

AMENDED

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

DATE: THURSDAY, JANUARY 13, 201[0]1
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

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

MEMBERS

William Aila
David Goode
Rob Pacheco

Ron Agor
John Morgan
Dr. Sam Gon

STAFF

Sam Lemmo/OCCL
Ed Underwood/DOBOR
Paul Conry/DOFAW
Francis Oishi/ DAR
Carty Chang/ENG

Pua Aiu/ SHPD
Russell Tsuji/ LAND
Michael Constantinides/DOFAW
Dan Quinn/PARKS

OTHERS

Bill Wynhoff, Deputy Attorney General
Kristin Shigemura, K-6
Neal Sims, K-3
Keola Lindsey, K-3
Don Bryan, C-3
Tim Richards, D-6
Richard Spacer, K-2
Eric Yoshizawa, M-1

Kapua Kawelo, K-7
Mike Recca, I-1
Randy Cates, K-3, F-1
Will Zapalac, C-3
David Frankel, C-3, D-6, K-2
Paul Makuakane, D-6
Eric Leong, M-1
Warren Booker, K-5

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

A number of written testimonies was received and distributed.

Item A-1 November 12, 2010 Minutes

Unanimously approved as submitted (Pacheco, Gon)

The rest of the minutes were not ready.

Item K-7 Conservation District Use Application (CDUA) OA-3561 for the Oahu Army's Natural Resource Program's Mâkua and O'ahu Implementation Plans, by the Department of the Army, in the ahupua'a of Ka'a'awa, Kahana, Kaluanui, and Lâ'ie, (Ko'olauloa); Pa'ala'a, Kawailoa, and Ka'ena (Waialua); Keawa'ula, Kahanaha Iki, and Mâkaha (Wai'anae); & Waiawa and Hâlawa ('Ewa), O'ahu TMKs (1) 5-1-7:1, 5-2-1:1, 5-3-11:1, 5-3-11:9, 5-4-6:1, 5-5-7:2, 6-3-1:1, 6-9-1:3, 6-9-1:4, 6-9-1:30; 6-9-2:13, 8-1-1:7, 8-1-1:12, 8-4-2:1, 8-4-2:14, 9-2-5:25, 9-6-6:1, and 9-6-11:2

Sam Lemmo, Office of Conservation and Coastal Lands (OCCL) Administrator briefed the Board that this CDUA addresses the management actions on the private conservation lands and unencumbered State lands. Also, a list of special conditions were identified to make sure cultural resources are protected and to carry out the various management actions. Staff sought the Boards approval of the CDUA subject to the conditions expressed in the staff report.

Kapua Kawelo representing U.S. Army Garrison, Hawaii – Environmental Division testified that this is to satisfy their biological opinions with U.S. Fish and Wildlife Service which covers potential threats to threatened and endangered species at Makua Military Reservation and other Oahu training areas. This plan outlines the steps required for the Army to save the lives of native species so they are not jeopardized by any military activities where she related some examples from the list including endangered species management.

It was asked by Member Gon whether this is the first time this has come before the Board because it was his understanding that the implementation of these kinds of activities were going on for awhile now by the Garrison. Mr. Lemmo said he wasn't aware of anything. Doing things in the existing forest reserve, staff has chosen not to get involved because that is Forestry and Federal lands are involved. It appears the Garrison is doing stuff in areas staff isn't regulating.

Unanimously approved as submitted (Gon, Agor)

Item K-1 Conservation District Use Application (CDUA) OA-3548 for the Hawaii Loa Campus Expansion by the Hawaii Pacific University Located at 45-045 Kamehameha Hwy, Kaneohe, Koolaupoko, Oahu, TMK: (1) 4-5-035:010

Mr. Lemmo related some background information reminding the Board what sub-zones are and pointed out changes to areas on the fold-out map, Exhibit 3. There were concerns with sedimentation of adjacent streams requiring the applicant obtain a construction and grading plan. Traffic is a potential issue and may need to put in a new ingress and egress requiring a DOT traffic warrant study and mitigation measures. There were no issues raised by the community during public hearings. An EA was processed which staff accepted. Staff asked for Board approval to the recommendations with a number of conditions.

The representative for the applicant, Hawaii Pacific University, Francis Oda said they were here to answer questions and had nothing to add.

Member Gon asked whether the applicant agreed to all the conditions and they agreed.

Member Goode asked whether the applicant will come back to the Board with a separate permit or actual activities or just approve the master plan with all the activities. Mr. Lemmo explained that as long as the Board approves the master plan then those uses are also approved. The applicant will have to go to construction plan approval, grading plan approval to effectuate those uses in the future. If the applicant changes anything they might have to come back to the Board to get approval to change the master plan. Staff will make sure they are in compliance.

It was approved as submitted by Member Morgan and seconded by Member Gon.

Unanimously approved as submitted (Morgan, Gon)

Item K-6 Appointment and Selection of a Hearing Officer to Conduct Hearings for One (1) Contested Case Hearing (Contested Case KA-11-3); Response to Additional Petition for Contested Case; Response to Request for Mediation Requesting Petition for Deviation from Conditions, Haena District, Island of Kauai, all re TMKs (4) 5-9-002:018, 21, 22, 35, 39, 41, 43, 44, 50, 51, 52, and 61;(4) 5-9-003:046; and (4) 5-9-005:021

Mr. Lemmo requested the Board's approval to appoint a hearing officer to conduct a contested case hearing at request for counsel for various land owners in Haena on the Island of Kauai. He reminded the Board that staff came before them last year with a recommendation to not allow these land owners to conduct rentals of their single family residences and counsel sought a contested case hearing on their behalf to deviate from the standard conditions and the Board said "no, we are not going to allow the deviation." Counsel came back asking for a contested case hearing. Staff recommended no, but the Board wanted to look at the land owners' situation and authorized a contested case hearing, but didn't designate a hearings officer which is the main reason staff came back today. Also, there is a second petition that needs to be addressed with a request for mediation.

Deputy Attorney General Bill Wynhoff noted that the attorney for the petitioners is here and could explain. With respect to the additional petition, Mr. Wynhoff was unclear why that was filed that. Of course it is grossly late to the extent that it relates to 2007 and they were told it was to address some procedural issues. Mr. Wynhoff is unaware what those are. The original request for petition was timely three years ago was limited. The relief that they sought was specifically requesting approval for the request to deviate from the conditions in the CDUPs. Since that time, they've been in court and asked that the rule be declared unconstitutional that it be outside the scope of the Statute. Mr. Wynhoff believes like staff has said the new petition should be denied. It's untimely, obviously, to the extent that it's put in to broaden the scope of the petition original request and he doesn't think that should be done for the reasons discussed before. With respect for request for mediation, Mr. Wynhoff didn't know how that would be handled unless the Board is going to handle mediation. It seemed to him that is exactly what you (counsel) didn't want to happen the last time you said you didn't want to delegate it, you didn't want to let it go to courts so more Mr. Wynhoff would suppose you wanted to go to a mediator, but from his point of view or the AG's point of view that is up to you.

Mr. Lemmo said the recommendation is to approve staff's ability to go out and hire a hearings officer to run a contested case on the matter, but to deny the second petition and the request for mediation.

Chair Aila asked whether he received written testimony from the Haena/Hanalei Community Association and Mr. Lemmo said he did not and read it. He wasn't sure it was appropriate, but it should be taken up at a standard hearing. Mr. Wynhoff suggested the Board might want to delegate that to the hearings officer as well. The rules provide that once a contested case is going additional parties can be admitted provided that they bring something new to the table, basically. That would be the most sensible way to handle that would be to have the hearings officer to dive into that.

Member Agor asked whether it's appropriate to discuss this in the meeting today. Mr. Wynhoff said arguably it might be outside the scope of the agenda item. If you were to follow the recommendation as delegated to the hearings officer that would be both within the letter and spirit of the agenda item and the law. He didn't think it would be necessarily appropriate for you to make a decision, but the decisions should go to a hearings officer. Member Gon asked whether that requires any changes to the recommendation by staff where Mr. Wynhoff said no.

Member Goode asked also the Community Association asked if we go to mediation that they be a party to that and whether to take it as a separate item. Mr. Wynhoff said he didn't think that was a problem. Mediation is a purely voluntary situation and a mediator unlike a contested case doesn't force anybody to do anything. If the mediator thought it was appropriate for them to participate then he didn't think there was any problem. Mr. Wynhoff thought the Board would not need to make that decision nor does he think it poses any problems for the agenda or legal aspects. He doesn't see that as a major issue if the Board decides to go with mediation. Not a problem. Staff's recommendation remains as discussed.

