BENJAMIN J. CAYETANO
GOVERNOR

EARL I. ANZAI
ATTORNEY GENERAL

THOMAS R. KELLER
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

October 1, 2001

The Honorable Gilbert S. Coloma-Agaran
Chairperson
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

Re: Ownership of Two Historic Trails Located in Halawa Valley, Molokai, TMK 5-9-1, 2, 3, 4

Dear Mr. Coloma-Agaran:

In your memorandum of August 21, 2001, you asked:

(1) Whether, in our view, the abstract prepared by Mahoe Collins dated December 26, 1995 (Abstract) (Exhibit I, attached), which was synopsized in a memo dated June 6, 2001, from Doris Moana Rowland (Exhibit II, attached), correctly concludes that the government owns two parallel trails in Halawa Valley on the island of Molokai; and

(2) Whether a public trail that has evolved into what is today a vehicular roadway is a road under the jurisdiction of the county or a public trail under the jurisdiction of the Board of Land and Natural Resources (Board).

Short Answer

Based on our review of the evidence provided to us and application of the relevant law, we concur that the two parallel trails in Halawa Valley are owned by the government. We caution, however, that the trails that are in use today may not necessarily coincide with what is owned by the government.

A metes and bounds survey will have to be conducted to determine the precise location of the government-owned trails.

A government-owned roadway that is currently used for vehicular traffic, which is not a highway under the jurisdiction of the state Department of Transportation, falls under the jurisdiction of the county in which it is located and not under the jurisdiction of the Board, regardless of it having been, at one time, a non-vehicular trail.

I. Government Ownership of Trails

A. Background and Relevant Statute

As part of the Mahele, Kamehameha III surrendered all of his interest in the ahupua`a, through which the trails in question run, to Victoria Kamamalu. By mesne conveyances, the Estate of Bernice Pauahi Bishop (Bishop Estate) succeeded to ownership of the ahupua`a in 1884. In 1935, Bishop Estate conveyed the land to Helene Irwin Fagan.

As noted in the Abstract, the existence of the trails (alanui) in question was identified and depicted in several Land Commission Awards issued in the 1850s. Information about the location of these trails that can be gleaned from the Land Commission Awards is consistent with the depiction of the "roads" on the 1915 map prepared for Bishop Estate (1915 Bishop Estate Map). The issue, then, is not whether these roads or trails existed, but whether they are public trails owned by the government pursuant to Hawaii Revised Statutes (HRS) §264-1. In pertinent part, that statute provides:

> (b) All trails, and other nonvehicular rights-of-way in the State declared to be public rights-of-ways by the highways act of 1892, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails. A public trail is under the jurisdiction of the state board of land and natural resources unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county.

(c) All . . . trails . . . in the State, opened, laid out, or built by private parties and dedicated or surrendered to the public use, are declared to be public highways or public trails as follows:

(1) Dedication of public highways or trails shall be by deed of conveyance naming the State as grantee in the case of a state highway or trail and naming the county as grantee in the case of a county highway or trail. The deed of conveyance shall be delivered to and accepted by the director of transportation in the case of a state highway or the board of land and natural resources in the case of a state trail. In the case of a county highway or county trail, the deed shall be delivered to and accepted by the legislative body of a county.

(2) Surrender of public highways or trails shall be deemed to have taken place if no act of ownership by the owner of the . . . trail . . . has been exercised for five years and when, in the case of a county highway, in addition thereto, the legislative body of the county has, thereafter, by a resolution, adopted the same as a county highway or trail.

* * *

(d) All county public highways and trails once established shall continue until vacated, closed, abandoned, or discontinued by a resolution of the legislative body of the county wherein the county highway or trail lies. All state trails once established shall continue until lawfully disposed of pursuant to the requirements of chapter 171.

Thus, the trails in question are public trails if either (1) they were declared to be public rights of way under the Highways Act of 1892; (2) they were opened, laid out, or built by the government; (3) they were built by private parties and dedicated by deed to the county or the state as grantee; or (4) they were built by private parties and surrendered to public use.

From the evidence provided by your department, we believe that the trails in question were declared to be public rights-of-way under the Highways Act of 1892. As there is no evidence that these trails were subsequently disposed of by the government, fee simple ownership remains with the State today.

B. Public Rights-of-Way Under the Highways Act of 1892

Pursuant to the Highways Act of 1892, fee simple ownership of all "public highways" resided in the Hawaiian Government. The same Act declared that all roads, alleys, streets, ways, lanes, courts, places, trails and bridges in the Hawaiian islands that had been opened, laid out or built by the government were public highways. If there were roads, trails, etc., that were opened, laid out or built by private parties that by 1892 had been dedicated as public highways or abandoned to the public as a highway, then these roads, trails, etc. were also declared to be public highways owned by the government pursuant to the Highways Act.

As noted above, it appears clear that the trails in question were built by the time the Land Commission Awards were issued in the 1850s.

