DEPARTMENT OF THE ATTORNEY GENERAL

NEIL ABERCROMBIE
GOVERNOR

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ATTORNEY GENERAL ANNOUNCES RELEASE OF FORMAL OPINION NO. 14-1

HONOLULU – Attorney General David M. Louie announced today that he has issued a Formal Opinion concluding that 100% of the royalties derived from geothermal resources development on Hawaiian home lands must be used for the benefit of native Hawaiians.

Attorney General Louie has announced that he has issued Formal Opinion No. 14-1 (Op. No. 14-1) in which he has concluded that pursuant to article XII, sections 1 and 3, of the Hawaii State Constitution, and section 4 of the Admissions Act, 100% of the royalties derived from geothermal resource development on Hawaiian home lands must be paid to the Department of Hawaiian Home Lands (DHHL) to be used for the benefit of native Hawaiians.

As a compact with the United States upon admission of Hawaii as a state, Hawaii accepted responsibility to manage and dispose of the Hawaiian home lands under the terms of the Hawaiian Homes Commission Act, 1920, as amended (HHCA). Section 203 of the HHCA describes the lands that comprise the Hawaiian Home lands (also known as the "available lands"). The Admissions Act provides that "all proceeds and income from the 'available lands', as defined by the [HHCA], shall be used only in carrying out the provisions of [the HHCA]."

Attorney General Louie stated that "following a comprehensive legal analysis by the capable deputy attorneys general in my office, I have concluded that the DHHL has the right to receive all proceeds and income from the available lands, including 100% of the royalties derived from geothermal resource development." Based on the analysis of sections 204 and 206 of the HHCA, the opinion also concludes that DHHL is the state entity authorized to manage geothermal resources on Hawaiian home lands.

"I hope that by issuing Op. No. 14-1, the Legislature and the community will have a greater appreciation of the constitutional and legal foundation for DHHL's rights to the economic benefits of geothermal resource development on Hawaiian home lands."

A copy of Op. No. 14-1 can be reviewed and downloaded at Op. No. 14-1 Letter to the Honorable Jobie M.K. Masagatani, Chairman, Hawaiian Home Commission, Regarding Management and Disposition of Geothermal Resources on DHHL Lands.

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March 17, 2014

The Honorable Jobie M.K. Masagatani
Chairman, Hawaiian Homes Commission
Department of Hawaiian Home Lands
State of Hawaii
91-5420 Kapolei Parkway
Kapolei, Hawaii 96707

Dear Chairman Masagatani:

Re: Management and Disposition of Geothermal Resources on DHHL Lands

This letter responds to your request for an opinion regarding the management and disposition of geothermal resources on lands controlled by the Department of Hawaiian Home Lands (DHHL).

Your inquiry arises from proposed legislation that would allocate to DHHL a portion of any royalties received by the State of Hawaii from geothermal resource development on "available lands."[1] In considering the proposed legislation, questions arose as to whether DHHL is entitled to all royalties from geothermal developments on "available lands," and whether DHHL has the authority to manage and dispose of

[1] The terms "Hawaiian home lands," "DHHL lands," "lands controlled by DHHL," and "its lands" are used interchangeably throughout this opinion with the term "available lands," which consist of all the lands described in section 203 of the Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, ch. 42, 42 Stat. 108 (hereinafter referred to as the HHCA), and all other lands subsequently designated by statute to constitute "available lands."

geothermal resources on "available lands." We address these issues by answering the following questions.

I. QUESTIONS PRESENTED

A. Is DHHL entitled to 100 percent of royalties from geothermal projects on all lands controlled by DHHL?

B. Is DHHL, as opposed to the Board of Land and Natural Resources (BLNR), authorized to manage and dispose of geothermal resources on DHHL lands?

