LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR

KURT KAWAFUCHI
DIRECTOR OF TAXATION

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DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
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HOUSE COMMITTEE ON TRANSPORTATION

TESTIMONY REGARDING HB 2860 HD 1
RELATING TO TAXATION

TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)
DATE: FEBRUARY 11, 2008
TIME: 9:00AM
ROOM: 309

This bill proposes exempt aviation fuel purchased from a foreign trade zone from the state general excise and use taxes for fuel used in inter-island travel.

The House Committee on Economic Development & Taxation amended this bill's effective date for purposes of further discussion.

The Department of Taxation (Department) takes **no position** on this legislation; however **offers comments and the revenue impact**.

This bill amends the foreign trade zone law regarding the exemptions from taxation that are currently allowed. Presently, aviation fuel purchased in a foreign trade zone is exempt from state taxation for those flights that are bound for an out-of-state or foreign destination. Because these flights are considered within interstate or foreign commerce, taxation is exempt pursuant to federal law.

I. SUBSTANTIVE COMMENTS.

The Department offers the following comments—

CURRENT BILL DRAFTING ACCOMPLISHES LITTLE—The draft of this legislation currently maintains the status quo as written. This bill adds nothing other than an express definition of what is considered "interstate air transportation," which is defined as transportation by air between two places in Hawaii through a place outside Hawaii.

In general, court cases conclude that transportation from one point in a state through international territory and back to another point in the same state is not interstate commerce.

Therefore, the Department could still interpret this current bill to preclude the exemption because an inter-island flight may not be flying sufficiently through a "place outside Hawaii." In short, this bill adds additional enforcement confusion because now disputes will arise between the Department and airlines over whether flights are sufficiently "outside Hawaii" in order to receive the exemption. With court cases concluding that travel between points in the same state even through international territories is not interstate commerce, this legislation will compound the problem as written.

To accomplish the intent of this legislation and to avoid any unnecessary confusion or lack of clarity, the definition of "interstate air transportation" should be amended as follows—

""Interstate air transportation" includes the transportation of passengers or property by aircraft between two points in the State."

FTZ EXEMPTION IS MISPLACED; EXEMPTION SHOULD BE IN HRS CHAPTERS 237 AND 238—This exemption would more properly be included in Chapter 237 and 238, Hawaii Revised Statutes—not in the foreign trade zone law, because this law applies to those acts in foreign or interstate commerce. The provision in HRS § 212-8 is inappropriate because it overlays an element of intrastate commerce in a chapter solely reserved for interstate or foreign commerce. The Department believes that an exemption from the foreign trade zone in the general excise and use tax chapters is most logical.

The Department suggests that the exemption be placed in Chapters 237 and 238. For purposes of Chapter 237, the exemption could read:

> "Amounts received from sales of aviation fuel, as defined in section 243-1, categorized as privileged foreign merchandise, non-privileged foreign merchandise, domestic merchandise, or zone-restricted merchandise, that is admitted into a foreign-trade zone and purchased in a foreign-trade zone and is made directly to or is used by a common carrier for consumption or use in air transportation between two points in the State."

In short, the Department believes that an intrastate tax exemption has no business being placed in Chapter 212, which relates solely to foreign and interstate commerce.

II. REVENUE IMPACT.

After considering recent additional information regarding aviation fuel sale data, it is the Department's position that this legislation will result in a revenue loss of approximately:

- $5.1 million loss, FY2009.
- $5.3 million loss, FY2010.
- $5.5 million loss, FY2011.

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:
H.B. NO. 2860, H.D. 1, RELATING TO TAXATION.

BEFORE THE:
HOUSE COMMITTEE ON TRANSPORTATION

DATE: Monday, February 11, 2008 **TIME:** 9:00 AM
LOCATION: State Capitol Room 309
Deliver to: State Capitol, Room 441, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Mary Bahng Yokota, Deputy Attorney General

Chair Souki and Members of the Committee:

The Attorney General takes no position on this bill but brings to your attention that this bill may be legally ambiguous.

The expressed purpose of this bill is to exempt sales of fuel in foreign trade zone to common carriers for use in "in*tra*state" transportation from general excise and use tax.

To accomplish this purpose, section 2 (page 3, lines 4 and 10) of this bill exempts sales of aviation fuel sold from a foreign-trade zone to any common carrier for consumption or use in "in*ter*state" air transportation from general excise and use tax. On page 3 at lines 10-12, the bill defines "in*ter*state air transportation" as "the transportation of passengers or property by aircraft as defined in Title 49 United States Code Section 40102(25)." We assume that the bill intended to refer to Title 49 United States Code Section 40102**(a)**(25), which provides:

> (a) General definitions. - In this part --
>
> * * * * *
>
> (25) "interstate air transportation" means the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft -
>
> (A) between a place in -
>
> (i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States;

(ii) *Hawaii and another place in Hawaii through the airspace over a place outside Hawaii*;

(iii) the District of Columbia and another place in the District of Columbia; or

(iv) a territory or possession of the United States and another place in the same territory or possession; and

(B) when any part of the transportation is by aircraft. [Emphasis added.]

As prior testimonies for this bill illustrate, there appears to be different views on whether this definition includes *inter-island* air transportation.

If the intent of this bill is to exempt common carriers from the general excise and use taxes for fuel sold from a foreign-trade zone for use in inter-island air transportation in Hawaii, we recommend that the bill use a term other than "interstate air transportation," which is already subject to different interpretations.

LINDA LINGLE
GOVERNOR
MARSHA WIENERT
TOURISM LIAISON

TOURISM LIAISON

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Written statement of
MARSHA WIENERT
Tourism Liaison
Department of Business, Economic Development & Tourism
before the
HOUSE COMMITTEE ON TRANSPORTATION
Monday, February 11, 2008
9:00 a.m.
State Capitol, Conference Room 309

in consideration of
HB 2860 HD1
RELATING TO TAXATION.

Chair Souki and Members of the House Committee on Transportation.

The Department of Business, Economic Development and Tourism supports the intent of HB 2860 HD1, which exempts from general excise and use taxes the fuel sold from a foreign trade zone for intrastate air transportation by common carriers.

In as much as we support the intent of HB 2860 HD1 and believe that the intrastate carriers should have the same exemptions in general excise and use taxes as airlines traveling out-of-state, we are concerned about the cost implications generated by this proposal.

Thank you for the opportunity to comment on HB 2860 HD1.

aloha
AIRLINES

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February 8, 2008

Representative Joseph M. Souki, Chair
Representative Scott Y. Nishimoto, Vice-chair

Committee on Transportation
Monday, February 11, 2008

RE: HB 2860 Relating to Taxation

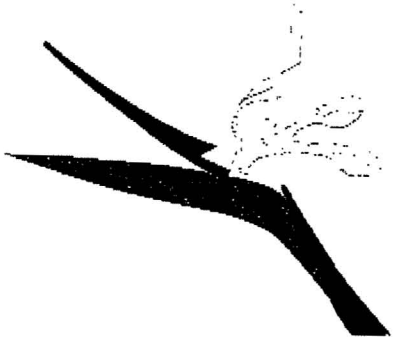
Chair Souki, Vice Chair Nishimoto and Members of the Committee:

My name is Stephanie Ackerman and I am Senior Vice President, Public Relations and Government Affairs, for Aloha Airlines. Thank you for this opportunity to testify in strong support of HB 2860.

In the past we have urged lawmakers to act on this matter to remedy an inequity in current state law that places an undue tax burden on Hawaii-based interisland carriers.

The existing Statute (Section 212-8) grants a General Excise and Use tax exemption to airlines when they purchase jet fuel from the Hawaii Foreign Trade Zone for flying in interstate or foreign commerce. This is consistent with Federal law governing foreign trade zones and interstate commerce. However, the law is not being applied consistently and as a result, there is discrimination against Hawaii-based air carriers. Legislation is required to ensure that the Hawaii Department of Taxation applies the GET and use tax exemption when airlines purchase fuel from a foreign trade zone for use in interisland flying, which is regulated by Federal law as a form of interstate commerce.

