

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

DATE: FRIDAY, JANUARY 8, 2010
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

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

MEMBERS

Laura Thielen
David Goode
Jerry Edlao
Rob Pacheco

Ron Agor
John Morgan
Dr. Sam Gon

STAFF

Morris Atta/LAND
Michael Constantinides/DOFAW
Chris Conner/ OCCL
Lindsay/DOFAW
Pua Aiu/HP
Francis Oishi/DAR

Paul Conry/DOFAW
Robert Kennedy/DOFAW
Audrey Barker/OCCL
Brent Ligemeyer/DOFAW
Curt Cottrell/PARKS

OTHERS

Linda Chow, Deputy AG
Neil Simms, D-25
Rob Parsons, D-25
Richard DeRopertis, C-5
Reverend John Hoover, D-12
Brian Vinson, D-23
Jim Stone, M-4
Sophia Maikui, D-11
Steve Baczkiewicz, D-17
Gregory Spencer, C-3
Huang Chi Kuo, C-1
Jonlyn Kamokakane, C-1

Bill Wynhoff, Deputy AG
Todd Madsen, D-25
Marti Townsend, D-25, C-1
Robert Reiarson, D-6
Leolani Kim, D-12
Conrad Hokama, D-8
Mike Tressler, M-4
Ron Self, D-17
Vernon Char, D-21
Leila Hubbard, C-1
Summer Nemeth, C-1
Ashley Adams, C-1

Audrey Kahooalii, C-1
Bill Stanley, C-1
Steve Montgomery, C-1
Jacqueline Kozak, C-1
Cynthia Rezentes, C-1
Dr. Sheila Conant, C-1
Lola Nitholen, C-1
Ronald Sato, D-24
Kimo David Frankel, D-24, D-1
Pi'ilani Smith, D-24
Randy Rapoza, D-24
Douglas Haigh, D-1

David Duffy, C-1
Thomas Shirai, C-1
Wayne Liggett, C-1
Rachel, Lavell, C-1
Candace Fujitani, C-1
William Aila, Jr., C-1
Gerald Sumida, D-24
Darell Young, D-24
Na'u Kamali'i, D-24, D-1
Waldeen Palmeira, D-24, D-1
Hal Hemmit, D-24, D-1
Alan Ho, D-28

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

Item A-1 November 19 2009 Minutes (TO BE DISTRIBUTED.)

Item A-2 December 11, 2009 Minutes (TO BE DISTRIBUTED.)

Not ready.

Deferred.

Item D-25 Consent to Assign General Lease No. S-5721, Kona Blue Water Farms, Inc., Assignor, to Keahole Point Fish LLC, Assignee, Kalaoa 1st through 4th, North Kona, Hawaii, Tax Map Key: 3rd/7-3-43: seaward of Kalaoa.

A number of written testimonies were distributed to the Board.

Morris Atta, Administrator for Land Division (LD) reported that Kona Blue is selling it's off shore mariculture operations to Keahole Point Fish while retaining ownership of its shore based facilities. This request is for the restructuring of their organization and is coming to the Department for consent assignment.

The Board asked whether there were changes or is this just a transfer. Mr. Atta said there are no changes that staffed reviewed the assignees and found them qualified to operate the facilities.

The Board queried if there were any significant problems while Kona Blue was operating. Mr. Atta replied that he wasn't aware of any.

It was questioned by the Board whether the new applicant read the conditions set forth in the previous lease and was acceptable where Mr. Atta said that the applicant is here and could answer that.

Neil Sims is President and CEO of Kona Blue Water Farms testified that they've worked closely with Keahole Point Fish since they've been in business. The principle for Ocean Spa is the company that manufactures the submersible net pens. This transfer allows Keahole to bring in additional capital and expertise to continue operating the site which is advantageous for a sustainable industry in Hawaii. Mr. Simms reminded the Board that last year the Board granted them larger net pens. Keahole will bring in new net pens and they are pleased with this close working relationship.

The Board asked whether the assignee reviewed and accepted the conditions to the lease. Todd Madsen representing Keahole Point Fish LLC said they reviewed the lease and all the associated permits and confirmed that they can meet all conditions.

