

**MINUTES FOR THE  
MEETING OF THE  
BOARD OF LAND AND NATURAL RESOURCES**

DATE: MONDAY, NOVEMBER 22, 2010  
TIME: 9:00 A.M.  
PLACE: KALANIMOKU BUILDING  
LAND BOARD CONFERENCE ROOM 132  
1151 PUNCHBOWL STREET  
HONOLULU, HI 96813

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:05 a.m. The following were in attendance:

**MEMBERS**

Laura Thielen  
Jerry Edlao  
Dr. Sam Gon

Ron Agor  
John Morgan  
David Goode

**STAFF**

Charlene Unoki/LAND  
Edwin Matsuda/ENG  
Morris Atta/LAND  
Ed Underwood/DOBOR

Carty Chang/ENG  
Sam Lemmo/OCCL  
Dan Quinn/PARKS

**OTHERS**

Linda Chow, Deputy Attorney General  
Lea Hong, D-3  
Warren Watanabe, L-5  
Wayne Katayama, L-5  
Matt Rose, L-5  
Dwayne Okamoto, L-5  
Dr. Gary Ostrander, K-2  
Ivan Lay, K-2  
Jeanne Skog, K-2  
Marti Townsend, K-2  
John Rapacz, D-7  
Mike Lee, D-12

Cindy Fujiwara, D-14  
Roy Oyama, L-5  
Jerry Ornellas, L-5  
Mark Vaught, L-5  
Alan Gottlieb, L-5  
Shamon, Alaveido, L-5  
Tony Gibson, K-2  
Bruce U'u, K-2  
David Frankel, K-2  
Jeff Coon, K-2  
Bo Kahui, D-4

{Note: language for deletion is [bracketed], new/added is underlined}

A number of written testimonies was received and distributed to the Board members.

Chair Thielen noted that a couple Board members have to leave early today and they are at risk of losing quorum. She will keep people focused on the main points of their testimonies to move folks along faster because if they lose quorum they will have to shut down the meeting. Minutes are not ready since they are being reviewed and finalized, but should have them at the next meeting.

**Item D-14 Grant of Term, Non-Exclusive Easement to David & Cynthia Fujiwara for Seawall Purposes, Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-4-037:049-0002 seaward.**

Charlene Unoki representing Land Division conveyed before the Board is a request to authorize Land Division to issue a term, non-exclusive easement for a seawall encroachment which was discovered during a shoreline certification process.

Cindy Fujiwara had nothing to add.

**Unanimously approved as submitted (Morgan, Gon)**

**Item D-3 Acquisition of Private Lands and Set Aside to Division of State Parks for Addition to Lapakahi State Historical Park, Kaipuhaa, North Kohala, Island of Hawaii, Tax Map Key: (3) 5-7-001:011.**

Ms. Unoki related that this is a request to acquire private property owned by the Trust for Public Lands on the Big Island. Its 17.05 acres surrounded by state lands and the acquisition would allow us to have 2,000 feet of shoreline and eventually staff will turn it over or set aside to State Parks to manage. Staff is speaking to the community and the Trust for Public Lands are working to obtain monies to manage the property. Also, staff is asking for a management right-of-entry to be issued to State Parks upon completion of the acquisition.

Member Gon asked whether the intent is the acquisition and with the jurisdiction go to State Parks eventually. Ms. Unoki confirmed that saying there is usually a lag of less than a month to prepare survey maps, accepted documents for the Governor to sign and that is why staff is asking for a management right-of-entry.

Lea Hong, Program Director for the Trust for Public Lands thanked Dan Quinn, Martha Yent, State Parks, the cooperation of the landowner and the community's support.

Member Gon asked whether the set of recommendations were to her liking and Ms. Hong acknowledged they are.

**Unanimously approved as submitted (Gon, Agor)**

**Item L-5 Request for Final Approval to Repeal Hawaii Administrative Rules, Title 13, Subtitle 7, Chapter 190 and to Adopt Proposed Hawaii Administrative Rules, Title 13, Subtitle 7, Chapter 190.1 as Required by the "Hawaii Dam and Reservoir Safety Act of 2007," Chapter 179D HRS - Dams and Reservoirs**

A number of written testimonies were distributed.

Carty Chang representing Engineering Division spoke about the authority of the Dam Safety Program and what staff's authority under the law is where he read the purpose of the law is to provide for the regulation of activity to dams and reservoirs to protect the health, safety and welfare of the citizens of the state by reducing the risk of failure of dams and reservoirs. This is to keep things in perspective, what the obligation and what the mandate of the law is which is to protect public safety. We recognize that dams play an important role in agriculture, hydropower, recreation, habitat and in some cases flood control. But, it's recognized that dams have the potential to kill people and if not regulated it could be catastrophic. The responsibility to keep the dam safe is the owner's responsibility and is also, the law. No one will forget March 14, 2006 when Kaloko burst killing 7 people. When the results are catastrophic we will talk about whose at fault and how could we let this happen. Kaloko resulted in the passage of a new law in 2007 and that Statute says that rules should be adopted no later than 1 and 1/2 years after July 1, 2007 which is January 2009 and these rules long over due. Kaloko was classified as a high hazard dam which means if it breaks there is probable loss of human life. Exhibit 9 of the submittal based on current classification ratings illustrate that more than 120 of the 134 regulated dams are considered high hazard dams.

Mr. Chang said according to Chapter 91, staff went out to public hearings, one in each county. In the submittal there is a summary of the comments received and how they were addressed where about 90% of the comments were about the fees imposed. In Exhibit 10 of the submittal describes the structure, amount and purpose of the various fees. Prior to the Kaloko disaster the Dam Safety Program consisted of 1 full time engineer. Immediately after the Legislature approved additional positions as well as general funds for the program and creating legislation that is now the Hawaii Dam Safety Act. Ever since the Dam Safety Program was established in 1987, no fees have ever been imposed on any dam owner except a \$25.00 application fee which would not pay for anything in today's dollars. February of this year staff sent a letter to all dam owners and fees did come up. What the Dam Safety Program did was they looked at the fees and made some concession on the certificate to impound fee to reduce it from \$12,000 every 5 years to \$400. There was some concession already given on the fees. A public hearing was held and the fees came up again. Staff looked at the expenditures for the cost to run the Dam Safety Program where they took the actual cost in 2008 and those figures are on exhibit 7. Also, they projected out what it would cost to run the program to fiscal year 2012 based on the collection of fees. The table shows that the fees will cover 50-60% of the costs to run the program and does not cover the entire cost of the program. Until 2009 the Legislature provided general funds for the program where 100% of the Dam Safety Program was general funded. The 2009 Legislature had limited every penny from the

general funds from the program. The Legislature made this an unfunded mandate since 2009. To make it more problematic the Legislature required the Department to fund the program with its own special funds, but within the last 3 years the Department's own special funds have been declining over 30%. It's very tenuous and scary that these special funds which are funding this important program has been going down and cannot rely on special funds any more. Fees are necessary to run this program. Without the fees staff cannot fulfill the mandate under the law.

Mr. Chang agrees that no likes to pay fees, but he would ask what is in it for the person paying fees? The Dam Safety Program is not only a regulatory agency, but are a resource for dam owners. Dam owners have a responsibility by law to make the dam safe. Staff serves as a resource agency, provides technical assistance and provides periodic inspections. Staff helps the owner comply with issues like developing an O and M manual, develop an emergency action plan which is required under the law. A safe dam also protects a dam owner's resource and limits their liability as well. It makes good business sense to keep your dam safe. Everyone who lives, works or patronizes below a dam is going to get a higher level of protection and piece of mind that these dams are safer. These fees are not intended to be a cash cow. They go back into the program to help owners comply with the law. In the submittal staff is requesting approval for an incentive program because their goal is to help owners succeed with making their dam safe and comply with the law. Staff came up with an incentive program to help owners save some of the fee savings to be used for their repairs and maintenance. When you come in with an application instead of paying the 2% of construction costs you get a discount of ½-1% which is a significant savings if you are an owner with multiple dams. The reason staff picked 3 years and not any longer is that the law has been in effect since 2007, 3 years ago. It gives owners time to plan, budget, secure funds and to come up with an implementation schedule which they think is fair, 6 years is 3 biennials for any government agency and that is a long time to come in with an application. Any longer, staff believes would create a disincentive for dam owners to take action. The important thing to know is that the State paid for a Phase I investigation for every single regulated dam in the State of Hawaii and spent \$1.2 million dollars of State monies. It's an assessment of your dam and all dam owners are put on notice of their deficiencies since 2007 or 2008 where everyone is aware of what they need to do to comply with the law.

