

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

September 14, 2012

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Deny Henry Chang Wo's and Michael Kumukauoha Lee's Requests for a Contested Case and Reconsider the Board's Decision to Grant the Conservation District Use Permit or Grant a Discretionary Hearing and Authorize the Chairperson to Select and Appoint a Hearing Officer for the Kalo'i Gulch Drainage Improvements Located at Oneula Beach Park, Honouliuli, Ewa, Oahu, Makai of TMKs: (1) 9-1-011:007 & (1) 9-1-134:006

BACKGROUND

The land use is intended to provide flood control and address regional drainage needs within the Kalo'i Gulch watershed. Future upland development plans are currently constrained due to the retention of surface flows. To prevent potential flooding of downstream properties during a high rainfall event, runoff is to be directed into golf courses, grassed swales and drainage channels that lead to an ocean outlet at the shoreline and within the Conservation District.

The 0.5-acre drainage improvement consists primarily of lowering the natural berm along the shoreline to allow storm-water flows to reach the ocean and raising the channel banks with the excavated material. The entire site shall be landscaped to merge with the rest of Oneula Park.

This project was the subject of a prior contested case that included Mr. Michael Kumukauoha Lee in 2008. The project was disapproved by the Board of Land and Natural Resources. It appeared that the sole applicant, Haseko, was not able to justify the necessity of the drainage improvements at that time. Since then, development within the Kalo'i watershed area has continued to increase and storm drainage standards have been revised by the City for regulating flood control.

An application was resubmitted for the same project. It only differed in that it included multiple applicants: Haseko (Ewa) Inc.; the University of Hawaii-West Oahu; the Department of Hawaiian Homelands; and the City & County of Honolulu-Department of Planning and Permitting. The prior application only included Haseko as the applicant. According to the applicants, they are undertaking this effort to integrate and coordinate upland development infrastructure with regional drainage infrastructure development.

On March 23, 2012, the Board of Land and Natural Resources under Agenda Item K-1, granted Conservation District Use Permit (CDUP) OA-3604 for the Kalo'i Gulch Drainage Improvements proposed on submerged land makai of TMKs:(1) 9-1-011:007 & (1) 9-1-134:006 subject to 18 conditions (**Exhibit 1**).

RECEIVED PETITIONS (Exhibits 2 & 3)

At the March 23, 2012 Land Board meeting, there were two oral requests for a contested case by Mr. Lee and by Alan Murakami, an attorney with the Native Hawaiian Legal Corporation, on behalf of Henry Chang Wo. The Board received Mr. Chang Wo's petition for a contested case hearing and his \$100.00 filing fee on March 27, 2012. The Board received Mr. Lee's petition for contested case hearing on March 29, 2012 with no filing fee and no request to waive the filing fee in this matter.

In the earlier contested case noted as OA 08-03, Mr. Lee was found to have standing to challenge the application for the same drainage project. Hearing Officer Dr. Lawrence Miike found that Mr. Lee is of native Hawaiian ancestry, lives in the moku of Ewa, and gathers shells and limu in the area makai of the Kalo'i Gulch drainage way project. Based on those findings, Dr. Miike concluded that Mr. Lee's "own practices in the petition area are of such personal and special interests to meet the standing requirements." Those findings were adopted by the Land Board in its Decision and Order dated January 9, 2009. Mr. Lee's interests were discussed in the Hearing Officer's Proposed Findings of Fact Conclusions of Law of the previous contested case proceedings for the Kaloi Gulch drainage way.

DISCUSSION

The Land Board is obligated to protect and preserve traditional and customary native Hawaiian rights to the extent feasible and to make certain findings.¹ The Hawaii Supreme Court defined the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests:

"At a minimum specific findings and conclusions as to the following: (1) the identity and scope of 'valued cultural, historical, or natural resources' in the petitioned area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist."

Staff notes there is a Final Environmental Impact Statement for the Kaloi Gulch Drainageway Improvements at Oneula Beach Park dated December 2005 (FEIS) which was accepted by the City and County of Honolulu Department of Planning and Permitting. Although there is evidence in the FEIS and the prior contested case regarding resources and traditional and customary rights in the project area, specific findings were not made by the Board prior to granting the CDUP.

