

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

NOA EMMETT ALULI, et al.,	)	CIVIL NO. 76-0380
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR ORDER COMPEL-
vs.	)	LING COMPLIANCE WITH
	)	UNITED STATES DISTRICT
HAROLD BROWN, Secretary of	)	COURT ORDER ISSUED
Defense, et al.,	)	SEPTEMBER 15, 1977
	)	
Defendants.	)	
	)	

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MEMORANDUM IN SUPPORT OF  
MOTION FOR ORDER COMPELLING COMPLIANCE  
WITH UNITED STATES DISTRICT COURT  
ORDER ISSUED SEPTEMBER 15, 1977

I

INTRODUCTION

The narrow issue placed before the Court is whether Defendants have complied with that portion of the United States District Court Order dated September 15, 1977 which mandates that:

. . . Defendants comply forthwith with the applicable provisions of Executive Order No. 11593 and 36 C.F.R. Part 800, including but not limited to . . . submission for nomination to the Secretary of the Interior of those sites [on the Island of Kaho'olawe] which appear to qualify for listing on the National Register of Historic Places . . . .

In order to nominate the sites, the Court had required Defendants to identify and inventory the sites on Kaho'olawe. The resulting archaeological survey, lasting over a period of four years, was the first such intensive survey of an entire Hawaiian island. A total of five hundred forty-four sites

were discovered,<sup>1/</sup> the integral significance of which is specified as follows in the conclusion to the Multiple Resource Nomination Overview by the Defendants' prime archaeological contractor, Hawaii Marine Research, Inc. [hereinafter referred to as HMR]:

Fundamental to the significance of the archaeological resources of Kaho'olawe [the five hundred forty-four sites] is the fact that together they constitute a detailed and complex record of nearly 1000 years of the human history of the entire island. Each archaeological site is inextricably linked to the whole pattern by history, function and environment. While the quantity and quality of information varies from site to site, the usefulness of this information for illuminating the Hawaiian past is fully dependent on its spatial, temporal and functional position within the pattern as a whole.<sup>2/</sup>

Notwithstanding the position of Defendants' prime archaeological contractor that "... all sites recorded to date on Kaho'olawe are considered by HMR Archaeologists as being eligible for listing in the National Register,"<sup>3/</sup> the Defendants merely nominated a token number of sites: one

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<sup>1/</sup> National Register of Historic Places Inventory--Nomination Form [hereinafter referred to as Multiple Resource Nomination Overview], prepared by Dr. Robert J. Hommon, Senior Archaeologist, Hawaii Marine Research, Inc. (August 4, 1980): Table 1, Kaho'olawe Survey Data.

<sup>2/</sup> Id., "Statement of Significance" p. 34 (emphasis added).

The Multiple Resource Nomination Overview format was suggested in 1978 by Dr. William J. Murtagh, Keeper of the National Register, as being the appropriate format for a resource containing numerous individual sites. The Multiple Resource Nomination Overview, in effect, is an "umbrella" which integrates and presents the full scope of the significance of the data obtained from each of the individual sites.

<sup>3/</sup> HMR letter to CDR D. B. Miller USN (CEC), June 26, 1979.

hundred seventy-one.<sup>4/</sup> In addition, Defendants submitted eighty-five sites for "an initial determination of eligibility"<sup>5/</sup> while expressing "doubts concerning the eligibility of . . . 76 [of these] sites."<sup>6/</sup> The Defendants' token nomination and submission of substantially less than one-half of the archaeological and cultural sites on the Island of Kaho'olawe fails to constitute compliance with the United States District Court Order dated September 15, 1977, issued by the late Judge Dick Yin Wong.

## II

### STATUTORY SCHEME

#### A. THE STATUTORY SCHEME MANDATES PROTECTION OF OBJECTS OF ARCHAEOLOGICAL, HISTORIC AND CULTURAL SIGNIFICANCE.

Executive Order No. 11593,<sup>7/</sup> "Protection and Enhancement of the Cultural Environment" was promulgated on May 13, 1971 to further the purposes and policies of the National Environmental Policy Act of 1969,<sup>8/</sup> the National Historic Preservation Act of 1966,<sup>9/</sup> as well as other acts.

