

NO. 29035

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE SIERRA CLUB, a California
non-profit corporation
registered to do business in the
State of Hawaii; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF HAWAII; HAWAII
SUPERFERRY, INC., et al.,

Defendants/Appellees/
Cross-Appellants.

Hawaii Second Cir. Ct.
Civil No. 05-1-0114(3)

(Declaratory Judgment)

Judge Joseph E. Cardoza

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MOTION OF STATE OF HAWAII FOR RECONSIDERATION

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF DOROTHY SELLERS

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MOTION OF STATE OF HAWAII FOR RECONSIDERATION

This motion is filed on behalf of the department of transportation of the State of Hawaii (the Department or the State). Pursuant to Hawaii Rule of Appellate Procedure 40, the State moves the court to withdraw and reconsider its opinion filed March 16, 2009.

The grounds for this motion are that the court has overlooked or misapprehended points of law or fact. These points include primarily (1) the court's misapprehensions that section 15 of Act 2 is an exercise of legislative power over State lands; that Act 2 is special rather than general legislation; that HRS chapter 343 waives the State of Hawaii's

sovereign immunity for an award of attorneys' fees when the legislature has said no such thing; and that this court may judicially legislate "private attorney general" fee awards against the State.

This motion incorporates the State's answering brief filed August 18, 2008, adopts the conclusion of the concurring and dissenting opinion that the claim for attorney's fees under the private attorney general doctrine is not within the scope of any State waiver of sovereign immunity, and adopts the arguments of any amicus brief filed in support of the State's request for reconsideration.

The grounds for this motion are more fully set forth in the accompanying memorandum.

Dated, Honolulu, Hawaii, April 13, 2009.



Dorothy Sellers
State Solicitor General

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

1. Background. HRS chapter 343 is entitled "Environmental Impact Statements." HRS § 343-5(a)(1) provides that, except as otherwise provided, an environmental assessment shall be required for actions which propose the use of State lands or funds. The "otherwise provided" is HRS § 343-6(a)(7), which authorizes the environmental council (OEQC) to establish procedures whereby specific types of actions, because they will probably have minimal or no significant effects on the environment, may be declared exempt by the proposing agency from the preparation of an assessment.

The OEQC adopted HAR § 11-200-8, "Exempt classes of action," for this purpose. The Department determined that the proposed harbor modifications and improvements for large capacity ferry vessels to be operated by Hawaii Superferry, Inc. at Kahului Harbor, Honolulu Harbor, Nawiliwili Harbor, and Kawaihae Harbor were sufficiently minor under the OEQC's administrative rules and under the Department's pre-existing required Comprehensive Exemption List to qualify under for exemption for the environmental assessment requirement of HRS chapter 343.

The Department gave public notice of its exemption determinations and of the 120 day period (starting February 23, 2005) to commence judicial action about the lack of an environmental assessment. The only timely filed judicial action

concerning the Department's exemption determinations was this case commenced in Maui circuit court concerning Kahului Harbor.

This court has issued two opinions in this case:

Superferry I, 115 Haw. 299, 167 P.3d 292 (2007); and Superferry II (Slip Op. Mar. 16, 2009).

Superferry I conferred standing on the plaintiff environmental groups based on their nexus to Kahului Harbor and held that the Department's determination of exemption from the environmental assessment requirement was erroneous for failure to consider secondary impacts on the environment resulting from Superferry's use of Kahului Harbor.

Superferry II held that Act 2 of the second special 2007 legislative session was unconstitutional special legislation in violation of Article XI, Section 5 of the Hawaii Constitution.

2. Act 2. The elected legislature, not the judicial branch of government, sets (and resets as necessary) the public policies of Hawaii. In Act 2, the legislature purposefully--and based on detailed findings of public interest--changed the public policy of Hawaii to allow large capacity ferry vessels to operate in Hawaii waters and to use state harbors and harbor improvements subject to all the conditions and protocols of Act 2, notwithstanding any requirements of HRS chapter 343 (and therefore notwithstanding this court's pre-Act 2 interpretation of chapter 343 in Superferry I). The new policy allowed large capacity ferry vessels, including Superferry, to operate and

required the Department to prepare an environmental impact statement for harbor improvements requiring expenditure of public funds to accommodate large capacity ferry vessels and to evaluate the secondary effects on the State's environment.

