Marketing and the Environment in Paradise: The Sierra Club Lawsuit Against the Hawai'i Tourism Authority

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Can an advertising campaign possibly result in environmental damage? The Sierra Club ("Club") thinks so. On January 11, 2000, the Club's Hawai'i chapter filed a lawsuit asserting that a proposed marketing campaign by the Hawai'i Tourism Authority ("HTA") to boost tourism should undergo environmental review.¹ The suit was filed directly with the Hawai'i Supreme Court because the law that created the HTA gives the state supreme court original jurisdiction over suits against the HTA.² On October 3, 2000, the state's high court heard oral argument on the case.³

According to the Club, an increase in the number of tourists may adversely affect Hawai'i's environment through such impacts as overcrowding of beaches, construction of infrastructure such as new power plants, landfills, and sewage treatment facilities to accommodate growth, and a potential increase in the number of alien species that could wreak havoc on Hawai'i's native species.⁴ Therefore, a tourism project such as a marketing campaign that does not involve actual construction of physical facilities (e.g., hotels or golf courses), but would increase the number of tourists should undergo environmental review.⁵ Thus, the Club argues that the HTA is legally obligated to submit the marketing effort to environmental review.⁶

This comment will address the origins of the proposed marketing campaign, the environmental laws at issue, the arguments on

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² HAW. REV. STAT. ANN. § 201B-15 (Michie 2000).
⁵ Id.
⁶ Id.
both sides of the issue, an example of a project with potential environmental consequences, and the need for Hawai‘i to diversify away from tourism. The analysis, although mostly legal-based, will also touch on the personal perspective of a native Hawaiian.7 As of the writing of this comment, the case was pending before the Hawai‘i Supreme Court.

I. Genesis of the Marketing Campaign

Tourism accounts for about 21% of Hawai‘i’s economy and about 26% of all jobs.8 The 1990s proved to be a difficult time for Hawai‘i’s number one industry.9 The number of visitors to the state stagnated during much of the decade as the visitor industry matured.10 In addition, several factors, including the Persian Gulf War, increased global competition, an Asian economic crisis, and Hurricane Iniki, negatively impacted the number of tourists that visited Hawai‘i during the 1990’s.11 Because of slower growth and the now mature character of Hawai‘i’s visitor industry, “future growth in the industry will depend upon Hawai‘i’s competitive skills rather than simply riding the growth in the travel market as a whole.”12 Hawai‘i will thus have to market itself more creatively and with greater effort to revive tourism.13 “The revitalization of Hawai‘i tourism for the 21st century is essential for [the state’s] economic wellbeing,” notes the director of the Hawai‘i Department of Business, Economic Development and Tourism (“DBEDT”).14

In an effort to revitalize the tourism industry, “[t]he HTA was established in July 1998 as Hawai‘i’s lead state tourism agency”15 as an outgrowth of recommendations by the Economic Revitalization Task Force convened the previous year.16 HTA’s mission is “[t]o manage the strategic growth of Hawai‘i’s visitor industry in a manner consistent with the economic goals, cultural values, preservation of natural resources, and community interests of the people of Hawai‘i.”17

The HTA, a cabinet-level executive board,18 assumes responsibilities that were previously shared among various public and private agencies, such as the State Tourism Office of the DBEDT and the Hawai‘i Visitors and Convention Bureau.19 “The HTA has been given the authority to develop and administer marketing and promotional efforts on behalf of Hawai‘i’s visitor industry [and] may also develop plans for the future development of tourism in terms of both industry projects and infrastructure support.”20

The HTA is also creating a Tourism Strategic Plan (“Draft TSP”) to form “the basis or foundation upon which Hawai‘i’s future as a visitor destination will be built.”21 The goals of the Draft TSP are: (1) to “[a]chieve managed growth of Hawai‘i’s tourism industry by focusing on increasing visitor expenditures” and (2)
to "[a]verage [an] annual growth rate of 4.6 percent in visitor expenditures through 2005."22 The Draft TSP identifies seven strategic initiatives to reach those goals, one of which is marketing.23 In fact, the creation of a "state tourism strategic marketing plan" is a large focus of the law that created the HTA.24

