

NATIVE HAWAIIAN LEGAL CORPORATION

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March 1, 2011

BY E-MAIL, FAX, AND U.S. MAIL

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Washington, DC 20585

Re: Comments - Hawaii Interisland Renewable Energy Program: Wind
Final Environmental Assessment/Environmental Impact Statement
Preparation Notice

Dear Mr. Kam and Mr. Como:

Thank you for the opportunity to comment on the Hawaii Interisland Renewable Energy Program: Wind Final Environmental Assessment/Environmental Impact Statement Preparation Notice ("EISPN" or "preparation notice"). The Native Hawaiian Legal Corporation submits these comments on behalf of Kaulana Kaho'ohalahala and Matthew Mano. They hereby request to be consulting parties, pursuant to HRS Chapter 343 and National Historic Preservation Act Section 106 ("Section 106").

In order to fully inform decision-making, the draft Environmental Impact Statement and final Environmental Impact Statement (hereinafter "EIS") must discuss the following issues in detail:

CULTURAL IMPACT STATEMENT

Transparency is necessary as to the applicants' consultations/interviews concerning cultural resources. Over 60 "one-on-one or small group talk story sessions" concerning cultural resources have been held, according to the preparation notice. All persons consulted should be identified in the EIS. Also, the applicants must disclose how these individuals or groups were selected.

The EIS should define precisely and broadly the kinds of resources and practices that constitute "cultural resources" or "cultural practices." It is clear that the applicants would consider the following to be cultural practices or cultural resources: fishing, hunting, gathering

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and religious practices. EISPN, p. 3-46. The applicants should study and address impacts on the following, as well, at a minimum:

- natural resources upon which subsistence, cultural, and religious practices depend;
- natural resources to which Native Hawaiians attach cultural or religious significance;
- visual resources imbued with cultural or historical meaning;
- caring for and protecting ‘iwi kupuna;
- cultural or religious significance afforded to the winds in the project areas;
- trails and roads used to perpetuate cultural or subsistence practices.

Further, the EIS must explore the relative cultural impact of the various methods of producing alternative energy. There must be a clear basis for the State’s decision to choose one source of renewable energy over another. More importantly, the State should disclose why it has chosen to extract wind energy from one particular geographical area rather than another, after evaluating the relative cultural impacts of developing this energy in these areas.

OLD GOVERNMENT ROAD AND TRAILS

The applicants identify some of the roads, including Polihua Road, which will be expanded and altered if the project is approved. EISPN, p. 3-30. What impact will such expansion/alteration have on natural resources, historic properties, and protected traditional and customary Native Hawaiian practices for subsistence, religious and cultural purposes? The EIS must disclose and map the location of all roads and trails owned by the public/government, including so-called “secondary roads” and map them in relation to the proposed development. The EIS should discuss court decisions that have guaranteed continued public use of these resources. In addition, the EIS must disclose all roads or trails that the applicants or site-specific developers are obligated to keep open under conditions, covenants, or other restrictions. Finally, the applicants must reveal the impacts of the project, from construction through operation, on the public’s right to use these roads.

BURIALS

The project will significantly impact Native Hawaiian burial sites. The preparation notice demonstrates that the project will involve significant sub-surface disturbances in coastal areas, particularly at cable landing sites. EISPN, pp. 2-5, 2-10. Also, road expansion will be necessary and may impact burials. EISPN, p. 3-30.

Under federal and state law, the EIS must provide meaningful information regarding the impact on burial sites and explore alternatives. For instance, the preparation notice indicates that the landing sites for the cable crossing will be determined based on “appropriate consideration” of existing land uses and impacts to natural and cultural resources. The term “appropriate consideration” is vague. We must know whether the applicants will displace or relocate existing

burial sites and the process they will follow for making this decision. Further, the draft EIS should explicitly recognize burial sites as existing land uses within the proposed project area. Finally, if all preferred and alternative cable routes would impact burials, that fact should be known now before proceeding further.

