

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawai`i**

February 14, 2014

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawai`i**

**REGARDING:** Contested Case Request HA-14-01 Regarding Conservation District Use Permit (CDUP) HA-3674 for the Old Plantation Spring Pipeline

**PETITIONER:** Abel Simeona Lui

**LANDOWNER:** The Nature Conservancy; State of Hawai`i

**LOCATION:** Kaiholena, Ka`u, Hawai`i; TMKs: (3) 9-7-001:001, 004, and 016

**SUBZONE:** Protective and Resource

**I. BACKGROUND**

On November 8, 2013, the Board, at its regular meeting held pursuant to HRS chapter 92 (sunshine law), approved Conservation District Use Permit (CDUP) HA-3674 for the installation of a water pipeline located at Old Plantation Spring at Kaiholena, Ka`u, Hawai`i, by applicant Kuahiwi Ranch. The proposed pipeline would cross over two parcels of state land and a parcel under private ownership to The Nature Conservancy. The water would be conveyed by a 2-inch above-ground pipeline and without any grading, grubbing, or tree removal.

Mr. Lui orally requested a contested case hearing at the board meeting and submitted a written petition that was received by the Office Conservation and Coastal Lands (OCCL) on November 18, 2013<sup>1</sup> (**Exhibit 1**). The Petition alleges that he is "a lineal heir of properties ... in Hilea, Kaalaiki Kau, HI" and later states that he is native Hawaiian and a taro farmer.

**II. QUESTIONS AND SUMMARY OF ANSWERS**

**Question 1:** *Is Mr. Lui entitled to a review of the Board's November 8, 2013 action regarding issuance of a CDUP to Kuahiwi Ranch by way of contested case?*

No. It is clear as a matter of law (HAR § 13-1-29.1) that petitioner is not entitled to a contested case hearing.

**Question 2:** *Is the issuance of the CDUP proper pending this determination of contested case rights?*

No. Under recent case law, the issuance of the CDUP should have been stayed pending this determination of contested case rights.

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<sup>1</sup> The petition request met the deadline imposed by Hawaii Administrative Rules (HAR) § 13-1-29.

### III. DISCUSSION

#### A. Legal framework

A contested case is defined by Hawaii Revised Statutes (HRS) § 91-1(5)(1993) as “a proceeding in which the legal rights, duties, or privileges of specific persons are required by law to be determined after an opportunity for agency hearing.” An “agency hearing” is defined by section 91-1(6) as “such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14.”<sup>2</sup>

This definitional scheme is circular and the case law interpreting it is exceedingly complex. However, the question of whether a contested case must be afforded in any particular matter may usefully be divided into two parts. First, could anyone be entitled to a contested case - i.e., are rights of any “specific person” “required by law” to be determined after an “agency hearing”? Second, does the particular person requesting a contested case have standing - i.e., is the requestor one of the specific persons at issue in the first part of the inquiry? *C.f.* HAR § 13-1-29.1 (distinguishing “a subject that is not within the adjudicatory jurisdiction of the board” from “a petitioner [who] does not have a legal right, duty, or privilege entitling one to a contested case proceeding”); *Kaleikini v. Thielen*, 124 Haw. 1, 17, 237 P.3d 1067, 1083 (2010) (noting separate requirements that the contested case must have been “required by law and determined the rights, duties, and privileges of specific parties” and “the claimant’s legal interests must have been injured - i.e., the claimant must have standing to appeal”) (internal punctuation and citation omitted).

#### 1. Whether a contested case is required by law to determine the legal rights, duties, or privileges of specific persons

A contested case hearing 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. *Bush v. Hawaiian Homes Comm’n*, 76 Haw. 128, 134, 870 P.2d 1272, 1278 (1994).

As to due process, the Hawai‘i supreme court has said, “[I]n order to assert a right to procedural due process, [a party] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989). *Accord, Brown v. Thompson*, 91 Haw. 1, 10, 979 P.2d 586, 595 (1999):

a claim of due process right to a hearing requires a two[-]step analysis: (1) is the particular interest which the claimant seeks to protect by a hearing “property” within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is “property” what specific procedures are required to protect it. (Citations omitted).

