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 MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
 CLARENCE KUKAUAKAHI CHING; FLORES-CASE
 OHANA; DEBORAH J. WARD; PAUL K. NEVES; and
 KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE,
 a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing Re
 Conservation District Use Permit
 (CDUP) HA-3568 for the Thirty Meter
 Telescope at the Mauna Kea Science
 Reserve, Kaohe Mauka, Hamakua
 District, Island of Hawaii,
 TMK (3) 4-4-015:009

) Case No. BLNR-CC-16-002
)
) MOTION TO DISQUALIFY
) BLNR'S AND HEARING OFFICER'S
) COUNSEL; MEMORANDUM IN
) SUPPORT OF MOTION;
) DECLARATION OF RICHARD
) NAIWIEHA WURDEMAN; EXHIBITS
) "A" – "E"; and CERTIFICATE OF
) SERVICE
)
)
)
)

DEPT. OF LAND &
 NATURAL RESOURCES
 STATE OF HAWAII

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RECEIVED
 OFFICE OF CONSERVATION
 AND COASTAL LANDS

MOTION TO DISQUALIFY BLNR'S AND HEARING OFFICER'S COUNSEL

COMES NOW Petitioners MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA, CLARENCE KUKAUAKAHI CHING, FLORES-CASE OHANA, DEBORAH J. WARD, PAUL K. NEVES, and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation (also referred to herein collectively as "Petitioners"), by and through their counsel undersigned, and hereby moves for an Order disqualifying the Board of Land and Natural Resources' and the Hearing Officer's Counsel, including, but not limited to, State of Hawaii Deputy Attorney Generals William J. Wynhoff, Julie H. China, and any other deputy attorney generals and Attorney

General Douglas Chin, himself, from any further participation in the contested case proceedings in the above-entitled matter and from any further participation in any matters relating to Mauna Kea. (See generally Rule 1.10 of the Hawaii Rules of Professional Conduct, in the case of representation), which conflicts all other members of the firm, if certain members are in a conflict).¹ These various attorneys have taken advocacy roles in support of and defending the issuance of the CDUP, including advocating that the factors for the issuance of the CDUP, under HAR § 13-5-30(c), had been met by the University of Hawaii at Hilo in its application, and on all other issues, as evidenced by their arguments throughout the agency appeal process through arguments before the Hawaii Supreme Court, in SCAP-14-0000873.

In addition, the Petitioners respectfully request that the Order of disqualification further be made effective, as it applies to both the Board of Land and Natural Resources and the Hearing Officer, *nunc pro tunc* to February 22, 2016, the day that the Order for Remand was issued by the Third Circuit in response to the Hawaii Supreme Court's decision and judgment in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224, 237 (2015)(see Exhibit "A" attached hereto which is a true and correct copy of the Order for Remand filed on February 22, 2016, in the Third Circuit Court).

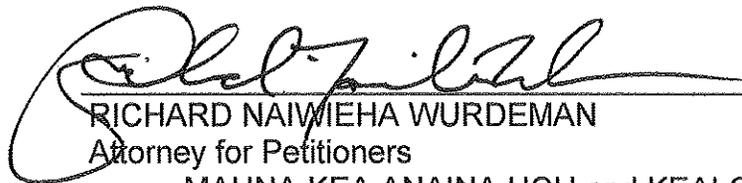
Petitioners assert that based on these issues as well as based on other matters with which the various deputy attorney generals in question have been involved with counsel for the University of Hawaii and the counsel for TMT, these various deputy attorney generals (and Attorney General) cannot provide fair and impartial advice, nor would it even "appear to be fair" and impartial, to a Hearing Officer who, at the same time, may be seeking advice from these same deputy attorney generals, in the instant

¹ The "Chinese wall" exception that has been recognized in the past for the Department of the Attorney General should not apply in this case where the Governor has expressed public support for the project and the Attorney General Douglas Chin has engaged in advocacy and enforcement (albeit wrong as subsequently found by the courts) as all other deputies could be presented with undue pressure about their continued employment and, as a result, the Petitioners submit they cannot be fair and impartial or even appear to be fair and impartial as advisors.

proceedings, and who is at the same time required to be fair and impartial. The Hearing Officer being provided advice in these instant proceedings by counsel who has already taken advocacy roles in support of and defending the issuance of the CDUP, based on what could be the same or similar evidence, would undermine due process and in addressing the concerns of the Hawaii Supreme Court in the BLNR placing the "cart before the horse," previously, and the Hawaii Supreme Court's remand to the BLNR (which is made up of different members than on February 25, 2011) or a new hearing officer, was clearly to ensure that the same taint and partiality would not be in existence in the new contested case hearing process.

This Motion is brought pursuant to Hawaii Administrative Rules ("HAR") §§ 13-1-12 and 13-1-34. This Motion is also based on the Memorandum in Support of Motion and the authorities and arguments set forth therein, Declaration of Richard Naiwieha Wurdeman, and exhibits attached hereto; the records and files in the instant case; and any further evidence that may be adduced and arguments that may be presented at a hearing on the said Motion.

DATED: Honolulu, Hawaii, July 18, 2016.



RICHARD NAIWIEHA WURDEMAN
Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA
PISCIOTTA; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J. WARD; PAUL
K. NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic non-profit
Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
) MEMORANDUM IN SUPPORT
A Contested Case Hearing Re) OF MOTION
Conservation District Use Permit)
(CDUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kaohe Mauka, Hamakua)
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

As this Board and the Hearing Officer is aware, the Hawaii Supreme Court found that the Board of Land and Natural Resources had previously acted improperly when the BLNR issued the Conservation District Use Permit to the University of Hawaii at Hilo prior to holding a contested case hearing and that “[n]o case or argument put forth by the UHH or BLNR persuade[d] [the Hawaii Supreme Court] otherwise.” Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai’i 376, 363 P.3d 224, 247 (2015). As the Hawaii Supreme Court also heavily emphasized in its decision and had raised with UHH and BLNR Counsel during oral arguments in Mauna Kea Anaina Hou, *supra*, “...the manner in which the justice system operates must be fair and must also appear to be fair.” Mauna Kea Anaina Hou, *supra*, 363 P.3d at 237 (Emphasis added); Sifagaloa v. Bd. of Trs. of Emps.’ Ret. Sys., 74 Haw. 181, 190, 840 P.2d 367, 371 (1992)(“[J]ustice must not only be done but must manifestly be seen to be done[.]”).

The Petitioners further submit, yet once again, that they have been deprived of due process and notice and an opportunity to be heard at a meaningful time and in a meaningful manner. See Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai’i 376, 363 P.3d 224, 237 (2015) *citing* Sandy Beach Def. Fund. v. City and Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

II. ARGUMENT.

In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decision-makers from being biased, and more specifically, prohibits decision-makers from prejudging matters and the appearance of having prejudged matters. Mauna Kea Anaina Hou, *supra*, 363 P.3d at 237-238; *citing Sussell* 71 Haw. at 109, 784 P.2d at 871 (concluding that where an adjudicator's actions while presiding over a matter gave rise to an appearance of impropriety, the circuit court erred in not enjoining the adjudicator from deciding the case); Winthrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)(“Not only is a biased decisionmaker constitutionally unacceptable, but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”)(*quoting Murchison*, 349 U.S. at 136, 75 S.Ct. 623); see also Cinderella v. Career & Finishing Schs., Inc. v. F.T.C., 425 F.2d 583, 591 (D.C.Cir.1970)(holding that the standard for evaluating the existence of improper prejudgment in an adjudicative context is whether “a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”). “Indeed, if there exists any reasonable doubt about the adjudicator’s impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice.” Mauna Kea Anaina Hou, *supra*, 363 P.3d at 238, *quoting Sussell*, 71 Haw. at 108, 784 P.2d at 870)(*quoting M. Redish & L. Marshall, Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84 (1986)); see Sifagaloa 74 Haw. at 190, 840 P.2d at 371 (same); see also Cinderella, 425 F.2d at 590 (disapproving of circumstances “which give the appearance that [a decisionmaker] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves”). It is abundantly clear that “[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance” due to “some identifiable potential bias.” Mauna Kea Anaina Hou, *supra*; *Redish & Marshall, Adjudicatory Independence*, 95 Yale L.J. at 483 (emphasis in original); *see Williams-Yulee v. Florida Bar*, - U.S. -, 135 S.Ct.1656, 16666, 191 L.Ed.2d 570 (2015)(stating that “public perception of judicial integrity” is a governmental interest of “the highest order”)(quotations omitted).

In the instant case, Attorney General Douglas Chin and Deputy Attorney Generals William J. Wynhoff and Julie H. China have already taken positions, through the appellate process following the first contested case hearing, and advocated in favor of and in support of the University of Hawaii at Hilo and the CDUP being properly issued with respect to all issues previously raised and all evidence previously presented by the Petitioners in opposition. See Exhibit "B" attached hereto which is a true and correct copy of Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and William J. Aila', Jr.'s Answering Brief, filed on March 25, 2015, in CAAP-14-0000873; see also Exhibit "C" attached hereto which is a true and correct copy of the Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne D. Case's Joinder in Appellee University of Hawai'i at Hilo's Opposition to Petitioners-Appellants' Emergency Motion for Stay Upon Appeal Filed November 16, 2015, filed on November 24, 2015, in SCAP-14-0000873.¹ These various attorneys have taken advocacy roles in support of and defending the issuance of the CDUP, including advocating that the factors for the issuance of the CDUP, under HAR § 13-5-30(c), had been met by the University of Hawaii at Hilo in its application, and they opposed all other issues presented by the Petitioners on the previous appeal, including the issue that lead to the reversal, and in which these various deputy attorney generals (and the Attorney General) were proven to be wrong. These or one or more of these attorneys also engaged in coordination and apparent discussion of issues with the counsel for the University of Hawaii at Hilo during the appellate process as well. See Exhibit "D" attached hereto, which are true and correct copies of emails that were produced and those that were reviewed to date by counsel following the production. Counsel would note that in the production, large amount of time blocks are not included, and it has not been disclosed whether emails for time blocks were deleted, and that's why they were never presented, or if they simply did not exist.

¹ Exhibits "B" and "C" are being attached as exhibits obviously to support the instant motion and the Petitioners have no other choice as to include these pleadings in the instant motion as the subject refuse to voluntarily recuse themselves and the attachments of such exhibits, and inclusion as part of the record, is necessary for inclusion as support in the instant motion.

Petitioners assert that based on these issues as well as based on other matters with which the various deputy attorney generals in question have been involved with counsel for the University of Hawaii and the counsel for TMT, these various deputy attorney generals (and Attorney General) cannot provide fair and impartial advice, nor would it even "appear to be fair" and impartial, to a Hearing Officer who, at the same time, may be seeking advice from these same deputy attorney generals, in the instant proceedings, and who is at the same time required to be fair and impartial. The Hearing Officer being provided advice in these instant proceedings by counsel who has already taken advocacy roles in support of and defending the issuance of the CDUP, based on what could be the same or similar evidence, would undermine due process and in addressing the concerns of the Hawaii Supreme Court in the BLNR placing the "cart before the horse," previously, and the Hawaii Supreme Court's remand to the BLNR (which is made up of different members than on February 25, 2011) or to a new hearing officer (see Mauna Kea Anaina Hou, *supra*, 136 Hawai'i at 399, 363 P.3d at 247), was clearly to ensure that the same taint and partiality would not be in existence in the new contested case hearing process. This bias and lack of fairness and impartiality and even the appearance of lack of fairness, the appearance of lack of impartiality and the perception of potential bias, all discussed in the *Mauna Kea Anaina Hou* case would all exist with the continued advice being provided by these various attorneys from the Department of the Attorney General. William J. Wynoff, Julie H. China, and any other deputy attorney generals and Attorney General Douglas Chin, himself, should be recused and disqualified from any further participation in the contested case proceedings in the above-entitled matter and from any further participation in any matters relating to Mauna Kea. (See also generally Rule 1.10 of the Hawaii Rules of Professional Conduct, in the case of representation), which conflicts all other members of the firm, if certain members are in a conflict).²

² The "Chinese wall" exception that has been recognized in the past for the Department of the Attorney General should not apply in this case where the Governor has expressed public support for the project and the Attorney General Douglas Chin has engaged in advocacy and enforcement (albeit wrong as subsequently found by the courts) as all other deputies could be presented with undue pressure about their

In addition, the Petitioners respectfully request that the Order of disqualification further be made effective, as it applies to both the Board of Land and Natural Resources and the Hearing Officer, *nunc pro tunc* to February 22, 2016, the day that the Order for Remand was issued by the Third Circuit in response to the Hawaii Supreme Court's decision and judgment in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224, 237 (2015)(see Exhibit "A," which is a true and correct copy of the Order for Remand, filed on February 22, 2016, in the Third Circuit Court).

Further, the coordination for enforcement, arrest, and prosecution by these various deputy attorney generals (and the Attorney General who advocated for the emergency rule making, as well, which was later struck down by the Honorable Ronald Ibarra of the Third Circuit, yet another example of the many errors made by the Department of the Attorney General to date) with counsel for University of Hawaii and counsel for TMT, of not only some of the other parties that were recently added to the instant contested case proceedings, but the coordination and enforcement of which also interfered with and violated the customary and traditional practices of the Petitioners and was in violation of their civil and international human rights. See Exhibit "D" attached hereto, which are true and correct copies of emails that were produced through the HRS Chapter 92F request and a true and correct copy of an article that appeared in the Hawaii Tribune Herald, dated July 10, 2015, that references certain emails that the media obtained, but which were not produced in response to the Chapter 92F requests, as well as a true and correct copy of a Hawaii Tribune Herald article, dated July 19, 2015, that summarized some of the emails that were received in the production of documents pursuant to the Chapter 92F request.

III. CONCLUSION.

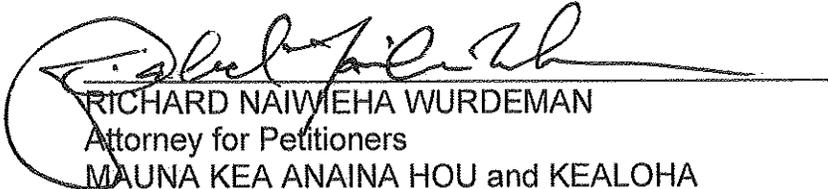
Based on the foregoing arguments and authorities, the Petitioners respectfully request that State of Hawaii Deputy Attorney Generals William J. Wynhoff, Julie H. China, and any other deputy attorney generals and Attorney General Douglas Chin, himself, from any further participation in the contested case proceedings in the above-

continued employment and, as a result, the Petitioners submit they cannot be fair and impartial or even appear to be fair and impartial as advisors.

entitled matter and from any further participation in any matters relating to Mauna Kea, as well as the Department of the Attorney General as a whole.

In addition, the Petitioners respectfully request that the Order of disqualification further be made effective, as it applies to both the Board of Land and Natural Resources and the Hearing Officer, *nunc pro tunc* to February 22, 2016, the day that the Order for Remand was issued by the Third Circuit in response to the Hawaii Supreme Court's decision and judgment in Mauna Kea Anaina Hou, *supra*.

DATED: Honolulu, Hawaii, July 18, 2016.



RICHARD NAIWIEHA WURDEMAN
Attorney for Petitioners
MAUNA KEA ANAINA HOU and KEALOHA
PISCIOTTA; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J. WARD; PAUL
K. NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic non-profit
Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
) DECLARATION OF COUNSEL
A Contested Case Hearing Re)
Conservation District Use Permit)
(CDUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kaohe Mauka, Hamakua)
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)
)

DECLARATION OF COUNSEL

I, RICHARD NAIWIEHA WURDEMAN, do declare as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and I represent the Petitioners, MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation, in the above-entitled matter.

2. I am competent to testify to the matters set forth herein and do so on personal knowledge, unless otherwise indicated.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Order for Remand, filed on February 22, 2016, in Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al., Civil No. 13-1-0349 (Third Circuit Court).

4. Attached hereto as Exhibit "B" is a true and correct copy of Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and William J. Aila's Answering Brief, filed on March 25, 2015, in CAAP-14-0000873. This is

the same brief that was before the Hawaii Supreme court in the same case under SCAP-14-0000873.

5. Attached hereto as Exhibit "C" is a true and correct copy of the Appellees Board of Land and Natural Resources, and Suzanne Case's Joinder in Appellee University of Hawai'i at Hilo's Opposition to Petitioners-Appellants-Appellants' Emergency Motion for Stay Upon appeal Filed November 16, 2015, filed on November 24, 2015, in SCAP-14-0000873.

6. Attached hereto as Exhibit "D" are true and correct copies of emails that were produced in Chapter 92F requests to Deputy Attorney Generals William Wynhoff, Julie China and Linda Chow, the copies of the requests having been filed as exhibits by Petitioners in earlier pleadings in the instant case.

7. Attached hereto as Exhibit "E" are true and correct copies of emails that were produced in Chapter 92F requests to Deputy Attorney Generals William Wynhoff, Julie China and Linda Chow, the copies of the requests having been filed as exhibits by Petitioners in earlier pleadings in the instant case, as well as true and correct copies of article from Hawaii Tribune Herald, dated July 10, 2015 and July 19, 2015, that were copied from the Hawaii Tribune Herald website.

8. I, RICHARD NAIWIEHA WURDEMAN, do declare under penalty of law do declare that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, July 18, 2016.

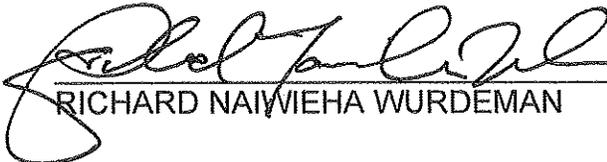

RICHARD NAIWIEHA WURDEMAN

EXHIBIT "A"

FILED

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L. CHINEN, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

Attorneys for Appellee
UNIVERSITY OF HAWAI'I AT HILO

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

MAUNA KEA AINANA HOU; KEALOHA
PISCIOTTA; CLARENCE KUKAUAKAHI
CHING; FLORES-CASE 'OHANA;
DEBORAH J. WARD; PAUL K. NEVES; and
KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic
non-profit corporation,

Appellants,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, STATE OF HAWAI'I;
DEPARTMENT OF LAND AND NATURAL
RESOURCES, STATE OF HAWAI'I;
SUZANNE D. CASE, in her official capacity
as Chair of the Board of Land and Natural
Resources and Director of the Department of
Land and Natural Resources; and
UNIVERSITY OF HAWAI'I AT HILO,

Appellees.

CIVIL NO. 13-1-0349
(AGENCY APPEAL)

ORDER FOR REMAND

[RE: CAAP-14-0873; SCAP-14-0873]

ORDER FOR REMAND

Pursuant to the opinion of the Supreme Court of the State of Hawai'i entered on
December 2, 2015 (the "Opinion"), and the related Judgment on Appeal entered on December

I hereby certify that this is a full, true and correct
copy of the original on file in this office.


