Appeal No. 04-15306
(Dist. Ct. Civil No. CV02-00139 SOM/KSC)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, EVELYN C. ARAKAKI, EDWARD U. BUGARIN, SANDRA PUANANI BURGESS, PATRICIA A. CARROLL, ROBERT M.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
	)	HONORABLE SUSAN OKI MOLLWAY
[caption continued on next page]	)	

DEFENDANTS-INTERVENORS/APPELLEES STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS AND ANTHONY SANG, SR.'S MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE HEARING

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Plaintiff-Appellants,

vs.

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAI`I; GEORGINA KAWAMURA, in her official capacity as DIRECTOR OF THE DEPARTMENT OF BUDGET AND FINANCE; RUSS SAITO, in his official capacity as COMPTROLLER and DIRECTOR OF THE DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES; PETER YOUNG, in his official capacity as CHAIRMAN OF THE BOARD OF LAND AND NATURAL RESOURCES; SANDRA LEE KUNIMOTO, in her official capacity as DIRECTOR OF THE DEPARTMENT OF AGRICULTURE; TED LIU, in his official capacity as DIRECTOR OF THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM; RODNEY HARAGA, in his capacity as DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION,

State Defendant-Appellees,

HAUNANI APOLIONA, Chairperson; ROWENA AKANA; DONALD B. CATALUNA; LINDA DELA CRUZ;

DANTE CARPENTER; COLETTE Y.P. MACHADO; BOYD P. MOSSMAN; OSWALD STENDER; and JOHN D. WAIHE`E, IV; in their official capacities as trustees of the Office of Hawaiian Affairs,

OHA Defendant-Appellees,

MICAH KANE, Chairman; and WONDA MAE AGPALSA; HENRY CHO; THOMAS P. CONTRADES; QUENTIN KAWANANAKOA; HERRING K. KALUA; MILTON PA; and JOHN A.H. TOMOSO in their official capacities as members of the Hawaiian Homes Commission,

HHCA/DHHL Defendant-Appellees,

THE UNITED STATES OF AMERICA, and JOHN DOES 1 through 10,

Defendant-Appellees,

STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATION; ANTHONY SANG, SR.,

Defendants-Intervenor/Appellees,

HUI KAKO'O 'AINA HO'OPULAPULA, BLOSSOM FEITEIRA and DUTCH SAFFERY,

Defendants-Intervenor/Appellees.

DEFENDANTS-INTERVENORS/APPELLEES STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS AND ANTHONY SANG, SR.'S MEMORANDUM IN OPPOSITION TO APPELLANTS' MOTION TO EXPEDITE HEARING

COME NOW Defendants-Intervenors/Appellees State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. (collectively, "SCHHA"), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, and oppose Appellants' Motion to Expedite Hearing, filed on July 19, 2004, ("Motion"). SCHHA opposes the Motion because "good cause" required by Circuit Rule 27-12 does not exist, as Appellants have not demonstrated that irreparable harm will occur in the absence of an expedited hearing, and an expedited hearing would thus burden the Court unnecessarily.

Circuit Rule 27-12 establishes a high standard for granting of expedited hearings:

> Motions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause. "Good cause" includes, but is not limited to, situations in which: (1) an incarcerated criminal defendant contends that the valid guideline term of confinement does not extend beyond 12 months from the filing of the notice of appeal; (2) the projected release date for an incarcerated criminal defendant occurs within 12 months from the filing of the notice of appeal; or (3) in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot.

Appellants argue that, if the hearing on their appeal is not expedited, they will be irreparably harmed during the intervening months by the continuance of long-standing state and federal programs with which they disagree. This

argument is unconvincing in light of the extended history of the programs at issue, Appellants' own conduct in pursuing their claims, and the speculative nature of the injury alleged.

While there are no reported cases setting forth the precise definition of "irreparable harm" for purposes of Circuit Rule 27-12, cases discussing irreparable harm in the context of motions for preliminary injunctions are instructive. One such case, *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374 (9th Cir. 1985), suggests that irreparable harm requires that the claimed injury be a new one. In *Oakland Tribune*, the plaintiff sought to enjoin certain contract provisions which been in effect for a number of years. On appeal of the denial of a preliminary injunction, this Court observed that "[w]here no *new harm* is imminent, and where no compelling reason is apparent, the district court was not required to issue a preliminary injunction against a practice which has continued unchallenged for several years." *Oakland Tribune,* 762 F.2d at 1377 (emphasis added).

