchapter 2 (DLNR Rule 13-183-7), for new

geographical areas may not be issued until the subzones are designated.

Second. (a) On agricultural land, lessees holding geothermal mining leases may continue to explore within the limits of special use permit which they may now have. They may not develop geothermal resources until the Board designates subzones.

(b) Neither the Board nor any County may issue a development permit to any existing lessee until the subzones are designated since no development rights were authorized prior to June 14, 1983. While the existing geothermal mining leases all envision eventual development, they all expressly require the Board to approve any development. More importantly, except for the HGP-A project which is currently producing electricity, the County had not granted any special use permit to develop on agricultural land and the Board had not granted any right to develop on conservatioN land as of June 14, 1983. Since development would constitute an expansion of activities legally taking place on June 14, 1983, development clearly comes within the scope and intention of the Act's coverage.

Third, Act 296 did not disturb the normal special use permit procedures of the county. However, until the subzones are designated, the counties may not approve a special use permit for development since that would constitute an expansion of existing activities taking place on June 14, 1983. Nor may any new special use permits be issued for exploration in a totally new and descrete geographical area even if it is within the leased area. This is not to say that modification in the number and precise location of wells cannot be made in the general areas (including land contiguous to existing wells) already authorized for drilling.

Fourth, Act 296, Section 3, subparagraph (c) on page 5, lines 14-16 eliminates Land Use Commission approval rquirement in subzones. It abolishes all Land Use Commission consideration of geothermal activities in designated subzones regardless of the acreage.

Fifth, Act 296, Section 3, subparagraph (d) on page 7, lines 22-23 to page 10, line 2 directs the Board to "complete a county by county assessment of all areas with geothermal potential. . ." The Conference Committee Report (No. 60) at page 3 states:

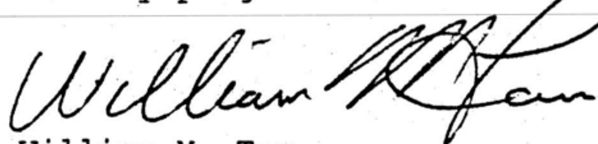
> Senate Bill 903, S.D. 1, H.D. 2, has further been amended to require that after a consideration of all potential areas for subzone designation, the Land Board shall select those areas that can best demonstrate an acceptable balance among the criteria set forth in the bill. (Emphasis added).

The legislative intent makes clear that all areas in the State must be considered before the first designation is made. This insures that the Board have before it the complete range of choices in the State and not only a selected few areas.

CONCLUSION

In conclusion, Act 296 requires the Board of Land and Natural Resources to assess the entire State and designate geothermal subzones based upon the criteria in the Act before there may be any expansion of those activities taking place on June 14, 1983. Act 296 does not create an entirely new permitting process; rather it utilizes the existing State and County procedures and eliminates the Land Use Commission approval for Special Use Permits over 15 acres.

Since development of any kind will require either new county approval of a Special Use Permit (for agricultural, rural or urban lands) or new Board approval of a Conservation District Use Permit (for any conservation land) and because none had been granted as of June 14, 1983, development constitutes an expansion of activities and is subject to the subzone designation requirements of the Act. Accordingly, no development permit may be issued until the subzones are designated. For the same reason, neither the counties nor the State may issue new exploration permits that will expand activities into distinctly new geographical areas, although permittees may reasonably seek to modify their existing permits to continue their present exploratory program until such time as subzones are designated.



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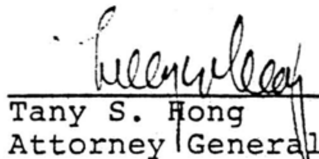

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