ARCHAEOLOGICAL SITES

The EIS must undertake a serious effort to discover archaeological sites. The cultural impact statement should not rely solely on reviews of known sites and literature. There must be subsurface investigations, remote-sensing studies, or investigation of kama`āina statements to identify all archaeological sites and human burials which may be affected adversely by this project. The EIS must fully discuss the cumulative impacts on archaeological sites now. The plan to study these impacts in detail at the site-specific level is inappropriate because (1) contrary to the EISPN, these project areas are known already and (2) the relative impacts of reasonable alternatives must be understood at the programmatic level in order for informed decision-making to take place.

SUBMERGED CEDED LANDS

The project, as described in the EIS, will require the use of ceded lands because the cable will sit upon submerged lands. It is well-settled that submerged lands around all islands are held in trust for the betterment of Native Hawaiians, and other purposes set forth in the Admission Act. *See Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). As such, approval of the project is subject to the State's trust responsibilities under Section 5(f) of the Admission Act.

The EISPN does not disclose how it will address the impact of the project on the ceded lands trust. The EIS must evaluate this impact and how the State's responsibilities under Section 5(f) will be satisfied. Among other things, the EIS must identify and disclose all permits and leases required for the use of ceded lands. The EIS must also evaluate whether the proposed project is consistent with two purposes of the ceded lands trust: the betterment of the conditions of Native Hawaiians and public use of these lands. Finally, the EIS should identify with specificity all potential project areas that lie within the ceded lands trust.

ENVIRONMENTAL JUSTICE

The proposed action raises several environmental justice concerns, which warrant detailed study. Environmental justice, as the applicants know, must be considered for federal actions. This proposed federal action will disproportionately impact Native Hawaiian communities on Lāna`i and Molokai to benefit urban Honolulu. The EIS should evaluate how the project will disproportionately impact the ability of these Native Hawaiian communities to perpetuate their religious, subsistence and cultural practices. EISPN, p. 3-49. The EIS should evaluate and study desecration – including the relocation of Native Hawaiian burial sites – as an issue of environmental injustice.

VEGETATION

The EISPN identifies vegetation affected by the project, including the Kānepu`u dryland forest reserve on Lāna`i, but makes no mention of how impacts to this forest reserve will be studied or mitigated. EISPN, pp. 3-8 to 3-10.

The EIS must examine the ecological and cultural significance of this dryland forest reserve. The EIS must include a detailed map, demonstrating the footprint of the project, including the proposed wind turbines and any and all new roads or improvements needed to transport materials, in relationship to the Kānepu`u dryland forest reserve.

TERRESTRIAL NATIVE, THREATENED AND/OR ENDANGERED SPECIES

Informed decision-making on a project of this scope cannot occur without meaningful data about how important species will be affected and if impacts can be avoided. In developing a programmatic approach to these species, the EIS must actually study the existence of these species, assess the impacts, and evaluate whether mitigation is even possible.

The project will affect threatened or endangered species. EISPN, p. 3-13. The EIS should disclose all that is presently known or knowable about the impact of similar projects on threatened or endangered species like the Hawaiian petrel, the native pueo, Newell's shearwater, the Hawaiian hoary bat, and the ae`o, the Hawaiian stilt. The EIS should also disclose all facts known about how these species were impacted by the met tower pilot project done on Lāna`i.

The EIS must fully study the presence of native or endemic species in the project area, and how these species will be impacted. It is insufficient to state, without support as the EISPN does, that the `amakihi is unlikely to be found in the project area, while acknowledging that the `amakihi is an endemic forest bird found on Lāna`i. EISPN, p. 3-12. The presence and impact on the `apapane, another forest bird on Lāna`i, must be studied.

To the extent that any of these species have cultural significance to Native Hawaiians, the EIS must fully disclose the presence of these species as cultural resources and study the impact to these species as part of the cultural impact assessment.