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<sup>4/</sup> Captain B. F. Montoya letter to Carol Shull, Acting Keeper of the National Register, August 18, 1980. Thirty-four of these sites, endangered by erosion and submitted pursuant to stipulated Order of November 23, 1979, had previously been determined by the Keeper to be eligible for inclusion on the National Register of Historic Places.

<sup>5/</sup> Id.

<sup>6/</sup> Id.

<sup>7/</sup> 36 F.R. 8921 (1971), see 16 U.S.C. 470.

<sup>8/</sup> 83 Stat. 852, 42 U.S.C. § 4321 et seq.

<sup>9/</sup> 80 Stat. 915, 16 U.S.C. § 470 et seq.

Section 1 of Executive Order 11593 mandates that the "Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation."<sup>10/</sup> Federal Agencies are directed to "administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations,"<sup>11/</sup> and take other steps necessary for the preservation of objects of archaeological and historical significance.

In a statement issued by the President of the United States upon signing Executive Order 11593, the President noted that ". . . the number of nominations of federally-owned properties has lagged, even though the Federal Government--particularly in its military installations--owns an important share of the Nation's historic sites and buildings."<sup>12/</sup> To correct this problem, the President stated:

By my order today [Executive Order 11593]  
I am directing Federal agencies to assure  
that the Government's own historic prop-  
erties are identified, nominated for  
listing on the National Register, and  
preserved at professional standards.<sup>13/</sup>

The President placed the Federal government in a leadership role of "preserving its own culturally significant sites . . . and artifacts."<sup>14/</sup>

By express language, Executive Order 11593 furthered similar purposes and policies established in the National

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<sup>10/</sup> 36 F.R. 8921 (1971).

<sup>11/</sup> Id.

<sup>12/</sup> 7 Weekly Comp. of Pres. Doc. 756 (May 17, 1971)  
(emphasis added).

<sup>13/</sup> Id.

<sup>14/</sup> Id.

Historic Preservation Act of 1966, Pub L. 89-665, 80 Stat. 915, 16 U.S.C. § 470 et seq. [hereinafter referred to as NHPA]:

The Congress finds and declares--

- (a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;
- (b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
- (c) that . . . the present governmental . . . historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and
- (d) . . . it is . . . necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities . . .<sup>15/</sup>

B. THE CLEAR INTENT TO PROTECT SITES OF LOCAL SIGNIFICANCE IS STATED IN THE LEGISLATIVE HISTORY.

Examination of the legislative history behind the NHPA clearly establishes congressional intent to extend protection not only to sites of national significance but also to properties "which are worthy of protection because of their historical . . . or cultural significance at the community . . . level. . . . It is important that they be brought to light and that attention be focused on their significance . . ."<sup>16/</sup> The Committee concluded that "Federal agencies

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<sup>15/</sup> Preamble to NHPA, Pub. L. 89-665, 80 Stat. 915.

<sup>16/</sup> H.R. Rep. No. 1916, 89th Cong., 1st Sess. (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 3307, 3309.

having direct or indirect jurisdiction over various undertakings . . . should recognize those values."<sup>17/</sup> In an executive communication from the Secretary of the Interior to the Honorable John W. McCormack, Speaker of the House of Representatives, the importance of sites of local significance again was stressed: "Historic places important to local communities . . . are also vital parts of the Nation's heritage, and they are even less immune to the forces of destruction than nationally significant properties."<sup>18/</sup> (See also Watch (Waterbury Action, Etc.) v. Harris, 603 F.2d 310 (2nd Cir. 1979) U.S. cert. den. in 100 S. Ct. 530, in which the Court broadly interprets the mandate of the NHPA: "Throughout Congress has recognized that it is necessary to identify the properties that are of . . . local significance, and this was one of the major purposes of the 1966 Act [NHPA] itself." 603 F.2d at 325.)

Section 2 of Executive Order 11593 establishes a pertinent responsibility of the Defendants:

[Heads of Federal agencies shall] no later than July 1, 1973, with the advice of the Secretary of the Interior, and in cooperation with the liaison officer for historic preservation for the State or territory involved, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts, and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.<sup>19/</sup>

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<sup>17/</sup> 1966 U.S. Code & Cong. & Ad. News at 3310.

<sup>18/</sup> Id. at 3312 (March 2, 1966).

