

RICHARD NAIWIEHA WURDEMAN 6015-0
 Attorney at Law, A Law Corporation
 Pauahi Tower, Suite 720
 1003 Bishop Street
 Honolulu, Hawaii 96813
 Telephone: (808) 536-0633
 Facsimile: (808) 536-0634
 e-mail: RNWurdeman@RNWLaw.com

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 OFFICE OF CONSERVATION
 AND COASTAL LANDS
 2016 MAY -6 P 4: 26
 DEPT. OF LAND &
 NATURAL RESOURCES
 STATE OF HAWAII

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
)	
)	PETITIONERS' OBJECTIONS
A Contested Case Hearing Re)	REGARDING PROCUREMENT
Conservation District Use Permit)	COMMITTEE AND PROCESS
(CDUP) HA-3568 for the Thirty Meter)	AND COMMITTEE MEMBER/
Telescope at the Mauna Kea Science)	BLNR BOARD MEMBER;
Reserve, Kaohe Mauka, Hamakua)	DECLARATION OF COUNSEL;
District, Island of Hawaii,)	EXHIBITS "A" – "E"; and CERTIFICATE
TMK (3) 4-4-015:009)	OF SERVICE
)	
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PETITIONERS' OBJECTIONS REGARDING PROCUREMENT COMMITTEE AND
 PROCESS AND COMMITTEE MEMBER/BLNR BOARD MEMBER

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 "Mauna Kea Anaina Hou")

or "Petitioners"), by and through their counsel undersigned, and hereby respectfully submit their objections regarding the procurement committee and process and committee member and BLNR Board Member.¹

The Petitioners incorporate herein and reassert their Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on April 15, 2016 ("Petitioners' April 15, 2016 Objections"), as well as the Petitioners' Responsive and Supplemental Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on May 2, 2016 ("Petitioners' May 2, 2016 Objections"). Petitioners submit their Objections without waiving any positions about the deprivation and denial of due process, which they respectfully submit continues to occur, while trying to preserve a record through written objections, which appears, to date, to be the only way in which to make a record without any type of scheduling, notice and participation in hearings, including public hearings and without waiving their positions on the public hearings requirements. The Petitioners respectfully submit, yet once again, that they continue to be deprived of notice and an opportunity to be heard at a meaningful time and in a meaningful manner, which are the basic elements of due process. 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).

¹ The filing of the instant responsive and supplemental objections is done without waiving any positions and objections as to hearing requirements and the overall selection process or that the application is not in compliance with law and other related issues.

A. Procurement Committee and Process.

The BLNR Chair clearly commenced the selection process of a hearing officer in or about January of 2016 without the authority of the Board and such *ultra vires* actions are invalid. The Petitioners once again challenge the selection process of a hearing officer, the objections of which were previously made through the Petitioners' April 15, 2016 Objections and the Petitioners' May 2, 2016 Objections. As was stated previously, the authority to start the process of conducting a contested case hearing is clear and unambiguous under the rules. Hawaii Administrative Rules Section 13-1-32(b), provides in pertinent part: "The board may conduct the hearing or, the board in its discretion may delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer..." (Emphasis added). The Chair has no authority to do anything with respect to the selection process of a hearing officer until the Board decides whether it is going to first conduct the hearing itself or delegate the conduct of the hearing to a hearing officer and then and only then may the Chair proceed with selecting a hearing officer once the board makes the delegation of its authority to a hearing officer to conduct the contested case. As with the "cart before the horse" phrase used by the Hawaii Supreme Court in its discussion of due process violations previously committed by the BLNR, the Petitioners respectfully submit that the Chair is once again putting the "cart before the horse" in the instant matter, and commencing the hearing officer selection process even before the delegation by the Board had been made and before the Chair had the authority to do so. These *ultra vires* actions by the Chair were being done arbitrarily and capriciously and without authority and any process, and, further, contrary to the law and rules, and,

without proper rules promulgated to conduct such actions, such actions are also contrary to HRS Chapter 91 and the rule making requirements. Starting the process all over again is the only remedy and only upon the proper delegation by the Board as discussed by the Petitioners in their April 15, 2016 Objections and May 2, 2016 filings and herein.

The Petitioners also raise and incorporate again herein their objections that such a delegation by the Board to conduct the contested case hearing must be done at a public hearing.

As was set forth in the Petitioners' April 15, 2016 Objections, prior to the Third Circuit Court's Order of Remand to the Board of Land and Natural Resources, dated February 22, 2016, a true and correct copy of which is attached hereto as Exhibit "A," the Chair had already started the process in January of 2016 in having published the Notice to Attorneys Interested in Providing Legal Services to the Department of Land Resources as a Hearing Officer in the Thirty Meter Telescope CDUP Permit Contested Case (Pursuant to § 103D-304, HRS)("Notice to Attorneys for a Hearing Officer").

The Petitioners also note, once again, that it was only after receipt of Minute Order No. 1 and after counsel for Petitioners raised with counsel for the BLNR objections to the selection process as being in violation of Sunshine Law, as well as other issues, was Minute Order No. 2, dated April 8, 2016, in this matter issued, seemingly in response to Petitioners' counsel's objections that were raised with BLNR's counsel. According to Minute Order No. 2, the BLNR had met on February 26, 2016 (almost a month after the Notice to Attorneys for a Hearing Officer was published) "as part of and to discharge its adjudicatory function governed by Haw. Rev. Stat. § 91-9,"

during which “the Board delegated the conduct of the contested case hearing to a hearing officer, pursuant to HAR § 13-1-32(b), and confirmed that the chairperson was authorized to engage the services of a hearing officer pursuant to law.” No notice was ever provided to the Petitioners of the February 26, 2016 meeting, regardless of whether the meeting was considered by the BLNR as an adjudicatory function, governed by H.R.S. Sect. 91-9, nor were the Petitioners ever provided an opportunity to be heard. The Petitioners raise this argument without waiving their arguments and authorities set forth in their April 15, 2016 Objections and their May 2, 2016 Objections, that this February 26, 2016 meeting of the Board was simply a preliminary manner, not “adjudicatory” in nature, and subject to proper notice and Sunshine Law.

Interestingly, and according to a special web page on the DLNR website², dedicated to the Contested Case on TMT and Mauna Kea, in a portion of the Q&A section of the web page, the following is set forth:

Question: Is the BLNR concerned about fast-tracking this permit so that the developers don't move the telescope project somewhere else?

Answer: No. [T]he BLNR is committed to a process that is efficient, fair, and, provides an ample opportunity to be heard.

If the BLNR was not trying to fast-track the process for the TMT developers, an important need raised by representatives and officers of the TMT Observatory International Board and its Executive Director in the media, than why did the Notice to Attorneys for a Hearing Officer go out in publication in January of 2016, even before the case was remanded by Order of the Third Circuit Court, in the Order dated February 22, 2016, and prior to the purported authorization and delegation by the BLNR on February

² Objections to this web page and the predetermination and predisposition of issues in this case are also raised and objections made in Section C below.

22, 2016? Obviously, the Petitioners would respectfully submit, the only logical answer is that it was done in response to TMT developers' stated concerns and to fast-track and get the process moving for the TMT developers, a special "fast-tracked" process that certainly would never occur for most other projects or for most if not all of the other BLNR issues. These types of arbitrary and capricious actions, and what the Petitioners believe to be preferential treatment for TMT developers, cannot be permitted and are contrary to law and to due process and the just determinations that the Hawaii Supreme Court just discussed in its December 2, 2105 Opinion in this case. Once again, as the Hawaii Supreme court reiterated in its Opinion, "[t]his means that 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[.]").

B. Objections Regarding Procurement Selection Committee/BLNR Member.

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, counsel for Petitioners just learned on May 4, 2016 of “[A]n Interview with Chris Yuen As He Leaves the Land Board,” dated July 1998 and then

posted, at least once again, it appears, on October 29, 2014, on the environment-hawaii.org web page. In the interview, BLNR Board Member Chris Yuen had been interviewed, and provided his views and perspectives on various issues, including Mauna Kea, when he departed the BLNR during his earlier tenure in 1998. In the interview, Mr. Yuen stated, among other things the following about Mauna Kea:

...For all the criticism and the auditors report—I just don't see a lot of harm that's been done to those resources by the astronomy facilities being put up there and with all this activity in the last 20-25 years.

...

The auditor report was critical. There were some delays. The big archaeological study was late, certainly the arthropod study was delayed. But if you try to identify what has gone wrong--has something been destroyed or lost? Again, apart from just the thing that you have all those domes sticking up there, it's been done in a pretty responsible way.

These are people that don't like having all those buildings up there--which is a valid point, but the basic decision was made, almost 20 years ago. And, honestly, I don't see what difference it would make to have a few more telescopes up there as long as you site them properly. It doesn't make a qualitative change in the mountaintop if you do that.

Please see Exhibit "B" attached hereto, which is a true and correct copy of the said Interview that appeared on the environment-hawaii.org web page as described above.

