NO. 30397

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI'I CHAPTER; KAHEA and CLARENCE CHING,

Appellants/Petitioners/
Appellants,

vs.

BOARD OF LAND AND NATURAL RESOURCES; UNIVERSITY OF HAWAI'I (Respondent); UNIVERSITY OF HAWAI'I INSTITUTE OF ASTRONOMY (Respondent),

Appellees/Appellees.

CIVIL NO. 01-9-336

APPELLANTS MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB HAWAI'I CHAPTER, KAHEA and CLARENCE CHING'S APPEAL FROM (1) FINAL JUDGMENT; (2) ORDER GRANTING APPELLEES UNIVERSITY OF HAWAI`I AND UNIVERSITY OF HAWAI`I INSTITUTE FOR ASTRONOMY'S MOTION TO DISMISS APPEAL AND (3) THE MEMORANDUM OF DECISION ON APPELLEES UNIVERSITY OF HAWAI`I AND UNIVERSITY OF HAWAI`I INSTITUTE FOR ASTRONOMY'S MOTION TO DISMISS APPEAL

THIRD CIRCUIT COURT

THE HONORABLE GLENN S. HARA

APPELLANTS MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI`I CHAPTER, KAHEA and CLARENCE CHING'S OPENING BRIEF

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KAHEA and CLARENCE CHING

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Comes now MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI`I CHAPTER; KAHEA and CLARENCE CHING, the Appellants named above (hereinafter "Mauna Kea Appellants" or "Appellants"), by and through their attorneys Cruise & Yost, LLLC, and submit their Opening Brief pursuant to Rule 28(b) of the Hawai'i Rules of Appellate Procedure.

I. INTRODUCTION

This case is about Board of Land and Natural Resources' ("BLNR") preferential treatment of the University of Hawai'i's astronomy program and its complete disregard for the protected rights of Native Hawaiian and other users of the summit of Mauna Kea. On its face, the University of Hawai'i's Mauna Kea Comprehensive Management Plan ("CMP") purports to broadly and actively regulate all uses of the Conservation District of Mauna Kea's summit, including the religious, cultural and recreational activities of the Mauna Kea Appellants. But the BLNR chose to completely ignore the CMP's impact on Mauna Kea Appellants' rights, duties and privileges. Contrary to its obligations under Hawai'i Revised Statutes ("HRS") Chapter 91 and Department of Land and Natural Resource ("DLNR") regulations, (Hawai'i Administrative Rules ("H.A.R.") §§ 13-1-28 - 13-1-40), the BLNR issued its final decision to approve the CMP without holding a full and formal contested case proceeding. Record on Appeal, 2009 ("ROA-2009") at 20-27.

The Mauna Kea Appellants appealed the BLNR's final decisions to the Third Circuit Court of Hawaii ("Circuit Court"). ROA-2009 at 1-15. Appellees BLNR and the UH entities refused to transmit the administrative record to the Circuit Court and instead filed a Motion to Dismiss the appeal. ROA-2009 at 254-265, 268-282. Incredibly, the Circuit Court determined, without ever reviewing the CMP or the rest of the administrative record, that the CMP was a harmless "unimplemented" document and dismissed the appeal for lack of jurisdiction. ROA-2009 at 369-372; Record on Appeal, 2010 ("ROA-2010") at 1-9.

The Mauna Kea Appellants respectfully request that this Court reverse the Circuit Court's order and remand this case to the Circuit Court: (1) with a finding that the Circuit Court has jurisdiction, under HRS § 91-14 and/or .HA.R. § 13-5-3 to review Appellants' appeal from

the BLNR's final decisions; or, alternatively, (2) with a finding that the Circuit Court misapplied the standard of review for a motion to dismiss for lack of subject matter jurisdiction, particularly where the issue of subject matter jurisdiction is intertwined with the merits of Appellants' appeal.

II. STATEMENT OF THE CASE

A. Mauna Kea

Mauna Kea's summit reaches 13,796 feet about sea level and is one of the most significant features in the Hawaiian Archipelago. ROA-2009 at 35. Mauna Kea has been, and continues to be, attributed with spiritual and cultural significance in the Hawaiian community. ROA-2009 at 36. The summit of Mauna Kea is revered as "Wao Akua" (a region or home of deities)[1] and is considered, in many oral and written histories throughout Polynesia, the Temple of the Supreme Being. ROA-2009 at 34.

Modern Hawaiians regard Mauna Kea as having cultural and religious significance and use it as a resource for traditional and customary practices, including prayer and restoration, experiencing spiritual feelings and the healing qualities of the mountain, worship of ancestral shrines, the placement of cremated remains, the use of water of Lake Waiau for healing purposes, continued burial practice, and the taking of piko or umbilical cords to the summit and Lake Waiau. ROA-2009 at 36. Mauna Kea is also home to rare and threatened species found nowhere else. ROA-2009 at 38.