The Commerce clause of the U.S. Constitution gives Congress sole power to regulate interstate commerce. The U.S. Court of Appeals, Ninth Circuit, has noted that the boundaries of states are determined by Congress, and in the case of Hawaii, the Statehood Act specifies that the channels between the islands of Hawaii are NOT within the boundaries of the state.



Furthermore, Title 49 U.S. Code, section 40102, defines "interstate air transportation" as "the transportation of passengers or property by aircraft as a common carrier for compensation... between Hawaii and another place in Hawaii through the airspace over a place outside Hawaii."

As we understand it, Federal law preempts the State from imposing GET on the sale of fuel from a foreign trade zone when the fuel is used in interstate commerce, which includes points within the State of Hawaii.

With that in mind, we return to the equity issue. We believe that ALL flights operated by common carriers must be considered interstate transportation; therefore the fuel tax exemption must apply to ALL of them.

We urge you to pass this bill to do what is fair, by clarifying and expanding the scope of the current GET exemption to include locally based airlines. In this way, you will also be recognizing the vital role that interisland airlines play in the economy of our state by bridging our communities, and employing more than 6,500 Hawaii residents.

RE: Testimony in support of HB 2860 Relating to Taxation

I am Randall Cummings, an Aloha Airlines pilot, representing the Aloha Airlines Pilots' Union, testifying in strong support of HB 2860

Bill summary

Currently aviation fuel purchased in Hawaii's Foreign Trade Zone ("FTZ") for use on flights originating in Hawaii and terminating outside of Hawaii is exempt from state excise tax under Hawaii Revised Statutes section 212-8. This exemption is consistent with the purpose of the FTZ to facilitate international and interstate commerce. This bill proposes to extend that exemption to any aviation fuel sold in the FTZ for use on interisland flights. Hawaii's foreign trade zone was established under the provisions of 19 U.S.C. 81a-81u, 15 CFR 400, and 19 CFR part 146. While Hawaii's interisland airlines do not depart the state, they nonetheless are engaged in 'interstate commerce' for the purpose of federal regulations and federal law.

Testimony in Support

There are three strong reasons why this bill should be enacted into law:

First: Legally, the exemption from excise tax on airline fuel to airlines leaving the state is based on their operation within 'interstate commerce' as it is applied to federally regulated airlines. Airlines that complete domestic flights within the state of Hawaii are also engaged in 'interstate commerce' as it is defined under federal law.

Second: As a matter of equity, the state department of taxation is in a situation where it must discriminate among Federally Regulated airlines based on whether their flights will terminate within the state or not. This results in some airlines receiving preferential treatment over others, without any legal or policy basis.

Third: As a matter of policy, it is good policy to reduce taxes on the interisland airlines, as the airlines provide a vital lifeline for our island state, and because higher costs resulting from the taxes have a dramatically negative impact on Airline employees and on charities supported by the local airlines. This policy argument is especially true where the taxes being applied go in to the general fund and are not earmarked for aviation infrastructure.

I. Interisland airlines operate within 'interstate commerce' and therefore this bill is mandated by federal law:

The state department of taxation currently grants a G.E.T. exemption for fuel purchased within the Foreign Trade Zone for use on flights that leave the state. This exemption is provided in accordance with federal law mandates that State G.E.T. shall not interfere with the flow of interstate commerce. This very issue has been litigated before the U.S. Supreme Court. In the 1983 case of *Aloha Airlines v. Director of Taxation*, citation 464 U.S. 7 (1983), appellants Aloha Airlines and Hawaiian Airlines prevailed in their argument that Hawaii's G.E.T. on interisland airline tickets was in violation of Federal Law. Hawaii's GET on interisland tickets was found to be preempted by Federal Law and was therefore determined to be invalid in the U.S. Supreme Court.

It is abundantly clear that even though a flight may originate and terminate within the state of Hawaii, it is nonetheless within the economic umbrella of interstate commerce, and must be treated as such in every way. Indeed the only reason the federal government has the authority to regulate the airlines is because of the limited powers granted to the federal government by the U.S. Constitution's Interstate Commerce Clause. Conceptually one can easily see how air freight originating on the neighbor islands and then changing planes in Honolulu for out of state destinations does not suddenly become 'interstate commerce' the minute it changes planes in Honolulu. Passengers as well often change planes. Federal law does not discriminate between the part of the flight that happens within Hawaii and the part that leaves the state. We ask the legislature to provide guidance to the state department of taxation by enacting this law.

Extending the exemption to interstate airlines will allow the tax department to treat all airlines equally

It is inappropriate for a state government to provide benefits to one class of individuals and not to another without a policy basis for doing so. The law as it is being applied forces the tax department to make an artificial distinction between airlines, thus conferring benefits on some, while burdening others. Without a legitimate purpose for doing so, the law is both improper and unfair.

This tax exemption will assist in stabilizing the airlines, will benefit Hawaii's airlines' 7000 employees, and will benefit the communities that these airlines serve

Most airline costs are fixed costs and are difficult or impossible to reduce. These fixed costs include:

1. Fuel
2. Taxes and fees
3. Aircraft and equipment leases
4. Facility leases
5. Maintenance costs
6. Other miscellaneous expenses, such as food concessions, technical and I.T. services, etc.

The other major airline expense is labor. Because airlines have little 'wiggle room' with regards to these costs, they routinely turn to labor for cost concessions. Over the past few years Aloha's employees have endured a 20% pay cut. Hawaiian Airlines' employees have endured similar cuts. Hawaii Island Air had substantial layoffs. The tax exemption provided by this bill will help the airlines remain viable and will reduce the pressure on the airlines to ask for wage and benefit cuts of their employees by reducing the interisland airlines' fixed costs. It will also allow the airlines to continue to make generous charitible donations, both financial and in-kind.

The reduction in interisland airlines' fixed costs that will result from this bill's tax exemption will benefit Hawaii's airline employees

In the words of Southwest Airlines' former CEO Herb Kelleher, "an airline is made up of people, not airplanes." Any reduction in taxes, whether State or Federal will directly benefit the over 7,000 people who work for Hawaii's interisland airlines, as well as their families and dependents. It is the peculiar nature of the our industry that rising costs are seldom passed on to consumers, and as a result, the high

cost of fuel and the heavy tax burden that air carriers shoulder are impacting the bottom line of our local airlines. As airline employees who have sacrificed so much, we urge you to act on this measure to help reduce fixed costs and ensure the stability and viability of Hawaii's interisland airlines.

Public policy favors passage of this bill

Hawaii's interisland airlines are a vital part of Hawaii's economy. They provide a vital service to our communities. The well-being of Hawaii's airline employees is vital to our airlines. The tax exemption provided by this bill will be good for these employees, it will be good for the interisland carriers, and it will be good for Hawaii. This is really about treating all airlines that serve our state fairly, and taking care of the employees who work for Hawaii's interisland airlines, which ultimately provides economic benefits for all of Hawaii. This is good public policy.

TESTIMONY SUBMITTED BEFORE THE SENATE AT THE TWENTY-FOURTH LEGISLATURE REGULAR SESSION OF 2008
Committee on Transportation
February 11, 2008

House Bill 2860 Relating to Taxation

Chair Souki, Vice Chair Nishimoto and Members of the Committee:

My name is Jason Maga. I represent the Hawaii Fueling Facilities Corporation (HFFC), which works with the Department of Transportation and the Airlines Committee of Hawaii (ACH) on issues affecting all three parties. HFFC is comprised of 21 air carries and owns the fueling systems at Honolulu, Kona and Hilo airports. HFFC is responsible for providing safe and reliable jet fuel facilities, supply and administration to each of these locations which allow the uninterrupted arrivals and departures of travelers to, from and within the State of Hawaii. I have been asked to present the following testimony in strong support on behalf of HFFC.