In addition, to these very strong opinions and beliefs about telescope development on Mauna Kea, which the Petitioners, respectfully submit, in and of themselves, rises to the level of the appearance of prejudgment, a lack of an appearance of justice, and potential bias, as described in the authorities set forth above, which the Petitioners submit would require disqualification, Mr. Yuen also further voted in favor of the Emergency Rule involving Mauna Kea that was heard by the BLNR on July 10, 2015 and approved by Governor Ige and the BLNR, on July 14, 2015, effective on the same date, and that was then struck down and invalidated by the Third Circuit on

October 9, 2015. See Exhibit "C" attached hereto, which is a true and correct copy of the Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Partial Summary Judgment, filed September 14, 2015, in the Third Circuit Court, in Civil No. 15-1-276K. The Plaintiff in that successful challenge to the Emergency Rule before the Third Circuit Court, in E. Kalani Flores vs. Board of Land and Natural Resources, et al, Civil No. 15-1-276K (Third Circuit Court, State of Hawaii) is E. Kalani Flores a member of the Case-Flores Ohana that is a petitioner in the instant matter before the BLNR.

Further, Petitioners also raise the failure of BLNR Board Member to raise the issue of "An Interview with Chris Yuen As He Leaves the Land Board," in his rather detailed disclosures in the letter, dated April 29, 2016, and made a part of the Notice of Filing of Disclosures of BLNR Board Chairperson Suzanne Case and Board Member Chris Yuen, dated May 2, 2016. While the said article and interview was given in or about July of 1998, Mr. Yuen makes disclosures in his April 29, 2016 disclosures of litigation that occurred even prior to that date, in the early 1990's and disclosed having been a lecturer in the Hawaii Community College system back in the mid-1980's, as well as having graduated from the UH Law School in 1982, all events that were well before July of 1998. And, while the Interview was apparently reposted on October 29, 2014, it was easily discovered with a google search of "Chris Yuen Hawaii" and is still on-line. Further, while the particular planning of the TMT project started some years following the 1998 article, the strong and favorable opinions and positions of future telescope development as described in the interview by Mr. Yuen, the Petitioners respectfully submit, the appearance of prejudgment, a lack of an appearance of justice,

and potential bias, as described in the authorities set forth above, with respect to the instant matter involving the proposed development of the TMT Observatory project.

Finally, the fact that Mr. Yuen was also a member of the 3-member procurement selection process for a hearing officer, in which panel members ranked potential hearing officers, the Petitioners respectfully submit, and without waiving its position that it was done prematurely and should be redone in any event, that the procurement and selection process should start all over again, in any event, given the issues involving panel member Yuen as discussed herein, with a completely and entirely new committee.

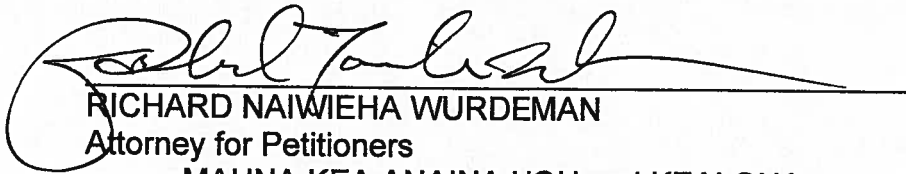
C. Objections to the DLNR Mauna Kea Specific Web Page.

As was discussed through the legal authorities set forth in Section B above, the Petitioners also submit that the legal conclusions and opinions on issues raised by the Petitioners' in their objections of April 15, 2016 and May 2, 2016, including, but not limited to, whether such the February 26, 2016 meeting of the BLNR in which the alleged delegation was made under HAR Section 13-1-32(b), was a required public hearing under Sunshine Law and issues involving the selection process, were listed and then responded to in answer form on the DLNR-Mauna Kea specific web page and the Q&A (question and answer portion) on some of the important legal objections raised by the Petitioners in their filings. How did this web page come about and why a Mauna Kea specific web page? Was it discussed and approved in a hearing of any kind? Who authorized it? Who rendered the opinions and through what process? More importantly, how are legal issues raised by the Petitioners being summarily addressed on a web page without the Petitioners having a hearing or even some semblance of due

process and the opportunity to be heard at a meaningful time? A true and correct copy of the Mauna Kea Web page on the DLNR web page is attached hereto as Exhibit "E."

Additionally, if the Mauna Kea web site is an attempt at some sort of transparency, why not public hearings as well as an opportunity for the Petitioners to be heard at a meaningful time and in a meaningful manner?

DATED: Honolulu, Hawaii, May 6, 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 of Remand, filed on February 22, 2016 in Civil No. 13-1-0349, in the Third Circuit Court.

4. Attached hereto as Exhibit "B" is a true and correct copy of "An Interview with Chris Yuen As He Leaves the Land Board," that appears on the environment-hawaii.org web page.

5. Attached hereto as Exhibit "C" is a true and correct copy of the Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Partial Summary Judgment, filed September 14, 2015, in Civil No. 15-1-276K (Third Circuit Court).

6. Attached hereto as Exhibit "D" is a true and correct copy of the Notice of Filing of Filing of Disclosure of BLNR Board Chairperson Suzanne Case and Board Member Chris Yuen, dated May 2, 2016.

7. Attached hereto as Exhibit "E" is a true and correct copy of the Mauna Kea FAQ web site from the DLNR web page (that apparently was posted earlier this week, based on information and belief).

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, May 6, 2016.

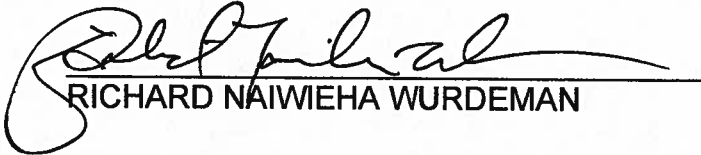

RICHARD NAIWIEHA WURDEMAN

EXHIBIT "A"

FILED

CARLSMITH BALL LLP

ORIGINAL

IAN L. SANDISON 5597
 TIM LUI-KWAN 2271
 LINDSAY N. MCANEELEY 8810
 ASB Tower, Suite 2100
 1001 Bishop Street
 Honolulu, HI 96813
 Tel No. 808.523.2500
 Fax No. 808.523.0842

2016 FEB 22 AM 9:12
L. Chinen
 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]

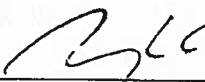
ORDER FOR REMAND

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

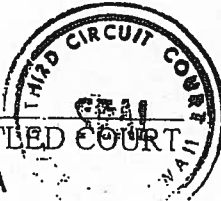
Mina

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**



JUDGE OF THE ABOVE-ENTITLED COURT
GREG K. NAKAMURA



Mauna Kea Ainana Hou et al. vs. Board of Land and Natural Resources et al., Civil No. 13-1-0349; ORDER FOR REMAND

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



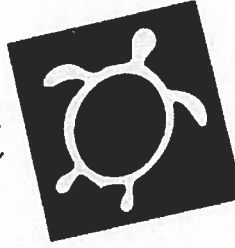
DOUGLAS S. CHIN
WILLIAM J. WYNHOFF
JULIE H. CHINA

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

Mauna Kea Ainana Hou et al. vs. Board of Land and Natural Resources et al., Civil No. 13-1-0349; ORDER FOR REMAND

EXHIBIT "B"

Environment



Hawai'i
a monthly newsletter

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An Interview with Chris Yuen As He Leaves the Land Board 29

OCT 2014

posted in: July 1998 | 0

Chris Yuen has been the Big Island member of the Board of Land and Natural Resources since 1990. His second term will expire on June 30. Recently, Environment Hawai'i met with Yuen to discuss his views and experiences on the Land Board. Excerpts from that discussion follow:

Environment Hawai'i: One of the big differences that I feel has occurred over the time you've served on the board has been that nowadays, far fewer high-profile, controversial Conservation District cases come before you for decision-making.

Chris Yuen: Yes, those big, inappropriate residential developments seem to have fallen off. There was just a whole slew of them in the late '80s. They were a product of the times, you know. I think that if we didn't have the rules, size limits, probably these sorts of things would come up from time to time. Maybe not all in a rush, like they did in the late '80s, but there still would be some attempt.

Do you think maybe now the Land Board is a little less willing to go along with those proposals, even if you didn't have the rule change? I think there's a heightened sensitivity among board members that wasn't there when you joined the board.

Well, probably. There's been more resistance to it, and I can't really cite anything in particular. I mean, Engelstad has had its problems, of course, and eventually what was approved was much downsized from what he started with. [Ed. note: "Engelstad" refers to the proposal for a large house in the Conservation District above Lanikai, O'ahu, whose approval has been the source of great controversy stretching back two decades.]

Could you talk about some of the changes you've seen?

The board – the people are more individualistically strong-minded. More than when I joined the board, they have their own opinions about things. And so, I think you'll see it's a little more difficult to achieve consensus sometimes on the board.

I think they're all good board members, they're all pretty smart at what they're doing. I think that when I was first on the board, there was more of an idea of just trying to achieve consensus all the time.

Led by the island board members?

It tended to be that way, but there were some times when that wasn't true, or people didn't have a strong opinion one way or another. There was also more of a tendency for the board to just approve the staff's recommendation. Now the board tends to look at staff proposals a little more critically.

Board members had started to do that in the past: T.C. Yim, for example, or Libert Landgraf, Colbert Matsumoto's carrying on that tradition. I think that's a little different than in the early 1990s.

Even from before I was on the board, the department has become more environmentally responsive. I think it started to happen, certainly in Bill Paty's time, and has continued in Mike Wilson's, where there's a much stronger environmental emphasis. So I think those are many of the changes that have happened that are good.