Mauna Kea is a vast public resource, accessed and used by many in the community. ROA-2009 at 37. Many residents of the State of Hawai'i access and use Mauna Kea for many activities, inter alia, amateur astronomy, snow play and snow gathering, hiking

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[1] Wao akua" is defined as "[a] distant mountain region believed inhabited only by the spirits (akua)[.]" M. Pukui & Elbert, Hawaiian Dictionary 382 (6th ed. 1986).

trails (ancient and modern), spiritual contemplation, rest and recuperation, viewing sun activities (i.e., sun rise and sunset) and other astronomical observation (i.e., viewing star and constellation rising and setting, viewing the great shadow of the mountain on the clouds, meteor showers etc.), hunting, hiking, observing the natural beauty and rare floral and fauna and other recreational purposes. ROA-2009 at 37-38.

The summit is in the Resource Subzone of a state Conservation District as defined in H.R.S. Chapter 205. ROA-2009 at 38. The objective of the Resource Subzone is to "develop, with proper management, areas to ensure sustained use of the natural resources of this area." H.A.R. § 13-5-13(a) (emphasis added). "Natural resources" include, "resources such as plants, aquatic life and wildlife, cultural, historic, and archaeological sites and minerals." H.A.R .§ 13-5-2.

B. University of Hawai'i's Activities on the Mauna Kea Summit

BLNR is a state governmental agency that has jurisdiction and authority over conservation districts, including the Mauna Kea conservation district pursuant to H.R.S. 205 and 183C. ROA-2009 at 41. BLNR leases the summit area of Mauna Kea to the UH (General Lease S-4191, 1968) for one dollar ($1/yr) per year. ROA-2009 at 38. General Lease S-4191 expressly requires the UH to "follow all DLNR rules and regulations...." ROA-2009 at 38. UH has been conducting scientific research activities on the summit for a number of years. ROA-2009 at 55-251; ROA-2010 at 309-346.

C. BLNR's Administrative Practice of Holding Contested Case Hearings on Management Plans for Mauna Kea and Prior Third Circuit Proceedings

BLNR and UH know well the process for a contested case hearing for plans governing the use and development of the Mauna Kea summit. In 2003, UH applied to BLNR for approval of its Outrigger Telescopes Management Plan. *See* DLNR File No HA-02-06,

ROA-2009 at 311-330. BLNR held a separate contested case hearing on UH's application. ROA-2009 at 312-330. Appellants here (with the exception of KAHEA) participated in the 2003 contested case regarding the Outrigger Telescopes Management Plan. ROA-2009 at 312-330.

Appellants disagreed with the outcome of that contested case and filed a Chapter 91 appeal. In 2007, the Circuit Court ruled in the Mauna Kea Appellants' favor, finding that UH's Outrigger Telescopes Management Plan was deficient and needed to be more comprehensive. *See Mauna Kea Anaina Hou et al. v. BLNR, et al.*, CV No. 04-1-397, Decision and Order Dated January 19, 2007, ROA-2009 at 331-346.

Cognizant of its prior deficiencies, UH attempted to prepare the CMP in accordance with the Third Circuit Court's January 2007 Decision and Order. ROA-2009 at 45. This time, however, BLNR elected to hold a public hearing on the CMP that did not comply with Chapter 91 and DLNR's regulations regarding contested case hearings. ROA-2009 at 8.

D. University of Hawaii's 2009 Mauna Kea Comprehensive Management Plan

The CMP, subject to BLNR's approval under H.A.R. § 13-5-24, is the central document governing Mauna Kea's natural and cultural resources. According to the Draft Environmental Assessment for the CMP:

> The CMP provides a management framework for UH to address existing and future astronomical, recreational, commercial, scientific research and cultural activities in the UH Management Areas. It identifies measures to enhance public participation in the management process. ***The CMP, once approved by the BLNR, will be the guiding management plan for University decisions. All activities within the UH Management Areas will have to be consistent with the provisions of the CMP***, as well as with applicable provisions of the Conservation District Use regulations and other laws and regulations.

ROA-2009 at 311 (emphasis added).

The CMP's provisions directly and specifically affect the Mauna Kea Appellants' rights, duties, and privileges under law. The powers and terms set forth in the CMP are complex

land use controls in the same way the state or county land use classifications, subdivisions, and zoning ordinances describe allowable uses and govern overall land use activities whether or not site specific permits are granted. ROA-2009 at 45. The CMP empowers the University to, *inter alia*, restrict public access, regulate cultural practices, monitor whether tenants comply with the terms of leases with the BLNR, and designate and approve projects that are deemed "minor". ROA-2009 at 45 (citing CMP, 7-8, 7-14, 7-31, 7-35, 7-55). The CMP will govern the recycling of astronomy facilities, future land uses, and a host of other management factors. ROA-2009 at 46.

E. BLNR's Failure to Hold a Full Contested Case Hearing

On April 8-9, 2009 BLNR held a public hearing on the proposed CMP. ROA-2009 at 10. BLNR permitted public testimony, but did not allow an opportunity for interested parties to cross-examine witnesses or submit additional evidence. ROA-2009 at 7-13. During this public hearing, Mauna Kea Appellants made timely and proper oral requests for a contested case hearing. ROA-2009 at 10. Notwithstanding the Mauna Kea Appellants' request for a contested case, the BLNR approved UH's CMP at the close of the April 9, 2009 meeting. ROA-2009 at 5-6.