To address this, staff suggests alternative actions. Either:

- 1) Reconsider the Board's prior decision, giving consideration to the Ka Pa'akai factors, and then come to a new determination with those factors as part of the analysis, or
- 2) Grant a discretionary hearing.

The contested case requested by Mr. Lee and Mr. Chang Wo is not mandatory because a contested case is not required by law. The Hawaii Revised Statutes (HRS) §91-1(5), defines a

¹ Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 45, 7 P.3d 1068, 1082 (2000)

“contested case” as a proceeding in which the “legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.”

HRS §91-1(6) defines an agency hearing as ‘such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14.’ The question of whether Petitioners are entitled to a contested case depends on whether an agency hearing is “required by law” and whether a contested case would determine the “legal rights, duties, or privileges of specific parties.”

A contested case is “required by law” if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if a hearing is mandated by due process. In this case, no statute or rule requires a hearing prior to the issuance or denial of a CDUP.

Whether a contested case is required by due process depends on whether Petitioners have a property right that is affected by the CDUP. The Hawaii Supreme Court has held that asserted property interests that are purely of an aesthetic and environmental nature do not rise to the level of a protectable property interest for due process purposes.

The Petitioners cite Article XII, Section 7 of the Hawaii State Constitution as providing such a due process property right that entitles them to a contested case hearing. Article XII, Section 7 of the Hawaii State Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

The legal privilege to engage in traditional and customary native Hawaiian rights is not the type of property interest that is protected by the due process clause of the United States Constitution or the Hawaii State Constitution and, therefore, does not entitle practitioners of such traditional and customary Hawaiian rights to a contested case hearing. The totality of circumstances must be considered in balancing the competing interests.

Any native Hawaiian rights conferred by Article XII, Section 7 of the Hawaii State Constitution are not absolute and may be restricted by the balancing of any competing rights. Such rights that are limited by countervailing interests do not rise to the level of a due process property interest.

It is further noted that a claim of right under Article XII, Section 7 of the Hawaii State Constitution is contingent on the claimant establishing to the Board's satisfaction that the claimant meets the three legal criteria set forth by the Hawaii Supreme Court to show that his activity is afforded constitutional protection: (1) that he is native Hawaiian; 2) the claimant rights must be constitutionally protected as a customary or traditional native Hawaiian practice; and 3) that the exercise of the right occurred on undeveloped property.

Discretionary Hearing

Even though a contested case is not required by law, the Board can exercise its discretion and grant a hearing. In this matter, the Board should consider granting a discretionary hearing if such hearing is necessary to provide the Board with sufficient information to make necessary findings,

including the findings required by Ka Pa'akai. Staff recommends the Board consider a discretionary hearing to present additional evidence and argument on the traditional and customary rights so that appropriate findings can be obtained.

Should Mr. Lee wish to be a party in this matter, a \$100.00 filing fee or a request for waiver of the fee shall be submitted to the Department pursuant to §13-1-30, HAR.

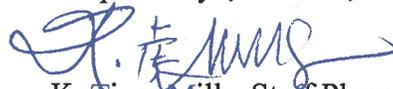
Alternatively, if the Board decides to deny Mr. Chang Wo's and Mr. Lee's requests for a contested case hearing, the Board should reconsider the CDUP and issue additional necessary findings, including identifying traditional and customary rights that are practiced in the area covered by the CDUP and, if there are such traditional and customary rights being practiced, the extent to which such rights may be affected by the CDUP, and what feasible action, if any, will be taken to protect such rights.