Rob Parsons, a Maui consultant with Food & Water Watch and other Hawaii organizations stressed on behalf of Food & Water Watch concerns of transfer of Kona Blue Water Farms to Keahole Point Farms LLC outlined in his written letter noting that the public heard news about this two days ago urging to defer any action. His organization recognized the legitimacy of the transfer based on HAR§171-36, but are concerned with the amount of rent proposed, the overall sustainability of the company and the disproportionate social and economic return to Hawaii. Mr. Parsons referred to comments made to the environmental assessment regarding changes to the CDUA and listed them. Also, he reiterated concerns raised during the October 23, 2009 BLNR meeting on Hawaii Oceanic Technology. He read a letter from a Charles Fleurity of Kealahou, Hawaii who has been trying to get documents from OCCL regarding Kona Blue, but staff has refused to release it urging the Board to be concerned and to defer this.

Member Gon asked whether any problems with diseases or parasites came up during the year Kona Blue was in operation. Mr. Parsons confirmed there was and described skin and gill fluke infestation on the caged fish where regular chemical treatment is needed to reduce the parasites on the fish and he was concerned with mortality being disposed at sea because there have been reports of dead fish in the ocean.

Marti Townsend representing KAHEA opposed this because it sets a precedent for private use.

Member Gon queried in response to Sierra Club's letter whether there was any deviation of any permit requirements. Mr. Atta said any defaults were noted in the submittal and all were cured. As for performance of operation, he wasn't aware of any dead fish and there were reports in the past on studies of disease, but staff has not received a direct report.

Member Gon asked in regards to monitoring biological ocean resources are they (Kona Blue) self policing. Mr. Atta explained that Land management doesn't have the

resources or expertise to enforce these activities confirming that the assignor was self policing and if there are reports from the public that staff could initiate an investigation.

Chair Thielen asked for clarification that Office of Conservation and Coastal Lands (OCCL) would oversee the conservation district use permit conditions. Mr. Atta confirmed that and said Division of Aquatic Resources (DAR) would input on any fisheries issues.

The Board asked whether OCCL and DAR reviewed this application which Mr. Atta confirmed and noted that if there was a problem OCCL would point it out, but he wasn't sure about DAR.

It was asked by the Board whether the Department has the option of applying additional conditions to the 20 year lease. Mr. Atta confirmed that it's built in and is a standard provision for their submittals.

Board member Gon asked the Kona Blue representative to outline their relationship with OCCL and others who help monitor the consequences of an open ocean system and to give the run down on the skin and gill fluke situation – when it arose, how they dealt with it and what the current status is. Mr. Sims explained that their ownership of the water is what is inside the cage and there is public access. There is a third party water quality monitoring through the NEPDES permit issued by Department of Health (DOH), Clean Water Branch with oversight from the EPA including the benthic monitoring. Kona Blue was mandated to inform OCCL and Clean Water Branch of any instances of disease or parasites, which they do. If there is need for treatment the oversight is by OCCL, Clean Water Branch, US Fish and Wildlife Service and FDA which includes water quality monitoring of the effluent around the cages. Also, Kona Blue monitors the health of the wild stocks around the farm site. Mr. Sims admitted to one instance of skin fluke the size of a flea which is a management challenge in the pens, but they haven't seen any increase in the wild because wild fish have a lot of external and internal parasites.

The Board asked Mr. Sims to comment on Mr. Parson's concern regarding mortality of dead fish. Mr. Sims explained that he was a marine biologist having previously managed commercial fisheries and he sees open ocean mariculture as a way to give back to the ocean rather than continually taking from it. It is important to Kona Blue and Keahole to do this in a responsible, sustainable manner noting that one of the permit conditions is to discard dead fish in the land fill which his staff takes seriously. If there are instances of fish kills then Mr. Sims recommended calling Bill Walsh of DAR to come out and verify that and to call Mr. Sims because he will fire any employee who disposes fish in the ocean. He suggested involving a third party like Monterey Bay Aquarium who is an authority on sustainable seafood rather than indulge in hearsay. Kona Blue's kampachi has been the first open ocean fish to be ranked by Monterey Bay Aquarium. Kona Blue staff has not received any complaints about dead fish reiterating contacting Bill Walsh and that it's important that they are transparent.

