STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

April 8, 2011

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 10od-016

OAHU

Rescind Prior Board Action of May 13, 2010, Item D-17; Sale of Reclaimed Land to Fordyce Smith Marsh, Jr. and Noelani Fowler; Amendment of Grant Non-Exclusive Easement S-5973; Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-4-037:seaward of 012

BACKGROUND:

On May 13, 2010, under agenda itemD-17, the Board authorized the sale of reclaimed land (about 1,000 square feet) to Fordyce Smith Marsh, Jr. and Noelani Fowler ("Applicant"). The subject reclaimed land was encumbered by an easement (GL 5973) for which the Applicant is the grantee.

The plan was to withdraw the reclaimed land from the easement before the sale of reclaimed land can be processed. In addition, the sale is subject to an appraisal at the cost of the Applicant and the concurrent resolution by the both the State Senate and the House, pursuant to Section 171-64.7, HRS. A copy of the 2010 approved submittal is attached as **Exhibit 1**.

Around July 2010, the Applicant paid $2,200 as the appraisal fee for the purchase. An appraisal was procured and the appraisal report was submitted to the Department around October 2010.

During the ensuing weeks, the Land Division has reviewed the request further and do not believe that selling the fee interest of ceded lands is good policy. As mentioned above, the subject reclaimed land is currently a portion of a term easement area, and that easement may be renewed in the future at the Board's discretion.. Therefore, rescission of the prior approval will not extinguish the Applicant's right to continue using the subject area.

However, the Land Division believes that an authorization from the Land Board allowing the refund of $2,200, being the appraisal fee paid by the Applicant during the process, would be fair and is in order. Therefore, the Land Division recommends the Board authorize the refund of $2,200 appraisal fee to the Applicant.

There are no other pertinent concerns or issues and staff does not have any objection to the request.

RECOMMENDATION: That the Board:

1. Rescind its prior action of May 13, 2010, item D-17;

2. Authorize the refund of appraisal fee in the amount $2,200.00 to Fordyce Smith Marsh, Jr. and Noelani Fowler

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

William J. Aila, Jr., Chairperson

D-17

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

May 13, 2010

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.:10od-016

OAHU

Sale of Reclaimed Land to Fordyce Smith Marsh, Jr and Noelani Fowler; Amendment of Grant of Non-Exclusive Easement S-5973; Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-4-037:seaward of 012.

APPLICANT:

Fordyce Smith Marsh, Jr and Noelani Fowler, husband and wife, tenants by the entirety

LEGAL REFERENCE:

Section 171-53, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Kaneohe, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-4-037:seaward of 012, as shown on the attached map labeled Exhibit A.

AREA:

1,000 square feet, more or less.

ZONING:

State Land Use District: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Encumbered by Grant of Non-Exclusive Easement S-5973 expiring on July 14, 2064.

APPROVED BY THE BOARD OF LAND AND NATURAL RESOURCES AT ITS MEETING HELD ON May 13, 2010

D-17

EXHIBIT " 1 "

CONSIDERATION:

One-time payment of fair market value to be determined by independent or staff appraiser, subject to review and approval by the Chairperson; provided that if the reclaimed land has been filled in or made with the prior approval of government authorities, and not otherwise filled in or made contrary to the public interest, it may be disposed of at fair market value of the submerged land, but if the reclaimed land has been filled in or made otherwise, it shall be disposed of at the fair market value of the reclaimed or fast land.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Not applicable as the sale of state lands is not an action that requires an EA or EIS be done under Chapter 343, HRS. Subject lands are to be conveyed to abutting landowner(s) and will become privately owned land at that point.

DCCA VERIFICATION:

Individual owner, not applicable.

APPLICANT REQUIREMENTS:

Applicant shall be required to pay for an appraisal to determine the one-time payment of fair market value for the reclaimed land.

REMARKS:

On November 14, 2008, agenda item D-17, the Board authorized the issuance of a 55-year non-exclusive easement to Mary J. Porter Trust for seawall, landscaping and pier purpose (GL 5973) for a lump sum payment of $39,060. The private property abutting the encroachment was sold to the applicant in January 2009, who became the grantee of GL 5973.