RECOMMENDATION:

Staff therefore recommends that the Board either:

- (a) Deny Mr. Chang Wo's and Mr. Lee's requests for a contested case and the Board reconsider its decision to grant the CDUP and issue additional necessary findings as discussed above, or
- (b) Grant a discretionary hearing on this matter and:
 - 1) Find that Petitioner Henry Chang Wo may be a party to the discretionary hearing;
 - 2) Find that Petitioner Michael Kumukauoha Lee be a party to the discretionary hearing if he complies with §13-1-30, HAR;
 - 3) The hearing be limited to identifying traditional and customary rights that are practiced in the area covered by the CDUP, and, if there are such traditional and customary rights being practiced, the extent to which such rights may be affected by the CDUP, and what feasible action, if any, will be taken to protect such rights;
 - 4) The Board authorize the appointment of a Hearing Officer to conduct the discretionary hearing limited to the issues described above and report back to the Board for a final decision; and
 - 5) The Board delegate authority for selection of the Hearing Officer to the Chairperson.

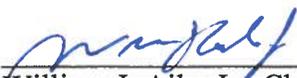
Respectfully submitted,



K. Tiger Mills, Staff Planner

Office of Conservation and Coastal Lands

Approved for submittal:



William J. Aila, Jr., Chairperson
Board of Land and Natural Resources

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:TM

CDUP: OA-3604

Dean Uchida
SSFM International, Inc.
501 Sumner Street, Suite 620
Honolulu, HI 96817

MAR 27 2012

SUBJECT: Conservation District Use Permit (CDUP) OA 3604 for the Kaloi Gulch
Regional Drainage Improvements

Dear Mr. Uchida:

This is to inform you that on March 23, 2012, the Board of Land and Natural Resources APPROVED your clients: Haseko (Ewa) Inc.; University of Hawaii-West Oahu; Department of Hawaiian Homelands; and the City & County of Honolulu-Department of Planning and Permitting Conservation District Use Application (CDUA) OA-3604 for the Kaloi Gulch Drainage Improvements located on submerged land makai of TMKs:(1) 9-1-011:007 & (1) 9-1-134:006 subject to the following conditions:

1. The permittees shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of Title 13-5 of the Hawaii Administrative Rules (HAR);
2. The permittees, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
3. The permittees shall obtain appropriate authorization from the department for the occupancy of state lands;
4. The permittees shall comply with all applicable department of health administrative rules;
5. The permittees shall observe guidelines and implement policies and principles of the Ewa Development Plan;
6. Before proceeding with any work authorized by the department or the board, the permittees shall submit four copies of the construction plans and specifications to the chairperson or an authorized representative for approval for consistency with the

EXHIBIT 1

- conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the permittees. Plan approval by the chairperson does not constitute approval required from other agencies;
7. Unless otherwise authorized, any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and shall be completed within three years of the approval of such use;
 8. The permittees shall notify the department in writing when construction activity is initiated and when it is completed;
 9. All representations relative to mitigation set forth in the accepted environmental impact statement for the proposed use are incorporated as conditions of the permit;
 10. The permittees understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
 11. In issuing the permit, the department and board have relied on the information and data that the permittees has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
 12. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the permittees shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
 13. During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
 14. The permittees acknowledges that the approved work shall not hamper, impede, or otherwise limit the exercise of traditional, customary, or religious practices of native Hawaiians in the immediate area, to the extent the practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
 15. Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact SHPD (808-692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary;
 16. The applicant shall plan to minimize the amount of dust generating materials and activities. Material transfer points and on-site vehicular traffic routes shall be centralized. Dusty equipment shall be located in areas of least impact. Dust control measures shall be provided during weekends, after hours and prior to daily start-up of project activities.

Dust from debris being hauled away from the project site shall be controlled. Landscaping and dust control of cleared areas will be initiated promptly;

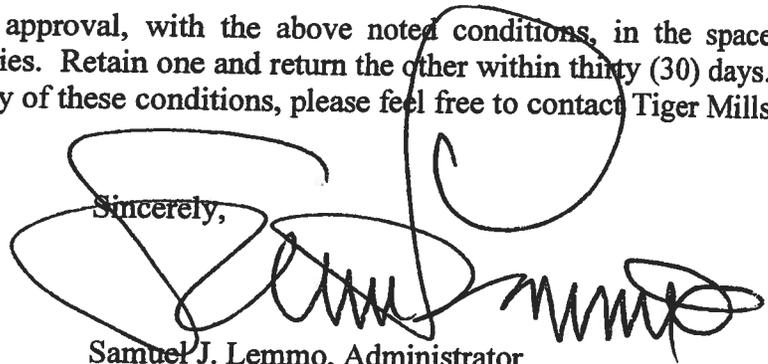
17. Other terms and conditions as may be prescribed by the Chairperson; and

