

Harry Fergerstrom Pro Posse Suo  
PO Box 951  
Kurtistown, Hawaii 96760  
808 938-9994  
[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)

## BOARD OF LAND AND NATURAL RESOURCES

### STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
) FINDING OF FACT,  
A Contested Case Hearing Re ) CONCLUSIONS OF LAW,  
Conservation District Use Permit ) RECOMMENDATION; TABLE  
(CDUP) HA-3568 for the Thirty ) OF CONTENTS; COS  
Meter Telescope at the Mauna )  
Science Reserve, Kaohe, Mauka, )  
Hamakua District, Island of Hawaii )  
) Hearings Officer: Riki M. Amano

#### **FINDING OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION;**

#### **TABLE OF CONTENTS; COS**

#### **TABLE OF CONTENTS:**

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Dated: may 30, 2017

Harry Fergerstrom

Received  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
2017 May 30 8:32 am

## **THE SUPREME COURT DECISION**

THIS COURT VACATES THE CIRCUIT COURTS MAY 5<sup>TH</sup>, 2014 DECISION AND ORDER AFFIRMING BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII'S FINDING OF FACT AND CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING CONSERVTION DISTRICT USE PERMIT FOR THE THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE RESERVE DATED APRIL 12, 2013, AND FINAL JUDGEMENT THEREON.

THIS MATTER IS REMANDED TO THE CIRCUIT COURT TO FURTHER REMAND TO BLNR FOR PROCEEDING CONSISTANT WITH THIS OPINON, SO THAT A CONTESTED CASE CAN BE CONDUCTED BEFORE THE BOARD, OR A NEW HEARINGS OFFICER, OR FOR OTHER PROCEEDING CONSISTANT WITH THIS OPINON.

## **FACTS**

Hawaii Administrative Rules Title 13 sets the rules for practice and procedure use by the Department of Land and Natural Resources. Chapter 5 is specific to Contested Cases.

This all must be in compliance with Hawaii Revised Statues Chapter 91 Administrative procedures.

Under HAR 13.5 there is **NO** place where intervention takes place. Rather it shows that the way to become a party to a contested case, one has to be present at the public hearing

held regarding the application for a permit. Any person may call for a contested case, but it has to be done before the close of the day of said hearing. The person(s) must followed up within ten days a written request. Once a contested case hearing is authorized, the candidates are informed of the hearing date noticed by certified mail. The hearings will held on the island of most impact. Hawaii Island is the home of Mauna Kea. The names of those claiming a right to contest are informed of public hearing where each potential contestant is vetted to insure that each has a standing different than that of the general public or that another's position is not substantively duplicative or already represented.

In this particular case, the applicant is the University of Hawaii on behalf of the Thirty Meter Telescope, a non-profit Corporation.

Because there is no place for interventions on contested cases the proper procedure that is would be consistent with the opinion of the Supreme Court is to have the applicant re apply so a public hearing could commence.

## **CONCLUSIONS**

As a result of non compliance to the strict reading of the rules set out in Title 13 Chapter 5 we find ourselves back where we

started with the cart before the horse following the same path that lead to the vacation permit that is on remand.

It is very important to revisit/ re-apply the application as the circumstances have changed dramatically since this application was first filed in 2010. The language of the Court clearly points out that the constitutionally protected rights of the Hawaiian as defined in Article XI.5 and Article XII section 7, of the Hawaii State Constitution must be complied with first before any other consideration are made.

My position is, the rules regarding contested cases have not been adhered to and all other attempts to move this application forward WILL CONTINUE fail as a result.

The rules on procedure are clear and self-explanatory; I have included them as part of my finding of fact. The conclusions are self-evident.

## **RECOMMENDATION**

It is my recommendation that we need to strictly follow the rules. By denying the application now insures compliance with the opinion of the Supreme Court and insures that others in the future know that THE CONSTITUTION, fairness and due process prevails in Hawaii.

DATED THIS DAY: MAY 30, 2017

HARRY FERGERSTROM

## REMAND DOWN FOR A CONTESTED CASE, OR OTHER PROCEEDINGS CONSISTANT

HAR 13-5 is the guiding Rules for a contested case. It is very specific in the description for participation, how one gets considered as a party, how one must have a position that is different from the general public.

HRS Chapter 91-9 Sets the structure of any contested case.

- A) All parties shall be afforded an opportunity for hearing after reasonable notice.
- B) Notice shall include a statement of;
  - 1) Date, Time, Place, and nature of hearing;
  - 2) The legal authority under which the hearing is to be held;
  - 3) The particular sections of the statues and rules involved;
  - 4) An explicit statement in plain language of the issues involved;
  - 5) Fact that any party may retain counsel.
- C) Opportunities shall afford all parties to present evidence and argument on all issues involved.
- D) Any procedure in a contested case may be modified or waived by stipulation of the parties.

HRS 91-9.5 Notification of hearing, service.

- A) Unless otherwise provided by law, ALL parties shall be given written notice of hearings by registered or certified mail with return receipt requested at least 15 days before hearing.