Clerk, Third Circuit Court, State of Hawaii

29, 2015, this Court hereby vacates the Board of Land and Natural Resources' *Findings of Fact, Conclusions of Law and Decision and Order*, dated April 12, 2013, DLNR Docket No. HA-11-05 and vacates the issuance of the Conservation District Use Permit, and remands this matter to the Board of Land and Natural Resources so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with the Opinion.

DATED: Hilo, Hawai'i, February ____, 2016. **FEB 22 2016**

GREG K. NAKAMURA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:



IAN L. SANDISON
TIM LUI-KWAN
LINDSAY N. MCANEELEY

Attorneys for Appellee
UNIVERSITY OF HAWAI'I AT HILO



Attorney for Appellants
MAUNA KEA AINANA HOU; KEAOLOHA
PISCIOTTA; CLARENCE KUKAUAKAHI
CHING; FLORES-CASE 'OHANA;
DEBORAH J. WARD; PAUL K. NEVES; and
KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic
non-profit corporation



DOUGLAS S. CHIN
WILLIAM J. WYNHOFF
JULIE H. CHINA

Attorneys for Appellees
BOARD OF LAND AND NATURAL
RESOURCES, STATE OF HAWAI'I AND
DEPARTMENT OF LAND AND
NATURAL RESOURCES, STATE OF
HAWAI'I, AND SUZANNE D. CASE, in
her official capacity as Chair of the Board of
Land and Natural Resources and Director of
the Department of Land and Natural
Resources

EXHIBIT "B"

Electronically Filed
Intermediate Court of Appeals
CAAP-14-0000873
25-MAR-2015
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CAAP-14-0000873

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

MAUNA KEA ANAINA HOU;)	CIVIL NO. 13-1-0349
CLARENCE KUKAUAKAHI CHING;	)	(Agency Appeal)
FLORES-CASE 'OHANA; DEBORAH J.)	
WARD; PAUL K. NEVES; and KAHEA:	)	APPEAL FROM THE
THE HAWAIIAN ENVIRONMENTAL)	
ALLIANCE, a domestic non-profit	)	1) FINAL JUDGMENT, filed on May 5,
corporation,	)	2014
)	
Appellants-Appellants,	)	2) DECISION AND ORDER AFFIRMING
	)	BOARD OF LAND AND NATURAL
vs.	)	RESOURCES, STATE OF HAWAI'I'S
	)	FINDINGS OF FACT, CONCLUSIONS OF
BOARD OF LAND AND NATURAL	)	LAW AND DECISION AND ORDER
RESOURCES, STATE OF HAWAI'I;	)	GRANTING CONSERVATION DISTRICT
DEPARTMENT OF LAND AND	)	USE PERMIT FOR THE THIRTY METER
NATURAL RESOURCES, STATE OF	)	TELESCOPE AT MAUNA KEA SCIENCE
HAWAI'I; WILLIAM J. AILA, JR., in his	)	RESERVE DATED APRIL 12, 2013, filed
official capacity as Chair of the Board of	)	on May 5, 2014
Land and Natural Resources and Director of)	
the Department of Land and Natural	)	THIRD CIRCUIT COURT
Resources; and the UNIVERSITY OF)	
HAWAI'I AT HILO,	)	HONORABLE GREG K. NAKAMURA
	)	Judge
Appellees-Appellees.)	
)	

APPELLEES BOARD OF LAND AND NATURAL RESOURCES,
DEPARTMENT OF LAND AND NATURAL RESOURCES,
AND WILLIAM J. AILA, JR.'S ANSWERING BRIEF

APPENDICES "A" – "C"

STATEMENT OF RELATED CASES

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Resources, Department of Land and Natural Resources,
and William J. Aila, Jr., in his official capacity as Chairperson of the Board

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Glossary of Acronyms

AIS - Archaeological Inventory Survey
Board - Board of Land and Natural Resources
CDUA - conservation district use application
CDUP - conservation district use permit
COL - Conclusions of Law
CMP - Mauna Kea Comprehensive Management Plan
DLNR - Department of Land and Natural Resources
EIS - Environmental Impact Statement
FEIS - Final Environmental Impact Statement
FOF - Findings of Fact
HAR - Hawaii Administrative Rules
HELCO - Hawaii Electric and Light Company
HRAP - Hawai'i Rules of Appellate Procedure
HRCP - Hawai'i Rules of Civil Procedure
HRE - Hawai'i Rules of Evidence
HRS - Hawaii Revised Statutes
KOH - Kilakila 'O Haleakala
Master Plan - Mauna Kea Science Reserve Master Plan
MKSR - Mauna Kea Science Reserve
SHPD - State Historic Preservation Division
THINK Fund - The Hawaii Island New Knowledge Fund
TMT - Thirty Meter Telescope
UH - University of Hawai'i
UHH - University of Hawai'i at Hilo

This case concerns one of the most important projects in the world today. The Thirty Meter Telescope is a joint project by institutions from the United States, Japan, China, India, and Canada to construct the world's most advanced and powerful ground-based optical, near-infrared, and mid-infrared observatory.¹ TMT will enable astronomers to study objects in our own solar system and stars throughout our Milky Way and its neighboring galaxies, and forming galaxies at the very edge of the observable Universe, near the beginning of time.

This appeal is from a contested case that was held by the Board of Land and Natural Resources² on a conservation district use application submitted by the University of Hawai'i at Hilo for the construction of a telescope in the conservation district of Mauna Kea. Appellants Mauna Kea Anaina Hou, Clarence Kukauakahi Ching, the Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance (together "Appellants") were provided a full opportunity to introduce evidence, conduct cross examination, elicit expert testimony, and present argument. In evaluating the merits of a proposed land use in the conservation district the Board was required to apply eight criteria contained in its administrative rules. HAR § 13-5-30(c) (2011). The Board issued findings of fact, conclusions of law and a decision and order that determined that UHH could construct a new telescope on Mauna Kea. The burden is on Appellants to overcome the presumption that

¹ See www.tmt.org/about-tmt/partners.

² The Department of Land and Natural Resources is the state agency charged to manage, administer, and exercise control over all of the State's public lands, including submerged land and beaches. HRS § 26-15(b) (Cum. Supp. 2014); HRS § 171-3 (2011). DLNR is headed by an executive board called the Board of Land and Natural Resources. HRS § 26-15(a). During this appeal, William J. Aila, Jr. was succeeded by present Acting Chairperson Carty Chang.

the Board's decision is valid. In order to do so, Appellants must make a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences. Appellants have not made such a showing, and the circuit court's order and judgment should be affirmed.

I. CONCISE STATEMENT OF THE CASE

A. Nature of the Case

This case is a secondary administrative appeal pursuant to HRS chapter 91, concerning the Board's Findings of Fact, Conclusions of Law and Decision and Order following a contested case.

B. Course and Disposition of Proceedings in the Court Appealed From

The circuit court affirmed the Board's decision. The court entered both its order and the judgment on May 5, 2014. JEFS 40 at 30, 33.

C. Facts Material to This Appeal

1. Procedural History

On September 2, 2010, UHH submitted a CDUA and the TMT Management Plan for the TMT Project to the Department for approval. JEFS 100 at 8, FOF 8.³ The TMT Project consists of a 30-meter telescope, associated facilities and access road near the summit of Mauna Kea on the Big Island. JEFS 276 at 3-151; JEFS 278 at 2-150. The TMT Management Plan contains: (1) a general description of the proposed land use for the TMT Project; (2) existing conditions; (3) the proposed land use; (4) management actions and mitigation measures; and (5) monitoring and reporting requirements, and schedules. JEFS 52 at 27-99; JEFS 54 at 2-99. Extensive public

³ Citation to the Record on Appeal will be done by citing to the JEFS document number and the pdf page of that document, i.e. JEFS 115 at 351-52. When referring to the Board's Findings of Fact, Conclusions of Law Decision and Order, the citation will also include a reference to specific FOF or COL as appropriate.

informational hearings on UHH's CDUA were held in Hilo and Kona. JEFS 100 at 8, FOF 11-14.

On February 25, 2011, the Board, at its regular sunshine meeting (held pursuant to HRS chapter 92), preliminarily approved a conservation district use permit for the TMT Project. JEFS 100 at 8-9, FOF 15-16; JEFS 272 at 25-59; JEFS 276 at 3-151; JEFS 278 at 2-150. The Board specifically conditioned the permit on the requirement that “[i]f a contested case proceeding is initiated, no construction shall occur until a final decision is rendered by the Board in favor of the applicant or the proceeding is otherwise dismissed.” JEFS 60 at 100-103, Condition 21 (emphasis added). At the same meeting, the Board, on its own motion and pursuant to HAR § 13-1-29, directed that a contested case be held. JEFS 100 at 8, FOF 15.

On February 23, 2011, E. Kalani Flores submitted a written petition for a contested case on behalf of himself, B. Pualani Case, and their two daughters, Hawane Rios and Kapulei Flores. JEFS 100 at 20, FOF 26. Hawane Rios and Kapulei Flores were later withdrawn as potential parties. JEFS 100 at 13, FOF 51. Thus, at the contested case the Flores-Case ‘Ohana consisted of Mr. Flores and Ms. Case, who are Hawaiian cultural practitioners. JEFS 100 at 7, FOF 5. Mr. Flores also submitted a written petition on behalf of Mooinanea, who was identified as a “nature spirit and guardian of Lake Waiau [who] presently resides on the summit of Mauna a Wakea.” JEFS 100 at 10, FOF 29. On June 23, 2011, the Board denied standing to Mooinanea. JEFS 100 at 14, FOF 55-57.

On March 7, 2011, Kealoha Pisciotta submitted a written petition for a contested case on behalf of Mauna Kea Anaina Hou, an unincorporated association that advocates for the protection of Mauna Kea's cultural and natural resources. JEFS 100 at 7, 9, FOF 3, 18, 19. Marti Townsend submitted a written petition for a contested case on behalf of KAHEA: The

Hawaiian Environmental Alliance, a nonprofit Hawaii environmental organization. *Id.*, FOF 2, 20. Paul K. Neves, a native Hawaiian cultural practitioner, submitted a written petition for a contested case on his behalf and on behalf of ROOK I (the petition for ROOK I was subsequently withdrawn). *Id.*, FOF 7, 23. Clarence Kukauakahi Ching, a Hawaiian cultural practitioner, and Deborah Ward, a recreational user of Mauna Kea land, submitted written petitions for a contested case. JEFS 100 at 7, 9, 10, FOF 4, 6, 22, 25. Except as noted, all of the petitions were granted and all of these persons and entities participated in the contested case.

Paul Aoki, Esq. was selected to serve as the Hearing Officer. JEFS 100 at 11, FOF 31. The Hearing Officer conducted seven days of hearings. JEFS 100 at 17, FOF 81. He submitted his closely reasoned, 124 page, proposed recommendation to the Board on November 30, 2012. JEFS 88. On April 12, 2013, the Board issued its Findings of Fact, Conclusions of Law and Decision and Order, which approved the TMT Management Plan and granted the CDUP.⁴ JEFS 100 (attached as Appendix "A"). This CDUP supplanted the preliminary approval. JEFS 100 at 127, Decision and Order.

During its consideration of the CDUA, the Board identified and reviewed numerous research studies, plans, and impact assessments documenting the cultural practices and resources of Mauna Kea, including native Hawaiian traditional and customary practices. JEFS 100 at 63-64, FOF 344. The Board also identified and reviewed numerous research studies, plans, and impact assessments that identify the potential impacts that the TMT Project and astronomy-related development may have on cultural practices and resources, including native Hawaiian traditional and customary practices. JEFS 100 at 64-65, FOF 348. The Board assessed impacts

⁴ Appellants wrongly allude to improper conduct by the Board for not holding its contested case vote in public. *Opening Brief* at 6. The contested case was an administrative procedure held pursuant to HRS chapter 91, and not a public meeting held under HRS chapter 92.

to native Hawaiian traditional and customary practices and resources, and measures to reasonably protect them. JEFS 100 at 65-70, FOF 350, 352, 355-357, 360, 362-369.

Appellants filed their appeal to the circuit court on May 13, 2013.⁵ JEFS 32 at 30. The parties filed their briefs and oral argument on the merits was held on December 13, 2013. JEFS 17; JEFS 34 at 29, 130, 172, 222.

On the day of the oral argument, the Supreme Court issued its opinion in *Kilakila 'O Haleakala v. Board of Land and Natural Resources*, 131 Hawai'i 193, 317 P.3d 27 (2013). The parties and amicus TMT Observatory Corporation were allowed to brief whether the *Kilakila* case had any impact on the appeal, and following oral argument on this issue, on May 5, 2014, the circuit court issued its Decision and Order Affirming Board of Land and Natural Resources, State of Hawaii's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve Dated April 13, 2013 (attached as Appendix "B"). JEFS 13; JEFS 36 at 104, 175; JEFS 38 at 2, 163; JEFS 40 at 33.

Judgment was entered on May 5, 2014. JEFS 40 at 30. Appellants filed their Notice of Appeal on June 3, 2014. JEFS 40 at 54.

2. The Mauna Kea Science Reserve

The Mauna Kea Science Reserve is comprised of 11,288 acres, which the Mauna Kea Science Reserve Master Plan describes as a 10,763 acre cultural and natural preserve and a 525 acre Astronomy Precinct. JEFS 100 at 21, FOF 111. The MKSR covers all land on Mauna Kea above the 12,000 foot elevation, except for certain portions that lie within the Mauna Kea Ice

⁵ In their *Opening Brief*, Appellants incorrectly identify the circuit court as the trial court. The Board was the tribunal in this instance. Pursuant to HRS § 91-14 and HRCF Rule 72, the circuit court was authorized to review the Board's decision.

Age Natural Area Reserve. JEFS 100 at 21, FOF 108. The MKSR is located in the resource subzone of a conservation district. *Id.*, FOF 110. The Board has jurisdiction to regulate and administer land uses within the conservation district. JEFS 100 at 32, FOF 162; HRS § 183C-3 (2011), HRS § 183C-6 (2011).

In 1968, the State of Hawaii, through the Board, entered into a lease with the University of Hawaii for the MKSR, General Lease No. S-4191. JEFS 100 at 21, FOF 107. Current observatories at the MKSR include: the UH 2.2-Meter Observatory; the United Kingdom Infrared Telescope; the NASA Infrared Telescope Facility; the Canada-France-Hawaii Telescope; the Caltech Submillimeter Observatory; the James Clark Maxwell Telescope; the Very Long Baseline Array telescope; the W. M. Keck Observatory; the Subaru Observatory; the Gemini North Observatory; and the Submillimeter Array telescopes. JEFS 100 at 22, FOF 116.⁶

In June 2000, UH adopted the Mauna Kea Science Reserve Master Plan. JEFS 100 at 24, FOF 122. The Master Plan was created to serve as a policy and planning guide for UH. *Id.* Its goal is balanced stewardship of the UH Management Areas and local oversight of observatory development within the MKSR. *Id.* The Master Plan established a new on-island (Hawai'i Island) community-based management entity that advises the UHH Chancellor, who is responsible for overseeing the management of the UH Management Areas on Mauna Kea. JEFS 100 at 24, FOF 125. The management entity is composed of the Office of Mauna Kea Management, the Mauna Kea Management Board, and the native Hawaiian advisory council, Kahu Ku Mauna ("Guardians of the Mountain"). *Id.*

⁶ In addition to the MKSR, the lands managed by UH (UH Management Areas) include the Hale Pohaku mid-level facilities, and the Summit Access Road between Hale Pohaku and the MKSR. JEFS 100 at 21, FOF 111.

UH also developed the Mauna Kea Comprehensive Management Plan to govern its internal management of the UH Management Areas. JEFS 42 at 3-93; JEFS 44 at 2-99; JEFS 46 at 2-111; JEFS 100 at 26, FOF 134. The CMP is an integrated planning guide for resource management that is designed to ensure the protection of Mauna Kea's unique cultural, natural, recreational, educational, and scientific resources. JEFS 100 at 26, FOF 134. The CMP contains: (1) a summary description of the resources within the UH Management Areas; (2) identification of uses and activities; (3) identification of threats to Mauna Kea's resources; and (4) a total of 103 management actions and associated reporting requirements to mitigate threats and to protect various resources in the UH Management Areas. The Board approved the CMP, conditioned upon UH submitting for approval four additional sub-plans and a project development framework. JEFS 100 at 26-27, FOF 135. UH developed and submitted the Project Development Implementation Framework and four sub-plans to the Board. The four sub-plans – the Cultural Resources Management Plan; the Natural Resources Management Plan; the Decommissioning Plan for the Mauna Kea Observatories; and the Public Access Plan for the UH Management Areas on Mauna Kea – were approved by the Board. JEFS 100 at 27, FOF 137; JEFS 198, 200, 202, 204, 206, 208, 210, 212.

3. The TMT Project

In 2008, in consultation with UHH, the TMT Observatory Corporation began exploring the possibility of developing the TMT Project. JEFS 100 at 32, FOF 166. The TMT Observatory Corporation is a California non-profit public benefit corporation formed by the University of California and the California Institute of Technology for the purpose of fostering astronomy. *Id.*

The TMT Observatory will be located inside the MKSR. JEFS 100 at 34, FOF 180. The TMT Project will consist of a 30-meter telescope, instruments, dome, attached building, and parking; an access way with underground utilities; Hawaii Electric and Light Company upgrades to electrical transformers at the HELCO substation located near UH's mid-level support facility known as Hale Pohaku; and a facility in Hilo that will manage activities at and support operation of the TMT Observatory. JEFS 100 at 34-35, FOF 181. The footprint of the TMT dome, associated areas, and the area disturbed during construction will be roughly five acres. JEFS 100 at 36, FOF 188. A half-acre portion of this area has already been disturbed by the existing 4-wheel drive road and site testing equipment.⁷ *Id.* TMT is expected to take its first astronomical image no earlier than 2019. JEFS 100 at 40, FOF 208.

UHH published the Draft Environmental Impact Statement for the TMT Project on May 23, 2009. JEFS 100 at 33, FOF 170. KAHEA, MKAH, and Mr. Neves submitted written comments on the Draft EIS. *Id.* Ms. Ward submitted written comments on the Draft EIS on behalf of the Sierra Club's Hawaii Chapter. *Id.* The Governor of the State of Hawaii accepted the Final Environmental Impact Statement for the TMT Project on May 19, 2010. *Id.*, FOF 172. No challenges to the FEIS were ever filed. *Id.*, FOF 174.

Mitigation measures for the impacts from the TMT Project can be found in the FEIS, TMT CDUA, and TMT Management Plan. JEFS 100 at 42, FOF 217.