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

In addition, the permittees shall maintain and monitor their drainage basins and drainage facilities and strive to improve the Comprehensive Drainage Plan to decrease point/non-point pollution into the offshore water. Ocean water quality monitoring shall continue and after a storm event in which storm water flows to the ocean, the drainage area shall be cleared of debris.

Please acknowledge receipt of this approval, with the above noted conditions, in the space provided below. Please sign two copies. Retain one and return the other within thirty (30) days. Should you have any questions on any of these conditions, please feel free to contact Tiger Mills at 587-0382.

Sincerely,



Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

Receipt acknowledged:

Signature

_____ Date _____

c: Chairperson
ODLO/DoH
City and County of Honolulu
~Department of Planning and Permitting



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED VATION

PETITION FOR A CONTESTED CASE HEARING

2017 MAR 21

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390

- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Henry Chang Wo	2. Contact Person David Kimo Frankel	
3. Address _____. Street	4. City Ewa Beach	5. State and ZIP HI 96706
6. Email _____.com	7. Phone (808)	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name David Kimo Frankel	10. Firm Name Native Hawaiian Legal Corporation	
11. Address 1164 Bishop St. #1205	12. City Honolulu	13. State and ZIP HI 96813
14. Email dafrank@nhlchi.org	15. Phone 808-521-2302	16. Fax 808-537-4268

C. SUBJECT MATTER

17. Board Action Being Contested

Approval of Conservation District Use Application (CDUA) OA-3604 for a Portion of the Kaloi Gulch Drainage Improvements by Haseko (Ewa) Inc., University of Hawaii - West Oahu, Department of Hawaiian Homelands, City & County of Honolulu - Department of Planning and Permitting Located at Oneula Shoreline/Submerged land, Ewa, Island of Oahu, Makai of TMKs: (1) 9-1-011:007 & (1) 9-1-134:006

18. Board Action Date

3/23/12

19. Item No.

K-1

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

Petitioner and his ancestors have traditionally and customarily gathered limu and other marine life from the area fronting, adjacent to, and near the area affected to be the proposed Kaloi Gulch drainage "improvements" proposed by applicants. He has gathered limu and restored limu grounds along the shoreline area and nearshore waters and used the potentially affected marine area to educate legions of youth about the nature of the traditional and customary use of the area, so the knowledge of these practices are handed down to future generations. see, attached declaration. see also the DLNR's file in OA-08-03, the previous contested case hearing on Haseko's request for Kaloi Drainage Improvements.

Petitioner's interests stem from his (a) traditional and customary practices; (b) recreational interests; (c) cultural interests; and (d) environmental interests.

21. Any Disagreement Petitioner May Have with an Application before the Board

The proposed project will adversely affect limu, fish, other marine life, water quality, gathering practices, recreational activities and existing burials in the area. The proposed project would adversely affect Petitioner's traditional and customary practices, his cultural interests, his recreational interests and his environmental interests. The applicants and DLNR have inadequately assessed existing conditions, uses, and impacts of, and alternatives to, the project. The applicants have failed to meet their burden of demonstrating that the proposed land use under, and the CDUA fails to meet the criteria in, HAR Chapter 13-5 (including HAR § 13-5-30(c) for obtaining a conservation district use permit as well as the public trust doctrine, Native Hawaiian rights, Hawai'i State Constitution Articles XI § 1 and § 9, and XII § 4 and § 7, section 5(f) of the Admissions Act; and HRS Chapters 7 and 205A, and other applicable legal authority.

