

Debate over high court's ceded lands decision continues

By Liza Simon and Lisa Asato
Ka Wai Ola

The Supreme Court's reversal of an earlier ruling by the Hawai'i Supreme Court blocking the sale of former Hawaiian Kingdom lands becomes official this month, triggering debate over whether the remand of the ceded land appeals case bodes well for preserving the corpus of the ceded lands trust.

"The remand does not decide the issue of clear title to ceded lands, as the state (administration) had hoped," said William Meheula, attorney for four Native Hawaiians who initiated this protracted legal battle. In 1994, the four individuals and the Office of Hawaiian Affairs filed a lawsuit to stop the state from selling ceded land sales for a development on Maui.

Meheula also said the Supreme Court's ruling does not extinguish native claims to

ceded lands, because the high court's decision only addressed the essential question of the appeals case, which asked whether the federal resolution apologizing for the overthrow of the Kingdom of Hawai'i stripped the state of its authority to sell or transfer about 1.2 million acres of former crown lands.

In March the U.S. Supreme Court ruled that the state court had erred in relying on the federal Apology Bill in its January 2008 ruling barring the state from selling or transferring ceded lands until Native Hawaiian claims to the lands are resolved.

Meheula said the ruling leaves open the possibility that the state court can now use state law to reach the same conclusion. The state court can keep the injunction on ceded land sales stays in place, unless it decides otherwise, Meheula added.

Meanwhile, state Attorney General Mark Bennett said the Supreme Court's reversal of the state court's decision clarified that the

state retains title to the ceded lands. "The unanimous opinion by the nation's nine justices makes clear the point made throughout the last three administrations that the State of Hawai'i through the Admission Act holds the fee-simple title to the trust lands for the benefit of all Hawai'i including Native Hawaiians," Bennett said.

Charles Ka'ai'ai, one of four plaintiffs in the case to stop ceded lands sales, expressed optimism about what the outcome will be out of the Hawai'i Supreme Court.

Ka'ai'ai said the state court may have overstepped their bounds in using federal law in deciding the case, but at the same time had found basis in state law for stopping the state from alienating ceded lands. "I think that's all they really need to uphold the moratorium they imposed," he said.

The Hawai'i court receives the Supreme Court mandate just as lawmakers hammer out details of ceded lands bills during the closing weeks of the legislative session. Rep. Mele Carroll expressed concern that a lifting of the injunction leaves no doubt that the state can sell lands – a possibility she called "frightening" in a written statement, which also called on lawmakers to take the opportunity to set policy "to ensure that ceded lands are not sold or transferred until the state fulfills its fiduciary responsibility and moral obligation to native Hawaiians." The state Admission Act requires that revenues from ceded lands be used for two classes of beneficiaries – the general public and Native Hawaiians, and assigns to the state the duty of ceded lands trustee.

Carroll, who chairs the Legislative Hawaiian Caucus, fought this session to pass a bill that would have imposed a five year moratorium on ceded lands sales, noting that the state's self-imposed ban is not guaranteed to stay in place. "I can cite many examples where the state has reversed its position, especially in matters related to revenues and funding of programs."

The moratorium bill did not gain as much traction with lawmakers as another senate that would allow for any resolution proposing a ceded land sale to be stopped by a majority of both houses to disapprove ceded land sales. Critics say the measure weakens protection for the ceded lands trust, because resolutions frequently fail early in the Legislature, thus diminishing the opportunity for public input on a pending sale. The measure was being discussed in conference committee as *Ka Wai Ola* went to press.

Look for updates to the ceded lands situation on oha.org. ■

OHA hails Nā Wai 'Ehā recommendations

By Ka Wai Ola Staff

The Office of Hawaiian Affairs is hailing the recommendations of a hearings officer to the State Commission on Water Resource Management to restore tens of millions of gallons per day of water to the streams of Nā Wai 'Ehā o Maui: Waikapū, 'Īao, Wai'ehu and Waihe'e. These streams, which once supported extensive kalo cultivation, have been drained almost dry for more than a century by ditches that diverted the water to irrigate sugar plantations.