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<sup>2</sup> The Board’s sunshine meeting is not an “agency hearing” as that term is used in these definitions. *Pele Defense Fund v. Puna Geothermal Venture*, 77 Haw. 64, 69, 881 P.2d 1210, 1215 (1994)(holding that a Board sunshine meeting is a “public hearing required by law” but not a “contested case hearing”).

Property interests are protected by the Constitution. However, they “are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Int’l Broth. Of Painters and Allied Trades v. Befitel*, 104 Haw. 275, 283, 88 P.3d 647, 655 (2004) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). This property interest must be one for which the claimant has “a legitimate claim of entitlement” and must be “more than an abstract need or desire for it” or “a unilateral expectation of it.” *Bush*, 76 Haw. at 136, 870 P.2d at 1280 (quoting *Bd. of Regents*).

Article XII, section 7 of the state constitution is a particularly noteworthy possible source of such protectable rights. It states:

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 Hawai‘i supreme court has said, “This provision places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies ‘the power to protect these rights and to prevent any interference with the exercise of these rights.’” *Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n*, 94 Haw. 31, 45, 7 P.3d 1068, 1082 (2000).

The *Ka Pa‘akai* court went on to define an “analytical framework in an effort to effectuate the State’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests”:

In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must - *at a minimum* - make specific findings and conclusions as to the following: (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 LUC to reasonably protect native Hawaiian rights if they are found to exist.

*Ka Pa‘akai*, 94 Haw. at 46-47, 7 P.3d at 1083-1084. The case specifically applies to the LUC, but its reasoning is equally applicable to other state agencies, including the Board.

## 2. Standing

The question of whether a particular person has standing involves a three part test:

- (1) whether the person “has suffered an actual or threatened injury as a result of the defendant's wrongful conduct,”
- (2) whether “the

injury is fairly traceable to the defendant's actions," and (3) whether "a favorable decision would likely provide relief for [the person's] injury."

*E & J Lounge Operating Co., Inc. v. Liquor Com'n of City and County of Honolulu*, 118 Haw. 320, 346, 189 P.3d 432, 458 (2008). See also HAR § 13-1-31(b).

Obviously, whether a particular person has standing can overlap with whether a contested case is required. When a hearing determines the legal rights, duties, or privileges of a specific person, that person will have standing. When the contested case is required by due process, a person with a protectable property interest will have standing.

We now discuss the specific petition in light of this legal framework.

## **B. Abel Lui's petition**

### **1. Is a contested case required by law?**

Petitioner does not point to any such statute or rule. We found none.

As to whether a hearing is required by due process, petitioner fails to identify or even claim any specific rights or interests he may have in the property. Although identifying himself as an heir to certain property, petitioner fails to allege any interest in the parcels in question or any adjoining parcel. Petitioner identifies himself as a "growing taro on the land" and "employed by God" but does not specifically state how his livelihood is affected by the Board's action.

The petition also indicates a major concern is with removal of water from "this stream", but does not state what property right he has or how his interest in the property right would be affected. Petitioner's claims a generalized interest in protecting "aquifers, underlying wetlands, ecosystem, & ancient taro patches" as well as ensuring "wetlands, critical habitats, & estuaries survive, at Kawa & all of Ka'u". This interest does not rise to the level of a protectable property interest.

Petitioner further indicates that his participation in a contested case would serve the public interest by "protecting" the Public Trust Doctrine, protection of water resources & ecosystem, [and] native Hawaiian cultural rights" but does not say why this is so and does not identify what impact his participation protects. Petitioner does not identify any "valued cultural, historical, or natural resources" in the area covered by the Board action or pointed to any "traditional and customary native Hawaiian rights [] exercised" in the area. Nor would one expect there to be any such resources or rights, given that the area has previously been used as a flume system to transport water to sugar cane fields until the 1950s.

