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THE HAWAII SUPERFERRY BUSINESS VENTURE NAVIGATES TO FAILURE

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At first glance, the private business venture of the Hawaii Superferry appeared to be an economic opportunity for Superferry executives, the State of Hawaii, as well as tourists and residents looking for a cheaper alternative for inter-island travel. However, upon its introduction to the Hawaii Islands, it faced stiff opposition from several public interest groups. Plagued with legal troubles and roadblocks throughout the Superferry's short lifetime, the inter-island ferry business was no longer able to stay afloat financially. The poor implementation of conflict resolution and negotiation of the parties involved appeared to be the perfect storm for what was supposed to be smooth sailing. The eagerness with which the State waived environmental permits appeared to be done with the sole aim of benefiting the Superferry corporation, upon which the Court did not look with favor. This article explores the arguments made by the defense and opposition, and presents the findings of the court.

Keywords: Conflict, Resolution, Negotiation, Maui, Kauai, Oahu, Travel, Interisland, Ferry, Environment.

1 INTRODUCTION

In 2001, venture capitalist Tim Dick cultivated the idea to provide Hawai'i residents and tourists an efficient, rapid, and cost-effective means of transportation between the Hawaiian Islands. The result of this idea was the *Alakai*, a $100 million, 349 ft. catamaran. The *Alakai* (Figure 1) was capable of transporting 282 vehicles and 866 passengers at speeds of 35 knots between the islands of Oahu, Maui, and Kauai (Segal 2007).

On Sunday August 26th, 2007, the Hawaii Superferry set sail on its maiden voyage from Honolulu Harbor to its passenger terminal on Kahului, Maui. At a low introductory cost of $5 per seat and $5 per car, the trip sold out within thirty minutes. Upon the Hawaii Superferry's arrival to Maui, it was met by angry protestors and a restraining order preventing the vessel from docking. The protest was the beginning of many legal and financial struggles for Tim Dick and his associates that led to the demise of the interisland ferry service (Hawaii Interisland Super Ferry News 2009). In addition, the company marketed a second Superferry that would provide a four-hour route (each way) from Oahu to the Big Island in the near future. The objective of this paper is to discuss the case that went to court, and explore the implementation of conflict resolution or lack thereof between the involved parties that led to the end of an economic opportunity to the State of Hawaii.

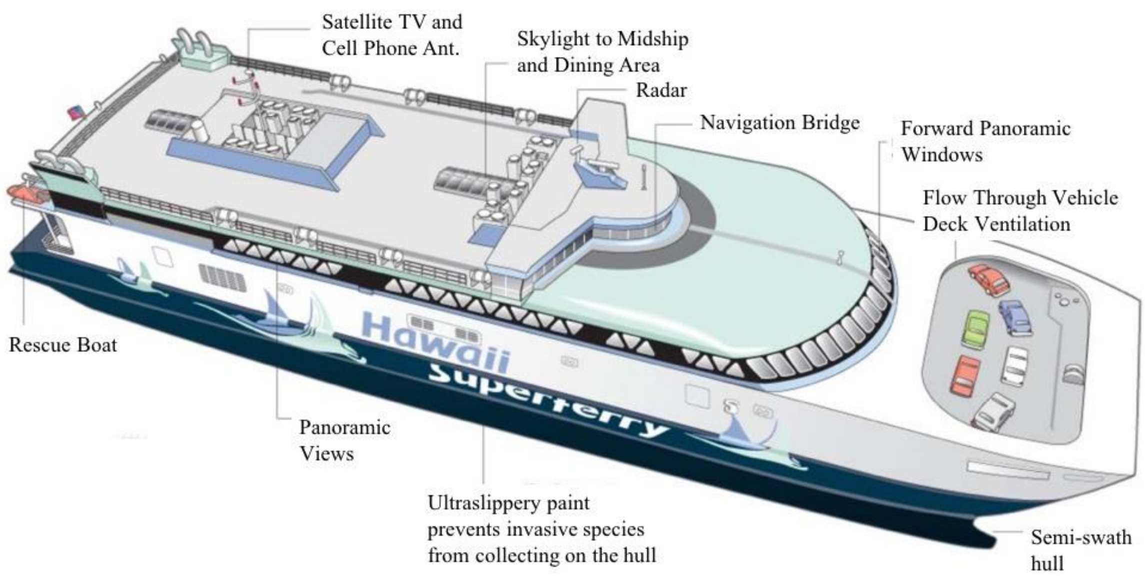

Figure 1. Graphic of the *Alakai* an interisland passenger ferry (Segal 2007).