On April 17, 2009, the Mauna Kea Appellants filed timely written petitions requesting a contested case hearing on the proposed CMP approved by BLNR on April 9, 2009. ROA-2009 at 10-11. On August 13, 2009, the Department of Land and Natural Resources ("DLNR") mailed to the Mauna Kea Appellants a staff recommendation and notice of a hearing set for August 28, 2009 hearing at the Board meeting room, 1151 Punchbowl Street in Honolulu. ROA-2009 at 33.

DLNR recommended the Board deny Mauna Kea Appellants' requests for a contested case hearing. ROA-2009 at 9-13. On August 28, 2009, representatives of Appellants Sierra Club Hawai`i Chapter, KAHEA and Mauna Kea Anaina Hou attended the BLNR hearing and presented both oral and written testimony in support of their request for a full contested case hearing. ROA-2009 at 42. The Board voted to deny the Mauna Kea Appellants' requests for a contested case hearing. ROA-2009 at 8.

On September 1, 2009, the DLNR mailed to the Mauna Kea Appellants written confirmation of the August 28, 2009 BLNR vote to deny their contested case hearing requests on the proposed CMP. ROA-2009 at 34.

F. Proceedings Before The Circuit Court

On September 28, 2009, the Mauna Kea Appellants filed their Notice of Appeal. ROA-2009 at 1-15.

On October 1, 2009, the Mauna Kea Appellants filed their Statement of the Case. ROA-2009 at 30-50.

On October 20, 2009, instead of transmitting the administrative record on appeal to the Circuit Court, Appellees University of Hawai`i and University of Hawai'i Institute for Astronomy moved to dismiss the Mauna Kea Appellants' appeal. ROA-2009 at 268-282. Appellee BLNR joined in said Motion to Dismiss on October 23, 2009. ROA-2009 at 293-296.

Following the exchange of pleadings and a court hearing, the Third Circuit Court granted the Motion to Dismiss in a December 29, 2009 Memorandum of Decision and directed the preparation of an order dismissing the appeal as to all parties and preparation and entry of a final judgment. ROA-2009 at 369-372.

The Order granting the Motion to Dismiss the Appeal was filed on January 27, 2010. Record on Appeal, 2010 ("ROA-2010) at 1-6. The Final Judgment dismissing the appeal as to all parties and all claims was filed on February 17, 2010. ROA-2010 at 7-9.

On March 17, 2010, the Mauna Kea Appellants timely filed their Notice of Appeal of the Final Judgment and its underlying Order and Memorandum of Decision. ROA-2010 at 16-35.

III. STATEMENT OF POINTS OF ERROR

A. **The Circuit Court erred** in finding that it did not have jurisdiction, pursuant to HRS § 91-14, to review BLNR's final decision to approve the CMP. The April 8-9, 2009 public hearing was not formally designated as a contested case by BLNR, but the hearing was a "contested case" for purposes of circuit court jurisdiction under HRS § 91-14. The Mauna Kea Appellants have met the requirements for judicial review because: (1) the April 8-9, 2009 public hearing was required by law; (2) there is, at minimum, a question of fact as to whether the public hearing determined Appellants' rights, duties, and privileges.

The Circuit Court's error is stated in its Memorandum of Decision, dated December 29, 2009 (ROA-2009 at 369-372) and Order, dated January 27, 2010 (ROA-2010 at 1-6).

The Mauna Kea Appellants' position was briefed and argued in their filings below (ROA-2009 at 349-353) and at oral argument on Appellees' motion to dismiss (ROA-2010 at 55-80).

B. **The Circuit Court erred** in finding that it did not have jurisdiction to review BLNR's denial of the Mauna Kea Appellants' request for a full contested case hearing in compliance with HRS Chapter 91 and DLNR regulations. The BLNR's denial of Appellants'

request for a contested case is an appealable order pursuant to HRS § 91-14. BLNR's denial: (1) is a final agency decision; (2) required by H.A.R. § 13-1-29.1; (3) that determined Appellants' right to participate in a contested case proceeding. The Circuit Court has jurisdiction to determine whether BLNR should have held a more extensive hearing on the proposed CMP in full compliance with Chapter 91 and DLNR regulations regarding contested case proceedings.

The Circuit Court's error is stated in its Memorandum of Decision, dated December 29, 2009 (ROA-2009 at 369-372) and Order, dated January 27, 2010 (ROA-2010 at 1-6).

The Mauna Kea Appellants' position was briefed and argued in their filings below (ROA-2009 at 349-353) and at oral argument on Appellees' motion to dismiss (ROA-2010 at 55-80).

C. **The Circuit Court erred** in failing to consider whether it had jurisdiction to hear Mauna Kea Appellants' appeal pursuant to H.A.R. § 13-5-3. Hawaii Administrative Rule § 13-5-3 provides: "[a]ny final order of the department based upon this chapter may be appealed to the circuit court of the circuit in which the land in question is found." The Circuit Court did not expressly consider whether it had jurisdiction pursuant to H.A.R. § 13-5-3, although it implicitly touched on this issue in finding that the BLNR's adoption of the CMP was not a final order. The Circuit Court failed altogether to address whether the BLNR's decision to deny Appellants' request for a contested case hearing was a final order. The Circuit Court erred because both BLNR decisions are final orders appealable to the Circuit Court pursuant to H.A.R. § 13-5-3.

