



11011

07 JUN 1984

From: Commander, Fourteenth Coast Guard District  
To: Commandant (G-FLP)

Subj: REQUEST FOR REVISED PRELIMINARY OPINION OF TITLE; 17.547  
ACRE ACQUISITION FROM RICHARD SMART (PARKER RANCH), UPOLU  
POINT, ISLAND AND STATE OF HAWAII

1. The purpose of this letter is to request a revised Preliminary Opinion of Title (POOT) on the subject land acquisition based upon circumstances which differ from those existing at the time the original POOT was issued by the Department of Justice in 1965. This submission is made on the advice of Ms Ellen Cook, attorney for the Title Unit, Land Acquisition Section, Department of Justice.

2. The Coast Guard took possession of an 18.424 acre parcel at Upolu Point, in approximately August 1961. An option to purchase agreement was accepted by the Coast Guard in 1965 (Enclosure (1)). In order to transfer the parcel, seller Richard Smart, owner of Parker Ranch, had to separate it from his larger parcel by way of a Land Court approved subdivision. This subdivision could not be approved until the United States acquired contiguous acreage providing legal access from the parcel to the public road. This access was acquired in late 1980, and subdivision by the land owner has been completed since that time (Enclosure (8a)). However, several new circumstances, discussed in the following paragraphs, require this request for a revised POOT.

A. Right to Repurchase Clause

A right-to-repurchase clause negotiated for the option agreement was approved by the Attorney General in the 1965 POOT (Enclosure (8b)). In January 1983, Mr. Tim Titus of this office was telephonically informed by Mr. Philip M. Zeidner, Assistant Chief of the Land Acquisition Section, U. S. Department of Justice, that the 1965 approval was incorrect, and that the right to repurchase clause was unenforceable and could not be used. Because the clause formed an important part of the option agreement, certain changes were required in our acquisition process for the subject parcel.

By letter dated January 14, 1983 from Ellen E. Cook, of the Title Unit of the Land Acquisition Section, we received written confirmation of the impropriety of the right to repurchase clause, together with documentation citing our statutory authority to acquire real property with a reverter

clause (Enclosure (8c)). It is our present intent to substitute the reverter clause for the improper right-to-repurchase clause. A copy of the proposed deed and of the most recent land court map are attached as enclosures (6) and (5), respectively.

Please note that the parcel to be acquired is referred to as Lot 19-A in the proposed deed and on the approved Land Court map. In the preliminary title assembly package submitted in 1965 and the POOT issued in response thereto, the parcel was labeled Lot 19-B. This label was changed to Lot 19-A when the survey work for the preparation of MAP 34 was accomplished in 1981.

The proposed deed also contains a covenant to reconvey if the conditioned use ceases. Because the land is registered land, the only transfers recognized by the State of Hawaii, other than transfers between the parties, are transfers of record. We don't believe that an automatic reverter, alone, is sufficient to fully re-establish title in the Grantor if the conditioned use ceases; hence, the covenant to reconvey was added. The addition of this covenant to reconvey does not appear to work to the disadvantage of the United States, and it was requested by the proposed Grantor. Mr. Frederick G. Riecker, attorney for the seller, orally approved the form of the proposed deed on 9 March 1984.

#### B. Price

The agreed price under the 1965 option-to-purchase was \$6,448.40, which equates \$350.00 per acre for 18.424 acres. This price was based upon appraisals as of the 1961 date of possession. A new price has not been negotiated as of this writing, because we must first obtain permission to use the reverter clause. The price will reflect the value as of the date of possession together with a reasonable return on that value to the seller. United States v. DOW, 357 U.S. 17 (1958); BISHOP v. United States, 288 F. 2d 525 (C.A. 5, 1961). We expect that the price will be in the range of between \$30,000 and \$35,000. As explained in lettered paragraph C. below, the price will be based upon our acquiring 17.547 acres rather than the 18.424 acres we originally bargained for. We intend initially to calculate the interest we owe the seller based upon a yearly average yield of marketable public debt securities constituting a direct obligation of the United States Treasury. United States v. BLANKENSHIP, 543 F. 2d 1272 (C.A. 9, 1976). This rate will have a floor of 6%, as required by the Declaration of Taking Act, 40 USC 258a (1970), and will be compounded annually. United States v. 429.59 Acres of Land, 612 F. 2d 459 (C.A. 9, 1980).

The anticipated cost of this acquisition is not the cost-free or nominal consideration usually required by Coast Guard policy before approving use of a reverter clause, but purchase of the property in this price range equates to a lease rental of less than \$80.00 per acre per year for the last 23 years. Also, recognizing that the reverter is a workable substitute to the originally negotiated right to repurchase clause, and comparing this \$30,000 price range to present market

values of from \$10,000 to \$20,000 per acre, we believe the acquisition with a reverter clause is in the best interests of the government.