Current Issue



Navy Poised To Clean Sediments At Several Sites in Pearl Harbor
May 1, 2016



Board Talk: Coastal Resilience, Legacy Lands, Shark Hunt, Maunaloa Grant
May 1, 2016



Kauai Permit Case Skewers Notion That DOT Doesn't Need Supervision
May 1, 2016



Rent, Subdivision Issues Confound Efforts To Fix DLNR's Revocable Permit Mess
May 1, 2016



Extended Closure Spurs Wildlife To Reclaim Areas at 'Ahihi-Kina'u
May 1, 2016



NARS Commission Grants Permit For 'Alala Release at Pu'u Maka'ala
May 1, 2016



Prominent Architect, County Parks Head Flout SMA Regulations to Rebuild Seawall
May 1, 2016



Editorial: The New Keaukaha Seawall Must Come Down And the Parks Director Should Resign
May 1, 2016



NEW & NOTEWORTHY: Solar Charges, Puccinia Rust, Feral Cats
May 1, 2016



And we're not approving a lot of bad things. I would say that the problem with environmental policy in Hawai'i now is, while the environmental movement is pretty good at stopping bad things from happening, there is a problem with implementing positive change. The environmental movement is very good at getting out and fighting particular permits or development proposals that are destructive, but a lot of the things that are going on are – well, there is no permit involved. Banana poka overrunning the upland forests – you can't just sit there and take a vote and stop it. You have to implement a program to do something about it. And that's where we are still, the DLNR is not doing as much as it should.

And just in general, the environmental community is not really focused on those kind of issues.

For things that are enforcement related issues – there was an interesting story in the paper recently about dumping in Wai'anae. You had people just going around dumping. Nobody seems to get that excited about it.

Where environmental people are active is on the zoning, rezoning, permitting, things like that. At the moment, I think that's a less important part of the picture as far as environmental policy in the state overall.

One of Mike Wilson's big priorities is trying to beef up funding for DLNR so that it can better handle these environmental management issues, particularly with ocean resources. He's had some success, which is remarkable given the state's overall budget climate, but these issues of management and funding are things which the environmental community needs to work on more.

The HELCO Case

Can you comment on the HELCO decision?

I can discuss the question of the effect of the 3-2 vote by the board against granting the permit, with one member recused. It seems to me that that should be a denial.

This question of the effect of a vote by the board on a Conservation District permit where there aren't four votes either for or against is a big unresolved issue. When I got on the board we were told that the permit would be automatically approved if there weren't four votes against it. The reasoning was that the law says that the owner can put the land to the requested use unless the board makes a decision in 180 days, and that a valid action requires a majority of the board.

I went along with this unquestioningly until the first vote taken on Keahole in 1994, where three members just refused to vote.

Right after that I did some legal research that shows that in these automatic approval situations, the better legal interpretation is that if the board votes on the matter on time, the permit is defeated unless it gets enough votes to pass. This is the normal way that voting works: if you don't pass something, it fails, and there are many Mainland court decisions which agree with this.

It's one thing to say that an agency's got to bring a matter up for a vote or a decision, but when you couple it with the idea that you have to have a majority to defeat the proposal, then you're not only imposing a time frame, but you're skewing the voting, you're juicing the voting.

Especially if you have a member who has recused himself?

Right, which then counts the same as a yes vote, or a vote in favor of the permit. It's just ridiculous.

Referring back to Chapter 171 [Hawaii Revised Statutes], it just requires action be made by a simple majority of the members voting; it doesn't say total members.

What it says is that any action taken shall be by a simple majority of the members. The question is, do you count members who are absent or recused? The practice on the BLNR has been to assume you still need four votes to act under those circumstances, but there's never been a definitive legal ruling. If you look at Mainland cases, they go both ways on this. So this is another ambiguity. By the way, most state boards and commissions operate under a different law, which clearly says you need a majority of the entire membership to make a valid decision.

There was a bill at the Legislature which would have solved this problem by saying that as long as the board voted on time the permit would pass only if it got a majority of those present and qualified to vote in favor. For example, if one member was absent or disqualified, three votes would be enough to approve the permit. The bill has passed the House two years in a row but Randy Iwase and Malama Solomon have refused to hear it in their committee in the Senate.

This is going to become a broader issue, because the 1998 Legislature passed a law that some other kinds of permits will be automatically approved unless a decision is made within a time limit, including many County Planning commission decisions. The Legislature didn't specify what happens where there is a tie vote of less than a majority either way, so this is going to be a problem.

As far as the HELCO court case, Judge Ibarra ruled that a 3-2 vote against was not a denial, so the project could go forward. This is on appeal. I think that the judge was locked in to ruling this way to some extent by the fact that the people opposed to the permit had argued that the 2-0 vote in 1994 was going to result in approval, and that they would then not have a contested case hearing, which would be a denial of due process. And Judge Ibarra agreed with that.

So they were all locked into the line of thinking that the failure to get enough votes for a denial was approval. They were probably thinking the same way I was until I started looking into it.

Protecting the State's Interests

You have a background in law and biology, but one of the things I've been impressed with over the years is how you protect the state's financial interest. The most remarkable example that stands out in my mind is the negotiation with AT&T over the state's share in the sale of the lease of its berthing space at Sand Island.²

Oh, yeah, we did make some money on that one. I earned my per diem.

More than that. You earned hundreds of thousands of dollars for the state at that meeting.

I think it was something between 100, 150 thousand dollars.

Right. And that all revolved around a rather arcane argument, as to when you start amortizing capital improvements.

The whole thing was a little bit of an arbitrary situation, but, using the logic of how AT&T had come up with the first figure, really, it was more logical to do it the way I said to do it, which did result in some more money for the state, which is what we're supposed to be doing.

You know, the point you're making here is a good one. The Land Board does two things, which are somewhat distinct and actually quite different. Two main things: one is, we decide on the use of state land, does it become a school site, or a highway if the Department of Transportation wants it. And the other thing is Conservation District permits, and usually a little more attention is paid to those.

But it's amazing what comes up.

Were you prepared for that?

I knew what the board did, because I had been involved in issues before the Land Board. Certainly, I knew what the major responsibilities were. I know what had changed from the 70s to the 80s to the 90s. In the 80s, they stopped taking a lot of things to the board that probably never belonged there. They used to take everything – promotions, things like that, to the board, including many that really shouldn't have come to the board.

So, yes, I did know what the main responsibilities are.

And it's amazing, the amount of power – there really is a lot of power on the board.

I think you may be the exception, because at least you had attended board meetings before you joined the board. There are new members who have never attended a board meeting before they were appointed.

The board members have all been basically pretty astute. I don't know what their background is in any detail. There's a briefing, division heads talk to you, explain what they do.

The Oji Lease

One of the most controversial decisions the board has made in your tenure was the denial of the Oji lease for a eucalyptus plantation on the Big Island. As late as February 1997, the board seemed prepared to approve it, having voted over your dissent to sign a letter of intent with Oji, but by November, it had fallen through.

That was a very tough issue. After it had been worked on in the department, the project that was brought to the board in November 1997, with all the conditions that were there and the lands that had been taken out, it was a very defensible project. I don't think it was a bad project, from an environmental point of view. It could have been a bad project in the sense that there may have been something better that the land could be used for. I think time will tell for that.

There was fairly broad opposition within the community. Not so much that it was vocal, but a pretty broad base of people, not just one segment. I think that affected board members.

There was a lot of interest expressed, people saying at least that they wanted to go out and farm. I would like to see a very strong community of small-sized but commercially viable farms out there. We looked at all of this.

Back in 1994, when the original idea went out to forestry, we thought we had held enough land out for farming purposes, and we even added another 500 or 600 acres below the highway and below the ditch in the course of the Oji negotiations.

It may turn out that that was way more than enough, and in a few years time, it may not have been the right decision. Who knows, at this point?

I would say if the land becomes pasture, then we would have been better off going with Oji, because pasture provides fewer jobs and less revenue for the state. That's my assessment of how to judge this in four or five years' time. But for the moment, we're going to try, working first with the better lands, to put those out for auction, and see if people show up and want to farm them.

In light of the ardent, emotional, sometimes abusive testimony, was there any way at all that the land Board could have approved the Oji lease?

I don't think we were on the verge of any kind of a riot. I hope not. The board could have approved it. It would have been against the testimony that was there.

The Honolulu Advertiser had a pretty good editorial about it: we don't necessarily agree with all the things people say, but this is the way government is supposed to work, by listening to what people want or don't want.

I was a little concerned at one point because people were sort of, not exactly booing, but noises were being made over people that were testifying the other way, and I get concerned about people being intimidated from testifying, saying what they had to say. Clarence Souza, for example, who is a person who's been involved in things in the community over the years, and he wanted to speak, there was some noise being made concerning what he had to say. That's too bad.

DLNR Reorganization

There have been some watershed events in the DLNR – perhaps the most significant, the reorganization that has been effected. The Office of Conservation and Environmental Affairs is no more; the Division of Water and Land Development is no more. Their functions, to the extent those functions continue, have been soaked up by the Division of Land Management. Was the Land Board consulted about this?

I wouldn't say consulted in the sense of being sounded out as to whether this is a good idea or not. I think it's Mike Wilson's prerogative to do it. I knew about it happening, but I don't look to Mike to come to me on this kind of a decision.

I feel that personnel decisions are a matter for administration, not for the board. We are just not there, we don't work with these people except at board meetings, when they come in to make presentations. So it's very hard for me to know how the department should be organized.

