

DOWALD  
W

GEORGE R. ARIYOSHI  
GOVERNOR



TANY S. HONG  
ATTORNEY GENERAL

11:57  
MICHAEL A. LILLY  
ASSISTANT ATTORNEY GENERAL

STATE OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
LAND/TRANSPORTATION DIVISION  
ROOM 214-B, OLD FEDERAL BLDG.  
335 MERCHANT STREET  
HONOLULU, HAWAII 96813

STATE OF HAWAII

November 1, 1983

83 NOV 4 9:52  
DIV. OF WATER & LAND DEVELOPMENT  
RECEIVED

ATTORNEY-CLIENT COMMUNICATION  
NOT FOR DISTRIBUTION

MEMORANDUM

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

ATTN: Robert T. Chuck, Manager-Chief Engineer, DOWALD  
Manabu Tagamori, Branch Chief,  
Water Resources and Flood Control Branch, DOWALD  
James J. Detor, Land Management Administrator

FROM: William M. Tam, Deputy Attorney General

SUBJECT: Geothermal Leases and Drilling Permits on Private Lands.

In reviewing the geothermal drilling permits issued by the Department to date, it came to my attention that two permits were issued for private lands without express mineral reservation clauses and without geothermal mining leases. The two permits were both to Geothermal Exploration and Development Corporation, a joint partnership involving Barnwell Corporation:

Ashida No. 1	1/10/80	suspended	expired
Daiichi No. 1	3/2/81	not drilled	expired

DLNR's regulations in Title 13, Chapter 183, address State and reserved lands. The definition of reserved lands includes those lands where the "State or its predecessors in interest has reserved to itself, expressly or by implication the minerals or right to mine minerals, or both" (HRS

Susumu Ono  
Page 2  
November 1, 1983

182-1(3)). But the effect of granting a drilling permit on private land without reserving the ownership question or issuing a lease impliedly creates a third category of "unreserved" lands. As a consequence, the State may jeopardize its legal claim to mineral resources by implied reservation.

As you will recall, at the time of the Mahele a statute was in place reserving all mineral rights to the sovereign. For reasons that have never been clear, the statute (1845-1859) was deleted during the codification of the civil code in 1859. Nonetheless, the land patent form used during that period was retained without modification so that the mineral reservation clause was in fact retained in land patents issued by the government until 1900. With the transfer of all government and Crown lands to the U.S. in 1898 and the subsequent formation of the Territory in 1900, the land document forms were revised. In the process, the mineral reservation clause was eliminated from the form. In 1955, the Territory again inserted mineral reservation clauses in the land patents, but not consistently. In 1963, after bauxite was discovered, the State enacted a statute reinserting the mineral reservation clause in land patents and leases. Finally, in 1974, Hawaii's Legislature adopted a statute defining minerals to include geothermal.


Since the question of implied reservation of mineral rights to the State has not been judicially resolved, the State's conduct toward private lands without express mineral reservations deserves some attention.

A savings clause could be inserted in drilling permits on private lands which lack mineral reservation clauses so that neither party is prejudiced on the ownership question. By such a provision, the State's claim of ownership by implied reservation will be preserved without prejudice.

Ms. Helen Kane, a title abstractor with Land Management, is presently reviewing land patents in lower Puna to determine which lack mineral reservation clauses and, therefore, deserve special scrutiny.

#### RECOMMENDATION

Drilling permits should contain a savings clause that provides that the State reserves the ownership question and the permit is made without prejudice to the rights of any party to seek resolution of the ownership question.



