

## FIFTH DAY

Tuesday, October 30, 2007

The House of Representatives of the Twenty-Fourth Legislature of the State of Hawaii, Second Special Session of 2007, convened at 2:06 o'clock p.m., with Temporary Chair B. Oshiro presiding.

The invocation was delivered by Representative Angus L.K. McKelvey, after which the Roll was called showing all members present with the exception of Representatives Bertram, Chang, Marumoto, Meyer, Saiki and Takamine, who were excused.

By unanimous consent, reading and approval of the Journal of the House of Representatives of the Fourth Day of the Second Special Session was deferred.

## INTRODUCTIONS

The following introductions were made to the members of the House:

Representative Evans, on behalf of Representatives Har, Pine and herself, introduced 96 students of the Youth Challenge Academy Class 27 who are graduating in December.

Representative Nishimoto introduced his mother, Mrs. Pat Nishimoto. She was accompanied by Representative Nishimoto's office manager, Ms. Candace Van Buren.

Representative Awana introduced Ms. Wendy Sefo, legislative aide to Honolulu City Councilman, Todd Apo

## ORDER OF THE DAY

## STANDING COMMITTEE REPORTS

Representatives Souki and M. Oshiro, for the Committee on Transportation and the Committee on Finance presented a report (Stand. Com. Rep. No. 3) recommending that S.B. No. 1, SD 1, pass Second Reading and be placed on the calendar for Third Reading.

Representative Caldwell moved that the report of the Committee be adopted, and that S.B. No. 1, SD 1, pass Second Reading and be placed on the calendar for Third Reading, seconded by Representative Say.

The Chair then stated:

"Before we proceed on to any discussion, I would like to remind the Members we are on Second Reading. Should this pass, we will have another opportunity to speak on Third Reading. And to the extent that anyone would like to incorporate any of the comments that they made on the similar House Bill, I would invite you to do so. Let's proceed."

Representative Morita rose in opposition to the measure, and asked that her written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Morita's written remarks are as follows:

"Mr. Speaker: I stand in opposition to this measure. I would like to refer to my remarks regarding the Floor Amendment I offered on House Bill 1 several days ago and incorporate those remarks to this brief statement.

"I offered this body an amendment that had a more viable structure that would meet the need to conduct the environmental review with transparency, a venue for conditions to mitigate negative impacts to be properly placed for regulation and enforcement, and an

investigation and appeal process without setting up a new taskforce or giving the Governor extraordinary powers. It was my hope that the Chairs of the House Committees on Transportation and Finance would have seriously considered the merit of the Floor Amendment when they took the Senate bill to a public hearing. But, unfortunately, the actions we take during this Special Session do not reflect deliberative discussion and debate on this issue, just the need to push through a preordained decision while we go through the motions of acting like a representative democracy."

Representative McKelvey rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Green rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Hanohano rose to speak in opposition to the measure, stating:

"Please register a no vote for me. However, I would like to say a few things.

*"'Ano 'ai ke aloha mai ka 'āina 'o Puna. Aloha auinā nā lālā no ka Hale o nā Lunamaka'āinana. Eia nō mākou e hana kūpono nō na po'e 'o Hawai'i nei. 'Ano 'eha 'eha loa ku'u na'au a me ka hilahila nō kekahi hoa nō ka mokupuni 'o Hawai'i. 'O keia kau kui ikawa e hana pono oli. No keia hana he ho'opauanawa a me ka ho'opaukālā.*

*"E noinoi aku au iā 'oukou e ho'oponopono keia hana no keia kau kūikawa. Mai ho'opuni wale nō ka po'e e loa'a ka moku 'o ke Alaka'i. 'A'ole maika'i kō lākou hana. 'O ka mea i'o he koho, 'a'ole. 'Oia ka mea i'o nō.*

*"Mahalo iā oukou nō kō 'oukou ho'olohe mai a ke 'olu'olu 'oukou e koho nā mea pono me ka ha'i 'ōlelo, 'a'ole.*

*"Nā ke akua e mālama iā kakou i na lā 'apau a e hele kākou me ka 'oia i'o.*

*"E ho'omana'o iā kākou nā mea 'ekolu, ka mana'o i'o, ka mana'o lana, a me ke aloha. Aloha i ke kahi i ke kahi. Kulia i ka nu'u a e ohipa'a kākou. Mahalo."*

[Translation provided by Representative Hanohano:

"Greetings from the land of Puna. Good afternoon Members of the House of Representatives. Here we are doing the work for the people of Hawai'i. I am deeply troubled and feeling shameful for the actions of some of my colleagues from the Island of Hawai'i. This Special Session is filled with untruthful work. This work is a waste of time and a waste of money.

I ask you to correct this Special Session work. Don't be misled by the Superferry – Alaka'i people. Their process is not right. The right thing to do is to vote no. That is indeed the right choice.

Thank you for your time and please do the right choice by voicing a no vote.

May the Lord care for us daily and lead us in the right direction.

We need to remember the three greatest gifts of faith, hope and love. Love one another. Strive for the highest and be steadfast. Thank you."]

Representative Carroll rose in opposition to the measure and asked that the remarks of Representative Hanohano be entered in the Journal as her own, and the Chair "so ordered." (By reference only.)

Representative Souki rose to a point of information, stating:

"Mr. Speaker, a point of information. I had some difficulty following the Representative from Puna. If she could do it in English so I could follow her speech, please. Thank you."

At 2:15 o'clock p.m., the Chair declared a recess subject to the call of the Chair.

The House of Representatives reconvened at 2:15 o'clock p.m.

The Chair then stated:

"Members, before the recess there was a request for a translation. I do believe that the Hawaiian language is an official language of the State and therefore the Representative from the Big Island is within her right to speak fully in Hawaiian. However, after talking to Representative Hanohano, she has indicated that she will provide a translation to the Requestor at a later date."

Representative Berg rose and asked that the Clerk record an aye vote with reservations for her, and the Chair "so ordered."

Representative Belatti rose to speak in support of the measure with reservations, stating:

"Thank you, Mr. Speaker. I also rise with very strong reservations and request that reserve some time also insert and add comments on Third Reading.