Member Pacheco was unclear the purpose of the second petition where Mr. Wynhoff suggested asking the petitioner's counsel. Kristin Shigemura spoke saying she was here for Randy Vitousek who was in a contested case hearing. The second petition was to address Mr. Vitousek's concerns about a new rule that might have required some things to be filed and Mr. Vitousek thought a second one to make sure they didn't have any procedural problems because this petition has been pending for over three years. They didn't want any procedural holes or gaps and wanted to be certain they crossed every "t" and dotted every "i" to meet the requirements for a contested case hearing even though it had already been approved by the Board on October 20, 2010. This was done with an abundance of caution and was discussed with Mr. Wynhoff in some e-mail before this hearing. What Mr. Vitousek had recommended was if this was deemed to be unnecessary which the Department has said in a January 13, 2011 letter then they will just withdraw that and be refunded the fees. It was not intended to broaden the scope or anything like that. It really is the same petition that they want to go to contested case hearing that Mr. Vitousek had asked for in 2007.

Ms. Shigemura said with regard to the appointment of a hearing officer they agreed to that. And the mediation – the contested case hearing has been pending since 2007 and at that time there was confusion as to what this permit condition means as to the definition of "rental" that there is no definition of rental in the permit or in the rules or in the statute. There was confusion expressed by the Board members at that time, the Department. There was a denial of a contested case hearing, it went to the Fifth Circuit Court, there was some confusion about the issue, the court ruled against our client at that point. They went up to the ICA and the ICA ruled that the denial of a contested case hearing has to be done by the Chair of the Department and came back down to the Board again. There has been a lot of time, money and effort spent to resolve this issue and they would like to have a contested case hearing on this issue, but if it can be resolved short of going into a full blown contested case hearing they think it would be worth saving that time and energy for everyone. The public policy recommends or favors mediation and the rules provide an opportunity to do that under 91-8.5. She wasn't sure whether it was Mr. Wynhoff or Mr. Lemmo who said that the statute provides that the parties may jointly select a person to conduct the mediation and if the parties are unable to jointly select a mediator within 10 days of referral to mediation the agency shall select a mediator and the cost of the mediation shall be born equally by the parties unless otherwise agreed or ordered by the agency or provided by law. They understand this is a discretionary decision by the Board and they preferred mediation where they are not opposed to using the same mediator as the hearings officer if the Board wishes to order that.

Mr. Wynhoff said what he understands is the second petition is going to be withdrawn and he agrees there aren't any procedural issues. The Board already said there is going to be a hearing and it's moot since they aren't seeking to broaden the scope of whatever hearings they get. He had an opportunity to look at HHCA's letter which also requested that the hearing be held on Kauai which they certainly would do. With respect to mediation, it's not who will be the mediator although he would object to the hearing officer being the mediator, but the question is who would participate on behalf of the Board. It's not the issue of who will be the mediator, but who would participate on

behalf of you. If you delegate it to somebody to do it then that somebody is essentially taking over the role that seemed to him just last month that you (the Board) said you wanted to reserve for yourself. Personally, it doesn't matter to him. It doesn't seem consistent with what you said before, but if that is what you want to do, he'll happy to participate in the mediation.

Member Pacheco said he doesn't recall as long as he has been on the Board any request for mediation. He asked whether the Board or the Department has ever gone through a mediation process in the past. Mr. Lemmo confirmed that there was a request for a contested case either by a third party on a CDUA or in response to a prosecution of a civil violation where he thinks they did go to a mediation process. It was not fruitful. They tried mediation and it went back into the contested case because there was no resolution. That is his fear besides from all the legal issues that you go through the mediation process, there is no agreement, it's not binding, etc. and defaults back to the contested case hearing and end up spending additional time and resources that would be critical for this.

Member Gon said if we were inclined to be on the verge of an agreement of some sort then we could do a mediation process. This has been going on for a long time with discussions.

Member Agor made a motion to accept staff's recommendation with the addition of Item 5 stating the status of any future interveners shall be addressed by the hearings officer. Member Morgan seconded it. All approved as moved.

The Board:

Amended staff's recommendations by addition a recommendation #5) The status of any future interveners shall be addressed by the hearings officer.

Unanimously approved as amended (Agor, Morgan)

Item I-1 Enforcement Action against Hawaii Intergenerational Community Development Association and Halealii Homes for excavating a historic property within the designated buffer zone in Maunalua Ahupua'a, Oahu, TMK (1) 3-9-008:039.

Pua Aiu representing State Historic Preservation Division (SHPD) briefed the Board on the background regarding the violation where the buffer zone had been violated. The State archaeologist and the project proponent's archaeologist did not find a heiau there relating a petroglyph site and some stone walls where it was agreed to be preserved in place. The rock wall had been breached, with debris around one of the petroglyphs and some of the rocks had been cracked. There was a violation per 60-11 which allows staff to fine up \$10,000 and staff requested the project proponents be fined the full value of that amount. The project proponents knew the site was there because they did an archaeological inventory survey not too long before this. They violated their own preservation plan. They violated their own preservation buffers and they violated their

own monitoring plan which requires a monitor on site which they did not have at that time. Also, they did not have any City and County permits.

In answer to Member Goode's question whether the project proponents are under a stop work by the State or City and County, Ms. Aiu said they submitted additional EIS as well as well as other reports.

Mike Recca, Chief Operating Officer for the development after this violation was done by previous management related that he has been correcting all the past problems. Staff's report was received, but was addressed to previous management prior to them buying the land. As a responsible community member and developer they have gone through and taken care of all the NOV's on site that were related to stop pile grubbing, grading and excavation. There is a wetlands delineation report. This problem existed and should never have been done. It is everybody's best interest to get this taken care of 100% the right way with management and with everyone's cooperation. The inventory survey plan for the residential portions and there was an NOV notice of violation on the park which has already been cleared. They never received any stop work order, but they are not doing anything now. No one from past management is with them so a complete new team with a new approach and Mr. Recca reassured these problems will not happen in the future which he guaranteed.

Member Goode said he was happy to hear this from the new management and asked they submitted the supplemental archaeological reports which are being reviewed and whether it was their intention to not do any work until those are reviewed and approved and the plans are set forth which Mr. Recca acknowledged that because they are starting to go through zoning with DPB which is a completely different design where they changed everything. They also have an agreement with Trust for Public Lands to the five acres of the park portions which they will build with the Trust so they can take that land to put a conservation easement on it so its there for everybody's future including restoring all the wetlands and preservation areas. They are going to help the community develop that with the community's help.

Member Morgan asked whether he was okay with staff's recommendation and fine and Mr. Recca acknowledged them and said that there were so many problems he had to resolve and as a responsible developer lets get it done and past us. It's not in their name, but it should not have been done. The NOV... people were without permits. Yes. It's the right thing to do and they want to show they will stand up and take responsibility.

Unanimously approved as submitted (Morgan, Gon)

Item K-3 Conservation District Enforcement File (ENF) HA-10-23 for Alleged Coral Damage by Kona Blue Water Farms, Located at Kawaihae Small Boat Harbor, South Kohala, Hawai'i