Since 1969, HFFC member airlines have worked closely with the Legislature to develop a partnership with the State of Hawaii in a way that is fair to all airlines serving the State. This partnership is vital to ensure that we are able to meet the demands of each airport's jet fuel requirements, which directly effects Hawaii's economy and the airlines.

HFFC currently operates a Foreign-Trade Zone (FTZ) which is approved by United States Customs. One of the reasons this zone was established was to allow airlines the benefit to operate within the federal regulations and remain duty free. Under the current State tax laws, it seems that there is an unfair tax balance in favor of the airlines that operate flights outside of the State of Hawaii, but not to the airlines that provide inter-island flights, which are considered interstate commerce under federal law.

Accordingly, the HFFC member airlines strongly support House Bill 2860, which would allow the local Hawaii airlines to provide service to the people of Hawaii within a level playing field.

Thank you for the opportunity to comment on this important matter.

Sincerely,

Jason Maga
Area General Manager
HFFC

Hawaii Chapter
1451 South King Street, PH-504
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February 8, 2008

Representative Joseph M. Souki
Chair
House Committee on Transportation
State Capitol, Room 224

RE: HB 2860 Relating to Taxation

Chair Souki, Vice Chair Nishimoto and Members of the Committee:

My name is Carmella Hernandez and I am State Director of the Hawaii Chapter of the March of Dimes. I am testifying in support of HB 2860.

In 2006, the March of Dimes honored Aloha Airlines with the Franklin Delano Roosevelt Award for Distinguished Community Service. Aloha Airlines has long supported the March of Dimes and many other not-for-profit organizations in Hawaii in numerous ways. For example, when expectant mothers on the Neighbor Islands are in danger, and specialized medical treatment is not available where they live, Aloha provides air transportation to Oahu so they can get the care they need. There are many times when a baby is born premature on a Neighbor Island and needs to be flown to Honolulu to be cared for at Kapi'olani Medical Center's neonatal intensive care unit. Aloha provides tickets so that the parents can come to Honolulu and stay with their baby. Sadly, there are times for a variety of reasons that the mother cannot come to be with her baby. Aloha Airlines helps these babies by flying the mother's breast milk to Oahu for them. This may sound like a small thing, but to the health of these tiny babies, there is nothing better for them than having their mother's breast milk. Aloha has also donated tickets for Neighbor Island families that have children with cancer to bring them here to specialists at Kapi'olani for life saving treatment.

Aloha continues to provide free tickets to the March of Dimes staff and volunteers when we need to travel to the neighbor islands to set up our biggest fundraising event – March for Babies. A practice they have done for more than 15 years. And as an incentive for our walkers to raise money, Aloha Airlines donates tickets for us to give as prizes for each of our five walk sites top fundraisers. They also help us raise money by putting an Aloha Airlines team of employees who come out to support the walk and by donating tickets to our annual ball that we include in our auction. They do not often take credit for their community giving, but they keep on giving, in good times and bad. Their name says it all, they always have and will continue to show much Aloha for the people of Hawaii.

As I understand it, Aloha and other Hawaii-based carriers are asking Hawaii's lawmakers to remedy an inequity, by clarifying state law to extend a tax exemption that other airlines already have. If federal law does indeed regard them as interstate carriers, and if interstate carriers are exempt from GET on fuel purchases from the free trade zone at Honolulu Airport, then you should act swiftly to unburden Hawaii's airlines and secure those benefits for them.

Our inter-island airlines have been dedicated to serving Hawaii for decades. Without the reliable passenger and cargo service they provide, and the helping hand they offer to Hawaii's people, we would all be lost. Charities depend on our local businesses to support and fund our important work in the community. When business profits decline due to a slowing economy and increased costs, so does a company's ability to contribute to the organizations that help our community in time of need. Aloha Airlines is always ready to help when the need arises, as noted earlier – in good times and in bad - now its time for the Aloha State to help all our local airline companies by passing HB 2860. To help them is to help the communities we live in. I urge you to think of who we are and what we care about, and pass House Bill 2860 to give our local airlines the same benefits already enjoyed by other airlines.

Thank you,

Carmella Hernandez
State Director
March of Dimes Hawaii Chapter

Rep. Joseph M. Souki, Chair
Rep. Scott Y. Nishimoto, Vice-chair

Committee on Transportation
Monday, February 11, 2008, 9 AM

RE: HB 2860 Relating to Taxation

Chair Souki, Vice-chair Nishimoto and Members of the Committee:

I am Kamuela Clemente, testifying on behalf of the Transport Workers Union, representing Dispatchers, Assistant Dispatchers and Crew Schedulers of Aloha Airlines.

We strongly support passage of HB2860, which exempts interisland carriers from the general excise tax and use tax on sales of aviation fuel from a foreign trade zone for use in interstate air transportation.

For one thing, the current law is unfair to our interisland carriers because they are common carriers in interstate commerce just like the overseas carriers that already take advantage of this exemption.

For another thing, we believe that interisland air transportation is interstate commerce under federal law and should be treated equally under the law.

Finally I urge you to act in support of the working people of Hawaii, including our Aloha Airlines employees, who are so committed to serving the communities of our State.

Mahalo Nui Loa,

Kamuela Clemente

Representative Joseph M. Souki, Chair
Committee on Transportation

RE: HB 2860 Relating to Taxation

Chair Souki, Vice Chair Nishimoto and Members of the Committee:

My name is Randy Kauhane and I am Assistant General Chairman of the International Association of Machinists and Aerospace Workers (IAM) District 141 for Aloha Airlines, Hawaiian Airlines, United Airlines and Philippine Airlines, testifying in strong support of HB 2860.

Our members are concerned that current tax law is not being applied fairly, depriving our local Hawaii-based airlines of tax advantages enjoyed by all other airlines flying from Hawaii.

It is not fair that airlines are granted General Excise and Use tax exemption when they purchase jet fuel from the Hawaii Foreign Trade Zone for flying out-of-state but airlines that fly within the State of Hawaii are denied this exemption. Under federal law, all common use carriers in the United States, including Hawaii's locally based airlines, are regulated by the same laws that govern interstate commerce.

Hawaii's airlines operate under the same federal regulations. It does not seem right that the state Taxation Department has chosen to treat some airlines one way and others another way, when we are all engaged in interstate commerce under federal law.

We urge you to pass House Bill 2860. Thank you.

TESTIMONY OF KEONI WAGNER ON BEHALF OF HAWAIIAN AIRLINES IN SUPPORT OF H.B. NO. 2860, HD 1, RELATING TO TAXATION

February 11, 2008

To: Chairman Joseph M. Souki and Members of the House Committee on Transportation:

My name is Keoni Wagner and I am the Vice President for Public Affairs for Hawaiian Airlines presenting this testimony on behalf of Hawaiian Airlines in support of H.B. No. 2860, HD 1.

This bill provides an exemption from state general excise and use taxes on fuel purchased from a foreign trade zone (FTZ) and used for interisland air transportation within the State of Hawaii. The current statute provides an exemption for fuel sold from an FTZ to an airline which is flying in interstate commerce, that is, between states and in particular between Hawaii and the mainland. We continue to believe that this same exemption should apply to interisland flights and respectfully request that legislation be passed to make this exemption more explicit.

Thank you for the opportunity to testify on this measure.

TO: THE HONORABLE SCOTT NISHIMOTO

FROM: JON OKUDARA

SUBJECT: H.B. 2860

Attached is a copy of a proposed H.B. 2860, H.D. 2, which address concerns raised by the Attorney General and the Department of Taxation in their testimony, by incorporating changes recommended by both departments.

It amends SECTION 1 to address the inconsistencies between the purpose in SECTION 1 and the body of the bill. It also incorporates the changes recommended by the Tax Department by amending Chapters 237 and 238, instead of Chapter 212.

I am also including the testimonies submitted by the Attorney General and the Department of Taxation. In response to the part of the Department of Taxation's testimony that "...court cases conclude that transportation from one point in a state through international territory and back to another point i n the same state is not interstate commerce," I am including Island Airlines, Inc. v. C.A.B. from the U.S. Court of Appeals, Ninth Circuit, which held that flights between the islands of state of Hawaii over channels between the islands are "interstate air transportation" under th e Federal Aviation Act.