As noted in the 2008 submittal, the original intention was to purchase the reclaimed lands from the State pursuant to 171-53, HRS. Due to the Hawaii Supreme Court decision regarding the disposition of ceded land and the imminent conveyance of the private property in 2008, the original applicant decided to obtain an easement from the Board to rectify the encroachment issue. Recently, the applicant reactivates the request of purchasing the reclaimed land from the State.

Pursuant to Section 171-53(b), HRS, the Board may sell reclaimed land to the abutting owner if the land was filled as of June 12, 1962 and the Board finds that its disposition is not prejudicial to the best interest of the State, community or area in which such reclaimed land is located. Further, if the reclaimed land was filled in or made with the approval of government authorities and not otherwise filled in or made contrary to the public interest, the reclaimed land is valued as submerged land. Otherwise, it must be valued as reclaimed or fast land.

The original applicant, in the 2008 submittal, provided documents, including family photos dating 1953 & 1958 showing the subject area. Further, by a letter dated January 26, 1956 from the Department of Transportation, permit #1123 was issued to the family to excavate the channel. Therefore, staff agrees that the encroachment was approved in 1956. Staff does not believe selling the subject reclaimed land would be prejudicial to the State's interest as the subject land lacks legal access that would allow the public to utilize the area. Also, there are no beaches or facilities adjacent to the reclaimed land which the public can use or access.

The portion of the area underneath the pier dock is not considered as reclaimed land. Staff recommends the Board authorize an amendment of GL 5973 by withdrawing only the reclaimed lands portion from the easement; further, authorize the refund of the pro-rated portion of consideration paid for the withdrawn area for the remaining term of the easement. Staff will request the staff appraiser to compute the exact amount of refund. Such refund will be transferred to the purchase price of the reclaimed lands. A map at Exhibit B shows the respective portions of the sale of reclaimed land and the remaining pier dock area under GL 5973.

Department of Facility Maintenance, Department of Parks and Recreation, State Historic Preservation Division, Board of Water Supply, Department of Health, Division of Aquatic Resources, Commission on Water Resource Management, Office of Conservation and Coastal Lands have no objections/comments on the request. Department of Planning and Permitting has not responded as of the suspense date of the request.

Office of Hawaiian Affairs (OHA) objects to the sale pursuant to its comments at Exhibit C. OHA does not agree the request is exempt from environmental assessment process. Staff responds that the subject area was formed in the 1950s', which was before the enactment of environmental assessment law under Chapter 343, HRS. As such, the initial reclamation of the area did not require an EA or EIS. The current sale of land is also not an action that requires an EA or EIS.

Further, OHA argues that the subject area should be considered as a remnant rather than as reclaimed land, because of Staff's incomplete statement when we stated that the lack of legal access showed there would be no prejudice to the State's interest. What Staff meant to say was that the lack of legal access would prevent the public from accessing the area. We have further clarified that there are also no nearby beaches or facilities from which the public could access the reclaimed land. Thus, the State's interest would not be prejudiced by the sale of this reclaimed land.

OHA also questions the accuracy of our in-house database pertaining to the determination of ceded land status. Staff responds we will continue to use our database. In the event there is information indicating our record is wrong, such record will be corrected promptly. To date, there is no indication that the ceded land status of the subject land is wrong.

Therefore, staff respectfully disagrees with the comments of OHA and recommends the Board approve the subject request.

Compliance with Act 176, Session Laws of Hawaii 2009, including holding informational briefing and obtaining concurrent resolution from the legislatures will be obtained after the Board approves today's request.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions. Currently, applicant is in compliance under GL 5973.

There are no other pertinent issues or concerns and staff has no objection to the request.

RECOMMENDATION: That the Board, subject to the Applicant fulfilling all of the Applicant requirements listed above:

1. Authorize the withdraw of reclaimed land from GL 5973 and refund the pro-rated consideration paid for such withdrawn area;

2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (1) 4-4-037-012, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.

3. Find that the sale of the subject reclaimed land is not prejudicial to the best interest of the State, community or area in which subject reclaimed land is located.