Mr. Lemmo briefed the Board on the background referring to Exhibits 4 and 5 and explained that back in April 2010 somebody noticed a net pen within the harbor and that

pen was a surface cage intended to hold fish for commercial farming purposes. Staff asked Division of Aquatic Resources (DAR) to go to the site and they conducted a relatively detailed coral damage assessment which is attached to the staff report. There were 28 instances of coral damage where staff issued a notice to the party and have since removed the cage from the harbor. The report discusses type of damage to coral which he described. Staff is pursuing penalties under DAR statutes and rules. Essentially, staff is going under 187 (a) which allows up to \$1,000 fine or each specimen of coral taken, killed or injured. Staff, Mr. Lemmo and with the assistance of DAR staff whom he thanked in dealing with this where DAR came up with a damage matrix which is included in the report. The purpose is to see the recommended penalty or fine for each specimen of coral damage. The penalty ranges anywhere from \$200 to \$600 per specimen. The reason why the values are lower than a \$1,000 as explained in the staff report which is based on the lower to moderate ecosystem value of this particular coral. Staff looks at each case based on its own merits looking at all the circumstances before making a recommendation, but in the aggregate staff came up with a total fine assessment of \$13,500 with 28 instances of coral damage. Staff tried to make this consistent with cases that have come before the Board on prior coral damage cases and did that at some extent. Staff talked about reducing the \$13,500 penalty due to various mitigating factors in this case identified in the staff report. Essentially, the mitigating factors are even though the company was allowed to come into the harbor it was very clear that you need to get prior approval and to get permits to come into the harbor, that didn't happen. The coral is in an existing commercial harbor. It isn't coral out in the open ecologically sensitive area of the coastline. The damage was not intentional it was inadvertent and accidental staff believes. The damage was relatively minor. The party has been extremely cooperative with staff in going through this process trying to figure out what to do. Based on the coral damage, the mitigating factors staff is seeking Board's approval of a fine in the amount of \$6,750 and if the Board approves the fine staff is also attaching five recommendations where one is to require the company to pay the fine in 60 days. Also, an additional condition #3 which requires Kona Blue to notify staff when pens at the farm are being moved, but that condition may have to be changed because Mr. Lemmo doesn't think Kona Blue Waters is any longer involved with Keahole, the off shore fish farming components in this project. Standard conditions that the company doesn't comply with order staff will institute additional processes. Mr. Lemmo noted there was a letter submitted from Kona Blue Water asking whether or not they can do in lieu of a fine some sort of mitigation project like transplanting coral. Staff ran this by their aquatic biologists and they were not in favor of that for a number of reasons. Neal Sims representing the responsible party is here.

After Member Gon asked to clarify the modifications to condition #3, Mr. Lemmo explained that Kona Blue Water started the off shore fish farm at Keahole Point which this Board approved. The off shore fish farming part, the actual cages in the water were bought out by a company called Keahole Point who now operates the off shore fish farm and Kona Blue Water has nothing to do with the off shore fish farm. They run the hatchery and do some research at NELHA. When this infraction occurred they were in a transitional period when the Kona Blue had just been bought by Keahole Point and Kona Blue Water was doing various things maybe supplying the hatchlings to the off shore fish

farm, but are not involved with the pens. Member Gon asked whether he recommended removing the third condition from this recommendation set and Mr. Lemmo confirmed he would. If we have a concern with other fish farm operations moving pens staff should go and talk to them separately.

Chairperson Aila referred to some written testimony submitted by a Dave Raney who recommended the Board make the process friendly for people by allowing a 30 day full review.

Neal Anthony Sims, Co-Founder and Co-CEO of Kona Blue Water Farms, Inc. distributed his written testimony and testified from it relating his company's background. His company admitted to their mistake in mooring the PoKi net pen over the top of live coral in Kawaihae south basin small boat harbor. In their defense they were told by DOBOR (Division of Boating and Ocean Recreation) that they could moor the pen there, so long as they kept it out of the main channel (which is why they moored it in the NW corner of the harbor). Mr. Sims pointed out that Kawaihae is a small boat harbor and some might assert that the coral needs to be removed to allow it to function as such. The head of DOBOR, Ed Underwood was quoted recently in the West Hawaii Today it's a touchy subject and that this area was built to be a harbor. Just because coral grew in the last 10 years (while the state was trying to expand the harbor), should everything stop? The conflicting arguments have been happening for years and they were caught unwittingly in the cross-fire. He questioned whether this might cause a precedent in the future. Kona Blue has accepted responsibility. You could levy a fine, but it doesn't bring the coral back. It was suggested to direct Kona Blue to implement a project that could provide some benefit or support some beneficial program already in place like a coral reef planting project, but understands DAR staff doesn't endorse it. Alternatively, he related some background on the adopt a buoy program under the Malama Kai Foundation and Mr. Sims suggested the Board in lieu of a fine direct Kona Blue to provide some equivalent monetary donation to this Foundation for the upkeep and maintenance of buoys that is supported by this program which their company prefers as a mitigation.

Member Pacheco inquired what were the permits that Kona Blue was supposed to get, but didn't. Mr. Sims said they needed a temporary mooring permit, but it was unclear to us at what stage we should get that and was given permission by DOBOR head on the Big Island to move the net pen there and we understood once that was done they would go to the DOBOR office to get the permit. It was our oversight on our part that we hadn't done that immediately once the pens had been moored there.

It was asked by Member Pacheco whether Mr. Sims spoke with the DOBOR Administrator and whether she mentioned anything about watching for coral in the small boat harbor. Mr. Sims acknowledged he spoke to her and she did not mention the coral, but asked them not to block the channel to the harbor.

Member Pacheco said that Mr. Lemmo commented there is relatively minor damage, but he had an issue with the coral. He related some background of the coral being dredged in

the 1950s and has since grown back and is now protected in this area which is a disconnect for him. The assessed value is over \$13,000 in one scheme is relatively minor amount and asking for half the amount and playing that up next to Item I-1 there is a disconnect here – the value, intent and on the other end regarding a case on Maui where we have State staff instructing folks to do something that results in this behavior and that is taken into consideration in having this fine value damage and he asked should the Department be held responsible for some of that value of the damage. He is just throwing out points for discussion.

Member Morgan agreed having the same disconnect and Kona Blue is willing to support and Foundation because he had the same problem with the fine.

Randy Cates testified that he is in the off shore aquaculture business and they also deal with corals having been involved with every coral mitigation in the State mentioning Cape Flattery (Barber's Point) and was a general contractor on Port Royal. He is also a member of MayFAC which is an advisory board that advises the Secretary of Commerce and the President on various issues which this is one of them. They have an on-going ESA process where they want a list of the 18 corals in Hawaii which are endangered. It is his opinion that he agrees with a lot that is said where there are times to have coral mitigation and there are times not to. It is a complex thing and he would not recommend anybody to go out to replant coral. Even Mr. Cates doesn't do it and would have companies on the mainland with 20 plus years experience to do it. There are a lot of biological issues to take into account and has to be planned and well thought out. Coral in a harbor is a zoning issue and what the Board does today will impact future events. He is not a fan of taking coral from a harbor and replanting it somewhere else which could be expensive and it affects commerce greatly in Hawaii. Mr. Cates suggested the Board think out bigger whether this is appropriate or not. Not that he advocates one way or the other. The issue is having coral in the harbor. If we impose a fine what does that mean? Mooring buoys – he has documented evidence of ever mooring buoy the chain bounces there is a dead zone around it. There is no limit of how one group feels about the coral one way and another group another way. To conclude if you want to mitigate coral damage is not replanting of coral, it's the massive grounding and you get the rubble and you want to stop the impact. What happens is that can spread as a surf event and the damage area rose which is a lesson learned from Cape Flattery. Because the rubble wasn't removed the impact increased which isn't the case here. Remove the rubble and nature will heal itself. Replanting and leaving the rubble will cause more damage.

Member Gon asked his advice is what with regard to dealing with coral growth in projects. Mr. Cates said the biggest concern he has is an ESA process for the endangered species because if that is implemented then everything requires an EIS citing an example of a gas station in Idaho affecting coral or adding a barge to you tug fleet, how does it affect that? He proposed zoning like we do on land to do it in the water. If coral that grows naturally on a break wall and a ship damages it are we going to impose fines on that shipping company? The average person would say we won't because it is zoned for that use. If that cage had gone aground on a natural environment then this would be an entirely different discussion.

Member Goode asked Mr. Underwood to come up. Ed Underwood representing Division of Boating and Ocean Recreation (DOBOR) clarified the issue of the permission DOBOR gave to go in the harbor. When staff became aware that the net pen was in the harbor, he spoke with Mr. Sims and he spoke with Nancy Murphy (District Manager) and they don't have a problem with mooring within the small boat harbors. The discussion between Ms. Murphy and Mr. Sims was yes, you can moor in the small boat harbor, but before you move the net pen in inform us (staff). The issue is it's been two years where they have been trying to get the permits to build out the harbor there with the coral and needed to be careful that anything moored in that harbor there wasn't on reef. Mr. Underwood acknowledged staff didn't have a problem with the net pen moored in that harbor, however let staff know before it went in so it wasn't on coral because staff has a survey of that entire harbor.

It was asked by Member Goode that in the future as staff moves forward with harbor plans they will disrupt some coral colonies. Mr. Underwood said correct, in order to put in the launch ramp they will disrupt 234 square feet of coral. For the past two years staff has been working with the Federal partners on how to mitigate coral as well as the habitat loss and they are working with another consultant and may adopt Hilo's mitigation plan to get this project going.