As this court noted in Superferry II, legislative enactments are presumptively constitutional, any party challenging the constitutionality of presumptively constitution legislation must show unconstitutionality beyond a reasonable doubt, and the constitutional defect must be clear, manifest, and unmistakable. (Slip Op. at 21). The court's invalidation of Act 2 was at odds with these precepts.

3. Reasons For Reconsideration.

A. There Was No Exercise Of
Legislative Power Over The Lands.

Article XI, Section 5 of the Hawaii Constitution provides: "The legislature power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof."

This court held in Superferry II that one sentence of Section 15 of Act 2 effected an exercise of legislative power over State lands. The sentence is, "Any state lands previously authorized to be used to facilitate or support the operation of

a large capacity ferry vessel, shall be authorized to be used to effectuate the provisions of this Act." (Slip Op. at 28-30).

The court's reasoning was based solely on the existence of the September 2005 harbors operating agreement between the Department and Hawaii Superferry, Inc. (Id.).

The legislature was not a party to the operating agreement. The operating agreement did not involve--and did not need to involve--any legislative action.¹ The operating agreement was entirely an executive branch action. The operating agreement therefore could not and did not qualify as the "legislative power over the lands" trigger for a general law/special law inquiry under Article XI, Section 5 of the Hawaii Constitution.

This court grounded its finding that the quoted sentence from Section 15 of Act 2 was unconstitutional on the theory that it somehow transformed the operating agreement from an executive branch action into legislative action over lands owned by or under the control of the State. But the executive branch did

¹ HRS § 266-1 is entitled "Department of Transportation; harbors; jurisdiction." It provides:

All commercial harbors and roadsteads, and all commercial harbor and waterfront improvements belong to or controlled by the State, and all vessels and shipping within the commercial harbors and roadsteads shall be under the care and control of the department of transportation.

For the purpose of this chapter, "commercial harbor" means a harbor or off-shore mooring facility which is primarily for the movement of commercial cargo, passenger and fishing vessels entering, leaving, or traveling within the State, and facilities and supporting services for loading, off-loading, and handling of cargo, passengers and vessels.

not need specific legislative authorization to enter into the operating agreement in 2005, and did not need Act 2 to re-authorize the agreement in 2007.

The fact that the 2007 legislature in Act 2 confirmed the ongoing viability of the 2005 executive branch operating agreement did not transform that operating agreement into an exercise of legislative power over state lands.² This court's contrary analysis is flawed and deprives the State of the required presumption of constitutionality.

B. The Severability Section of Act 2 Applies.

This court not only erred in holding that Act 2 effected an exercise of legislative power over the lands, but further erred in disregarding the severability provision of Section 17 of Act 2:

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

If the one sentence in Act 2 that the court singled out converts some part of Act 2 into a special law regarding lands, the remedy is to sever out that sentence from Act 2 and to

² The circuit court correctly noted that "Act 2 does not involve the exercise of legislative power over the lands of the State. Act 2 instead alters the applicability of Chapter 343 of the Hawaii Revised Statutes and the environmental review process of this state as it relates to large capacity ferry vessels." (Tr. Nov. 14, 2007 at 82).

uphold the remainder of Act 2 pursuant to its severability provision.

C. Act 2 Was Not Special Legislation.

Not only is the single sentence of Act 2 on which this court relied insufficient proof of an exercise of "legislative power over the lands owned by or under the control of the State" but this court further erred first by undertaking the general law/special law analysis under Article XI, Section 5 and then by characterizing Act 2 as special rather than general law.

As set forth in the State's answering brief, there are two governing legal principles relevant to the issue whether legislation is general or special.

The first governing legal principle is that legislation qualifies as general rather than prohibited special legislation if the classification established by the legislation is rationally related to a legitimate state interest, even one not identified by the legislature. For example, the Supreme Court of Illinois, in upholding a statute challenged as special legislation, held that "the statute is constitutional if the classification it establishes is rationally related to a legitimate state interest" and that "[i]f this court can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope, it will uphold the statute." Crusius v. Illinois Gaming Board, 837 N.E.2d 88, 94-95 (Ill. 2005)

(citations omitted). See also CLEAN v. Washington, 928 P.2d 1054, 1064 (1997) (stating that "In order to survive a challenge as special legislation, any exclusions from a statute's applicability, as well as the statute itself, must be rationally related to the purpose of the statute." (emphasis added) (citation omitted)).