Mr. Chang wanted to talk about a variance provision in the law because there have been questions about exemptions for certain purposes. When staff sent out the rules in February for review government has to be waived at least on the fees. Unfortunately, government owns 30% of the dams and waiving government would only shift the burden somewhere else. Exhibit 7 shows that without these fees the program cannot operate. He would not put in front of the Board any recommendations to exercise this variance option if he knew for a fact that any exemption from a fee would put the program into the red or would compromise public safety. We have to be careful how we use this variance provision for what purpose because fees are necessary and any waiver of these fees for anybody is going to put the program into the red. Mr. Chang has heard the argument of what are the chances of another dam breaking since many of the dams have been around since the turn of the century. These are artificial barriers that have a design life and if

your dam is a 100 years old there is a greater chance for a failure. The law is clear and long overdue. Any delay is a disincentive to comply with the law and continue to put public safety at risk. The State of Hawaii as well as dam owners both have obligations under the law to do what is in the best interest to protect health, welfare and the citizens of Hawaii. A lot of the concerns heard today need to be brought to the Legislature and staff is willing to work with the Legislature on any issues that may come up. None of us can afford another Kaloko and we must make the right decision and take the necessary steps to move forward. Staff believes that the submittal presents all the facts. These proposed rules and incentive program they believe is a fair compromise and they stand by the recommendation in their submittal. They repeal the existing rules and approve adoption of these new rules and the incentive program as specified in the submittal. Staff and consultant are here to answer any questions.

Member Gon asked whether staff explored the idea of a resource for procuring funds external to the State's coffers like the availability of other monies like Federal funds that dam owners could explore. Mr. Chang said the Bureau of Reclamation...and had Edwin Matsuda speak confirming that staff has explored other monies and the program receives a small amount about \$60,000 a year of Federal funds to supplement expenses and training. As for owners staff tries to pass on that information. There are cases in the past where the Bureau of Reclamation came down and provided staff a training grant to put on training for the owners. As for funding, staff does look at other Federal agencies whether it's the Army Corp of Engineers or the NRCS. Staff does assist some owners in rehabilitation of some structures, but there are specific parameters and not every case is a perfect match. If there appears to be a match then staff will recommend it to people.

Member Gon commented that aging infrastructure is a growing problem nationally and that groups like NRCS has a mandate to assist in the modification or establishment of new programs to assist owners. He didn't know whether or not staff has taken enough time to work with our local reps in pushing that issue with the Legislature and we should look for others.

Member Agor asked whether the 2% permit fees were developed for the purpose of reaching a number or is it to be comparable to other jurisdictions. Mr. Chang said it was a combination of both referring to Exhibit 10. It's to cover to the cost and consistent with other states as well. Mr. Matsuda said the cost on Exhibit 10 is only for the cost for outsourcing consultants to help staff with the reviews, but doesn't include staff time or expenses to travel out to the sites and Member Agor said he understands. This is an unfunded mandate and the Legislature should think about this that when monies are available it would be easier to get funding for health and safety reasons. A mandate like this should be funded partially by the Governor. He asked when the economy is better is there a mechanism to adjust these fees? Mr. Chang said that rules can always be amended. As this goes through the first few years staff will get a better cost of what this actually costs to run the program.

Member Goode asked of the 134 dams how many need work. Mr. Matsuda said that after the Phase I inspections staff found these structures need varying amounts of work and a

significant amount are in the poor condition state. They've let these dam structures be vegetated with trees and overgrowth and on a National level it was shown it was dangerous a situation. Some may be remediated easily, but some not and this occurred before the current understanding of dam safety standards we have now.

Member Goode asked whether there was a process for land owners to contest the findings by hiring their own engineers. Mr. Matsuda confirmed that they could where he related what happened after the Phase I investigation. Staff released these structures to the owners in a draft form so that they could comment to staff. The owners did have a chance to come back to staff to formulate a different plan.

Member Goode asked whether there was any idea of the total dollar amounts for each party over the next 3-5 years to get construction done and what revenues to be generated. Mr. Matsuda said staff hasn't calculated the costs on the construction work on how that is to be remediated. Member Goode asked whether Phase I would work. Mr. Chang said that Phase I identifies the deficiencies and it's up to the owner to review that and get their own estimates.

Chair Thielen noted that the DLNR is a full or partial owner of a number of dams. The Phase I assessment included the DLNR dams. She asked what has the Department done since getting that information and what construction costs and amounts that we've put out to start to upgrade our dams. Mr. Chang said DLNR owns 10 dams and they went to the Legislature about 2 or 3 years ago and they secured \$14-1/2 million dollars in funding. Staff designed it, bid it out and we'll see a lot of activity on DLNR dams in the next couple years. Mr. Matsuda said the estimates were around \$22-\$23 million, but they got less because of the construction climate and there were changes going through where some dams staff thought were going to be remediate a lot of the owners felt they no longer needed the structure there and decided to remove the structure which is a lesser cost and confirmed that they were able to accomplish with what they had.

Chair Thielen asked with the 10 dams DLNR has gone through design and is initiating construction now how many designs and applications do you have for the other 120 plus privately owned and other government dams. Mr. Matsuda said that they have been working with owners, but there may not be an actual permit application to staff yet which is about 10-20 permits. Staff hasn't received any design or construction permits for the rest of the dams.

The Chair related some perspective to the Board that staff met with some of the dam owners and there will be comments raised about the fees, but this is 3 years after Kaloko and we have not seen a lot of movement to make these upgrades. The owners have the Phase I in hand and they know what the deficiencies are. Also, after speaking to one owner the fees for the total dams was going to be \$100-\$200 thousand, but with the upgrades possibly up to a \$100 million. The big concern is how they will address the maintenance and upgrade the standards for a system of reservoir and dams that were built a hundred years ago for large scale agriculture. She sympathizes with the testifiers, but they need to keep the bigger picture in mind going forward.

Warren Watanabe representing the Hawaii Farm Bureau Federation testified that they represent commercial farming, ranch families and organizations from across the state and are opposed to the fee structure proposed. Dams and reservoirs are important to agriculture and ranching statewide especially during times of drought. There is a need for more dams and reservoirs to carry agriculture users through. Costs should be born through the general fund and they recognize that the Legislature cut the Department's funding. The Legislature recommended agencies seek external funding including fee for services. Everyone should share in the costs. The Bureau appreciates the attempt to create an incentive system, but the cost would still be born disproportionately by farmers and ranchers. Drought mitigation projects submitted by the State of Hawaii were rejected by the Bureau of Reclamation. They urge deferral of imposing these fees at this time to allow time to discuss with Legislators how critical it is to restore general funds for these use and to meet Hawaii's water needs. The Hawaii Farm Bureau will engage their Legislature to advocate for this.

Member Agor asked whether there were any thoughts of passing these costs from the owners down to the farmers. Mr. Watanabe confirmed that there to some. The profit is so small and would endanger our farmers and ranchers.

Member Gon suggested passing the cost down to any beneficiaries down stream. It's a historical thing and in the past it would have been a free flowing stream and if the fees mean that more of the dams would be decommissioned and removed then we are going to be seeing predictable consequences of those waters returning to normal courses and would affect those below. The challenge is to find a fair way to share those costs. Mr. Watanabe related concerns with less rain in the future based on foreseeable weather patterns. The Bureau wants to mitigate the fees, operational costs and keeping agriculture viable.

The Chair asked with the Hawaii Farm Bureau coming on recently and whether they understood that the cost of the fees is a fraction of the upgrades of these dams. Mr. Watanabe said that Maui Land and Pine would pass the cost to the farmers and the farmers and ranchers cannot afford it. Chair Thielen referred back to Member Gon's comment to look at the broader benefits that the dam serves and figuring out how to spread the larger costs to maintain the safety standards.

Roy Oyama, President of Kauai County Farm Bureau testified confirming that agriculture has no way to pass on the cost. Wells for domestic use on Kauai has gone dry and there is no way to get extra water into these areas. Mr. Oyama related Grove Farm's water going to beautify the domestic system and nothing left for agriculture in the future. He likes Member Gon's idea of looking at other areas of income. Farming is not easy. Mr. Oyama asked the Board to consider ag for sustainability.

The Chair asked whether public safety is equally important. Mr. Oyama said he agreed, but the community needs to be balanced. Chair Thielen said that this goes back to the Legislature solution needs to be how to pay for the cost of the upgrades. Mr. Oyama agreed and said if it doesn't balance we will all be hurting Hawaii. The members of the

Kauai Farm Bureau are Kauai Coffee, Grove Farm, East Kauai Water System and the West Kauai Irrigation Association under ADC. He asked to consider agriculture wisely.

