

June 22, 2007

Howard Wiig  
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State of Hawaii  
P.O. Box 2359  
Honolulu, HI 96804

RE: Ghost Net Bounty

Dear Howard,

Chris Woolaway recently forwarded us your question about the contract and liability issues surrounding the development of a reward program for recovery of derelict fishing gear in Hawaii. As we understand it, your specific question was whether the state would be “entering into contracts” with the fishermen and therefore potentially liable for any damages. This letter contains the results of our research into the applicable law. Please be aware that the National Sea Grant Law Center does not offer formal legal advice, and that this letter is intended for informational purposes only.

The proposed reward for ghost nets is most accurately described as a bounty, rather than a reward. “The distinction between a bounty and a reward has been stated as being that in the case of a bounty, the acts of many persons are desired, and each person who acts upon the offer becomes entitled to the promised gratuity independently of the claims of others, while a reward can be claimed but for a single service, once performed, and can be earned only by the person, or cooperating persons, who succeed while others fail.”<sup>1</sup> Because Hawaii hopes to enlist many people to recover many nets, the state is proposing a bounty. It is similar to the bounties that many states offer for the pelts or carcasses of unwanted animals.<sup>2</sup>

### **Contract**

The liability concerns may have arisen due to the program’s characterization as a reward program. A reward is contractual in nature. A reward is compensation for the performance of special or extraordinary services, such as the provision of information leading to the arrest of criminal. “When an offer of a reward is accepted by performance, it becomes a binding contract, based on the principles and governed by the laws of contracts generally.”<sup>3</sup> A reward can only be claimed by the one person, or group of cooperating persons, who successfully completes the task. Not every person who provides information through a hot line, for example, is entitled to the reward. Even this contractual relationship is unlikely to result in liability, however, because the individual performing the task would be expected to act reasonably (i.e. abide by all applicable laws, exercise due care).

The mere offer of a bounty, on the other had, is not a contract.<sup>4</sup> A contract does not form until the requested act is performed.<sup>5</sup> Once the act is performed (net retrieved) and the contract ripens, the state

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<sup>1</sup> 12 Am. Jur. 2d Rewards § 1.

<sup>2</sup> See, e.g., Miss. Code § 19-5-51 (bounty on beaver, nutria, and bobcats).

<sup>3</sup> 12 Am. Jur. 2d Rewards § 2.

<sup>4</sup> 12 Am. Jur. 2d Bounties § 7; *Salt Co. v. East Saginaw*, 80 U.S. 373 (1871).

would be obligated to perform – that is, pay the bounty. Clearly, then, it is important for the state to specify with precision the act that will earn the bounty.

## **Liability**

While researching your contract question, we also thought about liability in general. We think you may have two potential liability concerns: (1) people seeking the bounty will commit illegal or tortious acts and someone will try to hold the state liable, and (2) people seeking the bounty will hurt themselves and they will try to hold the state liable.

## **Vicarious Liability for Illegal Acts**

A possible source for the liability concerns is a case out from Massachusetts. In *Strahan v. Coxe*<sup>6</sup>, the First Circuit Court of Appeals held a state agency responsible for issuing fishing licenses to gillnetters vicariously liable under the Endangered Species Act (ESA) for the acts of permittees. The court reasoned that because the Massachusetts regulations and permits explicitly authorized fishermen to use gillnets, and it was impossible to use such nets without harming right whales, the state was causing the fishermen to violate the ESA. In other words, since the fishing could not take place but for the permits, the state was liable for any harm to protected species. This concept is extremely controversial, however, and not a matter of settled law nor embraced by the other circuits. Furthermore, the derelict gear bounty program would not trigger such vicarious liability because the state would not be enabling individuals to carry out tasks they could not do otherwise. Permits are not needed to retrieve lost gear.

Vicarious liability may also arise in an agency relationship, when one party (the agent) acts on behalf of another (the principal). In some circumstances the principal can be held liable for the acts of its agent. Some of the concern about the ghost net program may be rooted in fear of the state being held vicariously liable for illegal or tortious actions of people seeking the bounty. This can happen only if a principle-agent relationship exists.

Agency is defined as “the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”<sup>7</sup> Control is an indispensable element of the agency relationship. In the case of ghost net bounty seekers, the state would have no control over their activities. Lacking that indispensable element there is no agency relationship and thus no need for the state to be concerned about vicarious liability for actions of the bounty seekers.

## **Liability for Injuries**

As for the second liability concern mentioned above, the doctrine of sovereign immunity would most likely shield the state from liability. Under the doctrine of sovereign immunity, a governmental entity

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<sup>5</sup> See, e.g., *Mintz v. Scowden*, 68 Pa. Super. 228 (1917) (offer of a bounty for scalps of noxious animals ripened into a contract when the animals were killed, despite repeal of bounty offer before scalps were presented with demand for payment).

<sup>6</sup> 127 F.3d 155 (1st Cir. 1997).

<sup>7</sup> Restatement (Third) of Agency § 1.01.

may only be sued if the government has given its consent. In Hawaii, the State Tort Liability Act (STLA) waives sovereign immunity for liability arising out of the torts of its employees.<sup>8</sup> There are seven exceptions to this broad waiver, however, including

Any claim based upon an act or omission of an employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused.<sup>9</sup>

The offer of a bounty, unless required by law, would be considered a discretionary function. The agency may choose to offer a bounty or refrain from doing so. Even if the bounty program is required by law, the state would still be immune from suit if the agency and its employees exercised due care in the execution of the statutory mandates. The standard of care required by the STLA is that of a “reasonably prudent person.”<sup>10</sup>

### **Policy Concerns**

In our opinion, the Hawaii Ghost Net Bounty Program will not expose the state to additional liability. Although it is unlikely that the state could be held liable for the acts of fishermen encouraged by the bounty program to retrieve derelict gear, a number of issues may need to be addressed prior to implementation. Safety, of course, is always a concern. Are you assuming that fishermen will retrieve only loose nets? Or will the bounty program encourage fishermen to attempt more difficult retrievals, such as nets tangled on coral reefs? If the latter is the case, while the state would not be liable for damages to protected resources, the fishermen would be responsible for any natural resource damages and may need to be made aware of that.

It is conceivable that a court would conclude that it was unreasonable for the state to encourage debris removal through a bounty program without providing informational materials. One potential solution to all the above concerns is to require potential bounty seekers to attend a training session on proper derelict gear removal. If the training covered proper technique, safety guidelines, and federal and state environmental laws and prohibitions, the state could show that it exercised reasonable care.

I hope you find this letter helpful. Please let us know if you have further questions. Thank you for bringing you questions to the National Sea Grant Law Center.

Sincerely,

Stephanie Showalter  
Director

Josh Clemons  
Research Counsel

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<sup>8</sup> HAW. REV. STAT. § 662-2.

<sup>9</sup> *Id.* § 662-15(1).

<sup>10</sup> *Upchurch v. Hawaii*, 454 P.2d 112 (1969).