The proposed H.D. 2 has been given to Representative Souki.

H.B. NO. 2860

PROPOSED H.D. 2

A BILL FOR AN ACT

RELATING TO TAXATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that a healthy inter-island airline industry is vital to the State's economy. Hawaii's inter-island airlines continue to face severe financial challenges. Fuel costs in particular have skyrocketed and grown volatile in recent years. In fact, for most airlines, the cost of fuel has surpassed labor as the highest operating cost factor.

Sales of fuel sold from a foreign-trade zone for use by airlines traveling out-of-the-state are exempt from general excise and use taxes. However, [~~intrastate~~] ***inter-island*** flights are not exempt. To the extent that the Hawaii general excise and use taxes [~~apply to intrastate flights, these taxes only exacerbate the problem for Hawaii airlines.~~] ***are being applied to inter-island flights, violates the Federal Aviation Act, which includes inter-island flights in the definition of "inter-state air transportation".***

The legislature finds that exempting common carriers from the general excise and use taxes for sales of fuel from a

foreign trade zone for [~~intrastate~~] ***inter-island*** flights would level the playing field and create a fairer market for all airlines.

The purpose of this Act is to exempt common carriers from the general excise and use taxes for fuel sold from a foreign trade zone to common carriers for use in [~~intrastate~~] ***inter-island air*** transportation.

SECTION 2. Chapter 237, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§237- Aviation fuel for air transportation.** (a) This chapter shall not apply to amounts received from the sales of aviation fuel, as defined in section 243-1, categorized as privileged foreign merchandise, non-privileged foreign merchandise, domestic merchandise, or zone-restricted merchandize, that is admitted into a foreign-trade zone and purchased in a foreign-trade zone and is made directly to or is used by a common carrier for consumption or use in air transportation between two points in the State."

SECTION 3. Section 238-1, Hawaii Revised Statutes, is amended by amending the definition of "use" to read:

"Use" (and any nounal, verbal, adjectival, adverbial, and other equivalent form of the term) herein used interchangeably means any use, whether the use is of such nature as to cause the property, services, or contracting to be appreciably consumed or not, or the keeping of the property or services for such use or for sale, the exercise of any right or power over tangible or intangible personal property incident to the ownership of that property, and shall include control over tangible or intangible property by a seller who is licensed or who should be licensed under chapter 237, who directs the importation of the property into the State for sale and delivery to a purchaser in the State, liability and free on board (FOB) to the contrary notwithstanding, regardless of where title passes, but the term "use" shall not include:

(1) Temporary use of property, not of a perishable or quickly consumable nature, where the property is imported into the State for temporary use (not sale) therein by the person importing the same and is not intended to be, and is not, kept permanently in the State. For example, without limiting the generality of the foregoing language:

(A) In the case of a contractor importing permanent equipment for the performance of a construction contract, with intent to remove, and who does remove, the equipment out of the State upon completing the contract;

(B) In the case of moving picture films imported for use in theaters in the State with intent or under contract to transport the same out of the State after completion of such use; and

(C) In the case of a transient visitor importing an automobile or other belongings into the State to be used by the transient visitor while therein but which are to be used and are removed upon the transient visitor's departure from the State;

(2) Use by the taxpayer of property acquired by the taxpayer solely by way of gift;

(3) Use which is limited to the receipt of articles and the return thereof, to the person from whom acquired, immediately or within a reasonable time either after temporary trial or without trial;

(4) Use of goods imported into the State by the owner of a vessel or vessels engaged in interstate or foreign

commerce and held for and used only as ship stores for the vessels;

(5) The use or keeping for use of household goods, personal effects, and private automobiles imported into the State for nonbusiness use by a person who:

(A) Acquired them in another state, territory, district, or country;

(B) At the time of the acquisition was a bona fide resident of another state, territory, district, or country;

(C) Acquired the property for use outside the State; and

(D) Made actual and substantial use thereof outside this State;

provided that as to an article acquired less than three months prior to the time of its importation into the State it shall be presumed, until and unless clearly proved to the contrary, that it was acquired for use in the State and that its use outside the State was not actual and substantial;

(6) The leasing or renting of any aircraft or the keeping of any aircraft solely for leasing or renting to

lessees or renters using the aircraft for commercial transportation of passengers and goods or the acquisition or importation of any such aircraft or aircraft engines by any lessee or renter engaged in interstate air transportation. For purposes of this paragraph, "leasing" includes all forms of lease, regardless of whether the lease is an operating lease or financing lease. The definition of "interstate air transportation" is the same as in 49 U.S.C. 40102;

(7) The use of oceangoing vehicles for passenger or passenger and goods transportation from one point to another within the State as a public utility as defined in chapter 269;

(8) The use of material, parts, or tools imported or purchased by a person licensed under chapter 237 which are used for aircraft service and maintenance, or the construction of an aircraft service and maintenance facility as those terms are defined in section 237-24.9;

(9) The use of services or contracting imported for resale where the contracting or services are for resale,

consumption, or use outside the State pursuant to section 237-29.53(a);

(10) The use of contracting imported or purchased by a contractor as defined in section 237-6 who is:

(A) Licensed under chapter 237;

(B) Engaged in business as a contractor; and

(C) Subject to the tax imposed under section 238-2.3; [~~and~~]

(11) The use of property, services, or contracting imported by foreign diplomats and consular officials who are holding cards issued or authorized by the United States Department of State granting them an exemption from state taxes[~~.~~]

(12) The use of aviation fuel, as defined in section 243-1, categorized as privileged foreign merchandise, non-privileged foreign merchandise, domestic merchandise, or zone-restricted merchandise, that is admitted into a foreign-trade zone and is used by a common carrier by air for consumption in air transportation between two points in the State."

SECTION 4. This Act shall not be construed to imply that any law prior to the effective date of this Act is inconsistent with this Act.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2035.

INTRODUCED BY:_____

on that ground, if valid under the Act, is not a denial of free speech."

[4] The remaining question presented by stipulation is whether the Commission's failure to issue a license to Idaho Microwave without the non-duplication condition violated Section 9 of the Administrative Procedure Act, 5 U.S.C. § 1008.[8] The appellants have not seen fit to argue that the Commission violated this section, and we suppose they have abandoned the point. In any event, we hold that the Commission did not violate Section 9 of the Administrative Procedure Act.

From the foregoing we conclude that the Commission's order must be upheld.

Affirmed.

8. Section 9 is as follows:

"In the exercise of any power or authority—

"(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

"(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

ISLAND AIRLINES, INC., Appellant,

v.

CIVIL AERONAUTICS BOARD, Appellee.

No. 19752.

United States Court of Appeals
Ninth Circuit.

Oct. 29, 1965.

Suit to enjoin interisland operation of airline in the state of Hawaii. On remand by the Court of Appeals, 9 Cir., 331 F.2d 207, the United States District Court for the District of Hawaii, Martin Pence, Chief Judge, 235 F.Supp. 990, entered judgment enjoining interisland flights and airline appealed. The Court of Appeals, Barnes, Circuit Judge, held that flights between islands of state of Hawaii over channels between the islands were flights over high seas and subject to authority of Civil Aeronautics Board from which airline was required to get a federal certificate of convenience and necessity.

Affirmed.

1. States ⇐12(1)

While boundaries of a state are determined by Congress, and not by international law, Congress in creating the boundaries is not foreclosed from following and adopting international law.

2. States ⇐12(1)

Where Congress has failed to delineate state boundaries with certainty, the courts must define such limits.

3. States ⇐12(1)

In defining limits of state boundaries which Congress has failed to delineate with certainty, courts need not ignore international law nor the position of the State Department.

4. States ⇐12(2)

Congress by the Hawaiian Statehood Act did not establish the channels between the islands as being within the boundaries of the state.

5. States ⇐12(2)

Evidence justified finding that state of Hawaii, both in coming into union with and in its annexation to the United States had not considered nor insisted that channels between the various islands of Hawaii were historic waters acquired by Hawaii by prescription.