I do think there are times when the staff reports are not as thorough as one might hope. I know it helps me to go in and look at the records. Do you do that?

Very rarely. You're right – when I was an activist, I really hit the files. You really learn a lot when you do that, but it's just very hard to take that time. When I have a question now, generally, I will call up.

There are times when I get an environmental impact statement, which we don't normally get. This natatorium issue, for example, most of what I need to know is in the EIS.

You know the effort you take in writing a feature article about a particular episode -that's about how much work it is to really be well-informed. Some of these things are very convoluted. Your articles have helped us sometimes, because the board doesn't get the detail that your articles provide, typically, in staff reports.

I don't know how much to expect from staff. I don't have to walk in their moccasins and I don't know how much time they have to prepare these reports. One thing you'll find is the DLNR is a very thin organization, in terms of what bodies are actually out there. And a lot of effort does get put into servicing the board and explaining things to the board. You have all these top level people who are spending the better part of the day during meetings hanging around the board room, to talk about things that they themselves don't have the time to learn chapter and verse.

So if you really want to get in there and learn something inside and out, it's hard to do it. And there have only been a few times when I've gone to original source materials and pulled files and looked at leases. There are more times when I've gotten an EIS, and probably even more when I've made phone calls to supplement what comes in from the staff. But unless you decide – you have to pick your spots and decide what you're interested in, to make an informed decision about a lot of these things.

Most of them aren't that big a deal, fortunately. But you have to get in there.

Some things, you know, you make a judgment on, based on your general experience of what is significant and what is not significant. For example, on this natatorium thing, I have a pretty good idea of what the ocean bottom looks like where they want to dump the rocks, so if you have that kind of experience, it helps. If I know a site, it helps.

Unfortunately, a lot of times, our staff planner that does the work-up has never gotten to the site, particularly on the neighbor islands, because they don't have any staff there. It makes a big difference when you can go out and see something.

What were the cases when you did look into the files?

Recently, I checked into our pasture leases. The state has a big opportunity in that a lot of upland areas that are presently in pasture could be converted back into koa forest, either for the economic value of the koa forest or for wildlife habitat – or perhaps there's a degree of compatibility, when you're not talking about absolutely pristine sites.

Some of our leases, especially on the slopes of Mauna Kea, near Keanakolu cabin – I thought I couldn't do anything about them, because they're leased to the year 2011, but I found a clause in them, at least some of them, that the lessor and lessee shall cooperate in a koa management plan. So I've been trying to get something going there. I haven't got too far, but I will be talking to some of the lessees about doing something up there.

Plus, thinking about Oji, I looked at all the cane leases, I was trying to get an idea of how many usable acres there were in the property we were looking to lease to Oji and the property that the state was looking at keeping for diversified ag purposes.

Other things I've spent a lot of time on: Onomea I spent quite a bit of time on, Mauna Kea I spent quite a bit of time on. There are a lot of other things I've spent a lot of time on, but those two especially come to mind. The draft EIS for the Hapuna [state park] expansion.

But as far as going and looking at the complete permit file on a particular permit, I don't know how often I've done that.

What is the hardest decision that you made?

I think Oji was a really difficult one. I had some concerns – I didn't want to see a bunch of cattle out there, which I think is worse environmentally, it's worse from the standpoint of the state's finances. I would like to get a forestry sector going.

Another one that was really, really difficult was the access easement for Koa Aina – Kyle Dong – up in South Kona.

He's in the ag district. He could cut down every tree on the property.

But he can't take it down without the state easement.

He could sling-load it down in a helicopter. There are other ways to get up there, although they're harder.

The balance there was, put some control on the site. If the conditions are enforced and are followed-up, then it's the proper decision to have made. He won't take down all the trees; he'll leave old trees; they're supposed to replant and re-establish the stands and keep feral animals out. The whole thing should be a better place than it was in 50 years time. If it's not enforced, then it could be a bad decision.

It's sometimes easier just to say no and walk away from things. But the environment has to be managed in a lot of areas because it's going downhill if left on its own – because it's not really being left on its own; there are feral animals, exotic plants. You've got to take an active management role to maintain a particular area. But then that exposes you to a lot of risk, if not done properly.

Mauna Kea

You mentioned earlier you'd spent a lot of time on the issue of the telescopes on Mauna Kea.

Once the state decided to have the astronomical facilities on Mauna Kea, the way the landscape looks is pretty changed. To me that's an irrevocable decision.

Once you've made that decision, there are still natural resource issues. You're not just making this an industrial waste site or a sacrifice area. The live issues are historic sites, archaeological sites, bug communities, cleanliness of the area, public safety issues, some culturally significant areas.

For all the criticism and the auditors report – I just don't see a lot of harm that's been done to those resources by the astronomy facilities being put up there and with all this activity in the last 20-25 years.

The one thing that happened was the side of the cinder cone being graded out by the Subaru telescope, which I was very critical of. And that may or may not turn out to be a very important thing. The arthropod study is being done now. If it turns out that they [wekiu bugs] are all over the place, the amount of habitat that was lost may turn out to be relatively insignificant. At this point, you

have to take it quite seriously, because they've only been identified in a small area of course, that's the only place you looked for them.

Putting aside that the basic view of the mountain was changed by having the telescopes put up there – probably there's been very little damage to habitat; the archaeological sites are all there; the cultural sites unless you take the view the whole thing is a cultural site – the things people have identified as cultural sites in the past are all untouched.

Why then has Mauna Kea become such a charged issue?

It's funny. I met with Nelson Ho in 1993, 1994, and I have a list of what his concerns were then and the issues. And I thought they were all management level issues – picking up the trash, completing the arthropod study, improving the staffing of the visitors center, so people had a better education. I think there's been pretty good progress made on all those issues. They're all completely manageable and they can all be taken care of – and they have all been taken care of.

The auditor's report was critical. There were some delays. The big archaeological study was late, certainly the arthropod study was delayed. But if you try to identify what has gone wrong – has something been destroyed or lost? Again, apart from just the thing that you have all those domes sticking up there, it's been done in a pretty responsible way.

There are people that don't like having all those buildings up there – which is a valid point of view, but the basic decision was made, almost 20 years ago. And, honestly, I don't see what difference it would make to have a few more telescopes up there as long as you site them properly. It doesn't make a qualitative change in the mountaintop if you do that.

I suppose the ultimate reason that Mauna Kea has been a hot issue is that it is a very important, prominent place.

Accomplishments

What accomplishments have been most satisfying?

There are some good things that happened – I hate to characterize them as my accomplishments: It's kind of post hoc, ergo propter hoc again. I was on the board, and therefore these things happened.

Early on, I was very active in negotiating the Awake'e land exchange, which I think was a great exchange for the state. The state traded for about 350 acres of shorefront property at Awake'e by giving up about the same area of the adjacent property, but one thousand feet back from the shore. The state got a mile of shoreline. I was just down there last weekend, and there are a lot of people who go down to Awake'e and use that as an access into Makalawena. Not that much has been done on the state park, but the whole development concept was to have a pretty low-key state park. You have Mahai'ula, which is a much nicer swimming and beach area than people in Kona had available to them ever before, so I'm really happy with the implementation of the Kekaha Kai state park and the Awake'e land exchange and all that's happened down there in the last few years.

I think the Conservation District rule change was a very positive change in 1994. The rule changes that were made then greatly limited the possibilities of mischief by the Land Board by making it clear that there are only certain things you can do in the Conservation District, just like any other zoning district. Before that, if you could sell two or three members on an idea, you could get a permit.

Are you going to keep attending board meetings?

Not as a regular thing. There are times I thought I would be a responsible activist and go back to doing what I did before. Get involved in a couple of things and put a lot of effort into them. I'm still interested in a couple of things – proper environmental management is what is really needed. There are people who do activism pretty well.

But I'm not going to become the board watchdog. They'll have to make do without me. I've had my chance.

Any parting words?

I think the environmental community needs to look at the fact that a lot of the ongoing management of the environment that government ought to be doing is really seriously underfunded. I had no idea of how thin and understaffed the DLNR is as an organization for what they are doing. They have four or five foresters on this island; two land agents for all the state land, and hundreds of thousands of acres that are being leased.

The same thing is true for other environmental programs. So people need to focus on not just fighting the bad things that could happen, but on taking better care and more active management of the resources that we have.

I think we also have to address the depletion of near-shore fisheries. I've been pushing for large zones, more protected inshore areas, and I think gillnetting will be a big issue.

I also want to put in a plug for land exchanges by the state as a means of protecting important areas, like prime beaches. Often the public is relying on the zoning to protect these areas, but it's hard to count on zoning forever. There can be a win-win for the state and the private landowner through an exchange for state land with developmental potential. This is what happened at Awake'e. There has been some opposition in the Hawaiian community over the possible loss of ceded land, but I think that's a misunderstanding – the land the state gets must be treated the same as ceded land so there's no net loss.