4. Authorize the sale of the subject reclaimed land to Fordyce Smith Marsh, Jr and Noelani Fowler covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

   a. The standard terms and conditions of the most current deed or grant (reclaimed land) form, as may be amended from time to time;

   b. Review and approval by the Department of the Attorney General; and

   c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

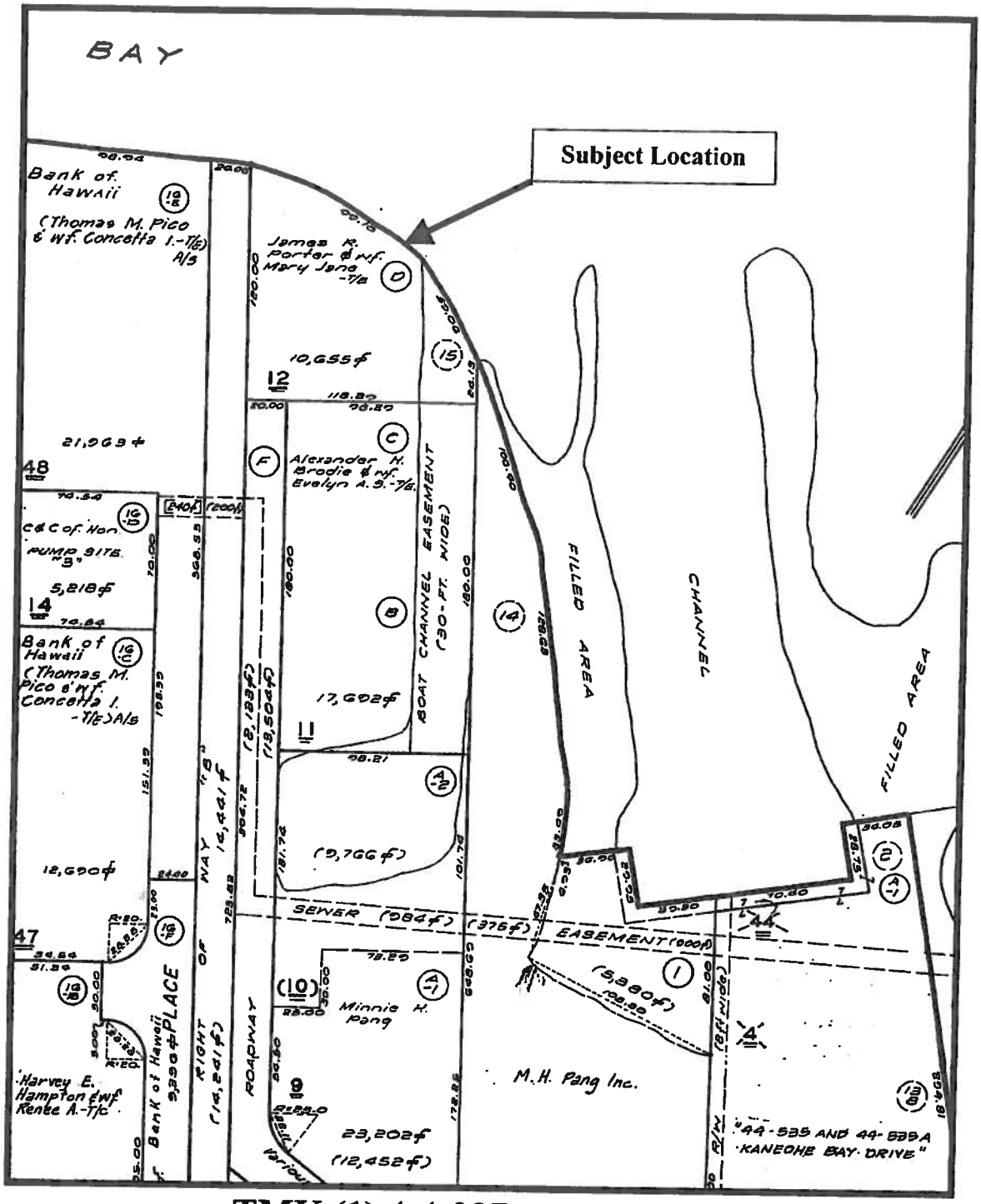
Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