"One short comment I would like to make Mr. Speaker in reservation. Over the past two days of hearings, we've talked a lot about the separation of powers and the possibility that we are overstepping our boundaries. We heard from some testifiers that we may be overstepping our boundaries pursuant to Article I, Section 21 of the Hawaii State Constitution, Article XI and Article XII.

"I pause and I wish to put this in the record orally because I do think what we are doing is an extraordinary measure and that the resolution of the separation of powers question is not going to come through this body, but by another body. And that we must be prepared also for what that ruling might be. Thank you, Mr. Speaker."

Representative Belatti's written remarks are as follows:

"After two days of hearings, I am increasingly concerned about whether the Legislature's actions are consistent with the State Constitution. As characterized by the testimony of Kauai Councilmember JoAnn A. Yukimura, "[w]e are facing a constitutional crisis that is testing the very framework of representative democracy in Hawaii." The councilmember goes on to state that the Legislature is "running the risk of violating the separation of powers doctrine underlying the State Constitution as well as Section 21 of Article I of the State Constitution which forbids grants of special privilege to any particular entity or business." Similarly, the advocate for the Office of Hawaiian Affairs reminded us of the constitutional and statutory duties of preserving the public trust that we are undermining with our actions.

"Although we are have been informed by the Attorney General through his testimony that the legislation before us "is wholly forward looking, and thus constitutional," these constitutional concerns are very troubling to me, especially because we are not simply overruling a Supreme Court decision, but we are instead reacting to a Circuit Court judge's ruling that was not favorable to the business and industry that we are seeking to support. With the exception of simply not passing any legislation, I am not sure there is any legislation we can enact at this time that is consistent with our State Constitution.

"Assuming that we are acting within our constitutional boundaries, I do, however, support this legislation because it does attempt to impose some conditions on the Hawaii Superferry that will provide some measure of environmental protection. I think it is a wiser course that the Legislature impose some base line conditions that recognize the deep concerns felt throughout our State that the Hawaii Superferry may cause irreparable harm."

Representative Manahan rose in support of the measure with reservations, and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Manahan's written remarks are as follows:

"Most everyone in my district supports the concept of the Superferry. I've been to the open markets, the churches, to the Neighborhood Board, spoken to community leaders and elders, as well as gone door to door to ask the residents how they feel on this issue.

"I myself support the concept of an inter-island ferry system, however, in light of our hearing yesterday and the concerns that were raised by the Committees, especially towards the Governor and the representative from the State Attorney General's Office, I feel there are still many questions that have been left unanswered. Questions that should be answered.

"And given the sensibility this Administration has shown us thus far on this issue, I am not confident in their ability to properly address the concerns of the environment. The consequences of which, our children will have to face.

"For these reasons, I will be voting with reservations."

Representative Shimabukuro rose and asked that the Clerk record a no vote for her, and the Chair "so ordered."

Representative Har rose and asked that the Clerk record an aye vote with reservations for her, and the Chair "so ordered."

Representative Sonson rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Caldwell rose in support of the measure and asked that his written remarks be inserted in the Journal, and the Chair "so ordered."

Representative Caldwell's written remarks are as follows:

"Mr. Speaker, my remarks are in support of S.B. No. 1, S.D. 1.

"Questions have been raised as to whether this measure will subject legislators to liability under 42 U.S.C. section 1983 of the Civil Rights Act of 1871, which allows individuals to sue state officials in state or federal courts for civil rights violations.

"Legislators will be shielded by the absolute immunity from civil liability under section 1983 for legislative actions, because the passage of a law is a quintessentially legislative action.

"In *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9<sup>th</sup> Cir. 2003), the court identified four factors used by courts in determining whether, for purposes of section 1983 lawsuits, an act by legislators is legislative in nature rather than administrative or executive:

- (1) Whether the act involves ad hoc decisionmaking, or the formulation of policy;
- (2) Whether the act applies to a few individuals, or to the public at large;
- (3) Whether the act is formally legislative in character; and

- (4) Whether the act bears all the hallmarks of traditional legislation.

"As to the first factor, S.B. No. 1, S.D. 1, is not ad hoc decisionmaking; it is the formulation of policy. In *Kaahumanu*, the court found that the Maui County Council had engaged in ad hoc decisionmaking because it applied an existing ordinance specifying the uses authorized under a conditional permit to plaintiff's wedding business, thereupon issuing a denial of plaintiff's request for a conditional permit by enacting an ordinance. The 9<sup>th</sup> Circuit Court determined that the Maui County Council was carrying out, not changing, the policies embodied in the comprehensive zoning ordinance, when granting or denying a conditional use permit. In contrast, the Legislature by passing S.B. No. 1, S.D. 1, would create a new policy governing a new type of industry, a clearly legislative function. To arrive at the final form of this law, the Legislature formulated policy by reconciling important questions of environmental, economic, and governmental policy with state-wide impact.

"As to the second factor, S.B. No. 1, S.D. 1, will apply to any "large capacity ferry vessel company," and therefore not only to the Superferry. This is the environmental regulation of an industry, not of a particular individual. Even if the bill only affected one company, that would not diminish its character as legislation. For example, the New Castle County Council's down-zoning ordinances in *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994), only affected 38 acres of land, all of which were owned by a single plaintiff. The court found that the county council had made a broad policy decision and performed a legislative act because the development plan for the 38 acre parcel raised concerns about traffic and compliance with wetlands, public works and fire prevention regulations. Similarly, S.B. No. 1, S.D. 1, is also a broad policy decision that seeks to address significant statewide economic, environmental, and transportation concerns as it applies to a large capacity ferry vessel such as the situation pertaining to the Superferry, and by its failure in Hawaii if such company is unable to operate during the environmental review process.

"As to the third factor, S.B. No. 1, S.D. 1, is a bill that has moved through the formal legislative process mandated by the Hawaii State Constitution. The measure will only become law if it proceeds through the full, formal legislative process.