In addition, the HTA receives funding in an amount that is both a substantial increase over previous marketing efforts and derived from a more stable source.25 Previously, tourism promotion efforts were funded through the State General Fund and competed with other state spending priorities.26 The law that created the HTA also created a dedicated Tourism Special Fund using about 38% of the revenue derived from the state’s Transient Accommodation Tax ("TAT").27 Recently increased to 7.25% of the price of a hotel room for one night, the TAT should generate between $50 million and $60 million per year that can be spent by the HTA.28 This is in contrast to the $25 million per year previously spent on tourism promotion.29 It is this doubling of tourism promotion spending, and the potential for increased numbers of tourists and resultant environmental damage, that is the focus of the Club’s challenge in the Hawai’i Supreme Court.30

Because many other states also rely on tourism as a source of support for their economies, and this lawsuit is one of first impression in the country apparently, many non-Hawaiian tourism groups have formed a coalition to support the HTA and are watching the lawsuit closely.31 However, a motion by the coalition to file an amicus curiae brief on behalf of the HTA was rejected by the Hawai’i Supreme Court without explanation.32

II. The Relevant Environmental Statutory Provisions

Chapter 343 of the Hawai’i Revised Statutes embodies the State’s environmental review process.33 Chapter 200 of Title 11 of the Hawai’i Administrative Rules sets forth regulations to carry out Chapter 343.34 The Hawai’i environmental review statute is similar to the National Environmental Policy Act of 196935 in that it requires each project to undergo a preliminary environmental assessment, in order to determine whether the proposal’s projected environmental impact is sufficient to trigger a more comprehensive environmental review.36 Similarly, the Hawai’i statute and regulations exempt from environmental review certain types of programs or projects that otherwise would be subject to review.37


23. Id. at 2 (listing the seven strategic initiatives as follows: (1) communication and community relations to enhance understanding of and support for tourism, (2) marketing that increases the state’s promotional presence and brand identity, (3) the development of events that generate awareness of “the Hawaii brand,” (4) the creation of new tourism events, experiences, and attractions that go beyond Hawaii’s traditional resort experience and specifically target visitor interest in agriculture, culture, education, health and wellness, nature (e.g., eco-tourism), sports, and technology, (5) increased airline service to the state, (6) making the HTA an advocate of investments in infrastructure that strengthens tourism, and (7) “[support changes in laws, regulations and capital spending to enable development of alternative and diversified products and new attractions while sustaining Hawaii’s natural and cultural resources, and community values.”). See also Haw. Rev. Stat. Ann. §§ 201B-20 to -22 (Michie 2000).

24. §§ 201B-2(9), (16), B-6, B-7(a).


26. Id.


32. Id.


37. § 343-6(a)(7), Haw. Admin. Rules § 11-200-8(a) (creating ten classes of exempt projects, such as maintenance of existing structures, replacement of an existing structure with a new one of essentially the same size in essentially the same location, interior or alterations of structures, and continuing administrative activities such as the purchase of supplies and personnel-related actions).
In creating an environmental review process, the Hawai‘i Legislature found “that the quality of humanity’s environment is critical to humanity’s well being, that humanity’s activities have broad and profound effects upon the . . . environment, [and] that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced.” 38 The purpose of the State’s environmental review process is in part to “alert decision makers to significant environmental effects which may result from the implementation of certain actions.” 39 “[A]n environmental assessment shall be required for actions which: (1) [p]ropose the use of . . . state or county funds . . . .” 40 An “action” is defined as “any program or project to be initiated by any agency or applicant.” 41