Petitioner also claims that removal and transport of water is "to be stored in reservoirs and sold to developers, or used for private interests" implying a commercial use. HRS §183C-6 requires a public hearing for permits involving commercial uses, but specifically excepts utility purposes.

**2. Does Abel Lui have standing?**

A contested case is not required by law. In any event, Abel Lui fails to meet any prong of the three-part test discussed above. Abel Lui has not shown that he suffered an actual or threatened injury as a result of the Board's action. If Mr. Lui has an injury at all, it does not appear to be "fairly traceable" to the Board's action nor would a change in the Board's action provide relief for the injury.

Mr. Lui's claim does not elaborate any proximity to the affected properties in the conservation district. Mr. Lui has not provided any information that would indicate that HAR § 13-1-31(b), admitting as parties persons "who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public" does not apply.

**IV. CONCLUSION**

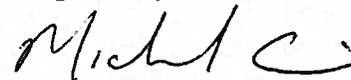
HAR § 13-1-29.1 allows the board to deny a request for contested case without a hearing under certain circumstances:

The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.

**V. RECOMMENDATION**

That the Board of Land and Natural Resources deny the request for a contested case in regards to Conservation District Use Permit (CDUP) HA-3674 for the Old Plantation Spring Pipeline by Abel Simeona Lui, and that the Board deny the requests for contested case without a hearing or pursuant to HAR § 13-1-29.1.

Respectfully submitted,



Michael Cain, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:



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

HA-14-1



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

2017

33

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 <i>Abel Simona Lui</i>	2. Contact Person <i>Same</i>	
3. Address <i>P.O. Box 791</i>	4. City <i>Pahala</i>	5. State and ZIP <i>HI 96777</i>
6. Email <i>Kawaabel@gmail.com</i>	7. Phone <i>(808) 938-8895</i>	8. Fax