II. SHORT ANSWERS

A. Yes. Section 4 of the Admission Act[2] expressly directs that "all proceeds and income" from Hawaiian home lands must be used in carrying out the provisions of the HHCA. Article XII, sections 1 and 3, of the Hawaii Constitution similarly require all proceeds and income from Hawaiian home lands to be used in accordance with the terms of the HHCA. Royalties derived from geothermal resources development constitute "proceeds and income."

B. Yes. Section 204 of the HHCA provides that all Hawaiian home lands are to be controlled by DHHL and requires such lands to be used and disposed of only "in accordance with the provisions of this Act." And although BLNR has been designated by statute to regulate the use of natural resources on lands owned by the State, section 206 of the HHCA provides that the "powers and duties of the . . . board of land and natural resources shall not extend to lands having the status of Hawaiian home lands" (emphasis added). DHHL can and should consider, however, entering into an agreement with BLNR to have BLNR manage the technical aspects of geothermal resource development on "available lands" since BLNR has the necessary expertise in that area.

[2] Act of March 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat 4.

III. DISCUSSION

A. State Constitutional and Statutory Provisions Regarding Geothermal Resources on State Lands

Before addressing the federal and state laws specific to DHHL, it is necessary to discuss the constitutional and statutory provisions relating to natural resources on state lands generally. Article XI, sections 1 and 2, of the Hawaii Constitution direct the State to conserve and protect Hawaii's natural resources, including "minerals and energy sources." Section 1 provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

(Emphasis added).

Section 182-1, Hawaii Revised Statutes (HRS), defines "minerals" to include "all geothermal resources." Article XI, section 2, of the Hawaii Constitution provides:

> The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be provided by law . . . .

BLNR's general control over the State's geothermal resources is statutory in nature. Section 171-3, HRS, confers upon BLNR the power to manage, administer, and exercise

control over the State's interest in minerals. Section 182-2(a), HRS, authorizes BLNR to dispose of the State's reservation of mineral resources under state lands:

> All minerals in, on, or under state lands or lands which hereafter become state lands are reserved to the State; provided that the board of land and natural resources may release, cancel, or waive the reservation whenever it deems the land use, other than mining, is of greater benefit to the State as provided in section 182-4.

Section 182-1, HRS, defines "state lands" as "all public and other lands owned or in possession, use and control of the then Territory of Hawaii or the State of Hawaii, or any of its agencies and this chapter shall apply thereto."

Section 182-4(a), HRS, further authorizes BLNR to issue mining leases by public auction for minerals discovered on state lands. Similarly, section 182-5, HRS, provides that BLNR may issue mining leases by public auction for minerals on "reserved lands," which is defined by section 182-1, HRS, as "those lands owned or leased by any person in which the State or its predecessors in interest has reserved to itself expressly or by implication the minerals or right to mine minerals, or both."

Sections 182-7(c) and 182-18, HRS, deal with geothermal resources specifically. Section 182-7(c), HRS, requires that thirty percent of royalties from geothermal resource development received by the State be paid to the county in which the geothermal resources are located:

> Any other law to the contrary notwithstanding, thirty per cent of all royalties received by the State from geothermal resources shall be paid to the county in which mining operations covered under a state geothermal resource mining lease are situated.

Section 182-18, HRS, requires BLNR to promulgate administrative rules fixing payment of royalties to the State from geothermal resource development at a rate that

"encourages initial and continued production of such resources.

For the reasons set forth below, however, these state constitutional and statutory provisions are qualified, and are not applicable to geothermal resources on "available lands."

B. Federal and State Laws Relating to DHHL Lands

As a compact with the United States upon admission of Hawaii as a state, Hawaii accepted the responsibility to manage and dispose of the Hawaiian home lands under the terms of the HHCA, and adopted the HHCA as a provision of the Hawaii Constitution. See section 4 of the Admission Act. The HHCA was made a part of the state constitution in article XII, sections 1 and 3, of the Hawaii Constitution.

The Admission Act further provides that "all proceeds and income from the 'available lands', as defined by [the HHCA], shall be used only in carrying out the provisions of [the HHCA]." Id. (bracketed material added). Section 5 of the Admission Act transferred title of all "available lands" to the State.

