

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

In The Matter of a Contested Case Regarding)
the East Molokai Watershed Partnership)
Fence Extension Project)
_____)

DLNR File No. MO-04-09

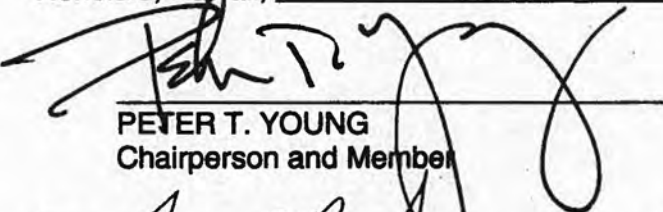
FINAL ORDER

The Board of Land and Natural Resources (Board), after fully considering the hearing officer's proposed findings of fact, conclusions of law, decision and order filed on June 17, 2005, in the above-captioned case, to which no exceptions have been filed, hereby adopts the attached Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Decision and Order as its own.

DATED:

Honolulu, Hawaii, _____

OCT 14 2005

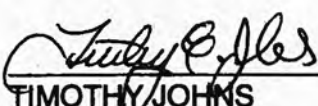

PETER T. YOUNG
Chairperson and Member


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FORESTARY & LAND
STATE OF HAWAII

Hearing Officer

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case)	DLNR File No. MO-04-09
Regarding the East Molokai)	
Watershed Partnership Fence)	HEARING OFFICER'S
Extension Project,)	PROPOSED FINDINGS OF
)	FACT, CONCLUSIONS OF
)	LAW, DECISION AND ORDER;
)	CERTIFICATE OF SERVICE
)	

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**HEARING OFFICER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER**

The Hearing Officer having duly considered the testimony and evidence presented during the contested case hearing and the record and file on the above-referenced matter hereby makes the following findings of fact, conclusions of law, decision and order:

FINDINGS OF FACT

I. INTRODUCTION

1. This Contested Case Hearing involves Applicant The Nature Conservancy's ("TNC") Conservation District Use Application ("CDUA") for the construction of a 3.5 mile fence through the Upper East Kawela and Makalelau ahupua'a between the 3,000 to 4,000 foot elevations of the East Molokai south slope. The fence

¹ Prior to April 1, 2005, Hearing Officer was employed by the law firm of Oshima Chun Fong & Chung. Ishikawa Morihara Lau & Fong is one of the successor firms to Oshima Chun Fong & Chung.

would extend and connect two existing fences, TNC's Kamakou East Boundary Fence and the Kamalo/Kapualei Watershed Project contour fence.

2. Applicant The Nature Conservancy is a nonprofit environmental organization. (TNC Finding of Fact ("TNC FF") No. 1). TNC applied on behalf of the East Molokai Watershed Partnership ("EMOWP") which is a partnership of Molokai landowners, government agencies, and community groups which coordinate management projects and programs to protect the East Molokai watershed, its native forests, and the ocean. See Exhibit 6 (TNC FF No. 2, Exhibit B-6).

3. Petitioner Wilma Kamakana Grambusch ("Petitioner Grambusch") is a life-long native Hawaiian tenant of the Kawela Ahupua'a on the Island of Molokai. For generations, she and her ancestors and kupuna have been caretakers and stewards of the Kawela ahupua'a. (Petitioner Grambusch Finding of Fact ("PG FF") No. 1, Hearing Transcript from 3/01/05 ("TR 3/1"), pages 102 & 103).

4. On February 26, 2004, a Notice of Public Hearing was published in the Molokai Dispatch.

5. The Public Hearing was held on March 11, 2004 at 6:30 p.m. at the Mitchell Pauole Center, Kaunakakai, Molokai 96748. (Exhibit B-4).

6. At the public hearing, Petitioner Grambusch orally requested a contested case hearing.

7. On March 24, 2004, Petitioner Grambusch submitted a written petition for a contested case hearing. The petition was filed outside of the 10-day deadline required by section 13-1-29, HAR. This deadline can be waived by order of the Board of Land and Natural Resources ("Board").

8. On August 13, 2004, the Board approved the appointment of a hearing officer to act of Petitioner Grambusch's written petition for a contested case hearing and also waived the 10-day requirement for filing a petition for a contested case hearing.

9. Minute Order No. 1 dated September 23, 2004, allowed until October 1, 2004, for any party to file comments or objections to the Chairperson's appointment of Ms. Sandra Wong as Hearing Officer. No objections were filed to Ms. Wong's appointment as Hearing Officer.

10. Minute Order No. 2 dated November 12, 2004, in part, set a hearing on the standing of Petitioner Grambusch on her written petition for December 14, 2004.

11. On November 30, 2004, TNC filed a Motion to Dismiss Petition for Contested Case Hearing.

12. On December 3, 2004, Alapai, Louise, and Mililani Hanapi ("Hanapi") filed a request for standing to participate as parties in a contested case hearing.

13. On December 10, 2004, Petitioner Grambusch filed a memorandum in opposition to TNC's Motion to Dismiss Petition for Contested Case Hearing.

14. At the December 14, 2004 hearing on standing, Hanapi stated that they did not want to intervene as parties in a contested case hearing. (TR. 12/14, page 32, line 1).

15. Minute Order 3 dated December 17, 2004 denied TNC's Motion to Dismiss and granted Petitioner Grambusch's request for a contested case hearing and set the contested case hearing for January 26 and 27, 2005.

16. Minute Order No. 4 dated January 13, 2005 reset the contested case hearing for February 28 (Site Visit), March 1-3, 2005. Minute Order No. 4 also stated that the DLNR's files on the CDUA would be part of the contested case hearing record.

17. On January 13, 2005, TNC filed an Objection to Petitioner's Second Amended Witness List for listing Mr. Kanai Kapeliela from testifying as a witness for Petitioner. On March 1, 2005, the Hearing Officer denied the objection based on the fact that the objection was moot because Mr. Kapeliela had not submitted a written statement and was not being called as a witness.