Jerry Ornellas representing Kauai County Farm Bureau testified if you are a dam owner today you are faced with either de-regulating your dam, decommission your dam or you can restore it and all are extremely expensive propositions. A fourth possibility is if the fines become so onerous, rules are so strict people are going to walk away from these properties and in which case who has the liability now? It's going to end up with the State. He knows of some people who are ready to walk away from some of these dams. Also, the criminalizing of people who bought agriculture properties with reservoirs on them and were unaware they were dam owners. Some are absentee owners. There are serious issues and all agree that safety is the foremost issue. There is a constitutional mandate to provide land and water. Every irrigation system in the world is subsidized. Mr. Ornellas applauds staff and Department of Ag's efforts because they are seeing a lot of improvements.

Member Goode asked whether Mr. Ornellas had a different percentage proposed where Mr. Ornellas said we need to go back to the Legislature to make them aware of the responsibilities and he doesn't think it is fair to put it in DLNR's lap.

Wayne Katayama representing Kauai Coffee and Mark Vaught representing HC&S and both of them are representing the agricultural commitment testified that he submitted written testimony and said that they are in complete support of the safety aspect of dams and reservoirs. Mr. Katayama related the number of reservoirs they have that is part of their operations. He reiterated the same concerns as the previous testifiers regarding supporting the Dam Safety Program. The ability to pass on these costs is non-existent.

Mr. Vaught said they (speaking for Kauai and Maui) reviewed all the Phase I data from DLNR and the preliminary studies came up with \$12-1/2 million dollars just to get started and doesn't include construction costs. They recognized their responsibility to maintain public safety and to their operation. Over the next several years they are willing to do what they need to do to pay for these remediation costs to conduct the studies that need to be done to make sure they are in complete compliance. We are going to take care of that. They increased their repair and maintenance budget for all of their dams which is about \$500,000 a year. The new annual fee will add another \$210,000 to that. These are annual recurring costs that do make it difficult for their operations, but they will do what they will have to do. They feel if there were a way to more equitable way to work through the annual fees it would help them with their mitigation costs.

Mr. Katayama asked to balance for the need to review for the balance of cost. They would like to see a cap. If they have a project that is tens of millions of dollars they don't think that number should run with that and have a fee structure that captures a reasonable review estimate with the understanding for smaller projects that number would be fixed. They support working with the Department to ensure the proper funding because their reservoir is integrated with the community, with the county and the future of ag in developing lands.

Member Gon appreciated their willingness to take action and was wondering what the procedure would be to place a cap. The Chair suggested bringing staff back up after public testimony to address what is in the existing draft.

Matt Rose representing Agribusiness Development Corporation had submitted written testimony and testified reiterating their concern for public safety appreciating the Dam Safety group. One issue that wasn't recognized was a timeline to help owners plan. Member Morgan asked whether he had a suggestion. Mr. Rose asked for a timeline so he would know what to expect and Member Morgan said 90 days. The Chair suggested wait to hear from staff.

Member Goode cited the 13-190.1-14 which they will review with staff and asked about change orders whether that will cause more fees. Mr. Rose said if a project takes too long to approve their funds could lapse. There could be extra costs for contractors waiting.

Alan Gottlieb, representing the Hawaii Cattleman's Council testified they support public safety reiterating previous testimony of shutting down of reservoirs which affects agriculture in the State. Fees and rules and recommendations and concerns with dams and earthquakes. A better process needed.

Dwayne Okamoto, Deputy Director for the Department of Agriculture (DOA) testified reiterating and recognizing what was said earlier. Food safety is important, too. Ag land incentive process set up some years ago could be hurt by this. He would guarantee a rate increase which would pass to farmers and ranchers. It was suggested that their engineers and the Department's engineers should sit down to mitigate the negative. Should go back to the Legislature for general funding and defer this until these issues are resolved.

Shannon Alevaido representing Land Use Research Foundation submitted written testimony and testified that they will stand on their written testimony reiterating previous concerns. She asked to defer the increase of the fees until the Legislature reinstates the general fund. The exemptions concerning the in-flow should remain. The existing dams and reservoirs should be allowed to impound water. The sliding scale might be excessive and arbitrary and to find something else for the fees. There should be an appeal process for the Board's approval and didn't see any guidelines. There should be a streamline process for the removal or decommissioning of non-strategic dams or reservoirs. To encourage ag the State should give incentive to encourage the repair and maintenance of reservoirs for ag water.

Chair Thielen related the cutting of 100% of the funds to the Dam Safety Program in 2009 by the Legislature.

There was Board discussions with staff.

Member Goode agreed with Board Member Morgan – clearly there are safety issues, clearly it's a benefit to the community and it's unfortunate that there are no Legislators here. Every time you jump fee to \$25.00 is a joke. Something like this hits everyone really hard. Should pass the annual fees to half of what was proposed which is a burden to find the money. He had a hard time with a large jump in annual fee. Member Morgan asked whether Member Agor had any interest to adjust that fee. Member Good said this is for the first year. Member Agor asked whether they were funded for that. Mr. Chang said they are not funded and that is why Exhibit 7 is important because those are actual costs.

Chair Thielen noted that this is hard for the Board members because the fees that come out of this Department tend to be very low like the \$25.00 fee, the park fee, \$5.00 at Federal Parks and we are used to things being very low. Its one thing to accept shoddy infrastructure in a harbor because boaters may not be willing to pay a higher fee for slips, but she thinks it's another when dealing with the Dam Safety Program. The costs of it are very big. What we are jumping from is a refusal to face the real cost to 50% of the real cost which is a lot, but it is still 50% reduction of what the cost of the program is. The question is it serves a bigger purpose, it's not fair, but all that was true in 2009 when it came in a year when it was the Department's #1 priority and they cut half the funds. The same arguments were true then and she doesn't know whether they will bring it back any time soon, but if they do there is a way through the waiver process to annually look at what the budget is and to determine whether to address those fees. Member Agor said he can't see funding for 50% of the work.

Chair Thielen summarized that the motion is to accept the recommendation with an amendment to add a section on the permit approval to require a staff determination within a 180 days of receiving a completed application and also the Board would review the fees annually in June of each year commensurate with the funding allocated to the program by the Legislature. She took a vote: ayes – Ron, Sam, Jerry and Laura, nays – John and David. Two opposed and four in favor, the motion passes.

Chair Thielen said that staff would be happy to work with the Farm Bureau and others who came in to testify to make a presentation to the Legislature. Not just DLNR's program, but for the greater cost of upgrading these facilities and ideas on how to find some of those things. And, thanked everyone for their testimonies today.

**The Board:**

**Amended staff's recommendation to add a section on the permit approval to require a staff determination within 180 days of receiving a completed application and also for the Board to review the fees annually in June of each year to commensurate with the funding allocated to the program by the Legislature. Otherwise, the recommendation was approved as submitted.**

**Approved as amended (Agor, Goode)**

11:20 AM RECESS. Member Gon departed for another meeting.

11:25 AM RECONVENED

**Item K-1 University of Hawaii, Institute for Astronomy's Management Plan for the Haleakala High Altitude Observatory Site at Pu`u Kolekole, ahupua`a of Papa`anui, moku of Honua`ula, Makawao District, Maui, TMK (2) 2-2-007:008**

A number of written testimonies were distributed.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) noted that he had a couple amendments to the report and he distributed the Management Plan. He wanted to recommend going through both items K-1 and K-2 before the Board goes into decision. Chair Thielen said she would like to hear what the Board has to say about that because the Management Plan is a stand alone document and Item K-2 is a conservation district use application (CDUA) where there are items in the Management Plan relevant to Item K-2 and help us understand it. She asked would it be helpful to have the staff presentation on both, public testimonies on both and then go into decision making or do you want to do that one at a time. Member Morgan said he would go with both. The Chair said it would be more expeditious time for the public testimonies. At Board discussion they will take them as separate items, but for the staff presentation and public testimonies they will hear both. Mr. Lemmo noted that they have a petition for a contested case hearing submitted by a Native Hawaiian Legal Corporation on behalf of Hawaiian organizations which he had a copy for the Board to look at. Chair Thielen said that there hasn't been any action yet and didn't know whether there is anything to contest.

Mr. Lemmo conveyed that U.H. (University of Hawaii) is seeking the Board's approval for the Haleakala High Altitude Observatory Site Management Plan. The applicant is the University of Hawaii - Institute for Astronomy, the landowner is the State of Hawaii, but the area is set aside under an Executive Order 1987 to the University of Hawaii. The area of the High Altitude Site is 18 acres which roughly follows the summit of Haleakala, at about the 10,000 foot elevation. Approximately 40% of the site is currently developed with roads, buildings, a parking area and walkways. The site has had astronomical facilities since the 1950s. The purpose of these facilities on Haleakala is to provide research and observe the activities of the sun, to provide research to students and educators worldwide, and to use lasers to measure the distance to satellites, tracking and catalog man-made objects, track asteroids and other potential threats to earth and obtain detail images of space craft where Mr. Lemmo referred to Exhibit 1 showing a detailed history of the development and actions at Haleakala Observatories. Exhibit 2 shows an overall site plan for the Hawaii Observatory (HO).