In proceedings before the Water Commission, OHA joined with the Maui community organizations Hui O Nā Wai 'Ehā, Maui Tomorrow Foundation and the Maui County Department of Water Supply in urging the Water Commission to restore mauka to makai flow in these streams in order to bring back native stream life to restore the traditional and customary practices such as kalo cultivation, which depends on flowing water.

"Maui's water future will not be bright unless we mālama the streams we depend on," said OHA Maui Trustee Boyd Mossman. "We hope the state government continues these efforts and this direction so that Hawaiians and all the people of Maui will be well served."

Following a lengthy administrative trial, where 77 testimonies were heard over the course of several months, hearing officer Dr. Lawrence Miike agreed. His 210-page proposed decision – which will now go to the full Water Commission for a vote – recommends that a total of 34.5 million gallons per day be restored to the streams: 14 million to Waihe'e, 2.2 million to North Wai'ehu, 1.3 million to South Wai'ehu, 13 million to 'Īao, and 4 million to Waikapū.

"OHA has committed significant resources over the last five years in working with the community on our shared goals for Nā Wai 'Ehā," said OHA Chairperson Haunani Apoliona. She said the three objectives for OHA are that sufficient water is provided to the kuleana users who have legal rights to the waters, year-round flow of the streams from Pu'u Kukui down to the sea, and permanent protection and management of the watersheds from which the water flows.

Miike has set May 11 as the deadline for the parties to submit exceptions to his proposed findings of fact, conclusions of law, decision and order. ■

NO KA ILINA • BURIAL NOTICES

PŪPŪKEA AHUPUA'A

NOTICE TO INTERESTED PARTIES IS HEREBY GIVEN that six unmarked burial sites containing a minimum of eight sets of human skeletal remains were discovered by Cultural Surveys Hawai'i, Inc. The finds were made in the course of an archaeological inventory survey associated with the planned Pūpūkea Road Rockfall Mitigation Project, Pūpūkea Ahupua'a, Ko'olauloa District, Island of O'ahu (TMKS [1] 5-9-018:030, 031, 032, 038, and the Pūpūkea Road right-of-way). The planned project involves rockfall mitigation work upslope of a portion of Pūpūkea Road, and is being funded by the City and County of Honolulu. No Land Commission Awards (LCA) are located within or in the vicinity of the project area. The project area is located within portions of former Land Grants 5196 to Leslie Cooper Clark and 5087 to A.A. Wilson.

The human remains were discovered within six burial caves along the coastal cliff area in the vicinity of Pūpūkea Road. The remains were determined to be over 50 years old and proper treatment shall occur in accordance with Hawai'i Revised Statutes (HRS) Chapter 6E-43 and Hawai'i Administrative Rules (HAR) Chapter 13-300 regarding unmarked burial sites. An evaluation of ethnicity will be made by the State Historic Preservation Division (SHPD). However, based on observations of the burial site context, the burials are reasonably believed to be Native Hawaiian. The O'ahu Island Burial Council has jurisdiction over all requests to preserve or relocate previously identified Native Hawaiian Burial sites, in consultation with any identified lineal and/or cultural descendents, per the requirements of HAR Chapter 13-300-33. The proposed treatment of the burial sites is preservation in place. The remains' proper treatment shall occur in accordance with HAR Chapter 13-300-38.

All persons having information about these burial sites or wishing to submit a descent claim are requested to immediately contact Ms. Kaleo Paik at SHPD, Department of Land and Natural Resources (DLNR), located at 555 Kāuhihewa Building, 601 Kamōila Boulevard, Kapolei, Hawai'i 96707 [Tel. (808) 692-8026; Fax (808) 692-8020]. All interested parties should respond within thirty (30) days of this notice and provide information to SHPD/DLNR adequately demonstrating lineal descent from these specific burials or cultural descent from ancestors buried in the same ahupua'a or district of this project.