A Board member asked what would be the continued relationship as this transfer occurs. Mr. Sims said that Kona Blue will continue operating the hatchery at the Natural Energy Lab that provides the fingerlings to Keahole Point Fish and will continue to provide biological support and guidance through the grow out on issues - fish sustainability, management and will continue to conduct research to improve feed, sustainability or fish health management and sell and market the fish as Kona kampachi. Keahole will be a third party grower for Kona Blue Water Farms which is to help take them to the next level to continue growing.

It was questioned by the Board whether there have been dead fish and reasons for it and Mr. Sims confirmed that in a farm some fish are not adapted to get through, they become emaciated or various other reasons. Member Gon said that a vast majority of fish that hatch don't come to significant size and asked what is the percentage of mortality. Mr. Sims said their target was out of 5 grams of fingerlings they expect about 85% at 4 to 5 lbs harvest size which is based on their historical experience. This working relationship with Keahole will get new net pens and will be efficient and better at managing the fish stock. Chair Thielen asked what is the survival rate compared to wild stock. Mr. Sims said the wild is a tiny fraction that of the 10 million eggs a female produces only about two survive to maturity.

Unanimously approved as submitted (Pacheco, Edlao)

**Item C-5 Issuance of Forest Reserve System Special Use Permit No. FW-2010-K-03 to Genera Texeira for Residence, Pasture and Cleanup
Purposes, Waimea, Kauai, Tax Map Key: (4) 1-5-01: portion 01.**

Paul Conry, Administrator with Division of Forestry and Wildlife (DOFAW) pointed out a correction that the submittal says staff had not received rent payments, but they have received the December rent payment and the January rent payment has been made. The issue is this is an old track land put into Forest Reserve and an old resident was not meeting the intention of the Forest Reserve designation. Staff contacted them back in October 2009 that they were not going to continue. Then at a site visit in December 2009 staff asked that a special use permit be issued for six months to allow the lessee to move and clean-up the site and there are some new requirements on the liability that go along with that. The applicant is here to provide comments.

The Board asked whether the lessee was notified when the Department was contemplating to set aside this land. Michael Constantinides, a DOFAW staff member said he was not aware if the lessee was informed and he thinks it came to the attention of Land Division later in 2009.

Richard DeRobertis, an attorney representing Genera Texeira testified that his mother-in-law has always paid their monthly on time. Ms. Texeira is 80 years old and switched insurance companies in May 2009 from Allied Insurance to Nautilus Insurance and has a policy through May 2010. The insurance agent hasn't filed anything with DLNR as they were supposed to and Mr. DeRobertis wanted to know why they haven't received it. The amount of insurance is \$500,000 per occurrence. The recommendation is a \$1 million

per occurrence asking the Board to keep it at \$500,000 and for more time. He is grateful for the extension.

There was some discussion between Mr. Conry and the Board regarding the extension that it was not a problem. The Chair said if Mr. DeRobertis needed longer than a week how much time would he need to show proof of insurance and January 31, 2010 was fine for Mr. DeRobertis and Mr. Conry agreed to that.

Member Edlao noted that there is a clause for the responsible party to clean-up asking whether or not to do a bond because the State has been stuck with the bill in the past. Where Mr. DeRobertis said this was on-going from the past.

Member Gon asked, looking at the pictures, whether the clean-up included building removal where Mr. Conry answered in the negative that it's the trash and not the building.

The Board:

Approved staff's submittal as amended to be the \$500,000 of insurance and proof of insurance delivered by January 31, 2010.

Unanimously approved as amended (Agor, Goode)

Item D-6 Grant of Perpetual, Non-Exclusive Easement to Motor Supply, Limited, for Access and Utility Purposes over a Portion of Maile Street at the Wailoa River State Recreation Area, Waiakea, South Hilo, Hawaii Tax Map Key: 3rd/2-2-29:01 (por.)