The second governing principle is that a class "may consist of one person or corporation as long as the law applies to all members of the class." Island County v. Washington, 955 P.2d 377, 382 (Wash. 1998) (emphasis added); CLEAN, 928 P.2d at 1063 (upholding Stadium Act that benefitted only counties with more than one million people when only one county qualified) (citations omitted). See also Crusius, 837 N.E. 2d at 95-96 (noting that only one non-operational licensee--Emerald--could qualify under the Riverboat Gambling Act and holding that it was rational for the legislature to conclude that recommencing Emerald's operations would promote the economic goals of the Act); Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 46 (N.J. 1981) (holding that "The fact that only one entity that meets the specific provisions of the amendment has been identified thus far does not render legislation special. . . . [I]t is settled that a class of one is constitutionally permissible.") (citation omitted). Republic Investment Fund, Inc. v. Town of Surprise, 800 P.2d 1251, 1258 (Ariz. 1990) ("A law may be general and still apply to only one entity, if that

entity is the only member of a legitimate class") (citations omitted).

These principles were the longstanding law of Hawaii until this court decided Superferry II. Specifically, in 1967, the Supreme Court of Hawaii decided Bulgo v. County of Maui, 50 Haw. 51, 430 P.2d 321. The legislation challenged in Bulgo as special legislation required the governor to issue a proclamation by May 10, 1967 requiring special elections if any person elected chairman of a county board of supervisors in the November 1966 general election had died before January 2, 1967. This court in Bulgo relied on the statement of delegate Heen in the 1950 Constitutional Convention that "[T]his grant of power to the legislature to provide by general laws for the exercise of the political subdivision allows classification so long as those classifications are based on some valid reasons." II Proceedings of the Constitutional Convention of Hawaii 1950 at 529 (emphasis added).

After considering "the purpose of the legislation," the Bulgo court upheld the legislation when (1) the class consisted of only one member (Maui County, because only the Maui electee had died before the death deadline); (2) the law had a maximum lifespan of eighty days, from its effective date of May 5, 1967 through the final election on July 24, 1967.

This court's opinion in Superferry II fails to address the key issue whether the classification established by the

legislature--large capacity ferry vessels--is rationally related to any legitimate state interest, even one not identified by the legislature.³ Here, the legislative findings in Act 2, Section 1 clearly and irrefutably describe the numerous legitimate, rational state interests to be served by Act 2.

Rather than address the key "rational relationship" issue, this court adopted the Colorado "illusory class" approach (Superferry II at 31-68). Apart from one New Jersey tax case decided forty years ago, the only state to consider issues of general/special legislation by an "illusory class" test is Colorado.

It was error for this court to apply idiomatic Colorado law in lieu of longstanding Hawaii law (the Bulgo decision) in addressing the general vs. special law issue. This court, like the United States Supreme Court, adheres to the doctrine of stare decisis because it promotes the evenhanded, predictable, and consistent development of legal principles and promotes the actual and perceived integrity of the judicial process. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63 (1996). This court agrees with the United States Supreme Court that a

³ This court oddly modeled its opinion in Superferry II on People v. Canister, 110 P.3d 380 (Colo. 2005). Canister was a non-unanimous opinion of the Supreme Court of Colorado rejecting as special rather than general legislation a Colorado law that would "avoid a hiatus in the imposition of the death penalty" following a decision of the United States Supreme Court enhancing the right to jury trials in capital prosecutions.

court should "not depart from the doctrine of stare decisis without some compelling justification." State v. Garcia, 96 Haw. 200, 206, 29 P.3d 919, 925 (2001) (quoting and emphasizing Hilton v. South Carolina Pub.Ry., 502 U.S. 197, 202 (1991)).

Act 2 as passed by the legislature clearly met the Bulgo standards for a constitutional general law. It is not fair to the legislature (or to the circuit court) for this court to invalidate Act 2 because this court now suddenly prefers maverick Colorado law.

There was no compelling reason for this court to abandon Bulgo in favor of Colorado law. In its opinion, this court abandoned Bulgo on the grounds that "[T]he Bulgo court did not consider a statute that created a class with only one member nor did it consider a statute that was limited in duration. (Slip Op. at 38). As demonstrated above, this court was wrong on both points. Bulgo was a one member class based on the lapsed (even before enactment) death deadline of the statute, and Bulgo had an extremely limited duration based on death dates and election dates. 1967 Haw. Sess. Laws at 34-35.