6. Commerce ⇐33(1), 47

The high seas over which interisland flights flew while traveling among the various islands of Hawaii, were a "place" within statute defining jurisdiction of the Civil Aeronautics Board over interstate air transportation which defines interstate commerce as transportation between points in the same state over a foreign country or high seas as well as over another state. Federal Aviation Act of 1958, § 101(21) (a), 49 U.S.C.A. § 1301(21) (a).

See publication Words and Phrases for other judicial constructions and definitions.

7. Aviation ⇐73

Flights between islands of state of Hawaii over channels between the islands were flights over the high seas and were subject to authority of Civil Aeronautics Board from which airline was required to get a federal certificate of convenience and necessity. Federal Aviation Act of 1958, §§ 101(10), (21) (a), 401(a), 1007, 49 U.S.C.A. §§ 1301(10), (21) (a), 1371 (a), 1487; 28 U.S.C.A. § 1345.

8. Commerce ⇐8(12)

The general principle of supremacy of federal control over interstate and high sea flights must prevail, over the economic importance of interisland air transportation to Hawaii. Federal Aviation Act of 1958, § 101(21) (d), 49 U.S.C.A. § 1301(21) (a).

9. Courts ⇐262.4(7)

Suit for declaratory judgment and permanent injunction forbidding airline from maintaining interisland flights in state of Hawaii without procuring a federal certificate of convenience and necessity, based on Civil Aeronautics Board's position that airline was an air carrier engaged in interstate transportation

without having obtained certificate, was an attack solely on airline's right to fly route, and statute forbidding district court from enjoining certain rate orders of state agencies was not applicable. 28 U.S.C.A. § 1342; Federal Aviation Act of 1958, § 101(21) (a), 46 U.S.C.A. § 1301(21) (a).

10. United States ⇐124

United States may lawfully maintain suits in its own courts to prevent interference with means it adopts to exercise its powers of government and to carry into effect its policies.

11. Courts ⇐493(3)

Injunctive relief will be granted to the United States to prevent interference with means it adopts to exercise its powers of government and to carry out its policies even though a pending state court action raises the same issue but with different parties.

12. States ⇐12(1)

Granting of equal boundaries to each state is not necessary.

Frank D. Padgett, Robertson, Castle & Anthony, Honolulu, Hawaii, for appellant.

John W. Douglas, Asst. Atty. Gen., J. William Doolittle, Morton Hollander, John C. Eldridge, Attys., Dept. of Justice, Washington, D. C., Herman T. F. Lum, U. S. Atty., Honolulu, Hawaii, for appellee.

J. Russell Cades, Wm. M. Swope, Smith, Wild, Beebe & Cades, Honolulu, Hawaii, for intervenor Aloha Airlines, Inc.

Richard K. Sharpless, Lewis, Buck & Saunders, Allen M. Stack, Pratt, Moore, Bortz & Vitousek, Honolulu, Hawaii, for intervenor Hawaiian Airlines, Inc.

Before BARNES, JERTBERG and MERRILL, Circuit Judges.

BARNES, Circuit Judge:

The Civil Aeronautics Board in 1963 sought and obtained from the District Court of Hawaii a permanent injunction against the appellant Island Airlines, Inc. inter-island flights upon the ground the appellant was required to first obtain from the Federal Civil Aeronautics Board (before further operations between the respective Hawaiian Islands of Oahu, Maui, Kauai, Hawaii, Lanai and Molokai) a federal certificate of convenience and necessity authorizing such flights.

On appeal, this court remanded the matter to the district court with instructions to vacate its final decree, and enter new findings and a decree, determining what the boundaries of the State of Hawaii are. Island Airlines, Inc. v. Civil Aeronautics Board, 331 F.2d 207 (9th Cir. 1964).

After remand, the judgment was vacated; the two competing airlines (Hawaiian and Aloha Airlines) were permitted to intervene, and further hearings were had and additional evidence introduced. Thereafter the district court entered a new decision, reaffirming its previous findings and conclusions, and held the boundaries of Hawaii to be the Islands plus a three-mile belt around each. It enjoined all of appellant's inter-island flights. (235 F.Supp. 990 (D.Hawaii 1964).) This second appeal followed.

Jurisdiction below rested upon 49 U.S.C. §§ 1371 and 1487 and 28 U.S.C. § 1345; and here rests upon 28 U.S.C. §§ 1291 and 1294.

This cause was presented to this court on written briefs and oral argument, heard in Hawaii on April 15, 1965. On May 17, 1965, the Supreme Court of the United States rendered its opinion in United States v. State of California, 381 U.S. 139, 85 S.Ct. 1401, 14 L.Ed.2d 296 (No. 5 original, 1965), deciding several questions with respect to the seaward boundaries of California, with particular emphasis on the channel islands off Southern California, and the Farallones off Northern California. So that this court might have the benefit of counsel's views of the effect, if any of United States v. State of California on the instant action, this court on June 9, 1965, vacated the order of submission previously entered, and requested counsel to file simultaneous briefs. Both appellant and appellee filed such briefs; the two intervenors declining to file briefs. Upon receipt of the supplemental briefs this court again ordered the matter submitted, as of July 16, 1965.

We conclude we should affirm the decision of the district court. We think United States v. State of California, supra, supports our conclusion, if it does not require it. We think it necessary to discuss this case in some detail.

The 1965 decision of the Supreme Court (381 U.S. 139), was a continuation of an original suit filed in the Supreme Court in 1945 by the United States against the State of California under Art. III, § 2 of the United States Constitution. (United States v. California, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).) Involved was the ownership of valuable oil rights in submerged lands lying off the coast of California, between the low-water mark and the three mile limit. The federal government was held to have "paramount rights" in such land. A decree was later issued (332 U.S. at 804–806, 67 S.Ct. 1658) referring to the existence in the United States of "paramount rights in, and full dominion and power over, the lands * * * lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles * * *," and granting "the injunctive relief prayed for in the complaint" which enjoined "California and all persons claiming under it" from trespassing thereon in violation of said rights.

The history of the proceeding is best described in the 1965 Supreme Court syllabus (381 U.S. at 139, 85 S.Ct. 1658):

> "Thereafter the Court appointed a Special Master to determine for specific coastal segments the line of ordinary low water and the outer limit of inland waters. In his Report, filed in 1952, the Master based his definition of inland waters on that applied by the United States in its foreign relations as of the date of the 1947 decree. Both parties noted exceptions to the Report, but before any further action, the Submerged Lands Act was enacted in 1953. This Act gave the States ownership of the lands beneath navigable waters within their boundaries, including the seaward boundaries 'as they existed at the time such State became a member of the Union,' but in no event to be interpreted as extending from the 'coast line' more than three geographical miles into the Pacific Ocean. 'Coast line' was derivatively defined in terms of the seaward limit of 'inland waters,' a term not defined by the Act. No action was taken on the Master's Report until 1963, when the United States filed an amended complaint reviving the Report and redescribing the issues as modified by the Submerged Lands Act."

In this amended complaint, the Unite States contended that the Submerge Lands Act "simply moved the line ou three miles from the line established b the 1947 decree, while California asser that 'inland waters' as used in the A means not what the United States woul claim as such in international relatior but what the States historically consi ered to be inland when they joined th Union."

The Supreme Court then decided (1 that Congress, by eliminating the defin tion of inland waters from the Submer ed Land Act intended to leave the mea ing of the term to the courts, indepen ently of the Act; (2) that the definitio of "inland waters," as used in the Ac should conform to the "Convention on th Territorial Sea and the Contiguou Zone," to which the United States becam a party in 1961, and which became effe tive as to the United States on Septem ber 10, 1964. In note 25 (381 U.S. a 162 n. 25, 85 S.Ct. at 1414) the opinio states that the 1947 decision "establish ed that *landlocked waters* not a part o the open sea are not part of the margina belt, and belong to the States." (Empha

sis added.) The "only problem remaining * * * was that of determining where the open sea ends and the landlocked waters begin."

