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VIA FACSIMILE TRANSMISSION (586-7589)

December 16, 1996

Kahoolawe Island Reserve Commission  
33 South King Street, Room 501  
Honolulu, HI 96813



Re: Supplemental Testimony to Draft Kahoolawe Ocean Management Plan Dated October 25, 1996

Dear Members of the KIRC:

Maalaea Fish & Boat Club, Maui Trailer Boat Club, Maalaea Fishermen Cooperative, Inc., and Kihei Boat Ramp (collectively referred to herein as "MFBC"), through their undersigned counsel, supplement their testimony on the Draft Kaho'olawe Ocean Management Plan dated October 25, 1996, to the Kaho'olawe Island Reserve Commission ("KIRC"). As supported by this and other testimony -- both written and oral -- MFBC proposes that Hawaii Administrative Rules, Title 13, Subtitle 12, Chapter 260, be amended in the form attached as Exhibit "A" hereto. For the same reasons, the draft management plan must be rejected.

I. ADOPTION OF THE DRAFT KOMP'S FISHING BAN WOULD EXCEED THE KIRC'S RULE-MAKING AUTHORITY.

A complete ban on fishing within the KIR is beyond the Commission's rule-making authority. The Hawaii Supreme Court recently reaffirmed that "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred." Stop H-3 Assoc. v. State, 68 Haw. 154, 161 (1985). The Supreme Court emphasized:

Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down.

Id. at 161. More recently, the Supreme Court in Hyatt Corp. v. Honolulu Liquor Comm., 69 Haw. 238, 243 (1987), cautioned that

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rulemaking in excess of statutory authority was essentially undemocratic:

We are mindful that legislative grants of authority must be limited so as to ensure that 'important choices of social policy are made by [the legislature], the branch of our Government most responsive to the popular will.'

Id. at 243-44.

Accordingly, it is beyond dispute that the *prohibition* on fishing proposed by the draft KOMP would be void and unenforceable if the ban were not authorized by statute. Id. at 240, citing Jacober v. Sunn, 6 Haw. App. 161, 172 (1986) (Agency "may not enact rules and regulations which enlarge, alter, or restrict the provisions of the act being administered) (Department of Social Services and Housing rule held void and unenforceable because of conflict with the intent of the statute being implemented").

Here, the legislature has spoken. Section 187A-21, Hawaii Revised Statutes, provides:

Except as otherwise provided by law, all fishing grounds appertaining to any government land or otherwise belonging to the government, except ponds, shall be and are forever granted to the people, for the free and equal use of all persons; provided that for the protection of these fishing grounds, the department may manage and regulate the taking of aquatic life.

More to the point, Section 6K-7, H.R.S., mandates this Commission to adopt rules to permit fishing to the extent consistent with the purpose of this chapter.

Fishing on public grounds is a right enjoyed by all of the people, and is a right this Commission has been instructed to recognize. Expansion of the existing ban on bottom fishing to encompass all fishing (beyond native Hawaiian subsistence use) within the reserve could stand only if reasonably necessary to achieve a purpose of Chapter 6K. Because the KOMP does not begin to provide that justification, it must be rejected and in its



place the Commission should adopt the rule proposed by the fishing community.

## II. PURPOSES OF HAWAII REVISED STATUTES CHAPTER 6K

The original draft of House Bill No. 2015 failed to expressly accommodate fishing rights in the waters surrounding Kaho'olawe. To correct this deficiency, the language of the bill was revised to "[i]nset a new Section 7 requiring the Commission to adopt rules to permit fishing in the waters around Kaho'olawe (page 7, line 3 to line 7). 1993 House Jnl., Conf. Com. Rep. 215 on H.B. No. 2015, at 952. Testimony given in support of passage of the bill included comment from Representative Baker, stating:

It addresses the concerns that some other of my constituents had with regard to being able to fish in the waters surrounding Kaho'olawe, and we were able to reach, what I believe is a wonderful compromise, that allows the protection as well as the continued use of the resource of the waters surrounding Kaho'olawe."

1993 House Jnl., Conf. Com. Rep. No. 215 and H.B. No. 2015, HD 2, SD 2, CD 1, at 818 (emphasis added).

The preamble to Act 340 reinforces this purpose: "The establishment of the commission will provide a system that recognizes the island's unique challenges and preserves in perpetuity the island's cultural and historic resources for the people of Hawaii." (Emphasis added.) As the trust corpus, the reserve "cannot serve purposes at odds with the trust purposes." State v. Jim, 80 Haw. 168, 171 (1995).