III. Is the Marketing Campaign a “Program” or “Project”?  

At the heart of the matter is whether the marketing campaign constitutes an “action”—a “program” or “project” that triggers environmental review. 42 Neither the statute nor the administrative rules define either “program” or “project.” The Club argues that “any program or project” is a broad term that should encompass expenditure of state funds on tourism promotion. 43 The HTA counterargues that a “program” or “project” has typically been limited to construction and site-specific projects and does not encompass advertising. 44 In response, the Club points out that “federal law requires [environmental] assessments for all kinds of non-construction activities.” 45 Both sides argue that the legislative history of the statute supports their interpretation of the terms “program” or “project.” 46

In favor of the HTA, Hawai‘i Supreme Court Associate Justice Steven Levinson noted that “[i]f one read (the statute) very broadly [to include the marketing campaign], one could read it to require an environmental assessment whenever the executive branch does anything.” 47 A counterargument is that the Hawai‘i Administrative Rules already exempt from environmental review many types of governmental activities, including “continuing administrative actions” such as purchases of supplies and personnel actions. 48

Further, the justices noted that the HTA could have asked the State Environmental Council (“EC”) to evaluate its program for an exemption from environmental review. 49 Even though the proposed marketing campaign does not appear to fit well into any of the ten current classes of exempt projects, an agency can petition to add a new class of exemptions or amend an existing exempt class. 50

Indeed, two bills were introduced in the Hawai‘i Legislature in response to the lawsuit. One bill would have specifically exempted “tourism policy-makers from complying with a law that requires government agencies to conduct environmental studies before enacting programs that use state money.” 51 The second bill would have changed the law so as to specifically limit environmental review to con-

39. Id. (emphasis added).
40. § 343-5 (emphasis added).
construction projects.\textsuperscript{52} Both bills ultimately failed.\textsuperscript{53}

Another issue in the debate is whether the marketing campaign really needs environmental review, regardless of whether review is legally required or not. The state argues that each individual tourism facility, such as a hotel or entertainment attraction, that is constructed undergoes environmental review anyway.\textsuperscript{54} Therefore, the marketing campaign simply seeks to make better use of underutilized existing tourism infrastructure that has already been approved under the environmental review process.\textsuperscript{55} If the construction of existing tourist facilities "would have an unexpected and unassessed [environmental] consequence [if put to their full use], then they should not have been built in the first place."\textsuperscript{56} From this perspective, environmental review of the marketing campaign duplicates the review that has already occurred for the individual hotels.\textsuperscript{57}

However, the Club counterargues that the construction of many hotels and other tourism related activities never went through the environmental review process initially, and thus their effects on the environment were never assessed.\textsuperscript{58} Thus, environmental review of the marketing campaign indirectly may be the first environmental review for some of the existing tourism facilities the Club says have never undergone environmental review.\textsuperscript{59}

The Club argues that, "[if] furthermore, no [environmental assessment] or [environmental impact statement] to date has adequately con-

55. Id.; Haw. Tourism Auth., supra note 11, at 8, at http://www.state.hi.us/tourism/index.html
57. Id.
59. Id.
60. Id. (emphasis added).
66. Id.

sidered the cumulative impact of tourism growth in Hawai‘i.\textsuperscript{60} The environmental review statute requires cumulative impact analysis when assessing environmentally "significant effects."\textsuperscript{61} In addition, "actions" that would normally fall into a category of actions exempt from environmental review are not allowed to be exempt if a succession of occurrences of the actions would have a cumulative impact on the environment.\textsuperscript{62} Environmental review of the marketing campaign would thus pose an opportunity to assess the cumulative impacts of tourism.\textsuperscript{63}

Even beyond the legal or practical needs for environmental review, the lawsuit has raised fundamental questions about the character of tourism in the state of Hawai‘i.\textsuperscript{64} Does the state need an additional one million tourists per year?\textsuperscript{65} If so, is the state "prepared to accommodate them in ways that won't destroy [the state populace's] lifestyle or endanger the health of the visitor industry by degrading the natural beauty that enables it?"\textsuperscript{66}