The Circuit Court's error is incorporated in its Memorandum of Decision, dated December 29, 2009 (ROA-2009 at 369-372) and Order, dated January 27, 2010 (ROA-2010 at 1-6).

Mauna Kea Appellants' position was briefed and argued in their filings below (ROA-2009 at 349-353) and at oral argument on Appellees' motion to dismiss (ROA-2010 at 55-80).

D. **The Circuit Court erred** in dismissing Mauna Kea Appellants' appeal for lack of jurisdiction on an incomplete record. The Circuit Court misapplied the standard of review for a motion to dismiss for lack of subject matter jurisdiction. In particular, the court (1) failed to construe Appellants alleged facts in the light most favorable to them and made its jurisdictional determination based on an incomplete record; and (2) improperly and prematurely decided the merits of Appellants' appeal in the context of a motion to dismiss where the merits are intertwined jurisdictional issues.

The Circuit Court's error is stated in its Memorandum of Decision, dated December 29, 2009 (ROA-2009 at 369-372) and Order, dated January 27, 2010 (ROA-2010 at 1-6).

The Mauna Kea Appellants' position was briefed and argued in their filings below (ROA-2009 at 349-353) and at oral argument on Appellees' motion to dismiss (ROA-2010 at 55-80).

IV. STANDARDS OF REVIEW

A. Motion to Dismiss

A trial court's grant or denial of a motion to dismiss for "lack of subject matter jurisdiction is a question of law, reviewable de novo." *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 239, 842 P.2d 634, 637 (1992), aff'd, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). In *Norris*, the Hawai'i Supreme Court adopted the view of the Ninth Circuit Court of

Appeals in *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir.1989), opinion amended on other grounds and superseded by *Love v. United States*, 915 F.2d 1242 (9th Cir.1989), that:

> review of a motion to dismiss for lack of subject matter jurisdiction is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Norris, 74 Haw. at 240, 842 P.2d at 637 (internal quotation marks, citation, and brackets omitted.) "However, when considering a motion to dismiss pursuant to [Hawai'i Rules of Civil Procedure] Rule 12(b)(1) the trial court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Norris*, 74 Haw. at 240, 842 P.2d at 637 (internal quotation marks, citation, and brackets in original omitted; bracketed material added).

B. Statutory Interpretation

"The standard of review for statutory construction is well-established. The interpretation of a statute is a question of law which this court reviews de novo." *Yamane v. Pohlson,* 111 Hawai'i 74, 81-82, 137 P.3d 980, 987- 988 (2006) (quoting *Liberty Mut. Fire Ins. Co. v. Dennison*, 108 Hawai'i 380, 384, 120 P.3d 1115, 1119 (2005)). "In so doing, this court must adhere to the well-established rule of statutory construction that the "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." *Id.* at 988 (quoting *Gray v. Admin. Dir. of the Courts*, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) (citations omitted)).

V. ARGUMENT

A. The Circuit Court Has Jurisdiction, Pursuant to HRS § 91-14, to Review BLNR's Final Decision to Approve the CMP

April 8-9, 2009 public hearing was a "contested case" for purposes of

HRS § 91-14. HRS § 91-14(a) provides: "Any person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof . . . " HRS § 91-1 defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing." DLNR regulations parallel this definition. *See* H.A.R. § 13-1-2. Accordingly,"[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (internal quotation marks and citation omitted) (emphasis added) [hereinafter, "PASH"]. "HRS § 91-1 does not contain the requirement that the hearing be a 'trial-type evidentiary hearing' or that the hearing exhibit a particular level of "adversarial" quality." *E & J Lounge Operating Co., Inc. v. Liquor Com'n of City and County of Honolulu*, 118 Haw. 320, 333, 189 P.3d 432, 445 (2008).

Although the April 8-9 public hearing was insufficient to properly consider the Mauna Kea Appellants' protected interests, the hearing was sufficient to establish the Circuit Court's jurisdiction pursuant to HRS § 91-14. The fact that BLNR did not call the April 8-9 public hearing a "contested case" or otherwise comply with applicable regulations governing contested case hearings is irrelevant. *See Mahuiki v. Planning Com'n,* 65 Haw. 506, 515, 654 P.2d 874, 880 (Haw. 1982) (quoting *Application of Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (Haw. 1975) ("a public hearing, conducted pursuant to public notice," has been deemed "a 'contested case' within the meaning of HRS § 91-1."); *East Diamond Head Association v. Zoning Board*, 52 Haw. 518, 524, 479 P.2d 796, 799 (1971) (public hearing, conducted pursuant to published notice, was a 'contested case' within the meaning of HRS § 91-1).