II. STANDARD OF REVIEW

Appellate review of a circuit court's review of an administrative decision is a secondary appeal. The appellate court determines whether the court under review was right or wrong in its

⁷ The original site testing occurred in the 1960s and site testing for the TMT Project was performed in the 2000s. JEFS 100 at 36, FOF 188.

decision. *Kauai Springs, Inc. v. Planning Comm'n of County of Kaua'i*, 133 Hawai'i 141, 163, 324 P.3d 951, 973 (2014).

Court review of an administrative agency's decision is set forth in HRS § 91-14(g) (Cum. Supp. 2014). An agency's "conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai'i 217, 229, 953 P.2d 1315, 1327 (1998) (quoting *Bragg v. State Farm Mut. Auto. Ins.*, 81 Hawai'i 302, 304, 916 P.2d 1203, 1205 (1996)). Furthermore, an "agency's decision carries a presumption of validity, and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." *Korean Buddhist*, 87 Hawai'i at 229, 953 P.2d at 1327.

Any agency findings that are not appealed are binding on the reviewing courts. *AlohaCare v. Ito*, 126 Hawai'i 326, 353, 271 P.3d 621, 648 (2012). Any findings that are challenged are reviewed pursuant to HRS § 91-14 (g)(5). Under HRS § 91-14 (g)(5), the appropriate standard of review is whether the findings of fact are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Korean Buddhist*, 87 Hawai'i at 229, 953 P.2d at 1327 (citations omitted). This type of review requires that:

[a]n administrative agency's findings of fact will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or the appellate court, upon a thorough examination of the record, is left with a definite and firm conviction that a mistake has been made.

Topliss v. Planning Comm'n, 9 Haw. App. 377, 383, 842 P.2d 648, 653 (1993).

Administrative conclusions of law are reviewed de novo. *Everson v. State*, 122 Hawai'i 402, 406-07, 228 P.3d 282, 286-87 (2010). "Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "This is particularly true where the law to be applied is not a statute but an administrative rule promulgated by the same agency interpreting it." *Camara v. Agsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984).

III. ARGUMENT⁸

A. The *Kilakila* Case Has No Impact on the TMT CDUP and Appellants are Not Entitled to a Double Helping of Due Process

Appellants' first point of error alleges that the Board erred in approving the TMT CDUA at its regular meeting on February 25, 2011, before holding a contested case. JEFS 302 (*Opening Brief* at 13). Appellants assert that the Board's actions violate due process and are inconsistent with the *Kilakila* case, and therefore, they are entitled to a second contested case with a different hearing officer. Appellants received a contested case and are not entitled to a second helping of due process.

⁸ Appellants raise broad objections to the Board's findings of fact and conclusions of law in their footnotes. *Opening Brief* at 8-11 fn. 3-7. These objections should be considered waived to the extent they are not specifically alleged in Appellants' four points of error and argued in their brief. See *Okada Trucking Co., Ltd. v. Bd. of Water Supply*, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002) ("Findings of fact ... that are not challenged on appeal are binding on the appellate court."); HRAP Rule 28(b) (4) (the opening brief must contain "[a] concise statement of the points of error set forth in separately numbered paragraphs.... Points not presented in accordance with this paragraph will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."); HRAP Rule 28(b)(7) ("Points not argued [in the opening brief] may be deemed waived."); *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1182 (9th Cir. 2001) ("Issues raised in a brief which are not supported by argument are deemed abandoned.").

Kilakila does not support Appellants' argument that the Board deprived them of due process by its preliminary approval of the CDUA on February 25, 2011. In fact, *Kilakila* squarely says that it did not decide any issue of due process. *Kilakila*, 131 Hawai'i at 202 n.5, 317 P.3d at 36 n.5. Appellants received the contested case they asked for before the Board made its final decision on the TMT CDUA on April 12, 2013. There was no error. In any event, the constitutional guarantee of due process does not guarantee perfection. *State v. Casipe*, 5 Haw. App. 210, 216, 686 P.2d 28, 34 (1984). "Due process encompasses the opportunity to be heard at a meaningful time and in a meaningful manner. Due process is flexible and calls for such procedural protections as the particular situation demands." *Kernan v. Tanaka*, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993). Appellants were parties to the contested case and allowed to present written and oral testimony, exhibits, and to cross-examine witnesses. JEFS 100 at 13, 17, FOF 52, 81, 83, 84. The issue decided by the Board at the contested case was whether UHH's proposed land use is consistent with HAR § 13-5-30(c). JEFS 63 at 23-24. Following the contested case, the Board approved the CDUA on April 12, 2013. JEFS 100 at 127, Decision and Order. Appellants have no legitimate basis for complaining about the abundant process they received.

The issue of whether, before ruling on a request for a contested case, the Board should have voted to grant a CDUA that allowed construction on a project to proceed – which is the question that was considered in *Kilakila* – is not relevant to our case. In *Kilakila*, the Board at its regular sunshine meeting on December 1, 2010, voted to approve UH's CDUA to construct a solar telescope on Haleakala. *Kilakila*, 131 Hawai'i at 196, 317 P.3d 30. *Kilakila* 'O Haleakala had both made an oral request and submitted a written petition for a contested case, thereby

perfecting its request prior to the meeting.⁹ *Id.*; see HAR § 13-1-29. The Board did not address the contested case petition at that meeting. KOH filed an appeal to the circuit court pursuant to HRS § 91-14 claiming that it had been denied a contested case hearing when the Board approved the CDUA at its regular meeting. *Kilakila*, 131 Hawai'i at 197, 317 P.3d at 31. The Supreme Court concluded that the Board's failure to either grant or deny KOH's perfected contested case request became an effective denial when the Board approved the CDUA on December 1, 2010. *Id.* at 203, 317 P.3d at 37. The Supreme Court found the Board's vote was a final decision and order and that the appeal was not moot even though a contested case hearing was subsequently held **specifically and only** because the Board "had neither stayed nor revoked the permit, not even when KOH appealed or [the Board] granted KOH a contested case hearing on the already-issued permit." *Id.* at 199, 317 P.3d at 33. The Court remanded to the circuit court for further proceedings on KOH's request for stay or reversal of the December 1, 2010 CDUP (but notably, not the CDUA approved after the contested case).¹⁰

A critical element from the *Kilakala* case is missing in our case because here, the February 25, 2011 CDUA approval was stayed. Construction was not allowed to proceed unless and until: (1) UHH won the contested case; and (2) the Board made a final decision approving

⁹ When the Board preliminarily approved the TMT CDUA with conditions on February 25, 2011, there were no perfected petitions for a contested case. HAR § 13-1-29 (2009) (requires an oral or written request by the close of the board meeting followed by a written petition no later than ten calendar days after the close of the board meeting); JEFS 60 at 6-43; JEFS 100 at 8-9, FOF 15-30 at 3-5.

¹⁰ At its February 11, 2011 regular sunshine meeting, the Board granted KOH's contested case petition and subsequently held a contested case on the CDUA. *Id.* at 198, 317 P.3d at 32. Following the contested case, the Board approved the CDUA, and that decision has since been affirmed by both the circuit court and this Court. See *Kilakila 'O Haleakala v. Board of Land and Natural Resources*, Civil No. 12-1-3070-12 RAN, CAAP-13-0003065 (Oct. 17, 2014), SCWC-13-0003065 (*cert. accepted* Jan. 7, 2015). This Court may take judicial notice of this action as a "matter of public record and easily verifiable." *Williams v. Aona*, 121 Hawai'i 1, 11, n. 6, 210 P.3d 501, 511 n.6 (2009); HRE Rule 201.

the CDUA and allowing the TMT Project to proceed. *See* JEFS 60 at 40. “Chair Aila said that with regards to the bulldozers one of the conditions of the CDUP they just approved is that no construction can begin until the contested hearing is adjudicated.” JEFS 60 at 42. The approval of the CDUA was preliminary. The circuit court properly concluded that “*Kilakila* does not apply to the [Board’s] February 25, 2011 vote, and that reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.” JEFS 40 at 42.

Despite their protestations, Appellants understood this distinction because unlike the petitioners in the *Kilakila* case, they did not appeal the Board’s February 25, 2011 decision. This fact is significant for three reasons. First, Appellants did not appeal because they correctly understood that an appeal was premature and would be dismissed. Second, if Appellants were wrong then and right now – that is, if they could have appealed back in February 2011 – then the time to appeal expired long ago. Section 91-14 (b), HRS, requires that an appeal be filed within 30 days of an appealable ruling. Third, Appellants received their contested case and acquiesced in going forward with their claims in that proceeding. The Board’s February 25, 2011 decision is both irrelevant and long past any possibility of review or appeal. The Court cannot create for Appellants an appellate issue that they themselves did not preserve. *See, e.g., State ex rel. Office of Consumer Protection v. Honolulu Univ. of Arts, Sciences & Humanities*, 110 Hawai‘i 504, 518, 135 P.3d 113, 127 (2006) (issues not properly preserved at the trial level are deemed waived). Therefore, the **only** issue before this Court is whether the circuit court properly determined that the Board’s April 12, 2013 decision complies with HAR § 13-5-30(c).

As a remedy for allegedly violating their right to due process, Appellants propose that a second contested case be held before a new hearing officer. *Opening Brief* at 16. What Appellants seek is a second helping of due process. Holding another contested case will

accomplish nothing since the hearing officer only makes recommendations which the Board is free to reverse, modify, or adopt. HAR § 13-1-45 (2009). Ultimately, the decision on a CDUA is made by the Board. HAR § 13-5-24 (2011); HAR § 13-5-34 (2011). Under the procedures required by the Rules, there is no alternative to the Board deciding the CDUA. *Id.* Absent a showing that the Board was acting on some disqualifying interest during the contested case, which Appellants have not pointed to and cannot provide any evidence in support of, there is no point in granting a double helping of due process by doing it all over again.¹¹

B. It was Not Clearly Erroneous for the Board to Find that the TMT Project Met the Eight Criteria Set Forth in HAR § 13-5-30(c)

Appellants' **second point of error** alleges that the TMT Project meets none of the eight criteria set forth in HAR § 13-5-30(c). *Opening Brief* at 18. The reliable, probative and substantial evidence on the whole record supports the Board's conclusion that the TMT Project meets the criteria for the issuance of a CDUP. JEFS 100 at 126, COL 254.

HAR § 13-5-30(c) requires the Board to apply certain criteria in evaluating the merits of a proposed land use within the conservation district. The eight criteria are:

- (1) The proposed land use is consistent with the purpose of the conservation district;
- (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;

¹¹ The Board's decision to grant preliminary approval of the CDUA during the February 25, 2011 regular meeting does not, by itself, indicate bias or prejudice sufficient to overcome the presumption that administrative adjudicators carry out their duties with honesty and integrity. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The United States Supreme Court has made it clear that administrators serving as adjudicators are presumed to be unbiased. *Wolkenstein v. Reville*, 694 F.2d 35, 41-42 (2nd Cir. 1982) (citing *United States v. Morgan*, 313 U.S. 409, 421 (1949); *Withrow*, 421 U.S. at 47; *Schweiker v. McClure*, 456 U.S. 188 (1982)). Appellants have not shown any sufficient interest on the part of the Board members to overcome the "presumption of honesty and integrity" that attaches by virtue of their office. *Sifagaloa v. Bd. of Trs. of Employees' Ret. Sys.*, 74 Haw. 181, 192, 840 P.2d 367, 372 (1992).

- (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, Haw. Rev. Stat., entitled “Coastal Zone Management,” where applicable;
- (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region;
- (5) The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
- (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;
- (7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
- (8) The proposed land use will not be materially detrimental to the public health, safety and welfare.

When reviewing an application for a conservation district use permit, the Board must also consider mitigation measures set forth in the accompanying environmental impact statement.

Morimoto v. Bd. of Land and Natural Resources, 107 Hawai‘i 296, 303-304, 113 P.3d 172, 179-80 (2005). Specifically, Appellants assert that criteria 1, 4, 5, 6, 7, and 8 have not been met. We address these criteria in the non-sequential order raised in the *Opening Brief*.

1. The TMT Project will Not Cause Substantial Adverse Impact to Existing Natural Resources within the Surrounding Area, Community or Region (HAR § 13-5-30(c)(4)) (Criteria 4)

The fourth criterion is that the “proposed land use will not cause substantial adverse impact to **existing natural resources** within the surrounding area, community or region.” HAR § 13-5-30(c)(4) (emphasis added). Natural resources are defined in the Rules as “plants, aquatic life and wildlife, cultural¹², historic, recreational, geologic, and archeological sites, scenic areas, ecologically significant areas, watershed, and minerals.” HAR § 13-5-2 (2011).¹³

¹² Even though cultural practices are not encompassed within the definition of “natural resources,” the Board, in its HAR § 13-5-30(c)(4) assessment, considered whether the proposed

a. **Following the Rules, the Board Considered How the TMT Project Would Impact Existing Natural Resources**

Appellants argue that because the summit area of Mauna Kea has already suffered significant adverse impacts, any new undertaking will have substantial adverse impacts. *Opening Brief* at 19. Appellants wrongly advocate evaluating the TMT Project's impact starting from the mountain in an untouched state. That is not correct. The express language in the rules requires an assessment based on “existing natural resources.” HAR § 13-5-30(c)(4) (emphasis added). Under the principles of statutory construction, the starting point is the statute itself:

Courts are bound to give effect to all parts of a statute, and [] no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute. Words are given their common meaning unless some wording in the statute requires a different interpretation.

Keliipuleole v. Wilson, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997) (citations, quotes, and brackets omitted). The same principles apply to administrative rules. The court must first look at the rule itself:

If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

International Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel Co., 68 Haw. 316, 323, 713 P.2d 943, 950 (1986) (citations omitted).

Appellants rely on the TMT Project FEIS to argue their point. The FEIS concluded that:

In general, the Project will add a limited increment to the current level of cumulative impact. Therefore, those resources that been substantially,

land use would cause substantial adverse impact to cultural practices. JEFS 100 at 101-102, COL 106.

¹³ Prior to a 2011 rule amendment, natural resources were defined as “plants, aquatic life and wildlife, cultural, historic and archeological sites and minerals.” HAR § 13-5-2 (1994).

significantly, and adversely impacted by past and present actions would continue to have a substantial, significant, and adverse impact with the addition of the project. For those resources that have been impacted to a less than significant degree by past and present actions, the Project would not tip the balance from a less than significant level to a significant level and the less than significant level of cumulative impact would continue.

JEFS 214 at 16. One of the accepted definitions of “incremental” is “of, relating to, being, or occurring in especially small increments.” *Merriam-Webster Online Dictionary* at <http://www.merriam-webster.com/dictionary/incremental>. The Board could interpret the term “incremental” in the FEIS as meaning only a slight change. This interpretation is consistent with the Board’s observation that “the TMT Project will not cause substantial adverse impact to plants, aquatic life and wildlife, cultural, historic, and archaeological sites, minerals, recreational sites, geologic sites, and scenic areas, ecologically significant areas, and watersheds.” JEFS 100 at 101, FOF 101.

Additionally, the identification of project impacts in the FEIS as being “substantial, significant, and adverse” was not the end of the Board’s analysis. The Board looked beyond the conclusory terminology and considered actual impacts. An EIS is intended as an informational document to be used by the decision maker. An EIS is intended to provide sufficient information to enable a decision maker to consider fully the environmental facts involved and to make a reasoned decision. As described by the Court in *Price v. Obayashi*:

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

81 Hawai‘i 171, 182, 914 P.2d 1364, 1375 (1996) (*quoting Life of the Land v. Ariyoshi*, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978)). Although the *Price* case discussed the test regarding the

sufficiency of an EIS, it is equally applicable here. The consideration of environmental facts does not require strict adherence to the subjective terms and labels utilized by the drafter of the EIS. Instead, the decision maker may, and should look beyond mere labels and instead look at the specific environmental factors and impact that are anticipated in connection with the subject project. In this case, that is exactly what the Board did. The Board, as the decision maker, reviewed numerous research studies, plans, and impact assessments, of which the FEIS was one such study.

b. The TMT Project Will Not Cause Substantial Adverse Impact to Archaeological and Historic Resources, Cultural Resources and Practices, and Biological Resources

Appellants assert that the TMT Project will have substantial adverse impact to archaeological and historical resources, cultural resources and practices, and biological resources, and that the mitigation measures are not adequate. *Opening Brief* at 20. The evidence does not support these assertions. The Board's decision extensively considered impacts to archaeological and historical resources, biological resources, cultural resources and practices, visual and aesthetic resources, hydrology and water resources, hazardous waste, solid waste, and wastewater, together with UHH's proposed mitigation measures. JEFS 100 at 52-78, FOF 281-421. Based on the testimony and evidence, the Board concluded that the reliable, probative, substantial, and credible evidence demonstrates that the TMT Project will not cause substantial adverse impact to plants, aquatic life, wildlife, cultural, historical, and archaeological sites, cultural practices, minerals, recreational sites, geologic sites, scenic areas, ecologically significant areas, and watersheds. *Id.* at 101-103, COL 101, 104, 108, 116. We limit our discussion here to the resources raised in the *Opening Brief*.

Archaeological and Historic Resources: Archaeological Inventory Surveys have been conducted on and adjacent to the MKSR to document the historic properties and cultural resources of the MKSR. JEFS 100 at 58, FOF 318. In addition, the Mauna Kea Historic Preservation Plan was prepared in conjunction with the Master Plan. *Id.* A Cultural Resources Management Plan was also prepared as a sub-plan to the CMP in order to identify and manage the cultural resources for the entire UH Management Areas. *Id. at 27, FOF 137-139, 318.*

No archaeological sites have been located on the TMT Observatory site, the TMT access way, or the staging area. *Id. at 59-64, FOF 325.* “Find spots” are sites that resemble historic properties but are likely of more recent vintage. *Id. at 58, FOF 320.* Two “find spots” located within the TMT Project area, which were initially thought to be a pre-contact shrine and a pre-contact temporary habitation complex, are not historic properties. *Id. at 60, FOF 327.* They were determined by State Historic Preservation Division staff to be a modern structure constructed within the last 10 years and a natural geological feature that only appeared to have been man-made. *Id.* The TMT Project site has been extensively and intensively surveyed and there are no known burials of human remains located in the TMT Project area. *Id., FOF 329.* All AISs have been reviewed by SHPD, and SHPD has determined that the TMT Project will have no significant impact on historic properties. *Id. at 61, FOF 333.*

In compliance with the CMP and to mitigate any potential impacts on historic properties, the TMT Project will implement mitigation measures that include a Cultural and Natural Resources Training Program for all staff and construction workers; location and design efforts to mitigate the Observatory’s visual effect; and funding programs specific to Hawaiian culture and archaeological resources. *Id. at 62, FOF 338-341.* The TMT Project will also develop an

Archaeological Monitoring Plan that will be submitted to SHPD for review and approval. *Id.* at 61, FOF 334.