Despite this mandate, the Commission starts from the premise that commercial fishing is prohibited in the KIR. This premise is faulty because, to the extent it is based on HAR § 13-260-3, it conflicts with the intent of the statute being implemented. Hyatt Corp., supra; H.R.S. § 6K-3(b) (which suggests the prohibition is limited to the "island"); § 6K-7 ("section 6K-3 notwithstanding, the commission shall adopt rules pursuant to chapter 91 to permit fishing in the waters around Kaho'olawe"); and the Historical Note to the HAR ("Commercial uses are strictly prohibited, except that the commission is authorized to adopt rules pursuant to chapter 91 to permit fishing in the waters

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around Kaho'olawe, consistent with the purpose of the law and which take into consideration the health and safety of the general public."

The Commission clearly construes the purposes outlined in § 6K-3(a) to be the purposes of the chapter. The prefatory language to § 6K-7 ("section 6K-3 of this chapter notwithstanding") therefore makes sense only if read to eliminate the restriction that the KIR be used "solely and exclusively for" the purposes enumerated in § 6K-3(a). In other words, the "reservation of uses" limitation does not apply to § 6K-7, and the Commission is mandated to adopt rules consistent with the enumerated purposes but which also permit fishing beyond native Hawaiian subsistence fishing.

The fishing rights/uses proposed by MFBC in Zone B are mutually exclusive of native Hawaiian subsistence fishing in Zone A (or can be accommodated without interfering with such use) and are therefore consistent with such use. Given the importance of fishing as a right of all of the people, KIRC is obligated to accommodate the respective interests which have yet to be shown to be competing. Zones A and B involve discrete fisheries and radically differing habitats; one is an open system and the other is relatively closed, hence allowing an opportunity for site specific management. Absent a compelling showing to the contrary, Zone B must be opened for use by all of the people.

III. THE DRAFT KOMP FAILS TO DEMONSTRATE A CAUSE/EFFECT  
RELATIONSHIP BETWEEN THE CONCERN AND THE PROHIBITION.

A. UXO

Concerns for public health and safety do not warrant restricting fishing within Zone B. The interim rule now in effect was to allow the Commission to ascertain the expectancy of any risk. The record is clear that any risk is far outweighed by the benefit of greater access. At this point, it is incumbent upon the Commission to identify and quantify the risk if UXO is going to be offered as a rationale for prohibiting access to Zone B. Otherwise, concern for UXO will remain no more than a pretext. Until such risks have been evaluated and measured (certainly the Navy would have insight here), Zone B should be opened without restriction. This point has been made by others, and stands un rebutted.



B. Perceived Depletion of Pelagics

The proposed rule amendments do nothing to alter the existing emphasis on preservation of reef fish.<sup>1</sup> Additional fishing rights would be achieved in Zone B only. The draft KOMP is replete with references indicating that there is insufficient data to assess the pelagics in Zone B. The perception that the resource is depleted is therefore unsupportable. Nor is there any data to support the KOMP's assertion that "unregulated trolling is incompatible with purposes of KIR." Section 3.3.1 (pg. 30).

C. Closure

Section 6K-7 mandates the Commission to adopt rules to permit fishing in the waters around Kaho'olawe that are consistent with the purposes of this chapter and that take into consideration the health and safety of the general public. This rule must be read against the backdrop provided by Section 187A-21, which guarantees access to all fishing grounds for the free and equal use of all persons.

In Hyatt Corp. v. Honolulu Liquor Comm., supra, the Supreme Court affirmed an agency rule prohibiting racial discrimination, but did so only after finding that the legislature had conferred upon the commission broad rule-making authority and noting the strong public policy of the state against racial discrimination. By contrast, in this case it is the public policy of this state to afford equal access to the fishing grounds to all citizens. There is nothing in the legislative history accompanying the adoption of Chapter 6K that suggests the legislature intended to confer this Commission with power to prohibit fishing within the reserve.

Even if the KIRC possessed such authority, however, it would be incumbent upon the Commission to first find closure of Kahoolawe was justified to protect a given resource. There is no evidence,

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<sup>1</sup>The KOMP contains a discussion of data nearly 100 years old pertaining to reef fish (pg. 32, § 3.3.4). As an outgrowth of this discussion, the KOMP proposes a "complete kapu" be placed on red fish. The two are not the same, nor is one a subset of the other. As with other conclusions drawn in the KOMP, the kapu proposed lacks a logical cause and effect relationship.

for example, that the potential spawning rate of onaga or opakapaka are at dangerously low levels in the main Hawaiian islands. Even were such the case, there is no showing that closure of a given area such as Kaho'olawe would promote recovery of either species. A complete ban of the sort recommended by the consultant is totally without justification.