This Board has previously denied the substantively identical request by Haseko. Furthermore, the circuit court overturned this Board's approval of Haseko's request to discharge polluted water a few hundred yards from this location because the BLNR failed to consider the cumulative impacts of doing so.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

The BLNR should (a) grant this request for a contested case hearing and allow a HRS chapter 91 contested case hearing to proceed in the absence of any approval of the CDUA; (b) deny the application for the subject CDUA; and (c) rule that its March 23, 2012 approval of the CDUP is null and void.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

The proposed project will adversely affect limu, fish and other marine life, water quality, constitutionally protected gathering practices, recreational activities and existing burials in the area. The contested hearing will be the only way to identify crucial facts and reasonable alternatives that the DLNR has failed to identify or analyze in accordance with governing law related to the public trust and constitutional provisions. The hearing will serve the public interest by allowing full implementation of HAR Chapter 13-5 for obtaining a CDUA permit, Haw. Const., Art. XII, §7; Art. XI §§1 and 9, and the Ka Pa`akai v. Land Use Commission decision of the Hawai`i Supreme Court, all of which the BLNR did not consider or analyze in its March 23, 2012 decision. Enforcing the rights of Hawaiians attempting to preserve their traditional and customary practice is a public trust purpose in and of itself and is necessarily in the public interest. Petitioner's participation in a contested case hearing will enable the BLNR to engage in the analysis required under the Haw. Constitution, Ka Pa`akai and other governing constitutional, statutory and regulatory criteria, all of which would serve the public interest. As a respected kupuna in the Hawaiian community, Uncle Henry represents the highest ideals of the traditional and customary practitioner whose rights this Board must acknowledge and should respect by allowing his participation in the requested contested case hearing. His extensive cultural knowledge makes him an ideal party to engage in a hearing of this sort.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Please review DLNR's file in OA-08-03, the previous contested case hearing on Haseko's request for Kaloι Drainage Improvements.

The facts concerning the project's impacts on natural and cultural resources will be presented in the course of the contested case hearing. While the facts may be disputed, the applicant bears the burden of demonstrating that the proposed land use is consistent with the criteria of HAE 13-5-30(c), the public trust doctrine, Native Hawaiian rights and other applicable authority.

The BLNR previously held a contested case hearing to make these same "improvements" to Kaloι Gulch. Granting a hearing in this instance would be consistent with that prior decision. The essential issue is whether the applicant has met its burden of demonstrating that the proposed land use is consistent with the criteria detailed in HAR § 13-5-30(c), the public trust doctrine, Hawai`i State Constitution Articles XI § 1 and § 9, and XII § 4 and § 7; section 5(f) of the Admissions Act; and HRS Chapters 7 and 205A. Among the issues to be considered are impacts to limu, marine life, water quality, public lands, cultural practices, religious practices, historic sites, cultural sites, burials, native Hawaiian health, public trust resources, and other natural resources. Should limu, marine life, water quality and traditional Native Hawaiian practices protected by the Hawai`i Constitution, be sacrificed as a trade-off to provide drainage, which could be diverted elsewhere to larger settlement basins on more acreage in order to accommodate future upland development plans [which] are currently constrained due to the retention of surface flows?

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

David Kimo Frankel for Henry Chang
Wo

Petitioner or Representative (Print Name)



Signature

MAR 27 2012

Date

DECLARATION OF HENRY CHANG WO JR.

I, HENRY CHANG WO JR., declare that:

1. I have personal knowledge of the following facts and am competent to testify to them.
2. I am Hawaiian.
3. My father was Henry Chang Wo and he was fifty percent Hawaiian. My mother was Irene Kekona and was seventy-five percent Hawaiian.
4. I was born on O`ahu and grew up in Aiea. My family members were fishermen and farmers. My grandparents taught us about ocean life when we were very young. My grandmother subsidized her income by collecting limu and `opihi. My mother and my aunt were instrumental in teaching me about limu. They were both skindivers. We grew up learning different types of limu, what they were used for, when to pick them, and how to pick the limu.
5. We would go to `Ewa Beach almost every weekend when I was growing up. We would collect limu every time we went to the beach. We would eat the limu there and bring the limu home to eat later.
6. I`ve lived in `Ewa Beach for thirty years.
7. About a decade ago, I started working with Uncle Walter Kamana. He was the la`au lapaau of limu. He taught me a lot about the medicinal uses of limu.
8. I am skilled at finding all types of edible limu. About twelve varieties of edible limu are part of my everyday diet.