Cultural Resources and Practices: The Board's decision considered the impacts to cultural resources, not only in the context of the conservation district use requirements, but also under *Ka Pa'akai O Ka'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000) . JEFS 100 at 63-72, 93-94, 113-116, 118-119, FOF 343-383, COL 33-36, 189-205, 215-221. Appellants' **fourth point of error** concerns whether the Board fulfilled its obligations under *Ka Pa'akai*. *Opening Brief* at 31. We address the impact to cultural resources and practices under both HAR § 13-5-30(c)(4) and *Ka Pa'akai*.

In order to fulfill its duty to protect traditional and customary native Hawaiian rights to the extent feasible, an agency must both examine and make specific findings and conclusions as to:

- (1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area;
- (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
- (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084 (footnotes omitted).

Numerous research studies, plans, and impact assessments documenting the cultural practices and resources of Mauna Kea, including native Hawaiian traditional and customary practices, were identified and reviewed by the Board. JEFS 100 at 63-64, FOF 344. Numerous research studies, plans, and impact assessments that identify the potential impacts that the TMT Project and astronomy-related development may have on cultural practices and resources,

including native Hawaiian traditional and customary practices, were identified and reviewed by the Board. *Id.* at 64-65, FOF 348.

Native Hawaiians have traditionally viewed the summit region of Mauna Kea as the realm of the ancestral akua (gods, goddesses, deities) who are believed to take earthly form as the cinder cones (pu'u), the waters of Lake Waiau, and other significant features of the mountain's landscape. *Id.*, FOF 347. The summit region of Mauna Kea is considered to be a sacred area and serves as a site for various cultural practices including traditional and modern shrine construction, pilgrimage, prayer, and offerings. *Id.* at 65-66, FOF 350.

The area that will be occupied by the TMT Observatory will not be available for future cultural practices. *Id.* Access for cultural practitioners to **culturally significant sites** on Mauna Kea, however, will be maintained. *Id.* at 62, FOF 357. For instance, water from Lake Waiau is collected by some cultural practitioners for healing and ritual practices. *Id.* at 66, FOF 352. The TMT Project will not affect this practice or the water quality of Lake Waiau. *Id.* With the exception of the area occupied by the TMT Observatory, the vast majority of the MKSR as well as the Mauna Kea Ice Age Natural Area Reserve, including Lake Waiau, will be available for umbilical cord (piko) deposition, which has historically been associated with the Lake Waiau area. *Id.*, FOF 353. There are no known burials in the TMT Project site. *Id.* at 67, FOF 355. Annual solstice and equinox observations generally occur on Pu'u Wekiu. *Id.*, FOF 356. The TMT Observatory site cannot be seen from Pu'u Wekiu. *Id.*

Numerous research studies, plans, and impact assessments that identify the mitigation measures needed to reasonably protect cultural practices and resources on Mauna Kea, including native Hawaiian traditional and customary practices, were identified and reviewed by the Board. *Id.* at 67-68, FOF 360. Mitigation measures to protect cultural resources and practices included

the selection of a site that is away from known historic and traditional cultural properties and cultural resources, and that minimizes the impact of the TMT Project on viewplanes. Additional mitigation measures will include consultation with Kahu Ku Mauna, the Hawai'i Island community, and cultural practitioners regarding implementation of a Cultural and Natural Resources Training Program; minimization of TMT Observatory operations to accommodate cultural activities on culturally sensitive days of the year; development of an Archaeological Monitoring Plan; development of an Archaeological Mitigation Plan; implementation of a Ride-Sharing Program to reduce the number of trips between Hale Pohaku and the TMT Observatory; and commitment to funding The Hawaii Island New Knowledge (THINK) Fund which is described in greater detail below under **Mitigation Measures**. *Id.* at 68-70, FOF 362-369.

Evidence of contemporary cultural practices was also submitted during the contested case. Many of these practices focused on the view from the summit of Mauna Kea. JEFS 100 at 71-72, FOF 378-382. The TMT Observatory will not be visible from the summit, located on Pu'u Wekiu, and therefore, will not interfere with any practices involving viewplanes from Pu'u Wekiu. *Id.* at 71, FOF 380.

The Board properly concluded that "[t]aking into account the many measures proposed to mitigate the Project's potential impacts on cultural practices confirms that the TMT Project will not cause substantial adverse impact to cultural practices." *Id.* at 102-103, COL 112.

Appellants assert that the Board improperly delegated the third *Ka Pa'akai* duty - feasible action to protect native Hawaiian rights - to UHH by imposing various conditions on UHH. *Opening Brief* at 32. *Ka Pa'akai* held that an agency cannot delegate its duty to protect native Hawaiian rights to a private entity. *Ka Pa'akai*, 94 Hawai'i at 52, 7 P.3d at 1089. It is not entirely clear that improper delegation is even an issue because UHH is a State entity. HRS §

304A-101 (2007); HRS § 304A-103 (2007). In any event, the Board has not delegated its authority to UHH. The Board performed its own *Ka Pa'akai* analysis. JEFS 100 at 63-65, 67-68, 118-119, FOF 344, 348, 360, COL 215-221. The Board retains supervisory and ultimate control over UH's leased lands and over any decisions that might have an impact on native Hawaiian traditional and customary practices. The Board approved the CMP and sub-plans, the TMT CDUP, and the TMT Management Plan, and it retains the authority to enforce compliance with these plans and the permit. JEFS 100 at 127, Decision and Order; HAR § 13-5-6 (2011); HAR § 13-5-44 (2011). The Board properly concluded that there has been no improper delegation and the *Ka Pa'akai* requirements have been satisfied. JEFS 100 at 119, COL 221.

Appellants claim that UHH used "some very strategic litigation tactics" to confuse them, and that as a result, they "failed to establish the elements of the existence of native cultural and traditional practices at Mauna Kea." *Opening Brief* at 34. During the contested case, the parties stipulated that Appellants could "testify as experts in **their** cultural practices regarding Mauna Kea." JEFS 110 at 9, TR 8/25/11 at 30. Appellants were afforded the opportunity to provide written direct testimonies and oral summaries of their testimonies. JEFS 100 at 17-18, FOF 83-85. Even if Appellants were found to be experts in all Hawaiian cultural practices, this would not have made a difference in the outcome of the contested case because the evidence offered by Appellants did not include testimony or evidence to support a finding that these practices are connected to a firmly rooted traditional or customary native Hawaiian practice dating back to 1892. JEFS 100 at 70, FOF 372.

Biological Resources: Appellants briefly mention the Douglas' bladder fern and the wekiu bug. *Opening Brief* at 21. The TMT Project will implement mitigation measures with regard to potential impacts on biological resources. *Id.* at 56, FOF 305.

Regarding the biological resources of concern to Appellants, there are no threatened or endangered species of flora in the TMT Project area. JEFS at 53, FOF 289. Moreover, there are no species of flora unique to the TMT Project site. *Id.*, FOF 290.

There are no currently listed threatened or endangered species known to occur in the Astronomy Precinct of the MKSR. *Id.* at 57, FOF 312. Only arthropods live above 12,800 feet on Mauna Kea. *Id.* at 53, FOF 292. The wekiu bug, an arthropod, is not known to exist anywhere other than Mauna Kea. *Id.*, FOF 293. The TMT Observatory will be located on a lava substrate which is not considered ideal for wekiu bug habitat. *Id.* at 54-55, FOF 296. On October 26, 2011, the United States Fish & Wildlife Service formally removed the wekiu bug as a candidate for listing as an endangered species under the Endangered Species Act. *Id.* at 57, FOF 311.

Mitigation Measures: The Hawaii Supreme Court has held that HAR § 13-5-42(a)(9) (2011), which makes mitigation measures in the FEIS automatic conditions of the CDUP, requires the Board to consider mitigation measures as part of its assessment. *Morimoto*, 107 Hawai'i at 179, 113 P.3d at 303.

Appellants object to the TMT Project's financial commitments, claiming they are insufficient to mitigate the impact of the TMT Project. *Opening Brief* at 23. Mitigation of impacts has been a fundamental component of the TMT Project from its inception and at all times thereafter. JEFS 100 at 42, FOF 217. The TMT Project has committed to funding a Community Benefits Package of one million dollars annually for scholarships and mini-grants, educational programs, college awards, educational programs specific to Hawaiian culture, astronomy, math and science, and community outreach. *Id.* at 40-41, FOF 210, 212. The benefits package will be administered by the THINK Fund Board of Advisors which will consist

to minimize impacts to sensitive arthropod habitat, cultural practices, viewplanes, historic sites, and traditional cultural properties. *Id.* at 35, 42, FOF 182, 218. The TMT Observatory has been designed to mitigate its visual impact by: (1) reducing the size of the dome; (2) designing the telescope with a shorter focal length; (3) designing the dome to fit very tightly around the telescope; (4) finishing the dome with an aluminum-like exterior coating, which will reflect the sky and reduce the visibility of the dome throughout the majority of the day; and (5) finishing the support building and fixed structure exterior with a lava color to better blend in with the surrounding area. *Id.* at 35-43, FOF 184, 222.

Other mitigation measures unchallenged by Appellants include:

- A zero-discharge wastewater system
- A Waste Minimization Plan
- Recycling
- A Materials Storage/Waste Management Plan
- A Spill Prevention and Response Plan
- Restoration of the staging area and a presently closed access road
- A Cultural and Natural Resources Training Program for all TMT Project staff and construction workers
- Development of educational material related to Mauna Kea
- Other mitigation measures identified in the TMT Project CDUA and the Decision and Order. *Id.* at 43-44, 127-131, FOF 224-235, Decision and Order.

The Board properly found and concluded that the proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region. JEFS 100 at 78, 103, FOF 421, COL 116.

2. The TMT Project is Consistent with the Purpose of the Conservation District (HAR § 13-5-30(c)(1)) (Criteria 1)

The first criterion is that the proposed land use be “consistent with the purpose of the conservation district.” HAR § 13-5-30(c)(1). Appellants assert that the TMT Project is not consistent with the purpose of a conservation district. *Opening Brief* at 26. This statement is not

supported by law. Astronomy facilities (under a management plan and board permit) are an identified allowable use in the resource subzone of a conservation district. HAR § 13-5-24.

The Land Use Commission and conservation districts were statutorily established in 1961. Act 187, 1961 Haw. Sess. Laws (SLH). The purpose of H.B. 1279, 1961 Leg., Reg. Sess. (Haw. 1961)¹⁴ was to “protect and encourage the development of land in the State for those uses for which they are best suited, the power to zone should be exercised by the State and the methods of real property assessment should encourage rather than penalize those who would develop these uses.” S. Stand. Comm. Rep. 1054, 1961 Senate Journal 1027. Act 187 focused on the best utilization of the development potential of land in the State. Although the authority to establish conservation districts was given to the newly created land use commission, zoning powers within the conservation districts were delegated to the department of land and natural resources. § 98H-3, RLH 1955 (Supp. 1961).

The lands that were initially classified as “conservation districts” were those lands that had previously been designated as forest and water reserve zones pursuant to § 19-70 RLH 1955 (Supp. 1961). § 98H-3, RLH 1955 (Supp. 1961).¹⁵ The forest and water reserve zones were established by the Board of Commissioners of Agriculture and Forestry¹⁶ which was given the authority to

establish subzones within the forest and water reserve zones, which subzones shall be restricted to certain uses. In establishing permitted uses

¹⁴ H.B. 1279 was enacted as Act 187, 1961 SLH (later codified as chapter 98H, Rev. L. of Haw. (RLH) 1955 (Supp. 1961), the precursor to HRS chapter 205).

¹⁵ The incorporation of the “forest and water reserve zones” as the establishment of the boundaries of the conservation district has been carried over into HRS § 205-2(a)(4) (Cum. Supp. 2014).

¹⁶ The functions and authority of the Board of Commissioners of Agriculture and Forestry was transferred to the DLNR. § 14-20, RLH 1955 (Supp. 1961).

in such subzones, the board shall give full consideration to all available data as to soil classification and physical use capabilities of the land so as to allow and encourage the highest economic use thereof consonant with requirements for the conservation and maintenance of the purity of the water supplies arising in or percolating through such land.

§ 19-70(a), RLH 1955 (Supp. 1961).

Conservation districts originally encouraged the highest economic use of conservation districts as long as such use did not affect the water supplies in the area. It would have been consistent to establish a conservation district subzone at the top of Mauna Kea that allowed for the construction of astronomy facilities as such facilities would not affect water supplies in the area. Finding that astronomy facilities are consistent with the original purpose of conservation districts is further supported by the history of this area.

In 1964, testing began to demonstrate that conditions at the summit made Mauna Kea a premier location for astronomical observation. JEFS 100 at 27, FOF 115. In 1968, the State of Hawai'i leased the MKSR to UH to use as a scientific complex. *Id.* at 21, FOF 107, 109. The lease provides that:

4. Specified Use. The land hereby leased shall be used by the Lessee as a scientific complex, including without limitation thereof an observatory, and be a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex.

Activities inimical to said scientific complex shall include light and dust interference to observatory operation and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

Id., FOF 109. UHH began operating an observatory on Mauna Kea in 1968. *Id.* at 22, FOF 116.

The TMT Project is consistent with the purpose of the conservation district “[b]ecause it provides for ‘appropriate management’ and for use that promotes the long-term sustainability of resources and the public health, safety, and welfare.” *Id.* at 46, FOF 244.

Implemented in accordance with its plans, the TMT Project will not consume significant natural resources; will not pollute; will not harm species of concern, or the environment generally; will not interfere with customary and traditional cultural practices; will not impede recreational uses; and will not threaten the public health, safety, or welfare.

Implemented in accordance with its plans, the TMT Project will make optimum and sustainable use of the natural resources that make Mauna Kea an ideal location for astronomy; will facilitate the management of Mauna Kea; will be an enormous benefit to the public welfare by contributing significant funds to Hawaii Island and providing jobs, injecting large amounts of money into the local economy, contributing new programs and funds to Hawaii Island schools, enabling UHH to remain at the forefront of astronomy in research and education, and contributing to the overall knowledge base of mankind.

Id. at 48, FOF 258, 259. The Board properly found and concluded that the TMT Project is consistent with the purpose of a conservation district. *Id.* at 48, 96-97, FOF 260, COL 54, 62.

3. The Existing Physical and Environmental Aspects of the Land, Such as Natural Beauty and Open Space Characteristics, Will Be Preserved or Improved Upon (HAR § 13-5-30(c)(6)) (Criteria 6)

The sixth criterion is that the “existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.” HAR § 13-5-30(c)(6). Appellants assert that none of the activities authorized by the CDUP will improve the natural beauty and open space characteristics of the conservation district. *Opening Brief* at 27. The stated objective of the conservation district resource subzone is to ensure, with proper management, the sustainable use of the natural resources of those areas. HAR § 13-5-13 (2011).

The current observatories on Mauna Kea are visible from 43 percent of Hawai'i Island. The TMT Project will increase that to 44.2 percent. JEFS 110 at 82, FOF 440. The decision was made to locate the TMT Observatory away from more culturally and visually sensitive areas. *Id.* at 81, FOF 437. The Board may approve a proposed land use despite some environmental impacts to the conservation district, provided that the project incorporates appropriate measures and conditions to mitigate the project's adverse impacts to a level less than substantial. *See Morimoto*, 107 Hawai'i at 305-306, 113 P.3d at 181-182. Measures, involving the TMT Project's location and design, have been incorporated to reduce its visual impact to the greatest extent feasible. *Id.* at 82, 106, FOF 441, COL 135. Because the MKSR site already contains various astronomy facilities, the Board found that visual impact will be less than significant. *Id.* at 83, FOF 447. The Board properly found and concluded that the proposed land use preserves or improves upon the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. *Id.* at 83, 103, 107, FOF 447, COL 126, 142. *See also* section III.B.1.b. **Mitigation Measures.**

4. The TMT Project Will be Compatible with the Locality and Surrounding Areas, Appropriate to the Physical Conditions and Capabilities of the Specific Parcel or Parcels (HAR § 13-5-30(c)(5)) (Criteria 5)

The fifth criterion is that the "proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels." HAR § 13-5-30(c)(5). Appellants assert that the TMT Observatory is not compatible with the proposed location on the northern plateau. *Opening Brief* at 27. The Board considered the current land uses of the TMT Observatory site as well as adjacent areas when reviewing this criterion. JEFS 100 at 103, COL 119.

The TMT Observatory will be built in the Astronomy Precinct which encompasses 525 acres of the MKSR's 11,288 acres (the Astronomy Precinct is less than 5% of the total MKSR). *Id.* at 79-80, FOF 422-429. Due to the stability of the atmosphere above Mauna Kea, low mean temperature, atmospheric clarity, and the distance from light pollution, the summit area of Mauna Kea is uniquely suitable for astronomical research and the TMT Observatory. *Id.* at 79, FOF 424. Moreover, the MKSR was specifically leased to UH to be used as a scientific complex. *Id.* at 21, FOF 109. And the Rules explicitly contemplate the presence of astronomy facilities in the resource subzone of a conservation district. *Id.* at 21, 104, FOF 110, COL 120; HAR § 13-5-24.

Locating the TMT Observatory in the selected location will result in less than significant impact on historic properties, identified cultural resources, and customary and traditional cultural practices, as well as on viewplanes, species habitat, and existing facilities. *Id.* at 79, FOF 423.

The Board properly found and concluded that the TMT Project is compatible with the locality and surrounding areas, and appropriate to the physical conditions and capabilities of the specific parcel. JEFS 100 at 80, 104, FOF 429, COL 124.

5. Subdivision of Land Will Not Be Utilized to Increase the Intensity of Land Uses in the Conservation District (HAR § 13-5-30(c)(7)) (Criteria 7)

The seventh criterion is that “[s]ubdivision of land will not be utilized to increase the intensity of land uses in the conservation district.” HAR § 13-5-30(c)(7). Appellants assert that the TMT Project is an illegal subdivision of land. *Opening Brief* at 28. UHH did not request, and the Board did not grant, any subdivision of land. JEFS 100 at 108, COL 150. The Board properly found and concluded that the TMT Project will not involve a subdivision of land. JEFS 100 at 83-84, 108, FOF 448, 453, COL 152.

6. **The TMT Project Will Not Be Materially Detrimental to the Public Health, Safety and Welfare (HAR § 13-5-30(c)(8)) (Criteria 8)**

The eighth criterion is that “the proposed land use will not be materially detrimental to the public health, safety and welfare.” HAR § 13-5-30(c)(8). Appellants assert that the TMT Project will have a materially detrimental affect on water quality and native Hawaiian health and wellbeing. *Opening Brief* at 29.