Further, this court erred in applying Colorado's "illusory class" approach. The core problem with the Colorado approach to distinguishing between general and special laws is that it minimizes (or, as is this case, entirely vitiates) considered judicial review of the critical legal issue whether the challenged legislation is rationally related to legitimate state

interests and instead embarks the court on non-judicial, factless supposition as to the likelihood of future events.

Here, the lynchpin of the court's conclusion that the class of large capacity ferry vessel was "illusory" was the court's supposition that class members could not "build or acquire" their large capacity ferry vessels by Act 2's mid-2009 sunset date. (Slip Op. at 50, 51, 60). The supposition is incorrect because there are already dozens of large capacity ferry vessels that have been built, acquired, and put into active service worldwide.⁴ But the issue is not the correctness or incorrectness of the court's supposition. The issue is that the supreme court of Hawaii is deciding cases based not on time-tested rational relationship requirements but instead on the factless suppositional "theoretical possibility" of future activities by non-parties and on equally factless supposition as to the efficiency with which those supposed future activities may occur. (Slip Op. at 61).

There is no question in this case that Act 2 was the legislature's response to Superferry I. There is no question that Act 2 was presumptively constitutional. And there is no question that the legislature provided undisputed findings of the rational relationship between Act 2 and legitimate state interests. This court's theory that a class of one is

⁴ This necessarily long footnote is inserted at the end of this motion.

necessarily an illusory class that necessarily results from special rather than general legislation is at odds with Bulgo, at odds with existing law nationwide (except Colorado), and diminishes the right of the elected legislature to override judicial decisions.

D. There Was No Basis For The Award
Of Attorney's Fees Against The State

This court awarded attorney's fees against the State based on the combination of two erroneous theories. They are: (1) that HRS § 343-7, which says nothing about the sovereign immunity of the State of Hawaii and nothing about attorney's fees against the State, nonetheless sub silentio waived the State's immunity from fee awards (See Slip Op. at 102); and (2) that the court, rather than the legislature, was free to waive the State's sovereign immunity from fee awards under the private attorney general doctrine.

1. The State Did Not Waive Its
Immunity From The Fee Award.

Each State is a separate sovereign entity in the system of dual federal/state sovereignty established by the United States Constitution. "[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today"
.."
Alden v. Maine, 527 U.S. 706, 713 (1999). "[T]he sovereign State [of Hawaii] is immune from suit for money damages, except where there has been a "clear relinquishment" of

immunity and the State has consented to be sued." Taylor-Rice v. State, 105 Haw. 104, 109-110, 94 P.3d 659, 665-666 (2004) (Taylor-Rice II) (citations omitted).

In addition to confirming the bedrock principles of clear relinquishment and express consent, Taylor-Rice II confirmed the relevance of federal sovereign immunity caselaw and the governing principles for construing State sovereign immunity statutes:

- (1) a waiver of sovereign immunity will be strictly construed in favor of the sovereign State;
- (2) a waiver of sovereign immunity must be unequivocally expressed in the statutory text;
- (3) a statute's legislative history cannot supply a waiver that does not appear clearly in the statutory text;
- (4) the courts may not extend a waiver of immunity beyond the waiver directed by the legislature; and
- (5) policy arguments do not waive sovereign immunity.

Taylor-Rice II, 105 Haw. at 110, 94 P.3d at 665 (paraphrased with internal quotation marks, brackets, and citations omitted). See also, Chun v. Bd. of Trs. of Employees' Ret. Sys., 106 Haw. 416, 432-33, 106 P.3d 339, 355-56 (2005) (quoting Taylor-Rice II).

This court's opinion awarding attorney's fees against the State entirely dispenses with principles 1 and 2 of Taylor-Rice II concerning waivers of sovereign immunity. Specifically, the court concluded that HRS § 343-7, which nowhere refers to attorney's fees, nowhere refers to sovereign immunity, and

therefore nowhere unequivocally expresses a waiver of sovereign immunity, must be read as a waiver of the State's sovereign immunity for attorney's fees. (Slip Op. at 102).⁵

This textually unsupported read of a straightforward statute is exacerbated by the court's read of HRS § 607-25, in which the legislature has spelled out in detail the permissible plaintiffs and defendants in actions for failure to obtain government approvals or permits under a number of environmental statutes, including HRS Chapter 343. The legislature in HRS § 607-25(e) specifically set forth the procedures for obtaining attorney's fees in such actions. Nothing in HRS § 607-25 (which is limited to private party disputes) even hints at a waiver of the State's sovereign immunity or the availability of fees against the State under HRS chapter 343). The opposite is true: in 1999, the Hawaii legislature rejected a proposed bill (SB 90) that would have expanded HRS § 607-25 to allow civil actions (and possible attorney's fees) by a private party against a