Mr. Atta informed the Board that the area in question is part of a set aside to State Parks and it's considered an internal road at the Wailua River Recreation Area. Staff contacted State Parks and got their concurrence and support subject to some concerns that they had regarding parking and signage and as such those conditions were incorporated as part of the applicant's requirements. Staff's recommendation is to grant this easement subject to those conditions to ensure that there is no parking problems associated with this easement.

Robert Reiarson representing Motor Supply Ltd. was present to answer any questions.

Unanimously approved as submitted (Pacheco, Edlao)

There was some discussion between Mr. Atta and the Chair that Items D-12, D-13 and D-16 has similar testifiers here and D-12 and D-13 are related. Item D-13 is housekeeping.

Item D-13 Amend Board Action of November 19, 2009, Item D-6, Amendment to Grant of Easement No. S-4858 to Joseph F. Pickering and Helen D. Pickering for Vehicular and Pedestrian Ingress and Egress Purposes, Puako, Lalamilo, South Kohala, Hawaii, Tax Map Key: 3rd/6-9-02: 9

Mr. Atta explained that the prior Board action misidentified the lot and staff wanted to correct the record.

Unanimously approved as submitted (Pacheco, Edlao)

Item D-12 Rescind Prior Board Action of November 15, 2002, Item D-3, Cancellation of Revocable Permit No. S-4350 and Issuance of New Revocable Permit to Hawaii Conference Foundation, Puako, Lalamilo, South Kohala, Hawaii, Tax Map Key: 3rd/ 6-9-02: 7, 8, 9 & 10;

Cancellation of Revocable Permit No. S-4350 and Issuance of Direct Lease to Hawaii Conference Foundation for Church and Landscaping Purposes; Right-of-Entry to Hawaii Conference Foundation for Survey Purposes, Puako, Lalamilo, South Kohala, Hawaii, Tax Map Key: 3rd/ 6-9-02: 7, 8, 9 & 10.

Written testimony was received and distributed.

Mr. Atta summarized and read the recommendation where the applicant is requesting the Board rescind its action on November 15, 2002 regarding RP S-4350 and instead issue a new revocable permit to the Hawaii Conference Foundation for this area subject to the applicant fulfilling its requirements in the submittal that staff authorizes issuance of a direct lease to the Hawaii Conference Foundation and authorize the right-of-entry to the Foundation for purposes of doing field studies on an environmental assessment for building a structure on the property itself. He noted there are a number of testifiers for the applicant here.

Reverend John Hoover with Hokuhoa Church commended the Board and staff for unraveling this complicated situation to clarify the church boundaries.

Leolani Kini representing Hawaii Conference Foundation was here to answer any questions.

Unanimously approved as submitted (Pacheco, Gon)

Item D-16 Re-Submittal Mutual Cancellation of General Lease No. S-5152 and Re-Issuance of a Direct Lease to Hawaii Conference Foundation for Youth Athletic, Education, and Religious Purposes, North Kona, Hawaii, Tax Map Key: (3) 7-6-16:33

It was reported by Mr. Atta that this item is to enable the non-profit organization to raise monies so they can build this facility. The Office of Attorney General had concerns with staff's explanation of the satisfaction of Chapter 343 requirements and referred to Chris Yuen who was assisting the organization and he came back saying that there was no 343 assessment needed. The Attorney General's Office was still not comfortable with

reliance on the statement by Mr. Yuen. Mr. Atta suggested that since the organization is not financially capable of proceeding with the construction and development of the site there is an immediate need for the organization to receive the lease so they can go out and actively raise funds for that project and that is why the organization is here. And, to amend the submittal to suggest that when the foundation does begin or commence design of the construction phase of this project then, at that point, they will address the need for any environmental assessment under Chapter 343 and move forward with issuing the lease to facilitate their ability to fund raise.

Chair Thielen summarized amending condition #2 to say future actions would need to comply with Chapter 343 which Mr. Atta acknowledged whether it is filing a FONSI or not, whatever it is to comply.