As MFBC testified at the hearing on December 5, 1996, a State-sponsored tag and release study conducted by Henry Okamoto confirmed that opakapaka is a migratory fish. In other words, the only available scientifically valid evidence to date shows that these fish travel widely. Concerns over closure of reserve waters are meaningless because the pelagics cannot be "fenced in", or contained, within the reserve. If the same is true of larger redfish such as onaga, there is no basis for believing that closure of a given area would do anything to remedy concerns over SPR or MSY. The burden is on KIRC and its consultant. Until and unless that burden is met, the law requires that fishing within Zone B be allowed.

The suggestion at pg. 31, § 3.3.3, that the waters surrounding Kaho'olawe be used to fulfill a 20% area closure quota for the County not only fails because the area is not amenable to closure, but because such a gesture would disserve the goal of such a quota.

#### IV. JUSTIFICATION FOR PROPOSED RULE AMENDMENTS

Attached is a proposed rule which has been fashioned to address KIRC's concerns for enforcement and preservation of the nearshore fishery, while also allowing expanded fishing within Zone B. The rule provides mechanisms for monitoring bottomfishing within the reserve and enhancing the quality of data on the taking of fish. This data will allow the KIRC to engage in responsible rulemaking in five years -- the earliest point by which one would expect significant occupancy of the island.

The rationale for the specific elements of the proposed rule should be self-evident. Unfortunately time constraints prevent more than superficial discussion. We would be pleased to supplement this testimony with specific responses to any questions that may surface. In that regard, we have available some of the most experienced and hardest working fishermen in Hawaii. They have much to contribute and are entitled to be heard.



A. Section 13-260-1

In certain areas surrounding the island, the 20-fathom isobath is located immediately offshore and lies within a bay that is amenable to closure. This is particularly true in the areas of Kanapou, Kamohio, and Waikahalulu Bays, and the shoreline between Kaka Point and Kuakaiwa Point, as illustrated on the attached map. Line of sight demarcation will facilitate enforcement, providing a clear line between the two zones, in areas which are more accessible and hence more inviting for interlopers. MFBC therefore believes that Zone A should be expanded in these areas, and Zone B reduced accordingly. This can be done as shown without compromising the deepwater, essentially pelagic fishery of Zone B.

B. Section 13-260-2

There is a need for "safe harbor" mooring areas in times of emergency. MFBC has identified five specific areas, as illustrated on the attached map, to provide such shelter. See also, proposed HAR § 13-260-4(c). This rule should be revised to accommodate a definition for "emergency" to ensure that the moorings are not abused or used in non-emergent situations. In addition, the definition of "commercial activities" has been revised for purposes of consistency with the prohibition stated in HAR § 13-260-3(c).

C. Section 13-260-3

The prohibited uses section has been revised to incorporate exceptions provided for in the chapter.

D. Section 13-260-4

The KIRC is obligated to enlarge the opportunity for fishing within the reserve as explained above. We propose a limit on vessel length to reflect historical usage and to enhance the de facto limit on access resulting from the generally adverse weather associated with the island. The limit on hook and line will eliminate any concerns regarding nets or deepwater trawling. The effect of the proposed rule will be to reinstitute the type of fishing that prevailed during the Navy's lamentable use of the island as a target.

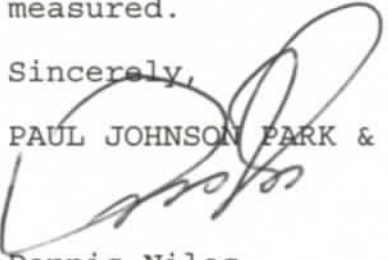
E. Section 13-260-5

Effective monitoring is a centerpiece of the proposed rule. Maui's fishing community does not welcome more reports and forms. However, they recognize the importance of data to effective resource management and that without it there will always be a threat of arbitrary rulemaking. MFBC promises cooperation and understands the consequences if the KIRC finds such cooperation wanting. The ultimate sanction would be for the Commission to allow the proposed rule to lapse in five years. This should be enough to ensure the kind of working relationship that the fishing community wishes to maintain with KIRC.

An important check is the requirement of point of sale reporting. This means that the seller must document what he is actually selling and require the buyer's confirmation. Although more paper is required, the fishing community believes the price is small when compared with the benefit of access to the fishing grounds. Lastly, the tagging device is an effective way of marking fish taken within Zone B and should allow for more disciplined analysis, as should the requirement of identifying the largest and smallest fish caught. The goal is a reliable baseline against which future actions can be modeled and measured.