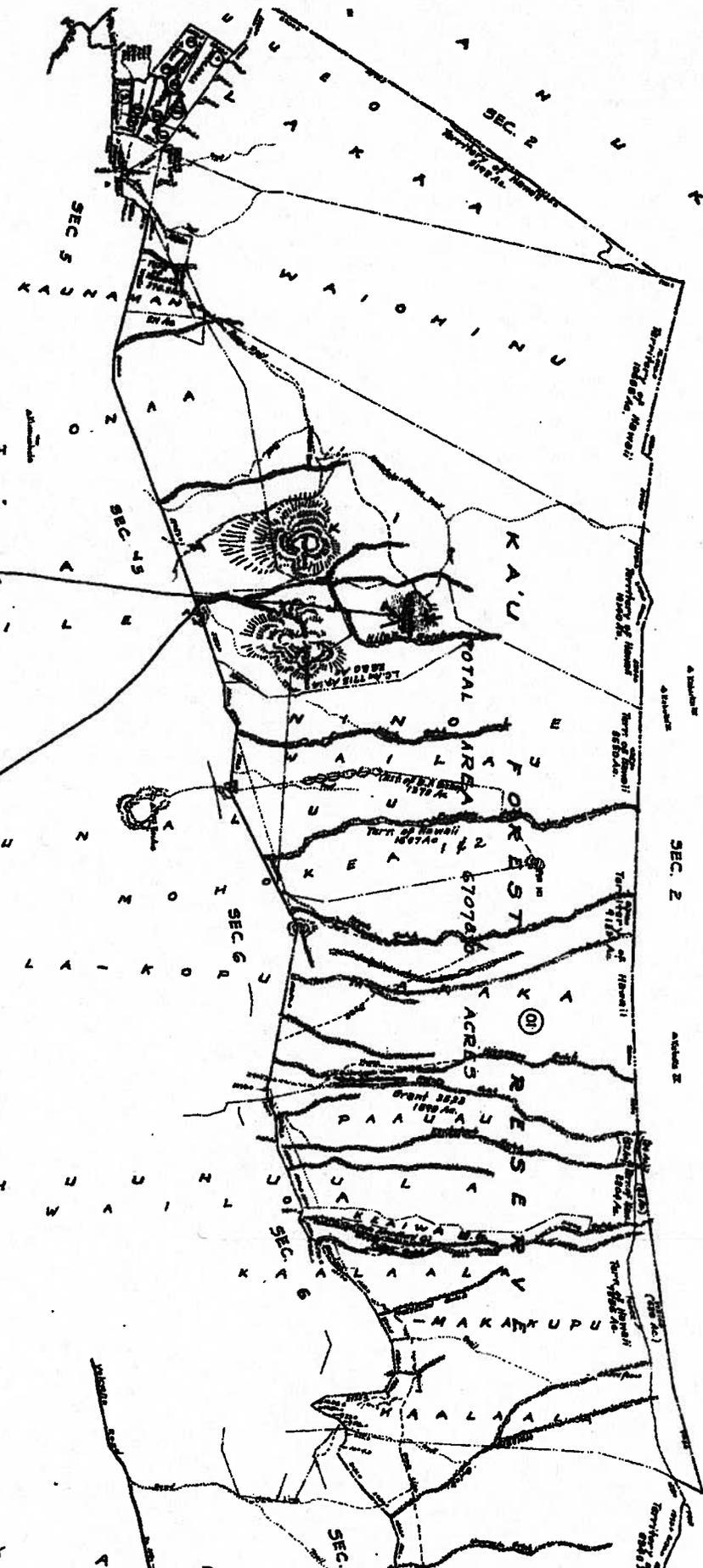
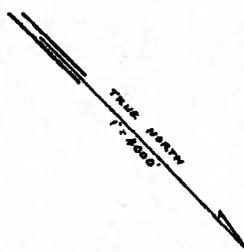
B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER	
<b>17. Board Action Being Contested</b> Approval of CDUA for a water pipeline by Kuchiwo Ranch, Located at Old Plantation Spring, Kaiholena, Kau, Hawaii, tmk (3) 9-7-001:001, 004 + 016.	
<b>18. Board Action Date</b> 11/8/2013	<b>19. Item No.</b> K-3
<b>20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action</b> I am a lineal heir of properties including the Royal Patent Grants to Timdeeo Keawe, 993 01536, in Hilea, Kaalaiki Kau, HI. This action threatens to accumulatively diminish the already disrupted flow of waters, potentially resulting in irreversible harm to the aquifers, underlying wetlands, ecosystem, + ancient taro patches.	
<b>21. Any Disagreement Petitioner May Have with an Application before the Board</b> No scientific data provided, and only a "guess" made by BNR + applicant to suggest water removed from this stream is "about" 10% of total flow... Water removed to be stored in reservoirs + sold to developers, or used for private interests - Use of waters that are 'supposed to be protected under "Public Trust Doctrine"	
<b>22. Any Relief Petitioner Seeks or Deems Itself Entitled to</b> Restore water flows to their natural courses mauka to makai, to ensure wetlands, critical habitats, estuaries survive, at Kawa + all of Kau. See article XII, sect. 7. Protect our resources	
<b>23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest</b> Public Trust Doctrine, protection of water resources + ecosystem, native Hawaiian cultural rights to be protected. Water diversion accumulatively resulting in decimation of ecosystem coastally of diversion of water.	
<b>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</b> Petitioner is an heir to property in watershed, native Hawaiian, Konohiki of Kawa, responsible for protecting lands, waters + natural resources for current + future generations. Employed by GOV. Growing taro on the land.	

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.

Abel S. Lui \_\_\_\_\_ 11/15/13  
 Petitioner or Representative Signature Date



*Handwritten notes:*  
\* Kawaia  
Old Plantation Spring  
Kawaia River bed

ADVANCE SHEET  
SUBJECT TO CHAIN

09:58:37 2013-11-18

EXHIBIT 1

TO DLNR

From: Abel S. Lui / Contested case 11/6/13 K-3

I request a waiver of fee if one is required for me to file this petition. I only receive \$500.00/month in social security, & have no other financial support.

Mahalo