Mr. Lemmo said they've gone through a discussion of geology, flora and fauna for the HO. The area is sparsely vegetated which is an alpine, shrub land ecosystem. There are two endemic plants, endemic grasses and a single pukiawe. There are no endangered silverswords in the HO except there are a few silverswords being cultivated at the Air Force facility parking lot. The biggest issue at the HO is that 85% of the known federally protected Hawaiian petrel occurs at the summit of Haleakala and there are nests in the

vicinity of the HO and in the HO. There 30 known burrows along the southeastern perimeter of the HO and other burrows to the northwest. There are burrows within the area and in the Federal Park which surrounds the HO site. Nene has been known to fly over the HO, but the summit area is outside of the known feeding range. Hawaiian hoary bats have been seen in the area.

Mr. Lemmo said The Management Plan talks about the cultural resources in the HO. Cultural practices include gathering of plants, hunting and collecting of basalt for tool making, burial of deed, burial of umbilical cord, calling of the sun, and training for astronomers and navigators. Modern practices include a hula halau, lapa'au practitioners gathering materials and sites used by Hawaiians for sunrise and sunset ceremonies. The general public is not permitted to enter the HO, however, the site is not gated and there is a sign at the entrance of the HO welcoming Native Hawaiians. There was an archaeological preservation plan approved by the State Historic Preservation Division (SHPD) in July of 2006.

Mr. Lemmo noted this Management Plan is being prepared under our Administrative Rules Chapter 13-5. Astronomy is an identified use in the resource sub-zone under an approved management plan. Staff is here to seek the Board's approval of the Management Plan. We will then discuss the proposed ATST Project which will be the first telescope approved under the Management Plan that the Board is considering. The timeframe is 10 years for this Management Plan – December 2010 to November 2020. There was an environmental assessment published for the Management Plan by KC Environmental, the FONSI was published in the Environmental Notice – November 8, 2010. The Management Plan is the governing document for existing and future development within the HO. And, in the staff report on page 7 we begin discussing what key elements of the plan have been identified. We go from looking at a cultural and historical resources management which are there and a number of environmental resource management elements on page 8 and 9 which include protection of the petrel and addresses Native Hawaiian issues. The other issue is facility design having identified a number of design criteria. For instance any building at the HO would not be permitted to obscure the observation function of other facilities, not to impact petrel habitat, etc.

Mr. Lemmo said The Management Plan calls for an annual report to DLNR which includes the status of compliance of permit conditions and instrumentation of land use pursuant to the Management Plan. On page 10 of the staff report is a point-by-point discussion of how this Management Plan complies with Exhibit 3 of our Administrative Rules which identifies what you have to have in a Management Plan. In addition to the standard or minimum elements of the Management Plan staff is recommending that the UHFIA also do some additional reporting to go beyond the minimal requirements. There is a list of 6 issues that staff would like them to update us on. Staff also recommends that the annual reporting period commence roughly from the date of the Board's decision on this document which would be around the end of November 30<sup>th</sup> and end 10 years later. The dates in the staff report seem a little off to him where it says November 30, 2012 to November 30, 2022 which means November 30, 2012 will be the first report that you

would receive for the HO and 10 years would be November 30, 2022 which may be an amendment to a condition.

Staff is here to seek the Board's approval of the Management Plan where they included 2 conditions. Mr. Lemmo suggested tweaking the language in condition 2 which says "Beginning of November 30, 2012 the University will submit to DLNR an annual report summarizing any construction activities occurring at HO. Habitat Conservation Plans, Monitoring Plans, Invertebrate, etc." Staff wants to know what aspects of these plans will be implemented. Staff would like an annual report summarizing for example implementation of the Habitat Conservation Plans, implementation plans for Invertebrates, implementation of Flora and Fauna Plans and implementation of Programmatic Agreements on Cultural Resources. Chair Thielen suggested for number 2 could they say an annual report summarizing the implementation of the Management Plan including...

**Item K-2 Conservation District Use Application MA-3542 regarding the University of Hawai'i, Institute for Astronomy and National Science Foundation's Advanced Technology Solar Telescope at Pu'u Kolekole, ahupua'a of Papa'anui, moku of Honua'ula, Makawao District, Maui, TMK (2) 2-2-007:008**

A number of written testimonies were distributed.

Mr. Lemmo reported that the agents, land ownership and location are the same as the HO. There is a typo on the first page with respect to the TMK where parcel 7 is repeated and is not the case. The parcel of the HO is parcel 8. There is an adjoining parcel 7 which is not part of the HO and is an FAA owned site to be used as a staging area for the Advanced Technology Solar Telescope (ATST). The area is about .6 acres. The description of the HO, flora and fauna, and cultural resources is similar to what was discussed in the HO report. He'll skip to the proposed use section and come back to some of the issues regarding environmental and cultural impact on proposed mitigation measures. The U.H. and the National Science Foundation is proposing to establish a solar telescope at the 10,000 foot elevation of Haleakala. They indicated that this is a previously disturbed site at the southern perimeter of the HO. The project would include a number of facilities and if the Board wants to see the proposed location of the ATST there is a number of exhibits that staff has included in the report. Mr. Lemmo referred to Exhibit 4 and other schematics and maps. The proposal has a number of elements including the telescope foundation, the actual structure on which the telescope rotates, the actual telescope facility itself would all be placed within an enclosure. The enclosure is 6,000 cubic meters, thermally controlled, highly ventilated, it would also co-rotate and the enclosure diameter would be about 25 meters at the top of the aperture to the zenith so the total elevation would be up to 43.5 meters which is about 150 feet. It would include a support and operations building attached to the observatory including a utility building attached to the support and operations building. It would include an expanded parking and service area. This would be shared with the existing NICE Solar Telescope Observatory. This telescope is being proposed at the existing NICE Telescope

Observatory site and will share existing facilities at the NICE site like the parking and there will be some modifications made to the NICE facility. There is going to be a small waste water treatment plant built on the site. There will be a gravel field to ground electrical currents. Some water management system consisting of gutters, catchment drains, underground tank and pipes connected to existing facility and an electric transformer. The applicants are proposing a staging area on a neighboring parcel under the FAA and they still have to receive FAA approval for that site where there will be some modifications to the site. If the applicant can't get it they will have to find another site. The staging area was discussed in the environmental impact statement for this project and was brought up in the CDUA.

Chair Thielen said that there are a number of standard things with projects that the Board was familiar with and suggested focusing on the areas of major interest to the people who'll testify.

Mr. Lemmo said that there was a public hearing held in Maui with about 150 members of the public attended where 35 provided oral testimony and 15 person's submitted written testimonies. A final environmental impact statement approved for this project. A Federal and a State EIS was done that were all approved.

In terms of impacts and mitigation measures, the EIS does a good job identifying what the major, adverse, long term impacts will be on a number of interests. He thinks it does a really good job of being up front and honest about the affects of the project and what they can or cannot do to mitigate these impacts. The first major impact identified is FAA's existing facilities due to radio communication interference where they worked out a mitigation plan for that and they think the impacts can be dropped to negligible if mitigation measures are implemented. With respect to cultural, historical and archaeological resources the EIS identifies a major adverse long term impact resulting from construction and day to day use. The EIS calls for about 12 mitigation strategies, but they conclude that the impact would remain major, adverse and long term. One of the main reasons for this is Haleakala has been identified as a traditional cultural place that satisfy the jury to be eligible for listing on a National Register of Historic Places. This is an important element because a traditional cultural property (TCP) has valuable cultural resources attached to it. Some members of the community provided testimonies on the summit of Haleakala considered a wahi pana or a celebrated or sacred place to the Native Hawaiian community in the realm of Akua – the God and spirits that are still revered there. Staff has been told in comments and public meetings that this is an important spiritual and cultural place for Native Hawaiians. There are many concerns about the effect of the telescope on these cultural and spiritual beliefs of Haleakala. It was indicated in staff's submittal while we could look at the cultural impacts in reasonably logical way and try to find ways to mitigate those impacts it is much more difficult to assess spiritual beliefs and devise mitigation measures for spiritual impacts. Staff has acknowledged to some people that this has a huge spiritual impact to their belief system.

