To: DHHL 9-9-94-3
CAG 94-17958

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September 7, 1994

The Honorable Hoaliku L. Drake
Chairperson, Hawaiian Homes Commission
P.O. Box 1878
Honolulu, Hawaii 96805

Dear Mrs. Drake:

Re: Section 221, Hawaiian Homes Commission Act
Use of Water

We are writing in response to your August 5, 1994 letter in which you asked whether section 221 of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921) (HHCA) requires that Hawaiian home land lessees receive water service from the counties free of all charge, including those costs normally associated with maintenance and operations.

HHCA § 221(c) provides that "the department [DHHL] is authorized to use, free of all charge, government owned water." On August 22, 1994, our office addressed this issue in a response to Richard D. Wurdeman, Corporation Counsel for the County of Hawaii. We include a copy of that letter for your consideration. As that letter concludes, the "free of all charge" language in § 221(c) means that the department is not required to obtain a lease of public lands in order to use water which may flow from those lands. However, where a county delivers water to HHCA lands, the department or its lessees must pay their pro rata share of normal operation and maintenance expenses and capital costs which every water delivery system incurs over time. The department may build its own system or the Legislature may appropriate funds to build or subsidize DHHL's needs. However, such appropriation requires affirmative legislative action and cannot be inferred from the language in § 221(c) alone.

Very truly yours,

Robert A. Marks
Attorney General

RAM/WMT
Enclosure
12456

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August 22, 1994

The Honorable Richard D. Wurdeman
Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720-4262

Dear Mr. Wurdeman:

Re: Section 221, Hawaiian Homes Commission Act
Use of Water

We are writing in response to your letter dated November 11, 1993, in which you asked whether section 221 of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921) (HHCA) requires that Hawaiian homes lessees receive water service from the county free of all charges, including those normally associated with maintenance and operations.

HHCA section 221(c) (1990) provides in relevant part:

> In order adequately to supply livestock, the aquaculture operations, the agriculture operations, or the domestic needs of individuals upon any tract, the department is authorized (1) to use, free of all charge, government-owned water not covered by any water license or covered by a water license issued after the passage of this Act or covered by a water license issued previous to the passage of this Act but containing a reservation of such water for the benefit of the public, and (2) to contract with any person for the right to use or to acquire, under eminent domain proceedings similar, as near as may be, to the proceedings provided in respect to land by sections 101-10 to 101-34, Hawaii Revised Statutes, the right to use any privately owned surplus water or any government-owned surplus water covered by a water license issued previous

> to the passage of this Act, but not containing a reservation of such water for the benefit of the public. Any such requirement shall be held to be for a public use and purpose. The department may institute the eminent domain proceedings in its own name.

First, subsection (c) authorizes to the Department of Hawaiian Home Lands (DHHL) the right to use "government owned water": 1) not covered by any water license; 2) covered by a license after passage of the Act (1921); and 3) covered by a water license issued prior to passage of the Act (1921) but containing a reservation of such water for the benefit of the public. When the HHCA was adopted in 1921, Hawaii water law was still developing. In Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675 (1904), and Carter v. Territory, 24 Haw. 47 (1917), the Hawaii Supreme Court described the right to use water as though it were "owned" by the title holder of the land (usually the konohiki) "to do with as he pleases." Hawaiian Commercial Sugar, 15 Haw. at 680-82. Hence, water on government land was described as being "government owned" and water deriving from private lands was described as being privately owned. Id.; Carter v. Territory, 24 Haw. at 53; Territory v. Gay, 31 Haw. 376, 382 (1930). Consequently, the phrase "government owned water" as used in 1921 means water deriving from government lands.

Beginning in 1973, the Hawaii Supreme Court made it clear that the conventional land tenure notions of "ownership" did not accurately describe, and thus were not applicable to, the shared use rights characteristic of water. McBryde v. Robinson, 54 Haw. 174 (1973); Robinson v. Ariyoshi, 65 Haw. 641 (1942); Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982). Consequently, the Court ruled that the State is the trustee of the water in order to allocate it in accordance with a system of use rights. Id. As a result, the term "ownership" is inappropriate and no longer used today to describe how water is allocated.

Second, "surplus water" (a term also discarded after McBryde v. Robinson, 54 Haw. 174, 199 (1973)) was used to describe "the water, whether storm water or not, that is not covered by prescriptive [appurtenant] rights and excluding also riparian rights, if there are any." Territory v. Gay, 31 Haw. 376, 385 (1930). The McBryde court found that surplus water could not be effectively quantified because Hawaii's streams, which run quickly off steep volcanic slopes, are short and

flashy and vary so greatly from week to week or month to month that it is difficult to ever say what is a normal flow. McBryde, 54 Haw. at 199.

Third, in 1921, as today, the government was authorized to lease public lands for the purpose of allowing surface water to be diverted from the lands. HRS § 171-58. The water licenses were issued for a fee although the licensee or lessee built the delivery system. Consequently, the phrase "free of all charge" in 1920-21 (as used in § 221(c) of the HHCA) meant that, notwithstanding a system in which water was thought to be "owned," the DHHL would not be required to bid for or obtain a water license or lease from the government in order to use water on government land as private parties would.