2 SUPERFERRY TIMELINE

Tim Dick and partners secured financing through equity and federally guaranteed loans totaling $211 million from ABN Amro Bank and J. F. Lehman & Co. respectively (Schaefers 2006). In 2004, it was determined by the Hawaii State Office of Environmental Quality Control and county governments that the Hawaii Superferry venture was exempt from conducting an environmental impact study (EIS). This was under the direction of Barry Fukunaga, the Honolulu Harbor Director, who later became the interim director of the State Department of Transportation in 2007 (Niesse 2007)[1]. With this information and direction, the Hawaii Superferry began operations on August 26, 2007 without an EIS, which became the underlying reasoning for the opposition.

The launching of the Hawaii Superferry was rushed by executives knowing that legal roadblocks lay ahead. With speculation that legal troubles would delay the Hawaii Superferry debut, discounted prices of $5 were offered to over 19,000 customers to facilitate operations. On August 27, 2007, at its maiden voyage, a restraining order was issued against the *Alakai* upon arrival in Kahului, Maui, which only allowed the Hawaii Superferry to disembark passengers at its destination. On September 12, 2007, through the support of Governor Linda Lingle and a Special Session conducted by the Hawaiian Legislature, it was determined it was in the public's interest that Hawaii Superferry services were allowed to resume, beginning September 26, 2007, between Oahu and Kauai (Senate Twenty-Fourth Legislature 2007 Second Special Session State of Hawaii). However, only two days later, on September 14, 2007, services were again halted between Oahu and Maui by Judge Joseph Cardoza from the Circuit Court of the Second Judicial Circuit until hearings from all stakeholders were completed (Hawaii Interisland Super Ferry News 2009).

As ferry services continued for an extra week between Oahu and Kauai, so did protests by surfers, paddlers, and swimmers, making it impossible for the *Alakai* to dock in Nawiliwili Harbor. On September 21, trips to Kauai stopped altogether. On October 4, 2007, the Hawaii Supreme Court determined that the inter-island Superferry required an environmental assessment

[1] Mr. Fukunaga apparently consulted with the Office of Environmental Quality Control and county governments.

in order to continue operations because the corporation used $40 million in taxpayer dollars for infrastructure improvements such as harbor improvements.[2] This halt in services placed a financial burden on the Hawaii Superferry corporation as it was no longer available to generate much-needed revenue. Hawaii Superferry officials estimated approximately six weeks without revenue until they would have to relocate. The ruling was overturned on December 13, 2007 when Governor Lingle and her administration convinced the court to allow the Hawaii Superferry to continue operations while an EIS was in progress.[3]

The inter-island ferry continued operations to Maui until March 16, 2009, while facing protests organized by the Sierra Club, Kahului Harbor Coalition, and the Surfrider Foundation. During this time, Aloha Airlines, a major inter-island airline faced bankruptcy. Hawaii Superferry prices increased,[4] while still being the cheaper inter-island transportation alternative. A ruling on that date in case No. 29035 *Sierra Club v. The Department of Transportation of the State of Hawaii* rejected and overturned the law that allowed the Hawaii Superferry to continue operations while an environmental impact assessment was conducted. Assets were liquidated and auctioned off while 236 employees were laid off. The financial implications of a delay, while conducting a time-consuming EIS, while the Superferry remained idle, was too much for the corporation to stay in business (Hawaii Interisland Super Ferry News 2009).

3 HAWAII SUPERFERRY OPPOSITION

Attorney Isaac Hall represented the Sierra Club, Maui Tomorrow, and the Kahului Harbor Coalition in their prosecution against State of Hawaii's Department of Transportation. The main argument in their prosecution was that the new ferry venture was operating illegally without an EIS and that the State of Hawaii was wrong in allowing an exemption to Chapter 343 of State law (Hawaii Revised Statutes Chapter 343 2009). The environmental concern was that the vessel would be traveling through protected marine mammal habitats and sanctuaries. In addition, the private venture was using $40 million in taxpayer dollars and state land to fund infrastructure and special barge requirements. These "special privileges" that were not available to others was seen as an unethical alliance between the State and the Hawaii Superferry (*Sierra Club v. The State of Hawaii Department of Transportation* 2009).