It was queried by Member Pacheco that staff is planning to put in buoys which would cause some coral damage. Mr. Underwood explained staff submitted a core permit to install the piles as well as the moorings and staff has to ensure that they do not affect coral by installing around it. These are Federal laws and you have to mitigate loss of coral and habitat. The initial Federal agencies asked to suction dredge the harbor so they can promote the coral growth within the harbor because the coral is almost dead in that harbor. On a boating perspective why would we promote coral growth in a small boat harbor because eventually boats are going to hit it and the Army Corp wrote a letter recently defending DOBOR's position saying it doesn't make sense, why would you suction dredge in the harbor? Chair Aila said the authorizing authority is the U.S. Army Corp of Engineers, however, when they issue the Department a permit they go out and ask other Federal agencies for input whether it's EPA, Fish and Wildlife Service or NOAA makes the comments about the coral which leads us to the situation we have today. An alternative route on how to mitigate the damage that will be done because of the construction and there is no agreement, still exploring ways to do it.

Member Pacheco asked whether the coral was there when that small boat harbor was built. Mr. Underwood said that Operation Tugboat was part of the nuclear program and blew up that inside basin. Part of that coral ledge or reef was there and remnants didn't get removed at the time it was built. Those areas still have coral, but with the new guidelines that have come out, no matter what they do, they have to mitigate. Chair Aila said since the 1950s some coral has grown.

It was asked by Member Pacheco whether there was no instance of no take provision like how we have for terrestrial endangered species, safe harbor agreements for land owners with coral in the water. Mr. Lemmo replied saying just the DAR law that says you can't

kill or take coral. Member Gon clarified the safe harbor agreement are those special agreements set in place where there is anticipated certain amount of take of a particular species and a certain amount is allowed in exchange for management of habitat that mitigates for anticipated loss, but that doesn't exist. Mr. Lemmo confirmed that.

Member Pacheco said that safe harbor agreements are where a land owner comes in to do conservation work that will benefit native communities and there is a disadvantage for landowner to do that if he improves habitat and an endangered species comes in and gets harmed and then the landowner is liable. The purpose of the safe harbor agreements was for the landowner to give comfort that they are not liable for the endangered species. Mr. Lemmo confirmed that. Member Pacheco finds it ridiculous with having coral reef protection within a harbor which he doesn't understand.

It was asked by Member Agor how large the net pen was and Mr. Sims said 100 feet in diameter and about three feet below the surface of the water with netting underneath about five or six feet. Member Agor asked whether a permit was needed and Mr. Underwood confirmed that saying subsequent to the pen being in there staff did issue a mooring permit and Kona Blue moved it off the coral into deeper water and everything was fine at that point. It is not a problem to moor boats in there, but the key is to watch where they drop anchor.

Member Gon noted a light canopy coral would not survive with the number of boats coming into the harbor which is an ironic situation here. Mr. Underwood said the biggest issue is the watershed because Pelekane Bay is completely silted up which has migrated into the harbor and by what he was told that coral was barely alive. Once the floating dock system and boats goes in he wouldn't give the coral much of a chance that is in there. He doesn't see how it would thrive.

Member Morgan opposed the fine. Member Goode asked if they should go with a fine where do the monies go. Mr. Lemmo said to DAR. Member Goode wondered whether the monies could go to the project DOBOR has planned. Francis Oishi (Division of Aquatic Resources – DAR) said we would have to ask the Attorney General's office because this is not Enforcement issuing an administrative penalty or a fine for fisheries or aquatic related based on the CDUP. Mr. Lemmo clarified that the penalty is being imposed under the DAR Statute and he reiterated the question on where does the money go. Mr. Pacheco said if there isn't a special fund then the monies would go into the general fund referring to previous cases that the Board could not designate where that money could go. DOBOR and Forestry have special funds. Mr. Oishi said that in previous cases monies have gone into the commercial fisheries special fund, but they have to be careful if they do that because there is a ceiling spending limit. If the monies go in there it may never get spent.

Member Pacheco was concerned that if they issue a fine would they be setting a precedent for future harbor coral instances. Russell Tsuji (Land Division) suggested that they could create a specialized trust fund for coral.

Member Agor agreed that it's crazy protecting coral in a harbor, but with the rule we have to protect the coral, he was okay with the fine and they could talk about how to disperse it. He doesn't want the discounted fine.

Keola Lindsey testified as an individual and a resident of Kohala relating how the development of Kawaihae created great change to the area and there are groups involved with efforts to improve the quality of the ocean there such as the Soil and Water Conservation District Group that is trying to deal with issues in Pelekane Bay and drainage from neighboring gulches. Also, the community group that deals with the Kuakahilima surf park which is the area dredged for the harbor. If Kona Blue wants to be involved Mr. Lindsey suggested those kinds of things.

Member Morgan said he still feels a disconnect with the zoning issues. It doesn't make sense to have a reef grow back after 40 years later fine somebody because the reef grew back and there is a small amount of damage. He would put this in a different category if it was out in the ocean, but he would support in kind service in lieu of a dollar fine.

Member Pacheco said he would support that too by designating organizations close to Kawaihae area or a donation to the Pelekane Bay restoration project. He would be comfortable with either cash or in kind services to the value of the fine. Kona Blue did fail to contact DOBOR before moving in and he would be comfortable with that.

Member Agor asked whether the Board felt comfortable with the Chair working out the fine whether its cash or in kind services. Or does the Board make that determination. Member Goode said he thinks they would consume more time figuring that out.

Member Pacheco said they could change condition #1 that Kona Blue is directed to contribute cash or in kind services valued at \$6,750.00 to an appropriate organization that is doing work in South/North Kohala region and as agreed upon by the Chairperson. Change #2 to say Kona Blue shall within sixty (60) days come to an agreement with the Chairperson on which mitigation entity that would take to do the mitigation. Delete condition #3. Renumber #4 as #3 and #5 as #4.

The Board:

Amended staff's recommendation #1 by adding after Kona Blue is directed to contribute cash or in kind services valued at ... and (f) to an appropriate organization that is doing work in South/North Kohala region;. Recommendation #2 delete [pay all fines] ... days come to an agreement with the Chairperson on which mitigation entity that would be able to do the mitigation; Delete recommendation #3 and renumber #4 as #3 and #5 as #4.

Unanimously approved as amended (Pacheco, Gon)

**Item C-3 Amend Prior Board Action of October 9, 2009, Agenda Item C-3:
Amendment No. 6 of Timber Land License No. H-101 held by
Tradewinds Forest Products, LLC.**

Paul Conry, Division of Forestry and Wildlife Administrator briefed the Board on the Board submittal referring to the outline on page one. Tradewinds was successful in getting the County permit, but ran into problems with financing and is now in default with that amendment and payments which he mentioned. Tradewinds was operating in good faith to proceed, but ran into the difficulty that they could not secure a bank loan for the financing where they submitted a letter to staff requesting continued extension of the license to December 2012 and hope to obtain additional financing from a private party and be able to continue implementation of the project. Staff recommends approving continuation of the license through the current 10 year term which ends August 2011 hoping Tradewinds will be able to put together a package before then and come back to the Board with a financier. There are six recommendations to amend the prior Board submittal to extend all the deadlines and forego collection of payments until financing is secured. If Tradewinds cannot put this together by the end of the existing 10 year license it will automatically terminate at the end of August 2011. Staff supports Tradewinds in developing a value added forest products industry on the Big Island and agreed to the additional time, but if they don't staff will consider re-packaging the project for other considerations on the Big Island. The Tradewinds representatives and staff are here for questions. Staff recommends approving the amendments to the prior Board action and also delegate to the Chairperson the authority to execute, amend and restate the license.

It was questioned by Member Pacheco how much Tradewinds will be in arrears in August 2011. Mr. Conry said right now as of December 2010 its \$225,000 and in August 2011 it will be an additional \$175,000. Staff agrees to forego the seven months of stumpage fees.

Member Pacheco asked after the license expires how long it would take the Department to turn around to put out a proposal to come back in to get the project going again. Michael Constantinides (DOFAW) said he believes staff would be able to turn around in a 3 to 6 month time frame with a follow-up request for proposals for alternative uses for those commercial resources.

Member Gon asked whether there were much clamoring by other alternative developers. Mr. Constantinides said in the last month there were two inquiries and the previous six months before another three or four where all of those represent bio-energy which is a lower value type of utilization and less value added. Staff's philosophy is creation of jobs secondary processing on island product. There is interest now and staff will have responses to a proposal.