The Hawaii Constitution mirrors the Admission Act's mandate that all proceeds from the "available lands" be used in furtherance of the HHCA in article XII, section 1:

> The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of such Act.

Article XII, section 3, of the Hawaii Constitution mirrors the provisions of section 4 of the Admission Act and reiterates that all "proceeds and income" from "available lands" must be used only in carrying out the terms and provisions of the HHCA.

Section 204(a) of the HHCA provides that all "available lands" shall "immediately assume the status of Hawaiian home lands and be under the control of the department to be used

and disposed of in accordance with the provisions of this Act" (emphasis added).

Although the Admission Act conveyed title to Hawaiian home lands to the State, section 206 of the HHCA specifically provides that the "powers and duties of the governor and the board of land and natural resources shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title" (emphasis added).[3]

C. DHHL Is Entitled to 100 Percent of Royalties from Geothermal Resource Development on its Lands

There is an apparent conflict between section 182-7(c), HRS, which allocates a percentage of geothermal royalties to the counties, and the remainder presumably to the State (even if the development is on DHHL's lands), and section 4 of the Admission Act and article XII, sections 1 and 3, of the Hawaii Constitution, which require that all proceeds and income from Hawaiian home lands be used in accordance with the terms of the HHCA.

Under article VI, clause 2, of the United States Constitution, also known as the Supremacy Clause, a state law is preempted to the extent that it actually conflicts with any federal law. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983). Section 182-7(c), HRS, directly conflicts with section 4 of the Admission Act because it allocates royalties from geothermal developments on Hawaiian home lands to entities other than DHHL.

Similarly, when a state constitutional provision conflicts with a state statute, the constitutional provision will control. See 16 C.J.S. Constitutional Law § 107 (2014). Here, to the extent that section 182-7(c), HRS, allocates royalties to entities other than DHHL for geothermal

[3] The only unrestricted role for BLNR in the HHCA is in section 204, which provides that "available lands" under lease by the Territory of Hawaii shall not assume the status of Hawaiian home lands until such lease expires or BLNR withdraws those lands from the operation of the lease.

developments on Hawaiian home lands, it conflicts with article XII, sections 1 and 3, of the Hawaii Constitution.

Accordingly, allocating royalties from geothermal developments on DHHL lands to BLNR or the counties flatly violates section 4 of the Admission Act and article XII, sections 1 and 3, of the Hawaii Constitution. It is clear from the Admission Act and the Hawaii Constitution that the State has an obligation to manage such resources on Hawaiian home lands for the benefit of native Hawaiians pursuant to the HHCA. Allocation of royalties from geothermal developments on DHHL lands to entities other than DHHL would be violations of both the Admission Act and the Hawaii Constitution because those proceeds would not be available to DHHL to carry out the terms and conditions of the HHCA.

D. Only DHHL Is Authorized to Manage and Dispose of Geothermal Resources on its Lands

Under the terms of the HHCA, DHHL has sole authority to manage and dispose of geothermal resources on or under "available lands." Neither the equal footing doctrine nor the public trust doctrine overrides the provisions of the HHCA authorizing DHHL to manage geothermal resources on Hawaiian home lands.

1. Section 206 of the HHCA Controls Over Chapter 182, HRS

Section 206 of the HHCA (which under the Admission Act is a provision of the Hawaii Constitution) specifically provides that the powers of BLNR, as they relate to the lands of the State, shall not apply to DHHL. As a constitutional provision, section 206 of the HHCA would control over chapter 182, HRS, if the two are in conflict. See Kepoo v. Watson, 87 Haw. 91, 99, 952 P.2d 379, 387 (1998) (holding that since the HHCA is a provision of the Hawaii Constitution, it would control over a state environmental regulation statute to the extent the two conflicted.)