Protestors were concerned that the private business venture was allowed without due diligence due to money-driven politics. Local opponents of the Hawaii Superferry feared that the Superferry corporation would be the sole benefactor of the state taxpayers $40 million and State land that was provided, and that they were entitled to know the business impact to the environment through an environmental impact assessment and statement. Other concerns included increased congestion and traffic due to disembarking vehicles, the spread of invasive species from island to island, and altering seafloor topography from dredging (if any was required) that would affect surf nearby breaks (Niesse 2007, Anforth and Singh 2012).

4 HAWAII SUPERFERRY DEFENSE

A service that seemed to be a valuable asset to the citizens of Hawaii, the State created an exemption to requiring an EIS through a new law known as "Act 2" from the Second Special session held by the State of Hawaii Senate Twenty-Fourth Legislature (2007). Act 2 allowed the Governor to pass an executive order that exempted large ferry vessels such as the Superferry from

[2] Operations to Kauai remained suspended because protestors would not allow the Superferry to dock.
[3] Linda Lingle passed an Executive Order, 07-10 in November 4, 2007 allowing the Superferry to operate.
[4] Owing to demand and supply, as well as because Superferry needed revenue.

having to abide by Chapter 343 of the Hawaii Revised Statutes, which required an EIS for such operations. Harbor and other infrastructure improvements were also included within the scope of this law (State of Hawaii Executive Order 07-10 2007). The Hawaii Superferry brought a valid argument that an EIS wasn't required by other large vessels such as Norwegian Cruise Lines, or shipping companies such as Matson or Young Brothers, which navigate the ocean and use harbors in the same manner. Additionally, the Hawaii Superferry was equipped with the latest sonar equipment for marine mammal avoidance, a technology that was not used by older Matson, Young Brothers, and Norwegian Cruise line vessels (Anderson 2007).

To mitigate the concerns of opposing parties and citizens, the Hawaii Superferry placed a number of self-regulations in place to reduce their environmental impact. To reduce the chances of potentially harming marine mammals, two marine mammal lookouts were hired for transits and traffic routes were altered. To reduce the likelihood of spreading invasive species from island to island, vehicles were inspected, and mud-caked vehicles were not allowed on the vessel. In addition, as an example of environmental stewardship, environmentally friendly plates were used for meals, implemented a recycling program for customers to partake, and provided public service announcements regarding the dangers of invasive species (Hawaii Superferry 2009).

The Hawaii Superferry also argued that their services would provide many benefits to the State. The venture would provide a new, cheaper transportation alternative that would generate much-needed revenue for a state that had an outstanding debt of $3.99 billion,[5] while providing approximately 240 jobs (State of Hawaii - Department of Budget and Finance 2007). In addition, bringing a vehicle over to another island via the ferry would not change the number of cars on the road than if a tourist was to rent a vehicle. This option would also alleviate another cost for residents who already owned vehicles that were traveling outer-island. Superferry executives would also make the ferry available at no cost to the state during times of emergency. A valuable asset that would be necessary in the event of a natural disaster that would shut airports down, with the ability to transport emergency goods and services (Anderson 2007).

5 FINAL RULING AND EFFECT

The final ruling in *Sierra Club v. The Department of Transportation of the State of Hawaii* determined that Act 2 of the Second Special Legislative Session violated a constitutional mandate. Due to the nature of the law, Act 2 appeared to have passed for (i) the sole purpose of allowing the Superferry to operate without an EIS (Chapter 343, Hawaii Statutes), in order to speed up its debut, and (ii) showing favoritism to one specific company by granting them harbor improvements. Act 2 was passed with a 21-month time frame, such that other ventures could not be given a fair chance to compete. The likelihood of another entity offering services like the Superferry within the applicable time frame of Act 2 was realistically impossible. The ruling in this court case was enough for the Superferry executives to throw in the towel. The company no longer had enough funds to keep the vessels in an operable condition while an environmental impact assessment was conducted. The stonewalling of what appeared to be a potential economic opportunity for the State of Hawaii by special interest groups was successful and forced the company into bankruptcy.

6 CONFLICT AND ALTERNATIVE DISPUTE RESOLUTION

According to the Hawaii Superferry, in order to be successful, $10 million was required to build special barges needed for loading and offloading the ferry, and another $30 million was required

[5] $8 billion in 2015; $6.8 billion in 2017

for pier, harbor, and other infrastructure improvements. The Superferry made clear that funding from the State of Hawaii was their only option, and that without this the transportation service would not come to Hawaii. State officials determined that the value the ferry service would provide in regards to tax revenue, boosting local economy, and providing an alternative mode of transportation between islands was worth shelling out the $40 million. With no other alternatives available to the state, their worse alternative to the negotiated agreement (WATNA) was no superferry servies to the islands. If the State of Hawaii did not aid in rushing the Superferry through Act 2, alternatives such as other private business ventures may have come to fruition.