<sup>19/</sup> Subsection 2(a), 36 F.R. 8921 (1971). Not until after Plaintiffs filed the instant lawsuit in 1976 did Defendants commence the required survey.



While the directive of Congress to nominate and protect sites of local significance is clear, the performance of this mandate by Federal agencies such as the Defendants falls prey to the differences between traditions and cultures. An analogy to the American Indian culture is appropriate to illustrate this point:

Some elements of American society . . . are the heirs to totally different traditions and ways of life. . . . set apart by color, social and economic status, religion, ethnic origins, and choice, they were less susceptible to the process of assimilation in the cultural melting pot. Vestiges of their . . . cultural patterns have remained intact, in the face of indifference and hostility. At the same time, the significance of the contributions of these Americans to America and American life cannot be denied. The declaration of Congress that the 'historical and cultural foundations of the nation' should be preserved in order 'to give a sense of orientation to the American people' is inclusive. [NHPA preamble] It speaks to and of all Americans.<sup>20/</sup>

Appendix D, 'OIA 'I'O O KAHO'OLAWA, to the Multiple Resource Nomination Overview, provided to the Defendants by the Protect Kaho'olawe 'Ohana, expresses the significance of the Island of Kaho'olawe to the native peoples:

. . . Our kupuna[s] advise, 'Ho'omana-wanui--patience,' but patience is difficult when we recognize that Kaho'olawe is so unique. It is the only place in this entire state so 'untouched' by modern civilization that its preservation and a more detailed study of its sites may be a basis for correcting our earlier interpretation of sites on the populated islands and for revising and refining our heretofore inadequate observations of Hawaii's past history. Our history books and school curriculum may hopefully more

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<sup>20/</sup> Wilson and Zingg, "What Is America's Heritage? Historic Preservation and American Indian Culture," 22 U. Kan. L. Rev. 413, 415 (1974).

accurately describe Hawaii's host population--Native Hawaiians--as a direct result of further study on Kaho'olawe . . . 21/

However, only through study of all of the archaeological sites on Kaho'olawe can the "detailed and complex record of nearly 1000 years of the human history of the entire island [illuminate] the Hawaiian past. . . ."22/

Nomination and submission of substantially less than one-half of the archaeological sites on the Island ignores the fact that each site is essential in its "spatial, temporal and functional position"23/ to "contribute to our overall understanding of the entire pattern of settlement and land use during the entire period of occupation of the island."24/ To nominate less than the whole decimates the integrity of the complex record of the Island, ignores the Congressional intent that areas of local concern be protected, and denigrates the importance of the cultural patterns of the ancient Hawaiians.

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21/ Native Hawaiian Perspectives On the Significance of Kaho'olawe to Hawai'i Nei: Mrs. Winona Rubin, Administrator of Alu Like, Inc.--a Native Hawaiian Program, p. 12.

22/ Multiple Resource Nomination Overview, Statement of Significance, p. 34.

23/ Id.

24/ Draft Multiple Resource Nomination Overview, Statement of Significance, p. 15. The importance of this island, untouched by development, can be illustrated by the following: "There are only ten known petroglyph sites on the island of Oahu . . . ." n. 6 Stop H-3 Ass'n v. Coleman, 533 F.2d 434 439 (1976). In striking contrast, 515 petroglyphs have been recorded on Kaho'olawe [Multiple Resource Nomination Overview, Table 4]. One area alone, Ahupu Iki West, appears to rank as one of the top ten recorded petroglyph sites in the state of Hawaii. In addition, site 135 on the west coast of Kaho'olawe contains numerous individual petroglyphs, [Natural Register of Historic Places Inventory--Nomination Form], as of yet, unrecorded.



C. WHERE A QUESTION EXISTS REGARDING ELIGIBILITY OF SITES, DEFENDANTS SHALL SUBMIT THOSE SITES TO THE SECRETARY OF THE INTERIOR FOR A DETERMINATION OF ELIGIBILITY.