If the Hawai‘i Supreme Court rules in favor the Club, then the short-term effect will be a 30-day delay in implementation of the marketing campaign, according to the state attorney general’s office.\textsuperscript{67} However, the Sierra Club argues that despite such a temporary delay in the expenditure of public funds on tourism promotion, private tourism entities (such as hotels, airlines, and other tourist attractions) can spend all they want on tourism promotion in the interim.\textsuperscript{68}
IV. Increased Numbers of Tourists Can Result in the Need for Additional Construction

A main concern of the Sierra Club is that attracting more tourists through the marketing campaign will create the need for more construction that may result in environmental damage. An example would be the now-defunct, controversial proposal to expand the runways at the airport on the island of Maui.

Currently, existing types of large planes that fly long distances cannot take off with both a full load of passengers and a full load of fuel from the Maui airport’s short runways and fly non-stop to distant locations. To fly non-stop for long distances, these planes must fly with less than a full load of passengers, or fly with a full load of passengers and a partial load of fuel to the airport on the island of Oahu to refuel and then take off from the Oahu airport’s longer runways.

The theory behind the Maui airport expansion is that tourists from faraway places would prefer to fly back home from Maui non-stop rather than having to stop at Oahu first. Therefore, a longer runway that allows non-stop flights from Maui would entice more visitors to come to Maui from distant locations, or at least allow existing flights to depart with a full load of passengers. Thus, the desire for more tourists from faraway places created the need for an airport expansion project that could result in adverse environmental impacts.

The concern about the environment is that more flights from new destinations would allow more opportunities for alien species from new places to be transported to the vulnerable natural ecosystems on Maui. Such a potential threat prompted the National Parks Conservation Association (“NPCA”) to place Haleakala National Park, located near the airport, on its list of the ten most endangered national parks for 2000. The potential threat also spurred the NPCA and a local environmental group to sue the United States Department of Transportation over the project.

However, the Ninth Circuit concluded that the project was consistent with federal environmental laws. While Governor Cayetano ultimately cancelled the proposed expansion of Maui’s airport (and a similar proposal to lengthen the runways at the airport on the island of Kauai) early in 2000, the now defunct projects are an example of how encouraging more tourists to visit Hawai‘i can lead to the need for construction projects with potential adverse environmental impacts.

V. Concluding Thoughts

The Hawai‘i Supreme Court should first make a finding that a “program” or “project” is not limited to construction of physical build-
ings. A broad interpretation of the terms “pro-
gram” and “project” is necessary to ensure that
as many actions as possible are subject to the
environmental review process. After that, the
court could take a variety of routes, such as
holding that the marketing campaign falls
within one of the existing ten classes of exempt
projects, judicially creating a special exempt
class for the marketing program, or finding that
the marketing program must undergo full envi-
ronmental review.

Hopefully, the court will take the last route.
To hold that the marketing program must go
through the normal environmental review
process does not mean that the marketing pro-
gram will not be approved. Having the market-
ing program undergo full environmental review
would reveal any potential negative environ-
mental consequences of increased numbers of
visitors. Such information could very well
prove useful to the HTA in other tourism plan-
ing efforts, such as creating new types of
tourist attractions.

No matter what the outcome of the law-
suit, hopefully it will lead to two beneficial
results. First, the government’s and the pub-
lic’s thoughtful look at tourism’s impact on
Hawai’i’s environment, sparked by the lawsuit,
will hopefully continue. The outer limits of
Hawai’i’s capacity to accommodate the tourism industry without adverse environ-
mental effects must be fully analyzed. In particular,
an in-depth review of the cumulative adverse
environmental effects of individual tourism
construction projects needs to be done.

Second, the lawsuit will hopefully result in
a renewed effort at diversifying the Hawaiian
economy away from tourism toward industries
with fewer adverse environmental impacts.
Diversifying the economy to reduce the state’s reliance on tourism would minimize the tempta-
tion to seek the economic benefits of tourism
regardless of the costs to the environment (or
to culture and society, for that matter). The
Draft TSP acknowledges the need for diversifica-
tion into other industries such as technology.