What both parties involved did not realize at the time was that the $40 million stipulation put in place by Hawaii Superferry was used as a primary argument for their opponents as to why the Act 2 was unconstitutional. What would have avoided this situation was if Superferry executives found their own source of funding for infrastructure improvements and included a self-contained ramp in the initial design of the vessel. An option that few knew about was the ability to include a self-contained ramp within the design of the Superferry, which would have avoided the need of the special barges that were state funded. This design was incorporated in the construction of the second non-commissioned Superferry that would have been used for transits between the Big Island. The self-contained ramp option may have been withheld by Superferry executives to see how much money they could save in their venture by getting the State of Hawaii to pay for it. In the eyes of the State, there was no alternative option but to provide funding for the special barges to onload and offload passengers. In this scenario, their WATNA (worst alternative to a negotiated agreement), had they not provided funding, was the possibility of the Superferry not coming to fruition. As the only inter-island ferry service and the cheapest travel alternative, the Superferry would have recouped its costs over time and avoided the legal headache had they sourced proper funding and made the wiser investments (Anforth and Singh 2012).

6.1 The Public – The Main Stakeholder

Additionally, all stakeholders should have been involved during the planning and development phase of the Superferry. A significant stakeholder that was overlooked during this phase was the the public at the vessel's destination. With more public involvement in the planning and development phase, Superferry executives and state officials may have learned earlier in the timeline that an environmental impact assessment and statement was important to the public, even though it was deemed not to be necessary. An EIS could have been conducted while the vessel was under construction, rather than when already in operation, thus eliminating and/or reducing the fears of those concerned. The Superferry did try to remedy environmental concerns through self-regulating policies and went above what was required in attempt to ease apprehensions. However, this may have been too little too late.

6.2 Hard Bargaining by the Opposition

Despite all attempts to mitigate conflict by the private business venture, its opponents appeared to have a hard-bargaining position. Mainly, the opposition refused to find compromise through the Superferry's efforts to accommodate concerns, and no middle ground was found. In their classic negotiation book, Fisher *et al.* (2011) state that "the soft negotiating game emphasizes the importance of building and maintaining a relationship." Maintaining a positive relationship with the opposition was important to the Superferry since those are the people that they hoped to one day provide a service to. Evidence of their soft position was equivalent to concessions made to cultivate a relationship. The opposition continued to have a close-minded position, especially in regards to the fact that the Superferry would be operating like any other vessel in the ocean (if not safer due to their self-imposed regulations and the latest technology used onboard). Fisher *et al.* (2011) go on to say that "[I]n positional bargaining…the negotiating game is biased in favor of the hard player. The process will produce an agreement, although it may not be a wise one." Even if an environmental impact statement was conducted or private funds were used for the entire operation, it appears the opposition would have still been against the Superferry as it affected their way of life.

7 CONCLUSION

The Hawaii Superferry had the potential of offering a cost effective, alternative mode of travel from Oahu to Maui, Kauai, and the Big Island. Although the private business venture was a for-profit business, it provided a service to the State of Hawaii that would have benefited the majority of its residents and tourists who would have used the service. By taking shortcuts and rushing its debut to the islands, the Superferry eliminated many of its alternatives that would have probably contributed towards their success. A major misstep in the planning was the lack of inclusion of opposing parties. Playing devil's advocate in its beginning stages could have addressed the concerns of the opposition while in the company's infancy, before operation costs were incurred.

Small, yet powerful, opposition groups took a hard bargaining position, which eventually led the Hawaii Superferry to bankruptcy. In addition, the erroneous decision by the State of Hawaii that allowed the Hawaii Superferry to operate without an EIS, obtain special exemption through the legislature for Superferry operation, and partially fund a private business venture exclusively, added fuel to the fire of the opposition. With no intention of changing its position against the Hawaii Superferry, protestors used the errors of the state and the Superferry to their advantage in order to preserve their way of life. With a hard bargaining position by their opponents, dispute resolution was impossible at the point conflict was introduced. With their backs to the wall, the Hawaii Superferry had no choice but to abandon ship.

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