1. Roads Opened, Laid Out, or Built by Government

The letter dated July 22, 1895, from Road Supervisor Hitchcock to the Minister of the Interior (part of your Exhibit III, attached) provides evidence that the roads were in fact built with government funds. In that letter, Hitchcock complains that "[t]he roads <u>never</u> should have been in the start, worked with <u>Govt</u> funds[.]" (emphasis in original).

Further inferences can be made of government ownership by the assumption of government responsibility for repairs and maintenance. Interior Department correspondence (your Exhibits IV and V, attached) dating from 1889 and 1890, indicate that the Hawaiian Government had assumed responsibility for maintaining the trails. The Interior Department correspondence in Exhibit III, although it post-dates the Highways Act by three years, provides evidence that the government had been maintaining the trails for several years. Although this correspondence does not specify the precise locations of the trails that the government was maintaining, the general descriptions, taken together with the notation of the "Govt Main Road" on the 1915 Bishop Estate Map, provide supporting evidence of government ownership of these trails.

Taken together, the evidence, though not conclusive, is persuasive that these trails were government trails.

2. Roads Abandoned to Public Use

Assuming, for the sake of argument, that the evidence is not persuasive enough to support a finding that these trails began as government trails and sows that these trails began as privately-owned trails, then it must be concluded that by 1892, they had been abandoned to public use.

Abandonment may clearly be inferred from the evidence that the government had assumed responsibility for repair and maintenance of the trail prior to 1892.

Moreover, on the 1915 Bishop Estate Map (Bishop Estate being the landowner at the time and since 1884), one of the trails is labeled "Gov't Main Road." Although this, by itself, is not competent evidence of government ownership, *see State v. Midkiff*, 49 Haw. 456, 473, 421 P.2d 550, 560 (1966); *Santos v. Perreira*, 2 Haw. App. 387, 393, 633 P.2d 1118, 1123-1124 (1981), it is supporting evidence that the owner of the ahupua`a considered the trail to be a public-right-of way.

C. Parallel Trails

As we understand, it is unusual to have two parallel public trails located closely together. Thus, it has been argued that it is unlikely that both are public trails; that one may have been for public use and the other for private use. While it may have been unusual to have two parallel public trails in close proximity, such situations were not unknown.

In *Kamehameha v. Kahookano*, 2 Haw. 118 (1858), we learn of a situation where, although a main public pathway had been laid out nearby for public use, people continued to use an old pathway to get to the church. The old pathway had been intermittently closed to public use, but eventually was reopened and set aside for public use to access the church. The court held that both the main public pathway and the old pathway were public rights-of-way, although the old pathway was limited for use as a way to the church.

An old road/new road situation was also present in *Robello v. County of Maui*, 19 Haw. 168(1908). There, a map of the government land that was leased by Mr. Robello showed an "old road" running through his parcel. The map also showed a "new 50' road" running along the boundary of the parcel. The court held in that case that there had been no extinguishment of the public right-of way in the old road, and, therefore, Mr. Robello was prohibited from cutting off public access to the old road.

There is some evidence to indicate that similar circumstances were involved here. As noted in the Abstract, survey notes of some of the Bishop Estate leases make reference to "Road," "Old Road," "main road," "old trail," and "Government main road." The 1915 Bishop Estate Map also denominates part of the trail as "Old Road." Thus, it is likely that, as the land was subdivided and developed, old public trails may have fallen into disuse or new public trails may have been laid out for greater convenience. Thus, the fact that there are two parallel trails in close proximity does not, in this case, give rise to a presumption that one is a public trail and the other is private.

D. Caveat

The evidence is not conclusive that both trails are public trails owned by the government. However, all of the evidence taken together presents a persuasive case for government ownership. Moreover, there does not appear to be any evidence to support a case for private ownership of the trails.

We must caution, however, that all of the evidence we have examined is on paper. As we understand, there may be a dispute as to whether the trails that are actually in use today are government-owned. As some of the evidence in this matter shows, the location of trails can change over time. A metes and bounds survey would be necessary to locate the trails that the government owns. They may not fully coincide with the trails that are actually being used today.

II. Jurisdiction Over Vehicular Roads

Some public roads began as non-vehicular trails, but evolved over time such that they are currently used as vehicular access ways. You ask whether these roads fall under county jurisdiction or under the jurisdiction of the board of land and natural resources (assuming they are clearly not under the jurisdiction of the state Department of Transportation). We believe that roads that are currently used for vehicular access are county roads under the jurisdiction of the county in which they lie.

The relevant statute is HRS §264-1. However, a clear answer to this question of county or Board jurisdiction cannot be gleaned from the language of the statute alone. Under subsections (a) and (c), all roads, alleys, streets, ways, lanes bikeways and bridges opened, laid out, or built by the government, or dedicated or surrendered to public use are public highways under the jurisdiction of either the state Department of Transportation or the county in which the road, alley, etc., is located. If the analysis stopped there, then it would be clear that the road in question here is under the jurisdiction of the county.

However, the first sentence of HRS §264-1(b), which provides:

> All trails and nonvehicular rights-of-way in the State declared to be public rights-of-ways by the highways act of 1892, or opened, laid out or built by the government or otherwise created or vested as nonvehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails[,]

could be interpreted to mean that a road that began as a nonvehicular public right-of-way is, and ever will be, a "public trail."