Will Zapalac representing Rockland Capital testified reading a letter from Tradewinds relating the difficulties in obtaining financing. Don Bryan (Tradewinds Forest Products, LLC) created a new entity called Tradewinds Hawaiian Woods which will continue pursuing development of the veneer mill. Rockland recently cooperated with Don as he

completes a veneer test with a potential investor from the Pacific Northwest. Rockland has supported Don over the last six months by allowing him to remain on the industrial side and they continue to underwrite some of the development costs associated with Don's efforts. They support staff's recommendation and they believe the project's success will positively impact the Hamakua Coast. They appreciate the staff and the Board's willingness to consider this.

Don Bryan, CEO of Tradewinds Hawaiian Woods (THW) testified clarifying that Tradewinds Forest Products, LLC (TFP) and THW are two different companies with different owners. He is a minor share holder in TFP. Three people own THW and would be the entity to proceed with funding a veneer mill in cooperation with TFP. Mr. Bryan related the bad financial situation in America in the last few years, but a hopeful sign is the published prices of the product they will make is has had a 40% increase since 2009. Forestry products are an international enterprise today which he described that the industry is sending their products to China. Oregon recognized this raw material shortage and came to THW proposing that they invest and build the mill here (Hawaii). He described the process of doing the test veneer in Washington and the company there. And, they believe this is the right thing to do for the people of Hamakua. Mr. Bryan is committed to putting all his energies for the next seven months in making this happen.

David Frankel testified recalling this item coming before the Board in 1988 and he had opposed it as did others on the Big Island. There were substantive concerns that this project doesn't adequately protect native under story plants of the native trees in the area. He related previous Board's reactions and that the staff presentation does not fully accurately reflect the history of failed promises. The Board has a fiduciary duty to the State and these folks have money they owe you. They wan to lock up the land for themselves and not let anyone else on it and if they don't have the money they'll go bankrupt and you'll never get your money where tax payers will be left holding the bag. If these guys are in default, that's it -- pau. They can reform as another corporation and compete with others for the land and get a better proposal that does a better job of protecting the species in the area that makes better use of the wood. These guys had too many chances.

Member Gon thanked Mr. Frankel for refreshing their memories since some of them were here for some of those meetings.

Member Pacheco said he talked to staff and wondered when is enough, enough. The fact of the matter is we got the end of the license in August and if the Board wants to act on the default they would be saving themselves a couple months. Tradewinds has been at it a long time, had some trying times and he doesn't think we will speed things up greatly by moving on a default on this. He is happy Tradewinds is agreeing with staff's recommendation and it's not asking for an extension at this time. They already paid several hundred thousand over the years having tied up that land for a long time. He made a motion to approve staff's recommendation because if they don't do it the license expires and they can get on with business. Member Agor seconded that motion.

Member Gon said all things being equal it's good to express the frustration of the long history of this particular proposal and if we were in other economic context he would attention item #3 with the quote "Drop-Dead" date which is an expression of the frustration of the Department and the Board over the long history of this. On the other hand we are in a situation where any investment proposal for resources is having a hard time. The fact that people are attempting to explore those options and move forward with them has to be appreciated. There were a whole bunch of different recommendations added to this and although he read through them all he is having a hard time getting the feeling for the integration of it. Perhaps Chair Aila when he looks through amendment 1 through 6 of this.

Member Pacheco said they got to come up with evidence that they've got the financial backing to do this. They are given that amount of time and once that's there then these other recommendations are allowing the Department and the Chairperson to do the necessary actions to clean up the arrears and to move forward with their projects. He is very skeptical at this point, but they are coming down the wire and Mr. Bryan spent the last 10 years getting this done with a lot of personal monies that he has put into this and hope he does succeed. If the Board did say no, they are in default and let's terminate this thing we got a whole administrative process that has to go through and to start the process in June than August it doesn't make sense to him. He thinks this is a reasonable approach. Member Morgan agreed. Member Gon thanked him for the clarification.

Unanimously approved as submitted (Pacheco, Gon)

Item D-6 Issuance of Revocable Permit to Kahua Ranch Limited, Waiohinu & Kaunamano, Ka'u, Hawaii, Tax Map Key:3rd/9-5-05:03 (portion), 9-5-13:01 (portion).

Russell Tsuji representing Land Division conveyed that these parcels do not have any legal access and Kahua Ranch has access between the two parcels and that the Board should grant the permit.

Tim Richards, Manager of Kahua Ranch testified giving some background that they have been under application for quite some time to get these lands. Their intent is to put this into an intensified grazing management plan with NRCS to develop this, but the drought has been problematic for everybody. It will make sense to develop a cow/calf program in that area which is a continuation of what they've been doing.

Member Pacheco asked how many lands are in the complex. Mr. Richards said in that area about 600 acres and this will add another 150 acres and maybe another 75-100 acres adjoining which they would put into the whole complex.

Where is the access? Member Pacheco asked and Mr. Richards says it comes up along Hau Springs which he knows is in question because the road that comes up to go to Hau Springs crosses some of the fee simple lands which goes into the forest where they will come out of that access road.

Paul Makuakane testified he is descended from the native people of these islands exercising his Hawaiian tenant rights to occupy two or three acres to plant kalo (taro) and 'uala (sweet potato) and showed some photos. He wants to grow food for his family and be sustainable like his kupuna (elders) did. Mr. Makuakane applied for a month-to-month revocable permit and mentioned the TMK, but he was notified that the lease was to be given to another applicant. He asked the Board not to approve this lease because he had made a police report, but he couldn't present it until 10 days when the police releases the records. Also, he contacted the Humane Society to address some of the problems like dead animals on the property. Mr. Makuakane has been going up there for the past 16 months without anyone stopping him from his gathering rights. If the Board approves this it's in your hands, but you are also obligated to us (Native Hawaiians), too in trying to survive in these hard economic times. He read a Ka Wai Ola article regarding the loss of Hawaiian traditional practices, but supports his taro growing in that area. If this is taken away from the Hawaiian community how do you expect them to exist? He asked the Board not to approve this until pending records are obtained to be submitted to the Board.

Chair Aila asked what records he referred to. Mr. Makuakane stated the police record number and said he spoke to someone at the Kea'au office of the Humane Society that wants the BLNR directed to them because they have a pending investigation. He has support letters from Ka'u Agri-Forest Association which he distributed and read asking to devote more lands to small agriculture.

It was asked by Member Agor how much land he is farming and Mr. Makuakane said two or three acres now, but he has plans to extend it and have been in contact with staff.

It was asked by Chair Aila what agreement he had. Mr. Makuakane had none which is the reason for this because he thought staff had submitted his application, but they didn't. The Chair asked how much land is he seeking. Mr. Makuakane said 96 acres either for his family or if he works with the Association he wants to work for the rest of the community, but he wants to see these lands be used historically in kalo and 'uala.

Board member Pacheco asked which parcel on the map where Mr. Makuakane pointed out the parcels which he accesses by old cane haul roads and has records of everything he does.

The Chair asked whether Mr. Makuakane intended to apply and he did and read a letter to staff that he needs permission from the State and he related the situation with old government roads.

Member Goode asked whether Mr. Makuakane was interested in the other parcel and he was not because the parcel he is at has access to stream water.

Mr. Tsuji stated that whatever occupancy Mr. Makuakane may have had on the land was not authorized by the Department. The gathering rights as defined by the Supreme Court

would not be affected by any disposition of a lease or RP. There is a big difference between gathering rights and occupancy. There are conditions in our land documents whether an RP or a lease that, obviously, if he was occupying and complied with that staff would ensure with indemnity, rent.

It was queried by Member Agor when we issue an RP like this can the lessee resell a portion of the lot. Mr. Tsuji answered in the negative unless with Board approval. Typically it's a 30 day RP with the Board's consent.

Member Pacheco asked whether this property can't be leased because there is no access. Mr. Tsuji said staff checked and they can't find the exact statutory site to that, but they were advised by the AG's office for a long term lease at auction and if its land locked the Department ought to secure an easement over private lands. Kahua has legal access to these lots. These lands used to be used for sugar cane.

Member Morgan supports the staff submittal, but he supports Mr. Makuakane's efforts for sustainable farming, but he doesn't think this is the right parcel to do it on referring to the earlier comment that occupancy does not convey a right to use a piece of property. Kahua is a reputable company and does a good job in stewarding land and there are local benefits to the area.

