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April 11, 2003

The Honorable Sol P. Kaho'ohalahala  
Representative, Thirteenth District  
Twenty-Second Legislature  
State Capitol, Room 405  
Honolulu, Hawaii 96813

Dear Representative Kaho'ohalahala:

Re: Legal Title to Biogenetic Resources From Public Lands

By letter dated April 1, 2003, you requested an opinion on the following questions in connection with your consideration of Senate Bill No. 643, and House Concurrent Resolution No. 196, Senate Concurrent Resolution No. 55, and Senate Resolution No. 35:

1. Is the legal title to biogenetic resources gathered from state public lands, including ceded lands vested in the State of Hawaii?
  - a. Is the legal title to biogenetic resources gathered from ceded lands part of the ceded lands public trust?
2. Does the University of Hawaii, through its autonomous status, have the legal authority to sell or transfer any biogenetic resources found on ceded lands or other state lands to third parties?
  - a. If the University does not have legal authority to sell or transfer such resources but has nevertheless purported to sell or transfer such resources to third parties through collaboration agreements, are those agreements null and void? If such an opinion is rendered on the basis that the University did not have the legal authority

to enter into such agreements, are these agreements no longer valid?

- b. What statutes and laws prevent the sale or transfer of biogenetic resources of the ceded lands trust by agencies or divisions of the State of Hawaii?
3. If the Attorney General opines that the University of Hawaii may lawfully enter into a contract with a private corporation for the sale or transfer of biogenetic material of the State of Hawaii, shall revenue generated from such sale or transfer of ceded lands be deposited into the Ceded Lands Trust account?

#### Brief Answers

For the reasons discussed below, we answer briefly, in order, as follows:

1. The State holds legal title to biogenetic resources<sup>1</sup> gathered from state public lands, including the ceded lands, if the State reserved its title to the biogenetic resources when it allowed third persons to remove the natural resources or things from which the biogenetic resources were extracted, or it transferred its title to the land from which the biogenetic resources came. Further, the State would not lose its title to the biogenetic resources if the natural resource or thing from which the biogenetic resource originated was removed from the public lands without authority or the State's permission.<sup>2</sup>

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<sup>1</sup>This opinion assumes that you are using the term "biogenetic resources" to refer to the genetic material or composition of the natural resources and other things connected to, or gathered from public lands, and that it would not include wild animals or other things found on the land over which the State does not exercise dominion and control. See, Davis v. Green, 2 Haw. 367 (1861); United States v. Gerber, 999 F.2d 1112 (7th Cir. 1993).

<sup>2</sup>If "biogenetic resources" refers instead to the product developed from the genetic material extracted from the resources and things connected to public lands, legal title to that product may not be vested in the State, although the State may have a right of action for damages against the product's developer if the State retained legal title to the resource or thing from which the genetic material was taken to make the product. Relying

2. The scope of the University of Hawaii's ("University") authority to sell or transfer biogenetic resources gathered from ceded lands, depends upon how the University acquired the ceded land from which the biogenetic resource originated. The University has complete authority over the lands that are set aside or conveyed to it by the State. The University would also have limited authority to dispose of biogenetic resources gathered from public lands it leases from the State, or lands that it has permits to use or licenses from which to remove materials.

If the collaboration agreements you ask about are like the May 15, 2002, Biodiversity Collaboration Agreement between the University and the Diversa Corporation, the agreements would not be null and void on their face. The agreements are capable of performance even if the University lacked authority to gather biogenetic material from public lands. Nothing in the agreements specifies that the environmental samples the University collects and transfers to Diversa must come from public lands.

We are not aware of any statutes or laws that prevent the sale or transfer of biogenetic resources extracted from resources or things gathered from ceded lands or any other public lands.

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on patent law that distinguishes between "naturally occurring raw materials," and "organisms that represent the product of 'human ingenuity,'" the California Supreme Court concluded that the owner of the cellular material used to make the biogenetic product did not have a legal interest in the biogenetic product. Moore v. Regents of University of California, 271 Cal. Rptr. 146, 159 (1990), citing Diamond v. Chakrabarty, 447 U.S. 303, 309-10, 100 S. Ct. 2204, 2208, 65 L. Ed. 2d 144 (1980).