1. For a summary of this, see the May 1998 issue of Environment Hawai'i.

2. This meeting occurred in June 1997. As part of a much larger scale of corporate assets, AT&T wanted to convey its lease of state land at Sand Island, used as a berth for its cable-laying ship, to another company. Calculating the value of that lease involved a detailed analysis of the improvements that AT&T had gotten the DLNR staff to go along with a formula that counted all the improvements as having been made at the time the lease started. In other words, according to the AT&T formula, the improvements would be counted as being much older than many of the actually were. What Yuen proposed, and what the board eventually decided to do, was to figure out, as much as possible, when the improvements were built, and amortize them from that date instead of from the beginning of the lease. Given that AT&T had made several millions of dollars of improvements in the leased area, the difference in value between the AT&T formula and that which Yuen proposed resulted in the state receiving a far greater payment as a result of the sale of this lease than it would have under the AT&T proposal.

— Patricia Tummons

Volume 9, Number 1 July 1998

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Contact Us

📍 Environment Hawai'i

📍 190 Keawe St., Suite 29
Hilo HI 96720

☎ 877-934-0130

✉ mail@environment-hawaii.org

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EXHIBIT "C"

Cc: A. Weston, Esq.
D. Kopper, Esq.

2015 OCT -9 PM 1:10

IN THE CIRCUIT COURT* OF THE THIRD CIRCUIT

STATE OF HAWAII

L. KITAOKA, CLERK
THIRD CIRCUIT COURT
STATE OF HAWAII

E. KALANI FLORES,

Plaintiff,

vs.

BOARD OF LAND AND NATURAL
RESOURCES; DIRECTOR SUZANNE
CASE, in her official capacity; and the
DEPARTMENT OF LAND AND
NATURAL RESOURCES,

Defendants.

) CIVIL NO. 15-1-267K
)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW, AND ORDER GRANTING
) PLAINTIFF'S MOTION FOR PARTIAL
) SUMMARY JUDGMENT, FILED
) SEPTEMBER 14, 2015
)
) Hearing:
) Date: October 6, 2015
) Time: 8:30 a.m.
) Judge: The Honorable Ronald Ibarra
)
)
)
)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED SEPTEMBER 14, 2015

1. This matter came before the Environmental Court of the Third Circuit (hereinafter "Court"), the Honorable Ronald Ibarra presiding, on October 6, 2015, for hearing on Plaintiff's Motion for Partial Summary Judgment ("Motion or MPSJ"), filed September 14, 2015. David Kopper, Esq. appeared on behalf of Plaintiff and deputy attorney general Amanda Weston, Esq. appeared on behalf of Defendants. No other appearances were made.

2. At the hearing and in accordance with their opposition filed on September 28, 2015, Defendants argued for a continuance of Plaintiff's Motion pursuant to Rule 56(f), Hawai'i Rules of Civil Procedure ("HRCP").

* Environmental Court

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

3. Plaintiff's Motion requests summary judgment only as to Count I (Violation of Article XII § 7 of the Constitution) and Count IV (Failure to Follow Statutory Rulemaking Procedures) of the Complaint.

4. The Court granted the State's request for a Rule 56(f), HRCF continuance on Plaintiff's Motion as to Count I, and a continued hearing shall take place on October 13, 2015 at 8:00 a.m.

5. The Court denied the State's request for a Rule 56(f), HRCF continuance on Plaintiff's Motion as to Count IV, finding that further discovery would not be pertinent to the Court's ability to rule on these claims.

6. The following findings of fact, conclusions of law, and order address Plaintiff's Motion for summary judgment on Count IV only.

7. Count IV alleges that Defendants did not follow statutory rulemaking procedures because Defendants did not properly find that imminent peril to the public health, safety or morals, or to livestock and poultry health, requires adoption of the camping ban and nighttime ban upon less than thirty day's notice of hearing. Complaint, ¶ 67.

8. The Court, having considered the motion, the memoranda and declarations submitted in support and in opposition to the motion, the arguments of counsel, and the record and file herein, and good cause appearing therefor, hereby issues the following findings of fact, conclusions of law, and order:

I. FINDINGS OF FACT

The Court makes the following findings of fact based on a preponderance of the evidence. To the extent that these findings of fact contain conclusions of law, they shall be considered as such.

A. Procedural History

9. On July 15, 2015, Plaintiff filed his complaint in this matter.

10. On July 16, 2015, Plaintiff filed an *Ex Parte* Motion For Temporary Restraining Order and a Motion for Preliminary Injunction (“MPI”) requesting that the State of Hawai‘i (the “State”) be enjoined from enforcing Hawai‘i Administrative Rule (“HAR”) §13-123-21.2 (the “Emergency Rule”).

11. On July 21, 2015, the Court *sua sponte* held a hearing on the issue of venue. Hearing no objection from Defendants, and for good cause shown, the Court ruled that venue is proper.

12. On July 24, 2015, Plaintiff filed his First Supplement to the MPI.

13. On July 27, 2015, Plaintiff filed his Second Supplement to the MPI.

14. On August 4, 2015, Defendants filed their Memorandum in Opposition to the MPI.

15. On August 5, 2015, Defendants filed their First Supplement to their Memorandum in Opposition to the MPI.

16. On August 5, 2015, Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order came on for hearing before the Court.

17. On August 7, 2015, the Court denied Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order pursuant to the Findings of Fact, Conclusions of Law, and Order on Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order.

18. On August 11, 2015, Defendants filed their Witness List for the hearing on the MPI.

19. On August 12, 2015, Defendants filed their Exhibit List for the hearing on the MPI.
20. On August 14, 2015, Plaintiff filed his Witness List for the hearing on the MPI.
21. On August 14, 2015, Defendants filed their First Amended Exhibit List for the hearing on the MPI.
22. On August 17, 2015, Plaintiff filed his reply in support of the MPI and Exhibit List for the hearing on the MPI.
23. On August 20, 2015, an evidentiary hearing on the MPI was held and the Court heard testimony of witnesses and the arguments of counsel.
24. On September 11, 2015, the Court entered Findings of Fact, Conclusions of Law, and Order Denying Plaintiff's Motion for Preliminary Injunction, filed July 16, 2015.
25. On September 14, 2015 Plaintiff filed the instant Motion for Partial Summary Judgment.
26. On September 18, 2015, Plaintiff filed an *ex parte* motion to advance the hearing on Plaintiff's MPSJ, which Defendants opposed in their memorandum filed September 16, 2015.
27. On September 18, 2015, the Court entered an order denying Plaintiff's *ex parte* motion to shorten time.
28. On September 28, 2015 Defendants filed an opposition to Plaintiff's MPSJ.
29. On September 30, 2015, Plaintiff filed a reply in support of his MPSJ.
30. On October 5, 2015, Defendants filed a supplemental memorandum in opposition to Plaintiff's MPSJ.

B. Parties

31. Plaintiff E. Kalani Flores is a Native Hawaiian who descends from the aboriginal people who occupied and exercised sovereignty in the area that now comprises the State of Hawai'i prior to 1778. Plaintiff resides in Waimea on Hawai'i Island. Flores Testimony.

32. Plaintiff is a tenured professor with thirty years of education and experience in Hawaiian culture, traditions, and language education. Flores Testimony.

33. Plaintiff engages in traditional practices on Mauna Kea, which includes pilgrimages to the summit and/or various significant sites on Mauna Kea. Flores Testimony.

34. Mr. Flores is the individual Plaintiff in this case. This case is not a class action.

35. The Department of Land and Natural Resources (the "Department" or "DLNR") is the state agency charged to manage, administer, and exercise control over the State's public lands, including submerged land and beaches. Haw. Rev. Stat. § 26-15(b) (2009); Haw. Rev. Stat. § 171-3 (2011). The Department is headed by an executive board called the Board of Land and Natural Resources (the "BLNR"). Haw. Rev. Stat. § 26-15(a) (2009); Haw. Rev. Stat. § 171-3 (2011).

36. The BLNR has a statutory duty to oversee conservation district land. Haw. Rev. Stat. § 183C-3 (2011).

C. Hawai'i Administrative Rule 13-123-21.2 ("Emergency Rule")

37. On July 10, 2015, a public hearing was held before the BLNR regarding the Emergency Rule. Exhibit 4, 6.

38. On July 14, 2015, Governor Ige and the BLNR approved the Emergency Rule, effective on the same date, as follows:

Prohibited activities. (a) The area referred to in this rule as the "restricted area" is defined as any lands in the public hunting area that includes the Mauna Kea

Observatory Access Road and one mile on either side of the Mauna Kea Observatory Access road.

(b) As used in this rule, the term “transiting” means operating, or being a passenger in, a motor vehicle travelling at a reasonable and prudent speed and having regard to the actual and potential hazards and conditions then existing.

(c) No person shall at any time possess or control in the restricted area any of the following items: sleeping bag, tent, camping stove, or propane burner.

(d) No person shall enter or remain in the restricted area during the hours of 10:00 p.m. to 4:00 a.m., unless the person is transiting through the restricted area on the Mauna Kea Observatory Access Road or is lawfully within or entering or exiting an existing observatory or a facility operated by the University of Hawaii.

Exhibit 4.

39. The Emergency Rule is in effect for 120 days, or until November 11, 2015.

Exhibit 4.

40. As filed, the Emergency Rule states:

The Department of Land & Natural Resources finds that the immediate adoption of this emergency rule amendment upon less than thirty days’ notice of hearing is necessary to prevent an imminent peril to public safety and the state’s natural resources related to the presence of persons in portions of public hunting areas, Units A and K, Mauna Kea, Hawai‘i, referred to as the “Restricted Area”, between the hours of 10:00 p.m. and 4:00 a.m.