HRS 91-10 Rules of evidence, official notice. In contested cases:

- 1) any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of *irrelevant, immaterial, or unduly repetitions evidence.*

- 6) Except as provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be the preponderance of the evidence.

#### HRS 91-11 Examination of evidence by agency.

Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, decision, if adverse to a party to the proceedings other than the agency itself, should not be made until a proposal for decision containing a statement of reasons including of each issue of fact or law necessary to the proposed decision has been served upon the parties, and opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who shall personally consider the whole record or such portions thereof as may be cited by the parties.

#### HRS 91-12 Decisions and orders.

Every decision and order adverse to a party to the proceedings, rendered by an agency in a contested case, shall be in writing in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceedings has filed proposed findings of fact, the agency shall incorporate and rely upon each proposed finding so presented. The agency shall notify the parties to the proceedings by delivering or mailing a certified copy of the decision order and accompanying findings of fact and conclusions with a reasonable time to each party or to a party's attorney of record.

#### HAR 13-1-13.1 Service

- a) Service of documents may be made by mail, personal delivery, or facsimile transmission.

HAR 13-1-13.2 Additional time at service by mail.

Whenever person has a right or is required to do some back within a prescribed period after the service of the document upon the person and the document is served by mail, two days shall be added to the prescribe period.

HAR 13-1-18 Counsel for the board and contest cases.

A deputy attorney general, as assigned by the Department of the Atty. Gen., Will serve as consul to the board during its proceedings. A contested cases concerning alleged violations of law, there will be at least two deputy Attorney General's assigned by and from different divisions of the Department of the Attorney General, one to serve the department of land and natural resources in enforcement of the law and one to serve as a consul for the board.

HAR 13-1-19 Substitution of parties.

Upon motion and for good cause shown the board may order substitution of parties; provided that in case of the death of a party, substitution may be ordered without the filing of a motion.

## HAR 13 SUBCHAPTER 5 CONTESTED CASE PROCEEDINGS

HAR 13-1-28 Contested case hearings.

- a) What is required by law, the board shall hold a contest case hearing up on its own motion or on a written petition of any government agency or any interested party.
- b) The contested case hearing shall be held after any public hearing which by law required to be held on the same subject matter.
- c) Any procedure in a contested case may be modified or waived by stipulation of the parties.

#### HAR 13-1-29 Request for a hearing.

- a) On its own motion, the board may hold the contested case hearing. Others must both request a contested case and petition the board to hold contested case hearing. An oral or request for a contested case hearing the estimate to the board no later than the close of the board meeting. An agency or person also requesting a contested case plus also file or mail a postmarked written petition with the board for the contested case no longer than 10 calendar days after the close of the board meeting.

#### HAR 13-1-31 Parties

- a) Party to a contested case to be determined within the reasonable time following the 10 day period following the board meeting, the presiding officer shall notify all persons and agencies who timely petitioned for the of contested case hearing of the date and time for the hearing to be to determine whether any or all persons or agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to submission of any request you as a party to the contested case.
- b) The following persons or agencies shall be admitted a parties:
  - 1) all government agencies whose jurisdiction include the land in question Shall be admitted as parties upon timely application.
  - 2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners or who otherwise can demonstrate that they will be s directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.



c) Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a part when it appears that:

The position of the requestor is substantially the same as the position of a party already admitted to the proceedings; and

(1) The admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable.

d) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.

(e) If any party opposes another person's request to be a party, the party may file objections within the time set forth by the presiding officer.

(f) The hearing to determine parties to the contested case may be conducted by the board or the presiding officer, or by a hearing officer appointed by the board. At such hearing, evidence and argument shall be limited to matters necessary to determine whether the requestor shall be admitted as a party. Only a party objecting to a requestor's admission as a party shall have the opportunity to cross-examine a requestor or the requestor's witness; provided, however, that the board or presiding officer or hearing officer may cross-examine any witness at such hearing. The hearing to determine parties may be waived upon concurrence of the applicant and all requestors.

(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a

party should not be allowed to participated in the contested case, such recommendation and the reasons therefor shall be immediately submitted to the board in writing. The requestor who request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be commencement of the contested case hearing.

(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a party should not be allowed to participate in the contested case, such recommendation and the reasons therefor shall be immediately submitted to the board in writing. The requestor whose request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be decided, by written order, not later than the commencement of the contested case hearing.

(h) A person whose request to be admitted as a party has been denied by the board may appeal that denial to the circuit court pursuant to section 91-14, HRS.