"Finally, as to the fourth factor, S.B. No. 1, S.D. 1, bears all of the hallmarks of traditional legislation. The Supreme Court in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), identified some of these hallmarks. The ordinance in that case eliminated a city department in which the plaintiff was the sole employee. The Supreme Court found that:

*the particular ordinance, in substance, bore all the hallmarks of traditional legislation: It reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents; it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office; and, in eliminating respondent's office, it governed in a field where legislators traditionally have power to act.*

"Similarly, S.B. No. 1, S.D. 1, implicates the State's budgetary priorities because of the impact that failure of Superferry will have on repayment of the \$40 million in reimbursable general obligation bonds authorized for Superferry harbor improvements. It involves statewide transportation services to constituents, albeit provided through a privately run system. The measure makes new law governing the environmental review of government actions, a field where legislators have the sole power to act. Finally, the act of passing S.B. No. 1, S.D. 1, reflects a discretionary, policymaking decision that will resolve economic and environmental concerns affecting the entire State that cannot be resolved in any other forum

but the Legislature. Thus, the measure governs in a field where legislators traditionally have the power to act, and have a duty to their constituents, to act.

"Absolute legislative immunity from section 1983 lawsuits protects the exercise of legislative discretion from judicial interference, and from distortion by the fear of personal liability. In this case it appropriately protects legislators as they consider S.B. No. 1, S.D. 1, and better allows them to make the difficult policy decisions necessary to resolve the issues that we confront in this Second Special Session of 2007."

Representative M. Oshiro rose to speak in support of the measure with reservations, stating:

"Mr. Speaker, in opposition with support. I mean, in support with reservations. Let me explain the reason why I'm supporting this bill. This bill before us is the only vehicle we have today to possibly guard the State of Hawaii from untold liability due to some errors and omissions of the Executive Branch. I find that in and of itself and only that the basis for my support. But I also would like to note in the record Mr. Speaker, that it's very unusual and somewhat ironic that through the same bill in which we attempt to raise a means of protecting ourselves from liability, that this same vehicle gives our adversary life to threaten us with a lawsuit. I would like to have permission to submit written comments. Thank you."

Representative M. Oshiro's written remarks are as follows:

"Thank you Mr. Speaker, for permission to submit these written comments to supplement my vote of "aye with reservations" and my brief comments regarding the cruel irony of this Special Session.

"Mr. Speaker, for now, I am in support of this Senate Bill, but with several strong reservations. I expressed the majority of my reservations during the Third Reading of HB 1. However, I reserve my right to change my vote on this bill at Third Reading. I'll explain that more in a moment. May the record also reflect that my prior comments on HB 1, made on Friday, October 26, 2007, are also incorporated herein by reference.

"For now, Mr. Speaker, I'd like to thank the House Leadership and their respective staffs for working so hard on this issue over the past few weeks. Indeed, I especially want to thank our House Attorneys Mr. James Funaki and Mr. Richard Dvonch, for their wise counsel, professionalism, and painstaking attention to detail and language. Their exceptional drafting skills have served the House well and provided us a measure that should withstand any initial constitutional challenge. The same appreciation is also given to Ms. Linda Oamilda and the House Majority Staff Office (HMSO) attorneys and staff for their hard and important work. They all have done good work to preserve this institution and its independence of co-governance with the State Senate of the Legislative Branch.

"And most importantly, I'd like to thank you and the Democratic Leadership for allowing free and open debate regarding this issue. The discussions have been nothing less than robust and critical, but we have respected each others' opinions and exhibited civility and decorum despite strong disagreement on policy. And you, Speaker Say, have, throughout this challenging time, exhibited the highest degree of civility and honor and garnered the respect and admiration from both sides of the issue. Finding any kind of consensus on this issue has been an extreme challenge, considering the damage done by Hawaii Superferry and the Lingle/Aiona Administration. I don't believe I have ever seen an issue divide our communities and islands the way this has.

"I'd also like to reiterate to the founders, investors, operators, boards of directors, and employees of the Hawaii Superferry, and other similar carriers, that I have always supported the development of alternative means of transportation between the islands as good for the people of Hawaii and good for commerce. For as long as I can

remember, Hawaii has been dependent upon two or three major inter-island airlines; be it Aloha, Hawaiian, Mahalo, or Go.

"An inter-island ferry system, that operates on the "H-4" between the islands is, on balance, a good option for the people of Hawaii, and has many good features that can enhance our quality of life. There is no doubt in my mind that an inter-island ferry system will provide more good for Hawaii's people than bad.

"Mr. Speaker, I believed that HB 1, Second Special Session of 2007, was the best possible bill for a bad policy decision. SB 1, SD 1, the bill currently before us, on the other hand, is a completely different story. I find it extremely difficult to support this bill. For now, I will be voting aye with reservations, but I may change my decision by the time we get to Third Reading.

Release and Indemnity Clause: Who Is The Client and Who Is The Master?

"Mr. Speaker, I believe the single most important provision under consideration in any bill that would assist any large capacity ferry vessel company commence operations in Hawaii is the release and indemnity clause. Requiring any large capacity ferry vessel company to release the State of Hawaii from any past, present, and future liabilities and law suits is the single most important concession that any large capacity ferry vessel company needs to commit to the State of Hawaii. This is especially true when you consider the extraordinary effort and special legislation necessary to undercut a valid and sound Hawaii Supreme Court determination.

"Because of testimony submitted by the Attorney General of the State of Hawaii to the Senate, and the amendments made therein, the Senate bill before us no longer protects the State from lawsuits by any large capacity ferry vessel company in the future.

"The release and indemnity clause, for all intents and purposes has been emasculated from that which both House and Senate agreed upon at the opening of the Second Special Session. As such, the present draft in its most practical and real-life application provides the Hawaii Superferry the unrestrained legal right to sue the State of Hawaii and grants unlimited access to the public treasury for damages or other judicial relief. What makes this even more astounding is that during the Senate hearing on this bill, not one question was asked of the Attorney General. In fact, so unusual was this Senate inaction that during the House hearing on the companion draft, Attorney General Mark Bennett mentioned it to the Joint House Transportation and Finance Committees. Moreover, a review of the written testimony of the Hawaii Superferry reveals that even Mr. Garibaldi did not seek any amendment to the indemnification provision, Section 16, but instead writes, "we believe the bill before you is a reasonable and balanced solution that will give Hawaii Superferry and its 308 employees an opportunity to demonstrate the benefits we and many others believe it can provide". Nowhere in the written testimony or during the relevant "question and answer" period did the Hawaii Superferry or Attorney General make such a request for any amendment to Section 16. Thus, it is a mystery on how it came about and upon whose direction the amendment was made.