18. On January 14, 2005, Petitioner filed an Objection to Witnesses listed by Applicant, TNC for failure to make an offer of proof for each witness as required by the Hearing Officer. On March 1, 2005, the Hearing Officer denied this objection because it was moot. The purpose of the offer of proof for each witness was to give the other party notice of what each witness would say on direct examination. Because the parties had already submitted written direct testimonies, the Hearing Officer felt that this objection was now moot as the parties each had adequate notice on what each witness would testify on to prepare adequate cross-examination of that witness.

19. On February 10, 2005, TNC filed Motion for Application of the Witness Exclusionary Rule to Contested Case Hearing to exclude all witnesses named by either party. The Hearing Officer acknowledges that were this a State Circuit Court case,

the application of the Witness Exclusionary Rule would be mandatory upon the request of any party to the proceedings. However, this is an administrative proceeding and the rules of the state circuit courts, while certainly providing guidance to the Hearing Officer in this proceeding, are not binding upon the Hearing Officer. Further, there is a public interest in these proceedings and because so many community members are named to testify that by invoking the witness exclusion rule would have the effect in this case of barring most of the interested members of the public from attending the hearing until some later point after they have testified. Given the public interest, the Hearing Officer denies the Motion.

20. On February 23, 2005, TNC filed a Motion in Limine to limit the testimony of Mr. Kai Markell to specify his area of expertise and preclude his testimony on the sufficiency of the EA. After oral argument on the motion, the motion was granted in part and denied in part. The motion was granted in part as to Mr. Markell giving any legal opinion regarding the sufficiency of the draft and final environmental assessment. The Hearing Officer granted the motion in part because legal opinions are the purview of the Hearing Officer and the Hearing Officer did not feel that testimony on that issue would assist the Hearing Officer on the determination of the legal sufficiency of the EA. The Hearing Officer deferred in part because it was unclear from the witness statement filed exactly what Mr. Markell was being asked to be an expert witness on and that the Hearing Officer would give the Petitioner an opportunity to make that showing at the time of Mr. Markell's testimony. On March 2, 2005, the Hearing Officer denied the motion in part and by agreement of the parties, Mr. Markell was certified as an expert witness in assessing cultural impact statements under chapter 343, HRS.

21. Minute Order No. 5 dated February 22, 2005, Sandra Wong withdrew as Hearing Officer.

22. On February 22, 2005, the Hearing Officer held a prehearing conference to go over logistics for the contested case hearing and site visit. No objections were raised to the Hearing Officer serving as a hearing officer for this contested case hearing.

23. Minute Order No. 6 dated March 4, 2005, appointed Linnel T. Nishioka as Hearing Officer effective February 18, 2005, with the mutual agreement of the parties.

24. On February 28, 2005, the Hearing Officer did a helicopter site visit of the project area and adjacent existing TNC fencing. The helicopter site visit lasted approximately 45 minutes and no transcript was taken of the site visit. Along with the Hearing Officer and the Pilot of the Helicopter; Ed Misaki, TNC, Wilma Grambusch, Petitioner and their respective attorneys, Michael Gibson, for TNC, and James Richard McCarty, for Petitioner. On the ground, Christen Mitchell, DLNR, and several employees of the TNC were also present.

25. On the site visit, the Hearing Officer observed the existing fence line of the adjacent TNC projects and the project area and the effect of erosion on the makai areas. The Hearing Officer also observed herds of goats in the fenced and unfenced area and observed the visual impact of the existing fencing. Petitioner attempted to show the Hearing Officer a significant cultural burial mound but was unable to locate it on the site visit. The area where the burial mound may be located appeared to the Hearing Officer to be significantly makai of the project area.

26. The contested case hearing commenced on March 1, 2005 and ended on March 2, 2005.

27. After several extensions, the parties submitted proposed findings of fact, conclusions of law, decision and order and supplemental legal briefs on April 27, 2005. See Minute Order Nos. 7 and 8.

II. PROPOSED PROJECT

28. The proposed project is to build an approximately 3.5 mile fence through the ahupua'a of Kawela and Makalelau between the 3,000 and 4,000 foot elevation. ("Kawela/Makalelau Fence") (TNC FF 29, TR 3/1, page 37, lines 14-15, Exhibits B-1 & B-2). The proposed Kawela/Makalelau Fence will connect two existing fences: TNC's Kamakou east boundary fence and the Kamalo/Kapualei Watershed Project Contour fence. (TNC FF 28, TR 3/1, pages 35, lines 17-25, & 36, lines 4-7).

29. The purpose of the fence is to prevent browsing by large herds of feral goats and other ungulates and to restore the native mesic forest and reduce sediment runoff to the ocean. (Exhibit B-2). Browsing by feral ungulates has been extensive and has resulted in destruction of native forest and increased runoff to the ocean. Fencing off the area combined with a continued aerial and ground hunting program is needed to protect and restore native forests and decrease runoff and sedimentation into the ocean. (TNC FF 30, TR 3/1, page 148, lines 4-23, Hearing Transcript for 3/02/05 ("TR 3/2") page 6, lines 13-18, page 54, lines 1-25, and page 55, lines 1-2; TNC FF 33, TR 3/1, page 44, lines 16-22).

30. The Kawela/Makalelau fence will protect rare natural communities, the Olopuia Lowland Mesic Forest and Halapepe Lowland Mesic Forest, 20

rare plant species, including species federally listed as endangered; and habitat for 4 rare tree snail species and one rare forest bird species. (Written Statement of Tina Lau). The native mesic shrub lands are some of best left in Hawaii. (Written Statement of Ed Misaki).