William M. Tam  
Deputy Attorney General

**WATER RESOURCES INTERNATIONAL INC.**  
INCORPORATED

233 QUEEN STREET • P.O. BOX 3084 • HONOLULU, HAWAII 96802 • TELEPHONE 533-6261

March 3, 1977

Water Resources International Inc.  
2828 Paa Street  
Honolulu, HI 96819

Attention: Mr. Ed. Craddick

Reference: MR as to Hawaii Island Parcels

Gentlemen:

You have requested that we determine from the original Grant documents whether mineral rights were reserved to the Hawaiian Government. Our search reveals the following:

- 1) TK: 1-4-01-1 - Being portion of Royal Patent 4497, LCAw 8559, Apana 5 - Mineral rights reserved to Government.
- 2) TK: 1-4-01-2 - Being portion of Royal Patent 4497, LCAw 8559, Apana 5 - Mineral rights reserved to Government.
- 3) TK: 1-4-01-10 - Being portion of Royal Patent 7788, LCAw 8452, Apana 15; portion of Royal Patent 7483, LCAw 4452, Apana 3; and portion of Royal Patent 4497, LCAw 8559, Apana 5 - All show mineral rights reserved to Government.
- 4) TK: 1-4-01-19 - Being portion of Royal Patent 4497, LCAw 8559, Apana 5 - Mineral rights reserved to Government.
- 5) TK: 1-3-08-6 - Being portion of LP 8094, LCAw 8559B, Apana 15 - No mineral reservations.
- 6) TK: 1-3-08-7 - Being portion of LP 8094, LCAw 8559B, Apana 15 and portion of LP Grant 3209. That portion of parcel comprising portion 3209 has mineral rights reserved to Government, and that portion comprising portion 8094 has no reservations.

*Kupoko  
LWD*

*TOKYO  
LWD  
J.T. TRADING CO. LTD  
AND  
AGENTS IMPORTERS OF  
HAWAII INC.*

**RECEIVED**

MAR 5 1977

WATER RESOURCES INTERNATIONAL, INC.



*2 KMB*

ATER RESOURCES INTERNATIONAL INC.  
Attention: Mr. Ed. Craddick  
MR as to Hawaii Island Parcels

March 3, 1977

-2-

7) TK: 1-3-08-19 -- Being portion of LP 8094  
LCAw 8559B, Apana 15 and portion of LP  
Grant 3209. That portion of parcel com-  
prising portion 3209 has mineral rights  
reserved to Government, and that portion  
comprising portion 8094 has no reservations.

*TAKY  
LXND.  
J.T. TRADING Co. LTD  
AND  
AMT IMPORTS OF  
HAWAII, INC.*

*Registering w/ T. Aden*

Yours very truly,

TITLE GUARANTY OF HAWAII  
INCORPORATED

  
David T. Pietsch  
Executive Vice President

*1-3-09-7*

*(8) TK 1-3-08-4*

*LP 8094 LCA 8559 B Apana 15*

*No Reservations*

*700  
1150 Acres PONA Sugar*

*(Registering with Amfac - M. Gilliland)*

DTP:hu

V. CONCLUSION

Ownership of geothermal resources, recently discovered in Hawaii, is uncertain. A 1974 state statute<sup>98</sup> declares the resource to be "mineral" and therefore included within the mineral rights expressly reserved by the Hawaii government in land grants made before 1900 and again after 1955. The 1974 statute may establish the state as owner of hot water under lands granted since enactment of the statute but it leaves in doubt whether pre-1974 mineral reservations cover geothermal resources and whether the reservations are to be implied in grants which contain no express retention of mineral rights. A special problem is presented by lands originally patented subject to a mineral reservation, portions of which were subsequently granted to private owners without one.

The leading decision on the issue of geothermal rights, *United States v. Union Oil Co. of California*, 549 F.2d 1291 (9th Cir. 1977) holds that geothermal resources are included among the "minerals" retained by the federal government in a distribution of homestead lands. However, the case may be distinguished by the fact that the *Union Oil* court relied on a well-documented record of Congressional intent to construe "minerals," while in Hawaii there is no indication of legislative intent.

Property law offers but limited guidance in predicting how a court would decide the ownership of geothermal resources. The common law maxim of *cujus est solum* has been severely truncated with respect to the ownership of subsurface resources which can be analogized to geothermal reservoirs. The states with known geothermal resources, and those with oil and gas (the energy sources most similar to geothermal) are split in classifying the subsurface reservoirs as mineral or non-mineral.