We would also note that the Diversa agreement between the University and Diversa Corporation discussed below differentiates between the material the University promised to provide, and the "Product" Diversa could develop from that material. See, Definitions, "The term 'Product(s)', shall mean a gene, gene bank, RNA, DNA, peptide, protein or metabolite which is recovered, obtained or derived from the Material. Product(s) shall also include any other derivatives of the Material, such as whole microorganisms, secondary metabolites and their derivatives (generated either chemically, biochemically, biologically or genetically.)"

3. As a result of the decision in OHA v. State, 96 Haw. 388 (2001), the Legislature must again determine which income and proceeds from the public land trust lands are to go to the Office of Hawaiian Affairs ("OHA"). Until the Legislature re-establishes a funding mechanism for OHA, Executive Order No. 03-03 is the only mechanism in place for transferring receipts from the use of ceded lands to OHA. Under that order, only receipts for the use of improved or unimproved parcels of ceded land are accumulated and transferred to OHA on a quarterly basis. Receipts from the sale or transfer of biogenetic resources do not qualify for transfer under the order.

#### Discussion

##### A. Title to Biogenetic Resources

With ten exceptions, section 171-2, Hawaii Revised Statutes ("HRS"), defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including submerged lands, and lands beneath tidal waters which are suitable for reclamation, . . . ." "Land" is defined in section 171-1, HRS, as including "all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided."

"Ceded lands" are all of the lands ceded to the United States by the Republic of Hawaii under the Joint Resolution of Annexation, not otherwise disposed of by the United States prior to the lands' transfer to the State of Hawaii pursuant to section 5(b) of the Admission Act, including the water, minerals, plants, and other things connected with the lands, and "every species of title inchoate or complete." State v. Zimring, 58 Haw. 106, 122-3, 566 P.2d 725, 735-6 (1977).

"Ownership" is a collection of rights to possess, to use and to enjoy property, including the right to sell and transmit it." 63C Am. Jur. 2d Property § 26 (2d ed. 1997). "Ownership of property implies the right of possession and control, . . .

the right to use property is just one of the several rights incident to ownership. Ownership includes the right to protect and defend such possession against the intrusion or trespass of others . . . As one of its incidents, the ownership of property carries with it, at law and equity, the right to its products . . . ." 63C Am. Jur. 2d Property § 28 (2d ed. 1997). Another of the prerogatives of ownership is the right to control the future use of the things one owns, by reserving that right prior to transferring title to those things to third parties. Moore v. Regents of the University of California, 271 Cal. Rptr. at 168 (J. Broussard concurring and dissenting).

Because there is no statute or law that presently reserves, or prevents or regulates the sale of, biogenetic resources extracted from resources or things situated on lands the State owns, we cannot simply assume that the State owns the biogenetic resources gathered from those lands. In an early Hawaii case, the Supreme Court explained that the word "owner" "has no fixed meaning applicable to all circumstances alike. . . . 'Owner may refer to the owner of the fee or one of a lesser estate [i.e., the holder of a leased interest, or a license or a permit] . . . . The word 'owner' is not infrequently used to describe one who has dominion of land, title to which is in another." Paterson v. Rush, 34 Haw. 881, 892-93 (1938) (citations omitted; bracketed explanatory material inserted).

Nonetheless, inasmuch as the genetic material or composition of the natural resources and things connected to public lands, including ceded lands, are an integral part of those resources and things, title to the biogenetic resources will still be held by the State if it has not sold the land. However, legal title to biogenetic resources gathered from State public lands will not still be vested in the State if third persons were allowed to remove from public lands the natural resource or thing from which the biogenetic resources were extracted or the State sold or leased title to a parcel of public land without reserving title or retaining control of the resources or things connected to the transferred land, or their biogenetic contents.

B. Authority to Sell or Transfer Biogenetic Resources

Section 171-13, HRS, allows the Board of Land and Natural Resources ("BLNR") to dispose of public lands by sale, lease,

license, or permit. Section 171-54, HRS, also allows the BLNR to issue land licenses that confer "a privilege . . . to enter land for a certain special purpose such as the removal of timber, soil, sand, gravel, stone, hapuu, and plants, but not including water rights, ground or surface, nor removal of minerals," as "land license" is defined in section 171-1, HRS.