Noise is another impact. Construction noise and jack hammering will cause a visual disturbance which will be a problem for petrel protection and have devised mitigation

measures to reduce the impact of these types of activities on the petrel. And they are developing a Habitat Conservation Plan (HCP) for the purpose of having an incidental take permit issued to them just in case there is a take of petrel between the construction and operation of the facility. In terms of visual impacts, it's a major issue. A U.H. consultant showed that ATST will dominant the view from Pu'u Ulaula overlook which is an area adjacent to the summit. It will be prominently visible from areas of the National Park adjacent to the HO and a small portion of the upper park road and Visitor Center, but not visible from inside the Haleakala Crater on the lower park road corridor. The project may be visible from other distant vantage points on Maui, but obscured by other terrain on Maui. There have been claims that U.H. did not take recommendations to reduce the visual impact of the project seriously. This issue has come up throughout the process where staff has asked U.H. about this and to put comments in writing that they have done everything they can to mitigate the visual impacts of this project. If the applicant were to try and mitigate any further by painting some other color, lowering it or putting it somewhere else it would seriously reduce the functionality of the observatory for achieving its stated purpose.

The cultural and archaeological mitigation - the University has entered into a Programmatic Agreement for dealing with cultural resources which he had passed out for the Board's use. The SHPD officer has signed on to this Programmatic Agreement as well as the National Science Foundation, other interest groups and cultural practitioners who are part of the Programmatic Agreement which includes a number measures to mitigate or provide some mitigation towards reducing the overall cultural impact of the project. One of the big things in the Programmatic Agreement is they are pledging 20 million dollars to be used for educational initiatives addressing Native Hawaiian culture and science. It will be 2 million dollars a year for 10 years. A 24 acre site will be set aside for use by Native Hawaiians to do Native Hawaiian practices and the applicant is funding 2 ahus at the summit area.

Biological resources identified potential major adverse short term impact on the petrel where construction could impact the petrel habitat. The applicant is devising mitigation measures to better deal with that situation.

Mr. Lemmo said that the Board has a difficult task of deciding whether the project may proceed. The research conducted at ATST will substantially add to our understanding of solar phenomenon and has benefits for public health, safety and welfare. The project will trigger adverse environmental and cultural impacts. As noted in this report the applicant has done a reasonable job of identifying those impacts and developing mitigation measures to reduce those impacts. Despite this some impacts may be difficult or impossible to mitigate. The public benefits of the proposed project should be weighed against the environmental and cultural impacts to the site and the area. Based on the analysis staff recommends the Board approve the ATST CDUP subject to a number of conditions with a couple amendments and sought the Board's support to delete condition 2. Mr. Lemmo was told by the Attorney General's office that you don't indemnify U.H. Condition 12 is that condition included in the Management Plan and that he wanted make sure the language in condition 12 is consistent with condition 2 of the Management Plan.

Those are the extra monitoring requirements staff is asking for from U.H. Chair Thielen asked whether it is the applicant's progress report updates on their compliance with the Management Plan. Mr. Lemmo said implementation of. The Chair asked if we adopt the Management Plan part of that Management Plan says the University needs to implement it that all future CDUPs would be in compliance with that, right and Mr. Lemmo confirmed that. Chair Thielen asked whether this would be a compliance report that this applicant wouldn't necessarily be responsible for the implementation. Mr. Lemmo acknowledged that they are not responsible for the management report. There are a lot of mitigation measures identified in the EIS, the Management Plan, and the CDUP that he wanted to make sure should this project proceed that when staff gets construction plans and specs that applicant include a list of those biological, cultural and archaeological mitigation measures as well as other mitigation measures identified in the various documents. Mr. Lemmo assumed they usually do that when construction plans are submitted. He is throwing it out there as something extra in their permit approval.

Dr. Gary Ostrander, Vice-Chancellor for Research and Graduate Education at University of Hawaii, Manoa testified that he was here to represent the University of Hawaii and providing testimony in support of the HO Site Management Plan and the granting of the CDUP for the ATST. He related some history of the telescopes on Haleakala since 1964 and background of the ATST project that Haleakala was the most suitable site after looking at 72 sites worldwide. The National Science Foundation (NSF) initiated the EIS process and last December Haleakala was recommended. Concurrently with the EIS, the NSF initiated a National Historic Preservation Act Section 106 consultation process which included more than 30 formal and informal consultations. Dr. Ostrander reiterated the National Science Foundation's commitment to provide 20 million dollars over 10 years to develop a program at the University of Hawaii, Maui College designed to cultivate and enforce the intersection of Hawaiian culture and knowledge with science technology.

Tony Gibson representing the Director of the National Science Foundation testified in continued support of the ATST project and will enable researchers to mitigate the effects of the sun on mankind. The Foundation has been engaged in the planning of this for over a decade and they take their responsibility of the natural and cultural environment seriously. NSF environmental compliance process began in 2005 involves preparation of a draft EIS, supplemental cultural resources survey, supplemental draft EIS, final EIS, and a Programmatic Agreement to address cultural resources issues. These documents were prepared with significant public input which enabled NSF to take a hard look at the environmental consequences of the ATST before making a funding decision. Public input will continue to be a feature of the ATST if construction is permitted. Mankind has a significant need for an instrument such as the ATST which would be the flagship facility for increasing our understanding of the sun and its ability to affect life on earth. The decisions the Board reaches today would have far reaching impacts on our children and grandchildren. And, he thanked the Board.

Ivan Lay representing the Hawaii Carpenters Union on Maui testified relating the funding amount of the project will help get residents back to work and boost the local economy. He reiterated previous testimony that the NSF undertook State and Federal EIS and any

impacts will be mitigated. Also, he reiterated the amount going to educational programs at UH-Maui emphasizing Hawaiian culture which would be an advantage to our children and to the Hawaiian people. \$1.5 million dollars will go to the HCP. The members who have been out of work the longest that have no medical, used up all their credit cards will celebrate when they get the call to go back to work which will benefit families and the community. Mr. Lay supports this project and asked to get this through now.

Bruce U'u, an Apprentice Coordinator for the Hawaii Carpenters Union on Maui is born and raised on Maui and is Native Hawaiian testified in support that 76% of their members are unemployed. There is a mitigation plan for the uau bird and the bat, but how about a mitigation plan for the people of Maui who need the funding. Unemployment is at 10%. Mr. U'u attended the Board meeting on Maui and understands the feelings of the Hawaiian people that something will be built on Haleakala, but at the same time you got to take care of the living. Respect the dead, take care of the living and he hopes they can work to bring some hope to the people to work and at the same time respect the culture which he thinks they've done in the mitigation plan.

Member Goode asked whether the Union has commitments from NSF or whomever that local Maui labor will be used on this project. Mr. U'u said they are in talks right now and are 99% complete which is looking good. At that Maui Board meeting one of those who opposed the project said if this was to go through to use the local labor. Of the 230 apprentices the Union has in Maui County more than half are of Hawaiian ancestry.

Jeanne Skog, President and CEO of the Maui Economic Development Board (MEDB) testified that they were formed in 1982 to diversify the economy and their mission is to provide leadership and vision for the responsible design and development of a strong, sustainable, diversified economy and two key words responsible and sustainable. For MEDB that tracks back to their community's environmental and cultural concerns and core values that economic and business development has to be done within the context of those values. The HO activity lead MEDB to help develop an orientation program called "Haleakala Sense of Place" to address the concern about the contractors and workers on Haleakala being aware of environmental and cultural sensitivity of that location. These workers want to be aware and want to know what the concerns are so that they can behave appropriately and the program is designed to do that. MEDB work with environmental and cultural specialists to develop the full range of program and today it is a protocol that must be adhered to and U.H. tracks that program put into place for any new workers or contractors that deal with Haleakala. It is within the HO area they follow the strictest protocol on everything from waste, how to plant, how to deal with rocks, etc. and is a heavily monitored protocol. MEDB is committed to continue helping the ATST continue in this tradition. We believe the ATST brings an extraordinary opportunity to diversify our island's economy and for stimulating and augmenting science, technology and math education (STM) in Maui County. STM education reaches over 10,000 students and teachers a year and Haleakala is a big part. All of MEDB's programs share the foundation of being done in the context of our environmental and cultural values. Science and culture do go hand in hand. The spin off companies triggered at Haleakala is frequently accessed by their education programs. And be part of the infrastructure that

works with ATST leadership and programs to fully realize the value it can bring to diversifying Maui's economy.