In their Motion, Appellants complain of "expenditures" to OHA and DHHL and of the continued issuance of Hawaiian Homestead leases. *See* Motion at 2-4. Yet OHA was established in 1978, the Hawaiian Home Lands Trust Fund was established in 1995, and Hawaiian Homestead leases were authorized in 1921. Indeed, in their Complaint, Appellants recognized "the practical reality that the HHCA laws have been in effect for 81 years" and that more than 7,000 leases had

been issued as of January 31, 2002. *None* of the programs or actions of which Appellants complain is new, and the passage of many years in which these programs operated prior to Appellants' Complaint demonstrates the absence of any imminent irreparable harm.

The lack of irreparable harm in the absence of an expedited hearing is further illuminated by Appellants' own delay in seeking preliminary relief. On March 4, 2002, the same day on which they filed their Complaint, Appellants moved for both a temporary restraining order and a preliminary injunction to address their claimed injuries. *See* Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, filed March 4, 2002, Docket 4. On March 18, 2002, the court denied the motion for a temporary restraining order. *See* Order Denying Plaintiffs' Motion for Temporary Restraining Order, filed March 18, 2002, Docket 26. On June 24, 2002, even prior to the hearing on the motion for a preliminary injunction, Plaintiffs withdrew their motion. *See* Plaintiffs' Withdrawal of Motion for Preliminary Injunction filed June 24, 2002, Docket 164. By abandoning their pursuit of injunctive relief, Appellants not only forfeited the right to a hearing on and disposition of their motion, they forfeited the right to an interlocutory appeal of a denial of that motion. *See* 15 U.S.C. § 1292. Consequently, had Plaintiffs not withdrawn their motion for preliminary injunction, and had the motion been denied, Plaintiffs would have enjoyed a right to an immediate interlocutory appeal as early as summer 2002. In view of these

actions, Appellants' assertions related to the urgency of the alleged harm to them rings hollow. Indeed, this Court has observed that a delay in seeking a preliminary injunction "implies a lack of urgency and irreparable harm." *Id.; see also Spring Patents, Inc. v. Avon Rubber & Plastics, Inc.*, 183 F. Supp. 2d 1198, 1211 (D. Haw. 2001) (noting that plaintiff waited almost two years to file suit and seek preliminary injunctive relief, and quoting *Lydo Enters., Inc. v. City of Las Vegas,* 745 F.2d 1211, 1213 (9th Cir. 1984) for the proposition that delay is a factor to be considered); *Asdourian v. Konstantin*, 50 F. Supp. 2d 152, 156 (E.D.N.Y. 1999) (finding that the plaintiff mortgage company failed to demonstrate a threat of irreparable harm if property owners were not enjoined from transferring property, where mortgage company waited four months before moving for preliminary injunction).

Appellants' argument that they will suffer immediate, irreparable harm absent an expedited hearing is also contradicted by the inherent nature of their claimed taxpayer pocketbook injury, as monetary injuries are not normally considered irreparable. *Lydo Enters.,* 745 F.2d at 1213. Moreover, this claimed pocketbook injury is merely speculative[1] and is uncertain as to time or extent. Looking again to a case involving a request for preliminary injunctive relief, this

[1] Appellants argue that, in the absence of an expedited hearing "hundreds more Homestead leases *may* be issued and, for six or more months, $6.8 million per month *may* continue to drain out of the State Treasury." Motion at 4 (emphasis added).

Court has stated that a party must do more than merely allege imminent harm sufficient to establish standing; he or she must also demonstrate *immediate* threatened injury. *Associated Gen. Contractors of Cal., Inc. v. Coalition For Econ. Equity,* 950 F.2d 1401, 1410 (9th Cir. 1991) (emphasis added). In this regard, even if it were true that Appellants have in the past paid higher taxes or received fewer or inferior services because of the programs or actions of which they complain, Appellants have not shown that success on a hearing a few months earlier than the time the hearing would otherwise be held would either immediately decrease their taxes or improve governmental services. Absent such a showing, there is no urgency necessary to justify the inconvenience an expedited hearing would pose to this Court.

For the foregoing reasons, Appellants Motion should be denied, and the hearing on the appeal should be heard in the normal course.

DATED: Honolulu, Hawaii, July 23, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were duly served upon the following persons by facsimile (FAX), electronic mail (E-MAIL), hand delivery (HD) or mailing (MAIL) said copies, postage prepaid, first class, in a United States post office at Honolulu, Hawaii, as indicated below, on July 23, 3004, addressed as set forth below:

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