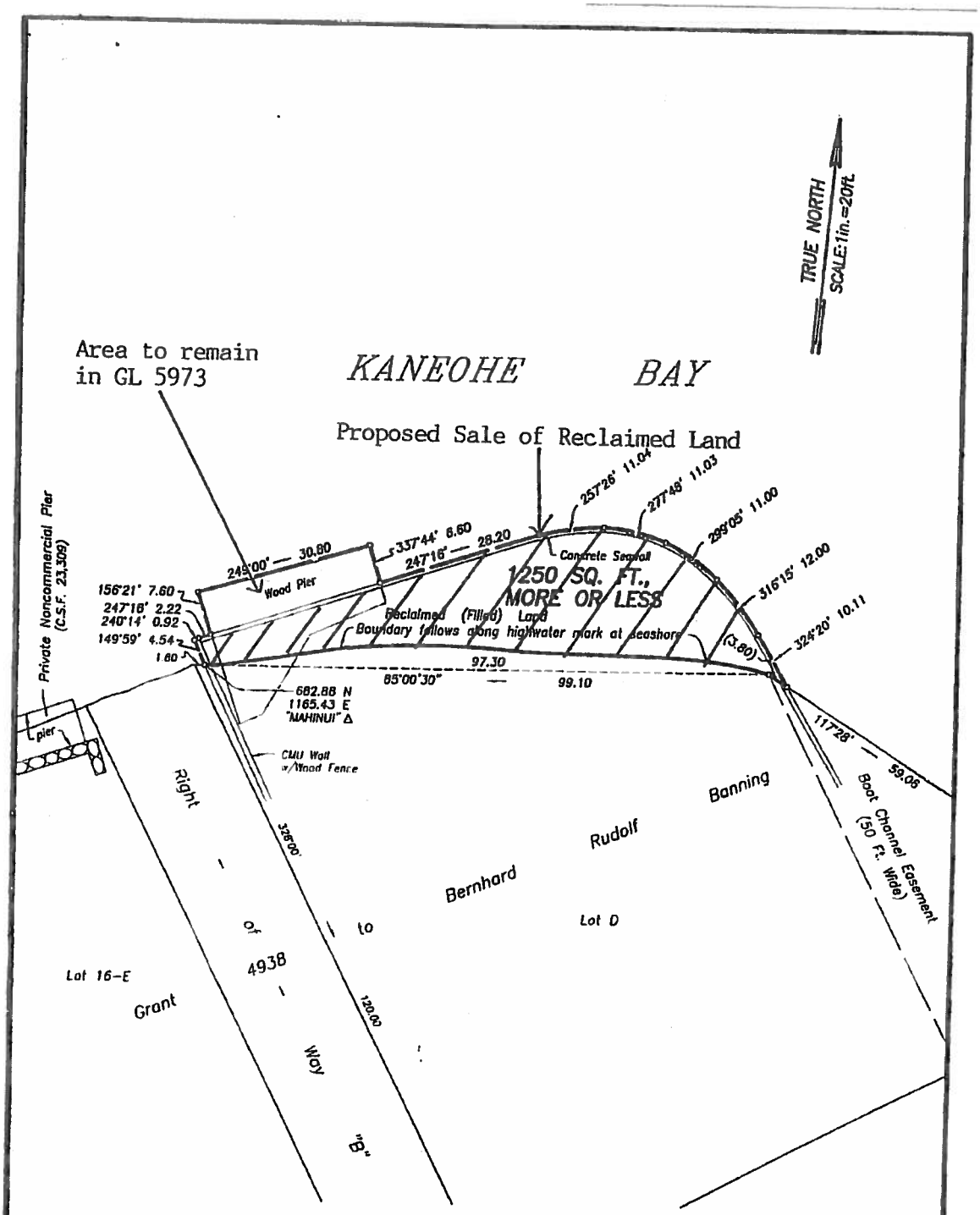
APPROVED FOR SUBMITTAL:

Laura H. Thielen, Chairperson



TMK (1) 4-4-037:seaward of 012

EXHIBIT A



NON-EXCLUSIVE EASEMENT
FOR SEAWALL, LANDSCAPING AND PIER PURPOSES

Fronting Grant 4938 to Bernhard Rudolf Banning

Keaalau, Kaneohe, Koolaupoko, Oahu, Hawaii

JOB O-017(09)

C. BK.

Scale: 1 inch = 20 feet

Fronting Parcel 12 of TMK 4-4-37

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

C.S.F. NO. 24,788

JGL February 6, 2009

PRELIM APPR'D
Department of the Attorney General

REDUCED NOT TO SCALE

EXHIBIT "B"

PHONE (808) 594-1888

FAX (808) 594-1865

STATE OF HAWAI'I
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAI'I 96813

RECEIVED
LAND DIVISION
2010 MAR 24 A 10: 35
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

March 22, 2010

HRD10/4848

Mr. Barry Cheung, District Land Agent
Division of Land Management
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: DRAFT—Sale of Reclaimed Land to Fordyce Smith Marsh, Jr. and Noelani Fowler; Amendment of Grant of Non-Exclusive Easement S-5973; Kāneʻohe, Koʻolaupoko, Oʻahu, Tax Map Key: (1) 4-4-037: seaward of 012.

Aloha e Mr. Cheung:

Thank you for the opportunity to comment on the above-referenced submittal draft.

The Office of Hawaiian Affairs (OHA) has reviewed the draft recommendation for sale of reclaimed-submerged state lands approximating 1,000 square feet zoned conservation to private third-parties. This measure involves a portion of Government Lands under Section 5(b) of the Admission Act—*i.e.*, ceded lands—presently encumbered by a state issued non-exclusive lease (S-5973) expiring on July 14, 2064. To summarize, this measure would withdraw certain ceded lands from lease S-5973 then authorize sale of the same lands back to the current lessees, among other functions, without either recourse to the Native Hawaiian people and review under Chapter 343, HRS. OHA, therefore, firmly objects and offers the following comments.

OHA holds the position that the state cannot reduce the ceded lands corpus until the Native Hawaiian people's claim to ceded lands has been resolved, which has not yet occurred. Law and policy for this mandate resides in Article XII, §§ 4-7, Haw. Const., and 1993 Haw.Sess.L.Acts 354,[1] 359[2] and 329,[3] *inter alia*, particularly with respect to the state's trust

[1] Act 354 recognized the illegal and immoral acts of the United States in 1893, among other things, as a valid claim for a Native Hawaiians reconciliation process and so forth.
[2] Act 359's stated purposes is facilitating the efforts of native Hawaiians to be governed by an indigenous sovereign nation of

EXHIBIT "C"

obligations to OHA beneficiaries. Plus, OHA believes the will of the people significantly demonstrates support for this mandate, as displayed by the response of our state Senate and House returning legislation promoting a more balanced and equitable approach to ceded lands reconciliation and transactions, as in Act 176, Session Laws of Hawai'i (2009).

OHA is certain that this balanced approach in law and equity is widely accepted on all local fronts. And rest assured OHA in no way whatsoever casts any aspersions, judgments or opinions unto the parties of the proposed transaction. However, there are additional points raised in the submittal draft which are prejudicial to OHA's mandate and its beneficiaries' interests.

First, OHA notes the draft's assertion that Chapter 343, HRS, on environmental assessments is not applicable. We disagree. Both the Department-Wide Exemption List[4] and Approved EIS Exemption List for Division of Land Management[5] of your department do not expressly include exchange(s), sale(s), trade(s) or transfer(s) of 5(b) ceded lands in any exemption class. OHA posits that those kinds of transactions cannot fall under any exemption class as routine maintenance, management or operations. Above all, the subject lands in question are in conservation and, thus, the exemptions themselves are inapplicable according to Land Management's environmental impact statement (EIS) exemption list.

Even assuming, moreover, that the submittal draft moves forward, OHA believes it will trigger NHPA,[6] NEPA[7] and Chapter 343, HRS,[8] *inter alia*, as well as performance of a joint federal-state EIS.[9] The underlying justifications requiring an EIS would be plenary; however, suffice it to say that the argument would likely hinge on two facts: (1) The indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States (or state), either through their monarchy or through a plebiscite or referendum; and (2) the health and well-being of Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.