David Frankel, an attorney with the Native Hawaiian Legal Corporation representing Kilakila 'O Haleakala testified from his written testimony noting that their comments were completely excluded from the submittal's staff analysis and the reason is the Legal Corp. included comments on both the ATST and the Management Plan in the same letter and that all these comments were included under the ATST letter. Mr. Lemmo's June 16, 2010 letter asked for comments on both the ATST and the Management Plan in the same letter. It is completely inappropriate for the Board to rely on the staff's submittal that completely ignores the comments received. The Management Plan provided to the Board is unacceptable because it fails to evaluate the carrying capacity of the area, analyze the cumulative impacts of increasing build out, or provide for adequate monitoring. It puts off analysis of impact of reasonable, foreseeable actions thereby defeating the purpose of a comprehensive management plan. It appears to allow new facilities that do not abide by the very terms of the Management Plan so long as those impacts are assessed individually. This Management Plan is not a comprehensive plan pursuant to HAR 13-5-24(c) any astronomy facility must be consistent with the Management Plan. A management plan is a comprehensive plan. The vagueness in the plan can unintentionally or intentionally authorize future conduct without substantive and comprehensive planning. On the one hand, the Management Plan attempts to authorize current operations and new facilities. It clearly envisions the construction of new facilities. On the other hand, the Management Plan delays any analysis of the cumulative impact of more facilities. It states that new projects will be individually assessed as to impact to cultural resources, scenic resources requirements. The Management Plan fails to include a thorough analysis of the cumulative impact of a full build out, visual resources of view plans, natural beauty, traditional and customary practices are required. It fails to plan comprehensively. The Management Plan also fails to include specific enforceable terms that protect traditional and customary practices, scenic resource required. Read the Management Plan. It has no specific height limits, no specific size limits, and no specific restrictions on the number of buildings and facilities that can be built in the HO site. Mr. Frankel questioned how can this be a comprehensive management plan if it doesn't specify those things. Without those things what it does on one hand is authorize more construction without allowing for cumulative impact of what this construction is going to be - cumulative impact analysis. The Management Plan is also provides inadequate protection to archaeological resources. Construction 50 feet from an archaeological structure may protect physical integrity, but a looming structure within 50 feet of a significant archaeological site does not protect its archaeological integrity. The University of Hawaii acknowledged that the current MSO facility uses a cesspool to handle waste water and septic waste that could affect sub-surface water quality. Given the importance of protecting sub-surface water quality the failure of the Management Plan to acquire a centralized and better management of waste water is shocking. The Management Plan prohibits new facilities from obscuring the observation function of existing facilities. It does not, however, prohibit construction that obscures site plans or views or impairs scenic resources. The clear priority of the plan is to protect the other observatories. Without appropriate detail, the document does not constitute a

management plan. The Management Plan fails to disclose much about monitoring. How often monitoring will take place or who is responsible for the monitoring, it does not say what the monitoring consist of or what will be monitored. There is no substantive information regarding how often weeding, vector control and trash removal will take place. Nor does the Management Plan disclose who will be doing it. If the management plan is necessary to authorize more facilities, but the Management Plan contains no specific commitments and it utterly fails to protect the management resources it intended to protect. Further issues on the Management Plan, Mr. Frankel related that they have filed suit this morning on the acceptance of the environmental assessment for the Management Plan because an EIS is required and they are requesting a contested case hearing on the Management Plan.

Mr. Frankel testified on the ATST saying it's troubling that this decision making hearing is taking place on Oahu where on Maui this room would be filled with opponents. At the public hearing which was poorly described in the staff analysis, opponents outnumbered supporters by more than 2 to 1. It is not a project that is supported, but you got a sanitized report that does not convey to you the depth of emotion opposing this project. We have requested a contested case hearing orally and in writing and he repeated that request to the Board today. Mr. Frankel was troubled by Chair Thielen's comment that demonstrates inaccurate understanding of how contested case hearing request and proceedings are supposed to proceed. You do not vote first before granting us a contested case hearing. Mr. Frankel cited an example of the Cohen house at Pao'o where Deputy Attorney General, Linda Chow attended and before the Board voted a contested case hearing was held. When Haseko asked for a CDUP for drainage of Pipipi Road the Board did not vote on their application until after they had a contested case hearing. When Haseko asked for a CDUP for the Kalo drainage project the Board did not vote and had a hearing on the CDUP. Voting on this application before the conduct of a contested case violates our due process rights and unnecessarily throws us back into court prematurely. After a couple years they have been vindicated in their request for a contested case hearing in Kaleikini versus Thielen where the Hawaii Supreme Court agreed with them. Today we are suppose to have a hearing on the Lepeuli matter before the judge, but were postponed because Bill Wynhoff believed they were right. They were entitled to a contested case hearing. The Board can't vote on this application until a contested case hearing held. A CDUP should not and cannot be granted for this project for a number of reasons. One is the applicant admits this project will have major adverse long term impacts which cannot be mitigated. You need to read your rules. The rules lay out the criteria for granting the CDUA. Jobs are not one of the criteria. It is irrelevant and insulting for this Board to ask for the economic potential of this project because that is not a criteria you are not allowed by law to consider. This project is 142 feet and 10 inches is a massive project. Think - the most protected land is conservation district. It is more protected than the urban district, more protected than the agriculture district, more protected than the rural district and yet we are going to allow a building that exceeds the height limit of Maui County by more than triple in the most protected land in the State. Why protect land next to Haleakala National Park and then allow a structure of such magnitude that is going to completely destroy the sense of quiet and the sense of beauty up there.

Marti Townsend representing KAHEA – The Hawaiian-Environmental Alliance distributed written testimony and testified in opposition for the ATST. On the Management Plan, KAHEA is involved on the Mauna Kea issue and found similar mistakes in the HO Management Plan as in Mauna Kea's which is disconcerting since the University of Hawaii who is in charge of both has failed to grasp the importance of the location. The management plan which has been deemed comprehensive in the past has limits on them - 13 telescopes, only 125 feet tall, only so wide, only so many in such place. The current Management Plan for Haleakala and Mauna Kea don't provide any of these kinds of limitations. There is no analysis of carrying capacity. It's possible under these management plans for development and construction to overrun the purpose of the conservation district because these management plans don't have limitations. Because you are going to monitor doesn't mean you are actually protecting conservation resources. You are not conserving resources because you are going to count the number of wekiu bugs you've killed or silverswords you've destroyed. You have to have limitations. Say how many telescopes will be built. Where and how big will they be? Based on that concrete limitation you can manage the resources. You cannot approve this Management Plan. It doesn't meet the law. In addition to advance on what was presented earlier, astronomy is no where in the law. Astronomy is not a protected right. Astronomy isn't something in the constitution or in statute – you have no right to astronomy. Ms. Townsend is a fan of astronomy, but it is not a protected right. Traditional, customary practices of Native Hawaiians are protected - it's in the constitution and protecting the conservation resources at this district are in the statute – that is the Board's obligation and not ensuring astronomy on Haleakala or Mauna Kea. To be clear, your Administrative Rules 13-5-30(c)(4) specifically says anything that is allowed in the conservation district cannot substantially and adversely impact the conservation district. Both the EIS's for the TMT and the ATST admit there is substantial adverse impact. You can't legally grant this permit because it violates your rules. In addition, you haven't dealt with the underlying fundamental problem that there is no genuine management there. The University of Hawaii is the applicant and the manager and can't play both roles. Both Mauna Kea and Haleakala, you have a management authority that is 100% controlled by the University of Hawaii. All decisions ultimately are made by the University of Hawaii. There is no genuine oversight. If you don't agree with the University's position you are asked to move to be removed. They won't come to committee, they won't take your advice and that is not genuine management until this body mans up to taking responsibility of protecting the conservation district we will continue to have serious distrust and public displays of anger around mismanagement of conservation districts. You have to control the University because that is your job. The fact that they have a lease they can do what they want up there. Ms. Townsend noted that the last meeting was held on Maui and this agenda item was not held which is quite telling.

Jean Stoppard Peahi testified that she is an educator under the University of Hawaii system and is not Native Hawaiian although her husband and daughter are. Her family feels there are enough telescopes on Haleakala. There are a lot of cultural and religious significance and part of that is to go up there seeing only the mountain. She suggested

not building anything else up there because of how important it is to the people and that this hearing should have been held on Maui because it affects the population there. Ms. Peahi was concerned with destroying endangered species and history that there is no way to turn it back. Having modern buildings in an area of traditional practice is wrong. There are other things we could do for the economy. She suggested following how Native Hawaiians read astronomy and could relate in education. Ms. Peahi hoped the Board would consider.

Jeff Coon, Associate Science Director for the FAA testified for himself that he has hiked the crater around 20 times and he wouldn't do anything that would impair his ability to appreciate it. ATST represents for science all around the world the biggest step for our ability to understand the sun. For 40 years scientists have been trying to understand what is going on with the sun. This telescope is an instrument to measure the connection between the sun and the earth. This telescope is the most expensive project the NSF has undertaken because it measures magnetism of the earth and the sun. A community of 12 countries with numerous scientists and a huge investment to understand how the sun works and that instrument can't do what it can do from anywhere in the world except from Haleakala where Mr. Coon related how these scientist decided on this site. This telescope can only do what it can do for the world at Haleakala. Civilizations come and go due to climate change induced by the sun. Not everything in CO2 and global warming is produced by man. Those connections depend on the magnetic studies and information that comes from the instruments that you could move forward of the ATST.