## **RESULTS OF ADMINISTRATIVE BIAS AND NON- COMPLIANCE with HAR**

### **13.5**

1. Thirty Meter Telescope International Observatories has been allowed to be a party without any standing that is different or unrepresented by the University of Hawaii on behalf of Thirty Meter Telescope Corporation Represented by CARLSMITH BALL LLP, Timothy Lui Kwan, Ian Sandison
2. Thirty Meter Telescope International Observatories is not named on the Conservation District Use application and no attempt has been made to Accurately prefect the application.
3. Thirty Meter Telescope International Observatories is represented by Watanabe Ing LLP....with two new attorneys Douglas Ing and Ross Shinyama.
4. The Attorney General's office is represented by Julie China, William Wynhoff both of which has previously advocated in court for the applicant The University of Hawaii on behalf of TMT Corporation.
5. Perpetuating Unique Educational Opportunities (PUEO) has been admitted as a party having absolutely no standing what so ever that is different than the General Public.
6. Perpetuating Unique Educational Opportunities (PUEO) is represented by Lincoln Ashida of who also teaches at the University of Hawaii at Hilo

I HARRY FERGERSTROM DO INCORPORATE BY REFERENCE AND MAKE MY OWN THE TESTIMONIES OF KEALHOA PISCOTTA; MAUNA KEA ANAINA HOU; JOESEPH CAMARA; DEBORAH WARD; CINDY FREITAS; WILLIAM FREITAS; JENNIFER LEINAALA SLEIGHTHOLM; LANNY SINKIN; MEHANA KIHAI; TIFFINIE KAKALIA; KALIKOLEHUA KANAELE; BRANDON KAMAHANA KEALOHA; DWIGHT VINCENTE; KAHOOKAHI KANUHA; PAUL NEVES; E.KALANI FLORES; PUA CASE; CLARENCE KUKAUAKAHI CHING; TOGETHER WITH THEIR WITNESSES, AND EXHIBITS, INCLUDING THEIR FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS.

DATED: MAY 30, 2017

HARRY FERGERSTROM

Certificate of Service

I attest that a true and accurate of copy attached document has been served electronically or otherwise sent via U.S Postal service.

Michael Cain <[michael.cain@hawaii.gov](mailto:michael.cain@hawaii.gov)>, Office of Conservation & Coastal Lands

<[dlr.maunakea@hawaii.gov](mailto:dlr.maunakea@hawaii.gov)>, Kealoha Pisciotta-

Keomailani Von Gogh <[keomaivg@gmail.com](mailto:keomaivg@gmail.com)>,

Clarence Ching <[kahiwaL@cs.com](mailto:kahiwaL@cs.com)>, Uncle Kalani Flores

<[ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)>, Pua Case

<[puacase@hawaiiantel.net](mailto:puacase@hawaiiantel.net)>, [cordylinecolor@gmail.com](mailto:cordylinecolor@gmail.com),

[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com), Bianca Isaki

<[bianca@kahea.org](mailto:bianca@kahea.org)>, Ian Sandison

<[isandison@carlsmith.com](mailto:isandison@carlsmith.com)>, [tluikwan@carlsmith.com](mailto:tluikwan@carlsmith.com),

John P. (Pete) Manaut <[jpm@carlsmith.com](mailto:jpm@carlsmith.com)>, Lindsay

N. McAneeley <[lmcaneley@carlsmith.com](mailto:lmcaneley@carlsmith.com)>, T.

Shinyama' <[RShinyama@wik.com](mailto:RShinyama@wik.com)>, [douging@wik.com](mailto:douging@wik.com)

<[douging@wik.com](mailto:douging@wik.com)>, mehana kihoi

<[uhiwai@live.com](mailto:uhiwai@live.com)>, Kahookahi Kanuha

<[kahookahi@gmail.com](mailto:kahookahi@gmail.com)>, Joseph Camara

<[kualiic@hotmail.com](mailto:kualiic@hotmail.com)>, [lsa@torkildson.com](mailto:lsa@torkildson.com)

<[lsa@torkildson.com](mailto:lsa@torkildson.com)>, [njc@torkildson.com](mailto:njc@torkildson.com)

<[njc@torkildson.com](mailto:njc@torkildson.com)>, leina'ala s

<[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)>, Maelani Lee

[<maelanilee@yahoo.com>](mailto:maelanilee@yahoo.com), Lanny Sinkin  
[<lanny.sinkin@gmail.com>](mailto:lanny.sinkin@gmail.com), [akulele@yahoo.com](mailto:akulele@yahoo.com)  
[<akulele@yahoo.com>](mailto:akulele@yahoo.com), [s.tabbada@hawaiiintel.net](mailto:s.tabbada@hawaiiintel.net)  
[<s.tabbada@hawaiiintel.net>](mailto:s.tabbada@hawaiiintel.net), tiffniekakalia  
[<tiffniekakalia@gmail.com>](mailto:tiffniekakalia@gmail.com), Glen Kila  
[<makakila@gmail.com>](mailto:makakila@gmail.com), Brannon Kealoha  
[<brannonk@hawaii.edu>](mailto:brannonk@hawaii.edu), [hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)  
[<hanahanai@hawaii.rr.com>](mailto:hanahanai@hawaii.rr.com), [pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)  
[<pohaku7@yahoo.com>](mailto:pohaku7@yahoo.com), Ivy McIntosh  
[<3popoki@gmail.com>](mailto:3popoki@gmail.com), Kealamakia Jr.

Written copies sent to:

Michael Cain

Office of Conservation and Coastal Lands

1151 Punchbowl St, Room 131

Honolulu, Hawaii 96813

Dwight Vincente

2608 Ainaloa Drive

Hilo, Hawaiian Kingdom

Wilma Holi

P.O. Box 368

Hanapepe, Kauai 96716

Dated: May 30, 2017

Harry Fergerstrom  
Party-Pro Posse Suo