### C. Acreage

The parcel to be acquired originally consisted of 18.424 acres. A map showing this acreage is included as enclosure (8e). This was reduced to 17.574 acres during a re-survey following a Hawaii State Supreme Court decision holding that the State owns all land to the upper reaches of the wash of the waves, as evidenced by the vegetation line or the line of debris left by the wash of the waves. In re Ashford, 50 Hawaii 314, 440 P.2d 76 (1968). Formerly, the seaward boundary was considered as being the intersection of the shore with the horizontal plane of mean high water. The difference in acreage does not affect the Government's use of the property.

The parcel is described by approved lot number, rather than by metes and bounds, so as to be consistent with the provisions of Rule 24 of the Rules of the Land Court, which provides:

"(1) No metes and bounds description will be allowed in any conveyance or other instrument affecting registered land where a portion only of the land described in a certificate is sought to be affected. The designation of land in any deed...shall be by lot number..."

### D. Encumbrance

In October 1965, Richard Smart encumbered his real property holdings with a blanket mortgage to the Federal Land Bank of Berkeley (now of Sacramento) in the amount of \$4,750,000 (Enclosure (2a)). This encumbrance, referenced on the Certificate of Title (Enclosure (2)), must be released as to the parcel being acquired prior to closing. We foresee no problem in securing this release because an adjacent parcel was released by Smart in 1981 prior to its sale to a new owner. Frederick Riecker, Richard Smart's attorney, has indicated his intent to obtain the release of this encumbrance. Statutory encumbrances to registered land are outlined in Section 501-82, Hawaii Revised Statutes, (Enclosure (8d)).

3. The above discussion explains the changes that have occurred since we submitted our original preliminary title assembly and received the 1965 POOT. To complete the revised preliminary Opinion of Title Assembly, we are also submitting new unexecuted Certificates of Inspection and Possession (enclosure (4)) and Non-Interference (enclosure (3)) as well as an environmental assessment (enclosure (8f)). We have not negotiated a new offer to sell agreement, as previously discussed. Except for the changes herein, we are treating the original option agreement as still in effect.

4. We would appreciate your expedited handling of this request for a revised POOT. Should you require additional information, please contact Mr. Tim Titus of my staff at FTS 546-7110 in Honolulu.

*Richard B. Cole*

RICHARD B. COLE  
By direction

Encl: Revised Preliminary Opinion of Title Assembly (original and 2 copies)

- (1) Option to purchase agreement
- (2) Title evidence
  - (a) Blanket encumbrance on subject property
- (3) Certificate of Non-Interference (unexecuted)
- (4) Certificate of Inspection and Possession (unexecuted)
- (5) Plot of Parcel to be acquired; Map 34, LCA pp 1120
- (6) Proposed deed of Conveyance
- (7) Corporate Documentation intentionally left blank
- (8) Miscellaneous documents:
  - a. Land Court Order 59747; Subdivision Approval
  - b. D.O.J. Preliminary Opinion of Title (POOT), dated 26 March 1965
  - c. D.O.J. ltr from Ellen Cook, dated 14 January 1983
  - d. Section 501-82, Revised Statutes of Hawaii
  - e. Map 16 of L.C. App. 1120; Map of 18.424 acre parcel before the subdivision and change in acreage
  - f. Environmental assessment and negative declaration

Copy: (flp)

PROPERTY ACQUISITION OF 18.242 (ACRE)  
PARKER RANCH LAND NEAR LORSTA UPOLOU PT, HI

10 Jun 1985

(flp)

4000/Ser 23158  
(flp): X5523

(ecv)

1. Our legal representative negotiating subject acquisition has advised that he expects to make an offer to the seller by the end of this calendar year. He has requested the funds be available here for this purchase when he makes the offer. Previously FY82 survey and design funds were reserved by Commandant (G-ECV-4) per enclosure (1). The new estimated offer for this parcel is \$39,561.74 (say \$40,000.00).

2. Please take action with G-ECV for the necessary funds and advise us accordingly.

E. NEIL ERICKSON

Encl: (1) Comdt ltr (G-ECV-4)  
dtd 19 Jan 82

Copy: w/encl  
(fbr)  
(dl) Attn: T. Titus

(ecv)

*me*  
*fly*

(808)546-3121

11011  
Serial s-16143

12 JUL 1985

From: Commander, Fourteenth Coast Guard District  
To: Commandant (G-ECV)

Subj: PROPERTY ACQUISITION AT UPOLO POINT, HAWAII

Ref: (a) COMDT (G-ECV-4) ltr of 19 Jan 82

1. Request \$40,000 of FY 86 funds be allocated to this office for subject. Reference (a) had previously reserved FY 82 funds.
2. Enclosure (1) provides more background information on this property acquisition. Our legal representative expects to make an offer to the seller by the end of this calendar year and has requested that the funds be available. The new estimated price is \$39,561.74.

R. V. BUTCHKA  
By direction

Encl: (1) CCGD14(d1) ltr 11011 of 7 Jun 84 to COMDT (G-FLP)

Blind copy: w/o encl  
✓(flp)  
(dl)

*Copy to T. TIXAS*  
*11/15/85*

*James*



*Checked w/  
Lt Florn (ecv)*

*3/29/86 no response from Comdt.*

*James*

*need to be  
rechecked per  
form 4/1/86*

*addition 15% ?*