The Hawaii Supreme Court has opined on the scope of section 206 of the HHCA on two occasions. In State v. Jim, 80

Haw. 168, 907 P.2d 754 (1995), the court held that state and county officials have authority to enforce criminal laws on DHHL lands, despite the provisions of section 206 of the HHCA. In rendering its decision, the court distinguished laws that directly affect the management and disposition of Hawaiian home lands from laws that relate to the exercise of the State's general police powers:

> Although one of the governor's duties is to execute the laws . . . a plain reading of HHCA § 206 demonstrates that executive power only "in respect to lands of the state, shall not extend to . . . Hawaiian home lands[.]" In other words, the governor may not treat these lands, which have been set aside to fulfill the purposes of the HHCA, as any other lands held outright by the State: Hawaiian home lands are impressed with a trust whose co-trustees are the State of Hawai'i and the United States. As the trust corpus, these lands cannot serve purposes at odds with the trust purposes. Nevertheless, the limitation on executive power set out in HHCA § 206 was never intended to limit the police power of the State in the fashion envisioned by the Appellants, and they point to no authority to support their position.

Id. at 170-71, 907 P.2d at 756-57. Using very similar reasoning, the Hawaii Supreme Court has also held that laws requiring environmental impact statements for certain projects on state lands (including Hawaiian home lands) do not run afoul of section 206 of the HHCA because they are an exercise of the State's police powers and do not significantly affect the land:

> HRS ch. 343 involves EIS requirements and is therefore a type of environmental regulation. Clearly, environmental regulations are enacted for the purpose of protecting the public safety, health, and welfare. Consequently, the present case is similar to *Jim* in that HRS ch. 343, like the Hawai'i Penal Code, is a police power regulation.

. . . .

> Another aspect of this case that is similar to *Jim* is the fact that HRS ch. 343 does not significantly affect the land. HRS ch. 343 essentially requires decision makers to consider the potential impact of their projects on the environment and to prepare informational documents disclosing these effects. . . . The procedure established by HRS ch. 343 focuses on preparation of certain informational documents. The agency or applicant proposing action must prepare an EA that describes the possible environmental effects of the project . . . . Thus, it is clear that HRS ch. 343 primarily establishes procedural and informational requirements.

Kepoo at 99-100, 952 P.2d at 387-88. To contrast laws exercising general police powers from those that significantly affect the land, the court cited Attorney General Opinion Nos. 75-3 (Governor may not use executive orders to set aside Hawaiian home lands) and 72-21 (county zoning ordinances do not apply to Hawaiian home lands used for homestead purposes) as examples of actions that would run afoul of section 206 of the HHCA because they significantly affect DHHL's ability to manage and dispose of Hawaiian home lands.

Chapter 182, HRS, which designates BLNR as the entity to control leasing of state lands for natural resource exploitation, appears to be the type of law that would run afoul of section 206 of the HHCA because it significantly affects DHHL's use of its own lands. In other words, if BLNR were given exclusive authority to determine whether geothermal resources on "available lands" should be leased for development, DHHL would be deprived of the ability to manage its lands.

Although there may be an argument that chapter 182's requirements can be considered an exercise of the State's general police powers, chapter 182 goes further than the environmental regulations at issue in the Kepoo case. In Kepoo, chapter 343, HRS, only required DHHL to follow certain

procedural and informational steps before allowing developments to proceed on Hawaiian home lands. These provisions were held by the Hawaii Supreme Court to not "significantly affect the land" and, therefore, do not violate section 206 of the HHCA.

In contrast, chapter 182, HRS, gives BLNR sole discretion to release reservations of geothermal rights and issue geothermal development leases on state lands. By chapter 182's own terms, DHHL does not have any role in deciding whether a geothermal development lease can be issued on Hawaiian home lands. Such a law "significantly affects the land" because it prevents DHHL from managing and disposing of geothermal resources on its own lands, and instead places such powers in the hands of another agency. This type of regulation is prohibited by section 206 of the HHCA, as construed by the Hawaii Supreme Court in the Jim and Kepoo cases.