This Amendment to chapter 13-123, Hawai‘i Administrative Rules, on the Summary Page dated July 10, 2015, was adopted on July 10, 2015 without prior notice or hearing pursuant to emergency rulemaking authority provided in HRS 91-3(b).

Exhibit 4.

41. On its face, the Emergency Rule as filed does not articulate the reasons supporting a finding that the Emergency Rule is necessary to prevent an imminent peril to public safety and the state’s natural resources. Exhibit 4.

42. Defendants have enforced, and will continue to enforce, the Rule. Kamakau Testimony; Defendants’ Memorandum in Opposition To Plaintiff’s Motion For A Preliminary

Injunction Filed on July 16, 2015 at 7 (“The State fully intends to prosecute all who violate the [R]ule.”).

II. CONCLUSIONS OF LAW

The Court, based upon the findings of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. This Environmental Court has subject matter jurisdiction pursuant to Haw. Rev. Stat. § 91-7 and jurisdiction over the parties.

A. Standing

2. Plaintiff has standing to bring this action for declaratory relief pursuant to Haw. Rev. Stat. § 91-7(a), which states:

(a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

3. Plaintiff is an interested person because he resides on Hawai`i Island and may be affected by the Emergency Rule if he visits Mauna Kea to engage in cultural and religious practices.

B. Summary Judgment Standard

4. A moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), HRCF; *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989).

5. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Hawaii Cmty. Fed. Credit Union v. Keka, 94 Haw. 213, 221, 11 P.3d 1, 9 (2000).

6. On a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Id.*

C. Emergency Rule Violates Haw. Rev. Stat. § 91-4(b)(2)

7. Haw. Rev. Stat. § 91-4(b)(2) states:

An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with section 91-3(b) if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals, or to natural resources. **The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed.** The agency shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of the rule.

(Emphasis added).

8. There is no genuine issue of material fact that the Emergency Rule as filed does not contain a brief statement of the reasons supporting a finding that the Emergency Rule is necessary to prevent an imminent peril to “the public health, safety, or morals, or to natural resources.”

9. Specifically, the “presence of persons in portions of public hunting areas, Units A and K, Mauna Kea, Hawai‘i...between the hours of 10:00 p.m. and 4:00 a.m.” is not a reason supporting a finding of imminent peril.

10. Additionally, without specific reasons or findings by the BLNR, the rule cannot be properly reviewed by this Court. The reasons are necessary for “facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative

consideration, helping parties plan their cases for rehearing and judicial review, and keeping [administrative] agencies within their jurisdiction.... [T]he most prominent reason ... is the facilitation of judicial review.” Gray v. Admin. Dir. of the Court, State of Hawaii, 84 Haw. 138, 145, 931 P.2d 580, 587 (1997).

D. Declaratory Relief

11. The Court must declare a rule invalid if it finds that the rule violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. Haw. Rev. Stat. § 91-7(b).

12. The Emergency Rule was adopted without compliance with the statutory rulemaking procedures set forth in Haw. Rev. Stat. § 91-4(b)(2) because it does not contain a brief statement of the reasons supporting a finding that the rule is necessary to prevent imminent peril.

13. Therefore, the Court must declare the Emergency Rule to be invalid.

ORDER

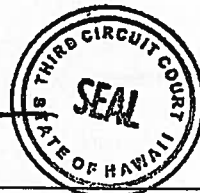
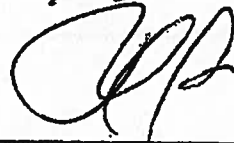
Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff’s Motion for Partial Summary Judgment, filed September 14, 2015, is GRANTED as to Count IV;

IT IS FURTHER ORDERED that Hawai’i Administrative Rule 13-123-21.2 is hereby declared invalid.

DATED: Kealahou, Hawaii,

10/9/15



Judge of the above-entitled Court

EXHIBIT "D"

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē Mauka,
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the disclosure of BLNR Chairperson Suzanne Case, dated May 2, 2016, and the disclosure of BLNR Board Member Chris Yuen, dated April 29, 2016 was served upon the following parties via regular mail on May 2, 2016, addressed as follows:

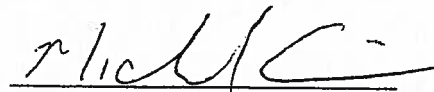
Julie China, Deputy Attorney General
Land and Transportation Division
Kekuanao`a Building
465 South King Street, Third Floor
Honolulu, HI 96813
*Counsel for the Board of Land and Natural
Resources*

Ian Sandison
Tim Lui Kwon
Arsima K. Muller
Carlsmith Ball LLP
1001 Bishop Street
ASB Tower, Suite 2200
Honolulu, HI 96813
*Counsel for the University of Hawai'i at
Hilo*

Judge Riki May Amano (Ret.)
1003 Bishop Street, Suite 1155
Honolulu, HI 96813
Hearing Officer

Richard N. Wurdeman
Attorney at Law
1003 Bishop Street, Suite 720
Honolulu, HI 96813
*Counsel for the petitioners Mauna Kea
Anaina Hou, Clarence Kukauakahi Ching,
Flores-Case 'Ohana, Deborah J. Ward,
Paul K. Neves, and Kahea: The
Environmental Alliance*

Dated: Honolulu, Hawai'i, May 2, 2016



Michael Cain
Department of Land & Natural Resources
State of Hawai'i

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
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RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

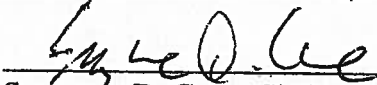
Case No. BLNR-CC-16-002
2016 MAY -2 P 12:13

NOTICE OF FILING OF DISCLOSURES BY
BLNR CHAIRPERSON SUZANNE CASE AND BOARD
MEMBER YUEN; EXHIBITS 1 AND 2;
CERTIFICATE OF SERVICE

**NOTICE OF FILING OF DISCLOSURES OF BLNR BOARD CHAIRPERSON SUZANNE CASE AND
BOARD MEMBER CHRIS YUEN**

Notice is hereby given that BLNR Board Chairperson Suzanne Case and Board Member Chris Yuen have filed disclosure statements related to the above subject Contested Case. The disclosures are attached as Exhibits 1 and 2, respectively,

Dated: Honolulu, Hawai'i, May 2, 2016


SUZANNE D. CASE, Chairperson
Board of Land & Natural Resources
State of Hawai'i

DAVID Y. IGE
GOVERNOR OF
HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

May 2, 2016

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
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LAND
STATE PARKS

Disclosure of BLNR Board Chair Suzanne Case re CDUA HA-3568 (Thirty Meter Telescope)

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In this capacity I oversee the Department of Land and Natural Resources (DLNR) divisions, under authority of BLNR, including these divisions with management and regulatory jurisdiction over activities on Mauna Kea:

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as well as other areas such as water, aquatics, and state parks.

I began my work at DLNR on April 27, 2015, over three weeks following the April 2, 2015 arrests for blocking the Mauna Kea access road. I did not participate in the February 12, 2013 BLNR decision to approve the conservation district use permit for the Thirty Meter Telescope, nor did I sign the March 6, 2015 Notice To Proceed. These had been approved prior to my appointment as chairperson of the BLNR.

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My fundamental approach has been as quoted in the July 10, 2015 Hawaii Tribune Herald article:

"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."

I have addressed questions from time to time from persons in the Cabinet, the University of Hawaii, the Thirty Meter Telescope, the media and the public relating to the permitting and legal challenge process and timing, but not the merits of the contested case. I have engaged in detailed discussions with representatives of the Attorney General's offices and with BLNR members and relevant DLNR staff regarding the specific legal requirements and steps to proceed with the contested case following the December 2, 2015 Supreme Court decision.

I have limited my comments on Mauna Kea in public speaking engagements to DLNR's overall jurisdiction on Mauna Kea, TMT's right to proceed with preliminary construction under the CDUP and Notice to Proceed, public safety and enforcement of laws, the emergency rule, the uncertainty with the Supreme Court case pending, the need for constructive dialogue, and moving forward with the Governor's ten-point plan. I have not commented on the merits of the contested case.

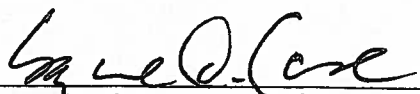
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I have no personal conflict with respect to any party to the contested case. I am not related to the Flores-Case 'ohana. Ian Sandison, counsel for TMT, was my high school classmate and a former professional colleague of my father and brothers; I do not see him regularly but occasionally run into him socially and I have not discussed the TMT case with him.

I do not believe my position as Chair of the Board of Land and Natural Resources nor my actions in carrying out my related duties at the Department of Land and Natural Resources create or reflect bias in my approach, nor would it cause any reasonable person to think that my impartiality in this contested case hearing would be affected.


Suzanne D. Case

CHRISTOPHER J. YUEN
ATTORNEY AT LAW

P.O. Box 5
Ninole, HI 96773
Telephone: (808)963-6966
e-mail: chrisyuenz@hotmail.com

April 29, 2016

Via Email to suzanne.case@hawaii.gov

Suzanne D. Case, Chairperson
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Dear Suzanne:

Re: CDUA HA-3568 (Thirty Meter Telescope) Contested Case

I have written the following disclosure. I'd appreciate it very much if you would forward this to the parties in the contested case, our fellow board members, and to anyone else you may find appropriate.