Sincerely,

PAUL JOHNSON PARK & NILES



Dennis Niles  
Attorney for Petitioners

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Attach: (1) Exhibit "A" (Proposed Amendments to HAR)  
(2) Map of Kaho'olawe demarcating 5 proposed mooring areas under proposed section 13-260-4(c), HAR



PROPOSED AMENDMENT TO  
HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 12

KAHO'OLAWA ISLAND RESERVE COMMISSION

CHAPTER 260

KAHO'OLAWA ISLAND RESERVE

§ 13-260-1 Kaho'olawe island reserve restricted area. (a) The Kaho'olawe island reserve restricted area means the entire island of Kaho'olawe and the waters of the Kaho'olawe island reserve encompassing waters seaward of the shoreline of Kaho'olawe island to a distance of two nautical miles as shown on Exhibit "000", dated June 20, 1994, which is located at the end of this subchapter and made part of this chapter. The boundaries are described as follows:

Beginning at a point at the high water mark of Lae o Kealaikahiki Point; then by azimuth measured clockwise from True South, 103 degrees for a distance of 2.70 nautical miles to a point located in the ocean waters; then 215 degrees for a distance of 3.80 nautical miles; 242 degrees for a distance of 6.65 nautical miles; 270 degrees for a distance of 2.00 nautical miles; 302 degrees for a distance of 3.32 nautical miles; 350 degrees for a distance of 4.80 nautical miles; 032 degrees for a distance of 3.35 nautical miles; 085 degrees for a distance of 9.19 nautical miles; 132 degrees for a distance of 3.67 nautical miles; then along straight line to the point of beginning.

(b) Restricted zones:

- (1) Zone A means all the area within the Kaho'olawe island reserve, including the island, and the waters seaward from the shoreline to the greater of the following: (a) to a depth of twenty (20) fathoms [of water]; (b) to a straight line drawn from the points of land forming the bays of

Kanapou (Ule Point to Halona Point), Kamohio (Kuakaiwa Pt. to Puu Koae), and Waikahalulu (Puu Koae to Light); or (c) to a straight line drawn from Kaka Pt. to Kuakaiwa Pt., all as delineated in the map attached hereto as Exhibit "000."

- (2) Zone B means all the [area] waters within the Kaho'olawe island reserve [from a depth of twenty (20) fathoms of water to the boundary of the reserve] lying beyond the twenty fathom isobath and not falling within Zone A.

[Eff.           ] (Auth: HRS §§ 6K-1, 199-1, 199-7) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

§ 13-260-2 Definitions. For the purposes of this chapter:

"Commercial activities" shall mean any activity carried on for a profit including every kind of commercial enterprise, recreational activities offered for fee, and taking or removing any aquatic life, mineral, or vegetation from the reserve for the purpose of sale.

"Emergency" shall mean sea conditions resulting from high winds (near gale - 28 to 33 knots or higher), thunderstorms or waterspouts or any condition that places a vessel in imminent danger of sinking or otherwise renders the vessel unseaworthy such that continued operation would threaten injury to life or property.

"Person" shall mean any individual, firm, partnership, corporation, trust, association, joint venture, organization, institution, or any other legal entity.

"Reserve" shall mean the Kaho'olawe island reserve restricted area as described in section 13-260-1 above.

"Subsistence use" shall mean the customary and traditional native Hawaiian uses of renewable ocean resources for direct personal consumption while staying on the island, and not for sale.

[Eff.           ] (Auth: HRS §§ 6K-1, 199-1, 199-7) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

§ 13-260-3 Prohibited uses. (a) No person shall enter the reserve for any purpose, or operate, leave unattended, beach, park, anchor, or moor vessels or any other water craft, or use the reserve except in cases of emergency or as provided in this chapter.



(b) No person shall remove or attempt to remove any aquatic life, mineral, or vegetation from the reserve, except as provided in this chapter.

(c) No person shall engage in any activity which shall include but not be limited to fishing from shore, fishing by trolling or drifting, bottom fishing, spearfishing, net or trap fishing, diving, surfing, swimming, snorkeling, and walking in shallow waters, within the reserve, except as specifically provided [below] in this chapter.

(d) No commercial activities shall be allowed within the reserve, except for vessels transitting the [island] reserve that are engaged in intra-state, inter-state or foreign trade, except as provided in this chapter.

(e) None of the above is intended to conflict with international law [n]or to apply to the State, or the United States, or their contractors in carrying out any of the requirements of Title X of Public Law 103-139, 107 STAT. 1418, 1479-1484 and the provisions of the Consent Decree as set forth in Aluli vs. Brown (1980), for the purposes of access only.