Hawai'i case law is clear that an administrative agency cannot avoid court review simply by failing to follow administrative procedures or calling a hearing something other than a contested case hearing. *See E & J Lounge Operating Co., Inc.*, 118 Haw. at 332, 189 P.3d at 444 ("But neither the plain language of the HRS § 91-1 definition of a contested case nor *Bush* [*v. Hawaiian Homes Comm'n*, 76 Haw. 128, 870 P.2d 1272 (1994)] indicate that the requisite mandated hearing be referred to as a "contested case hearing" or that the mandating provision state that the hearing be conducted in accordance with chapter 91."). To prevent agencies from evading review, courts broadly construed their jurisdiction pursuant to HRS § 91-14. *See Kinkaid v. Bd. of Review of the City & County of Honolulu*, 106 Haw. 318, 323, 104 P.3d 905, 911 (2004) (stating that "HRS § 91-14 ... is a statute of broad application, governing judicial review of contested proceedings before government agencies generally" (emphasis added)); *Jordan v. Hamada*, 62 Haw. 444, 447, 616 P.2d 1368, 1371 (1980) (noting that " HRS § 91-14 evinces a purpose to grant broad rights to judicial review as it permits 'any person aggrieved' by a final decision or order of a government agency to seek review, provided he institutes proceedings in the circuit court within thirty days of service of the decision or order" (emphasis added)). As the court found in *Pele Defense Fund v. Puna Geothermal Venture,* 77 Haw. 64, 881 P.2d 1210 (1994), a "formal" contested case hearing is not required. The Supreme Court held that the appellants only needed to "demonstrate that they were involved in the administrative proceeding that culminated in the unfavorable decision." *Pele Defense Fund*, 77 Haw. at 70, 881 P.2d at 1216 (ellipses and brackets omitted). The Court held that it was sufficient that the members of the public "contested the issue of whether the permits should be granted before the agency . . . and thereby satisfied the requirement of adversary participation." *Id.* at 71; 881 P.2d at 1217.

The Circuit Court has jurisdiction under HRS § 91-14 because: (1) the April 8-9, 2009 hearing on the CMP: (a) was required by law; and (b) the BLNR's decision to adopt the CMP is a final decision that determined the Mauna Kea Appellants' rights, duties and privileges.

1. A Hearing on the CMP Is Required By Law

"In order for an agency hearing to be 'required by law,' it may be required by (1) agency rule, (2) statute, or (3) constitutional due process." *Aha Hui Malama O Kaniakapupu v. Land Use Commission*, 111 Haw. 124, 132; 139 P.3d 712, 720 (2006) ("Kaniakapupu"). The Circuit Court correctly found that a hearing on the CMP was required by law because BLNR held a hearing and "[p]ursuant to Hawaii Administrative Rules ("HAR") §§13-5-30 and 40 a public hearing on the Board's acceptance and approval was required . . ." ROA-2009 at 371.

2. The April 8-9, 2009 Hearing on the CMP Determined Mauna Kea Appellants' Rights, Duties, and Privileges

The Circuit Court erred in finding that the April 8-9, 2009 hearing on the CMP, resulting in a final decision by the BLNR to adopt the CMP, did not determine Mauna Kea Appellants' rights, duties, and privileges. It did. The Circuit Court's finding is inconsistent with its prior decision. In exercising jurisdiction over Appellants prior appeal from a contested case hearing on the Outrigger Telescopes Management Plan, the Circuit Court previously recognized Appellants' rights and interests in management plans for Mauna Kea. ROA-2009 at 344.

The CMP has a direct impact on native Hawaiian rights and Mauna Kea's unique and sacred environment. *Cf. Ka Pa'akai O Ka'aina v. Land Use Commission*, 94 Haw. 31, 42-43; 7 P.3d 1068, 1079-1080 (2000) ("the rights of native Hawaiians are a matter of great public concern . . . Hawai'i's state courts should provide a forum for cases raising issues of broad public

interest . . .).[2] As Appellees acknowledge, the CMP is the "guiding management plan" for UH decisions affecting the Mauna Kea summit. *See* ROA-2009 at 45, 298. The CMP, among other things, restricts public access and regulates cultural practices. ROA-2009 at 45 (citing CMP, 7-8, 7-31, 7-35). Such provisions obviously and directly impact Mauna Kea Appellants' rights to participate in traditional and customary practices and to otherwise use and enjoy Mauna Kea for many activities, including hiking and astrological observation.

Courts have found hearings and decisions in analogous circumstances to determine a person's rights, duties, or privileges. The powers and terms set forth in the CMP are complex land use controls in the same way the state or county land use classifications, subdivisions, and zoning ordinances describe allowable uses and govern overall land use activities before site specific permits are granted. *See Chang v. Planning Commission*, 64 Haw. 431, 436, 643 P.2d 55, 60 (1982) (confirming that an "SMA (special management area) use permit application proceeding was a 'contested case' within the meaning of HRS Chapter 91."); *Town v. Land Use Commission*, 55 Haw. 538, 539, 524 P.2d 84, 86 (1974) (petition before the Land Use Commission to amend district designation of certain property from agricultural to rural was a contested case).

In *Mahuiki*, 65 Haw. at 513, 654 P.2d at 879, for instance, the court found it "obvious" that a proceeding before the Planning Commission was a contested case because the

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[2] The strong presumption in favor of standing for those asserting native Hawaiian and environmental interests also militates in favor of courts exercising jurisdiction over challenges to agency decisions impacting such interests. *See Application of Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975) ("In addition to the requirement that an aggrieved party be specially, personally and adversely affected for standing to lie, this court has added a further gloss to the standing issue as regards administrative proceedings. . . . He must also have contested the issue before the agency.").

petitioner sought to have a company's "legal rights, duties, or privileges . . . relative to the development of land in which it held an interest declared over the objections of other landowners and residents of Haena." Similarly, at the April 8-9, 2009 public hearing, UH sought approval of a CMP to govern the Mauna Kea Appellants' and the general public's right to access, use, and enjoy the Mauna Kea summit. Under Art. XI, Sec. 1 and Art. XII, Sec. 4 of the Hawaii Constitution, respectively, natural resources and ceded lands are held in the public trust. Art. XI, Sec. 9 affords the public an enforceable right to a clean and healthful environment. The public, including the Mauna Kea Appellants, have a constitutionally protected interest in the lands within the Mauna Kea conservation district. The issues addressed at the hearing on the CMP were directly related to the manner in which the Mauna Kea Appellants can exercise their constitutional rights.