MARINE RESOURCES

The project will interfere substantially with important marine resources, particularly upon installation and operation of the undersea cable infrastructure. The EISPN, for instance, discloses the presence of deepwater corals in the project area. EISPN, p. 3-18. The ecological significance of these corals must be described in the EIS. Compliance with any and all regulatory schemes that protect these corals must be fully set forth in the EIS. Instead, the EISPN indicates that an assessment of existing coral reef locations and sensitive resources will be conducted during a site-specific study and the route for the cable will then be chosen. EISPN, p. 3-24. This assumes that a route can be selected that will be acceptable.

The EIS must disclose the preferred and alternate routes for the cable, and assess their impacts on marine resources and water quality. Without this information, the decision to move forward with an inter-island energy program cannot be made. It is significant, for example, that there is no cable route that could be employed that would avoid the humpback whale sanctuary. EISPN, p. 3-27. These preferred and alternative routes have already been studied. EISPN, p. 3-27 (described a 2010 study of preferred and alternate routes for the off-shore cable). Any impacts related to these known routes should be studied now. EISPN, p. 3-27 (described a 2010 study of preferred and alternate routes for the off-shore cable). The EIS must be done in such a way as to fully inform, control, and govern the siting and design of the project, including the cable route.

WATER QUALITY

The EISPN acknowledges that run-off will be a problem. EISPN, p. 3-5. A complete EIS will reveal the cumulative impact of all runoff and leaching on coastal waters. This includes sediment runoff during construction, fertilizers, heavy metals, grease, and sewage effluent. What specific studies will the EIS rely on to support its conclusions? The EIS should include all calculations or models used to support any conclusion regarding runoff and drainage into nearshore waters. It should study the amount of nonpoint source water pollution associated with similar developments and discuss the degradation of coral reefs and coastal water quality caused by similar projects.

The EIS also should include sufficient baseline data for meaningful analysis. For instance, what are the current levels of all the pollutants identified in Hawaii Administrative Rules 11-54-04 measured at the affected shoreline areas? How will each of these levels change if the project proceeds? Any water quality plan should spell out in detail all mitigation plans.

VISUAL IMPACT

A project of this scale and type will have intense cumulative impacts on significant visual resources on the islands encumbered by the wind turbines. The applicants state that these impacts will not be studied until island-specific projects are evaluated. EISPN, pp. 3-38, 3-39. Such a delay frustrates the purpose of environmental review. The applicants know now the number of wind turbines that must be constructed to make this project feasible. An analysis of the cumulative visual impact of this known number of wind turbines must be made now, not later.

It is woefully inadequate for the applicants merely to refer to the visual impact guidelines provided by the federal Highways Division and the pertinent community plans. The hallmarks of these federal guidelines and these community plans should be examined to determine whether this project can proceed in harmony with them.

It is also unclear how these visual impacts will be assessed. EISPN, pp. 3-38, 3-39. Though the applicants acknowledge the type of visual resources in the project area, the

applicants must reveal how they will study these resources. For instance, the EIS should examine: 1) given a structure at point x, where will it be seen from; and 2) from point y, what will you be able to see of the development?

WILDERNESS AND CONSERVATION

The EIS should discuss the high value that the public and Native Hawaiians place on preservation of areas with wilderness qualities (i.e., few -- if any -- people, no man-made structures, etc.). Those who walk along the shoreline, travel by boat along it, or exercise traditional Native Hawaiian practices will all experience a loss if these natural places are not conserved and preserved. The EIS should identify how many people currently use the coastline and the mauka areas affected by the project on any given day. In sum, the EIS should discuss the loss of the unspoiled coastal environment of Lāna`i and the other islands involved, the impact of this loss to Native Hawaiians, the visitor experience, and the public.

AGRICULTURAL LANDS

The loss of agricultural lands must be studied. The wind development project will occupy an enormous percentage of land on Lāna`i and Molokai. The EISPN says only that relevant state and county agencies will be involved in assessing this impact but it is unclear how this decision-making will proceed where the project impedes upon important agricultural lands. EISPN, p. 3-5. This project will require a major commitment of land, and that undercuts our State's ability to achieve food security by growing and/or gathering and hunting for food that we need right here in our islands. This impact must be weighed.