⁵ It is true that HRS § 661-1 confers jurisdiction on the Hawaii circuit courts for all claims "founded upon any statute of the State" But HRS § 661 does not mean that the State have waived its sovereign immunity for every single statute in the Hawaii Revised Statutes. Rather, "[I]t is a general principle of law that statutory laws of general application are not applicable to the State unless the legislature in the enactment of such laws made them explicitly applicable to the State." Chun v. Board of Trs., 106 Haw. 416, 433, 106 P.3d 339, 356 (2006) (citations omitted) (emphasis added).

public agency as well as against another private party.⁶

(www.capitol.hawaii.gov/session1999/bills/sb90_.htm)

In sum, the legislature has plainly precluded an award of attorney's fees against the State for violation of HRS chapter 343.⁷

2. This Court Could Not Waive The State's Immunity From The Fee Award

As set forth above, the only proper role for this court is to apply the law as enacted by the legislature, not to engage in judicial legislation and not to violate the doctrine of separation of powers by engrafting the private attorney general doctrine onto a clear statutory scheme. "If there is any inequality or any situation that was overlooked in the law, it is up to the legislature to make the correction. For this court

⁶ See also HRS § 607-24, in which the legislature has specified that costs reimbursable by the State when it is not the prevailing party do not include attorney's fees.

⁷ This court's reliance on Fought & Co., Inc. v. Steel Eng'g and Erection, Inc., 87 Haw. 37, 951 P.2d 487 (1998) is misplaced. Fought was based on the combination of (1) HRS § 661-1, the Hawaii version of the federal Tucker Act, which in part confers jurisdiction on the circuit courts over claims against the State founded upon any contract, express or implied; and (2) HRS § 607-14, which allows some attorneys' fees in actions in the nature of assumpsit.

In this case, as the concurring and dissenting opinion pointed out, neither HRS § 661-1(1) nor HRS § 343-7 even addresses the issue of attorney's fees against the state." (Slip Op. at 5). As this court more recently pointed out in Taomae v. Lingle, 110 Haw. 327, 333, 132 P.3d 1238, 1344 (2006) (denying fee request), even an outright waiver of sovereign immunity does not support an assumption that an assessment of fees and costs is appropriate.

to do so under the guise of statutory construction is to indulge in judicial legislation which we are prohibited from doing under the doctrine of separation of powers." Honbo v. Hawaiian Ins. & Guar. Co., 86 Haw. 373, 376, 949 P.2d 213, 216 (App. 1997).⁸

It has been settled law in Hawaii for over a century that only the legislature--not the executive branch and not the judicial branch--may waive the State's sovereign immunity. W.C. Peacock & Co. v. Republic of Hawaii, 11 Haw. 404, 405 (1898) (noting that "the Legislature alone had authority to determine what actions may or may not be brought the Government--the Government in this sense being the State and not merely the Executive branch of the State").

This court incorrectly concluded that HRS § 607-25 is not the "exclusive means" for awarding attorneys' fees for a violation of HRS chapter 343. (Slip Op. at 88). Section 607-25 is the exclusive means because it is the only means authorized by the legislature and because only the legislature may waive the State's immunity. This court is simply not empowered to waive the State's immunity, and it does not matter whether the invasion of the legislative prerogative takes the form of the private attorney general doctrine or some other form. This

⁸ The Court in Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 269 (1975) rejected the private attorney general doctrine for all federal courts, noting that it is solely the prerogative of the legislative branch to determine when fees may be allowed.

court's imposition of the private attorney general doctrine against the State entirely dispenses with principles 4 and 5 of Taylor-Rice II--that the courts may not extend a waiver of immunity beyond the waiver directed by the legislature and that policy arguments--such as those subsumed in the private attorney general doctrine--do not waive the State's inherent sovereign immunity.⁹

E. This Is Not An
Equal Protection Case.

The conclusion section of this court's opinion (Slip Op. at 111-113) refers (for the first time in the entire opinion) to equal protection. There simply was no equal protection issue in the case. Plaintiffs' opening brief does not mention equal protection. Nor does the State's answering brief.