For these reasons, the hearing on the CMP, and BLNR's final decision to adopt the CMP, determined Mauna Kea Appellants' rights, duties, and privileges. Alternatively, as discussed below, the Circuit Court did not have a sufficiently developed record to make this determination.

3. *BLNR's Decision to Adopt the CMP is a Final Decision*

The Circuit Court erred in finding that the BLNR's decision to adopt the CMP was not a final decision. For purposes of HRS § 91-14(a), a "final order" means "an order ending the proceedings, leaving nothing further to be accomplished." *Bocalbos v. Kapiolani Medical Center for Women and Children*, 89 Haw. 436, 439, 974 P.2d 1026, 1029 (1999) (quoting *Gealon v. Keala*, 60 Haw. 513, 520, 591 P.2d 621, 626 (1979)). "Consequently, an order is not final if the rights of a party involved remain undetermined or if the matter is retained for further action." *Id.*

Here, BLNR issued a written decision approving the CMP. This is a final agency decision, ending the proceedings for review and approval of the CMP. There is no requirement that UH resubmit the CMP for BLNR approval. Any proposed amendments to the CMP would be reviewed in a new and separate proceeding. *See Mahuiki,* 65 Haw. at 543, 654 P.2d at 879 (grant of special area management permit subject to conditions did not affect finality for purposes of appeal). Subject only to court review, the management framework for the entire Mauna Kea summit is now in place.

Despite this, the Circuit Court reasoned that the BLNR's decision was not a final decision because although the CMP had been adopted, it had not yet been implemented. ROA-2009 at 371-72. The Circuit Court's reasoning is flawed in two respects. First, the final decision standard applied by the Court leads to an illogical conclusion. There is not, and cannot, be a requirement that an agency decision must actually be implemented before it can be challenged. An implementation requirement would result in a waste of agency resources and cause needless delay. It would make little sense for UH to undertake the significant preparation and coordination required to implement the CMP, to only then have a court determine that it is inadequate and should not have been adopted by BLNR. Second, because Appellants had not yet had the opportunity to develop a factual record, the Circuit Court's conclusion that the CMP "remains an unimplemented plan" is pure speculation.

For these reasons, BLNR's decision to adopt the CMP is a final decision in a proceeding properly characterized as a contested case proceeding for purposes of an appeal under HRS § 91-14.

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B. The Circuit Court Has Jurisdiction to Review BLNR's Denial of Mauna Kea Appellants' Request for a Full Contested Case Hearing

Hawai'i law is clear that courts have jurisdiction to review whether an agency has complied with Chapter 91's contested case hearing requirements and applicable regulations (here H.A.R. §§ 13-1-28–13-1-40). The agency need not have called the hearing a contested case hearing or otherwise held a hearing in full compliance with the law governing contested cases. Indeed, in cases, such as the present case, the very question before the court is whether the agency did, in fact, follow contested case procedures and afford interested parties a meaningful opportunity to participate.

The Mauna Kea Appellants followed applicable procedures in making oral and written requests for a contested case hearing. On August 28, 2009, BLNR held a hearing on Appellants' request for a contested case, which BLNR denied. (ROA-2009 at 8-13). The BLNR's denial of Appellants' request for a contested case is an appealable order pursuant to HRS § 91-14. BLNR's denial: (1) is a final agency decision; (2) required by H.A.R. § 13-1-29.1; (3) that determined Appellants' right to participate in a contested case proceeding.

The Hawai'i Supreme Court's decision in *E & J Lounge Operating Co., Inc.*, 118 Haw. 320, 189 P.3d 432, is dispositive of this issue. In that case, the Court reviewed whether the Liquor Commission – who it determined had held a hearing that amounted to a contested case hearing for purposes of HRS § 91-14 review – had complied with Chapter 91's contested case hearing procedures. The Court reasoned that while the Commission's decision was subject to judicial review pursuant to HRS § 91-14, it "did not comply with these provisions, specifically HRS § 91-11." *E & J Lounge Operating Co., Inc.*, 118 Haw. at 350, 189 P.3d at 462.