A further pertinent responsibility of Defendants is established under Subsection 2(b) of Executive Order 11593. The heads of Federal agencies shall:

[E]xercise caution during the interim period until inventories and evaluations required by subsection (a) are completed to assure that any federally owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. The agency head shall refer any questionable actions to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places.<sup>25/</sup>

In Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974),<sup>26/</sup> a suit over alleged deficiencies including the archaeological element of an environmental impact statement, the Court analyzed subsection 2(b) of the Executive Order:

It further requires that the Agency head (in this case, the [Army] Corps) shall refer any questionable sites to the Secretary of the Interior for his opinion respecting their eligibility for listing (§ 2(b)). 378 F. Supp. at 251.

In other words, where a question exists respecting eligibility, the site(s) should be referred by the agency to the Secretary of Interior.

D. TWO PROCEDURES ARE ESTABLISHED BY LAW.

In summation, the law establishes two mandatory procedures:

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<sup>25/</sup> 36 F.R. 8921 (1971).

<sup>26/</sup> Stay granted 417 U.S. 1301 (1974), motion to vacate stay denied 418 U.S. 910 (1974), petition denied 431 F. Supp.

1. Defendants "shall . . . nominate to the Secretary of the Interior all sites . . . districts and objects under their jurisdiction or control that appear to qualify for listing in the National Register of Historic Places."<sup>27/</sup>

2. For those sites, districts or objects "that might qualify for nomination"<sup>28/</sup>or for which "a question exists,"<sup>29/</sup>the Defendants shall refer such properties "to the Secretary of the Interior for an opinion respecting the property's eligibility for inclusion on the National Register of Historic Places."<sup>30/</sup>

### III

#### REVIEW OF AGENCY ACTION

A. SPECIFIC AND MANDATORY CRITERIA FOR DETERMINING ELIGIBILITY ARE SET FORTH IN THE FEDERAL REGULATIONS.

In accordance with Subsection 2(a) of Executive Order 11593, and 36 C.F.R. Part 800,<sup>31/</sup>the United States District Court order dated September 15, 1977 mandated in part that Defendants submit "for nomination to the Secretary of the Interior those sites which appear to qualify for list-

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<sup>27/</sup> Section 2 of Executive Order 11593, 36 F.R. 8921 (1971).

<sup>28/</sup> Id., Subsection 2(b).

<sup>29/</sup> 36 C.F.R. § 800.4(a)(3).

<sup>30/</sup> Subsection 2(b) of Executive Order 11593, 36 F.R. 8921 (1971).

<sup>31/</sup> In its opinion in the instant case, the court noted that "there can be no doubt that the NHPA, [implemented by 36 C.F.R. Part 800] is applicable to the Defendants. . . ." United States District Court Opinion and Order dated September 15, 1977, p. 12.

ing in the National Register of Historic Places. . . ."<sup>32/</sup>  
Specific criteria to be applied in evaluating properties for possible listing in the National Register are established in 36 C.F.R. § 60.6,<sup>33/</sup> National Register of Historic Places Criteria for evaluation. The relevant portion is set forth:

. . . The following criteria shall be used in evaluating properties for nomination to the National Register . . . and for evaluating National Register eligibility of properties affected by Federal agency undertakings.

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects of State and local importance that possess integrity of location,

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<sup>32/</sup> Id., p. 19 (Emphasis added). Defendants may argue that their "agency action" falls within the scope of the Administrative Procedures Act, 5 U.S.C. § 701 and, therefore, statutory exceptions prohibit judicial review. However, such argument should be foreclosed. Neither NHPA nor Executive Order 11593 "preclude judicial review" 5 U.S.C. § 701(a)(1). The Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Rusk v. Cort, 369 U.S. 367, 379-380 (1962); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). The legislative intent to extend protection to cultural properties of local concern coupled with language specifying "appear to qualify" implemented by regulations establishing specific criteria to be applied is clear evidence that the exemption to judicial review does not apply.

Similarly, the exemption for "agency action [which] is committed to agency discretion by law" 5 U.S.C. § 701(a)(2) is inapplicable. This exception has been narrowly interpreted to apply in those few cases where "statutes are drawn in such broad terms that in a given case there is no law to apply." S. Rep. No. 752, 79th Cong. 1st Sess., 26 (1945), see also Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S. at 410.