"As you know Mr. Speaker, personally for me this was a "deal-breaker", and I could not stomach anymore concessions to the Hawaii Superferry that gains so much for so little in this unprecedented and infamous Special Session of 2007. Indeed, I find it absolutely deplorable that the Attorney General and the Lingle Administration have chosen to acquiesce to the whims of one private party and not stand firm on the side of the State of Hawaii, and the taxpayers of Hawaii. This capitulation to the whims of the Hawaii Superferry is as ignoble an action as they come and raises the question of who is the client and who is the master. This change of Section 16 is substantial and is not in the best interests of the people of the State of Hawaii. It might even be described as a dereliction of their duty and primary responsibility to the people of Hawaii. If one

had given the Governor the benefit of doubt, this change should shatter any illusion of who she serves and desires to please.

"Mr. Speaker, you have to wonder what ulterior motives have been driving their decision making process. You have to wonder how far the Lingle/Aiona administration is willing to go. For these reasons alone I find myself much more eager to abandon caution and throw all I have against this bill and therein risk all the political capital I may have earned over these 13 years in office.

2003 Public Relations and Media Manipulation vs. Environmental Protection?

"Mr. Speaker, during our questioning of various testifiers at our hearing on Monday, October 29, 2007, it was revealed that Hawaii Superferry officials contracted local public relations firm Communications Pacific as a consultant in 2003. On the surface, such a contract may not be unusual or a cause for concern, but in this case, Lingle/Aiona Administration appointees were involved.

"According to Kat Brady and Henry Curtis of Life of the Land, they were contacted by Communications Pacific and asked to attend a meeting at the Communications Pacific office in the summer of 2003. They both attended on behalf of the Life of the Land and related that the following individuals were also there:

- Cha Smith, Executive Director, KAHEA;
- Marge Ziegler, Conservation Council of Hawaii;
- Randy Ching, The Sierra Club of Hawaii, Oahu Chapter;
- John Garibaldi, Hawaii Superferry;
- Richard White, Hawaii Superferry;
- Tim Dick, Hawaii Superferry;
- Kitty Lagareta, Chair and CEO, Communications Pacific; and
- Christina Kemmer, Executive Vice President, Communications Pacific.

"Furthermore, according to Henry Curtis they were contacted and sought out to answer questions regarding the applicability of HRS 343, the Environmental Assessment (EA) and Environmental Impact Study (EIS) process as it related to the Hawaii Superferry.

"What's troubling about this piece of information is the potential for lengthy follow-up questions that your Committees were unable to explore due to time concerns. For instance, I had asked both Mr. Curtis and Ms. Brady to consult with the other parties and get back to the Committees as soon as possible, so that their recollection could be further substantiated and corroborated. Interestingly, even Mr. Garibaldi recalls the meeting back in 2003 at the office of Communications Pacific as he should since he probably paid for the services rendered.

"What can we reasonable deduce from all of this?"

1. For one, it is common knowledge and no secret that Communications Pacific, founded by a close personal friend of Governor Lingle, Kitty Lagareta, is the public relations firm that has been instrumental in Governor Lingle's campaigns as well as those of other prominent Republicans. Ms. Kitty Lagareta was also appointed by Governor Lingle to the Board of Regents of the University of Hawaii System and has served as the Chairperson of the Board of Regents.
2. Similarly, Christina Kemmer, Executive Vice-President, Communications Pacific, has been the Hawaii Civilian Aide to the Secretary of the Army and is knowledgeable about the Army's plans and activities in Hawaii.
3. Hawaii Superferry hired Communications Pacific sometime in 2002 or 2003.
4. Communications Pacific facilitated meetings between various community groups, Hawaii Superferry, and the

Lingle Administration, presumably to solicit community input; and

5. Various public opinion polls began to appear around this time supporting the Hawaii Superferry.

"Mr. Speaker, I have always stood in awe of the Lingle/Aiona Administration public relations team and their ability to manipulate the media and spin the story to suit their needs. They are ready for everything and seemingly cover all their bases. It looks like they were gearing up for a protracted community relations battle as far back as 2003 regarding the Hawaii Superferry.

"If a fraction of the zeal for creating a media plan was used to:

1. Determine whether an EA and EIS was needed; or
2. Actually conduct an EA and EIS;

We would not be in this quagmire.

"Unfortunately, the media has also been a willing participant in this mass manipulation of the news concerning the Hawaii Superferry. To the point where simple financial information seems to have been accepted without significant challenge.

#### Hawaii Superferry and its Financial Condition

"Mr. Speaker, the *Honolulu Advertiser* reported on October 11, 2007 that:

*"Hawaii Superferry announced this afternoon that it will furlough 249 workers today because of uncertainty over the future of the project since it has been blocked in court.*

*The furlough involves 178 people on O'ahu, 36 on Maui and 35 on Kaua'i.*

*Fifty-nine workers would be kept to handle administrative and operational functions. John Garibaldi, Superferry president and chief executive officer, said the company had reached a point where it couldn't continue paying the more than \$300,000 in weekly salary to the employees."*

"Everyone simply accepted this statement as truth. I don't believe anyone has done a very simple analysis of this statement made by Mr. Garibaldi. If we were to assume that the Hawaii Superferry was telling the truth and was paying 249 workers about \$300,000, they would be paying each of those employees \$62,650 per year.

"These numbers simply don't make any sense. I find it extremely difficult to believe that the employees furloughed by the Hawaii Superferry, many of whom were part-time employees, were earning \$62,650 per year.

"In fact, at our hearing we learned that the average part-time worker was working about 19 hours a week and earning about \$15 to \$19 per hour. That translates to about \$18,000 per year. That's a far cry from the supposed \$62,000 per year.