While the April 8-9, 2009 public hearing constitutes a contested case for purposes of HRS § 91-14, Appellants have the right to seek a court order requiring the BLNR to conduct a

full contested case hearing with the opportunity to present evidence and cross-examine witnesses. *See Alejado v. City & County of Honolulu* 89 Haw. 221, 231, 971 P.2d 310, 320 (Haw. App. 1998) ("We conclude that Appellant is entitled to a contested case hearing with the full procedural protection afforded by HAPA. The record indicates, however, that while the January 8, 1997 rehearing constituted a contested case hearing, it did not comply with HRS chapter 91. Although the Commission gave Appellant reasonable notice of the rehearing and the opportunity to present some evidence and argument, it did not provide him with (1) an agency decision on the record or (2) a written decision accompanied by findings of fact and conclusions of law. *See* HRS §§ 91-9 to -13. Therefore, we conclude that while the January 8, 1997 rehearing constituted a contested case hearing, this hearing was not conducted in full compliance with chapter 91."); *see also Citizens for Protection of North Kohala Coastline v. County of Hawai'i*, 91 Haw. 94, 96, 979 P.2d 1120, 1122 (1999) ("Citizens sought review in the circuit court of the HPC's decisions denying its contested case request and the issuance of Chalon's SMA permit. The circuit court, exercising its review powers pursuant to HRS § 91-14(a) (1993), affirmed the HPC's decision to deny Citizens its request to participate in a contested case hearing and further affirmed the HPC's approval of Chalon's SMA permit request."). It follows that Appellants have the right to appeal BLNR's denial of its request for a contested case hearing. The plain language of HRS § 91-14 contemplates such review insofar as one of the remedies under HRS § 91-14(g) is for a circuit court to remand to the agency for further proceedings.

The Circuit Court erroneously relied on *Kaniakapupu*, 111 Haw. at 137, 139 P.3d at 725 in making the circular determination that it lacked jurisdiction to review BLNR's denial of Mauna Kea Appellants' request for a contested case hearing because BLNR did not hold a contested case hearing. Any statements by the *Kaniakapupu* court regarding a court's

jurisdiction to review of an agency's denial of a request for a contested case hearing are *dicta*. The appellant, in that case, had not requested a contested case hearing. Because the appellant had not satisfied this procedural prerequisite, the issue of whether the appellant was entitled to a full contested case hearing (in compliance with Chapter 91 and applicable regulations) was not before the court on appeal. *Cf. Hui Kakoo Aina Hoopulapula v. Board of Land and Natural Resources*, 112 Haw. 28, 39, 143 P.3d 1230, 1241 (2006) ("[a]ppellants seeking judicial review under HRS § 91-14 must also follow agency rules 'relating to contested case proceedings ... properly promulgated under HRS [c]hapter 91[.]'").

The Mauna Kea Appellants requested a contested case hearing, both orally and in writing, and participated in the April 8-9, 2009 public hearing. There is nothing to prevent the Circuit Court from asserting jurisdiction to review whether, BLNR should, as Appellants contend, have conducted a full contested case hearing allowing for the opportunity to present witnesses, to conduct cross-examination, and requiring BLNR to prepare findings of fact and conclusions of law. Absent jurisdiction to review the adequacy of an agency's hearing, agencies could evade judicial review by arbitrarily and capriciously denying anyone a contested case hearing at any time.

C. The Circuit Court Has Jurisdiction Under H.A.R. § 13-5-3.

Mauna Kea Appellants also based their appeal on H.A.R § 13-5-3. H.A.R. § 13-5-3 provides: "[a]ny final order of the department based upon this chapter may be appealed to the circuit court of the circuit in which the land in question is found." The Circuit Court did not expressly examine whether it had jurisdiction pursuant to H.A.R. § 13-5-3, although it implicitly touched on this issue in finding that the BLNR's adoption of the CMP was not a final order.

The Circuit Court failed to address whether the BLNR's decision to deny Appellants' request for a contested case hearing was a final order.

Because both BLNR's decision to approve the CMP and its decision to deny Appellants' request for a contested case hearing are final orders from a contested case hearing (*see* Part A.3 above), governed by H.A.R. Chapter 13, the Circuit Court has jurisdiction to review them pursuant to H.A.R. § 13-5-3.

D. The Circuit Court Prematurely Determined Jurisdiction On An Incomplete Record

The Circuit Court misapplied the standard for reviewing a motion to dismiss for lack of subject matter jurisdiction. The Circuit Court found: "Appellants have failed to meet [their] burden of showing that their rights, duties, and privileges have been adversely affected by the adoption of the CMP." ROA-2009 at 371. The Circuit Court erred in making this factual determination on a motion to dismiss. In particular, the court erred by: (1) failing to construe Appellants' alleged facts in the light most favorable to them and by making its jurisdictional determination based on an incomplete record; and (2) by improperly and prematurely deciding the merits of Appellants' appeal in the context of a motion to dismiss.

The standard of review for a motion to dismiss for lack of subject matter jurisdiction is very high. The court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Norris*, 74 Haw. at 240, 842 P.2d at 637 (internal quotation marks, citation, and brackets omitted.). "Dismissal is improper unless it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim . . ." *Id.* (emphasis added).

Appellants' Statement of the Case (which in the context of an administrative appeal is the equivalent of the complaint), contains numerous allegations as to how Appellants'

rights, duties, and privileges were affected and determined by the April 8-9, 2009 hearing and BLNR's decision to adopt the CMP. ROA-2009 at 30-50. Appellants, for instance, alleged that the CMP "describes, directs, limits, prescribes, conditions, and restricts uses of land on the summit of Mauna Kea." ROA-2009 at 45. If the Circuit Court had properly construed Appellants' allegations as true, it would not have dismissed the appeal.