There was some discussion on whether there were other lands available with access.

Chair Aila asked whether he had discussions with Kahua. Mr. Makuakane confirmed that he talked to Mr. Richards and they have an understanding, but sometimes there's a problem with the cattle getting in and damaging the sweet potato and taro where he tried to contact Kahua Ranch on several occasions, but don't get any response from them. Shouldn't allow cattle out on State land or in the forest, but be responsible for them.

Mr. Richards explained that there was a storm and took down the fence where the cattle go in on that side of the State lands and they purposely kept out of there because of the situation. Once his people found out they got the cattle out. Also, they've up graded the boundary fence along the grazing area. He won't disagree with Mr. Makuakane as far as controlling cattle that is what they do and he can't say that cattle never get out because they strive to ensure that's the best. The next step is putting in the permanent fencing along the private lands. It was staff who recommended the fencing. As for the Humane Society situation, there is a severe drought and they have very skinny cattle and have lost some. It was not predicted to have such a severe drought. Kahua Ranch had to take measures to wean calves earlier to take them off the grazing area and de-stocked mother cows and supplemented with thousands of dollars of feed supplement, but the problem was they had no where to take these animals.

After Member Pacheco's inquiry, Mr. Richards confirmed that Mr. Makuakane is farming on both State and private lands which is no fault of his.

Member Gon asked whether Kahua Ranch and Mr. Makuakane can co-exist and Mr. Richards acknowledged that they get along pretty well, but he cannot grant any access

and the land owners will not. Both of them are frustrated and want to get this thing resolved that they want to be good neighbors. Kahua Ranch is stepping into the previous ranch's shoes and continuing it.

David Frankel, Attorney for Native Hawaiian Legal Corporation pointed out gathering and cultivating kalo are traditional and customary practices protected by the State Constitution. Secondly, Native Hawaiians have a right not only to engage in those practices, but to access undeveloped land to exercise those practices. If there is a Native Hawaiian who wants to exercise those practices on State land which happens to be land locked there is no constitutional or legal bar from him accessing that land. So if you have problems Native Hawaiians do not have problems accessing that land. Before you render decision today in Hawaii Supreme Court's case of Kapa'akai requires you to investigate and make findings regarding the extent of traditional and customary practices and feasibility of protecting those practices and considering to the degree your decision would impair those practices. You are on clear notice there is a Native Hawaiian engaging in a traditional customary practice. In abdication of your duties if you went along with staff's recommendation without first investigating those practices and protecting it.

Member Pacheco 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 Gon seconded it.

11:43 AM EXECUTIVE SESSION

11:53 AM RECONVENED

Chair Aila said that per our Attorney General's office a change in ownership, a change in disposition of land does not constitute a violation of Native gathering rights and summarized any disposition of land does not impact Native gathering rights.

It was asked by Mr. Makuakane about his rights for subsistence. Deputy Attorney General said people can have Native tenant rights, but those rights don't include going on to somebody else's property which in this case the State's to start operating a farm without any authorization. It may include gathering rights and other things, but it does not include the right to occupy the property and start a farm on somebody else's property. To the extent he has such rights those rights are not affected by the disposition, but in the view of the Department of the Attorney General those rights do not include the right to occupy or run a farm on the property.

Member Pacheco made a motion to approve staff's recommendation. Member Morgan seconded it.

Member Gon said the continuation of Mr. Makuakane's efforts to maintain traditional agriculture on the property is not an official part of this decision but would be reliant on

maintaining a relationship with Kahua Ranch who as a result of this action be the permittee. Member Pacheco clarified that the permit doesn't give Kahua Ranch the authority to do that. It can only come from Board disposition which they couldn't do at this meeting because of Sunshine Law. Member Gon said in fact the State wouldn't be able to address this case in any official manner and would have to rely on the relationship between Mr. Makuakane and Kahua Ranch just for discussion. Member Pacheco said it is still unauthorized use of State lands under rule or statute which the Board is obliged to follow.

All voted in favor.

Chair Aila suggested Mr. Makuakane talk to the land manager on other lands in the area.

Unanimously approved as submitted (Pacheco, Morgan)

Item D-4 Issuance of Direct Lease to Connections New Century Public Charter School for School Purposes, Kaumana, Hawaii, Tax Map Key: (3) 2-5-6:141.

Mr. Tsuji briefed the Board on the background and stated he didn't have anything to add noting that the applicant was here.

It was questioned by Member Pacheco whether the charter school has access to the cave. John Thatcher representing Connections New Century Public Charter School replied that there was access, but was barred up and he explained where the cave runs under the road.

Member Pacheco made a motion to approve as submitted. Member Gon seconded it. All voted in favor.

Unanimously approved as submitted (Pacheco, Gon)

Item D-10 Request to Reduce the Performance Bond Requirement; General Lease No. 4644; Vallejo Venture 99, LLC, Lessee; Waimalu, Ewa, Oahu; TMK (1) 9-8-013:014.

Mr. Tsuji conveyed that this is staff's recommendation to lower the current performance bond which came before the Board as one of the Department's income producing properties. The tenant complies will all his lease terms. There were letters staff sent out regarding prior past performance bonds, but were quickly cured. Staff did add a condition (recommendation) which Mr. Tsuji read. The bond staff recommends to be reduced to is six months worth of rent paid twice a year and that is adequate time to cure other types of defaults.

After Member Pacheco's inquiry, Mr. Tsuji said the Statute allows the Board to reduce the amount. Typically, it's twice the annual rent which is quite a substantial sum where he related this is the Westridge Shopping Center. The reduced amount is about \$200,000.

He summarized that Lessee pays twice a year, six months at a time and staff is asking to reduce the amount and period.

The Lessee's representative said they were here to answer any questions and were in agreement with staff's recommendation.

Board member Morgan moved to approve as submitted. Member Gon seconded it. All voted in approval.

Unanimously approved as submitted (Morgan, Gon)

Item K-2 Request that the Board of Land and Natural Resources Grant a Petition for a Contested Case Hearing with Respect to Conservation District Use Application KA-3525 For Landscaping (Fence Replacement, Brush & Pasture Management and Habitat Improvement), and for Authorization to Select and Appoint a Hearing Officer, Located at Lepeuli, Hanalei, Kauai, TMK: (4) 5-1-003: 003

Mr. Lemmo briefed the Board on the item and asked for a withdrawal because staff received a letter from the permittee's counsel surrendering the CDUP. Because this was a permit issued by the Chair, staff will prepare a letter for the Chair's signature which would effectively acknowledge the surrender and nullify the permit. If in the future the permittee wants to apply for a use they have to come before the Board. This closes the matter and there will be no need for a contested case.

Member Pacheco asked whether the fence was put in and did some grubbing and grading. Mr. Lemmo said they did not put in a fence.

The letter was received yesterday in answer to Member Goode's question. There was some discussion on whether the permittee might change their mind.

Member Gon asked what the consequences of surrendering a CDUP are and Mr. Lemmo said it's like no one ever applied for a CDUP. There was a little bit of clearing in the area, but nothing of the aspects of the CDUP was implemented. They didn't build the fence and now they won't build a fence on conservation land. The Board needs to acknowledge that which is to withdraw.

It was queried by Member Pacheco whether it needs to come back to the Board or does the Chairperson nullifies it. Mr. Lemmo said it was a permit issued by the Chair and will just acknowledge the surrender and confirm that it is no longer in affect and that would be the end of it. And, maybe copying the Board with a letter suggested by Member Goode.

Member Gon suggested notifying those who asked for a contested case on this matter.

David Frankel testified that they filed for a stipulation with the court yesterday and in that stipulation states that all parties acknowledge that the CDUP is void. He wanted to highlight two issues – one they initially asked for a contested case hearing after they submitted the opening brief and the Deputy Attorney General acknowledged that. The Board has been trigger happy in denying peoples’ request for contested case hearings and hoped the Board reconsiders that approach in the future. The second issue is the trail itself that it’s troubling that it will be raised in other cases. You need to ask legal counsel to train and advise your staff describing a land court decision that doesn’t mention the trail at all where staff formed a legal opinion of their own. He referred to a 1931 Hawaii Supreme Court decision regarding highways and trails. Na Ala Hele has taken the position that if it’s a land court property and there is no mention of trail the trails can’t exist which is not true. It would be good if the State advocate in the publics interest in trails in the future.