Further, if the decision is fundamentally flawed if it rests in any way on general equal protection law. The court misdescribes Article XI, section 5 of the Hawaii Constitution as

⁹ Moreover, this court erred in its application of the private attorney general doctrine against the State. In two prior cases, this court had discussed but rejected the applicability of the private attorney general doctrine for failure to meet the test of "the necessity for private enforcement and the magnitude of the resulting burden on the plaintiff." Maui Tomorrow v. Board of Land and Natural Resources, 110 Haw. 234, 244, 131 F.3d 517, 527 (2006); Waiahole II, 96 Haw. 27, 25 P.3d 802 (2001). In this case, the court found that the test was met because the State "wholly abandoned" its duty "by issuing an erroneous exemption to Superferry." It is unfair to the State for the court to equate an executive branch judgment call (that with perfect hindsight the court would have made differently) with a total abandonment of duty.

the "corollary" of the equal protection clause of Article I, section 5. (Slip Op. at 111). The two provisions have entirely different underpinnings--one to protect the alienation of State lands, the other to protect individual civil rights. And even the inapt corollary could not support this court's decision. The law is that the application of equal protection principles to a non-suspect category (for example, race) does not relieve the court of its duty of applying the rational basis standard of review.¹⁰ That duty was not discharged in this case because the court, following Colorado law, decided that inquiry into the reasonableness of the classification was not necessary. (Slip Op. at 68).

F. Conclusion.

For the reasons given above, the State asks the court to withdraw and reconsider its opinion issued March 16, 2009.

Respectfully submitted,



Dorothy Sellers

¹⁰ "Unless fundamental rights are implicated, we will apply the rational basis standard of review in examining a denial of equal protection claim." KNG Corp. v. Kim, 107 Haw. 73, 82, 110 P.3d 397, 406 (2005) (quoting Sandy Beach Def. Fund v. City Council, 70 Haw. 361, 380, 773 P.2d 250, 262 (1989) (emphasis omitted)).

Footnote 4

⁴ There are numerous large capacity ferry vessels already in service worldwide, as noted in the State's answering brief at 27 n. 13. The court may also take notice of the existence of:

1. British Columbia Ferry Services, Inc. (or BC Ferries) that operates ferries along the coast of British Columbia. This company was listed in the State's answering brief at 27 n. 13. Its fleet includes: three Coastal Class Ferries - Coastal Celebration, Coastal Inspiration and Coastal Renaissance (1,650 passengers/370 cars); two S (Spirit) Class Ferries - Spirit of British Columbia and Spirit of Vancouver Island (2,100 passengers/410 cars); and five C-Class Ferries - Queen of Coquitlam, Queen of Cowichan, Queen of Oak Bay, Queen of Surrey, and Queen of Alberni (1,200-1,500 passengers/290-360 cars). See <http://www.bcferrries.com/about/fleet/> (click on vessel names for specifications. Site last visited 4/13/09.

2. NFL/Bay Ferries which operates The CAT between Maine and Nova Scotia. This company was listed in the State's answering brief at 27 n. 13. Its fleet also includes: the Northumberland Ferries which runs between Prince Edward Island and Nova Scotia (600 passengers/220 cars). See <http://www.peiferry.com/the-ship/general-particulars.php> Site last visited 4/13/09.

3. Brittany Ferries, a French ferry company servicing France, the United Kingdom and Spain. Its fleet includes seven passenger/freight ferries: mv Amorique (1,500 passengers/470 cars); mv Barfleur (1,212 passengers/590 cars); mv Bretagne (2,056 passengers/580 cars); mv Mont St. Michel (2,200 passengers/800 cars); mv Normandie (2,123 passengers/600 cars); and mv Pont-Aven (2,400 passengers/650 cars). The company also has two "Fast Craft" ferries: Normandie Express (850 passengers/235 cars) and Normandie Vitesse (718 passengers/185 cars). See <http://www.brittany-ferries.co.uk/fleet/> (click on vessel names for specifications.) Site last visited 4/13/09.

4. Color Line, a Norwegian ferry company. Its fleet includes: MS Color Fantasy (2,750 passengers/750 cars); M/S Color Magic (2,700 cars, 500 cars) M/S Color Viking (1,460/passengers, 340 cars), M/S Superspeed I and II (1,928 passengers and 3,890 lane meters for passenger cars). See <http://www.colorline-cargo.com/servlets/page?section=278> Site last visited 4/13/09.