<sup>33/</sup> 36 C.F.R. Part 60 has been redesignated as 36 C.F.R. Part 1202, effective date Nov. 7, 1979, 44 Fed. Reg. 64,405.

design, setting, materials, workmanship, feeling, and association, and

(a) That are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) That are associated with the lives of persons significant in our past; or

(c) That embody the distinctive characteristics of a type, period, or method of construction, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction;

(d) That have yielded, or may be likely to yield, information important in prehistory or history.

B. THE FEDERAL AGENCY IS PRECLUDED FROM FORMULATING AND APPLYING ITS OWN CRITERIA.

No discretion is given to the Federal agency in either the formation or application of criteria.<sup>34/</sup> Notwithstanding the plain directive of the governing regulations, Defendants contracted with a mainland archaeological consulting firm, Ann S. Peak and Associates<sup>35/</sup> [hereinafter referred to as Peak], which established its own criteria to test eligibility of sites.<sup>36/</sup> Peak's criteria are set forth:

Criteria [sic] #1:

Indicates that site being previously disturbed (will not yield additional relevant information) and therefore no longer possesses integrity.

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<sup>34/</sup> Defendants' own regulations incorporate these regulations and specify that the specific procedures to be followed by Defendants include application of National Register criteria to identify properties which are eligible for inclusion in the National Register. OPNAVINST 6240.3E CH-2 Section 10304.a(3)(b).

<sup>35/</sup> The two archaeologists, Ann S. Peak and daughter, Melinda A. Peak, have evidenced no experience with Hawaiian or Pacific Basin archaeology. (Resume of Ann S. Peak and Melinda A. Peak)

<sup>36/</sup> Peak: Critique of Archaeological Work on the Island of Kaho'olawe, Hawaii, August 1, 1980.

Criteria [sic] #1A:

Same as Criteria #1 but where information is distinctly surface data.

Criteria [sic] #2:

Indicates that adequate documentation accomplished during initial survey (further field work not likely to yield additional information important to history or prehistory).

Criteria [sic] #3:

Indicates site being an isolated feature or surface scatter (probably will not reveal additional information).<sup>37/</sup>

The Federal regulations, specifically 36 C.F.R. § 60.6(d), clearly state that sites "[t]hat have yielded . . . information important in prehistory or history" are eligible for inclusion in the National Register. In direct opposition, Peak's criteria delete sites that: #1 ". . . will not yield additional information . . ."; #2 "surface data" will not yield additional relevant information; #3 ". . . adequate documentation accomplished . . ."; #4 ". . . site [is] an isolated feature or surface scatter (probably will not reveal additional information).<sup>38/</sup> While acknowledging that information has been yielded by the sites, Peak has developed and applied criteria to delete these sites for the very reason they are determined to be eligible under Federal regulations, 36 U.S.C. § 60.6(d)!

Furthermore, Peak devalues sites on the basis of the site being "disturbed", "surface data", "isolated feature or surface scatter"<sup>39/</sup> in direct opposition to the Directions

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<sup>37/</sup> Multiple Resource Nomination Overview, Encl. 6.

<sup>38/</sup> Id. (Emphasis added)

<sup>39/</sup> Id.

for Completing Archaeological Nominations for the National Register of Historic Places.<sup>40/</sup> The Directions specify that for properties not to qualify, they must "have lost their integrity by being completely excavated or otherwise totally disturbed."<sup>41/</sup> Partial disturbance, whether from erosion or military activities, does not constitute a loss of integrity and ineligibility. In addition, the National Register Directions state that a site can be significant even if it is comprised of "a single stratum or surface assemblage that might provide data on activity patterns during a short time span. . . ."<sup>42/</sup> In other words, sparseness or isolation of archaeological features does not automatically mean they are not significant.

Notwithstanding the creation of new criteria and misapplication of the governing criteria in 36 C.F.R. § 60.6, the Defendants state that "all sites were reviewed and analyzed [by Peak which "possessed experience in applying the eligibility criteria"<sup>43/</sup>] in light of the criteria for eligibility found at 36 C.F.R. Section 60.6 (1979)"<sup>44/</sup> Peak reviewed a work-product of HMR archaeologists, who had spent four years on the project. Peak devoted only two days to "a

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<sup>40/</sup> How to Complete National Register Forms, National Register of Historic Places, Office of Archeology and Historic Preservation, National Park Service, United States Department of the Interior, (January, 1977) Appendix II pp. 29-31.