David Murdock, the owner of Castle and
Cook (the developer of two resorts on the
island of Lanai that the Sierra Club asserts did
not undergo environmental review), believes
that the Hawaiian economy needs to be diver-
sified. Murdock feels that “Hawai’i very much
needs to have thoughts of doing something
else. We live in Hawai’i on the tourists. Take
away the tourists and we are out of business
totally.” Murdock mentions the electronics/
high-tech industry as one possible alternative
to tourism.

Hawai’i may be better off focusing on the
software, rather than the hardware, side of the
electronics/high-tech industry. Developing
software probably poses fewer environmental
consequences than does manufacturing com-
puter chips, in that manufacturing involves
construction of factories, whereas creating
software primarily requires an educated work-
force. Perhaps Hawai’i can take a page out of
the book of successful Asian island nations,
such as Japan, Taiwan, and Singapore, that are
poor in natural resources yet have an educated
populace.

True, those nations have advantages that
Hawai’i’s small size and geographic isolation
do not allow, such as relatively large popula-
tions that provide a significant local market for
goods and services and proximity to substanc-
tial markets in other nations. Nevertheless, the
presence of military installations in the state
(Hawai’i is the home of Pearl Harbor, for exam-
ple) could be a source of high-tech talent and
infrastructure. Investments in education of the
local population in high-tech industries could
build on the military infrastructure base and
create a dynamic, if probably small, high-tech
industry.

Technology could help bring about effi-
ciencies and boost productivity in agriculture,
another pillar of Hawai’i’s economy. Technology could also foster what should be
Hawai’i’s role as a central meeting place

state.hi.us/tourism/index.html.
sierraclub.org/action/2000/HTA.PDF.
85. Frank Cho, This Billionaire Just Loves Lana’i: Interview with
David Murdock, HONOLULU Advertiser, Nov. 19, 2000, available at
86. Id.
87. Id.
between business and government interests in Asia and the Western Hemisphere. Advances in technology might also change Hawai‘i’s future in ways perhaps not previously imagined. Governor Cayetano indicated this when he cancelled the proposed expansion of the runways at Maui’s airport, noting that newer types of aircraft may not need the longer runways that older airplanes need. In the near term, however, Hawai‘i will likely be thought of as a place to visit for recreation, rather than a place to do business. As such, tourism will likely continue to be the focus of economic development efforts for the foreseeable future.

The Draft TSP notes that:

The Hawaiian Islands define paradise. With the most temperate climate on Earth, its stunning vistas, dramatic mountain ranges, lush rainforests, awe-inspiring volcanoes, crystal clear waters and abundance of wildlife, the Hawaiian Islands have been truly blessed. Hawaii portrays an image of unsurpassable beauty and tranquility—certainly an enviable image by any standard.

The Draft TSP acknowledges that “tourism’s success stems from the natural and cultural resources of the community,” that “the HTA today recognizes the importance of preserving Hawaii’s fragile natural environment and natural resources to sustain future generations of residents and visitors,” and that “the right balance needs to be found” between achieving economic objectives and sustaining Hawai‘i’s natural and cultural resources.”

Hopefully, in striking the “right balance” between the environment and the economy, all of the Draft TSP’s language about Hawai‘i’s exquisite environment does not become empty rhetoric.

As long as America’s 50th state continues to rely on tourism for its economic base, the Sierra Club is right to ask the state to consider the environmental impacts of a marketing campaign intended to foster the growth of tourism. Indeed, the very health of the tourism industry may hinge on such an assessment.

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88. Id.


91. Id. at 3.

92. Id. at 6.

93. Id. at 5.

94. Sierra Club, supra note 4, available at http://www.hi.sierraclub.org/action/2000/HTA.PDF. “A Sierra Club survey of 1000 visitors to Maui revealed that 91% think preservation of natural areas was the most important factor in their decision to return to the islands.” Id.