Second, OHA notes the draft's characterization of the 5(b) ceded lands in question as "reclaimed" lands under § 171-53, HRS. We view it differently. Based on the documentation supplied along with the submittal draft, OHA finds the subject ceded lands (approx. 1,000 square feet or 0.022 acre) are more suitable characterized as "remnant" pursuant to § 171-52, HRS:

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their own choosing.

[3] Act 329 aimed to clarify the proper management and disposition of the lands subject to the public lands trust and the proceeds and income therefrom pursuant to the state's constitutional mandate.

[4] Dated December 4, 1991.

[5] Dated April 28, 1986.

[6] National Historic Preservation Act of 1966 (16 USC 470), as amended.

[7] National Environmental Policy Act of 1969 (42 USC 4321-4327), as amended.

[8] Chapter 343, HRS, contemplates consideration of secondary and nonphysical aspects of proposal, including socio-economic consequences. 63 Haw. 453, 629 P.2d 1134.

[9] See, Grant of Non-Exclusive Easement S-5973 at p. 10, para. 22: "The Grantee shall comply with all applicable federal and state environmental impact regulations." The letter and spirit of the lease should also then carry-over into any subsequent agreements binding all parties. To undue such a requirement, for example, would be unconscionable.

> The term "remnant" means a parcel of land economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics.[10]

The dichotomy drawn here is debatable; however, we focus on the submittal draft's sole reasoning[11] for the instant request: "Staff does not believe selling the subject reclaimed land would be prejudicial to the State's interest [because] the subject land lacks legal access to any public highway."[12]

Following that rationale, OHA finds that the applicable provision here then is § 171-52(b), HRS, that: "No parcel shall be disposed of as a remnant solely for the reason that it lacks an adequate access." Hence, OHA cannot appreciate any mischaracterizations of ceded lands to promote avoidance of legal restrictions on the one hand, and breach of trust obligations to the Native Hawaiian people on the other.

Third, OHA requests clarification on what information was used to make the determination that this sub-acre of land is indeed part of the Section 5(b) ceded lands corpus. Based on prior experience, OHA lacks confidence in the accuracy of the State Lands Information Management System (SLIMS) for it to be used in final determinations on whether a parcel is ceded lands or not, thus we hope you can supply us with information of any other databases, inventories, lists and/or resources now in use by the department for that purpose.

Mahalo again for the opportunity to comment on the submittal draft. If you have any questions, please contact Jerome Yasuhara at (808) 594-0239 or by email at jeromey@oha.org.

'O wau iho nō, me ka ha'aha'a,

Clyde W. Nāmu'o
Chief Executive Officer

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[10] § 171-52(a), HRS.
[11] The original intention for S 5973 was "to rectify the encroachment issue," which was resolved once the instant lease was agreed to between parties. Therefore, the "access" issue now presented appears as the sole reasoning for this submittal draft.
[12] DRAFT/BLNR—Sale of Reclaimed Land to Marsh & Fowler (Feb. 23, 2010) at p. 3.

11: 020357

100D-016

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

February 23, 2011

COPY

Ms. Noelani Fowler

Kaneohe, Hawaii 96744

Dear Ms. Fowler:

Thank you for your letter dated January 29, 2011 to Governor Neil Abercrombie regarding Land Division's position on the sale of reclaimed lands.

I apologize for the delay and any misunderstanding this process has caused you. Unfortunately, we do not believe selling of ceded lands is good policy. Nevertheless, the current Grant of Non-Exclusive Easement S-5973 will remain in place, and you will continue to have the opportunity to maintain and use the 1,000 square feet of reclaimed land.

For your information, as a housekeeping measure, the Land Division staff will be going back to the Land Board in the near future, and rescind its prior approval of May 13, 2010 (D-17) to sell the 1,000 square feet reclaimed land to you.

We sincerely hope you will understand the Department's position in making this decision. If you have any further questions, please feel free to contact Russell Y. Tsuji, Land Administrator at 587-0419.

Sincerely,

WILLIAM J. AILA, JR.
Interim Chairperson

c: Governor Neil Abercrombie