Presented with close questions of definition and intent bearing on the ownership of geothermal resources and lacking clear doctrinal guidance or dispositive precedent, a Hawaii court may give weight to policy arguments, such as the likely effects on the production of geothermal energy and on the distribution of its benefits under private or public ownership. Recent decisions on the ownership of other natural resources contested by private parties and the State of Hawaii indicate that the Hawaii Supreme Court has been responsive to social benefit arguments while the U. S. District Court has found the assertion of state ownership on such grounds to be a taking in violation of the 14th Amendment.

Robert M. Kamins

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of the state's authority to define property rights, under the decisions handed down by the Hawaii Supreme Court in *McBryde* and *Sotomura*, discussed in notes 94 and 95, *supra*.

<sup>98</sup> Act 241, 1974 Haw. Sess. Laws.

W. W. BOHNETT  
JAMES H. BOHNETT  
ROBERT E. BOHNETT  
ROBERT E. BOHNETT  
ROBERT E. BOHNETT  
JAMES H. BOHNETT  
BURNHAM H. GREELEY  
GEORGE G. GRUND  
JACK WALTON  
TOM E. TROE  
DAVID L. IRONS  
J. THOMAS VAN WINKLE  
DAVID C. LARSON  
TOM C. LEUTENERER  
THOMAS D. WELCH, JR.  
ROBERT W. CARLSMITH  
MICHAEL J. MEDEIROS  
HOWARD R. GREEN

JOHN F. LEZAR  
A. BERNARD BAYS  
GERALD A. SUMIDA  
JAMES R. KEEGAN  
JOSEPH T. KIEFER  
IVAN H. LUI-RWAN  
WILLIAM J. ROSDIL  
TERENCE J. OTOOLE  
PETER STARN  
THOMAS A. RULON  
LAWRENCE S. OKINAGA  
RONALD Y. SHIGETANI  
ROBERT E. STRAND  
RAYMOND S. IWAMOTO  
ALAN H. ROODHOUSE  
RAYMOND K. HASEGAWA  
WILLIAM F. ROOS, JR.  
SUSAN P. WALKER  
JAMES C. STORES  
TIM E. DESILVA

CARLSMITH, CARLSMITH, WICKHAM AND CARR  
ATTORNEYS AT LAW  
P O BOX 686

HILO, HAWAII 96720

October 20, 1976

HERMAN L. COOK, SMITH  
BY CHURCHILL

HILO OFFICE  
121 WAIANUENUE AVENUE  
(808) 935-8844

CABLE ADDRESS  
CARLSMITH HILO

HONOLULU OFFICE:  
2200 PACIFIC TRADE CENTER  
(808) 524-5112

KONA OFFICE:  
P. O. BOX 147  
CAPTAIN COOK  
(808) 323-2811

Mr. F. Newell Bohnett  
P. O. Box 1536  
Kailua-Kona, HI 96740

Dear Newell:

Re: Mineral Rights on Fee Simple Property  
Situate at Puuanahulu and Puuwaawaa,  
North Kona, Hawaii

Since talking with you on the above subject, I was able to have one of our associates check the law with respect to ownership of mineral rights. I reviewed your preliminary title report and spoke with Mr. Kenneth MaKinney at Title Guaranty. The present state of the law on mineral rights as best I can determine is that the Hawaii Government (the monarchy) reserved the mineral rights on all Land Patent Grants or Land Commission Awards made up until 1859. In 1859 the law requiring such reservations was repealed, and no new statute was enacted to replace this law until 1963. The 1963 Act does not give the State of Hawaii any claims to mineral rights for property which was granted by the State between 1859 and 1963.

With respect to your property then, the State would have no claim to the mineral rights, excepting for any grants made prior to 1859, or excepting the case where they may have specifically reserved those rights. If the State reserved any mineral rights in any of its original grants (covering land you now own), the reservation would appear as an exception in your title report. In my review of your preliminary report,

CARLSMITH, CARLSMITH, WICHMAN AND CASE

Mr. F. Newell Bohnett  
October 20, 1976  
Page 2

I did not see any reservations by the State, and therefore you should own the rights to mines, etc., on your fee simple property.