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The applicant for this CDUA is the University of Hawai'i-Hilo. My wife, Dr. Noelie Rodriguez, is a Professor in the Social Science Department at Hawai'i Community College. UH-Hilo and HCC are separate organizations but both are in the University of Hawai'i system. The highest administrator in UH-Hilo is the Chancellor, who is directly under the President of the University of Hawai'i. HCC has a separate Chancellor, who reports to the Vice-President for the Community Colleges, who is directly under the President of the University of Hawai'i.

There are two intermediate levels of administration between the Chancellor of HCC and the HCC Social Science Department, which consists of about ten faculty members.

The Social Science Department consists eight programs: Administration of Justice, Early Childhood Education, Fire Science, Human Services, Philosophy, Psychology, Social Science, and Sociology. Dr. Rodriguez's position is in Sociology.

As far as I know, neither the HCC Social Science Department nor the programs within it have any connection with the development of astronomy in Hawai'i, or specifically with the proposed new telescope. They do not train students for careers in astronomy (except in the very general sense of contributing to their overall education), and, as far as I know, do not receive funding from astronomical facilities. Given the nature of the programs in the Social Science Department it does not seem likely that the current non-involvement in training students for careers in astronomy would change in the future.

Dr. Rodriguez has been a tenured professor at HCC for almost twenty years. She is a full professor, which means that she has no possibility for further promotion as a professor. She has never applied for any administrative position within the UH system and does not plan to in the future. Her compensation is set by the union contract, and she has protections afforded by tenure and the union contract.

I do not foresee any way in which the approval or non-approval of this CDUA would affect her compensation or benefits, or the programs at HCC in which she is involved.

Neither my wife nor I have any direct or indirect pecuniary interest in the outcome of this CDUA.

If there were some positive or negative action affecting my wife's employment taken by the University to try to affect my views on this CDUA, it would, of course, be completely improper and I would report it to the parties. I do not see what actions of that nature could be taken, given my wife's situation at HCC.

I was the attorney in an employment discrimination lawsuit against the University of Hawai'i-Hilo and three individuals who were either administrators or faculty members at UH-Hilo. My wife was the plaintiff. The suit was filed in 1993 and settled in 1994. None of the individual defendants has been affiliated with UH-Hilo for at least ten years. A parallel suit on behalf of my wife, arising from the same factual circumstances, was filed earlier by the Hawai'i Civil Rights Commission against the same defendants, in 1992, and also settled at the same time as the other suit, in 1994.

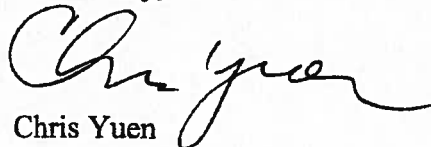
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Chris Yuen

DAVID Y. IGE
GOVERNOR OF
HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
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May 2, 2016

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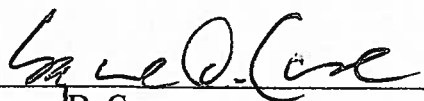
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CHRISTOPHER J. YUEN
ATTORNEY AT LAW

P.O. Box 5
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Telephone: (808)963-6966
e-mail: chrisyuenz@hotmail.com

April 29, 2016

Via Email to suzanne.case@hawaii.gov

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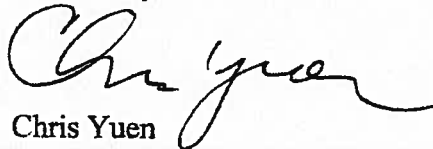
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Yours truly,

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Chris Yuen

EXHIBIT "E"

(http://dlnr.hawaii.gov)



Making Hawai'i a Great Place to Live!
Department of Land and Natural Resources (<http://dlnr.hawaii.gov>)

Home (<http://dlnr.hawaii.gov/>) » Frequently Asked Questions (<http://dlnr.hawaii.gov/faqs/>) » Mauna Kea FAQ

MAUNA KEA FAQ

[Contested Cases] [The Board and the Chair] [Telescopes on Mauna Kea] [The Supreme Court decision] [Contested Case on TMT and Mauna Kea]

File	Descriptions
DOC-1 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-1.pdf)	Minute Order No. 1: Notice of selection of Riki May Amano as Hearing Officer on subject contested case; Exhibit 1; COS
DOC-2 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-2.pdf)	Motion to have TMT International Observatory, LLC admitted as a party in the contested case hearing; Memorandum in support of motion; COS
DOC-3 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-3.pdf)	Minute Order No. 2: Order delegating the conduct of the contested case hearing to a hearing officer, and confirming that the chairperson was authorized to engage the services of a hearing officer; COS
DOC-4 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-4.pdf)	Notice of Filing of Hearing Officer's Supplemental Disclosure; Exhibit 2; COS
DOC-5 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-5.pdf)	Petitioners' objections to selection process and to appointment of Hearing Officer made pursuant to Minute Order No. 1, dated March 31, 2016; Declaration of Counsel; Exhibits 'A' – 'G'; and COS
DOC-6 (http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-6.pdf)	Applicant's response to Minute Orders Nos. 1 and 2; Exhibits 1-5; Copy Wurdeman

- DOC-6.pdf)

- DOC-7
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-7.pdf>) Notices regarding ex parte communication to members of the Land Board, Watanabe Ing LLP, Carlsmith Ball LLP, Wurdeman; copy Amano

- DOC-8
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-8.pdf>) Applicant's response to petitioners' objections to selection process and to appointment of Hearing Officer made pursuant to Minute Order No. 1, dated March 31, 2016, filed on April 15, 2006; copy Wurdeman

- DOC-9
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-9.pdf>) Notice of Filing of Hearing Officer's second supplemental disclosure, dated April 29, 2016; Exhibit 3; COS

- DOC-10
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-10.pdf>) Notice of Filing of Hearing Officer's third supplemental disclosure, dated April 25, 2016; Exhibit 4; COS

- DOC-11
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-11.pdf>) Minute Order 3, Order setting deadlines for responses to Hearing Officer's supplemental disclosures; COS

- DOC-12
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-12.pdf>) Notice of filing of disclosures by BLNR Chairperson Case and Board Member Yuen; Exhibits 1 and 2; COS

- DOC-13
(<http://dlnr.hawaii.gov/wp-content/uploads/2016/04/TMT-DOC-13.pdf>) Petitioners' responsive and supplemental objections to selection process and to appointment of Hearing Officer made pursuant to Minute Order No. 1, dated March 31, 2016; COS

Contested Cases

Question: What is a contested case hearing?

Answer: A contested case is “a proceeding in which the legal rights, duties, or privileges of

specific parties are required by law to be determined after an opportunity for agency hearing.” Hawaii Revised Statutes (HRS) § 91-1(5).

Question: What triggers a contested case hearing?

Answer: A contested case is required by law if a statute or rule governing the activity in question mandates a hearing prior to the administrative agency’s decision-making, or if a hearing is mandated by constitutional due process. A contested case may be required by due process if the person or agency seeking a contested case possesses a property interest, as that interest is defined by the State Constitution.

With respect to the application to build the Thirty-Meter Telescope (TMT), there is a contested case because certain parties who were deemed eligible, pursuant to law, to request a contested case hearing, made that request with respect to the 2011 TMT decision by the Board of Land and Natural Resources (BLNR). The contested case hearing is proceeding now because both the Supreme Court and the Circuit Court remanded to the BLNR with directions to conduct a contested case hearing before the BLNR or a new hearing officer.

Question: Who gets a contested case hearing?

Answer: Any interested person or government agency that is entitled to a contested case by law may petition for and receive a contested case hearing.

Question: Who can take part in a contested case hearing?

Answer: The applicant and all persons or government agencies admitted as parties may take part in the contested case hearing. Hawaii Administrative Rule (HAR) § 13-1-31.

Question: Are contested case hearings open to the public?

Answer: There is no requirement that a contested case hearing be open to the public. It has not yet been determined whether this particular contested case hearing will be open to the public.

Question: What role does the public have in a contested case hearing?

Answer: As noted above, while contested case hearings are not required to be open to the public, they may be. When a contested case hearing is open to the public, then – similar to a trial held in court – the public may observe the contested case hearing, but they do not participate in it.

Question: What kind of qualifications does a hearing officer need?

Answer: The qualifications for the TMT contested case hearing officer include the following: (1) being an attorney licensed to practice law in the State of Hawai'i and in good standing; (2) being able to serve with strict impartiality and having no conflicts of interest or appearance of conflict; (3) being available to devote a substantial amount of time in the next six to twelve months; and (4) being willing to accept the prevailing charge rate relevant to the professional service as a hearing officer, as determined by the Department of Land and Natural Resources (DLNR). Other desirable qualifications include civil litigation experience, practice in administrative law and process, familiarity with government proceedings and procedures, and knowledge of the statutes and rules administered by the DLNR.

Question: What role does the hearing officer play in a contested case hearing?

Answer: The BLNR may delegate the conduct of the contested case hearing to a hearing officer, and has done so for the TMT contested case hearing. Without limiting the hearing officer's powers, the hearing officer may rule on motions, receive testimony and evidence, and issue a report and recommended findings of fact and conclusions of law and decision to the BLNR.

Question: What is the difference between "sunshine law" and "contested case law"?