"With this piece of information, we can now try to figure out what the full time employees were earning. If we assume that all the part time workers earned \$19 per hour – the maximum claimed by Mr. Garibaldi; and we also take Mr. Garibaldi at his word that the total weekly payroll cost for Hawaii Superferry is about \$300,000; we find that the average salary for the full-time employees is \$86,000 per year.

"\$86,000 per year. That's still astounding! I wonder if the employees know what they are getting paid.

"According to Mr. Garibaldi's statements to the media, the furlough involved 178 people on Oahu, 36 on Maui, and 35 people

on Kauai. We know from the court record that only 3 out of about 70 employees on Maui and Kauai combined had full time status. That means we can assume that the vast majority of employees furloughed were the part-timers. Thus, the savings to Hawaii Superferry from furloughing their employees come out to only about \$90,000 per week.

"According to all news accounts, the Hawaii Superferry was "bleeding" \$650,000 per week by sitting idle. The furlough seems to have only saved them \$90,000 per week.

"This begs the question – were the employees really Hawaii Superferry's concern; or were the employees merely pawns in a well-crafted public relations ploy?

"Additionally, I learned from the sworn testimony of Mr. Duane Kim, Hawaii Superferry employee on Maui, that most of the employees on Maui or nearly 80% were still under probation and had not completed the requisite 30 days when they were furloughed. I would assume the same is true for the Kauai and Oahu part-time employees too.

"It seems more and more likely that the employees are being used as pawns or a public relation ploy in the larger scheme to get the Superferry up and running despite all the mistakes made by the Governor and the business risks taken by the Superferry. To my disappointment my fears were confirmed the other night when the CEO of the Hawaii Superferry could not share with the Committees how many employees were eligible for unemployment insurance, or collecting unemployment insurance, or had found other employment, or were seeking employment. The hue and cry of the furloughed workers made front page headlines in the *Honolulu Advertiser* and *Honolulu Star-Bulletin* earlier this month, but now, it seemed like a mere afterthought.

"Moreover, when I asked if the prospective employees were made aware of the pending appeal and consequences upon their jobs, the CEO of the Hawaii Superferry cavalierly stated that it was "common knowledge" by most applicants and that potential employees were not told of the pending lawsuit and consequences thereof, unless they asked.

"Mr. Speaker, I am shocked and angered by this kind of indifference and double standard of the Hawaii Superferry officers and operators. Certainly the officers and directors and investors knew about the risks inherent in the pending case on appeal, and yet they gambled. Should the same standard not apply to both the employer and the employee?

"Mr. Speaker, let us not forget that we are not dealing with a bunch of uninformed and unsophisticated neophytes trying to turn a nickel into a dime. The Hawaii Superferry Officers and Board of Directors reads like a "Who's-Who" of the best and brightest minds on Wall Street. Has anyone clicked on the Hawaii Superferry web site at:

<http://www.hawaiisuperferry.com/about-us/corporate-team/board-of-directors.html>

and reviewed the resumes of these distinguished gentlemen? How can we condone their actions and indifference to their employees and their interest? If we treated the Hawaii Superferry managers in the same manner as they did their own employees, we would not be here today even contemplating "saving" this company from its own bad choices and risky behavior. I cannot condone this arrogance and utter disrespect for the Hawaii Superferry employees who have been used as mere "cannon fodder" in this battle for its survival.

"Mr. Speaker, there are other issues to consider if we are to challenge the assumption that the Hawaii Superferry needs to be "saved". Unfortunately, given the short timeframe to probe and question the various financials assumptions, we have only a skeleton of data necessary to even extrapolate the financial scheme on which

the Hawaii Superferry is established. But, it may give some leads for others, especially any investigative reporters, to pursue.

"Data from numerous sources indicate that the Hawaii Superferry was able to raise about \$250 million dollars.

- \$140 million from the Maritime Administration as a loan financed through ABN-Amro Bank;
- \$17 million of subordinated notes from Austal, USA – the shipbuilder; and
- \$94 million in equity financing from JF Lehman & Company, Norwest, Maui Land and Pine, Grove Farm, and other investors.

"If we assume that Hawaii Superferry has spent:

- \$178 million on the two ships;
- \$10 million in public relations, legal, and other consulting fees through August 2007; and
- \$20 million in all other expenditures through August 2007 – this would include some assumptions on payroll based on newspaper and television reports.

"To date, Hawaii Superferry would have spent about \$208 million. That means that Hawaii Superferry should currently have access to over \$40 million. This is hardly the sign of a poor and undercapitalized company.

"This is why I find it difficult to believe that the Hawaii Superferry is currently in dire straits. Without full disclosure of its finances, I have an extremely difficult time believing all the news reports thus far. The media simply believed everything Superferry executives claimed without challenge. Just because they said so. Their current public relations firm of McNeil-Wilson has definitely earned their paycheck.

"Finally, Mr. Speaker, there is a provision within the loan agreement with the Maritime Administration (MarAd) that I find curious and disturbing at the same time. MarAd condition and requirement LVIX:

*'Required HSF and Austal to grant MARAD, at Closing, a royalty free license of the proprietary information and/or patents used to construct and/or design the Vessel, in form and substance satisfactorily to MARAD, for the term of the Title XI financing with the right of MARAD to transfer its royalty-free license to end users of the Vessels in case of a default by HSF.'*

"Basically, if Hawaii Superferry defaults on its loan to MarAd, it will lose all rights to its "proprietary information and/or patents used to construct and/or design" the Hawaii Superferry. This provision is worth much, much more than any periodic payments under the ABN-Amro Bank loan, various equity investment agreements, and the periodic MarAd loan guarantee payments. There is not a chance that the Hawaii Superferry and its investors would risk the federal government foreclosing on the agreement and "repossessing" the Alakai and the priceless design, construction, and patents attributable to the Hawaii Superferry. It is definitely not in Hawaii Superferry's interest to sit idle and their threat to leave unless given special treatment does not make any rationale business sense. It is merely crying "wolf" and an ingenious ploy to create the crisis that commands our attention. And that is ultimately the reason why we are in this Special Session.