Accordingly, section 206 of the HHCA controls over the provisions of chapter 182, HRS, as applied to Hawaiian home lands, and DHHL has the authority to manage and dispose of geothermal resources on its lands. [4]

2. Neither the Equal Footing Doctrine nor the Public Trust Doctrine Override Section 206 of the HHCA

We have analyzed two possible arguments that could be made that BLNR, rather than DHHL, has the authority to manage and dispose of geothermal resources on DHHL lands under the equal footing and public trust doctrines. We conclude, however, that neither doctrine overrides DHHL's authority to manage and dispose of geothermal resources on its lands.

[4] We were not asked, and therefore do not address, whether DHHL must exercise a level of care relative to its neighbors when developing geothermal resources on "available lands."

a. The Equal Footing Doctrine

In general, the imposition of conditions by Congress on newly admitted states is allowable. In Ervien v. United States, 251 U.S. 41 (1919), the U.S. Supreme Court held that Congress's directive that public lands granted to New Mexico be used for specific enumerated purposes was valid:

> There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose; and to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trusts as the lands producing the same.
>
> . . . .
>
> [T]he United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations.

Id. at 48.

One exception to this general rule is the common law doctrine of equal footing, which provides that a newly admitted state has "the same rights, sovereignty, and jurisdiction" as those enjoyed by the thirteen original states. Knight v. United Land Ass'n, 142 U.S. 161, 183 (1891).

An argument can be made that the equal footing doctrine requires that all lands owned by the State (including "available lands") are under the control of the State, that the State has the sole authority to decide which agency shall administer such lands as an exercise of its sovereign power, and that this authority cannot be restricted by the federal government, as no such restrictions applied to the original thirteen states.

In Coyle v. Smith, 221 U.S. 559 (1911), the U.S. Supreme Court held that the equal footing doctrine prohibits the United States from restricting the powers of a newly admitted state in respect to matters which would otherwise be exclusively within the sphere of state power. Id. at 568. At issue in Coyle was whether the congressional act admitting Oklahoma as a state could require that Oklahoma's state capital be in a certain location. The court held that such a requirement denied Oklahoma "equal footing" with the other states by impermissibly restricting Oklahoma's ability to locate its capital in a place of its choosing, a power solely within the state sphere. Id. at 579. The Coyle court distinguished between impermissible restrictions of state power by Congress and conditions imposed on new states by Congress acting within its enumerated powers:

> It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation . . . touching the sole care and disposition of the public lands or reservations herein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

Id. at 574 (emphasis added).[5] See also Branson School Dist. v. Romer, 958 F. Supp. 1501, 1513-14 (D. Colo. 1997) (rejecting

[5] Article IV, section 3, of the U.S. Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

equal footing challenge to trust conditions imposed on land granted to Colorado by the federal government upon its admission because the federal government has the power to "grant something less than a fee simple interest" in lands to the new state.)

Section 4 of the Admission Act specifically states that Hawaii's adoption of the HHCA, and the conditions imposed by Congress arising from the adoption of the HHCA, relates to the "management and disposition of the Hawaiian home lands." One such condition imposed by Congress is that "all proceeds and income" from Hawaiian home lands must be used in carrying out the provisions of the HHCA. Under Coyle, such a condition does not offend the equal footing doctrine because it is within the purview of Congress's enumerated powers.[6]

Under Ervien and Coyle, then, the limitations placed by Congress on Hawaii's use of Hawaiian home lands do not violate the equal footing doctrine.

b. The Public Trust Doctrine

The public trust doctrine recognizes that states enjoy certain non-transferable rights in natural resources. This doctrine is constitutional in nature. Article XI, section 1, of the Hawaii Constitution provides that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources" and that all public natural resources are "held in trust by the State for the benefit of the people." Article XI, section 2, of the Hawaii Constitution requires the legislature to vest in one or more executive boards or commissions powers to manage natural resources owned by the State.