31. Dr. Samuel M. Gon, III is employed by TNC as a senior scientist and cultural advisor. Dr. Gon was qualified as an expert in Hawaiian natural history and conservation biology. Dr. Gon has a Ph.D in Animal Behavior and has written numerous publications in systematic botany, ethnobotany, ecology, other biological disciplines, biological significance of Hawaii and terrestrial ecosystems of the Hawaiian islands. He has almost thirty years of conservation work in Hawaii. (Written Statement of Dr. Sam Gon).

32. Dr. Gon testified that in his nearly 30 years of conservation work that fencing that is established to control the movement of non-native herbivorous animals, the response of the native ecosystem to recover is often remarkable. It is an extremely effective tool for management of native ecosystems and species. (Written Statement of Dr. Sam Gon; TR 3/2, page 43, lines 11-24.).

33. Immediately after the existing fences in Kamalo and Kapualei ahupua'a were constructed, TNC science staff started monitoring vegetation conditions on each side of the fences. (Written Statement of Tina Lau).

34. At the beginning of the study, the condition of the vegetation was similar but as goats continue to inhabit the land below the fence and the goat population was drastically reduced above the fence, the conditions above the fence improved. Approximately 4 years after construction, vegetation in the shrub land below the fence,

where the majority of the goat population remained, showed drastically reduced amounts of new growth in the ground and shrub areas. (Exhibit B-7). Grasslands are markedly grazed to a few inches on the lower side while grasses have flourished above the fence line. (Exhibit B-7) (Written Statement of Tina Lau).

35. The presence of a variety of native plant seedlings on area above the fence line is one of the most encouraging results of the fencing project. Native plants are revegetating the lands above the fence line. (TR 3/1, page 105, lines 15-20, Exhibit B-7).

36. The proposed fence will be constructed of 47 inch, triple-drip, hi-tensile, hog-wire mesh. One strand of barbwire will run along the bottom of the fence, with two additional strands of barbwire running along the top of the fence (6 inches apart), which makes the total height of the fence 5 feet tall. Galvanized steel seven-foot t-posts will be used and pounded in using manual post pounders. (TNC FF 31, TR 3/1, page 79, lines 6-11, Exhibit B-2, page 10).

37. The proposed fence, like the existing Kamalo/Kapualei fence and the Kamakou fence will have gates and stepovers to allow people to pass through and over the fence. (TNC FF 41, TR 3/1, page 45, lines 22-25, page 46, lines 1-18). A stepover is a ladder-like structure in the fencing that allows a person to more easily climb over the fence. (Exhibit B-7). Stepovers will be put at regular intervals along the fence line at locations that are most likely to be accessed by the public. Gates will be installed on current access roads. The Gates will be swinging gates and not have any locks or other security devices installed. (Written Statement of Ed Misaki; TR 3/1, pages 45, lines 22-25, page 46, lines 1-13).

38. Construction of the proposed fence will involve brushing of a fence line which includes clearing an area approximately 4 feet wide by 8 feet tall corridor for fence construction and maintenance access. Where possible, the fence will be routed along existing game trails and through open/disturbed areas. Trees over 6 inch diameter will not be cut. Two-thirds of the proposed fence from Kamalo end to Kawela side is in open grasslands and very little brushing will be required. For the last third of the fence on the north side, major brushing will be required. Before clearing, any locations of endangered plants in the area will be mapped and will be avoided from construction. Brushing has only a short-term effect on existing vegetation and generally the vegetation does grow back. (TR 3/1, page 110, lines 1-12, Exhibit B-2, page 10).

39. A portion of the project area is in the Protective and Resource subzones of the Conservation District. The proposed use is an identified land use within the both subzones, Section 13-5-22, HAR, P-7, Sanctuaries, which states: "plant and wildlife sanctuaries, natural area reserves (see chapter 195) and wilderness and scenic areas, including habitat improvements under an approved management plan." A board permit is required for that identified land use.

III. CONTESTED CASE HEARING

40. The Contested Case Hearing presented evidence on essentially three issues:

1. Is the Final Environmental Assessment submitted by TNC legally sufficient under HRS chapter 343. Is it proper to challenge the legal sufficiency of the chapter 343 process

outside of the legal appeal process set forth in section 343-

7(b), HRS?

a. Was the notice and consultation process in conformance with chapter 343, HRS and chapter 11-200, HAR?

b. Was the Final EA required to strictly comply with the Guidelines on cultural impact statements published by the State Environmental Council?

2. Whether the project impermissibly burdens traditional and customary Hawaiian practices protected by Article 12, Section 7, HSC and Section 7-1, HRS.

3. Does the proposed use meet the criteria for the issuance of a conservation district use permit as provided in Chapter 183C, Hawaii Revised Statute, and Chapter 13-5, Hawaii Administrative Rules? If so, what conditions, if any, that should be imposed on the Applicant's conservation district use permit.

41. Because a portion of the project area is within the Conservation District, and state and county funds will be used to construct the fence, the project is required to comply with Chapter 343, including the preparation of an environment disclosure document. (Exhibits B-1 and B-2).

a. Was the notice and consultation process in conformance with chapter 343, HRS and chapter 11-200, HAR.

42. TNC consulted with members of the Hawaiian community, including people that practice traditional and customary Hawaiian practices in Kawela. (Written Testimony of Ed Misaki).

43. TNC also held a public meeting to solicit comments on the proposed fencing project from members of the Hawaiian community. TNC also consulted with Office of Hawaiian Affairs and the State Historic Properties Division for comments on the proposed project. (TR 3/1 page 47, lines 15-21).

44. A Draft Environmental Assessment (hereinafter referred to as "EA") was submitted to the DLNR in December, 2003. The Notice of the Draft EA availability and request for comments was published on the December 23, 2003 in the Office of Environmental Quality Control, The Environmental Notice. (Written Testimony of Christen Mitchell). Comments to the Draft EA were due within 30 days of the publication of the notice; on or before January 22, 2004. See §11-200-9-1(b), HAR.