Moreover, where there are disputed issues of fact as to facts relevant to jurisdiction, the court must deny a motion to dismiss. *See Kim v. Potter*, 474 F.Supp.2d 1175, 1184 (D. Haw. 2007) (quoting *Casumpang v. Int'l Longshoremen's & Warehousemen's Union*, 269 F.3d 1042, 1060-61 (9th Cir. 2001) ("The moving party "should prevail [on a motion to dismiss] only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law."). As set forth above, Appellants contend there is sufficient evidence in the record to show that the hearing did, in fact, implicate Appellants' rights, duties, and privileges. At the very least, however, these are disputed issues of fact. Appellants objected to the lack of a complete record. ROA-2009 at 305; *cf. St. Clair v. City of Chico*, 880 F.2d 199, 201-202 (9th Cir. 1989) ("Discovery is necessary . . . if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity.") (citation omitted). In the absence of a complete record, the Circuit Court improperly construed facts in the light most *un*favorable to Appellants, essentially finding, without ever reviewing the CMP, that it was an insignificant and unimplemented plan. ROA-2009 at 371-72.

The Circuit Court improperly and prematurely decided the merits of Appellants' appeal in the context of a motion to dismiss. Dismissal for lack of subject matter jurisdiction is improper where the jurisdictional issues are intertwined with the factual issues going to the resolution of the merits. *See Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983) ("where the

jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.") (citations omitted).

The two-part inquiry for whether an agency has held a contested case for the Circuit Court to exercise jurisdiction under HRS § 91-14 is intertwined with the merits of the issues raised by Appellants' on appeal to the Circuit Court. In fact, the issue on appeal as to whether BLNR should have held a contested case hearing requires the identical inquiry as the second prong of the contested case test for jurisdictional purposes under HRS § 91-14; that is, whether the hearing implicates Appellants' legal rights, duties or privileges. *See* H.A.R. § 13-1-29.1 (the Board without a hearing may deny a request for a contested case "when it is clear as a matter of law that petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding).

For these reasons, the Circuit Court erred in dismissing this matter for lack of subject matter jurisdiction.

VI. RELEVANT STATUTES AND RULES

HRS Chapters 91, 171; 183C; H.A.R. § 13-5-2; H.A.R. § 13-5-3; H.A.R. § 13-5-13(a); H.A.R. § 13-5-24; H.A.R. § 13-1-2; H.A.R. §§ 13-1-28–13-1-40; Hawaii Constitution, Art I, Sec. 5 (due process), Art. XI, Sec. 1 (natural resources held in public trust), Art. XI, Sec. 9 (environmental rights), Art. XII, Sec. 4 (ceded lands trust), Art. XII, Sec. 7 (PASH rights); U.S. Constitution, 14th Amendment (due process).

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VII. CONCLUSION

Based on the foregoing points and authorities, the Mauna Kea Appellants respectfully request that:

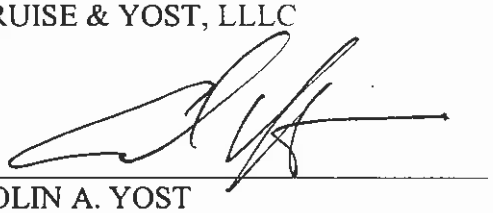
1. The Circuit Court's Final Judgment, dated February 17, 2010, be vacated;

2. The Circuit Court's Order Granting Appellees University of Hawai'i and University of Hawai'i Institute for Astronomy's Motion to Dismiss Appeal Filed October 20, 2009 be reversed;

3. This matter be remanded with a finding that the Circuit Court has jurisdiction to hear the Mauna Kea Appellants' appeal pursuant to HRS § 91-14, or alternatively, with a finding that the Circuit Court's finding as to lack of subject matter jurisdiction was premature.

DATED: Honolulu, Hawai`i, July 28, 2010.

CRUISE & YOST, LLLC



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NO. 30397

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I

MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI'I CHAPTER; KAHEA and CLARENCE CHING,

Appellants/Petitioners/ Appellants,

vs.

BOARD OF LAND AND NATURAL RESOURCES; UNIVERSITY OF HAWAI`I (Respondent); UNIVERSITY OF HAWAI`I INSTITUTE OF ASTRONOMY (Respondent),

Appellees/Appellees.

CIVIL NO. 01-9-336

APPELLANTS MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB HAWAI'I CHAPTER, KAHEA and CLARENCE CHING'S APPEAL FROM (1) FINAL JUDGMENT; (2) ORDER GRANTING APPELLEES UNIVERSITY OF HAWAI`I AND UNIVERSITY OF HAWAI`I INSTITUTE FOR ASTRONOMY'S MOTION TO DISMISS APPEAL AND (3) THE MEMORANDUM OF DECISION ON APPELLEES UNIVERSITY OF HAWAI`I AND UNIVERSITY OF HAWAI`I INSTITUTE FOR ASTRONOMY'S MOTION TO DISMISS APPEAL

THIRD CIRCUIT COURT

THE HONORABLE GLENN S. HARA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused a true and correct copy of the Appellants/Petitioners/Appellants Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawai`i Chapter, KAHEA and Clarence Ching's Opening Brief, is to be served on the following persons by U.S. mail, postage prepaid to their respective addresses:

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