9. I have lived in `Ewa Beach for thirty years. I have used the area *makai* of Kalo`i Gulch. I have gathered limu from that area; and taught others about the limu that grow there.

10. I`m concerned about the impact from Kalo`i Gulch on the whole area. Limu grow to the west and east of Kalo`i Gulch.

11. At this spot, I have found many types of limu (limu līpe`epe`e, pālahalaha, līpoa, māne`one`o, wawae`iole (two different types), limu kohu, limu kala, alani, pūhā, manauca; fish (manini, palani, `anuhenuhe, puwalu, hīnālea, kūpīpī, mullet, ō`io, awa (seasonal) moi, weke and āhole); and other marine life (rare green sea turtle, sea cucumber, wana, and corals).

12. The existing drainage outlets in `Ewa contain certain limu, but contain far less diversity than found at the spot where Haseko proposes to build a drainage system. Approximately seventy-five percent of the limu that grow in abundance at this spot are not found in the areas near the existing outlets. No wana, sea cucumbers – or very few – are found near the outlets. There are, however, more invasive limu in those areas.

13. The reason that fewer limu and other marine life grow at the outlet sites is the sediment and pollution.

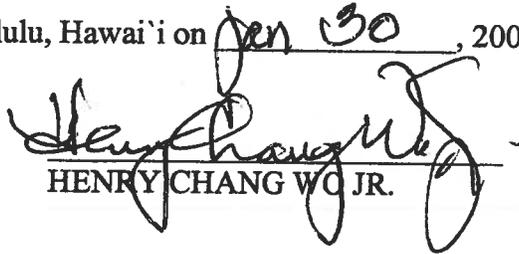
14. Based on my experience observing the conditions near the other outlets, if this drainage outlet is built, it will destroy the diversity of marine life in this area including the limu that grow there and the fish that feed on the limu.

15. I will no longer be able to engage in my traditional and customary practice of gathering limu in the area.

16. Over the years, I have seen hundreds and hundreds of different people using this particular area – and enjoying it. They fish, gather limu and other marine life, surf and snorkel.

I, HENRY CHANG WO JR., do declare under penalty of law that the foregoing is true and correct.

Executed in Honolulu, Hawai'i on Jan 30, 2008


HENRY CHANG WO JR.



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED
 DEPARTMENT OF LAND & NATURAL RESOURCES
 STATE OF HAWAII
 2012 MAR 29 P 12:55
 DEPARTMENT OF LAND & NATURAL RESOURCES
 STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

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Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390

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A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Michael Kumukauoha Lee	2. Contact Person Michael Kumukauoha Lee	
3. Address	4. City 'Ewa Beach	5. State and ZIP HI 96706
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER

17. Board Action Being Contested

Board of Land and Natural Resources Meeting of March 23, 2012, Conservation District Use Application (CDUA) OA-3604 for a Portion of Kalo'i Gulch Drainage Improvements by Haseko (Ewa) Inc., University of Hawaii-West O'ahu, Department of Hawaiian Homelands, City and County of Honolulu-Department of Planning and Permitting Located at Oneula Shoreline/Submerged land, 'Ewa, Island of O'ahu, Makai of TMK's: (1) 9-1-011:007 &(1) 9-1-134:006

18. Board Action Date

March 23, 2010

19. Item No.

K-1

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

Established Native Hawaiian Traditional Cultural Practitioner in 'Ewa region protected by State of Hawai'i, Hawai'i Revised Statutes and judicial opinion as Kahuna La'au Lapa'au o Limu, having successfully achieved legal standing in a previous case by this same applicant for this same area.