Water Quality: The TMT Observatory will be located 1.5 miles away on the opposite flank of Mauna Kea from Lake Waiau and will not be in the lake’s watershed. JEFS 100 at 75, FOF 404. The TMT Observatory will install a zero-wastewater system, which means that there will be no discharge of any wastewater from the observatory into the surrounding area. *Id.* at 76, FOF 406. The TMT Observatory will store all hazardous materials or wastes in a secondary containment area that will be inspected daily for leaks. *Id.* at 77, FOF 412. Fuel storage and piping will be double-walled and equipped with leak monitors. *Id.* Mirror washing will be done in a separate laboratory designed to collect waste from the mirror washing. *Id.*, FOF 414. The TMT Project will develop and implement a Spill Prevention and Response Plan to protect against the release of chemicals or fuel to the environment. *Id.* at 77-78, FOF 416. The Spill Prevention and Response Plan will spell out protocols for the proper handling, storage, use, and disposal of liquid and solid materials, and waste. *Id.* The TMT Observatory will collect all solid waste in secured and covered storage containers and truck it down the mountain for proper disposal, implement a Materials Storage/Waste Management Plan, a component of which will be the Spill Prevention and Response Plan, and implement a Waste Minimization Plan that will identify waste produced by the TMT Observatory and determine how that waste can be reduced, reused or recycled. *Id.* at 78, FOF 418.

Native Hawaiian Health and Well-Being: Appellants presented the testimonies of Dr. D. Kawika Liu and Dr. J. Kehaulani Kauanui to support their contention that the TMT Project will harm native Hawaiian health, safety, and welfare. JEFS 100 at 85, FOF 464. Dr. Liu testified that neither he nor anyone else has done the research necessary to validate his hypothesis about the potential effects of “multi-generational trauma” on the health of native Hawaiians, or how such a hypothesis relates to telescopes on Mauna Kea. *Id.*, FOF 465. Dr. Kauanui based her opinions on the assumptions that the TMT Observatory would destroy historical sites, archaeological sites, and burial grounds, which assumptions were refuted by the facts adduced during the contested case. *Id.*, FOF 466. She also conceded that she is categorically opposed to all telescopes on Mauna Kea, and that no matter where on Mauna Kea a telescope is located and what mitigation measures are employed, she still views any telescope as an unlawful desecration. *Id.* The Board found that Appellants had not offered any reliable, probative, substantial, or credible evidence, scientific or otherwise, to suggest that the TMT Project will be harmful to the health, safety, and welfare of native Hawaiians or anyone else. *Id.*, FOF 467.

The Board properly found and concluded that the TMT Project will not be materially detrimental to the public health, safety, and welfare. *Id.* at 86, 108-109, FOF 468, COL 154, 161. In sum, the Board properly concluded that the TMT Project satisfies all of the criteria set forth in HAR § 13-5-30(c). *Id.* at 109, COL 162.

C. The TMT Management Plan Complies with HAR § 13-5-39 and is Consistent with HAR § 13-5-24

Appellants’ **third point of error** once again alleges that criterion four, HAR § 13-5-30(c)(4) (that the “proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region”), has not been met because the

management plan is insufficient. *Opening Brief* at 30. Appellants challenge the scope of the CMP and the TMT Management Plan claiming that neither covers “Mauna Kea as a whole.”¹⁷ *Opening Brief* at 30-31. A management plan is not whatever Appellants want it to be, but what is required by law. Due to amendments to the Rules in 2011, UHH not only meets, but exceeds, the management planning requirements set forth in the Rules.

Appellants cite the unpublished circuit court decision of *Mauna Kea Anaaina Hou v. BLNR*, Civ. No. 04-1-397 (3rd Cir. 2007). *Opening Brief* at 31. This case involved an appeal following a contested case on UH’s CDUA to construct an addition to the Keck telescope on Mauna Kea. At that time, a “management plan” was defined in the Rules to mean “a comprehensive plan for carrying out multiple uses.” HAR § 13-5-2 (1994). Based on the term “comprehensive plan,” the circuit court found that a comprehensive management plan covering the summit area of Mauna Kea was required to satisfy the management plan requirement.

The Rules were subsequently amended in 2011 to distinguish between a “management plan” and a “comprehensive management plan.” HAR § 13-5-39 (2011). The definition of a “management plan” was amended to mean “a project or site based plan to protect and conserve natural and cultural resources.” HAR § 13-5-2 (emphasis added). And the definition of a “comprehensive management plan,” meaning “a comprehensive plan to manage multiple uses and activities in order to protect and conserve natural and cultural resources,” was added to the

¹⁷ Appellants disregard the four CMP sub-plans that were approved by the Board on March 25, 2010. JEFS 58 at 68-87; JEFS 100 at 126, COL 252. They include a Natural Resources Management Plan; a Cultural Resources Management Plan; a Public Access Plan for the UH Management Areas on Mauna Kea; and a Decommissioning Plan for the Mauna Kea Observatories. JEFS 198, 200, 202, 204, 206, 208, 210, 212. Appellants also ignore the Master Plan that was adopted by UH to serve as an internal policy and planning guide. JEFS 100 at 24, FOF 122-124. The Master Plan, CMP, and four sub-plans cover the **entire 11,288 acre area leased to UH**. JEFS 42 at 27-30; JEFS 100 at 21, FOF 107, 111.

Rules. *Id.* An astronomy facility under a management plan approved simultaneously with the permit is a permissible land use in a resource subzone of a conservation district. HAR § 13-5-24(c) (emphasis added). In certain instances, DLNR or the Board could require the preparation of a comprehensive management plan and determine its content. HAR § 13-5-39(b).

The TMT Management Plan, which covers the TMT Project area, complies with the present administrative rules. JEFS 52 at 27-99; JEFS 54; JEFS 100 at 121, COL 253. As a condition of the TMT Project CDUP, the Board has required UHH to comply with the terms of both the CMP and the TMT Management Plan. JEFS 100 at 128, Decision and Order. The Board properly approved the TMT Management Plan simultaneously with the TMT CDUA. *Id.* at 126, COL 253.

IV. CONCLUSION

Appellants have failed to sustain their burden on appeal, to overcome the presumption that the Board's decision is valid. Based on the foregoing, the decision of the circuit court should be affirmed.

DATED: Honolulu, Hawai'i, March 25, 2015.

/s/ Julie H. China
JULIE H. CHINA
Deputy Attorney General
Attorney for Appellees Board of Land and Natural
Resources, Department of Land and Natural
Resources, and William J. Aila, Jr., in his official
capacity as Chairperson of the Board

EXHIBIT "C"

SCAP-14-0000873

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MAUNA KEA ANAINA HOU;	)	CIVIL NO. 13-1-0349
CLARENCE KUKAUAKAHI CHING;	)	(Agency Appeal)
FLORES-CASE 'OHANA; DEBORAH J.)	
WARD; PAUL K. NEVES; and KAHEA:	)	APPEAL FROM THE
THE HAWAIIAN ENVIRONMENTAL)	
ALLIANCE, a domestic non-profit	)	1) FINAL JUDGMENT, FILED ON MAY 5,
corporation,	)	2014, AND
)	
Appellants,	)	2) DECISION AND ORDER AFFIRMING
	)	BOARD OF LAND AND NATURAL
vs.	)	RESOURCES, STATE OF HAWAI'I'S
	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW AND DECISION AND ORDER
BOARD OF LAND AND NATURAL	)	GRANTING CONSERVATION DISTRICT
RESOURCES, STATE OF HAWAI'I;	)	USE PERMIT FOR THE THIRTY METER
DEPARTMENT OF LAND AND	)	TELESCOPE AT MAUNA KEA SCIENCE
NATURAL RESOURCES, STATE OF	)	RESERVE DATED APRIL 12, 2013,
HAWAI'I; WILLIAM J. AILA, JR., in his	)	FILED ON MAY 5, 2014
official capacity as Chair of the Board of)	
Land and Natural Resources and Director of	)	CIRCUIT COURT OF THE THIRD
the Department of Land and Natural	)	CIRCUIT
Resources; and the UNIVERSITY OF)	
HAWAI'I AT HILO,	)	HONORABLE GREG K. NAKAMURA
	)	Judge
Appellees.)	
)	

**APPELLEES BOARD OF LAND AND NATURAL RESOURCES,
DEPARTMENT OF LAND AND NATURAL RESOURCES,
AND SUZANNE D. CASE'S JOINDER IN APPELLEE UNIVERSITY OF HAWAI'I AT
HILO'S OPPOSITION TO PETITIONERS-APPELLANTS-APPELLANTS'
EMERGENCY MOTION FOR STAY UPON APPEAL FILED NOVEMBER 16, 2015**

CERTIFICATE OF SERVICE

DOUGLAS S. CHIN 6465
Attorney General of Hawai'i

WILLIAM J. WYNHOFF 2558
JULIE H. CHINA 6256
Deputy Attorneys General
Department of the Attorney General, State of Hawai'i
465 South King Street, Room 300
Honolulu, Hawai'i 96813
Telephone: (808) 587-2987
Facsimile: (808) 587-2999

Attorneys for Appellees Board of Land and Natural
Resources, Department of Land and Natural Resources,
and Suzanne D. Case, in her official capacity as Chairperson of the Board

Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne D. Case¹, in her official capacity as Chairperson of the Board of Land and Natural Resources, by and through their attorneys, Douglas S. Chin, Attorney General, and Deputy Attorneys General William J. Wynhoff and Julie H. China, hereby join in and adopt the arguments and legal analysis set forth in Appellees University of Hawai'i at Hilo's Opposition to Petitioners-Appellants-Appellants' Emergency Motion for Stay Upon Appeal Filed November 16, 2015.

DATED: Honolulu, Hawai'i, November 24, 2015.

Respectfully submitted,

/s/ Julie H. China
JULIE H. CHINA
Deputy Attorney General
Attorney for Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, and Suzanne D. Case, in her official capacity as Chairperson of the Board

¹ During the pendency of this appeal, Suzanne D. Case replaced William J. Aila, Jr. as Chairperson of the Board of Land and Natural Resources.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MAUNA KEA ANAINA HOU;)	CIVIL NO. 13-1-0349
CLARENCE KUKAUAKAHI CHING;)	(Agency Appeal)
FLORES-CASE 'OHANA; DEBORAH J.)	
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ALLIANCE, a domestic non-profit)	1) FINAL JUDGMENT, FILED ON MAY 5,
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)	
Appellants,)	2) DECISION AND ORDER AFFIRMING
)	BOARD OF LAND AND NATURAL
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)	FINDINGS OF FACT, CONCLUSIONS OF
BOARD OF LAND AND NATURAL)	LAW AND DECISION AND ORDER
RESOURCES, STATE OF HAWAI'I;	)	GRANTING CONSERVATION DISTRICT
DEPARTMENT OF LAND AND	)	USE PERMIT FOR THE THIRTY METER
NATURAL RESOURCES, STATE OF	)	TELESCOPE AT MAUNA KEA SCIENCE
HAWAI'I; WILLIAM J. AILA, JR., in his	)	RESERVE DATED APRIL 12, 2013,
official capacity as Chair of the Board of	)	FILED ON MAY 5, 2014
Land and Natural Resources and Director of)	
the Department of Land and Natural	)	CIRCUIT COURT OF THE THIRD
Resources; and the UNIVERSITY OF	)	CIRCUIT
HAWAI'I AT HILO,)	
	)	HONORABLE GREG K. NAKAMURA
Appellees.	)	Judge
)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document will be served electronically through the Hawai'i Judiciary's Electronic Filing Service System ("JEFS") as follows:

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333 Queen Street, Suite 604
Honolulu, Hawai'i 96813
rnwurdeman@rnwlaw.com

EXHIBIT "D"

China, Julie H

From: Ian L. Sandison <isandison@carlsmith.com>
Sent: Tuesday, November 24, 2015 7:03 AM
To: China, Julie H
Cc: Tim Lui-Kwan; Wynhoff, Bill J
Subject: Re: Mauna Kea

Probably a good idea for us to have our opposition filed by then.

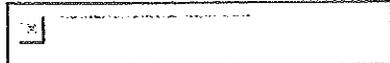
Sent from my iPad

On Nov 23, 2015, at 8:35 PM, "Julie.H.China@hawaii.gov" <Julie.H.China@hawaii.gov> wrote:

Ian,
After we spoke, I took another look at the Mauna Kea order. It says that all oppositions need to be filed by 11/24 at 4:30 p.m. Just letting you know that I'll be filing my joinder at around 4 p.m.
Julie

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IAN L. SANDISON
Partner | Carlsmith Ball LLP



1001 Bishop Street, Suite 2100
Honolulu, HI 96813
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China, Julie H

From: Ian L. Sandison <isandison@carlsmith.com>
Sent: Tuesday, November 17, 2015 4:03 PM
To: China, Julie H; Wynhoff, Bill J
Subject: Partial Grant of Stay
Attachments: 025299836.pdf; ATT00001.txt

FYI

IAN SANDISON
Partner | Carlsmith Ball LLP

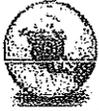
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{In Archive} UH Answering Brief
Ian L. Sandison to: Julie.H.China@hawaii.gov
Cc: "Jay S. Handlin", Tim Lui-Kwan, "Arsima A. Muller"

11/04/2013 01:40 PM

History: This message has been replied to.
Archive: This message is being viewed in an archive.

Julie,

Thanks for talking with me earlier today. Here is our near final version of the Answering Brief.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

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UH Answering Brief - TMT CDUA(3).docx



{In Archive} Kahea Reply 
Julie H China to: Ian L. Sandison, jhandlin

07/10/2013 08:26 AM

Archive:

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Ian and Jay,
Here's the reply I will be filing today.
Julie



Reply M Dismiss Final.doc

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{In Archive} RE: Kahea Reply

Jay S. Handlin to: 'Julie.H.China@hawaii.gov', Ian L. Sandison

07/10/2013 10:19 AM

History: This message has been replied to.
Archive: This message is being viewed in an archive.

Julie,

This looks great. Our calendar shows the reply as due tomorrow; do you have a different understanding?

Thanks,

Jay

From: Julie.H.China@hawaii.gov [mailto:Julie.H.China@hawaii.gov]
Sent: Wednesday, July 10, 2013 8:26 AM
To: Ian L. Sandison; Jay S. Handlin
Subject: Kahea Reply

Ian and Jay,
Here's the reply I will be filing today.
Julie

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Jay S. Handlin
Partner | Carlsmith Ball LLP

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{In Archive} RE: Kahea Reply 
Julie H China to: Jay S. Handlin
Cc: "Ian L. Sandison"

07/10/2013 10:21 AM

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No, it's due tomorrow, but I just wanted to make sure it got to Hilo in time.
Julie

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"Jay S. Handlin" Julie, This looks great. Our calendar shows t... 07/10/2013 10:19:55 AM

From: "Jay S. Handlin" <jhandlin@carlsmith.com>
To: "Julie.H.China@hawaii.gov" <Julie.H.China@hawaii.gov>, "Ian L. Sandison" <isandison@carlsmith.com>
Date: 07/10/2013 10:19 AM
Subject: RE: Kahea Reply

Julie,

This looks great. Our calendar shows the reply as due tomorrow; do you have a different understanding?

Thanks,

Jay

From: Julie.H.China@hawaii.gov [mailto:Julie.H.China@hawaii.gov]
Sent: Wednesday, July 10, 2013 8:26 AM
To: Ian L. Sandison; Jay S. Handlin
Subject: Kahea Reply

Ian and Jay,
Here's the reply I will be filing today.
Julie

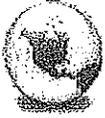
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Jay S. Handlin
Partner | Carlsmith Ball LLP

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{In Archive} RE: Kahea: Order Setting Oral Arguments and Answer to App.'s Statement of the Case

Ian L. Sandison

to:

'Julie.H.China@hawaii.gov'

06/10/2013 10:53 AM

Hide Details

From: "Ian L. Sandison" <isandison@carlsmith.com>

To: "'Julie.H.China@hawaii.gov'" <Julie.H.China@hawaii.gov>

Archive: This message is being viewed in an archive.

1 Attachment



(UH-CDUA) draft motion to dismiss.doc

Julie,

Early draft. Should have final in about an hour.

Ian

From: Julie.H.China@hawaii.gov [<mailto:Julie.H.China@hawaii.gov>]

Sent: Monday, June 10, 2013 9:51 AM

To: Ian L. Sandison

Subject: Fw: Kahea: Order Setting Oral Arguments and Answer to App.'s Statement of the Case

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----- Forwarded by Julie H China/AG/StateHiUS on 06/10/2013 09:49 AM -----

AG-002732

From: Jayne J Romero/AG/StateHIUS
To: Julie H China/AG/StateHIUS@StateHIUS
Date: 06/10/2013 09:28 AM
Subject: Kahea: Order Setting Oral Arguments and Answer to App.'s Statement of the Case

*Jayne Romero
Department of the Attorney General
Land and Transportation Division
Phone: 587-2857*

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Ian L. Sandison
Partner | Carlsmith Ball LLP

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AG-002733

EXHIBIT "E"

Emails offer insight into state's response to protests

Published July 10, 2015 - 8:27am

HOLLYN JOHNSON/Tribune-Herald Opponents of TMT return to cheers and chants from fellow protesters after removing rocks off of the summit access road June 25 near the visitors center on Mauna Kea.



By CHRIS D'ANGELO Hawaii Tribune-Herald

Emails obtained by the Hawaii Tribune-Herald reveal details about the state's strategy — and its struggles — to deal with the months-long protest atop Mauna Kea by those opposed to construction of the Thirty Meter Telescope.

In an apparent attempt to avoid accusations that it was targeting protesters, state officials considered restricting public access not only on Mauna Kea, but in public hunting areas statewide, according to internal communications between state officials.

In a July 1 email to Hawaii Attorney General Douglas Chin, Suzanne Case, chair of the state Department of Land and Natural Resources, thanked Chin for the “clear delineation of options” he laid out the day before and outlined several options for moving forward.

“File a board submittal for the July 10 meeting authorizing a DLNR representative to conduct temporary closures and restrictions in public hunting areas statewide (i.e. not specific to Mauna Kea) as the next step in implementing the amended hunting rules that were just finalized,” she wrote.

Ultimately, the proposed emergency rules, which will be discussed today, would restrict access to two hunting units on Mauna Kea. The state says the move is necessary to address “threats to public safety and impacts to natural resources.”

Case’s email also outlined steps for dealing with the permanent camp, known among protesters as the Aloha Safety Check, located across the street from the Mauna Kea Visitor Information Station.

“Notify the campers, today if possible, that their camping is a violation under the Forest Reserve rules and illegal under the rules governing public hunting areas, and we will move forward with administrative remedies including fines, removal of structures, and if necessary arrests if they don’t move off the mountain by __,” Case wrote.