Chair Thielen noted that at least 2 of the testifiers raised some legal issues and the Deputy AG is here and suggested seeking advice of counsel.

Member Goode moved to go into Executive Session in order to consult with their attorney on questions and issues relating to departmental permits, and questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities. Member Edlao seconded it.

11:23 PM EXECUTIVE SESSION

12:37 PM RECONVENED

Chair Thielen said this is to provide further guidance on traditional and customary rights. What the Board is asking is to have our counsel confer some more within their organization at the Attorney General's Office and get back to the Board to advise them before the next meeting which is scheduled for December 1<sup>st</sup>. She asked for a motion to defer this matter and place it for the December 1<sup>st</sup> agenda after we have some better guidance from the Attorney General's Office and to make sure the Board moves forward consistent with the decision coming from the Supreme Court on some of the issues that were raised in front of us. Also to give the Board more time to look at the Management Plan that was distributed. If the Board members are in concurrence with that she took a motion.

Member Goode moved to defer Items K-1 and K-2 to the December 1<sup>st</sup> BLNR meeting asking whether they will be taking public testimonies at that meeting for this item where it was confirmed the Board will by Chair Thielen. Member Agor seconded the motion. All voted in favor.

Chair Thielen summarized that the Board is deferring action today where they will be conferring with their counsel and will be placing this on the December 1<sup>st</sup> BLNR meeting. It will be open for public testimonies on December 1<sup>st</sup> and will begin with a staff presentation.

**Deferred (Goode, Agor)**

**The Board moved to defer Items K-1 and K-2 to the December 1, 2010 BLNR meeting.**

Member Gon returned to the Board meeting.

**Item D-7      Authorize the Chairperson of the Department of Land and Natural Resources to Negotiate the Terms and Conditions, and Sign a Memorandum of Agreement between the Department, Tri-Isle Resource Conservation & Development Council, Inc., and Uluniu Beach Reserve Association regarding Maintenance of the Uluniu Kihei Beach Reserve; Grant of Term, Non-Exclusive Easement to Tri-Isle Resource Conservation & Development Council, Inc. for Land Management Purposes; Cancellation of Revocable Permit S-6710 to Myron Higashi and Revocable Permit S-5377 to Douglas M. Sherman; and Issuance of Management Right-of-Entry, Waiohuli-Keokea Beach Homesteads, Kihei, Maui, Tax Map Key Numbers:(2) 3-9-007: portion of 005, (2) 3-9-007: 065, (2) 3-9-008:001, (2) 3-9-009:011, (2) 3-9-009:031, (2) 3-9-009:032, (2) 3-9-009:033, (2) 3-9-009:034 and (2) 3-9-010:777.**

Morris Atta representing Land Division related what this item is and that the Board is aware of the history of the area regarding the inability of the Department to effectively manage this preserve area. As a result, there is a problem with homelessness, crime, litter and over growth and this solution was sought as a public/private partnership to this problem. Staff negotiated much of the terms based on existing beach management recommendations from Tim Levin who was hired by the association to come up with these recommendations. The submittal is a plan that uses the Levin Plan as a general framework with some modifications from input of various interested parties and agencies that oversee management of the area. Staff received comments from various divisions – Aquatic Resources, the wildlife people from Forestry, and Maui Land District Office. There are outstanding issues that need to be resolved to set down implementing the general guidelines laid out by the Levin Plan that will be worked out in the final draft of the MOU contemplated by this request.

John Rapacz, an attorney from Wailuku, Maui representing the Uluniu Beach Reserve Association and for today's meeting the Tri-Isle Resource Conservation and Development Council, Inc. He distributed a booklet saying that the Association is in agreement with Mr. Atta's report, but Mr. Rapacz thought it was important to show some pictures which he described as examples of landowners who do or do not work on the area. A management plan was developed by the landowners to help manage the area using their own funds of about \$60,000 a year and this is an offer to the public to maximize its use. Mr. Rapacz asked for a waiver of the annual lease rent in the bond and thanked the staff.

It was asked by Member Goode whether the Association manages the rock jetty where Mr. Rapacz described in detail and they discussed whether it was to be removed. Mr. Atta said that jetty was never part of these discussions and staff would need to involve OCCL to analyze the sand preserves. There are studies on the impacts, but nothing on what to do about it. Member Goode said there needs to be improvement to the area since the community is working hard on it. Mr. Atta suggested initiating that issue with OCCL to take a look at it and find what to do with this area. Chair Thielen said they could have OCCL look at it internally and see what impacts they predict need to be removed. They may need to work with the University to do a study on it and she suggested Mr. Atta bring that suggestion to Mr. Lemmo.

**Unanimously approved as submitted (Goode, Morgan)**

**Item M-2      Modification/Supplement No. 1 to Lease No. DOT-A-09-0075 FAA Agreement No. DTFAWP-090L-00013, U.S. Federal Aviation Administration, Kona International Airport at Keahole**

Ms. Unoki representing Department of Transportation (DOT) conveyed that on October 9, 2009 the Board approved the lease between the DOT and FAA which is to operate and maintain a new traffic control tower at the Kona International Airport including 3 easements. FAA would like to modify easement 3 to change the area from 1.12 acres to approximately 19,150 square feet and add an easement 4 which will be about 14,091 square feet where easement 4 will be a utility easement. Everything else will stay the same.

Member Gon asked for a map. Ms. Unoki referred to Exhibit I-1 is the leaps and bonds for easement 4. For easement 3 is Insert C.

Darice Young representing FAA explained that easement 3 was going to run another route, but their engineers found a shorter route which will be used for the runway lighting and communication line for the new tower. It made sense to make short sections without having to tear up the road which will save the State and the FAA money. Easement 4 was an addition to easement 1 because there are plans to build a firefighting facility they plan to put in a 12 inch water line now rather than later. They are a third of the way on the construction of the tower.

**Unanimously approved as submitted (Gon, Morgan)**

**Item D-4 Cancellation of Governor's Executive Order No. 3665 and Reset Aside to County of Hawaii for Kealakehe Wastewater Reclamation Field, North Kona Golf Course and/or Public Park, Kealakehe, North Kona, Hawaii, Tax Map Key: (3) 7-4-20:07.**

Ms. Unoki reported that in 2009 Mayor Kenoi requested DLNR to amend Executive Order 3665 (EO) because he wanted to use a portion of the property as an active park for the West Hawaii community, but he also wanted to develop a golf course as well as use some of the reclaimed water for irrigation purposes. The request is to cancel the EO where the County Parks and Rec. will manage the park and maybe Public Works will manage the other portion. The new EO is to the County of Hawaii who will determine who will handle what side. The new EO under recommendation 2.B. has a condition staff normally doesn't put in the EO document and she had a correction to bracket or delete ....[by reason...and conditions of] and adding relating to or arising out of:. In 1991, the Board approved the lease between the County and Kealakehe Associates, Inc. (KAI) for the golf course portion and the County sued the KAI and we have no cancellation document provided to us by the County of Hawaii where staff asked this condition be placed in the EO which is not common.

Chair Thielen inquired that is mainly because we aren't clear about whether there are any remaining claims relating to this agreement and the County would take responsibility with that. Ms. Unoki acknowledged that and said that Corporation Council says they don't believe KAI has any rights, but it's just for protection.

Bo Kahui, Executive Director of the non-profit La'i 'Opua 2020 and he serves on the Native Hawaiian Kaniohale Homestead Association where he distributed written testimonies for Bob Lindsey his staff and his own. Mr. Kahui represents stakeholders in the region and set-up Kealakehe Regional Park Advisory Committee made up of sports enthusiasts. Also, he referred to written testimony from a Mr. Kunitake. Mr. Kahui distributed a La'i 'Opua Community Center brochure and presented it describing the various areas on the map, the plans and the future for the area which he supports. Many in the community don't support the golf course, but they are willing to compromise. Mr. Kahui supports the State's indemnity clause, but he didn't believe it will go anywhere after this.