21. Any Disagreement Petitioner May Have with an Application before the Board

Inadequate and inefficient government regulatory oversight of public trust resources thereby irreparably and unreasonably harming my ability to exercise my traditional and customary Native Hawaiian practices. DLNR/SHPD admission that 3-4 years of developer self-monitoring activities and loss and destruction of irreplaceable resources. Efficacy of DLNR/BLNR in properly identifying, assessing, mitigating natural, cultural and historical resources and traditional and customary Native Hawaiian practices pursuant to Ka Pa'akai Supreme Court Case and 1998 Supreme Court Memorandum Opinion on Haseko/'Ewa Marina and BLNR failures.

Significant Ali'i burial site identified in beach are to be destroyed by construction of marina entrance. Improper regulatory oversight and archaeological investigation of cultural and historic resources. This includes a failure to properly identify and protect the waihuna (fresh water springs) and the Karst, or underwater stream in the area of the proposed marina, in One'ula park, fronting Kalo'i Gulch and along the coastline which can impact the shoreline area via alteration of the ebb and flow of fresh water into the ocean which is a critical component of the viability of the limu resources and diversity of marine life, all resources which my traditional Hawaiian practices rely upon, as well as impact the stability of the underground network of coral and limestone caverns and tubes which may impact cultural resources in the beach area as well. Fresh water, as the embodiment of the Hawaiian akua Kane, was and is still sacred as a life giving element. The impacts to the fresh water and brackish water lens is still indeterminate since issues were raised over fifteen years ago. The obliteration of the historic and cultural sites, the "accidental" destruction and alteration of sites committed to be preserved, the "accidental" destruction of the endangered candidate opae'ula sinkhole, the discovery of a highly significant ali'i burial site at the proposed marina entrance, the high potential for toxicity and anoxic conditions to develop in a reduced marina with more stagnant water and less circulation, and the SHPD admission that it failed to monitor the destruction of the cultural landscape for years should raise a serious red flag with the BLNR as to the upholding of constitutional, statutory and judicial mandates in this matter.

I am competent to testify to the matters herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.

- I am a Papakilohökü and a Native Hawaiian practitioner of limu medicine and a practitioner of the Hä;

- My knowledge of limu was taught to me by my grandfather, Kino Guerrero and Uncle Walter Kamana;
 - My knowledge of Hä comes from Auntie Alice Holokai;
 - I possess knowledge of the kaona of the 2102 lines of the Kumulipo;
 - I am compelled to come forward at this time to reveal certain facts regarding significant Native Hawaiian cultural sites due to the threat of imminent harm, alteration, and destruction of these sacred sites;
 - The complex of sites addressed in this specific declaration are located in 'Ewa on the Island of O'ahu;
 - These sites are associated with Kalanikupule and his wives;
 - These sites are associated with Kaumuali'i and Kahekili;
 - These sites are associated with Captain Henry Barber and the ship Arthur;
 - These sites are associated with the Battle of Kuki'iahu and Kaeokulani;
 - These sites are directly associated with the aftermath of the Battle of Nu'uanu Pali in 1795;
 - Some of the sites include burial sites including the burial site of Kaeokulani; The burial site in One'ula discovered in January of 2001 is that of Kaomileika'ahumanu, the true mother of Kauikeaouli, Kamehameha the III;
- The storm water overflow and destruction of sand berms in the area of Kalo'i Gulch will adversely impact my traditional and cultural practices and irreparably harm the source of my Hawaiian medicine unique to this area;

There is a pattern of disrespect by the primary applicant, Haseko, of Native Hawaiian culture and 'aina resources found nowhere else in the World. The renewed CDUA is not in compliance with previous judicial orders from the First Circuit Court on this same issue.

The endangered Hawaiian Monk Seal utilizes this area for resting, birthing and rehabilitation and with greater and greater storm water runoff and more frequent storm events with changing Earth climate, the discharge of more pollutants from mauka development projects, and less retention basins, spells out a death sentence for rare and endangered limu only found in this area which seeds the reefs from Waikiki to Nanakuli.