45. Copies of the Draft EA were distributed to 76 persons and entities including county, federal, and state agencies, public and private organizations and members of the Molokai community. Additionally, a copy was placed in the Molokai Public Library for the public to review. Copies were also available at the TNC's Molokai Office. (Exhibits B-1 and B-2).

46. Written comments were received from the following:

- b. USFWS on the Section 7 consultation
- c. Hawaii State House Representative Sol P. Kahoolalahala
- d. State of Hawaii, DLNR
- e. State of Hawaii, State Historic Preservation Division
- f. State of Hawaii, Office of Hawaiian Affairs²
- g. County of Maui, Department of Public Works and Environmental Management
- h. County of Maui, Department of Planning
- i. Richard Larson

47. A final EA was submitted by TNC in early February, 2004. The DLNR accepted the Final EA and made a specific determination as the accepting agency that the proposed project would have no significant environmental impact (hereinafter referred to as a "FONSI"). The notice of agency's FONSI determination was published in the February 23, 2004 in the Office of Environmental Quality Control, The Environmental Notice. (Written Statement of Christen Mitchell).

48. Under Chapter 343, HRS, specifically, §343-7(b), a person wishing to challenge the acceptance of a final EA and FONSI determination must file an action in State Circuit Court within 30 days of the publication of the acceptance and determination by the accepting agency, here DLNR. There was no evidence presented that there was any legal challenge was filed in State Circuit Court within 30 days of the February 23, 2004 legal notice.

49. The Petitioner was not one of the members of the Molokai Community that was given prior notice or a copy of the Draft Environmental Assessment

² Petitioner attached a letter dated April 25, 2005 from the Office of Hawaiian Affairs providing additional comments to the Environmental Assessment. Because the Hearing Officer cannot consider additional evidence after the official close of the hearing that occurred on March 2, 2005 and therefore cannot consider the April 25, 2005 letter because it was submitted after the close of the evidentiary case. However, the Hearing Officer does note that the comments expressed in the letter appear to be very similar to the testimony given by Mr. Kai Markell in his testimony on the sufficiency of the cultural assessment in the EA which the Hearing Officer did consider in this proposed decision.

of the Kawela/Makalelau fence project. (Exhibit B-2, TR 3/1, page 63, lines 16-18, Written Statement of Petitioner Grambusch).

50. Several testifiers agreed that native tenants of Kawela ahupua'a, including Petitioner Grambusch, should have been contacted for input on the project including prior notice and a copy of the Final Environmental Assessment for their review and comment. (PG FF 52, TR 3/1, page 99, lines 3-7, PG FF 53, TR 3/1, page 152; PG FF 54, TR 3/1, page 153, lines 12-15).

b. Was the Final EA required to strictly comply with the Guidelines on cultural impact statements published by the State Environmental Council?

51. In November 1997, the Environmental Council published Guidelines for Assessing Cultural Impacts. The guidelines contained a cultural impact assessment methodology and cultural impact assessment contents. (TNC Memorandum of Law.)

52. At its November 19, 1997 meeting, the Environmental Council specifically amended and then adopted the Guidelines to clarify language used in the Guidelines was to "stress that the document [was] not a new rule." See The Environmental Notice, December 8, 1997, pg. 17. The Notice goes on to state "rather than establish strict rules governing cultural impacts, the Council is attempting this more collaborative approach." Id.

53. In 2000, the Hawaii State Legislature passed a bill, commonly referred to as "Act 50" that amended the definition of "significant impact" to include cultural assessments. Id.

54. There was no evidence presented to the Hearing Officer that any further action has been taken by the Environmental Council on the Guidelines to codify them into rules.

55. Mr. Kai Markell was qualified as an expert with respect to the adequacy of cultural impact statements for environmental disclosure documents. (GP FF 44, TR 3/2, page 144, lines 13-15, page 145, lines 4-9). Mr. Kai Markell was formerly employed by the Department of Land and Natural Resources in the State Historic Preservation Division with the Burial Sites Program. He is currently employed by the Office of Hawaiian Affairs, Native Rights Land and Culture Division. In that capacity, Mr. Markell reviews cultural impact statements, draft environmental assessments and environmental impact statements. (TR 3/2 page 134, lines 15-20, page 137 lines 19-25).

56. Mr. Markell testified that the Draft and Final EA did not include a proper cultural impact assessment. He testified that the Draft and Final EA didn't include some of the commonly known features about the Kawela area, including the 1750 battle and the information contained in the Weisler/Kirsch report. (PG FF 48, TR 3/2, page 148, lines 14-25, page 149, lines 1-2).

57. Ms. Collette Machado is an OHA Trustee and former member of the Land Use Commission. In those capacities, she has reviewed many environmental disclosure documents. Ms. Machado testified that the Final EA was inadequate because it failed to include a cultural impact assessment, did not detail the Weisler and Kirsch report and failed to consult with prominent members of the Kawela and Hawaiian community. (Written Statement of Collette Machado, TR 3/1, page 213, lines 9-11).

58. In 1982, Weisler and Kirsch prepared an archeological report of the ahupua'a of Kawela from sea level to the 500 foot contour. Although the report only included archeological data up to the 500 foot contour, the research was done up to the 800 foot contour. (TNC FF 45, TR 3/2, page 58, lines 6-25, Exhibit B-2, page 9).

59. The Weisler/Kirsch report was prepared during the construction of the Kawela Plantation Agricultural Subdivision project which including development of over 210 lots and included roads, other infrastructure and construction of homes within the subdivision. (TR 3/1, pages 211-212).

60. In a letter dated January 26, 2004 to TNC, the State Historic Preservation Division stated that with the possible exception an isolated habitation, agricultural, or religious sites that might be present, that "[g]enerally, there are few historic sites, if any, at such elevations." The letter went on to state that the TNC project as proposed that the Division believes that "no historic properties be affected." (Exhibit B-2).