If you decide on a site for exploration, you would be well advised to specifically review your title policy for the specific parcel involved to make doubly sure there is no reservation of mineral rights by the State. In all likelihood, natural heat or steam is not included in the term "mineral rights," however, this question was one you asked us not to check.

I hope this answers your question and please call again if you need further work done on the matter.

Very truly yours,

CARLSMITH, CARLSMITH, WICHMAN AND CASE



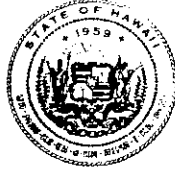
Robert W. Carlsmith

RWC/bt

RECEIVED

GEORGE R. ARIYOSHI  
GOVERNOR OF HAWAII

84 JAN 13 AIO: 51



DIVISIONS:  
AQUACULTURE DEVELOPMENT  
PROGRAM  
AQUATIC RESOURCES  
CONSERVATION AND  
RESOURCES ENFORCEMENT  
CONVEYANCES  
FORESTRY AND WILDLIFE  
LAND MANAGEMENT  
STATE PARKS  
WATER AND LAND DEVELOPMENT

DIV. OF WATER &  
LAND DEVELOPMENT

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF LAND MANAGEMENT  
P. O. BOX 621  
HONOLULU, HAWAII 96809

January 11, 1934

LM-ABS 8401

M E M O R A N D U M

TO: James J. Detor,  
Land Management Administrator

FOR: William A. Tam,  
Deputy Attorney General

FROM: Staff Abstractor,  
Division of Land Management

SUBJECT: MINERAL RIGHTS RESERVATION IN LANDS IN THE  
DISTRICT OF PUNA, ISLAND OF HAWAII

Attached hereto is the first of several lists disclosing lands in the District of Puna, Island of Hawaii, as to the subject matter, including those lands now under Mining Lease Nos. R-1, R-2, R-3, R-4 (pending), S-4602 and S-4717 (pending). 21.29 ACRES @ KAHOLE AIRPORT, KAHOOLAWE, HAWAII.

HGP-A  
NAT'L ENERGY LAB. OF HAWAII AND HAWAIIAN ABORIGINAL FARMS (AGRICULTURE.)  
A copy of these lists will be forwarded to Mr. Manabu Tagomori, Branch Chief of Water Resources and Flood Control, Water and Land Development Division, who will be outlining these lands on tax maps making it convenient to see where such lands are located. He and William Tam are working together on this matter.

STAFF ABSTRACTOR

HKK:js  
Enclosures

cc: Manabu Tagomori, DOWALD



LANDS BEARING MINERAL RIGHTS RESERVATION  
IN THE DISTRICT OF PUNA, HAWAII

L.C.AW.	R.P./GRANT	ISSUED TO	DATE	MINERAL RESERVATION	OTHER	GEO. R. MINING LEAS
7606-C:1	none	Kumaiku	5/10/1852	---	---	---
8760-C:2	none	Kekaula	5/10/1852	---	---	---
10848:1	6928	Pookuia	5/10/82	x	---	---
10114	7585	Mahoe	1/23/1854	x	---	---
8004	none	Ahia	5/16/1852	---	---	---
2564:1	6734	Nakahuna	5/11/1852	x	---	---
8760-C:1	none	Kekaula	5/10/1852	---	---	---
8364	not awarded					designated on
2564:2	6734	Nakahuna	5/11/1852	x	---	---
10848:2	6928	Pookuia	5/10/1852	x	---	---

(Note: L.C.AW. 7715:15 will be denoted later as it covers several plats)

PLAT 02

To Govt. Main Road

Down

RESOR

POND LOT

Am

180,857 sq. ft. 2,178 sq. ft.

(0.128 ac)

(0.128 ac)

(0.128 ac)

(0.128 ac)

(0.128 ac)

(0.128 ac)

(0.128 ac)

Elizabeth K. K. Bengay  
1.46 acs.

(M)

1011.4

Walter E. Dahlberg  
0.98 ac.