The Hawaii Supreme Court has held that the State has a duty to protect natural resources and regulate their use by devoting them to "public uses." State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). In

[6] The "available lands" became lands of the United States pursuant to the Newlands Resolution (Resolution No. 55 of July 7, 1898, 30 Stat. 750).

Zimring, the court held that newly created lands created by lava flows do not accrue solely to the benefit of private landowners, but instead must be held in trust by the State for public uses. Id. The Zimring court also held that the State may favor a particular public use if its importance outweighs competing public uses. Id.

Section 4 of the Admission Act, article XII, sections 1 and 3, of the Hawaii Constitution, and sections 204 and 206 of the HHCA recognize that certain lands held by the State (namely, Hawaiian home lands) are under the exclusive control of DHHL, and must be used only to carry out the provisions of the HHCA.

An argument can be made that the public trust doctrine imposes a constitutional obligation on the State, through BLNR, as provided in section 171-3, HRS, to oversee and regulate the development of geothermal resources on all lands in the State, including "available lands," for the benefit of the public at large, notwithstanding the provisions of the Admission Act and the HHCA.

We do not believe that the public trust doctrine compels the State to weigh the use of Hawaiian home lands solely for the benefit of native Hawaiians against the use of such lands for the public at large. As just explained, federal and state law provide that such lands, and the proceeds and income therefrom, are to be used solely to carry out the provisions of the HHCA. The same reasoning applies to geothermal resources located on Hawaiian home lands; section 206 of the HHCA specifically provides that BLNR's powers with respect to state lands shall not apply to Hawaiian home lands. We therefore conclude that DHHL's authority to manage and dispose of geothermal resources on its lands, which stems from the Admission Act, the Hawaii Constitution, and the HHCA, does not run afoul of the public trust doctrine.

Finally, the supremacy of the Admission Act as federal law, which required the adoption of the HHCA as a provision of the Hawaii Constitution, counsels against an interpretation of the public trust doctrine that would deny DHHL control over

geothermal resources on its lands, in contravention of the HHCA.

We are mindful that one natural resource, water, appears to enjoy heightened protections under the Hawaii Constitution. The Hawaii Supreme Court has recognized that water is a special type of natural resource because it is variable, transient, scarce, and subject to pollution and depletion. Robinson v. Ariyoshi, 65 Haw. 641, 667, 658 P.2d 287, 306 (1982). In addition, article XI, section 7, of the Hawaii Constitution obligates the State to "protect, control and regulate the use of Hawaii's water resources for the benefit of its people" and further requires the legislature to establish a "water resources agency" to protect ground and surface water resources by establishing procedures for identifying and regulating all uses of Hawaii's water resources.[7]

Our constitution does not include any provision for geothermal resources analogous to that afforded to water under article XI, section 7.[8] Nor is there case law holding that geothermal resources share the transient, scarce, and life-giving qualities attributable to water. In short, we are not convinced that the same level of protection and interest-balancing afforded to water resources are applicable to geothermal resources.

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[7] The Hawaii Supreme Court in In re Water Use Permit Applications, 94 Haw. 97, 9 P.3d 409 (2000), notes that the State's Commission on Water Resource Management is the "primary guardian" of the public's right to water under article XI, section 7, of the Hawaii Constitution. There is no similar constitutional provision appointing a "primary guardian" over geothermal resources.

[8] While the State's geothermal resources are protected under the public trust doctrine, only water resources have been accorded additional heightened protection by the Hawaii Supreme Court.

IV. CONCLUSION

Based on this analysis, we conclude as follows: (1) DHHL is entitled to 100 percent of royalties derived from geothermal resource development on its lands; and (2) DHHL has the sole authority to manage and dispose of geothermal resources on its lands.

We emphasize that these conclusions are applicable only to the issue of geothermal resources on DHHL lands. Whether such conclusions apply to other natural resources found on Hawaiian home lands requires additional analysis.

Very truly yours,

Matthew S. Dvonch
Deputy Attorney General

APPROVED:

David M. Louie
Attorney General