61. If during construction of the proposed site any archeological sites are discovered inadvertently, all work will cease and the State Historic Preservation Division will be notified and consulted. Chapter 6E, HRS.

2. Whether the project impermissibly burdens traditional and customary Hawaiian practices protected by Article 12, Section 7, HSC and Section 7-1, HRS.

62. Robert Alcain and Walter Mendes participated in the preparation of the Draft EA providing information concerning archeological sites, cultural sites, and cultural resources. (TNC FF 36, TR 3/1, page 74, lines 23-25, page 75, lines 1-3).

63. Mr. Mendes is a cultural practitioner, a hunter, and worked on archeological study of the Kawela ahupua'a done in 1982 by Weisler and Kirsch for the Bishop Museum. (TNC FF 37, TR 3/2, page 56, lines 15-20, page 58, lines 6-25).

64. Mr. Mendes and Mr. Alcain also participated in a helicopter survey of the location of the proposed fence looking for archeological sites and cultural resources. (TNC FF 38, TR 3/1, page 75, lines 3-6, TR 3/2, page 57, lines 21-25, page 58, lines 1-5).

65. Mr. Mendes concluded from his experience and observation that the proposed fence would not impact any archeological sites nor would the proposed fence interfere with cultural practices. (TNC FF 39, TR 3/2, page 59, lines 18-25, page 60, lines 1-25, page 61, lines 1-5).

66. The traditional and customary practices in the Kawela area is hunting animals and gathering native plants for cultural and medicinal purposes. (TNC FF 40, TR 3/1 p. 149, lines 17-19, Exhibit B-2, page 12).

67. Ms. Penny Martin is a cultural and environmental educator employed with by the Moanalua Gardens Foundation. Ms. Martin is a member of the Molokai Island Advisory Council for the Nature Conservancy. (Written Statement of Penny Martin.)

68. Ms. Martin has visited the project area (TR 3/1, pages 154-155) and believes that the proposed Kawela/Makalelau fence is consistent with the Hawaiian tradition of "malama aina" because it will protect and enhance native forest and reduce runoff to the ocean. Ms. Martin paddles and goes fishing in Kawela ahupua'a and has

observed the siltation and damage caused to the near shore by runoff from the upper Kawela lands. (TR 3/1 page 148, lines 16-23).

69. Ms. Martin has objected to fencing in the past but supports this proposed project because with she believes that the design of this fence with stepovers and gates will continue to allow people to exercise their traditional gathering rights. (Written Statement of Penny Martin).

70. Mr. Moses Kalilikane is a life long Molokai resident and commercial fisherman. His family has been fishermen for three generations. Mr. Kalilikane does not believe that the proposed Kawela/Makalelau fence will impact cultural practices including fishing on the reefs off Kawela. (Written Statement of Moses Kalilikane, Exhibit B-8).

71. Mr. Kalilikane stated that the fence will not affect any traditional practices for people are not kept out of the area since there is still access allowed for them. He believes it is the animals and not people who will be affected. Hunting and gathering rights will be protected and encouraged. (Exhibit B-8).

72. Mr. Kalilikane is strongly in favor of the fence because it will protect native forests from destruction that is now occurring from wild animals, it will protect coral reefs makai that are being destroyed by all the mud coming down and destroying the coral and does not prevent access for traditional and customary practices. (Exhibit B-8).

73. Ms. Judy Caprida and Ms. Ruth Manu are residents of Molokai and active in Molokai water and land issues. Ms. Caprida and Ms. Manu feel that a fence will keep people out and will not effectively control the goat population. (Written

Statements of Judy Caprida and Ruth Manu). Ms. Caprida was not aware that the design of the fence would include gates with no locks and stepovers at additional access points on the fence. (TR 3/1, page 166, lines 18-20).

74. Ms. Lori Higa is a kumu hula and cultural practitioner. Ms. Higa and her family gather plants for medicinal purposes and to gather adornments for cultural reasons. Ms. Higa believes that a fence will curtail her ability to access and enjoy the area for spiritual and cultural reason and inhibit her ability to practice as a kumu hula. Ms. Higa currently gathers at an elevation in the Kawela ahupua'a that is significantly below where the proposed fence will be placed. (TR 3/2 77-78, lines 23-25, 1-7).

75. Mr. Melvin Perrells and Mr. Yama Kaholoa'a are hunters that have hunted in Kawela ahupua'a and believe that hunting can control the goat population without a fence. (Written Statements of Mr. Perrells and Mr. Kaholoa'a). Mr. Perrells stated that he had access problems through Kawela Plantation and Kamehameha Schools lands. (TR 3/2, page 84, lines 7-19, page 92, lines 1-10).