Also the Ni'ihau shells found in this area are an important indicator of the health of our limu and we utilize the shells for our cultural practices and the chitons, also known a pu'umo'o is utilized in the mawaewae ceremony for newborn children to clear their path in life. These are found in the area fronting Kalo'i Gulch in the ocean.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

Proper analysis of water quality and cumulative impacts of the proposed project with existing stormwater discharges; or nutrient loads from Haseko's proposed stormwater outfall as mandated by the First Circuit Court in their January 17, 2008 Order.

Proper identification and protection of historic and cultural sites. Protection of exercise of my religious and traditional and customary native Hawaiian practices and historical, cultural and natural resources my practices rely upon.

Follow through on O'ahu Island Burial Council recognition of significant ali'i burial complex in the area of the proposed 'Ewa Marina and underground water resources, such as the underground stream (Karst) which was breached by Haseko, be inspected and corrected.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

The Legislature has found that historic sites and especially unmarked burial sites are at increased risk of destruction and it serves the public interest to protect and preserve the traditional cultural landscape. Furthermore, the Constitution of the State of Hawai'i, in Article 12, Section 7, protects the exercise of traditional and customary practices and inherently, the resources these practices rely upon. My connection to 'Ewa, the individuals buried in the unmarked burial areas, the knowledge I possess of traditional uses of the resources in the area, like limu, are important to the general public as there are established healing properties for many common and fatal diseases society is afflicted with. Preserving the cultural heritage of Hawaii is important to the well being of the populace. Article XII, Section 7, of the Constitution of the State of Hawaii states:

TRADITIONAL AND CUSTOMARY RIGHTS, Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

Notwithstanding the strong Constitutional mandates and statutory obligations set forth to recognize the duties of the State of Hawai'i and its sub-agencies to protect the traditional and customary rights of native Hawaiians and Hawaiians, the Hawaii Supreme Court has set forth judicial guidance and interpretation in this regard as well.

In *Public Access Shoreline Hawai'i vs. Hawai'i County Planning Commission (PASH)*, 79 Hawai'i 425 (1995), hereinafter PASH, the Hawaii Supreme Court, recognizing over 150 years of court decisions validating the existence of Native Hawaiian traditional and customary rights as part of the state's common law, reiterated that:

The State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians.

In *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31 (2000), hereinafter *Ka Pa'akai*, the Hawaii Supreme Court, again noting it was clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians, to the extent feasible, noted the findings of the Hawaii State Legislature in 2000 that:

[T]he past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture. Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000).

The *Ka Pa'akai* court also noted:

With regard to native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawai[i]." *Pele Defense Fund v. Paty*, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), certiorari denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993).

The Ka Pa'akai court also set forth an analytical framework, in that instance for the LUC to adhere to, but in the spirit and intent of the law, a framework that all State and County entities should follow, especially the BLNR, which is espoused as follows. The proper analysis of cultural impacts should include:

1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources -- including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the (agency) to reasonably protect native Hawaiian rights if they are found to exist.

Via this Petition, I am helping the BLNR fulfill their duty on behalf of the public.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

I have been granted standing in the Papipi Road issue and Kalo'i Case issue, before this very same BLNR for the very same area ('Ewa) and same development. (Haseko) I have also been recognized as a cultural descendant by the O'ahu Island Burial Council to this very same area and the primary informant for the ali'i burial complex and heiau which the OIBC officially recognized. I have a very strong, distinct and vested interest in this area as a Kahuna Lapa'au La'au o Limu and successfully challenged this same CDUA for Kalo'i Gulch and obtained a favorable January 17, 2008 ruling from the First Circuit Court vacating this Board's May 11, 2007 Order granting Haseko's request for a conservation district use permit to discharge polluted stormwater into the ocean. The Court remanded the decision "to the Board for receiving evidence and providing findings of fact and conclusions based upon a supplemental record." The Court's decision was based on the fact that "Haseko's water quality analysis failed to consider the cumulative impacts of the proposed project with existing stormwater discharges; or nutrient loads from Haseko's proposed stormwater outfall." Haseko has failed to provide this Board with any of the required evidence.

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Michael Kumukauoha Lee
Petitioner or Representative (Print Name) Michael Kumukauoha Lee March 29, 2012
Signature Date