Section 5 of article X of the State Constitution vests in the University legal title to all real property set aside or conveyed to the University by the State. It also directs that the University hold the lands in public trust for the University's purposes, and authorizes the University to administer and dispose of the lands as provided by law. Lands owned by the University are excepted from the definition of "public lands" in section 171-2(5), HRS.

Section 304-2(2), HRS, rather than sections 171-13 and 171-54, HRS, delineates the scope of the University's powers with respect to its lands. Section 304-2(2) provides in pertinent part that the University "under the direction of the board of regents, shall have the [power to] acquire . . . property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner, and to the extent deemed necessary or appropriate to carry out its purposes."

With the prior approval of the BLNR, state departments to which public lands have been set aside by the Governor under section 171-11, HRS, may also dispose of public lands by sale, lease, license, or permit, and issue land licenses for the privilege of removing natural resources and things from the public lands.<sup>3</sup> However, the authority of departments other than the University to dispose of set aside lands and the natural resources and things connected to them is limited only to dispositions that are consistent with the purposes of the set aside.

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<sup>3</sup>Price v. State of Hawaii, 921 F.2d 950, 957 (9th Cir. 1990), concludes that ceded lands may be set aside for state agencies to use and manage, without violating the public trust imposed upon the lands by the Admission Act.

The State's deeds, leases, and set aside orders include reservations clauses.<sup>4</sup> The leases also typically include a "Character of use" section to limit the uses to which the leased premises may be put. The precision with which leases describe the uses to which leased premises may be put can have the same effect as a reservation clause.<sup>5</sup> Similarly, state land licenses affirmatively describe what the licensee is permitted to remove from the public lands, so that anything not described in the license is not authorized to be removed.<sup>6</sup>

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<sup>4</sup> Typically, these clauses reserve and except the State's minerals and water rights from the sale or lease. Leases and some deeds also reserve prehistoric and historic remains and burial sites. An executive order setting aside parcels of public land on Kauai to the University includes the following provisions:

3. In regards to any commercial activities on the ceded lands, the UH shall negotiate with the Office of Hawaiian Affairs ("OHA"), the matter of entitlement as provided for in chapter 10, Hawaii Revised Statutes, as amended, and the UH shall hold the State of Hawaii harmless from liability on any financial compensation paid to OHA based on any ceded lands claims against the UH arising from this transaction.
4. The UH shall not rent or sublet the whole or any portion of the premises, for uses that are inconsistent with the purpose and intent of the set aside, without the prior consent of the Board of Land and Natural Resources.

<sup>5</sup> For example, the "Character of use" section of General Lease S-5529 between the State and the University provides that "[t]he Lessee shall use or allow the premises leased to be used solely for permanent mid-level facilities, a construction camp, an information station as well as existing facilities." In our view, the University would not have authority to sell or transfer biogenetic resources gathered from this leased parcel, and could not do so without the State's permission to do so.

<sup>6</sup> State and federal regulatory schemes can also qualify the use to which third parties may use public lands, including ceded lands. State deeds, leases, licenses, and permits commonly refer to state or federal laws by name, e.g., the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa, et seq., by their codification, e.g., chapter 6E, HRS, which is the State's Historic Preservation law, or generalized incorporation by a "Compliance with laws" section that requires a lessee, for instance, to "comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force." One of the first sections of the federal act provides: "Any person may apply to the Federal land manager for a permit to excavate or remove any archeological resource located on public lands or

We can say that the University does not have authority to sell or transfer biogenetic resources it collects from resources or things on ceded lands it does not own. We can also say the University does not have authority to sell or transfer biogenetic resources it extracts from resources and things it lacks authority to remove from ceded lands. However, we cannot conclusively say whether the University has authority to sell or transfer biogenetic resources found on ceded lands it owns or has some amount of control over, until we review all of the deeds and executive orders for every parcel of land the University owns and the terms of the leases, licenses, and permits for all of the parcels of public lands the University is licensed or permitted to use.<sup>7</sup>

#### C. Collaboration Agreements

The Diversa agreement requires the University to provide Diversa with environmental samples from diverse habitats<sup>8</sup> but does not prescribe from where the samples must or are to be collected. The University appears to be free to gather samples from lands it owns, public lands it is authorized to use for

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Indian lands and to carry out activities associated with such excavation or removal." 16 U.S.C. § 470cc.