5. Det Forenede Dampskibs-Seiskab (DFDS A/S), a Danish shipping Company, providing services between Copenhagen-Oslo,

Esbjerk-Harwich, Amsterdam-Newcastle and that has a fleet that includes: Crown of Scandinavia (1,940 passengers/450 cars); King of Scandinavia (2,053 passengers/600 cars); Pearl of Scandinavia (2,166 passengers/350 cars); Princess of Norway (1,460 passengers/580 cars); and Queen of Scandinavia (1,756 passengers/360 cars). See <http://dfds.com/DFDSGROUP/EN/Presentation/Fleet/Passenger/> (Click vessel names for specifications.) Site last visited 4/13/09.

6. Eckero Line, a Finnish shipping company, whose fleet includes: MS Norlandia (2000 passengers/450 cars). See <http://www.eckeroline.fi/en/document.aspx?docID=2035> Site last visited 4/13/09.

7. Marine Atlantic, Inc., a Canadian company, servicing Newfoundland, Labrador and Nova Scotia, whose fleet includes: MV Caribou (1,200 passengers/340 cars); MV Joseph and Clara Smallwood (1,200 passengers/340 cars); and MV Lief Ericson (500 passengers/300 cars). See <http://www.marine-atlantic.ca/en/company/fleet.shtml> Site last visited 4/13/09.

8. Stena Line, which provides ferry services to Sweden, Denmark, Norway, Great Britain, Ireland, Germany, the Netherlands and Poland. Its fleet includes: Stena Saga (2000 passengers/510 cars); Stena Danika (2,274 passengers/550 cars); Stena Jutlandica (1,500 passengers/550 cars); Stena Nautica (956 passengers/330 cars); Stena Germanica (1,700 passengers/590 cars); Stena Scandinavica (1,700 passengers/590 cars); Stena Baltica (1,200 passengers/450 cars); Hamlet (1,000 passengers/240 cars); Aurora af Helsingborg (1,250 passengers/240 cars); Stena Voyager (1,500 passengers/360 cars); Stena Caledonia (1,000 passengers/280 cars); Stena Explorer (1,500 passengers/360 cars); and Stena Europe (1,386 passengers/480 cars). See <http://www.freight.stenaline.com/ferry/our-ships/shipgallery/> (Click on vessel names for specifications.) Site last visited 4/13/09.

9. Viking, a Finnish shipping company operating ferries and cruise ferries between Finland, Aland Islands, Sweden and Estonia. Its fleet includes: M/S Amorella (2,480 passengers/450 cars); M/S Gabriella (2,420 passengers/400 cars); M/S Isabella (2,480 passengers/364 cars); M/S Mariella (2,500 passengers/430 cars); and M/S Rosella (1,700 passengers/340 cars). See <http://www.vikingline.fi/onboard/> (Click on vessel names for specifications.) Site last visited 4/13/09.

NO. 29035

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE SIERRA CLUB, a California
non-profit corporation
registered to do business in the
State of Hawaii; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF HAWAII; HAWAII
SUPERFERRY, INC., et al.,

Defendants/Appellees/
Cross-Appellants.

Hawaii Second Cir. Ct.
Civil No. 05-1-0114(3)

(Declaratory Judgment)

Judge Joseph E. Cardoza

DECLARATION OF DOROTHY SELLERS

1. I am employed by the Hawaii department of the attorney general, I presently serve as the State Solicitor General, I have represented the State of Hawaii in Appeal No. 29035 (the Superferry case), and I am familiar with the issues in the Superferry case.

2. The State of Hawaii's motion for reconsideration of the March 16, 2009 opinion issued by the court in the Superferry case is submitted in good faith and not for purposes of delay.

I DECLARE UNDER PENALTY OF LAW THAT THE STATEMENTS IN THIS
DECLARATION ARE TRUE AND CORRECT.

13 April 2009

Date

Dorothy Sellers

Dorothy Sellers

CERTIFICATE OF SERVICE

I certify that on April 13, 2009, a copy of the State of Hawaii's motion for reconsideration was mailed postage prepaid by the last mail pickup of the day to:

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Wailuku, Hawaii 96793

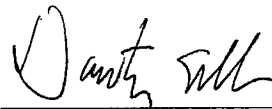
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Attorneys for Hawaii Superferry, Inc.

Dated: Honolulu, Hawaii, April 13, 2009.



Dorothy Sellers
Solicitor General
Counsel for State of Hawaii,
Department of Transportation