The Special Master appointed under the 1947 decision decided the question was controlled by the foreign policy position of the United States on the date of the California 1947 decree, i. e., October 27, 1947. That position, he found, was that a bay was inland water only if a closing line could be drawn across its mouth less than ten miles long enclosing a sufficient water area to satisfy the so-called Boggs formula, as to the sufficiency of the depth of bays. (Cf. 381 U.S. at 163 n. 27, 85 S.Ct. 1401.) But the Convention permits use of a different formula: a straight baseline method with a twenty-four mile maximum closing line for bays and a "semi-circle" test for testing the sufficiency of the water area enclosed. The semi-circle test [1] and the twenty-four mile closing line "[u]nquestionably * * * now represents the position of the United States." (381 U.S. at 164, 85 S.Ct. at 1415.) And this position and the 1964 Supreme Court opinion "freezes" the meaning of "inland waters" in terms of the Convention.

The "subsidiary issues" decided in United States v. State of California, supra, were:

(1) That straight base lines (as used by Norway) to include "fringe of islands along the coast in [its] immediate vicinity" to the coast line, are permissible under the Convention to participating nations, but not to States of the United States when contrary to the expressed opposition of the United States itself.

(2) Under the twenty-four mile closing rule, Monterey Bay becomes inland waters, but the Santa Barbara Channel does not, despite the location of those islands, a distance of less than twenty-four miles at both ends of the channel between the coast line and the islands (i. e., between Point Concepcion and the northwestern tip of San Miguel and between the southern tip of San Clemente and Point Loma).

(3) The "Historic bay" theory,[2] under which both state and federal courts have previously found or been aided in finding that Monterey, Santa Monica, and San Pedro Bays have boundaries three miles outside a line from point to point closing the bays (because falling within Art. XII of the 1849 California Constitution).[3]

(4) "Roadsteads" are not inland waters.

(5) The line of "Ordinary Low Water" as used in the Convention and the Submerged Lands Act was lower low water line, or lower low tide average, not the average of all low tides.

(6) "Artificial accretions" can increase the state's land and extend the original three mile limit seaward, when done without the United States exercising its power over navigable waters to prevent it.

With these Supreme Court rulings in mind, we turn to the instant case.

Appellant urges twelve errors.[4] We summarize these as follows:

(1) The boundaries of a state are determined by Congress, not international law. Congress, by the Hawaiian Statehood Act, established the "channels" between the Hawaiian Islands as being within the boundaries of the State of Hawaii. And even if we assume the enjoined flights pass over international waters subject to no sovereignty, such waters are not "a place" within the statute defining "interstate air transportation." (49 U.S.C. § 1301(21) (a).)

(2) The federal courts (a) should have abstained from exercising jurisdiction; (b) the federal courts had no jurisdiction; and (c) the State of Hawaii was an indispensable party.

(3) Certain findings as to flight patterns and effect on subsidies are without evidentiary support.

(4) There being error, as outlined above, the appellant's counterclaim should not have been dismissed.

[1–3] We can agree with appellant that the boundaries of a state are determined by Congress, and not by international law. But that does not foreclose Congress, in creating the boundaries, from following and adopting international law. And where the Congress has failed to delineate boundaries with certainty, the courts must define such limits. United States v. State of California, supra, 381 U.S. at pp. 150–160, 85 S.Ct. 1401. In doing so they need not ignore international law, nor the "position" of the State Department (idem, pp. 164–167, 85 S.Ct. 1401).

[4] Nor can we agree that Congress, by the Hawaiian Statehood Act, established the *channels* between the islands as within the boundaries. As Judge Pence points out below (235 F.Supp. at 997), the Statehood Act itself (§ 2, 73 Stat. 4) says: "The State of Hawaii shall consist of all the islands, together with

1. "The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line." 381 U.S. 164, 85 S.Ct. 1415.

2. "Historic bays" are defined as: "[B]ays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 381 U.S. at 172, 85 S.Ct. at 1419.

3. Ocean Industries, Inc. v. Superior Court, 200 Cal. 235, 252 P. 722 (1927); Ocean Industries, Inc. v. Greene, 15 F.2d 862 (N.D.Cal.1926) (Monterey Bay). People v. Stralla, 14 Cal.2d 617, 96 P.2d 941 (1939) (Santa Monica Bay). United States v. Carrillo, 13 F.Supp. 121 (S.D. Cal.1935) (San Pedro Bay).

4. "1. The Court below erred in placing the burden of proof on the State of Hawaii, which was not a party, and in granting an injunction because the State did not meet that burden.

"2. The Court below erred in not finding the channels between the Hawaiian Islands to be within the boundaries of the State of Hawaii.

"3. The Court below erred in failing to hold that appellee did not have jurisdiction over flights between two points within the State of Hawaii passing over waters outside the State and not within the sovereignty of any government.

"4. The Court below erred in assuming jurisdiction of the cause when proceedings in the State tribunals had not been terminated.

"5. The Court below erred in not dismissing the complaint herein since it lacked jurisdiction under the provisions of Title 28, United States Code, Section 1342.

"6. The Court below erred in failing to hold that either the Public Utilities Commission of the State of Hawaii or the State of Hawaii itself was an indispensable party to the action.

"7. The Court below erred in not dismissing the complaint upon the grounds that the Supreme Court of the United States is vested with original jurisdiction of actions to which a state is an indispensable party.

"8. The Court below erred in holding (a) that appellant on Honolulu-Lihue flights had to adhere to federal airways on visual clearances; (b) that the airways west of Oahu and southwest of Kauai were beyond any territory claimed by the State as within its boundaries; (c) that instrument flights from Kahului to Hilo 'must' proceed via airway V6 since none of these findings were supported by the evidence, and (d) that appellant must accept such clearances to maintain the service required of it as an air carrier.

"9. The Court below erred in not holding that appellee's construction and application of the Federal Aviation Act resulted in unconstitutional and invidious discrimination against Hawaii, her people and appellant.

"10. The Court below erred in failing to hold that appellee was invidiously discriminating against Hawaii by attempting to enjoin appellant's flights on the basis of instrument clearances requiring it to fly to sea while not applying the same rule against California intrastate carriers, or, alternatively, that appellee's conduct was (a) unjust and inequitable and constituted 'unclean hands,' or (b) showed such flights to be '*de minimis*' and hence no basis for injunctive relief, or (c) constituted an administrative interpretation of the Federal Aviation Act showing such flights did not constitute a basis for federal jurisdiction.

"11. The Court below erred in finding that appellant's operations would result in a decrease in intervenors' revenues and an increase in their subsidy need without there being testimony in the record by witnesses on the stand and subject to cross-examination.

"12. The Court below erred in dismissing appellant's counterclaim." (Appellant's Brief, pp. 10–13.)

their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act."

In a careful examination of the claims once made by Hawaii, both as a monarchy and a republic prior to annexation to the United States in 1898, the district court opinion points out (235 F.Supp. at 997–1001) the conflict in the claims originally made in (a) the 1846 Statutes; (b) the Privy Council Resolution of August 29, 1850; (c) the 1854 Neutrality Proclamation; versus those made in (d) the 1849 Supreme Court decision (The King v. Parish, 1 Haw. 58 (1849)); (e) the repeal in 1859 of the 1846 Second Act of Kamehameha; (f) the Kingdom's Neutrality Proclamation of 1877; (g) the 1902 Supreme Court of Hawaii decision (Ter. of Hawaii v. Liliuokalani, 14 Haw. 88, 91–92 (1902)); and (h) the detailed enumerations in the Hawaiian Organic Act of April 30, 1900.