The Board’s counsel, Mr. Wynhoff agreed with Mr. Frankel that the staff at the AG’s office takes very seriously the question whether a contested case is required and he believes the Board has always done so and will continue to do so in the future. With respect to trails, Mr. Wynhoff agrees 100% that there maybe land owners who disagree, but they don’t believe that Land Court necessarily wipes that out and he thinks Mr. Frankel is completely correct.

Member Pacheco asked about the CDUP being void and Mr. Wynhoff said the permittee pulled it so it’s like it was never filed. They basically said it was too much trouble and didn’t want to pursue it.

Richard Spacer testified that he was an activist on this matter and learned about the letter Tuesday and the AG’s decision today. He is greatly relieved as well as many people on Kauai are who opposed the fencing over traditional trails and impacts to the shoreline. His group extended their willingness to volunteer with the Na Ala Hele trails program, but the program has not been as receptive. Mr. Spacer spoke about another issue on a neighboring property regarding public access.

Member Agor reassured that what was discussed today and that information being conveyed to staff we can be assured that staff will start acting on what we learned today.

Member Gon made a motion to withdraw item K-2 which was seconded by Member Agor. All approved the motion.

Withdrawn (Gon, Agor)

Item M-1 Amendment to Prior Land Board Action of May 11, 2007 under Agenda Item M-1, Regarding Issuance of Direct Lease and Right-of-Entry to Ameron International Corporation, dba Ameron Hawaii Adjacent to and in Vicinity of Pier 60 and Keehi Lagoon Tax Map Key: 1st Division / 1-2-23: Portions of 33, Honolulu Harbor, Kapalama and Iwilei, Honolulu, Oahu

Eric Leong representing DOT – Harbors introduced Ameron Hawaii representative, Eric Yoshizawa and Mr. Leong reported on the submittal to the Board.

It was moved by Member Morgan and seconded by Member Gon. All voted in favor.

Unanimously approved as submitted (Morgan, Gon)

Item F-1 Request for Approval of a Draft Mitigation Plan for the Keawakapu Artificial Reef Incident Pursuant to the Board of Land and Natural Resources (BLNR) Decision of November 12, 2010.

Francis Oishi representing Division of Aquatic Resources (DAR) briefed the Board that at the November 12, 2010 meeting the Board determined the total damage amount of \$400,000 to the damage of coral resources as a result of artificial reef deployment accident. Of that total amount, it found American Marine Corporation liable for 1/3rd of that total amount and DAR liable for the remaining 2/3rd. DAR was further instructed to develop a draft mitigation plan to help restore the damages to the Keawakapu's natural reef and they had 60 days to do that. Before the Board is a proposed draft mitigation plan that has three components as part of the mitigation effort DAR proposes to remove all or most of the 125 artificial reef sea modules that currently impact the coral resources at Keawakapu. This proposed action is likely to include environmental review where DAR will contract for an environmental assessment for actions to remove some or all of those 125 modules. The second component is the actual removal of those modules provided staff gets an approval on an environmental assessment DAR would select a contractor through their RFP process to conduct the removal work. DAR would also supervise that contract, not only the removal of the modules off the coral, but relocated to the permitted area within Keawakapu. Lastly, DAR proposes the amount received by American Marine Corporation (AMC) \$132,000 will be spent on additional mitigation coral reef mitigation projects to the damaged area and relevant to coral reefs. Staff could identify a process to entertain ideas or suggestions for various projects and expend it towards that. Also, the Board wanted to know where the monies would be coming from for DAR's share and DAR proposes to use general funds or Federal funds or a combination of both to pay for both the environmental assessment which staff expects to run around between \$30,000 and \$50,000. And to pay for the contract removal work which staff expects will run between \$200,000 to \$300,000. To address DAR's share of the total award the total damage amount is any where from \$230,000 to \$350,000 which meets DAR's obligation. Staff recommends the Board approve the draft mitigation plan as proposed.

It was questioned by Member Pacheco whether staff proposes to remove the modules and put them back where they were suppose to be. Mr. Oishi said they plan to relocate them to the permitted area. In the long run it would cost a lot less than removing them and disposing them.

Chairperson Aila asked whether the draft mitigation plans A and B be done concurrently citing the example if staff gets a request for proposal of a certain way to remove that it

would make more sense that when you choose the RFP plan then you cause them to analyze that proposal as opposed to having a general analysis. Mr. Oishi said he thinks the Division prior to the Board's action in November looked at the logistics of whether the EA comes first and separate or do them concurrently so that the EA becomes more accurate in terms of the action. Staff could do a consultation meeting with prospective contractors and get their input on what staff wants to do and how peaceable it is to do it. The EA could be drafted to be more narrowly defined and more accurate in its information rather than staff asking for a draft of an EA and its one sided. The Chair asked for procurement purposes can the two recommendations be combined. Mr. Oishi said he didn't know and would have to check that. He recalled AG's formal opinion was they had to be separate, but he didn't think there was any restriction on the Division consulting with prospective contractors and getting their input on the operation itself as to make the EA a better informed document.

Member Pacheco asked whether Mr. Oishi saw Glenn Shiroma's written testimony referring to the external investigation at DOT. This was a report mentioned at our Board meeting that he had sent testimony previous to it and that there was an external report at the request of the Department to look at this and that. Supposedly as quoted here Chair Thielen says, on the last page, "Department of Transportation is conducting an external investigation, currently. Their report, when finalized, will be made public." and asked whether that report has been made public. Mr. Oishi said he will reiterate what the Chairperson said at that Board meeting - that was not a public document because it involved a review of personnel actions during that incident that it was not to be considered public. He believed her statement was part of the record on November 12th. Until Mr. Oishi is told otherwise he will stick to it. For the Board's information, when the artificial reef accident occurred Chair Thielen at the time ordered two separate investigations. She wanted an external independent investigation of the damage where that was contracted out. Almost concurrently, she wanted an investigation of what led up to accident and what were the causes for the accident. She did not want the Division doing that, she wanted an external agency doing that where DOT was contracted to do that.

Mr. Oishi confirmed Member Pacheco's inquiry that it does include comment, review and analysis of personnel matters. Member Pacheco stated that if Mr. Shiroma wants to pursue that he should pursue it through the Office of Information Practices and Mr. Oishi acknowledged that.

Mr. Wynhoff said he would say he asked for it so somebody will have to make an official determination as to whether or not it's actually public record or not. He supposed that DAR or Chair will ask someone at the AG's office and if Mr. Shiroma is dissatisfied he will pursue it however way he wants to pursue it. Mr. Wynhoff has seen the document, but doesn't have a clue whether it's public or not. The Department is getting pretty good at responding for a request for documents.

Randy Cates testified that he has some knowledge of the site having been asked by DAR personnel when it first occurred to create a plan or get some suggestions to fix the site.

Keep it simple and straight forward. He made recommendations on the right way and wrong way of doing it having gotten agreements from NOAA and the mainland. It would make more sense to have a contractor chosen first to determine how you are going to do the site and then do the EA. You may end up with an EA and the contractor not being the most environmentally friendly. Either do it together or get input on the best way of completing the job environmentally first and then draft an EA. That could be through discussions with DAR in getting the ideas and they could convey the EA, but that information has to get to the person drafting the EA. In this case, doing the EA in the time that it takes will not harm the environment. He hesitates every time we do down a path every time we have coral damage it takes a year or so before the work can get done. That can damage the environment as well and he has documented cases where that is ongoing. Sometimes you need to get in there right now and do the work. Whatever process comes up, think about that. You don't want permits in place and the environment suffering.

Member Pacheco asked whether there was a provision in the rules that allows for actions on certain things. Mr. Cates said there always has been in the past until recently there has been an interpretation that we don't citing Cape Flattery within two days they took emergency action. Port Royal we did emergency action. When a huge log washed up on the coral at Waikiki Beach we took emergency action. Now we are in a situation where it's uncertain and by the past Chairperson who said there is a requirement for an EA and that is very problematic. As responders to a vessel grounding would we respond without an EA? The whole industry is uncertain with liability and unfortunately the environment is suffering. In the past if there is a big mound of rubble you just went in and did the work without an EA. We have to change that so that DLNR has the tools to take action.

Member Pacheco made a motion to approve as submitted. Member Agor seconded it. All voted in favor.