(M)

L. C. Aw. 87605-1

For L. C. Aw. 7713-113

L.C. AW 8004  
Cecil S. Commisagent  
Margaret L. 1714

0.30 ac

Walter B. Dahlberg

L. C. Aw. 2564

Bishop Estate

Hawaiian Investment Co. Inc.

1.398 ac

1.398 ac

1.398 ac

1.398 ac

1.398 ac

1.398 ac

1.398 ac

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1.398 ac

1.398 ac

1.398 ac

GOVERNMENT ROAD

SEA

SEA

SEA

SEA

Walter E. Dahlberg

L. C. Aw. 8760-C-1

0.39 ac

Arthur H. Ulrich

L. C. Aw. 10088-1

0.28 ac

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

(M)

PLAT 02

B. M. Bishop Est  
(County of Hawaii)-1a.

0.871 acs.  
(6.193 ac.)

(0.28 ac)  
L.C. Aw. 10088-1

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

(0.28 ac)

TRUE NORTH

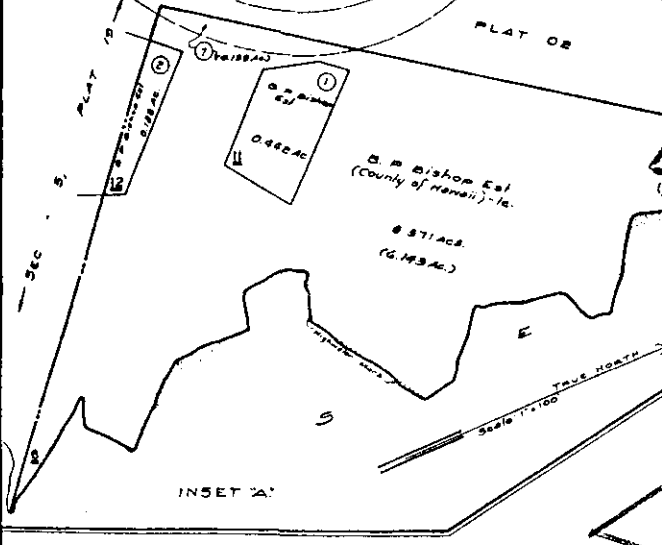
Scale 1"=100'

Part of the original  
The original action of 1923,  
L.C. Aw. 10088-1

Hawaiian Investment Co., Inc.

1.398 ac

INSET 'A'



PUNALUU BEACH, PUNALUU, KAU, HAWAII.

Dwg. No. 2586.  
Source: Tax Maps Bureau  
By: D.S.C. & J.F.H. - Jan. 1936.

May 2, 1984

Mr. Wayne H. Western, Analyst  
Real Estate Div., The Church of  
Jesus Christ of Latter-Day Saints  
50 East North Temple Street  
Salt Lake City, Utah 84150

Dear Mr. Western:

We are pleased to respond to your two questions concerning mineral resources in Hawaii.

Question 1. "What percent of Hawaii's mineral rights are owned by the State, Federal Government, private individuals and companies?" Under Chapter 182, Hawaii Revised Statutes, entitled "Reservation and Disposition of Government Mineral Rights", land is generally categorized as "state lands" which means those lands owned by the State of Hawaii, and "reserved lands" which means those lands owned or leased by any person in which the State has reserved the mineral rights. The State of Hawaii owns all the minerals found on state land or reserved land. However, some lands are privately owned in which the title does not contain any mention of mineral reservation. The ownership of minerals for such privately owned lands may be subject to court challenge, and thus, we do not know what percentage belongs to the State.

Question 2. "What resources are considered mineral resources in Hawaii?" Under Chapter 182, "'minerals' means any or all of the oil, gas, coal, phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits whether solid, gaseous, or liquid, including all geothermal resources, in, on, or under any land, fast or submerged; but does not include sand, rock, gravel, and other materials suitable for use and used in general construction."

Please contact me if I can be of further help.

Very truly yours,

ROBERT T. CHUCK  
Manager-Chief Engineer

ES:ko