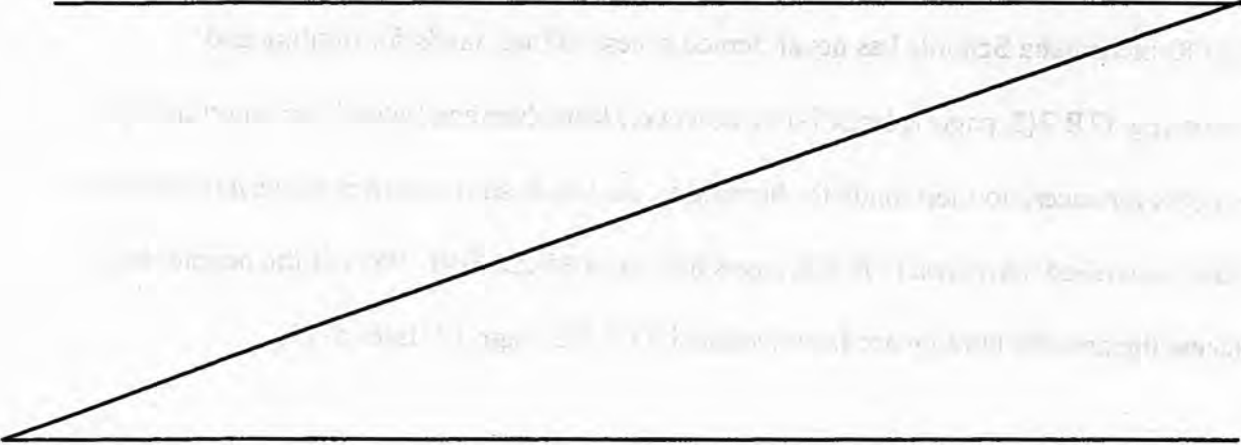
76. Mr. Roderick Kalani Fronda is employed by Kamehameha Schools and manages the Kamehameha Schools land on Molokai. Kamehameha Schools does not own land in the Kawela area but owns land in Kamalo and is part of the Kamalo/Kapuaiei Watershed Project. (TR 3/2, page 5, lines 24-25, page 6, lines 1-12). Mr. Fronda stated that Kamehameha Schools has never denied access to their lands for hunting and gathering. (TR 3/2, page 7, lines 7-14), however, Kamehameha School has a permitting process for access to their lands for hunting to weekends so it would not interfere with the other watershed activities. (TR 3/2, pages 8-9, lines 14-25, 1-9). 95% of the people that access the area for hunting are from Molokai. (TR 3/2, page 17, lines 8-11).

77. Dean K.L. Moku Chow is a resident and board member on the Kawela Plantations Homeowners Association. (TR 3/2, page 22, lines 16-22). Mr. Chow helps organize and is a volunteer hunter for the Kawela Plantations. (TR 3/2, page 23, lines 14-17). The Kawela Plantation community hunts are with TNC and are first open to residents of Kawela Plantation and then to members of the public. About 1/3 of the hunters are from Kawela Plantation and 2/3 are from the general community. (TR 3/2, page 29-30, lines 16-25, 1-10).

78. No witness was aware of a single incident where the existing Kamalo/Kapualei fence or the Kamakou fence interfered with a hunter or gatherer. (TNC FF 42, TR 3/1, page 47, lines 1-7, Page 166, lines 24-25, Page 167, lines 1-14, TR 3/2, page 7, lines 8-14, page 9, lines 10-16).

3. Does the proposed use meet the criteria for the issuance of a conservation district use permit as provided in Chapter 183C, Hawaii Revised Statute, and Chapter 13-5, Hawaii Administrative Rules. If so, what conditions, if any, that should be imposed on the Applicant's conservation district use permit.

79. The proposed fence will not have a significant visual impact nor will it significant adverse impact to existing natural resources in the area. (Exhibit B-2).



CONCLUSIONS OF LAW

1. The Board of Land and Natural Resources has jurisdiction over TNC's Application for a CDUP pursuant to section 183C-6, Hawaii Revised Statutes ("HRS"). (TNC Conclusion of Law ("TNC CL") 53).
2. The Petitioner Wilma Grambusch has standing to appear in this contested case as a party pursuant to section 13-1-31, HAR.
3. The application and contested case hearing was done in compliance with chapters 91 and 183C, HRS, and chapters 13-1 and 13-5, HAR.
4. On the issue of the legal sufficiency of the EA, based on the evidence, legal briefs submitted and the record of this case, the Hearing Officer concludes the following:
 - a. Under Chapter 343, specifically §343-7(b), legal challenge to the EA must be filed in the State Circuit Court no later than 60 days after the notice of its acceptance is published. The failure to file a timely action in a chapter 343 challenge is a jurisdictional and a bar to further legal challenge. Waianae Coast Neighborhood Board v. Hawaiian Electric Company, et.al., 64 Haw. 126, 637 P2d 776 (1981) (Per Curiam). In this case, no legal action was filed in this case challenging the legal sufficiency of the EA and it would now be time barred. Where a statute provides an exclusive remedy, the proper legal challenge is through the remedy provided by the statute. Koolau Ag. v. Commission on Water Resource Management, 83 Hawai'i 484, 927 P2d 1367 (1996). Therefore, the Hearing Officer finds that the legal sufficiency of the EA cannot be

considered in this proceeding. It is important to note that even though the legal sufficiency of the EA is not an issue in this proceeding, many of the issues, including the impact of the proposed project on traditional and customary Hawaiian practices and cultural and natural resources are proper issues for this contested case hearing.

- b. Assuming arguendo that the legal sufficiency of the EA can be considered in this proceeding, the Hearing Officer finds that the EA process and the EA document are both legally sufficient. On the issue of notice and consultation, the Hearing Officer does note that many organizations and members of the community were consulted in the process and there was an extensive distribution of the EA document. However, the Hearing Officer also understands the consternation that members of the Kawela and Hawaiian community that were not consulted in this EA process and that on Molokai, more extensive consultation and notice is expected. By making this determination that the notice and consultation process was legally sufficient, the Hearing Officer is making a finding as to what is required by law, and not what may be expected or deemed by some to be community or culturally appropriate. Finally, Petitioner argued that the Guidelines for Assessing Cultural Impacts adopted by the Environmental Council in 1997 were mandatory and that the EA failed to meet those guidelines. TNC argued that the Guidelines were guidelines and not mandatory requirements under chapter 343. The plain meaning of the word "Guidelines" and the legislative history of the adoption and

publication of the Guidelines support TNC's interpretation and the Hearing Officer finds that the Guidelines were not a mandatory requirement for the content of an environmental disclosure document but are there to provide guidance to drafters of environmental disclosure documents especially in a situation where the proposed project is not anticipated to have a significant adverse impact. As to the EA document itself, the Hearing Officer finds that the EA meets that legal standard under chapter 343, HRS and chapter 11-200, HAR.