"Mr. Speaker, this is simply another reason why I question whether Hawaii Superferry's interests are genuinely with its employees and the people of Hawaii or with its Board of Directors.

"It should also be noted that Austal, the company that built the Hawaii Superferry, Alakai, and is currently building the second vessel for Hawaii Superferry, is being considered to build 55 similar ships for the United States Navy. This contract is expected to be

awarded sometime in March 2008. If this contract is awarded to Austal, a shipbuilding company in Mobile, Alabama, it would be a multi-billion dollar boon to all involved. It would certainly be a boon for the people of Mobile.

"Mr. Speaker, I submit the real winners in all of this will be the people or companies and that own the rights to the "proprietary information and/or patents used to construct and/or design" the Hawaii Superferry.

#### Gambler's Paradise, Open for Business, and Unanswered Questions

"It is an amazing and intriguing phenomena that so many people can endorse the concept of the changing of the "rules of the game" so that the loser now becomes the winner. Mr. Speaker without a doubt this entire Superferry debacle is the stuff that books are written about and movies are made. Indeed, I would guess that the Hawaii Superferry case will be required reading in most law schools, business schools, and in the media and communication, political science, sociology, and environmental, related fields of study and academia. And, it should be taught in our elementary and secondary schools too, as it sets forth the essential elements of our democratic system of governance and vividly illustrates the principles of our three branches of government and separation of powers. Mr. Speaker, I strongly encourage any writer or aspiring journalist to write that novel or non-fiction or screen or stage play as the Hawaii Superferry story again reveals how "life imitates art" and sometimes "life can sometimes be stranger than fiction".

"First, I find it simply astounding that most people think the Superferry has been treated "unfairly" and is the "victim" and should be "rescued" and "saved". I must admit until one knows the facts it is so easy to come to those erroneous conclusions. After all, Hawaii people have a soft heart for the underdog and we are naturally inclined to help those who are victims of circumstance. Too bad, however, that the truth has been lost early on in this discussion and the traditional media outlets have been mere mouth pieces for the Hawaii Superferry propaganda and subtle, but effective messaging. I have not read or heard of any media question and challenge the assumption that the Hawaii Superferry would "leave" and not return if it could not operate concurrent with the EIS being done. Not one. Zero. Nada. Instead, nearly everyone is accepting this threat of "leaving" as truth and most fail to appreciate that whether it stays or goes or comes back is a pure business decision. And, as a business decision premised on the bottom line, not whales, not invasive species, not paddlers, but profit and wherewithal to generate the most from the operation of the vessel. Somehow this essential nature of the business enterprise got obscured by the message of addressing the "victimization" of the Hawaii Superferry and the need for it to be "saved" for the benefit of all Hawaii.

1. How many people understand that the Hawaii Superferry gambled that it would win in court and lost fair and square?
2. How many people know that the Hawaii Superferry had already been given extraordinary assistance from Hawaii's taxpayers of 40 million dollars in harbor improvements?
3. How many people know that the Hawaii Superferry and the Lingle Administration were repeatedly warned back in 2004, 2005, 2006, and 2007 that Hawaii environmental laws were to be followed?

"My hunch is that most people would change their minds and not be sympathetic to the Hawaii Superferry if they knew that the Hawaii Superferry gambled and lost.

"Mr. Speaker, but how does one reconcile changing the rules of the game after the winner is determined and rights are ascertained? What do we tell the young people about our democratic system of government where all men are created equal and all men are the same under the laws of the land? How do we maintain the sanctity of our Constitution and rule of law, if we forsake the integrity of our

Judicial Branch for the expediency of Executive fiat? These questions Mr. Speaker are those that I have asked myself and others for the past several weeks and the only response has been a deafening silence.

"Mr. Speaker, the truth is there is no way to reconcile upholding the Constitution and the integrity of the Legislative and Judicial branches if we are to embark upon this course set forth by the Executive Branch. For no matter how one tries to justify this endeavor and attempts to fool one's own conscience it cannot be done. Indeed, when I reflect upon the "Business is Open" theme of Governor Lingle's Administration, I had no idea that it would one day equate to the sale of the Governor's office to the highest bidder. And, with the sale comes the power to summon the Legislature into a Session upon the mere unilateral execution of a gubernatorial proclamation. Are these words too harsh? Do these words impinge upon the integrity of the Governor? Do these words suggest that the Governor acted less than nobly in her private dealings with the Hawaii Superferry? Certainly they are strong words and some might argue fighting words, but in my opinion, necessary, if they might invoke some honest response from the Governor and her Administrators. After all, there are so many unanswered questions. The citizens of Hawaii deserve answers.

"For instance:

- Did the Lingle/Aiona Administration promise any special treatment for the Hawaii Superferry?
- Did John F. Lehman's political connections pave the way for the MarAd loan guarantee and appropriation?
- How did John Garibaldi, CEO, Hawaii Superferry get Austal-USA, Alabama, to build two ships for about 140 million dollars on a handshake?
- Why doesn't Hawaii Superferry simply admit that Hawaii Superferry desires to obtain a contract with the US Military for the transport of Stryker vehicles between Oahu and Hawaii Island, when John F. Lehman and others have admitted the same?
- Why did Hawaii Superferry place so much reliance on the DOT August 23, 2005 letter when its own attorneys gave it other legal advice?
- How did the Hawaii Superferry attorneys know that MarAd would decide the NEPA was inapplicable when they filed with the PUC their Reply Statement of Position, December 8, 2004, when the MarAd decision was not issued until March 2005?
- Why was the Office of Hawaiian Affairs not consulted pursuant to HRS 343?
- Why does DOT Director Barry Fukunaga refuse to answer questions poised by Legislators regarding his decisions relating to the Hawaii Superferry?
- What does he have to hide?
- What role, if any, did ousted DOT Director Rodney Haraga play in the decisions regarding the EA exemption, DOT leases, Operating Agreement, etc?
- What role did the State Office of Planning play and was it consulted regarding the EA exemption and Operating Agreement?
- What role did Bob Awana, Chief of Staff, Governor's Office play in all of this?
- Why have key personal involved in the discussion and negotiating of the unprecedented 22 Year Operating Agreement been moved out or left the DOT Harbors Division?
- How did OEQC Executive Director Sorenson gain receipt of a letter from the DOT regarding the EA exemption decision on August 22, 2005, when the letter was dated August 23, 2005?
- Why did the Executive Director of the Office of Environmental Quality Control leave the post last year?
- Does this "new" legislation regarding "large capacity ferry vessels" create the ability to establish a monopoly by the Hawaii Superferry?
- How could a multi-million dollar enterprise led by some of the smartest businessmen in the world fail to foresee and consider options should they lose at the Hawaii Supreme Court?
- Was the Governor's power to summon a Special Legislative Session considered by the Hawaii Superferry as an option should they lose at the Hawaii Supreme Court?