Chair Thielen noted that when they change an EO they will give people a management right of entry to be able to go in for that purpose pending the finalization of the EO and asked whether they should add a condition pending the completion of the paperwork. Ms. Unoki said that staff will be sending to the AG's and the Governor's Office 2 EO documents and they are backed tracked. The Chair was wondering while staff is getting that done in case anyone wants to do a right-of-entry for working on the purposes of making it a park because right now the right-of-entry is for the golf course. Mr. Kahui said they no more the money for the park yet which will be another year or two, but they want to go after that funding from the County to earmark it for the park. He doesn't want the EO held up. The Chair agreed it doesn't hold up the EO, but allows people to go on the property for planning purposes while waiting for the EO. Mr. Kahui was agreeable to

that and Ms. Unoki acknowledged they could do that. After more discussion it was decided not to add it.

**The Board:**

**APPROVED WITH Amendment to Recommendation B. by deleting bracket items and adding underline item as follows:**

**...harmless from all actions, suits, damages, and claims by whomsoever brought or made [by reason of any non-observance or non-performance of any of the terms, covenants, and conditions of] relating to or arising out of: (1) that certain...**

**Unanimously approved as amended (Goode, Gon)**

**Item D-12 Issuance of Revocable Permit to Waikiki Community Center for Beach Activities Purpose at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:portion of 021.**

Ms. Unoki communicated that Waikiki Community Center is asking that the Board waive the 10 cents per square foot. In September 28, 2001, the Board approved a policy on right-of-entry on unencumbered state lands and the Board delegated to the Chairperson to waive the 10 cents per square foot if it had anything to do with government related projects or the users were not intending to profit monetarily from the use of State unencumbered lands or if the use was going to promote the State of Hawaii via movie, television or other media. Waikiki Community Center is planning to do a fundraiser on State unencumbered lands and is asking the Board to waive the 10 cents per square foot or \$10,400 for a 2 day event. Ms. Unoki related how much the Waikiki Community Center does for the community.

Mike Lee, Interim Executive Director of the Waikiki Community Center testified relating some background on the organization, the fundraiser and asked the Board's support.

Member Morgan moved to approve as submitted including the waiving of the fee. Member Gon seconded that.

**The Board:**

**Approved and amended. Fee is waived.**

**Unanimously approved as amended (Morgan, Gon)**

**Item D-11 Issuance of Revocable Permit to HIH KC Operating Company, LLC, Honolulu, Oahu, Tax Map Key: (1) 2-3-018:045.**

Ms. Unoki reported that we had a new tenant is in the process of acquiring the center from the old tenant, but a month-to-month revocable permit are not transferable and what

will happen is staff will cancel the old one and issue a new one for the parking. Rent is \$520/month which is what the existing tenant is paying.

**Unanimously approved as submitted (Morgan, Goode)**

- Item D-1 Request Permission to Re-Issue New Revocable Permit Documents to 169 Land Division Tenants located on Oahu, Maui, Lanai, Hawaii and Kauai.**
- Item D-2 Amend Prior Board Action of March 11, 2010, Agenda Item D-5, Consent to Extension of Lease Term, General Lease No. S-4307, Geo'Co., Inc., Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3<sup>rd</sup>/2-2-58:03.**
- Item D-5 Issuance of Revocable Permit to David Kaawa III and Madeline Kaawa for pasture purposes at Kau, Hawaii, Tax Map Key: (3) 9-5-12: 19 & 20 and 9-5-13: portion of 1.**
- Item D-8 Authorize the Chairperson of the Department of Land and Natural Resources to Negotiate the Terms and Conditions, and Sign a Memorandum of Agreement between the Department, the Hawaii Housing Finance and Development Corporation ("HHFDC") and Pioneer Mill Company, LLC ("PMCo") regarding the Drainage and Disposal of Transformer Fluid and Cleaning Up Impacted Soils, located in Lahaina, Maui County, at TMK No. (2) 4-5-021:022 (portion of).**
- Item D-9 Issuance of Immediate Right-of-Entry to State Department of Transportation, Highways Division for Kawela Bridge Replacement Purposes, Kawela, Molokai, Tax Map Key: (2) 5-4-001:102 por.**
- Item D-10 Grant of Perpetual, Non-Exclusive Easement to Board of Water Supply for Water Meter Purposes, Sand Island, Honolulu, Oahu, Tax Map Key: (1) 1-5-041:039, 046, 119, 302.**
- Item D-13 Sale of Lease at Public Auction for Intensive Agriculture or Pasture Purposes, Waimanalo, Koolaupoko, Oahu, Tax Map Key:(1) 4-1-027:014.**

Ms. Unoki said she had no changes.

**Unanimously approved as submitted (Gon, Morgan)**

- Item D-6 Issuance of Term, Non-Exclusive Easement to Patrick J. Ballenger, Trustee of the Patrick J. Ballenger Revocable Trust dated October 10, 1988 and Mathew Ballenger, Trustee of the Revocable Trust**

**Agreement of Mariana Van Blom dated March 16, 1983, for Deck Purposes, Lahaina, Maui, Tax Map Key: (2) 4-5-001:seaward of Parcel 4.**

Ms. Unoki noted there is a typo error on page 5, recommendation 3, and the 5<sup>th</sup> line down instead of [concrete piers] it should be deck.

**The Board:**

**APPROVED WITH Amendment to Recommendation 3, 5th line down,  
replace the term "concrete piers" with "deck"**

**This would be consistent with prior statement in the submittal that the purpose be "deck."**

**Unanimously approved as amended (Goode, Gon)**

**Item E-1 Approval to Enter a Grant-In-Aid Agreement with the Friends of Iolani Palace**

**Item E-2 Approval for a Three Month Extension on a Grant-In-Aid Agreement with Kauai Planning and Action Alliance, Inc. (Contract No. 57874)**

Dan Quinn representing State Parks said he had no changes and stand as presented.

**Unanimously approved as submitted (Goode, Morgan)**

**Item J-1 Approval for Contract IFB-M-2011-00-001, Buoy Maintenance and Repair Services for the Islands of Maui, Lanai and Molokai**

Ed Underwood said he had nothing to add to this item.

Deputy Attorney General Linda Chow noted that he needs to make an amendment to the recommendation that it should be the Department of the Attorney General as opposed to the Attorney General.

**The Board:**

**Made an amendment in the recommendation by adding Department of before ...the Attorney General... Otherwise, the submittal was approved as submitted.**

**Unanimously approved as amended (Morgan, Gon)**

**Item L-1 Permission to Contract a Professional Services Consultant to Conduct a Public Safety Assessment at Kaoloa Falls Trail, Hawaii**

Mr. Chang amended the recommendation to delete [‘s office] and add before Attorney General Department of the and he promised to be more consistent.

**Item L-2      Approve and Delegate Authority to the Chairperson to Enter Into Contracts or Agreements and Sign the Necessary Related Documents Needed to Perform Activities Required Under the Community Assistance Program-State Support Services Element (CAP-SSSE) Grant**

Mr. Chang said this is a clarification for the Board that staff gets a grant every year from FEMA and that grant has a number of requirements that staff provides assistance to the Counties through various means. Mr. Chang and the Board related how much outreach is done giving the flood control maps as an example.

**Item L-3      Permission to Contract a Professional Services Consultant to Prepare a Master Plan/EA for the Puu Anahulu Game Management Area (GMA)**

Mr. Chang clarified that this is a multi-year contract because DOCARE gets “X” number of dollars per year. Item 2.B. is saying in the event funds become available in the second or third year of this multi-year contract staff wants authority to execute a supplemental agreement to encumber those funds to the original contract. Staff is asking the Board to allow them to have that leverage to execute a supplemental to include those subsequent funding and be delegated to the Chair.

**Item L-4      Authorization to Enter Into a Memorandum of Agreement and Use and Occupancy Agreement between the State of Hawaii, Department of Land Natural Resources, and the State of Hawaii, Department of Transportation Regarding the Construction of Job No. F46C732C, Kokee/Waimea Canyon State Park Water System Improvements, Makaha Ridge to Puu Ka Pele, Kauai**

Mr. Chang made a change to the recommendation by deleting [deputy] and adding Department of the Attorney General.

**The Board:**

**Amended staff’s recommendation by deleting [deputy] and adding Department of before ...the Attorney General. Otherwise, the submittal was approved.**

**Unanimously approved as amended (Gon, Morgan)**

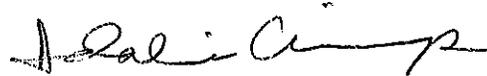
**Item M-1      Issuance of a Retail Concession Kahului Airport**

**Unanimously approved as submitted (Goode, Morgan)**

**Adjourned (Gon, Goode)**

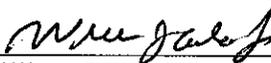
There being no further business, Chairperson Thielen adjourned the meeting at 2:14 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings  
Land Board Secretary

Approved for submittal:

  
\_\_\_\_\_  
William J. Aila, Jr.  
Interim Chairperson  
Department of Land and Natural Resources