<sup>41/</sup> Id. at 29. (Emphasis added)

<sup>42/</sup> Id. at 30.

<sup>43/</sup> Letter from J. T. Carson to Chief of Naval Operations, August 12, 1980.

<sup>44/</sup> Id.



field visit . . . to numerous sites on Kaho'olawe."<sup>45/</sup> A brief review of the site nomination forms was conducted by Peak, and based upon Peak's recommendations, while ignoring those of its prime archaeological contractor, HMR, the Navy nominated and submitted less than one-half of the archaeological sites.<sup>46/</sup>

C. AGENCY DISCRETION IS STRICTLY LIMITED; THE SPECIFIED CRITERIA FOR ELIGIBILITY MUST BE APPLIED.

While both Executive Order 11593<sup>47/</sup> and the United States District Court order dated September 15, 1977 state that "sites . . . [which] appear to qualify for listing . . ." shall be nominated by Defendants, the word appear is circumscribed by specific, authorized criteria set forth in 36 C.F.R. § 60.6. In Associated Gen. Con. of A., Inc., Okl., Etc. v. Laborers Int. U., 476 F.2d 1388 (Temp. Em. Ct. App. 1973), the Court addressed whether agencies charged with responsibility under the Economic Stabilization Act of 1970, 84 Stat. 799-800, and certain Executive Orders could establish criteria different than those specified in the Act and Executive Orders. The court stated: "It is neither a narrow nor a grudging construction to draw distinctions clearly delineated by controlling regulations, nor did the agencies have license to disregard them. 476 F.2d at 1399. Therefore, the court held: "The great deference to which administrative interpretations ordinarily are entitled [footnote omitted] may not prevail over misapplications of [criteria].

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<sup>45/</sup> Peak: Critique of Archaeological Work on the Island of Kaho'olawe, Hawaii, August 1, 1980.

<sup>46/</sup> Letter of J. T. Carson to Chief of Naval Operations, *supra* at n. 43.

476 F.2d at 1400. (Emphasis added). In other words, absent clear delegation of a general power to establish criteria different than those specified, the agencies lacked the authority to apply unauthorized criteria.

In NLRB v. Brown, 380 U.S. 278 (1965), a case alleging unfair labor practices under § 8(a)(1) and (3) of the amended National Labor Relations Act, the court addressed the issue of judicial review of administrative decisions. The court held:

Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.  
380 U.S. at 291-92.

As in the instant case, the governing criteria had been misapplied, and the decision "therefore rested on an erroneous legal foundation. . . ." 380 U.S. at 292.

In failing to apply the criteria specified in 36 C.F.R. Part 60.6, Defendants have mistakenly determined that large numbers of sites were ineligible for listing in the National Register. In addition, by application of unauthorized criteria, large numbers of sites have been deleted from Defendants' nomination list.<sup>48/</sup>

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<sup>48/</sup> For example, over 100 of the sites neither nominated nor submitted by Defendants have yielded dates, information which is important in prehistory. Although individual or sets of examples are illustrative, it is the whole spatial and temporal pattern of all of the sites which is important--"the forest, not the trees." Data from every site, with the exception of the historic period ranch sites, already has yielded information which has enabled a model of pre-contact history to be developed. In addition, no known ranch archaeology has been conducted in Hawaii; therefore the historic period ranch sites

D. WHERE A QUESTION EXISTS, DEFENDANTS SHALL REQUEST A DETERMINATION OF ELIGIBILITY FROM THE PROPER AUTHORITY, THE SECRETARY OF THE INTERIOR.

At the least, a question exists as to the eligibility of the sites which Defendants failed to nominate or submit. In such an instance, the statutory scheme mandates that Defendants submit these sites for a determination of eligibility for listing in the National Register.