[Eff.           ] (Auth: HRS §§ 6K-1, 199-1, 199-7) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

§ 13-260-4 Permitted uses. (a) [Fishing by trolling, where the vessel remains underway at all times, shall be allowed within Zone B on two weekends per month, as noticed by publication in the Local Notice To Mariners issued by Commander Fourteenth Coast Guard District (OAN).] Fishing by hook and line for commercial, recreational, and subsistence uses shall be allowed from any vessel of a length overall of less than fifty (50) feet within Zone B, as defined in section 13-260-1(b).

(b) Escorted access to reserve for the purpose of the following uses may be permitted by written authorization of the Kaho'olawe island reserve commission, and as necessary, subject to final approval by the U.S. Navy:

- 1) Customary and traditional native hawaiian cultural, spiritual and subsistence use, in areas deemed safe;
- 2) Activities for the preservation, protection and restoration of cultural, archaeological and historical sites;
- 3) Rehabilitation, revegetation, habitat restoration and preservation; and
- 4) Educational activities.

(c) Emergency mooring (shelter). Mooring in an emergency, as defined in section 13-260-2 above, shall be allowed at each of the five (5) locations within Zone B identified herein for the duration of the emergency, but in no event longer than six (6) hours. Emergency shelter shall be sought only at those areas shown on Exhibit "000" and shall involve use of an established mooring system. A vessel seeking emergency shelter pursuant to this rule shall not engage in fishing while moored or anchored, and shall as soon as practicable notify the U.S. Coast Guard, DOCARE or the Commission by radio or cellular telephone. The notification shall identify the vessel and its operator, the place of mooring, and the time of commencement of the mooring. At the conclusion of the emergency, the vessel shall notify the appropriate authority that the vessel is underway. [Eff. ] (Auth: HRS §§ 6K-1, 199-1, 199-7) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

§ 13-260-5 Monitoring of Commercial Fishing: (a) All fish taken within Zone B and delivered for sale shall be marked with an identifying tag. No fish caught in Zone B shall be sold within the State without the vessel operator first completing a Kaho'olawe Fish Catch Report, which shall be delivered to the purchaser and which shall include the following:

- (1) All information required by the Fish Catch Report required by the Division of Aquatic Resources, Department of Land and Natural Resources ("HDAR");
- (2) The approximate location within Zone B where the marked fish were taken;
- (3) The hours fished within Zone B;
- (4) The number of lines used; and,
- (5) The weight of the smallest and largest fish of each species taken.

(b) The vessel operator and fish purchaser shall each file catch reports containing the information required by subsection (a), above, quarterly with the HDAR.

(c) Individual catch reports submitted pursuant to this section shall not be made available to the general public.

[Eff. ] (Auth: HRS §§ ) (Imp: HRS §§ )

§ 13-260-6 Enforcement. (a) Fishing while anchored within Zone B shall be allowed subject to the following conditions:



- (1) The operator of any vessel intending to fish while anchored within Zone B must register annually with KIRC;
- (2) The operator of any vessel intending to fish while anchored within Zone B must attend an annual workshop conducted by KIRC and DOCARE regarding the requirements of this chapter and the penalties for noncompliance.
- (3) The operator must report to the KIR by radio or other communication device:
  - (a) upon entering Zone B with the intention of fishing while anchored; and
  - (b) upon departing Zone B.

(b) Any person fishing within the reserve shall be required to report a known violation of this chapter, including identification of any vessel determined to have crossed the boundary between Zones A and B.

[Eff. \_\_\_\_\_] (Auth: HRS §§ \_\_\_\_\_) (Imp: HRS §§ \_\_\_\_\_)

§ 13-260-7 The right to take aquatic life from Zone B by fishing as provided in section 13-260-4(a) shall automatically expire within five (5) years of enactment. The Kaho'olawe island reserve commission shall re-evaluate whether circumstances continue to warrant the rule. [Eff. \_\_\_\_\_] (Auth: HRS §§ \_\_\_\_\_) (Imp: HRS §§ \_\_\_\_\_)

§ 13-260-[5]8 Penalties. Any person who violates this [sub]chapter shall be guilty of a misdemeanor and shall be fined not more than \$1,000 or imprisoned not more than one year, or both, for each offense. Each day of each violation shall be deemed a separate offense.

[Eff. \_\_\_\_\_] (Auth: HRS §§ 6K-1, 199-1, 199-7) (Imp: HRS §§ 6K-3, 6K-4, 6K-7, 199-7)

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