Other recommendations included posting signs providing notice of towing, notifying Kona Lua that it must remove its unauthorized portable toilets from the mountain or face administrative penalties, and pursuing a memorandum of agreement between DLNR and the County of Hawaii.

“I would suggest our legitimate goal is to keep the mountain open to normal activities,” Case wrote to Chin. “Cessation of unlawful activities while protecting free speech and traditional and customary practices would be the path to that goal.”

As early as May, officials began discussing the idea of closing the road to Mauna Kea’s summit, according to the internal emails.

“Hawaii County Police and TMT are researching the legality and feasibility of closing the Mauna Kea Access Road at the junction of Daniel K. Inouye Highway for construction traffic when construction commences,” Jason Redulla, deputy enforcement chief of DLNR’s Division of Conservation and Resource Enforcement, wrote in an email to other department heads May 5.

Later that month, Redulla wrote that Deputy Attorney General William Wynhoff had informed him that he believed the Land Board has the authority to close the state-owned portion of the roadway in the interests of public safety and health. However, he warned that the Hawaii County prosecutor’s office would “have to be willing to accept arrests that are made under the authority of such a closure.”

“ATTENTION (Lino Kamakau, DLNR branch chief),” Redulla writes. “Please contact the Hawaii County Prosecutor’s Office and brief them on this information. Please ask them whether they would be willing to accept cases and charge people who are arrested if such a road closure would take place. Please let us know what their response is.”

On June 29, Deputy Attorney General Linda Chow wrote to Chin and outlined a proposal that Wynhoff described in a later email as “potentially a real home run.”

Chow said she met with DLNR Division of Forestry and Wildlife personnel and “picked their brains about our dilemma of the Mauna Kea road.”

“The acting administrator (Scott Fretz) said that we might be able to temporarily close or restrict access to the road under the Game Mammal Hunting rules,” she wrote.

Subsequently, Fretz’ submittal asks the Lands Board to adopt a new section under Hawaii Administrative Rules Title 13, Chapter 123, which regulate game mammal hunting.

If passed, the new rules would prohibit backpacks, blankets and other “obvious camping paraphernalia” and limit the hours during which individuals could remain in a designated restricted area within 1 mile of Mauna Kea Access Road.

Construction of the \$1.4 billion TMT has been at a standstill since late March, when protesters, who call themselves protectors of the mountain they consider sacred, stopped crews from commencing grading and grubbing work.

The 100-plus pages of documents obtained Thursday also contained several internal

emails between state officials discussing how to respond to previous requests for comment by Tribune-Herald reporters.

In early June the newspaper asked why DLNR was not enforcing laws prohibiting camping on the mountain. At that time, protesters had maintained a 24-hour presence for more than 70 days.

After several back-and-forth emails, Kekoa Kaluhiwa, first deputy director of DLNR, suggested the department “minimize” its response by simply stating that, “The area is not permitted for camping. Both state and county officials are monitoring the situation.”

“For your information, the road is under the county while the adjacent land area is state forest reserve, and at this point, Jason (Redulla) and I are uncertain as to where the exact boundary line is,” Kaluhiwa wrote. “So, to avoid placing all of the jurisdictional oversight on one entity, we should keep our response short and general.”

In a follow-up email, the Tribune-Herald pressed DLNR to answer why, if camping is illegal, the department was allowing protesters to camp?

“This is a tough one to answer,” Kaluhiwa wrote to DLNR spokeswoman Deborah Ward. “I would value (spokesman Dan Dennison’s) and your opinion on whether we respond further on this. Truth is, we have avoided evicting the illegal campers/protesters so as not to escalate the situation on the mountain.”

After first contacting Mike McCartney, chief of staff for Gov. David Ige, for feedback and approval, the DLNR provided the Tribune-Herald with the following response: “DLNR is in frequent communication with the campers to ensure that impacts to the surrounding natural resources are minimized and that public safety is a priority. At this time, we have allowed them to remain and peacefully express their right of free speech while we assess the situation.”

The Mauna Kea access road has been closed since June 24, when protesters used their bodies and large rocks to prevent TMT construction crews from reaching the summit. The closure is expected to continue for the rest of the week.

Today’s Land Board meeting begins at 9 a.m. in Honolulu. A live stream is available at <https://olelo.org/>^[1]

The proposed emergency rules can be viewed at dlnr.hawaii.gov/dofaw/draft-rules, or in person at the DOFAW Office on Hawaii Island at 19 E. Kawili St. in Hilo.

Email Chris D'Angelo at [cdangelo@hawaii^{\[2\]}tribune-herald.com](mailto:cdangelo@hawaii.tribune-herald.com).

Links

1. <https://olelo.org/>
2. <https://mail.google.com/mail/?view=cm&fs=1&tf=1&to=cdangelo@hawaii>

TMT attorney had inside track on legal issues

Published July 19, 2015 - 6:18am

HOLLYN JOHNSON/Tribune-Herald Opponents of TMT protest atop Mauna Kea on June 24.



By CHRIS D'ANGELO Hawaii Tribune-Herald

A private attorney for the Thirty Meter Telescope was allowed in on state and county officials' conversations about jurisdictional issues on Mauna Kea, according to documents obtained by the Tribune-Herald.

Additionally, J. Douglas Ing, of Honolulu-based Watanabe Ing LLC, provided those

officials with TMT's legal arguments supporting prosecution of the protesters who were arrested for blocking construction of the telescope atop Hawaii's tallest mountain.

In late April, in the wake of the initial 31 protesters' arrest, Ing, who represents the TMT International Observatory, participated in at least two conference calls with Hawaii Deputy Attorneys General Linda Chow and Julie China, as well as University of Hawaii attorney Ian Sandison and Hawaii County prosecutors, emails show.

Asked why an attorney for TMT would have been included in such conversations and allowed to offer legal arguments, Joshua Wisch, a spokesman for state Attorney General Doug Chin, pointed out that a number of the arrests April 2 involved protesters trespassing on the TMT site.

"Footage of people trespassing on the TMT site was videotaped by TMT security," Wisch said. "As a result, the purpose of the discussions ... was likely to coordinate with the Hawaii County prosecutor to make sure they had the necessary information to proceed with the cases, and so enforcement personnel would understand what evidence would be required for any future potential enforcement actions."

The conference calls were arranged by Sandison. Reached via email, Sandison referred the Tribune-Herald to UH spokesman Dan Meisenzahl, who deferred to the AG's office.

Shortly after an April 20 conference call, Ing sent out a document entitled "TMT - Legal argument re prosecution of protesters."

"Thank you for joining the call today," Ing wrote in an email addressed to Elizabeth "Britt" Bailey, the Hawaii County deputy prosecuting attorney assigned to the protesters' cases.

"In follow up, attached is the memo regarding sovereignty, the Kingdom, lack of jurisdiction issues and Judge Cardoza's ruling. This was prepared by Ross Shinyama of our office. Feel free to contact him if you have questions."

The nine-page document references a number of previous court rulings and outlines arguments for why TMT believes those arrested during protests against the \$1.4 billion project should be prosecuted for their crimes.

"There is no dispute that the protesters' conduct in obstructing state and county

highways and roads occurred within the State of Hawaii,” reads the memo. “The protesters are therefore subject to the criminal jurisdiction of the State of Hawaii.”

The document also states that the existence of the Kingdom of Hawaii is not relevant to the issue of whether the state has jurisdiction over the protesters and their conduct. He referenced a 2013 case involving Kona resident Dennis Kaulia, in which the Hawaii Supreme Court held that “individuals claiming to be citizens of the Kingdom (of Hawaii) and not of the State (of Hawaii) are not exempt from application of the State’s laws.”

Sovereignty has been a resounding issue for TMT protesters, who have taken a firm stance against further telescope development on the mountain they consider sacred.

During an initial appearance April 28 in Hilo District Court, Oahu attorney Dexter Kaiama, representing seven of the defendants, said he planned to argue that the Hawaiian Kingdom still lawfully exists and that the United States doesn’t have jurisdiction over the matter. In early May, during a second proceeding, this time in Waimea, a number of defendants demanded the hearings be moved back to Hilo.

The documents obtained by the newspaper also included several photographs of the April 2 protest, a map outlining the different jurisdictions along Mauna Kea Access Road and an April 17 email from Hawaii County Deputy Prosecuting Attorney Darien Nagata introducing others to Bailey, who is assigned to the Waimea courthouse.

“Britt has already charged/filed Criminal Trespass 2 (HRS 708-814) cases and it is anticipated that we will be charging additional charges of Obstructing (HRS 711-1105) on other cases referred to our office,” she wrote.

“For future cases, we would stress that we need to have the return to Hamakua Court (versus South Hilo Court) should the defendant(s) bail out and be provided with a future court date and courthouse.”

Kahookahi Kanuha, a protest leader who has been arrested twice, said allowing Ing to participate in the calls is yet another example of corruption and the state going above and beyond to protect the rights of private interests, while working against the other.

“How is protecting the rights of foreign entities over the rights of people of this place a sign of respect to the host culture?” Kanuha said, referring to comments made by Gov. David Ige in May.

This week, Ige signed a new emergency rule that prohibits camping and restricts public access on Mauna Kea. State officials say the rules are necessary to address an “imminent peril” to public safety and natural resources resulting from the ongoing protests.

Williamson Chang, a professor of law at the University of Hawaii Richardson School of Law and TMT opponent, filed a petition Wednesday seeking to repeal the rule.

He argues it prevents telescope opponents from legally exercising their rights to peacefully protest.

Email Chris D’Angelo at [cdangelo@hawaii^{\[1\]}tribune-herald.com](mailto:cdangelo@hawaii.tribune-herald.com).

Links

1. <https://mail.google.com/mail/?view=cm&fs=1&tf=1&to=cdangelo@hawaii>



{In Archive} RE: Meeting re TMT

Tim Lui-Kwan

to:

'Linda.L.Chow@hawaii.gov', Julie.H.China@hawaii.gov

04/15/2015 03:49 PM

Cc:

"Ian L. Sandison", "J. Douglas Ing"

Hide Details

From: Tim Lui-Kwan <tluikwan@carlsmith.com>

To: "'Linda.L.Chow@hawaii.gov'" <Linda.L.Chow@hawaii.gov>,

"Julie.H.China@hawaii.gov" <Julie.H.China@hawaii.gov>

Cc: "Ian L. Sandison" <isandison@carlsmith.com>, "J. Douglas Ing" <DougIng@wik.com>

History: This message has been forwarded.

Archive: This message is being viewed in an archive.

9am confirmed. We can meet at your office, Tim

From: Linda.L.Chow@hawaii.gov [<mailto:Linda.L.Chow@hawaii.gov>]

Sent: Wednesday, April 15, 2015 3:41 PM

To: Tim Lui-Kwan; Ian L. Sandison

Cc: Julie.H.China@hawaii.gov

Subject: Meeting re TMT

Tim and Ian,

We are both available on Friday, April 17th, at 9:00 am. Meet at our offices?

Linda L.W. Chow
Deputy Attorney General
Land Transportation Division

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Timothy J. Lui-Kwan

AG-001725

Partner | Carlsmith Ball LLP

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AG-001726



{In Archive} Mauna Kea Jurisdictional Issues - Conference Call

Ian L. Sandison

to:

Linda.L.Chow@hawaii.gov, Julie.H.China@hawaii.gov, 'J. Douglas Ing',
'darien.nagata@hawaii.county.gov'

04/17/2015 10:33 AM

Cc:

Tim Lui-Kwan

Hide Details

From: "Ian L. Sandison" <isandison@carlsmith.com>

To: "Linda.L.Chow@hawaii.gov" <Linda.L.Chow@hawaii.gov>, "Julie.H.China@hawaii.gov"
<Julie.H.China@hawaii.gov>, "J. Douglas Ing" <DougIng@wik.com>,
"darien.nagata@hawaii.county.gov" <darien.nagata@hawaii.county.gov>

Cc: Tim Lui-Kwan <tlukwan@carlsmith.com>

Archive: This message is being viewed in an archive.

All,

Please use the following bridge line for our 10:40 a.m. conference call this morning:

Dial In: 888-761-6665

Pass Code: 808-523-2526

Thanks,

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

ASB TOWER 1001 BISHOP STREET, SUITE 2100, HONOLULU, HI 96813

Direct: (808) 523-2526 Fax: (808) 523-0842 Web: www.carlsmith.com Email: isandison@carlsmith.com

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{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call
Ian L. Sandison

to:
'Linda.L.Chow@hawaii.gov', 'Julie.H.China@hawaii.gov', 'J. Douglas Ing',
'darien.nagata@hawaiiicounty.gov'

04/17/2015 10:34 AM

Cc:

Tim Lui-Kwan

Hide Details

From: "Ian L. Sandison" <isandison@carlsmith.com>

To: "'Linda.L.Chow@hawaii.gov'" <Linda.L.Chow@hawaii.gov>,
'Julie.H.China@hawaii.gov'" <Julie.H.China@hawaii.gov>, "J. Douglas Ing"
<DougIng@wik.com>, "'darien.nagata@hawaiiicounty.gov'"
<darien.nagata@hawaiiicounty.gov>

Cc: Tim Lui-Kwan <tlukwan@carlsmith.com>

Archive: This message is being viewed in an archive.

Sorry, I mistyped Darien's email address in the prior email.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

ASB TOWER 1001 BISHOP STREET, SUITE 2100, HONOLULU, HI 96813

Direct: (808) 523-2526 Fax: (808) 523-0842 Web: www.carlsmith.com Email: isandison@carlsmith.com

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From: Ian L. Sandison
Sent: Friday, April 17, 2015 10:33 AM

AG-001728

file:///C:/Users/chowll/AppData/Local/Temp/notes87944B/~web9376.htm

To: Linda.L.Chow@hawaii.gov; Julie.H.China@hawaii.gov; 'J. Douglas Ing'; 'darien.nagata@hawaii.county.gov'
Cc: Tim Lui-Kwan
Subject: Mauna Kea Jurisdictional Issues - Conference Call

All,

Please use the following bridge line for our 10:40 a.m. conference call this morning:

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian

AG-001729



{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call
Nagata, Darien

to:

Ian L. Sandison, 'Linda.L.Chow@hawaii.gov', 'Julie.H.China@hawaii.gov', 'J. Douglas Ing',
Bailey, Elizabeth B.

04/17/2015 11:32 AM

Cc:

Tim Lui-Kwan, "Roth, Mitch"

Hide Details

From: "Nagata, Darien" <Darien.Nagata@hawaiicounty.gov> Sort List...

To: "Ian L. Sandison" <isandison@carlsmith.com>, "'Linda.L.Chow@hawaii.gov'"
<Linda.L.Chow@hawaii.gov>, "'Julie.H.China@hawaii.gov'" <Julie.H.China@hawaii.gov>,
"'J. Douglas Ing'" <DougIng@wik.com>, "Bailey, Elizabeth B."
<Elizabeth.Bailey@hawaiicounty.gov>

Cc: Tim Lui-Kwan <tluikwan@carlsmith.com>, "Roth, Mitch"
<Mitch.Roth@hawaiicounty.gov>

Archive: This message is being viewed in an archive.

I am introducing Deputy Prosecuting Attorney "Britt" Bailey into this conversation.

Britt is our Deputy assigned to the Waimea courthouse and since the venue for these offenses are in Hamakua, therefore going to the Waimea courthouse, Britt will be the Deputy assigned to these case.

Britt has already charged/filed Criminal Trespass 2 (HRS 708-814) cases and it is anticipated that we will be charging additional charges of Obstructing (HRS711-1105) on other cases referred to our office.

I am also "cc'ing" in Prosecutor Mitch Roth should he wish to add anything to this conversation.

For future cases, we would stress that we need to have the return to Hamakua Court (versus South Hilo Court) should the defendant(s) bail out and be provided with a future court date and courthouse.

I am expected at court now so I can provide more information in a later email.

Thank you,
Darien Nagata

AG-001730

From: Ian L. Sandison [mailto:isandison@carlsmith.com]
Sent: Friday, April 17, 2015 10:35 AM
To: 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Nagata, Darien
Cc: Tim Lui-Kwan
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Sorry, I mistyped Darien's email address in the prior email.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

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From: Ian L. Sandison
Sent: Friday, April 17, 2015 10:33 AM
To: Linda.L.Chow@hawaii.gov; Julie.H.China@hawaii.gov; 'J. Douglas Ing'; 'darien.nagata@hawaii.county.gov'
Cc: Tim Lui-Kwan
Subject: Mauna Kea Jurisdictional Issues - Conference Call

All,

Please use the following bridge line for our 10:40 a.m. conference call this morning:

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian



{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call
J. Douglas Ing

to:

Ian L. Sandison, 'Nagata, Darien', 'Linda.L.Chow@hawaii.gov', 'Julie.H.China@hawaii.gov',
Bailey, Elizabeth B.

04/17/2015 03:00 PM

Cc:

Tim Lui-Kwan, "Roth, Mitch"

Hide Details

From: "J. Douglas Ing" <DougIng@wik.com> Sort List...

To: "Ian L. Sandison" <isandison@carlsmith.com>, "Nagata, Darien"
<Darien.Nagata@hawaiicounty.gov>, "Linda.L.Chow@hawaii.gov"
<Linda.L.Chow@hawaii.gov>, "Julie.H.China@hawaii.gov" <Julie.H.China@hawaii.gov>,
"Bailey, Elizabeth B." <Elizabeth.Bailey@hawaiicounty.gov>

Cc: Tim Lui-Kwan <tluikwan@carlsmith.com>, "Roth, Mitch"
<Mitch.Roth@hawaiicounty.gov>

Archive: This message is being viewed in an archive.

This is to notify you that TMT **will not** be re-starting construction this coming Monday, and will not be working at the summit next week, except for upkeep and maintaining the equipment.

From: Ian L. Sandison [<mailto:isandison@carlsmith.com>]

Sent: Friday, April 17, 2015 12:32 PM

To: 'Nagata, Darien'; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; J. Douglas Ing; Bailey, Elizabeth B.

Cc: Tim Lui-Kwan; Roth, Mitch

Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

All,

Following up on Darien's question about the fact patterns we expect, attached are photographs of the protesters, TMT vehicles / personnel and law enforcement officers at the time of last arrests.

- In the first picture, the protesters are blocking the road adjacent to the visitor center at Hale Pohaku. This is the area where most of the protests occur and where the protesters spend the night currently.
- The second picture shows Lanikila slowly walking up the road adjacent to the dormitories / dining hall at

AG-001732

file:///C:/Users/chowll/AppData/Local/Temp/notes87944B/~web1784.htm

Hale Pohaku in front of the TMT vehicles and after the police had cleared the initial road block and made the initial arrests.