If the vehicular road is still deemed to be a "public trail" regardless of its current use, it would be under the jurisdiction of the board of land and natural resources, (unless the trails were created by or dedicated to a particular county). HRS §264-1(b).

Thus, for example, if a nonvehicular trail was laid out by the government in the mid-1800s, and, therefore, became a public highway in 1892 pursuant to the Highways Act, it would forever be considered a public trail, under the jurisdiction of the Board, even if it was subsequently expanded and paved over for vehicular use.

Because the statute may be reasonably interpreted to produce diametrically opposing results, we look to the legislative intent of the statute. When construing a statute, the foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. The statutory language must be read in the context of the entire statute and it must be construed in a manner consistent with its purpose. When a statute is ambiguous, that is, when there is doubt, doubleness of meaning, indistinctiveness or uncertainty as to the meaning, we may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. *State v. Pacheco*, 96 Hawai`i 83, 94, 26 P.3d 572, 583 (2001).

Originally, under the Highways Act of 1892, all public highways were owned by the Hawaiian Government in fee simple. As a result, even properties acquired by the counties for highway purposes, whether by eminent domain, purchase, dedication, or surrender were acquired in the name of the Territory and, subsequently, in the name of the State. Recognizing the unfairness of such a law, in 1963 the legislature amended the statute such that ownership of highways that had been acquired by the county were vested in the county. Act 190, Session Laws of Hawaii 1963. House Stand. Comm. Rep. No. 964, reprinted in 1963 House Journal at 849-850 (attached as Appendix A), stated that the purpose of the act was to allow the counties to use or dispose of any abandoned public road and to retain the proceeds therefrom, inasmuch as the counties were required to maintain such public highways and to use their own funds in the purchase of these highways.

Two years later, the legislature went even further by transferring ownership of all highways maintained by the counties, no matter how the highways were obtained. Act 221, Session Laws of Hawaii 1965. Again, the rationale was that it was inequitable for the State to retain ownership when the county was responsible for maintenance. House Stand. Comm. Rep. No. 84, reprinted in 1965 House Journal at 541-542 (attached as Appendix B).

Provisions regarding the jurisdiction of the Board were added in 1988. Act 150, Session Laws of Hawaii 1988. The stated purpose for the amendment was to clear up a misunderstanding expressed by the Hawaii Intermediate Court of Appeals (ICA) in *Santos v. Perreira*, 2 Haw. App. 387, 633 P.2d 1118 (1981), that all public highways that were not designated for inclusion in the state Highway System under HRS §264-41 were county highways. The ICA's interpretation would have put all public trails under the jurisdiction of the counties. Thus, the legislature deemed it necessary to clarify that the State owned some public highways that were not included in the state Highway System; that these public highways, being nonvehicular, were deemed to be public trails under the jurisdiction of the Board. Senate Stand. Com Rep. No. 2045, reprinted in 1988 Senate Journal at 886 (attached as Appendix C).

Importantly, the legislature noted that county highways or county trails could be closed or abandoned by the counties, whereas state trails required action by the Board to be closed, abandoned, or auctioned. Senate Stand. Com Rep. No. 2045, reprinted in 1988 Senate Journal at 886. As noted above, the rationale for earlier amendments to HRS §264-1 was to give the agency that maintained the highway the proceeds of any sale of the highway. Thus, it appears that the legislature's continued policy was to have jurisdiction reside in the government agency that was responsible for maintenance, and, when the highway or trail was no longer required, any proceeds would inure to the agency that had maintained the same.

Since the Board does not have the responsibility or authority for maintaining vehicular public highways, a vehicular highway does not fall under the jurisdiction of the Board, even if at one time it may have been a public trail. Indeed, if the Board continued to retain jurisdiction after the trail became part of a vehicular highway, it is conceivable that the Board could decide to close and auction off the highway because it is no longer needed as a public trail and accessway, even though it was in current use as a vehicular highway. And, in that scenario, contrary to the intent of the legislature, the State would be the recipient of the proceeds from the sale, despite county responsibility for maintenance of the vehicular roadway.

Based on our reading of the legislative history to HRS §264-1, therefore, we conclude that a public right-of-way that is currently being used for vehicular travel, is under the jurisdiction of the county and not the Board, even though it may have been, in the past, a nonvehicular trail.

SUMMARY

Based on the above, we concur that the two parallel trails in Halawa Valley are owned by the government. A metes and bounds survey should be conducted to determine the precise location of these government-owned trails.

A government-owned roadway that is currently used for vehicular traffic, which is not a highway under the

jurisdiction of the state Department of Transportation, falls under the jurisdiction of the county in which it is located and not under the jurisdiction of the Board of Land and Natural Resources, regardless of it having been, at one time, a non-vehicular trail.

Very truly yours,

Yvonne Y. Izu
Deputy Attorney General

APPROVED:

Earl I. Anzai
Attorney General

YYI:jn
Attachments