5. On the issue of the impact of the proposed project on traditional and customary Hawaiian practices, Article 12, Section 7 of the Hawaii State Constitution provides: "The State reaffirms and shall protect all rights, customary and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the rights of the State to regulate such rights." See also Section 7-1, HRS. (TNC CL 56). In Ka Pa'akai O Ka 'Aina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000), the Hawaii Supreme Court set out the following factors that must be considered by any Decision maker that evaluates the proposed land use's impact on traditional and customary Hawaiian rights/practices: (1) The identity and scope of cultural, historic, and natural resources in the application area, including the extent to which traditional and customary native rights are to have been exercised in the application area; (2) the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and (3) the feasible action, if any, taken to reasonably protect native Hawaiian rights if

they are found to exist. Id. at 47. (TNC CL 63). Based on the evidence, legal briefs submitted and the record of this case, the Hearing Officer concludes the following:

- a. The Hearing Officer finds that the findings of fact contained herein and the evidence and record of this case adequately details the cultural, historic and natural resources in the project area. The Hearing Officer finds that traditional and cultural native Hawaiian practices do exist in the subject area, primarily hunting of goats and other animals and gathering of native plants for cultural and medicinal purposes.
- b. The Hearing Officer finds that the extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action impact will be minimal and the proposed project may have a positive impact on traditional and customary native Hawaiian practices by improving the Native Forest and habitat for native plants and animals.
- c. The Hearing Officer finds that the fence construction including unlocked gates and stepovers constructed in the fence itself are feasible measures that will mitigate against any reduced access to those areas caused by the proposed project. In addition, the Hearing Officer has imposed additional conditions that will further assist in protecting access for traditional and customary native Hawaiian rights/practices in the subject area.

6. In evaluating the merits of a proposed use in the conservation district, the Hearing Officer must evaluate eight criteria found in section 13-5-30(c), HAR. The eight criteria are:

- a. The proposed land use is consistent with the purpose of the conservation district;
 - b. The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
 - c. The proposed land use complies with the provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management," where applicable;
 - d. The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region;
 - e. The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
 - f. The existing physical and environmental aspects of the lands, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable.
 - g. Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
 - h. The proposed land use will not be materially detrimental to the public health, safety and welfare. (TNC CL 60).
7. The burden of proof is on TNC to prove that it meets the requirements of the granting of the application. The degree of proof is a preponderance of the evidence.
- §13-5-30(c), HAR, §91-10(5), HRS. (TNC CL 61).

8. The Hearing Officer finds that the proposed land use is consistent with the purpose of the conservation district. The proposed land use is to construct a 3.5 mile fence to keep out goats from continued damage of the Native Forest and allow for restoration of the forest. This proposed land use is consistent with the purpose of the Conservation District.

9. The Hearing Officer finds that the proposed land use is consistent with the objectives of the subzones. A portion of the subject property is in the protective and resource subzones. The objective of the protective subzone is to "protect valuable resources in designated areas such as restricted watersheds, marine, plant, and wildlife sanctuaries, significant historical, archeological, geological, and volcanological features and sites, and other designated unique areas." §13-5-11(a), HAR. The objective of the resource subzone is to "develop, with proper management, areas to ensure sustained use of natural resources of those areas." §13-5-13(a), HAR. The application for the land use as proposed will meet the objectives of both the protective and resource subzones.

10. The Hearing Officer finds that the area is not in the coastal zone management area and therefore not subject to chapter 205A, HRS.

11. The Hearing Officer finds that the proposed land use will not cause substantial adverse impact to the existing natural resources within the surrounding area, community or region. The construction of the fence as proposed by TNC will cause minimal impact to natural resources in the area and such impact will be temporary in nature.

12. The Hearing Officer finds that the proposed land use is compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities

of the specific parcel or parcels. The proposed land use will enhance existing natural resources in the area by facilitating the restoration of Native Forest.

13. The Hearing Officer finds that the proposed land will preserve the existing physical and environmental aspects of the lands, such as natural beauty and open space characteristics. In addition, the fence will allow for protection and restoration of Native Forest that will actually improve the open space and natural beauty of the area.

14. The Hearing Officer finds that the proposed land use does not involve a subdivision of land so section 13-5-30(c)(7), HAR is inapplicable.

15. The Hearing Officer finds that the proposed land use will not be materially detrimental to the public health, safety and welfare. The proposed land use not be materially detrimental to the public health, safety and welfare. The Hearing Officer finds that the proposed project will actually improve the area by restoring the Native Forest and thereby reducing erosion and sedimentation runoff into the ocean.

16. Minute Orders 1 through 8 are hereby incorporated by reference herein as if fully set forth.

17. Any conclusion of law improperly designated as a finding of fact shall be deemed or construed as a conclusion of law. Any finding of fact improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

18. Applicant TNC has met its burden of proving by a preponderance of the evidence that the proposed land use is consistent with the statutory criteria of chapters 205 and 183C, HRS.

**RULINGS ON THE PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW SUBMITTED BY THE PARITES**

The Hearing Officer makes the following rulings on the parties' proposed findings of fact. The findings are placed into two categories.

Category A contains findings that are accepted in their entirety, or accepted with minor modifications or corrections that do not substantially alter the meaning of the original findings.

Category B contains findings that are rejected because they may be:

1) duplicative; 2) not relevant; 3) not material; 4) taken out of context; 5) contrary (in whole or in part) to the found facts; 6) an opinion (in whole or in part); 7) contradicted by other evidence; or 8) contrary to law.

I. TNC

1. Accepted: 1, 2, 28-31, 33, 36-42, 45, 53, 56, 60, 61, 63.
2. Rejected: 3-27, 32, 34-35, 43-44, 46-52, 54, 55, 57-59, 62, 64-81.