Title 36 C.F.R. § 800.4(a)(3) specifies:

The Agency Official . . . shall apply the National Register criteria<sup>49/</sup> to all properties that may possess any historical . . . archaeological, or cultural value. . . . If . . . the Agency Official . . . finds that a question exists as to whether a property meets the Criteria, the Agency Official shall request a determination of eligibility from the Secretary of the Interior in accordance with 36 C.F.R. Part 63.<sup>50/</sup>

While 36 C.F.R. § 63.2(C) notes that "[a] question on whether a property meets the Criteria exists . . . when the agency determines that a question exists," such determination may not be made in a vacuum. All of the relevant Criteria set forth in 36 C.F.R. 60.6, and only those criteria, must be applied. The official Naval signator and decision-maker for the archaeological site nominations and submissions, Captain Benjamin F. Montoya,<sup>51/</sup> acknowledged that Peak did not apply the first section of 36 C.F.R. § 60.6(d) "That have yielded . . . information important in pre-history . . .":

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<sup>49/</sup> "'National Register Criteria' means the criteria established by the Secretary of the Interior to evaluate properties to determine whether they are eligible for inclusion in the National Register. (See 36 C.F.R. § 60.6)." 36 C.F.R. § 800.2(g).

<sup>50/</sup> 36 C.F.R. Part 63 has been redesignated as 36 C.F.R. Part 1204, effective date April 30, 1980. 45 Fed. Reg. 28,716.

<sup>51/</sup> See Deposition of Captain Benjamin F. Montoya, September

As I understand her [Peak's] criteria, as I understood it in applying what she has given me, she has really zeroed in on the phrase 'or may be likely to yield,' and, therefore, all her criteria, the ones we've just talked about, are in the negative sense.

She hasn't focused on the have yielded but on the or may be likely to yield and has said it won't yield any more.<sup>52/</sup>

To illustrate the devastating effect of the failure to apply the above-stated portion of 36 C.F.R. § 60.6(d), virtually all of the sites which were neither nominated nor submitted by Defendants have yielded information important in prehistory!<sup>53/</sup> At the least, it is clear that a question exists as to these sites' eligibility, and, therefore, the sites should be submitted for a determination of eligibility.

A further illustration of the conflict between the Navy's analysis of "eligibility" and that of the Keeper of the National Register, who applies 36 C.F.R. § 60.6(d) to determine eligibility, is found in the Defendants' submission pursuant to stipulated Order of November 23, 1979 of thirty-four sites endangered by erosion. In Defendants' analysis, "15 of these sites did not appear to clearly<sup>54/</sup>satisfy the criteria for eligibility . . ."<sup>55/</sup> However, merely one day

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<sup>52/</sup> Deposition of Captain Benjamin F. Montoya, September 2, 1980, pp. 34-40. Captain Montoya further acknowledged that the Defendants followed Peak's recommendations totally with the minor exception of nominating 15 of the erosion endangered sites that had already been determined eligible by the Keeper against the recommendation of Peak. p. 97.

<sup>53/</sup> See n. 48 at p. 16.

<sup>54/</sup> A thorough review of the regulations fails to disclose the necessity for a site to "clearly" satisfy the criteria.

<sup>55/</sup> Letter of J. T. Carson to Chief of Naval Operations, supra at n. 43.

after receipt of Defendants' submission, the Keeper of the National Register determined all of these sites eligible for listing in the National Register:

These sites are determined to be eligible for listing for their potential to yield important information in the study of the history and prehistory of the Hawaiian Islands, when viewed in the context of other related sites on Kaho'olawe. These properties represent a variety of site types and contain data on a wide range of cultural activity. It is expected that information may be gained on paleoenvironmental fluctuations, changing settlement and land use patterning, specialized activity loci, symbolic systems and ceremonial behavior, and mortuary customs.<sup>56/</sup>

In addition, the Multiple Resource Nomination Overview details eighteen Research Issues,<sup>57/</sup> eleven of which will require analysis of data from all of the sites on the Island, which then will yield "information important in prehistory or history." 36 C.F.R. § 60.6(d). For example, "a thorough archaeological study of an ahupua'a<sup>58/</sup> would make possible estimates of local community population, productivity, degree of self-sufficiency, and the nature of the local religious system at all levels, as well as the historical sequence of such factors."<sup>59/</sup> Since Kaho'olawe has not

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<sup>56/</sup> E.O. 11593 Determination of Eligibility Notification, National Register of Historic Places for Kahoolawe, January 25, 1980. (Emphasis added).

<sup>57/</sup> Multiple Resource Nomination Overview, Current Research in Hawaii and The Kaho'olawe Data, Statement of Significance, pp. 4-15.