The trial judge then compared the claims as to the channels made by the Constitutional Convention of the State of Hawaii in 1951, and the testimony of the Hon. Joseph R. Farrington, Delegate in Congress from Hawaii; the Hon. C. Nils Tavares, Chairman of the Hawaiian Statehood Committee (formerly Attorney General of Hawaii, and now a United States Judge for the District of Hawaii); and the Hon. Oren E. Long, former Governor of Hawaii (later a United States Senator and then a member of the Statehood Commission) at the 1953–54 hearings before the Committee on Interior Insular Affairs of the United States Senate, 83d Congress on Statehood Bills, where: "all three jointly and severally stated positively and unequivocally that Hawaii made no claim for control of ocean waters beyond the traditional three mile limit."

Likewise the district court referred to similar hearings before the 84th Congress, which had developed no claim that the "territorial waters" of Hawaii went beyond the three mile limit. Finally, the district court opinion carefully anticipated the second United States v. California (381 U.S. 139, 85 S.Ct. 1401, 14 L.Ed.2d 296 (No. 5 Original, 1965)) holding by considering this country's national and international "position" on what constitutes "territorial waters" of islands; how they would have of necessity been bounded between the Hawaiian Islands; and how the title to "historic waters" is usually based on something approaching a prescriptive right; stating:

> "The 'historic waters' concept constitutes an exception to the general rules of international law governing the delimitation of the maritime domain of a state. [note] Therefore, the title to 'historic waters' is generally considered in the nature of a prescriptive right, i. e., by virtue of 'acquisitive prescription'. The position of the United Kingdom in the Norwegian Fisheries case, United Kingdom v. Norway, was that a state can only establish title to areas of sea which do not come within the general rules of territorial or inland waters, on the basis of a prescriptive title. [note] Norway's position in the same case was 'the usage on which an historic title is based must be peaceful and continuous, and consequently * * * the reaction of foreign States constitutes an element to be taken into account in and appreciation of such title * * *.' [note]
>
> At least three factors must be taken into consideration in determining whether a state has acquired an historic title to a maritime area. These factors are 1, the exercise of authority over the area by the state claiming the historic right; 2, a continuity of this exercise of authority; and 3, the attitude of foreign states. The authority which a state must continuously exercise over a maritime area in order to be able to claim it validly as 'historic waters' is sovereignty, i. e., it must be claimed as a part of its national domain. Absent international approval of the claim, the activities carried on by the state in the area in question must be something far more objective than simply and solely internal verbalization, i. e., local legislation or proclamation: 1. The sovereignty claimed must be effectively exercised; the intent of the state must be expressed by deed and not merely by proclamations, e. g., keeping foreign ships or foreign fishermen away from the area, or taking action against them. 2. The *acts* must have notoriety which is normal for acts of the state. [note]
>
> Continuous usage of long standing of the maritime area was demanded even in 1894 (Institute of International Law of 1894). Established usage generally recognized by the nations, was the criteria set up by the International Law Association of 1926. Since an historic title to a maritime area must be based on the active exercise of sovereignty over the area by the state claiming it, the activities from which the required usage must emerge was consequently a repeated or continued activity of that same state. Passage of time is therefore essential; i. e., the state must have kept up its exercise of sovereignty over the area for a considerable time. [note]
>
> In the Fisheries Case, supra, Norway claimed that certain areas off the Norwegian coast (one of them demanding a 'baseline' boundary running over the open sea for a distance of 100 miles) were reserved for the exclusive fishing of her nationals. The United Kingdom claimed those areas were 'high seas'. The historic pattern of exercise of sovereignty showed that prior to the 17th Century there had been disputes between British and Norwegian fishermen in the areas, and as a result of Norway's complaints, the British did not fish in those areas for 300 years. Beginning in 1906, however, British vessels again appeared, with resulting frequent 'incidents' and much intergovernmental action, with British trawlers being arrested and condemned by Norway. The International Court of Justice found that the same were 'historic waters' of Norway. [note]
>
> The burden of proving the open and notorious use of the area in question rests on the state claiming that its 'historical waters' possess a character inconsistent with the principle of the freedom of the high seas. Since the historic element is the basis for validating what is an exception to the general rule of freedom of the seas and therefore intrinsically invalid, the burden of proof is thus logically and emphatically placed upon the claimant state. [note]
>
> When the claim of the Kingdom of Hawaii is measured in the light of the above rules of international law, it instantly becomes obvious that the nation of Hawaii ceded and turned over to the United States no valid claim of sovereignty over the inter-island (sic) channels.
>
> * * * * * *
>
> A study of the above case [United States v. Louisiana, 363 U.S. 1, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960)] and other authorities [note] clearly shows that the term "territorial waters' has a uniformly well understood meaning and application, viz., the term includes 1, the water area comprising both inland waters (rivers, lakes and true bays, etc.) and 2, the waters extending seaward three nautical miles from the coast line, i. e., the line of ordinary low water, (ofttime called the 'territorial sea'). Seaward of that three-mile territorial sea lie the high seas. The Submerged Lands Act (1953) confirms titles to the States in the submerged lands off their coasts for a distance of three geographical miles from the coast line. Section 5(i) of the Hawaii Statehood Act reads:
>
> 'The Submerged Lands Act of 1953 * * * and the Outer Continental Shelf Lands Act of 1953

> * * * shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.' [note]" (235 F.Supp. at 1004–1005, 1007.)

But this approach, urges appellant, improperly placed the burden of proof on an absent nonlitigant, the State of Hawaii. We note that the State of Hawaii heretofore petitioned for leave to intervene as a party defendant, in this matter, and then, before the hearing, withdrew its petition and asked for and was granted leave to appear as amicus curiae only. Thus it had full opportunity to become a litigant had it desired. After it had knowledge of the decision below, it did not care to petition this court for leave to intervene. We assume it felt its interests, if any, were adequately protected by able counsel for other parties.

When the court below stated that "[t]he burden of proving the open and notorious use of the area in question rests on the state claiming that its 'historical waters' possess a character inconsistent with the principle of freedom of the high seas," and that "the burden of proof is thus logically and emphatically placed upon the claimant state" the court was referring, not to the State of Hawaii in this case, but to the State of Hawaii in any legal controversy in which such burden might arise, and to which controversy the State might be a party. And if any party to such litigation, such as the Hawaiian Public Utilities Commission, or a licensee thereunder, relies on such a "historic waters" exception to the general rule of law defining what constitutes the "high seas" (United States v. Rodgers, 150 U.S. 249, 14 S.Ct. 109, 37 L.Ed. 1071 (1893)), it must stand in the shoes of the state claiming such an exception, and bear the burden of proof.

[5] In our opinion, the evidence before the district court amply justified the trial court's opinion that the State of Hawaii, both in coming into union with and in its annexation to the United States, had not considered or insisted that the *channels* between the various islands of Hawaii were "historic waters" acquired by Hawaii by prescription.

[6] Nor can we agree that the high seas over which the interisland flights are made are not "a place" within the statute defining the jurisdiction of the C. A. B. over interstate air transportation. (49 U.S.C. § 1301(21) (a).) The cases cited in the district court's opinion (235 F.Supp. at 994–995) and the congressional history (S.Rep.No. 80, 86th Cong., 1st Sess. 1–4 (1959)) show that the language "the air space over any place" outside a state makes interstate commerce "transportation between points in the same State over a foreign country or the *high seas* as well as over another state." A three-judge district court in this circuit so ruled in United Air Lines, Inc. v. Public Utilities Commission of California, 109 F.Supp. 13 (N.D.Calif. 1952). Unfortunately for this opinion on appeal, the Supreme Court of the United States refused to meet the issue now presented. The case was reversed on other grounds. 346 U.S. 402, 74 S.Ct. 151, 98 L.Ed. 140 (1953), see dissenting opinion of Mr. Justice Douglas, pp. 403–405, 74 S.Ct. 151.

[7, 8] Appellate urges that the federal agencies and the courts should refrain from exercising jurisdiction, in view of the Hawaiian Supreme Court's decision, upholding the Hawaiian Public Utilities Commission's jurisdiction. (Application of Island Airlines, Inc., 47 Haw. 1, 384 P.2d 536 (1963).) Such position, in our view, begs the fundamental question. If the flights are intrastate, then of course, the federal courts should not permit the C. A. B. to require a certificate, but conversely, if the "channels" are high seas, then flight over them should and must be subject to the C. A. B.'s authority. This general principle of the supremacy of federal control over interstate and high seas flights must prevail, if the facts support it, over the paramount importance to the Hawaiian economy of inter-island air transportation.