II. PETITIONER GRAMBUSCH

1. Accepted: 1, 44, 48, 52, 53, 54.
2. Rejected: 2-43, 45-47, 49-51, 55-109, Conclusions of Law 1-14.

DECISION AND ORDER

IT IS HEREBY ORDERED that the Conservation District Use Application for TNC to construct a 3.5 mile fence in Kawela/Makalelau ahupua'a, DLNR File No. MO-04-09 is granted subject to the following terms and conditions:

- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;
- 2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit.
- 3) The applicant shall comply with all applicable Department of Health administrative rules.
- 4) The applicant shall provide documentation (i.e. book/page document number) that this approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
- 5) Before proceedings with any work authorized by the Board, the applicant shall submit four (4) copies of the construction and grading plans and specifications to the Chairperson or his authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three (3) of the copies will be returned to the applicant. Plan approval by the Chairperson does not constitute approval required from other agencies;

6) Any work done on the land shall be initiated within one year of the approval of such use, and unless otherwise authorized be completed within three years of the approval. The applicant shall notify the Department in writing when construction activity is initiated and when it is completed;

7) All representations relative to mitigation set forth in the accepted Final Environmental Assessment for the proposed use, except as modified by this proposed decision and order, are incorporated as conditions of the permit.

8) This permit does not convey any vested right(s) or exclusive privilege.

9) In issuing this permit, the Department has relied on the information and data that the applicant has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings.

10) Where any interference, nuisance, or harm may be caused, or hazard established by the use, the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard.

11) Obstruction of public roads, trails, and pathways shall be minimized. If obstruction is unavoidable, the Applicant shall provide roads, trails, or pathways acceptable to the Department.

12) During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities.

13) Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact SHPD (587-0013), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary.

14) The Applicant shall hold a public meeting in Kawela to get public input on the locations of stepovers for the proposed fence. The public shall be invited to attend and individual notice of the meeting must be provided by hand delivery or U.S. Mail to Petitioner Mrs. Grambusch at least 20 days before the meeting. Public notice of the meeting must be posted on community bulletin board(s) in Kaunakakai and the Molokai Public Library at least 20 days before the meeting. Petitioner and the public may designate up to five stepover locations. If more than five requests are made, the Petitioner's request shall be given first priority with the remaining requests on a first-come, first-served basis. This meeting shall be held prior to the initiation of construction of the fence.

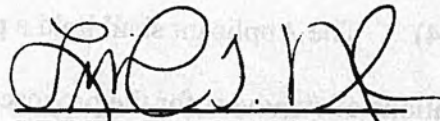
15) If less than five locations are identified at the public meeting, the Petitioner and the public shall have up to sixty days after the completion of the fence to designate the remaining stepover locations until a total of five stepover locations have been identified. After the expiration of sixty days after completion of the fence, TNC has no obligation to place additional stepovers unless ordered to do so by the Board of Land and Natural Resources.

16) The Applicant shall place stepovers at up to five locations identified in conditions 14 and 15 above.

17) This CDUP is subject to other terms and conditions as may be prescribed by the Chairperson.

18) Failure to comply with any of these conditions may render this Conservation District Use Permit null and void.

DATED: Honolulu, Hawaii, June 17, 2005.



LINNEL T. NISHIOKA

Hearing Officer for the
Board of Land and Natural Resources

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of a Contested Case Regarding)
the East Molokai Watershed Partnership)
Fence Extension Project)
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DLNR File No. MO-04-09

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the "*Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Decision and Order*" was duly served on the following, in the manner indicated below, either by depositing the same in the United States Mail, postage prepaid, first class mail, or by hand delivery of same on June 17, 2005.

	<u>U.S. Mail</u>	<u>Hand Delivery</u>
Christen Mitchell Department of Land and Natural Resources Division of Forestry and Wildlife 1151 Punchbowl Street, Room 325 Honolulu, Hawaii 96813	(✓)	()
Vince Kanemoto, Deputy Attorney General Dept. of the Attorney General 465 South King Street, Room 300 Honolulu, Hawaii 96813	(✓)	()
James Richard McCarty, Esq. 2530 Kekaa Drive, Suite B-6 Lahaina, Hawaii 96761	(✓)	()
Michael W. Gibson, Esq. Ashford & Wriston 1099 Alakea Street, Suite 1400 Honolulu, Hawaii 96813	(✓)	()

U.S. Mail

Hand
Delivery

Wilma Kamakana Grambusch
P.O. Box 614
Kaunakakai, Hawaii 96748

(✓)

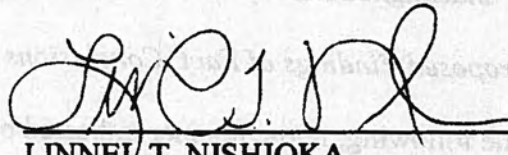
()

Melinda Ching
The Nature Conservancy of Hawaii
923 Nuuanu Avenue
Honolulu, Hawaii 96817

(✓)

()

Dated: Honolulu, Hawaii, June 17, 2005.



LINET T. NISHIOKA
Hearing Officer for the
Board of Land and Natural Resources.

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

In The Matter of a Contested Case Regarding)
the East Molokai Watershed Partnership)
Fence Extension Project)

DLNR File No. MO-04-09

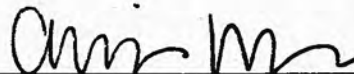
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Board of Land and Natural Resources' Final Order was delivered by U.S. Mail, postage prepaid, to the following parties:

James Richard McCarty, Esq.
2530 Kekaa Drive, Suite B-6
Lahaina, Maui, HI 96761

Michael W. Gibson, Esq.
Ashford & Wriston
PO Box 131
Honolulu, HI 96810

Dated: Honolulu, Hawaii, OCTOBER 14, 2005



Christen Mitchell
Department of Land & Natural Resources
State of Hawaii