<sup>58/</sup> The fundamental local community socioeconomic land unit, generally extending from the reef into the interior section of the Island, containing a variety of natural products and environments. Id., Statement of Description, p. 33.

<sup>59/</sup> Id., Statement of Significance, p. 9.

been subject to destruction of data from large-scale agricultural, commercial or residential development, the archaeological records of the Island "will make a unique contribution to the understanding of ancient Hawaii."<sup>60/</sup>

It is obvious that, at the least, a question exists as to the eligibility of sites based on their potential to yield information within a research context. The Defendants failed to consider any research issues and their impact upon site eligibility. Also, the Defendants' decision-maker, Captain Benjamin F. Montoya, failed to review the Multiple Resource Nomination Overview prior to determining which sites to nominate and submit.<sup>61/</sup> In other words, a document which had been suggested by the then Keeper of the National Register, Dr. William Murtagh, as the essential document which would provide the broad, detailed and integrated overview under which each of the individual site nomination forms would be placed was not even utilized by the Defendants' primary decision-maker in determining which sites to nominate or submit. It is clear that the position taken in the Multiple Resource Nomination Overview is that all sites "have yielded, or may be likely to yield, information important in prehistory of history," thereby meeting the Criteria for eligibility. 36 C.F.R. § 60.6(d).<sup>62/</sup> At the least, it is clear that a question exists as to whether the Criteria are met.

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<sup>60/</sup> Id., p. 3.

<sup>61/</sup> Deposition of Captain Benjamin F. Montoya, September 2, 1980, p. 82. Captain Montoya had been informed by Commander THIRD Fleet of the fact that "The Multiple Resources Nomination Form [Multiple Resources Nomination Overview] provides an overview of the archaeological significance of Kaho'olawe and includes data pertinent to all sites and districts." Letter dated August 18, 1980.

<sup>62/</sup> Statement of Significance, p. 34.



CONCLUSION

Had Defendants properly applied the criteria set forth in 36 C.F.R § 60.6 to the sites on Kaho'olawe, it is clear that Defendants should have nominated all sites on the Island to the Secretary of the Interior for listing in the National Register.

In the event there could be a question as to a site's eligibility, Defendants are required to follow a simple procedure:

The agency [Defendants] shall submit a letter of request for a determination of eligibility with a description, statement of significance, photographs, and a map<sup>63/</sup>. . . directly to the Keeper of the National Register, National Park Service, Department of the Interior, Washington, D.C. 20240. . . . 36 C.F.R. § 63.2(d).

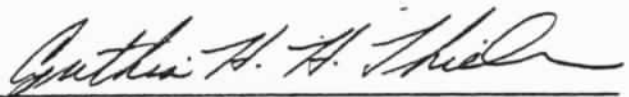
Given the misapplication of Criteria by Defendants' hired reviewer, Peak, and the stated position of Defendants' prime archaeological contractor, HMR, that all sites meet the specified Criteria, coupled with the fact that of the sites neither nominated nor submitted, virtually all ". . . have yielded, or may be likely to yield, information important in

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<sup>63/</sup> Defendants merely need to submit the letter of request as all of the other necessary documentation has been forwarded to the Keeper.

prehistory or history,"<sup>64</sup>/it is incumbent upon Defendants to nominate all sites, or, at the least, to request the Keeper of the National Register, the authorized and experienced decision-maker, to make the determination for eligibility of the sites, and, upon such determination, to nominate eligible sites for listing in the National Register of Historic Places.

DATED: Honolulu, Hawaii, September 15, 1980.

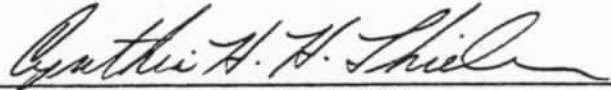


JOEL E. AUGUST  
BOYCE R. BROWN  
MELVIN M. M. MASUDA  
RONALD A. ALBU  
CYNTHIA H. H. THIELEN  
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 1980, one copy of  
the foregoing documents were hand-delivered to the following:

Roger D. Wiegley  
Special Assistant  
United States Attorney  
Room C-242  
300 Ala Moana Boulevard  
Honolulu, Hawaii 96850

  
CYNTHIA H. H. THIELEN  
Attorney for the Plaintiffs