"Mr. Speaker, I don't have the answers to these questions, but these questions and others like them need to be asked and answered and maybe readers of these remarks will ask them. These and many other questions remain for the Hawaii Superferry and the Lingle/Aiona Administration to answer. Unfortunately, the time constraints imposed in this Special Session and the haste in which this Special Session was convened does not afford the time necessary for responsible analysis and inquiry. Likewise, the lack of time to conduct more research, interview other parties involved, and sort through the sheer volume of materials has left so many questions unanswered and so many decisions of the Lingle/Aiona Administration unaccounted for.

"Mr. Speaker, as I have shared with many of my colleagues, the more I dug into this issue, the more disturbing it became. All the while opportunities for rigorous investigation and inquiry were rapidly diminishing. Had we had more time and resources I would have been able to catalog and extract from the Court record and transcripts all of the prior sworn statements of the Hawaii Superferry, all of the documents received into evidence, documents offered into the evidence, but not received, witness lists, exhibits list, and provided the Legislature some of the details necessary to understand and appreciate the decision of the Hawaii Supreme Court and the respective Maui and Kauai Circuit Courts. The same can be said for all of the documents filed with the PUC in Docket No. 04-0180. After all, through our legislative powers, we are in effect operating as if we are the final reviewing body with the power and authority to overrule the highest court under our State Constitution and impose our decision over a Circuit Court proceeding and ruling. But, given the time constraints and the expediency imposed upon the Legislature by the Hawaii Superferry, and the Lingle/Aiona Administration, I have, with much regret, been unable to bring this important information to this body.

"Fortunately, however, through this bill, the State Auditor is directed to conduct a performance audit of the State Administration's actions in exempting certain harbor improvements to facilitate large capacity ferry vessels from an Environmental Assessment (EA) or Environmental Impact Statement (EIS) requirements under Chapter 343, Hawaii Revised Statutes (HRS), including the reasons why potential secondary environmental impacts were not considered. The bill also requests that the Governor and any other State officer provide all documents and information deemed relevant by the Auditor and to fully cooperate with the Auditor's requests. Furthermore, the bill requires the Auditor to submit a preliminary report by March 1, 2008, and a final report as soon as possible thereafter, but no later than April 20, 2008. It is my hope that the Auditor will be able to complete the tasks requested of her and

ascertain when and how various decisions were made at the various State departments and agencies involved.

"Certainly, I hope the Governor demands full cooperation by all Departments and leads by example, although I do not realistically see her doing so. In our hearings they have been less than forthright and will probably use the shield of "Executive Privilege" in addition to the much used "attorney/client" privilege. The Governor has raised this privilege with the Joint House and Senate Felix-Investigative Committee and she will certainly do it again. After all, the Hawaii Superferry only needs to successfully operate for several months for the brilliant public relations firms to have the pictures, testimonials, employee comments, celebrity endorsements, and other indicators of community acceptance and endorsement for most to forget that an unprecedented special session was called by Governor Lingle to enact special legislation to "save" one business venture (aka "the victim") that gambled and lost.

"Moreover, given the tremendous political capital that she is willing to spend, and the magnitude of what we are being asked to do and the manner in which it is being done, there is no question in my mind that there is something "rotten in Denmark" and uncovering the truth will be tiresome and excruciatingly slow and tedious. To that end, however, I will provide any and all assistance to the State Auditor and her consultants and staff to ascertain the truth and get to the bottom of all of this.

"Mr. Speaker, I have hope, but I will not be holding my breath. Maybe I am being a bit harsh, but let it not be said that I shirked my responsibility to the people of Hawaii and the State House of Representatives. Let it instead be known that I pursued the truth regardless of my personal safety or political favor and fortune.

#### Final Comments

"Mr. Speaker, I believe this bill started off as a very good bill for a very bad public policy, but as it lies before us this day, it bears so little redeeming value but for the paper it is printed on. Far too many questions remain unanswered. Far too many issues remain unaddressed. Far too much is being given away for free.

"Perhaps the single greatest problem with this issue and this bill is the way it has divided our community. That is what pains me the most and gives me such great discomfort and alarm.

"In these closing moments of the unprecedented Second Special Session of 2007, there is no doubt in my mind that the Hawaii Superferry has mounted an exceptional campaign for a Special Session and done so with a "do or die" attitude without regard for the truth and without owning up to its own business decisions and assumption of those risks. Repeatedly, we have heard the cry "save the ferry" through our broadcast media and read the same by-lines as if the Hawaii Superferry was a helpless swimmer caught in a flash flood. The mass hysteria that has seemingly overcome any rational thought for less drastic measures has been omnipotent and persuasive among all levels of our community. It is as if the Hawaii Superferry and all its attendant benefits have been part and parcel of our lives forever and we fear its demise and loss. The reality of having operated for only two (2) days and with practically free tickets priced at \$5.00 is seemingly lost in the constant spin and in non-stop messaging that makes the Hawaii Superferry a "victim" and the Hawaii Supreme Court and Plaintiffs the "victimizers".