ALTERNATIVES ANALYSIS

The EIS must explore reasonable alternatives to importing wind-generated electricity from Lāna`i, Molokai, and Maui to O`ahu to meet energy demand. All reasonable alternatives, particularly requiring O`ahu to generate enough energy to meet its own needs such that an inter-island cable is not necessary, must be explored and weighed against the proposed action of importing wind, in terms of their relative impacts on: (1) cultural resources; (2) natural resources; (3) socio-economic/environmental justice impacts to name a few.

The EISPN starts with the conclusion that wind energy is the "most viable near-term technology" to achieve the goals set in the Hawaii Clean Energy Initiative. EISPN, pp. 1-4 to 1-5. In support of this conclusion, the EISPN cites a 2008 study done by the Department of Energy.¹ This 2008 DOE study apparently considered these criteria: "feasibility, scalability, and cost" and concludes that this inter-island wind program is the most "fiscally prudent and technologically feasible" option. It did not evaluate the cost of this option in terms of the loss of natural and cultural resources. The alternatives analysis in the EIS must weigh the environmental impacts of this option against the impact of any reasonable alternatives.

¹ This study should also be included as an appendix to the EIS to permit a full and fair discussion of the criteria used to reach this conclusion and the information relied upon.

Further, we ask that the EIS disclose and evaluate the costs, impacts, and viability of wind energy development projects in other states and countries. Instances of other states or countries abandoning or reducing reliance on wind-generated energy should be examined.

PROGRAMMATIC APPROACH

Throughout the EISPN, the applicants defer several studies, promising that they will be done later during site-specific environmental reviews. This methodology obscures the genuine impacts of this project as a whole. Following this approach wastes the money allocated for this study. Following this approach also encourages further public expenditures to further this project, without all necessary information. Following this approach further lulls decision-makers into a false sense of security that all impacts will be studied and all impacts can be mitigated. The approach should not be followed in the EIS.²

The EIS should analyze all impacts so far as the parameters of the project have been explored and agreed upon. For instance, at least one site-specific final environmental assessment/environmental impact statement preparation notice has been prepared for the project on Lāna`i. In addition, the State and HECO signed the Big Wind Agreement over two years ago. EISPN, p. 1-6, and HECO recently announced that it finalized a power purchase agreement with Castle Cooke.

All cumulative impacts of a project of this scale must be evaluated in the EIS. To explore the impacts of importing wind-generated energy from neighboring islands, the EIS must account for all components of such a system, including:

- (1) the impacts of planned or reasonably-foreseeable back-up power sources because wind is an intermittent source of energy;
- (2) the impacts of new or modified infrastructure to connect to the grid;
- (3) the impact of new transmission lines from the wind turbines to any converter stations;
- (4) how will decommissioning be paid for and regulated.

APPLICANTS' TRACK RECORD

The success of any mitigation measure is dependent on the track-records of the applicants and the site-specific developers. It therefore is essential for the EIS to discuss problems the applicants and the site-specific developers have had in the past in fulfilling commitments and representations.

BEST MANAGEMENT PRACTICES

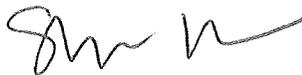
The preparation notice indicates that the purpose of the programmatic EIS is to establish policies and best management practices to address wind energy development. Please fully

² If the EIS is written in this manner, it must set forth requirements for future site-specific EIS documents.

Allen G. Kam, Esq.
Anthony J. Como
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discuss how the public can be assured that any proposed best management practices will be performed and will be effective.

Sincerely,

A handwritten signature in black ink, appearing to read 'Moses Haia III', with a stylized flourish at the end.

Moses Haia III
Sharla Manley
Camille Kalama
Staff Attorneys