Answer: The regular, twice-a-month, meetings of the BLNR held pursuant to HRS chapter 92 are conducted in a manner commonly referred to as the sunshine law, providing notice, public meetings, and opportunity for public testimony. A contested case hearing is a quasi-judicial proceeding similar to a court proceeding, which is held pursuant to HRS chapter 91. Chapter 92 explicitly provides that the sunshine law does not apply to contested case hearings. HRS § 92-6.

Court decision] [Contested Case on TMT and Mauna Kea]

The Board and the Chair

Question: What role does the BLNR play in a contested case hearing?

Answer: Like a judge in a court, the BLNR is the tribunal in the contested case. The law specifically authorizes the BLNR to delegate conduct of the contested case to a hearing officer. The BLNR did so in the TMT contested case. That means the BLNR will render a decision after receiving the hearing officer's report and recommendations and personally considering the whole record or such portions thereof as may be cited by the parties.

Question: What role does the BLNR Chairperson play in a contested case hearing?

Answer: Now that the contested case has been delegated to a hearing officer, the chairperson generally speaking has the same role as the other BLNR members.

[Contested Cases] [The Board and the Chair] [Telescopes on Mauna Kea] [The Supreme Court decision] [Contested Case on TMT and Mauna Kea]

Telescopes on Mauna Kea

Question: What is the history of telescopes on Mauna Kea?

Answer: In 1968, the State of Hawai'i, through the BLNR, entered into a lease with the University of Hawai'i (UH) for the Mauna Kea Science Reserve (MKSR), which is comprised of 11,288 acres of land. 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 Age Natural Area Reserve. Within the MKSR is a 525 acre Astronomy Precinct. The following observatories are located within the Astronomy Precinct: the UH 2.2-Meter Observatory; the United Kingdom Infrared Telescope; the NASA Infrared Telescope Facility; the Canada-France-Hawai'i 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. In addition to the MKSR, the lands managed by the UH include the Hale Pohaku mid-level facilities, and the Summit Access Road between Hale Pohaku and the MKSR.

Question: What is the history of the TMT?

Answer: In 2008, in consultation with the University of Hawai'i at Hilo (UHH), TMT International Observatory LLC (TMT-International) began exploring the possibility of locating an observatory at the Astronomy Precinct. The conservation district use permit application for the TMT observatory project filed by the UHH in 2010 includes: a 30-meter telescope, instruments, dome, attached building, and parking; an access way with underground utilities; upgrades to electrical transformers at a substation located near Hale Pohaku; and a facility in Hilo that will manage activities at and support operation of the TMT observatory. The footprint of the TMT observatory dome, associated areas, and the area to be disturbed during construction was anticipated to be roughly five acres.

[Contested Cases] [The Board and the Chair] [Telescopes on Mauna Kea] [The Supreme Court decision] [Contested Case on TMT and Mauna Kea]

The Supreme Court decision

Question: What did the Supreme Court rule with respect to TMT and Mauna Kea?

Answer: The Supreme Court ruled that if a contested case is required by law, due process requires a meaningful opportunity, both in reality and in appearance, to be heard before a decision is made. *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015).

Question: What are the results and impacts of that ruling?

Answer: The Supreme Court remanded the TMT permit application to the circuit court to further remand to the BLNR for a contested case hearing before the BLNR or a new hearing officer, or for other proceedings consistent with the opinion. On February 22, 2016, the Third Circuit Court – mirroring the Supreme Court's language – remanded this matter to the BLNR.

Question: Is there going to be a contested case hearing on the remand?

Answer: Yes. There will be a contested case hearing on the remand.

Question: Who actually applied for the permit?

Answer: The UHH is the applicant for the TMT conservation district use permit.

[Contested Cases] [The Board and the Chair] [Telescopes on Mauna Kea] [The Supreme Court decision] [Contested Case on TMT and Mauna Kea]

Contested Case on TMT and Mauna Kea

Question: Why was a hearing officer only recently selected even though the Supreme Court case was decided in December 2015?

Answer: As detailed in the BLNR's Minute Order No. 2, the Supreme Court ruled on December 2, 2015, and "remanded to the circuit court to further remand to BLNR for proceedings consistent with this opinion, so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion." The Circuit Court issued its order on February 22, 2016, remanding the matter to the BLNR so that a contested case hearing could be conducted before the BLNR or a new hearing officer, or for other proceedings consistent with the Supreme Court's opinion.

The BLNR met on February 26, 2016, as part of, and to discharge its adjudicatory function governed by HRS § 91-9. The BLNR delegated the conduct of the contested case hearing to a hearing officer, pursuant to HAR § 13-1-32(b), and confirmed that the Chairperson was authorized to engage the services of a hearing officer pursuant to law.

Question: Is the BLNR concerned about fast-tracking this permit so that the developers don't move the telescope project somewhere else?

Answer: No. the BLNR is committed to a process that is efficient, fair, and provides an ample opportunity for the parties to be heard.

Question: Did the BLNR decide to delegate the conduct of the contested case hearing to a hearing officer?

Answer: Yes. The BLNR delegated the conduct of the contested case hearing to a hearing officer and confirmed that the chairperson was authorized to engage the services of a hearing officer pursuant to law.

Question: How was the hearing officer selected?

Answer: The hearing officer was selected pursuant to HRS § 103D-304, which requires the DLNR to assemble and vet a list of applicants. Pursuant to this statute, (1) the list was reviewed by a selection committee, which ranked three candidates; and (2) the BLNR Chairperson then negotiated a contract with the first ranked person. If the BLNR Chairperson had been unable to successfully negotiate a contract with the first ranked person, then she would have attempted to negotiate a contract with the next ranked person. In this case, Chairperson Case was able to successfully negotiate a contract with Judge Amano as the first ranked applicant of the selection committee.

The selection committee consisted of: James Duffy, Associate Justice of the Hawaii Supreme Court (Ret.); Stella Kam, Deputy Attorney General; and Christopher Yuen, Member of the BLNR.

Question: Who was selected as hearing officer to hear the contested case?

Answer: Retired Circuit Court Judge Riki May Amano was selected as the hearing officer.

Question: What are Judge Amano's qualifications and background?

Answer: Judge Amano served as a judge in the district and circuit courts of the Third Judicial Circuit, State of Hawai'i from February 1992 until her retirement in April 2003. She completed her undergraduate education with a BA degree in Political Science and obtained her Juris Doctor degree from the William S. Richardson School of Law, UH. Prior to her appointment to the bench, Judge Amano was a deputy attorney general assigned to the Department of Land & Natural Resources, the Department of Transportation and the Department of Labor and Industrial Relations; and in private practice from 1981 until 1991.

Question: Who were the other applicants and how were the applicants ranked by the selection committee?

Answer: The names of qualified persons and the rankings cannot be made public at this time. The process allows for an objection period that could result in the removal of Judge Amano and the need to negotiate with the second or third ranked applicant. That

information will be released as soon as possible.

Question: What are the terms of the contract with Judge Amano?

Answer: A redacted copy of the contract is available upon request. An unredacted version will be released as soon as possible.

Question: What has to happen before the hearing officer can start work?

Answer: Comments and objections have been submitted to Judge Amano's selection. Her selection has been challenged by petitioners. Those objections need to be resolved as a first step to starting the process.

Question: Where will the contested case be heard?

Answer: The contested case hearing will be held on the Island of Hawai'i.

Question: What is the timeline and schedule for the contested case hearing?

Answer: Minute Order No. 1 informing the parties of the selection of a hearing officer for the contested case hearing was issued on March 31, 2016. The parties were directed to submit comments and objections to the selection by April 15, 2016, and petitioners did so.

After the hearing officer process is finalized, it is anticipated that the parties will file motions, briefs, and submit written testimony prior to the commencement of the contested case hearing. The hearing officer will then hear testimony and receive evidence in the contested case. Following this, the parties will have another opportunity to file proposed findings of fact and conclusions of law, and the hearing officer will issue a report and recommended findings of fact, conclusions of law and decision to the BLNR. The parties will have an opportunity to file their exceptions, argue their case before the BLNR, and finally, the BLNR will render its decision.

Question: Who sets that schedule?

Answer: The hearing officer will set the schedule for the contested case hearing. After the

hearing officer submits a report and recommendations, the BLNR will set deadlines for the filing of exceptions and oral argument.

Question: Can the contested case hearing be recorded or video-taped?

Answer: Consideration of requests to record or video-tape the contested case hearing by the media and members of the public is discretionary and will be addressed by the hearing officer.

Question: Will there be a transcript of the proceedings of the contested case hearing?

Answer: Yes. The contested case hearing will be transcribed by a court reporter procured by the DLNR.

Question: What happens after the contested case hearing is over?

Answer: After the BLNR issues its final decision and order, the parties will again have a right to seek judicial review under HRS § 91-14.

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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, Kahohe 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 party(ies) by leaving the same at the addresses set forth below:


Ian L. Sandison, Esq.
Timothy Lui-Kwan, Esq.
Carlsmith Ball, LLP
1001 Bishop Street
American Savings Bank Tower, Suite 2100
Honolulu, HI 96813

Attorneys for Applicant University of Hawaii at Hilo

William J. Wynhoff, Esq.
Julie H. China, Esq.
Department of the Attorney General
State of Hawaii
465 South King Street, Room 300
Honolulu, HI 96813

Attorneys for the Board of Land and Natural Resources

DATED: Honolulu, Hawaii, May 6, 2016.


RICHARD NAIWIEHA WURDEMAN