Unanimously approved as submitted (Pacheco, Agor)

Item K-5 Conservation District Use Application (CDUA) KA-3562 for the Aliomanu Road Repair Project (Shoreline Revetment) by County of Kauai Department of Public Works, Located at Anahola, Kaua'i, TMKs: (4) 4-8-018:028 and 029

Mr. Lemmo conveyed to the Board that it's unusual to be asking the Land Board to approve a shoreline structure because generally we have a practice of not promoting sea wall construction and point people into other direction other than building a shoreline structure because they have been shown to damage our beaches. He referred to staff's discussion on page 10 and 11. On page 10 there is a policy that a former Land Board approved regarding shoreline armoring which Mr. Lemmo went over. The road the applicant wants to build the revetment on is the only access to the area and a whole community would not be able to get to their homes, but this area has a severe erosion problem. There is no beach in front of the area so armoring won't cause anything new to the beach. The substrate is a clay bank and he would like to have new rock or stones

rather than exposed clay. Based on all this staff was okay to recommend it. Also, ensure pedestrian access through the area and suggested over the shoulder and putting a sign in. There are a number of recommendations and Mr. Lemmo recommended granting them an approval of this project.

Warren Booker testified he is a Coastal Engineer with Oceanit who are the consultants for design and planning for County of Kauai, Department of Public Works and he distributed a handout of photos. He related some history of the area referring to the photos and maps.

It was asked by Member Gon whether Mr. Booker's presentation was leading up to an adjustment to the recommendations and it does not say Mr. Booker.

There was some discussion of temporary revetments in the area.

Member Agor moved to approve staff's recommendations. Member Gon seconded it. All approved it.

Unanimously approved as submitted (Agor, Gon)

Item K-4 Time Extension Request for Conservation District Use Permit (CDUP) HA-3247 for the Replacement of Pi'ihonua Reservoir No. 2 and Associated Improvements by the County of Hawaii Department of Water Supply, Located on Waianuenue Avenue, Pi'ihonua, South Hilo, Island of Hawaii, TMK: (3) 2-3-030:005

Mr. Lemmo stated that this item is a time extension request which staff recommends.

A motion was made to approve by Member Pacheco and was seconded by Member Morgan. All voted in favor.

Unanimously approved as submitted (Pacheco, Morgan)

Item C-1 Acceptance of Hearing Officer's Report on a Public Hearing for One Proposed Withdrawal from the Forest Reserve System on the Island of Maui

Approval and Recommendation to the Governor issuance of an Executive Order to Withdraw Approximately 0.60 Acres from Koolau Forest Reserve, Governor's Proclamations Dated August 24, 1906, May 20, 1925 and/or May 2, 1938, Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001:portions of 023 and/or 044.
The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties,

privileges, immunities and liabilities in connection with the pending lawsuit, *Bradbury v. State*, Civ. No. 09-1-763(1).

Item C-2 Request Approval to Initiate the Competitive Sealed Proposal Process and Authorize the Chairperson to Issue a Request for Proposals and Award and Execute a Contract for the Construction of 18 Miles of Ungulate Proof Fence on Mauna Kea to Protect Palila Critical Habitat.

Paul Conry, Administrator Division of Forestry and Wildlife (DOFAW) briefed the Board on item C-1 and staff recommends the Board to accept the hearing officer's report and based on that the issuance of the Executive Order. No changes to item C-2 where he related what it does. This will not complete the fence.

Member Gon moved to approve items C-1 and C-2. Member Pacheco seconded it. It was approved by all.

Unanimously approved as submitted (Gon, Pacheco)

Item D-2 Issuance of Month-to-month Revocable Permit to Giampaolo Boschetti for Storage Area and Parking Purposes, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-1-06:84.

Mr. Tsuji noted that this item needs to be deferred.

Member Pacheco made a motion to defer this item. Member Gon seconded it. All approved to defer.

Deferred (Pacheco, Gon)

Item D-1 Extinguish Two Reservations to the State of Hawaii Covering Easement 1 and 2 for Electric Pole and Wire Line Purposes Within Land Patent Grant No. S-15810 issued to the Department of Hawaiian Home Lands, Puna, Hawaii, Tax Map Key: (3) 1-7-007:42 and 44.

Item D-3 Sale of Remnant to Mark A. Goldman and Iva R. Goldman, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-4-57:portion of 01.

Item D-5 After-the-Fact Consent to Assign General Lease No. S-3933, Roman Catholic Bishop of Honolulu, Assignor, to Roman Catholic Church in the State of Hawaii, Assignee, Lalamilo, Waimea, South Kohala, Hawaii, Tax Map Key: (3) 6-9-05:19.

Item D-7 Issuance of Revocable Permit to MC&A, Inc. for a Team Building Event at Wailea Beach, Maui, Tax Map Key:(2) 2-1-008: seaward of 109.

- Item D-8** **After-the-Fact Consent to Assign Grant of Non-Exclusive Easement (Land Office Deed No. S-27932); Sybil A. Orr, Assignor, to Anthony P. and Dolores Amaral, Assignee and amendment of Grant of Non-Exclusive Easement (Land Office Deed No. S-27932), Waiakoa, Makawao, Maui, Tax Map Key: (2) 2-2-009:030 portion.**
- Item D-9** **Issuance of Revocable Permit to Hawaii Explosives and Pyrotechnics, Inc. for Aerial Fireworks Display at Duke Kahanamoku Beach, Waikiki, Honolulu, Oahu, Tax Map Key:(1) 2-3-037:021 portion.**
- Item D-11** **Amend Prior Board Action of August 23, 1996, Item D-24, Direct Issuance of Perpetual Non-Exclusive Easements to the City and County of Honolulu for Wall Footing and Metering Purposes at Halawa, Ewa, Oahu, Tax Map Key: (1) 9-9-075: portion of 028.**

Member Morgan moved to approve as submitted. Member Gon seconded it. All voted in favor.

Unanimously approved as submitted (Morgan, Gon)

- Item E-1** **Request Approval to Enter into Memorandum of Agreement between Department of Land and Natural Resources and Hawai'i Maoli to Repair Ornamental Ironwork at the Royal Mausoleum, Mauna'ala, Nu'uaniu, O'ahu (TMK: 2-2-021: 012)**

Dan Quinn representing State Parks briefed the Board and that they had no changes. Staff needs the MOA to be able to go out to bid for the project. Also, authority be delegated to the Chair for any further amendments.

Member Gon approved as submitted. Member Morgan seconded it. All approved it.

Unanimously approved as submitted (Gon, Morgan)

- Item L-1** **Approval to Execute Supplemental Contract No. 1 to Contract No. 55928 for Job No. B61XM82A for Professional Services, Kaunakakahi Harbor Ferry Improvements Molokai, Hawaii.**
- Item L-2** **Certification of Election of Mauna Kea Soil and Water Conservation District Director**
- Item L-3** **Approval to Execute Supplemental Contract No. 1 to the Agreement for Professional Services, Contract No. 57262, for Job No. F74C664A Haena State Park Master Plan, Haena, Kauai**

Carty Chang representing Engineering Division state he had no changes to items L-1, L-2 and L-3 where he gave some background on item L-1.

Member Morgan moved to approve items L-1, L-2 and L-3. Member Gon seconded it. All approved.

Unanimously approved as submitted (Morgan, Gon)

- Item M-2 Rescission of Prior Board Action of January 8, 2010, Under Item M-3, Issuance of Non-Exclusive On-Demand Airport-Based Shuttle Bus Concession and Authorization to Issue an Exclusive On-Demand Shuttle Services Concession at Honolulu International Airport Through a Request For Proposals.**

- Item M-3 Amendment No. 1 to Lease No. DOT-A-09-0015 Rental Car Baseyard Lease EAN Holdings, LLC dba Enterprise Rent-A-Car, Kahului Airport.**

- Item M-4 Consent to Sublease for Lease No. DOT-A-10-0002 Travel Traders of Hawaii, Inc. and JME Group LLC Lihue Airport.**

- Item M-5 Issuance of a Direct Lease to Sky-Med, Inc. dba Pacific International Skydiving Center Dillingham, Airfield, Waialua, Hawaii.**

- Item M-6 Amendment No. 1 to State Lease No. DOT-A-81-0014 Extension of Fixed-Base Facilities Lease Gary Owen Galiher and Diane Tsugie Ono Honolulu International Airport**

Member Gon moved to approve and Member Morgan seconded it. All voted in favor.

Unanimously approved as submitted (Gon, Morgan)

Adjourned (Morgan, Gon)

There being no further business, Interim Chairperson Aila adjourned the meeting at 12:55 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