- The third picture shows DOCARE officers speaking with protesters sitting in the gravel road (just above Hale Pohaku) blocking TMT vehicles and just prior to being arrested.
- The last picture shows the protesters on SMA subleased property adjacent to TMT subleased property.

We are working on a map now.

Ian

From: Nagata, Darien [<mailto:Darien.Nagata@hawaiicounty.gov>]
Sent: Friday, April 17, 2015 11:33 AM
To: Ian L. Sandison; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Bailey, Elizabeth B.
Cc: Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

I am introducing Deputy Prosecuting Attorney "Britt" Bailey into this conversation. Britt is our Deputy assigned to the Waimea courthouse and since the venue for these offenses are in Hamakua, therefore going to the Waimea courthouse, Britt will be the Deputy assigned to these case. Britt has already charged/filed Criminal Trespass 2 (HRS 708-814) cases and it is anticipated that we will be charging additional charges of Obstructing (HRS711-1105) on other cases referred to our office.

I am also "cc'ing" in Prosecutor Mitch Roth should he wish to add anything to this conversation.

For future cases, we would stress that we need to have the return to Hamakua Court (versus South Hilo Court) should the defendant(s) bail out and be provided with a future court date and courthouse.

I am expected at court now so I can provide more information in a later email.

Thank you,
Darien Nagata

From: Ian L. Sandison [<mailto:isandison@carlsmith.com>]
Sent: Friday, April 17, 2015 10:35 AM
To: 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Nagata, Darien
Cc: Tim Lui-Kwan
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Sorry, I mistyped Darien's email address in the prior email.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

ASB TOWER 1001 BISHOP STREET, SUITE 2100, HONOLULU, HI 96813
Direct: (808) 523-2528 Fax: (808) 523-0842 Web: www.carlsmith.com Email: isandison@carlsmith.com

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From: Ian L. Sandison

Sent: Friday, April 17, 2015 10:33 AM

To: Linda.L.Chow@hawaii.gov; Julie.H.China@hawaii.gov; 'J. Douglas Ing'; darien.nagata@hawaii.county.gov

Cc: Tim Lui-Kwan

Subject: Mauna Kea Jurisdictional Issues - Conference Call

All,

Please use the following bridge line for our 10:40 a.m. conference call this morning:

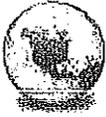
Dial In: 888-761-6665

Pass Code: 808-523-2526

Thanks,

Ian

AG-001734



{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call

'Nagata, Darien',
Ian L. Sandison to: 'Linda.L.Chow@hawaii.gov',
'Julie.H.China@hawaii.gov', 'J. Douglas Ing',
Cc: Tim Lui-Kwan, "Roth, Mitch"

04/17/2015 12:32 PM

Archive: This message is being viewed in an archive.

[attachment "IMG_0439.jpg" deleted by Linda L Chow/AG/StateHiUS]
[attachment "IMG_0427.jpg" deleted by Linda L Chow/AG/StateHiUS]
[attachment "IMG_0428.png" deleted by Linda L Chow/AG/StateHiUS]
[attachment "IMG_0413.jpg" deleted by Linda L Chow/AG/StateHiUS]
All,

Following up on Darien's question about the fact patterns we expect, attached are photographs of the protesters, TMT vehicles / personnel and law enforcement officers at the time of last arrests.

- In the first picture, the protesters are blocking the road adjacent to the visitor center at Hale Pohaku. This is the area where most of the protests occur and where the protesters spend the night currently.
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- The last picture shows the protesters on SMA subleased property adjacent to TMT subleased property.

We are working on a map now.

Ian

From: Nagata, Darien [mailto:Darien.Nagata@hawaiicounty.gov]
Sent: Friday, April 17, 2015 11:33 AM
To: Ian L. Sandison; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Bailey, Elizabeth B.
Cc: Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

I am introducing Deputy Prosecuting Attorney "Britt" Bailey into this conversation. Britt is our Deputy assigned to the Waimea courthouse and since the venue for these offenses are in Hamakua, therefore going to the Waimea courthouse, Britt will be the Deputy assigned to these case. Britt has already charged/filed Criminal Trespass 2 (HRS 708-814) cases and it is anticipated that we will be charging additional charges of Obstructing (HRS711-1105) on other cases referred to our office.

I am also "cc'ing" in Prosecutor Mitch Roth should he wish to add anything to this conversation.

For future cases, we would stress that we need to have the return to Hamakua Court (versus South Hilo Court) should the defendant(s) bail out and be provided with a future court date and courthouse.

AG-001735

I am expected at court now so I can provide more information in a later email.

Thank you,
Darren Nagata

From: Ian L. Sandison [mailto:isandison@carlsmith.com]
Sent: Friday, April 17, 2015 10:35 AM
To: 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Nagata, Darren
Cc: Tim Lui-Kwan
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Sorry, I mistyped Darren's email address in the prior email.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

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From: Ian L. Sandison
Sent: Friday, April 17, 2015 10:33 AM
To: Linda.L.Chow@hawaii.gov; Julie.H.China@hawaii.gov; 'J. Douglas Ing';
'darien.nagata@hawaii.county.gov'
Cc: Tim Lui-Kwan
Subject: Mauna Kea Jurisdictional Issues - Conference Call

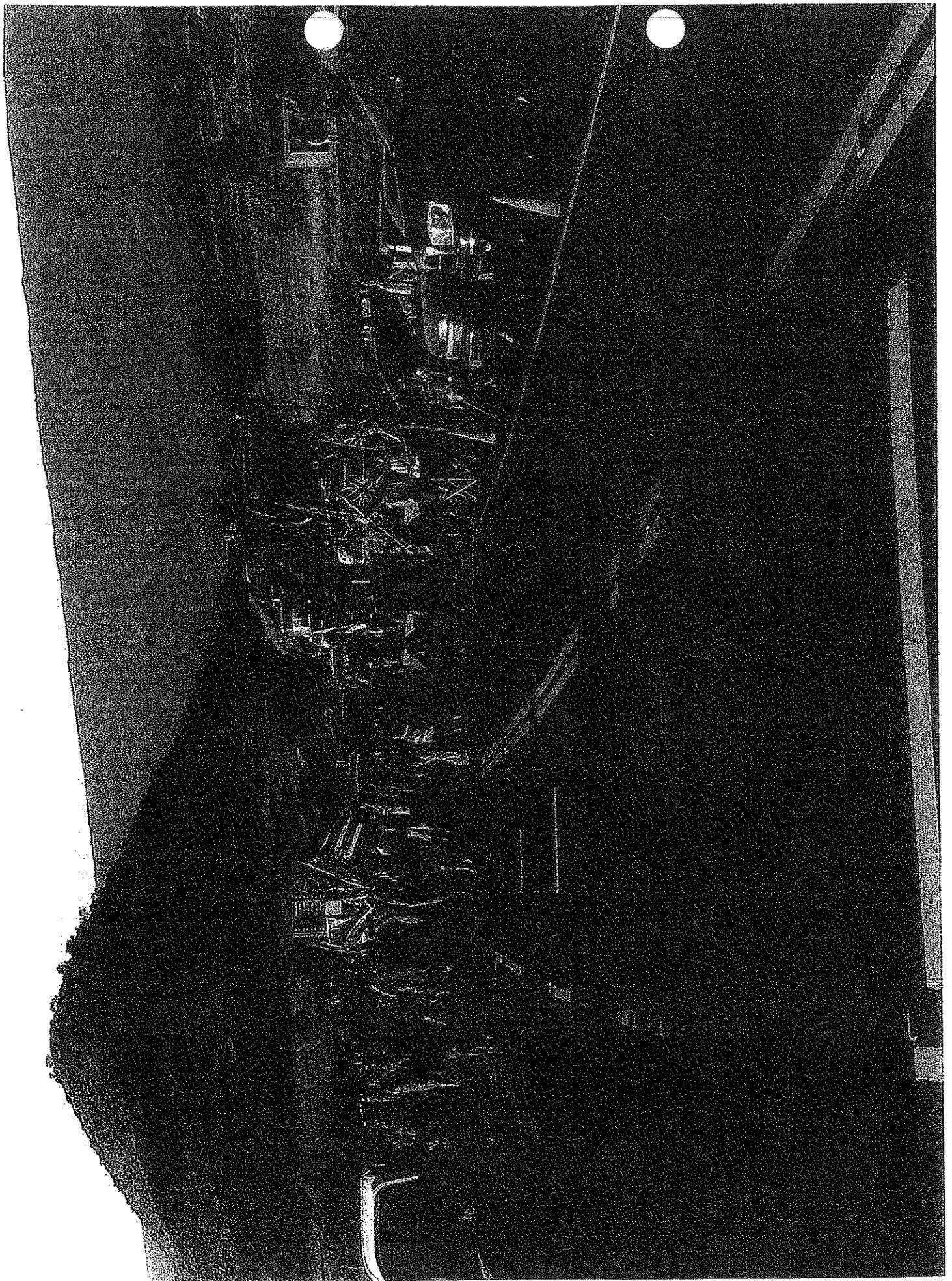
All,

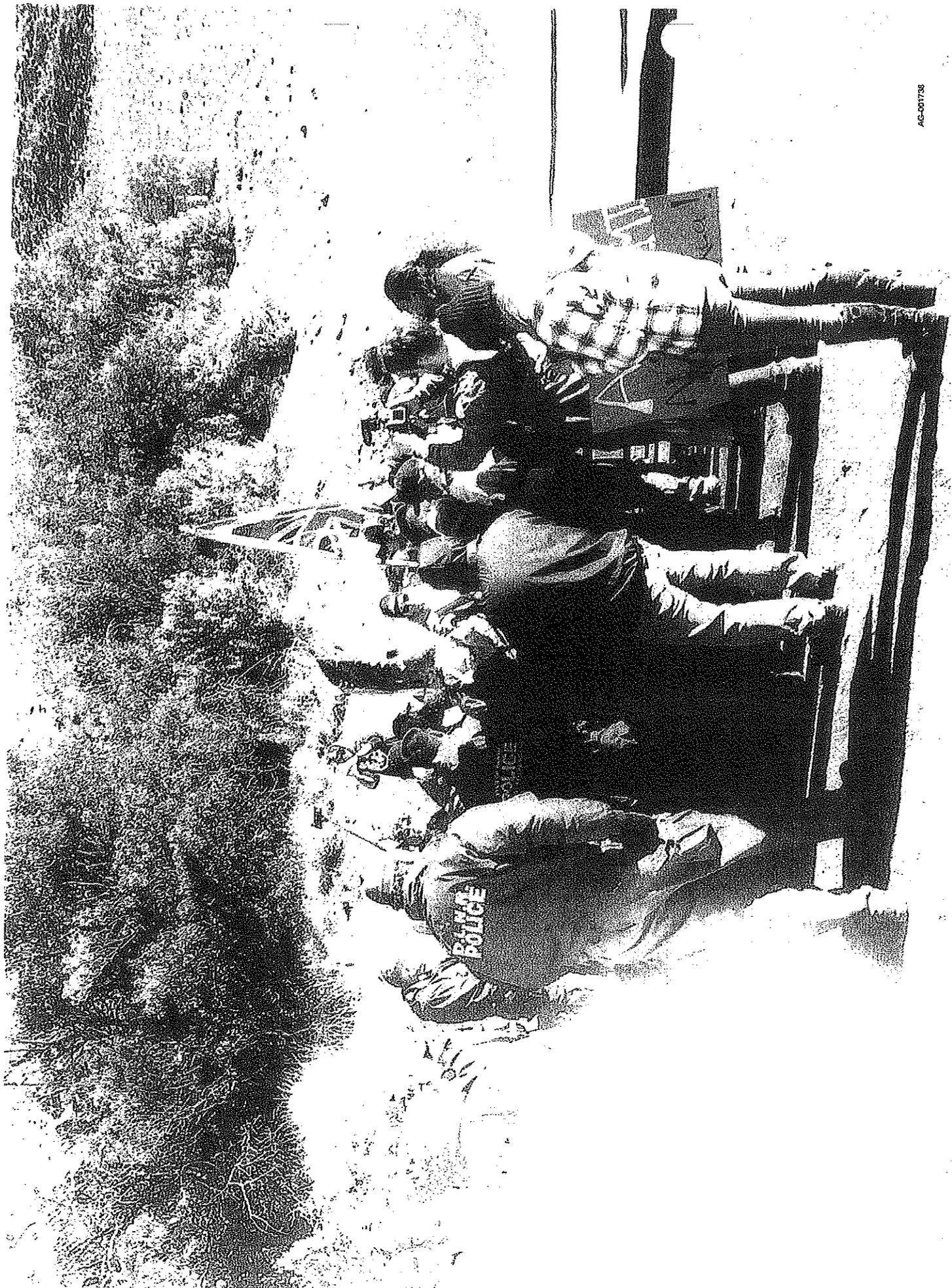
Please use the following bridge line for our 10:40 a.m. conference call this morning:

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian





⚡ Auto

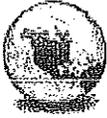


VIDEO PHOTO



AG-001739





{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call

J. Douglas Ing to: Ian L. Sandison, 'Linda.L.Chow@hawaii.gov' 04/20/2015 01:40 PM
Cc: "Nagata, Darien", "Julie.H.China@hawaii.gov", "Bailey, Elizabeth B.", Tim Lui-Kwan, "Roth, Mitch"

Archive: This message is being viewed in an archive.

I am ok at 3:15 pm today. Doug

-----Original Message-----

From: Ian L. Sandison [mailto:isandison@carlsmith.com]
Sent: Monday, April 20, 2015 1:05 PM
To: 'Linda.L.Chow@hawaii.gov'
Cc: J. Douglas Ing; 'Nagata, Darien'; 'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Good by me. Ian

-----Original Message-----

From: Linda.L.Chow@hawaii.gov [mailto:Linda.L.Chow@hawaii.gov]
Sent: Monday, April 20, 2015 1:04 PM
To: Ian L. Sandison
Cc: 'J. Douglas Ing'; 'Nagata, Darien'; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

I have another meeting at 2. How about 3:15?

Linda L.W. Chow
Deputy Attorney General
Land Transportation Division

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-----"Ian L. Sandison" <isandison@carlsmith.com> wrote: -----

=====
To: "'J. Douglas Ing'" <DougIng@wik.com>, "'Nagata, Darien'" <Darien.Nagata@hawaiicounty.gov>, "'Linda.L.Chow@hawaii.gov'" <Linda.L.Chow@hawaii.gov>, "'Julie.H.China@hawaii.gov'" <Julie.H.China@hawaii.gov>, "Bailey, Elizabeth B." <Elizabeth.Bailey@hawaiicounty.gov>
From: "Ian L. Sandison" <isandison@carlsmith.com>
Date: 04/20/2015 10:47AM
Cc: Tim Lui-Kwan <tlukwan@carlsmith.com>, "Roth, Mitch" <Mitch.Roth@hawaiicounty.gov>
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call
=====

All,

Attached is a first attempt at a map. Could we have a call today to fill in/correct the commentary? Does 2:00 p.m. work?

Thanks,

Ian

From: J. Douglas Ing [mailto:DougIng@wik.com]
Sent: Friday, April 17, 2015 3:00 PM
To: Ian L. Sandison; 'Nagata, Darien'; 'Linda.L.Chow@hawaii.gov';
'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.
Cc: Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

This is to notify you that TMT will not be re-starting construction this coming Monday, and will not be working at the summit next week, except for upkeep and maintaining the equipment.

From: Ian L. Sandison [mailto:isandison@carlsmith.com]<mailto:[mailto:isandison@carlsmith.com]>
Sent: Friday, April 17, 2015 12:32 PM
To: 'Nagata, Darien'; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov';
J. Douglas Ing; Bailey, Elizabeth B.
Cc: Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

All,

Following up on Darien's question about the fact patterns we expect, attached are photographs of the protesters, TMT vehicles / personnel and law enforcement officers at the time of last arrests.

• In the first picture, the protesters are blocking the road adjacent to the visitor center at Hale Pohaku. This is the area where most of the protests occur and where the protesters spend the night currently.

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• The third picture shows DOCARE officers speaking with protesters sitting in the gravel road (just above Hale Pohaku) blocking TMT vehicles and just prior to being arrested.

• The last picture shows the protesters on SMA subleased property adjacent to TMT subleased property.

We are working on a map now.

Ian

From: Nagata, Darien [mailto:Darien.Nagata@hawaiicounty.gov]
Sent: Friday, April 17, 2015 11:33 AM
To: Ian L. Sandison; 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov';
'J. Douglas Ing'; Bailey, Elizabeth B.
Cc: Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

I am introducing Deputy Prosecuting Attorney “Britt” Bailey into this conversation.
Britt is our Deputy assigned to the Waimea courthouse and since the venue for these offenses are in Hamakua, therefore going to the Waimea courthouse, Britt will be the Deputy assigned to these case.

Britt has already charged/filed Criminal Trespass 2 (HRS 708-814) cases and it is anticipated that we will be charging additional charges of Obstructing (HRS711-1105) on other cases referred to our office.

I am also “cc’ing” in Prosecutor Mitch Roth should he wish to add anything to this conversation.

For future cases, we would stress that we need to have the return to Hamakua Court (versus South Hilo Court) should the defendant(s) bail out and be provided with a future court date and courthouse.

I am expected at court now so I can provide more information in a later email.

Thank you,
Darien Nagata

From: Ian L. Sandison [mailto:isandison@carlsmith.com]<mailto:[mailto:isandison@carlsmith.com]>
Sent: Friday, April 17, 2015 10:35 AM
To: 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing'; Nagata, Darien
Cc: Tim Lui-Kwan
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Sorry, I mistyped Darien’s email address in the prior email.

Ian

Ian L. Sandison
Partner | Carlsmith Ball LLP

ASB TOWER 1001 BISHOP STREET, SUITE 2100, HONOLULU, HI 96813
Direct:(808) 523-2526 Fax: (808) 523-0842 Web: www.carlsmith.com Email:
isandison@carlsmith.com

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Hilo * Kona * Maui * Guam * Los Angeles
IMPORTANT/CONFIDENTIAL: This message may contain confidential and privileged information. If it has been sent to you in error, please reply to inform the sender of the error and then delete this message.

From: Ian L. Sandison
Sent: Friday, April 17, 2015 10:33 AM
To: Linda.L.Chow@hawaii.gov<mailto:Linda.L.Chow@hawaii.gov>; Julie.H.China@hawaii.gov<mailto:Julie.H.China@hawaii.gov>; 'J. Douglas Ing'; 'darien.nagata@hawaii.county.gov'
Cc: Tim Lui-Kwan
Subject: Mauna Kea Jurisdictional Issues - Conference Call

All,

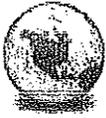
Please use the following bridge line for our 10:40 a.m. conference call this morning:

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian

[attachment(s) Maunakea Access Roads 2015-04-17.pdf removed by Linda L
Chow/AG/StateHiUS]



{In Archive} RE: Mauna Kea Jurisdictional Issues - Conference Call

J. Douglas Ing to: Bailey, Elizabeth B.

04/20/2015 04:10 PM

Cc: "Nagata, Darien", "Julie.H.China@hawaii.gov", Tim Lui-Kwan
"Roth, Mitch", "Ian L. Sandison",
"Linda.L.Chow@hawaii.gov", "Ross T. Shinyama"

Archive: This message is being viewed in an archive.