"Mr. Speaker I wonder if the Governor would have called for a Special Session and legislation and put all of her political capital on the line if the Defendants had won at the Hawaii Supreme Court instead of the Plaintiffs? In fact, Mr. Speaker would we, the Hawaii State Legislature have gone in to "save" the Plaintiffs and provided a "fix" for the other side? Frankly, I have my doubts. I do not think either the Governor or the Hawaii State Legislature would have concerned itself with the outcome of the case if the Hawaii Superferry had won and the Plaintiffs had lost.

"The early promise and vision of the Hawaii Superferry was to help connect our islands through an idea conceived as "H-4". I know that because in my office is a baseball cap that bears that unusual and provocative insignia. One day I hope to learn of its creator and any thought that went into it since the H-3 like the Hawaii Superferry ultimately needed federal legislation to exempt it from our environmental laws. An "H-4" could have connected so many people, but reality has proven otherwise because of the mistakes made by Governor Lingle and her Administration and the Hawaii Superferry. At the end of the day, the Hawaii Superferry may be allowed to operate, but they will fail in their endeavor if they don't get the support of all our communities.

"I am hopeful that the naiveté of the comments made by Mr. Tig Krekel, JF Lehman & Company Vice Chairman, is not shared by Hawaii Superferry executives or the Lingle/Aiona Administration.

"According to reports in the *Honolulu Advertiser*, October 26, 2007:

*"Asked how Superferry would approach potential resistance on the Neighbor Islands, particularly Kaua'i, Krekel said: "Do not confuse a very loud minority with speaking for all the people of Kaua'i. We have received countless communications from Kaua'i residents about how embarrassed they are and that the loud minority of activists, not environmentalists — but activists — do not speak for them."*

*"So we're hopeful that that situation will calm down."*

"It appears that Mr. Krekel, the "eyes and ears" of John F. Lehman, just doesn't get it. It is as if he learned nothing about Hawaii's people despite attending both public hearings on Thursday, October 25, 2007, and Monday, October 29, 2007. His attendance at the hearings was not lost on anyone and simply ignoring legitimate concerns of the people of Maui and Kauai will not serve anyone. Simply assuming that the situation will calm down after all the damage done by the Superferry and Lingle/Aiona Administration is a strategy doomed to failure. I would hope that executives from a company hoping to make millions of dollars from the people of Hawaii would show more consideration and respect for these islands and its citizenry.

"To the Hawaii Superferry, don't be so smug, the people of Hawaii will be watching what you do. Do not take Hawaii's graciousness and hospitality for lack of resolve and principle. This bill gives you an extraordinary opportunity to do what is right by all of Hawaii's people. Be assured that should there be a next time others will most likely stand against you.

"Mr. Speaker, I have poured out my heart and placed my reservations and concerns on this bill and this Special Session in the court of public opinion. So too, have I placed my reputation out there for all to judge. But, both you and I know and accept, at the end of the day, we will all be gone and all that remains will be our words and our deeds.

"The other day, my parents sent me a facsimile of an old poem that my father would read aloud to me and my sisters. It was something that I had forgotten about, but seeing it before me again reminded me of who I am and all that I was hoping to be. To say the least, it touched me deeply as only a parent can touch a child regardless of the years gone by. In any case, that poem and the eternal themes therein will probably have much to do with my final decision as any fact or testimony I have uncovered or heard during the public hearings.

"I hope that history will judge us kindly and the wheels of justice, however slow they turn will finally arrive on point and impose a just consequence to all that we and others have done and have sought to do. I hope the discord and disunity caused by the Lingle/Aiona Administration and the Hawaii Superferry is brought to its end. We



must not allow the Hawaii Superferry and the Lingle/Aiona Administration to divide Hawaii's people, but we must overcome their indifference with tolerance, forgiveness, and aloha. We must rise above the tyranny and selfishness and heal our community and restore justice to our land.

"Please know that toward that end you have my unrestricted support and pledge. *Malama pono*."

Representative Pine rose to speak in support of the measure, stating:

"Mr. Speaker, I will be reserving my comments in support for Third Reading. However, I did want to just add to the comments as the previous speaker. For me, I was not decided on this issue before I came here. But I think what this whole process did was actually reveal also perhaps the errors and omission of this legislative body. Through many years of allowing many projects that perhaps may have or already have hurt the environment. And so it is my hope that when we finish this process tomorrow, that in January when we come back, that we will fix our own errors and omission and make our environmental laws stronger for every single business and corporation and nonprofit in the State of Hawaii."

Representative Ching rose and asked that the Clerk record an aye vote with reservations for her, and the Chair "so ordered."

Representative Ward rose to speak in support of the measure, stating:

"Mr. Speaker, support with comments, but just a comment in retort. Rather than let us leave the notion that we are protecting the liability of the State, I would submit we are here protecting the interest of the people of the State. If we did not want to give an option of a Superferry, we would not have come to this Special Session. Without that option, the Superferry would leave and then everyone of us in this Chamber would be in jeopardy of not representing our constituency. To say that we are here protecting the State of Hawaii is a misstatement of why we are here, each of us in our 51 districts. Thank you, Mr. Speaker."

Representative Tokioka rose and asked that the Clerk record a no vote for him, and the Chair "so ordered."

Representative Yamane rose to speak in support of the measure with reservations, stating:

"Mr. Speaker, I would like to register a support with reservations. And I hope that the issue of the audit that is written in this bill, that everybody will participate openly and honestly. Thank you."

Representative Bertram rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

Representative Waters rose and asked that the Clerk record an aye vote with reservations for him, and the Chair "so ordered."

The motion was put to vote by the Chair and carried, and the report of the Committee was adopted and S.B. No. 1, SD 1, entitled: "A BILL FOR AN ACT RELATING TRANSPORTATION," passed Second Reading and was placed on the calendar for Third Reading, with Representatives Carroll, Hanohano, Morita, Shimabukuro and Tokioka voting no, and Representative Chang, Marumoto, Meyer and Saiki being excused.

#### ADJOURNMENT

At 2:22 o'clock p.m. on motion by Representative Caldwell, seconded by Representative Thielen and carried, the House of Representatives adjourned until 12:00 o'clock noon, Wednesday,

October 31, 2007. (Representative Chang, Marumoto, Meyer and Saiki were excused.)