<sup>7</sup>Because the state law does not categorically reserve the State's title to biological resources derived from the natural resources and things connected to the lands it owns (and the proposals for the formulation of a task force to wrestle with competing interests and concerns suggest that there are serious questions as to whether there should even be such a law), the documents used to convey the State's interests in the lands it owns to third parties are the only means presently available for protecting any economic benefit the biological resources may have. It is important, therefore, that there be an appreciation of the potential value of the resources and a deliberate evaluation made as to whether an express reservation should be included in each conveyance document.

<sup>8</sup>Paragraph 1 of the Agreement Terms of the Diversa agreement provides in part: "Collaborator [the University] will provide Diversa the Material as set forth in Appendix A hereto. Appendix A elaborates in part as follows: "Collaborator will be responsible for the collection, processing and shipment to Diversa of environmental samples from diverse habitats and/or DNA samples isolated from such environmental samples using the Technology." Appendix A also describes the "environmental samples" the University is required to provide to Diversa under the agreement, as "including soils, sediments, mire, earth, microbial mats and filaments, plants, ecto and endo symbiont microbial communities, endophytes, fungi, animal and/or insect excrement, marine and terrestrial invertebrates, air and water."



this purpose, or private lands. Alternatively, it can secure a land license from the BLNR so that it may provide samples from resources or things gathered on public lands, or extract samples from soil, plants, animals, and other material it already owns, or no one else owns.

Given these circumstances, and because the University at minimum has the power to dispose of biogenetic resources on the land it owns, there is no basis to say that the agreement is invalid for lack of authority. However, if both Diversa and the University intended that all material come from only ceded lands the State owned, the agreement may be voidable but not null and void altogether. The University could still perform under the contract by collecting material from the lands it owns and by securing a land license so that it could collect materials from the ceded lands the State owns. See Restatement Second of Contracts 2d § 152 (1981) (When Mistake of Both Parties Makes a Contract Voidable).

D. Revenue Generated from the Sale of Biogenetic Resources

The decision in OHA v. State does not foreclose state agencies from transferring funds they receive for the use of ceded lands, to OHA. Sections 10-13.5 and 10-3(1), HRS, still provide that "[t]wenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter," and that for purposes of chapter 10 "the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation," or what Zimring describes as the ceded lands.

Nevertheless, until the Legislature again makes the policy determinations on which a replacement funding mechanism can be grounded, there are no standards or precedents for determining whether receipts from the sale of extracts from material originating on ceded lands constitute "funds derived from the public land trust" under section 10-13.5. Until the Legislature re-establishes a funding mechanism, our only precedent is the receipts the Department of Land and Natural Resources ("DLNR") collected in the interval from 1987, when OHA v. Yamasaki, 69 Haw. 154 (1987), was decided, and 1990, when Act 304, Session Laws of Hawaii 1990 was enacted. These collections did not

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include receipts from products processed from resources or things connected to ceded lands. Because the University must process the resources or things from the public land in order to get the genetic material the University provides Diversa under the agreement, the receipts from the sale of the genetic material are different from the receipts DLNR transferred to OHA in the 1987 - 1990 interim, and do not qualify for transfer under Executive Order No. 03-03.<sup>9</sup>

Please do not hesitate to call us if there are further questions about these issues.

Very truly yours,



Charleen M. Aina  
Deputy Attorney General

APPROVED:



Mark J. Bennett  
Attorney General

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<sup>9</sup>If anything, the receipts from the Diversa agreement are like the receipts from the sale of the plants and animals, and goods Lahainaluna students grew or made on ceded lands after-school, that OHA asserted a twenty percent claim against in OHA v. State.