1 attachment



TMT- Legal argument re prosecution of protesters.docx

Britt,
Thank you for joining the call today. In follow up, attached is the memo regarding sovereignty, the Kingdom, lack of jurisdiction issues and Judge Cardoza's ruling. This was prepared by Ross Shinyama of our office. Feel free to contact him if you have questions. Doug

J. Douglas Ing, Esq.
Watanabe Ing LLP
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813
Direct Line: (808) 544-8324
Email Address: douging@wik.com

-----Original Message-----

From: Ian L. Sandison [mailto:isandison@carlsmith.com]
Sent: Monday, April 20, 2015 1:45 PM
To: J. Douglas Ing; 'Linda.L.Chow@hawaii.gov'
Cc: 'Nagata, Darien'; 'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Let's use the following bridge line for the 3:15 call

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian

-----Original Message-----

From: J. Douglas Ing [mailto:DougIng@wik.com]
Sent: Monday, April 20, 2015 1:41 PM
To: Ian L. Sandison; 'Linda.L.Chow@hawaii.gov'
Cc: 'Nagata, Darien'; 'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

I am ok at 3:15 pm today. Doug

-----Original Message-----

From: Ian L. Sandison [mailto:isandison@carlsmith.com]
Sent: Monday, April 20, 2015 1:05 PM
To: 'Linda.L.Chow@hawaii.gov'
Cc: J. Douglas Ing; 'Nagata, Darien'; 'Julie.H.China@hawaii.gov'; Bailey,

AG-001745

Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

Good by me. Ian

-----Original Message-----

From: Linda.L.Chow@hawaii.gov [mailto:Linda.L.Chow@hawaii.gov]
Sent: Monday, April 20, 2015 1:04 PM
To: Ian L. Sandison
Cc: 'J. Douglas Ing'; 'Nagata, Darien'; 'Linda.L.Chow@hawaii.gov';
'Julie.H.China@hawaii.gov'; Bailey, Elizabeth B.; Tim Lui-Kwan; Roth, Mitch
Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

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Deputy Attorney General
Land Transportation Division

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=====

To: "'J. Douglas Ing'" <DougIng@wik.com>, "'Nagata, Darien'" <Darien.Nagata@hawaiicounty.gov>, "'Linda.L.Chow@hawaii.gov'" <Linda.L.Chow@hawaii.gov>, "'Julie.H.China@hawaii.gov'" <Julie.H.China@hawaii.gov>, "Bailey, Elizabeth B." <Elizabeth.Bailey@hawaiicounty.gov>
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Cc: Tim Lui-Kwan <tluikwan@carlsmith.com>, "Roth, Mitch" <Mitch.Roth@hawaiicounty.gov>
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Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

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I am expected at court now so I can provide more information in a later email.

Thank you,
Darien Nagata

AG-001747

From: Ian L. Sandison [mailto:isandison@carlsmith.com]<mailto:[
mailto:isandison@carlsmith.com]>
Sent: Friday, April 17, 2015 10:35 AM
To: 'Linda.L.Chow@hawaii.gov'; 'Julie.H.China@hawaii.gov'; 'J. Douglas Ing';
Nagata, Darien
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Subject: RE: Mauna Kea Jurisdictional Issues - Conference Call

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'darien.nagata@hawaii.county.gov'
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Subject: Mauna Kea Jurisdictional Issues - Conference Call

All,

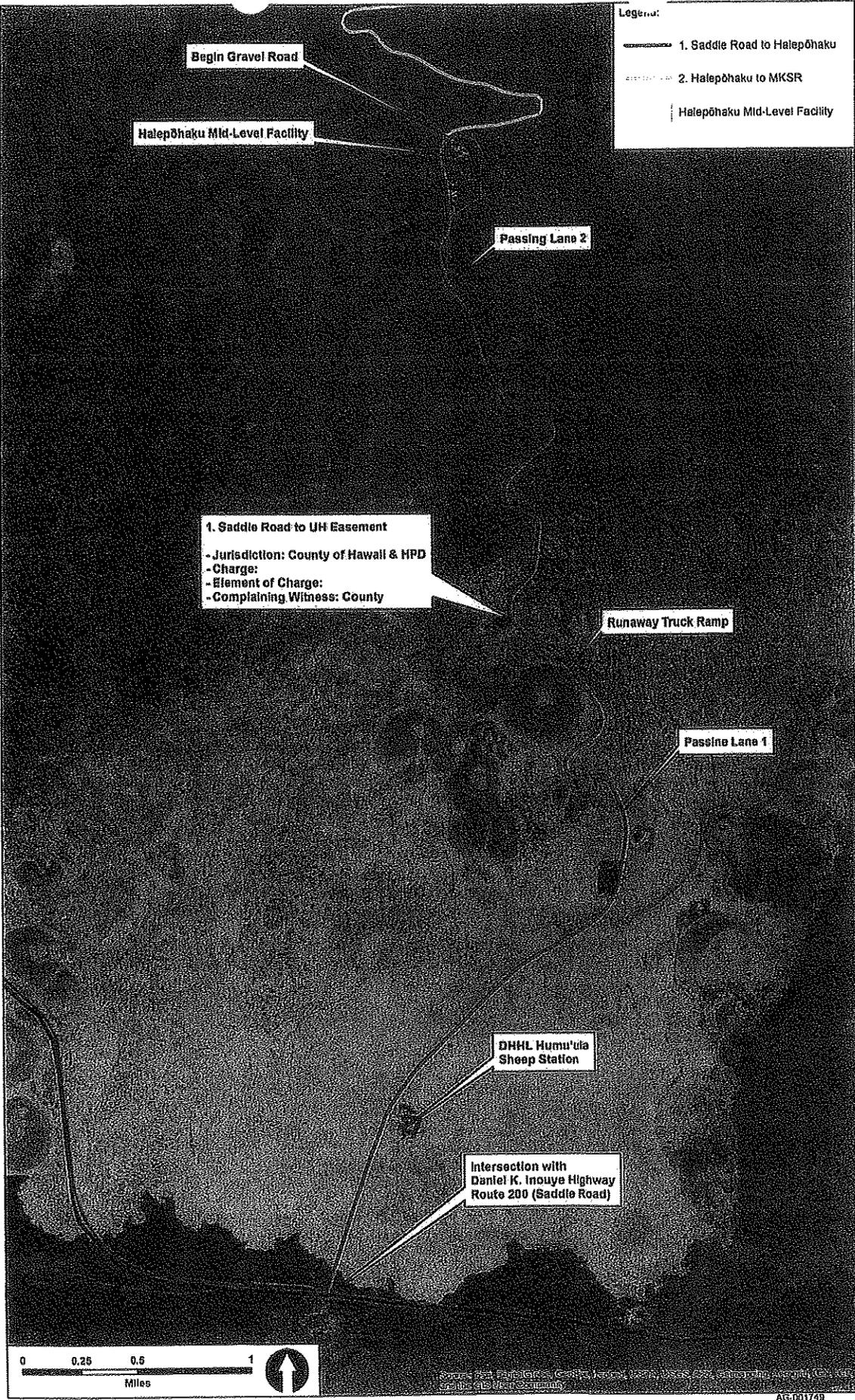
Please use the following bridge line for our 10:40 a.m. conference call this
morning:

Dial In: 888-761-6665
Pass Code: 808-523-2526

Thanks,

Ian

[attachment(s) Maunakea Access Roads 2015-04-17.pdf removed by Linda L
Chow/AG/StateHiUS]



Legend:

- 1. Saddle Road to Halepōhaku
- 2. Halepōhaku to MKSR
- Halepōhaku Mid-Level Facility

Begin Gravel Road

Halepōhaku Mid-Level Facility

Passing Lane 2

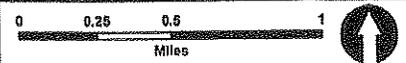
1. Saddle Road to UH Easement
 - Jurisdiction: County of Hawaii & HPD
 - Charge:
 - Element of Charge:
 - Complaining Witness: County

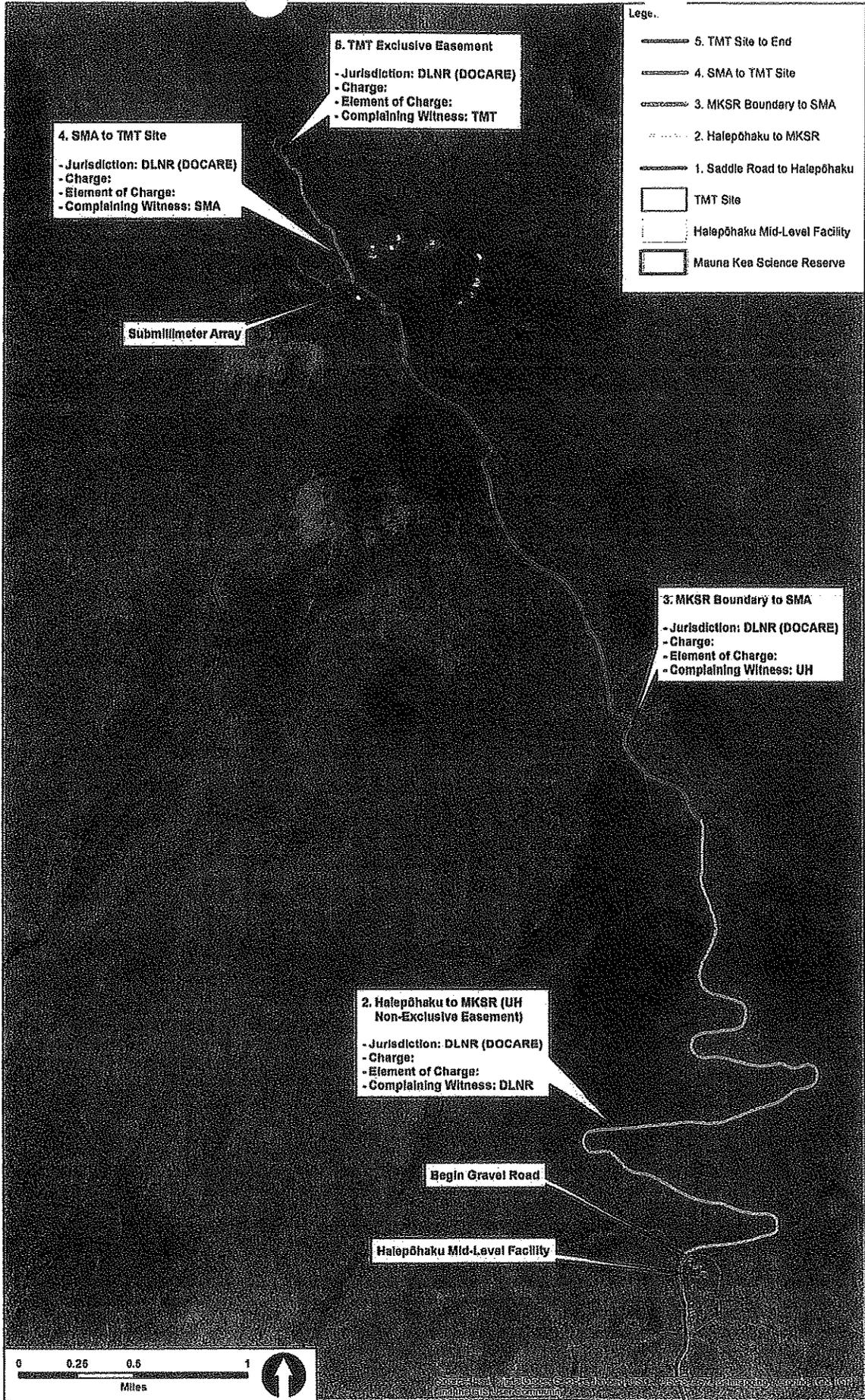
Runaway Truck Ramp

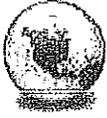
Passing Lane 1

DHHL Humu'ula Sheep Station

Intersection with Daniel K. Inouye Highway Route 200 (Saddle Road)







TMT Casesa

Bailey, Elizabeth B. to: J. Douglas Ing
"Julie.H.China@hawaii.gov", Tim Lui-Kwan, "Ian L.
Cc: Sandison", "Linda.L.Chow@hawaii.gov", "Ross T. Shinyama"

05/11/2015 05:28 PM

History: This message has been replied to.

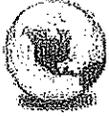
Hi all,
I am writing to request for any discoverable materials in relation to the TMT arrests. Our office needs to get discovery to the various attorneys involved by the end of the week. If there are any reports from witnesses, would you be able to please provide them to our office. For example, did TMT security draft a report regarding the trespass of Defendants on TMT land and the subsequent arrests. Were warnings given to the trespass Defendants as to their being on private property and not having permission to be there?

Please contact me with any questions, and thank you for any assistance you can provide in this matter.

Britt

E. Britt Bailey
Deputy Prosecuting Attorney
Office of the Prosecuting Attorney
County of Hawai'i
64-1067 Mamalahoa Hwy., C-3
Kamuela, Hawai'i 96743

Phone: (808) 887-3017
Fax: (808) 887-3016
Email: Elizabeth.Bailey@HawaiiCounty.gov



RE: TMT Mauna Kea arrests
Bailey, Elizabeth B.
to:
Linda.L.Chow@hawaii.gov
04/27/2015 04:11 PM
Hide Details
From: "Bailey, Elizabeth B." <Elizabeth.Bailey@hawaiicounty.gov>

To: "Linda.L.Chow@hawaii.gov" <Linda.L.Chow@hawaii.gov>

History: This message has been replied to.

Hi Linda,
What is your phone #?
Thank you, Britt
E. Britt Bailey
Deputy Prosecuting Attorney
Office of the Prosecuting Attorney
County of Hawai'i
64-1067 Mamalahoa Hwy., C-3
Kamuela, Hawai'i 96743

Phone: (808) 887-3017
Fax: (808)887-3016
Email: Elizabeth.Bailey@HawaiiCounty.gov

From: Linda.L.Chow@hawaii.gov <Linda.L.Chow@hawaii.gov>
Sent: Monday, April 27, 2015 1:48 PM
To: Nagata, Darien; Bailey, Elizabeth B.
Subject: TMT Mauna Kea arrests

Darien and Britt,

Can you provide me with information regarding the following? One of my clients have asked me for this

AG-001760



RE: TMT Mauna Kea arrests

Nagata, Darien

to:

Linda.L.Chow@hawaii.gov, Bailey, Elizabeth B.

04/28/2015 11:01 PM

Hide Details

From: "Nagata, Darien" <Darien.Nagata@hawaiicounty.gov>

To: "Linda.L.Chow@hawaii.gov" <Linda.L.Chow@hawaii.gov>, "Bailey, Elizabeth B." <Elizabeth.Bailey@hawaiicounty.gov>

History: This message has been replied to.

Linda,

I apologize for not getting back to you sooner.

I've been tied up with court matters.

A majority of the cases came in today with the majority being reset for 5/7 in Hamakua court.

Britt Bailey will be the assigned Deputy for these cases.

I can provide you with more information when I get back into the office tomorrow.

Thank you,

Darien

From: Linda.L.Chow@hawaii.gov <Linda.L.Chow@hawaii.gov>

Sent: Monday, April 27, 2015 1:48 PM

To: Nagata, Darien; Bailey, Elizabeth B.

Subject: TMT Mauna Kea arrests

Darien and Britt,

Can you provide me with information regarding the following? One of my clients have asked me for this information.

1- Exact count of protesters that were arrested?

2- Type(s) of Charges? I understand you have already charged Criminal Trespass 2 (HRS § 708-814) in a few cases and you anticipated charging additional charges of Obstructing (HRS § 711-1105). Any other sections or

AG-001762

information.

- 1- Exact count of protesters that were arrested?
- 2- Type(s) of Charges? I understand you have already charged Criminal Trespass 2 (HRS § 708-814) in a few cases and you anticipated charging additional charges of Obstructing (HRS § 711-1105). Any other sections or charges?
- 3- Court Date(s) for protesters?
- 4- Hawai'i County Prosecutor that is assigned to this case? I am assuming Britt is the primary prosecutor. Darien, are you also assisting in the prosecutions?

Thank you for your cooperation in this matter.

Linda L.W. Chow
Deputy Attorney General
Land Transportation Division

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
) CERTIFICATE OF SERVICE
A Contested Case Hearing Re)
Conservation District Use Permit)
(CDUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kaohe Mauka, Hamakua)
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following parties by the means indicated:

Michael Cain
Office of Conservation and Coastal
Lands
1151 Punchbowl, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

Judge Riki May Amano (Ret.)
rma3cc@yahoo.com
Hearing Officer

William J. Wynhoff, Esq.
Julie H. China, Esq.
julie.h.china@hawaii.gov
bill.j.wynhoff@hawaii.gov
*Counsel for the Board of Land
and Natural Resources*

Ian Sandison, Esq.
Timothy Lui-Kwan, Esq.
isandison@carlsmith.com
tluikwan@carlsmith.com
*Counsel for the applicant University
Of Hawai'i at Hilo*

J. Douglas Ing, Esq.
Ross T. Shinyama, Esq.
douging@wik.com
rshinyama@wik.com
*Counsel for TMT International
Observatory, LLC*

Lincoln S.T. Ashida, Esq.
Newton J. Chu, Esq.
isa@torkildson.com
njc@torkildson.com
*Counsel for Perpetuating Unique
Educational
Opportunities (P.U.E.O)*

Harry Fergerstrom
hankhawaiian@yahoo.com

Richard L. DeLeon
kekaukike@msn.com

Mehana Kihoi
uhiwai@live.com

C.M. Kaho'okahi Kanuha
kahookahi@gmail.com

Joseph Kualii Lindsey Camara
kualiic@hotmail.com

J. Leina'ala Sleightholm
leina.ala.s808@gmail.com

Stephanie-Malia Tabbada
s.tabbada@hawaiiantel.net

William Freitas
pohaku7@yahoo.com

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Maelani Lee
maelanilee@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
akulele@yahoo.com

Cindy Freitas
hanahanai@hawaii.rr.com

Dwight J. Vincente
2608 Ainaloa Drive
Hilo, HI 96720-3538

DATED: Honolulu, Hawaii, July 18, 2016.


RICHARD NAWIEHA WURDEMAN