The Hawaiian Supreme Court in coming to its opposite conclusion relied on Bob-Lo Excursion Co. v. Michigan, 333

U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455 (1948). There the commerce (a one-day excursion to a local Coney Island, located in but separated from Canada) was held to be foreign commerce, but of such local concern that the facts created an exception. No other case, said the Supreme Court,

> "involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community. * * * It is difficult to imagine what national interest or policy, whether of securing uniformity in regulating commerce, affecting relations with foreign nations, or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so." (333 U.S. at 39–40, 68 S.Ct. at 364.)

It is our view that Bob-Lo represents the sui generis case. It could be relied upon for example if the C. A. B. attempted to require certification of an air line from Honolulu to Manana Island.

Nor can we overlook a very practical question—if the "channels" between the islands were to be held inland waters, where would the boundaries lie? In oral argument the appellant here argued that a straight base line should be drawn completely around the western perimeter of the Hawaiian archipelago from island headland to island headland, i. e., from Niihau's Kawaihoa Point to Hawaii's Ka Lae, a distance of approximately 350 statute miles,[5] coming no closer than fifty miles to land over two-thirds of its distance. Even straight base lines running between headlands on either side of the channels between islands would produce resulting "channels" aptly described in the district court's opinion as "fantastic." Similar proposed boundaries have been rejected by the Supreme Court in the two California submerged land cases, supra.[6]

Appellant urges that this court should follow the rule of Public Utilities Commission of State of California v. United Air Lines, 346 U.S. 402, 74 S.Ct. 151, 98 L.Ed. 140 (1953). The district court opinion (109 F.Supp. 13 (N.D.Cal.1952)) was reversed by the majority of the Supreme Court's citation of one case—Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). That cited case held, after emphasizing there was not past, pending or threatened action by a state commission touching plaintiff's business: The suit could not be entertained as one for injunction and should not be continued as one for a declaratory judgment. The injunctive process was not available because there was no proof of act or threat constituting irreparable injury; and the declaratory judgment act was unavailable because there was no actual controversy. As the dissenting opinion in the United Air Lines case stated, the issue as to whether an air trip to Catalina Island (30 miles from California) was over high seas, and therefore under the exclusive jurisdiction of the C. A. B., was answered "yes" by the district court, and not answered by the Supreme Court. The Supreme Court did meet this issue in the second United States v. California case, supra.

[9] As to the alleged lack of jurisdiction, appellant relies upon 28 U.S.C. § 1342.[7] The applicability of that stat-

5. The "Cord of the bow"—see 235 F.Supp. at 1004, n. 19.

6. See map, Appendix A to dissenting opinion of Black, J., 381 U.S. at 213, 85 S.Ct. 1401.

7. 28 U.S.C. § 1342 reads as follows:
"§ 1342. Rate orders of State agencies
The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
(1) Jurisdiction is based solely on diversity of citizenship or repugnance

ute rests upon two assumptions: (1) that Island Airlines is a public utility; and (2) the suit relates to an order affecting rates.

We need not pass upon the first requisite.

This suit was for a declaratory judgment and permanent injunction based on C. A. B.'s position that appellant was an air carrier engaged in transportation within the meaning of 49 U.S.C. § 1301 (10) and (21) (a) of the Act, without having obtained a C. A. B. certificate. This was not an attack on the rates appellant charged, but solely on the appellant's right to fly the route. As the trial court said: "* * * no problem is presented other than the determination by this court whether Island [Airlines] is carrying on air transportation in violation of Section 401(a) of the Act." (235 F.Supp. at 993.) Under § 1007 (49 U.S.C. § 1487) of the Act, the C. A. B. has congressional authority to sue for a violation of § 401(a). (49 U.S.C. § 1371 (a).) The district court has the authority to hear the suit under 28 U.S.C. § 1345 and 49 U.S.C. § 1487.

[10] We agree with the district court's conclusion:

> "The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies." United States v. Le May, 322 F.2d 100, 103 (5th Cir. 1963), quoting from United States v. Fitzgerald, 201 F. 295, 296 (8th Cir. 1912).

[11] This is true, and injunctive relief will be granted, even though a state court action is pending raising the same issue, but with different parties. United States v. Deasy, 24 F.2d 108 (D.Idaho 1928). See generally Judge Yankwich's language in United States v. Fallbrook Public Utility District, 101 F.Supp. 298 (S.D.Calif.1951).

There are other matters raised by appellant which we do not consider controlling. We refer particularly to alleged lack of evidence to support certain conclusions of the trial judge with respect to air traffic and flight patterns. Certain exhibits supported the court's conclusions. But at best, such evidence was mere "make weight" for the court's decision.

[12] We find no "invidious discrimination" against the State of Hawaii in the court's decision below. "Equal boundaries to each state are not necessary." United States v. Louisiana, 363 U.S. 1, 77, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960).

We finally note that in United Air Lines, Inc. v. Public Utilities Comm. of California, supra, it was held the C. A. B. had jurisdiction to regulate flights between the California mainland and Santa Catalina Island, a part of California, lying in the Pacific Ocean thirty miles (at its closest point) from the mainland. The basis for this holding was that the flights were in air space over the high seas after they had passed three miles from the mainland, and until they came within three miles of the island. We quote from that opinion:

> "The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find that a substantial portion of these 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a place outside of the State of California.

> The Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field it has supremacy. Since the Congress had the power to assert federal jurisdiction, the plain language of the statute compels the conclusion that the Public Utilities Commission of the State of California has no jurisdiction or power to regulate in any manner the transportation activites of the plaintiff over the route in question." Id. 109 F.Supp. at 16.

> We reach the same conclusion applied to the facts in the present case, strengthened by the majority Supreme Court opinion in United States v. California, supra.

> Affirmed.

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy, and efficient remedy may be had in the courts of such State."

WEST KEY NUMBER SYSTEM

ASSOCIATED HOME BUILDERS OF the GREATER EAST BAY, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 19381.

United States Court of Appeals
Ninth Circuit.

Oct. 29, 1965.

Proceedings on petition for review of an order of the National Labor Relations Board. The Court of Appeals, Pope, Circuit Judge, held that union rules relating to limitation of production were adopted for purpose of establishing terms and conditions of employment of union members and thus constituted an attempt by unilateral action to fix terms and conditions of employment of union members rather than a mere [illegible] of rules with respect to acquisition or retention of membership.

Order accordingly.

1. Labor Relations ⇐395

Union rules relating to limitation of production were adopted for purpose of establishing terms and conditions of employment of union members and thus constituted an attempt by unilateral action to fix terms and conditions of employment of union members rather than a mere prescribing of rules with respect to acquisition or retention of membership. National Labor Relations Act, § 8(b) (1) (A), (d) as amended 29 U.S.C.A. § 158(b) (1) (A), (d).

2. Labor Relations ⇐2, 107

Generally speaking, Labor Act guarantees to employees the right to refrain from engaging in certain concerted activities, and imposition of fines upon union members for union rules designed to limit production would restrain or coerce employees in exercise of such statutory rights. It might be argued that employees have given up some portion of their freedom when they joined union. National Labor Relations Act, §§ 7, 8(b) (1) (A), (d).

3. Labor Relations ⇐536, 5[illegible]

Complaint, alleging that union rule limiting production was "unestablished", sufficiently alleged agreement or attempted establishment of terms and conditions of employment by union without collective bargaining and failure to mention relevant provisions of Labor Relations Act would not justify board's failure to make findings with respect to key issue of failure to bargain collectively. National Labor Relations Act, § 8(b) (3), (d) as amended 29 U.S.C.A. § 158(b) (3), (d).

Gardiner Johnson, Thomas B. Stanton, Jr., Johnson & Stanton, San Francisco, Cal., for petitioner.