We turn now to the central question which you posed, namely, whether the operation, maintenance, and capital costs of a public water delivery system may be charged on a pro rata basis to the DHHL and its lessees.

Every water system has operation and maintenance expenses as well as infrastructure capital requirements. County boards of water supply are no exception. HRS chapter 54. Those costs are not for the water per se but for the delivery system, namely, for the "furnishing of water and for water service" (emphasis added) as authorized in HRS § 54-24. HRS § 54-26. Customarily, those costs are prorated to consumers based on the amount of water used on some per unit basis. In the case of capital expenses, these may be paid in advance by the relevant legislative body or obtained through the issuance of bonds which are then repaid by collecting fees for water service on some unit basis. This is simply a means of amortizing the debt incurred in building the system.

In either case, the daily operation and maintenance costs as well as capital expenses are charged to pay for the cost of delivering the water, not for the "ownership" of the water qua water. Thus, when HHCA § 221(c) provides that the DHHL may use "government owned" water "free of all charge" whether under license of not, it is clear that no fee for the water in the form of a water license or lease may be required. But does "free of all charge" also include the operation, maintenance and capital charges which are essential to any delivery system?

If Congress intended the phrase "free of all charge" in 1921 to include the delivery system costs, then the Congress

was imposing an ongoing financial and appropriation obligation on itself (during the territorial period) as well as the State and the counties. This affirmative duty would require the legislative bodies of the federal, state, and county governments to appropriate public funds as needed to build an infrastructure system and to operate and maintain it indefinitely for the benefit of various DHHL lessees. In addition, it could require the executive branches of the federal, state, and county governments to cover the systems' operation and maintenance costs by indirectly subsidizing the DHHL's lessees through higher use fees on all non-DHHL consumers. There is no evidence that Congress intended this result.

In fact, Congress required all other aspects of the HHCA to be self supporting and never provided any funding for the HHCA. The phrase "free of all charges" in § 221(c) is used to differentiate water (from government land) under lease versus water not then under lease. There is no suggestion in subsection (c) that Congress intended by this phrase alone to require the federal government, the Territory, and/or the counties to build and maintain (at future taxpayers' or water users' expense) water delivery systems whenever and wherever new DHHL lessees might need them. Legislative bodies may choose to appropriate funds from time to time as need is shown, but that would be by deliberate choice.

If "free of all charges" means that various water systems had to be built and maintained, Congress would be mandating itself or the Territory or county funding on a regular basis for some unknown amount. Moreover, from 1921 to 1959, when the United States held title and was responsible for the Hawaiian home lands, water use fees were collected and the system managed (albeit at a subsidy) on the basis that delivery costs were tied pro rata to actual use. Congress did appropriate funds for particular water projects (e.g., HRS Chapter 175 (repealed) the Molokai Irrigation System), but there is no evidence to suggest that Congress was binding itself to build, operate, and maintain water systems at no cost to the user whenever or wherever lessees might need them.

In this regard, it is important to remember that even today, the customers of the county boards of water supply are not paying for water when they pay their bimonthly fees. They are paying some pro rata share of the operation and maintenance expenses and an amortized portion of the capital costs of building or expanding the system. HRS § 54-24 and -26.

We turn now to the four water service arrangements you pose on page three of your letter.

1. The County supplies water directly to, and bills, lessees of Hawaiian Home Lands, such arrangement presently being implemented by the County.

Answer: In light of the above discussion, we see no problems in continuing the practice where the county supplies water to DHHL lessees or the DHHL itself and bills the user on a fair pro rata basis.

2. The County supplies water to, and bills, the Department of Hawaiian Home Lands.

Answer: Same as number 1.

3. The County supplies water to either lessees of Hawaiian Home Lands or the Department of Hawaiian Home Lands, free of charge, with the cost of such water to be subsidized by other users.

Answer: It is clearly within the Legislature's prerogative to appropriate public funds to build water delivery systems, provide funds to the counties to build systems from which DHHL lessees may benefit, or to subsidize DHHL lessees directly. However, we are not aware of any obligation or authority for the counties to deliver water to DHHL lessees at no charge and require other water users to subsidize the operation.

4. The Department of Hawaiian Home Lands operates its own system.

Answer: DHHL may always build and operate its own water delivery systems. HHCA § 220.

CONCLUSION

In light of the historical context in 1921, we conclude that the provision in HHCA § 221(c) which provides that "the department is authorized to use, free of all charge, government owned water" means that the DHHL may use water from government lands without obtaining a lease or paying rent. However, it does not mean that the DHHL may require the counties or the State to construct, operate, and maintain a water delivery

system at no expense to itself or its lessees. The DHHL or its lessees may continue to be charged a fair pro rata share of delivering the water in a particular system.

Accordingly, it is proper for the State or the counties to charge DHHL lessees or the DHHL itself (depending on how the system is established) the appropriate per unit fee to cover the cost of operation and maintenance of the system as well as those amortized capital costs of building the system as the county charges to any of its other customers on the same system.

Very truly yours,

William M. Tam
Deputy Attorney General

APPROVED:

Robert A. Marks
Attorney General

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