Ms. Kini agreed with the condition amendment.

Chair Thielen asked whether the Attorney General's Office was ok with this. Linda Chow, Deputy Attorney General confirmed they are.

The Board:

Approved as amended. The Land Board amended the recommendation by replacing Recommendation number 2 with the following: Applicant shall address all applicable environmental assessment and reporting requirements under HRS Chapter 343 prior to or as a part of commencing any planning, design, and construction activity for or on the premises. Otherwise, the Land Board approved staff's recommendations as submitted.

Unanimously approved as amended (Pacheco, Agor)

Item D-23 Grant of Two (2) Term, Non-Exclusive Easement to Brian W. Vinson for Seawall Purposes, Puuloa, Ewa, Oahu, Tax Map Key: (1) 9-1-007:seaward of 052 & 064.

Mr. Atta conveyed to the Board Item D-23 is seeking to resolve a shoreline encroachment issue that was discovered as inadvertently to the shoreline certification process. The applicant was here to resolve the easement issues to address the encroachments that were found.

Brian Vinson testified that his concern was with the signage requirement that it might entrap or endanger the monk seals and he asked this be removed from the requirements. There was a recommendation to fine him up to \$2,000 for the improvements built in 1962-64 with a permit and a high water mark set in 1967 where there was no violation then and he doesn't find it fair to fine him since he only owned the property less than a year.

There was some discussion about the signage requirement where Mr. Atta explained that this is a standard provision for our non-exclusive easement along the shoreline and it has

been a practice to ensure that the public is aware that this is a non-exclusive easement and the public is entitled to use it if it falls anywhere within the shoreline area and that is why signage has always been a standard provision in their easement documentation. Where the Chair said it is not a requirement to place the sign in front of the wall and suggested replacing the sign behind the wall and to work with staff on the location of the signage so it wouldn't impact the monk seals, but mainly it's for the public to know this is a public area. Mr. Vinson said didn't think the sign was needed since the public is there already.

A Board member asked whether \$1,000 is standard and 2 parcels is \$2,000 which was confirmed by Mr. Atta and that Board member said it should have been disclosed to Mr. Vinson that the makai boundary can change.

*A motion to approve as submitted was made by Member Morgan and seconded by Member Edlao.

There was some discussion between the Board members regarding standard practice when walls are already in place that realtors need to check on structures prior to purchasing. Mr. Vinson related more background information on the seawall reiterating the encroachment and being built before a high water mark was verified. There was more discussion with the Board and staff on the aerial photos and asked to speak with OCCL staff. Chair Thielen deferred because of conflicting information and said that this item will resume with staff later in this meeting.

**Item D-8 Consent to Extension of Lease Term, General Lease No. S-4310
Alumside Products, Inc., Lessee, Waiakea, South Hilo, Hawaii, Tax
Map Key: 3rd/2-2-58:31.**

Mr. Atta described that this is one of the State's industrial properties in Hilo that has an initial term of 40 years and the tenant is putting in significant improvements into the property where allowed by statute the Board may grant an extension up to a maximum of up to five years.

Conrad Hokama, representing the lessee appreciated continuing on the property and wants to move forward.

Unanimously approved as submitted (Pacheco, Edlao)

**Item M-4 Agreement for Purchase and Sale of Real Property between Visionary
LLC and State of Hawaii, Department of Transportation.**

Chair Thielen conveyed that this item is one of our standard DOT concession agreements.

Ms. Chow, the Board's Deputy AG, pointed out that this would be an acquisition by the Board because DOT cannot acquire land in its own name the Board must acquire it on behalf of DOT.

Jim Stone testified that he was here on behalf of Visionary who is selling the land to the DOT and it is not their intent to get into any dispute as to who takes title to it. He clarified after discussions with DOT that Director Morioka requested since DOT is paying for the land that DOT wanted the title and Mr. Stone is not disputing what the Deputy Attorney General is saying he was conveying what Director Morioka had said.

Chair Thielen asked Mr. Atta whether DOT Lands is titled within DOT or DLNR. Mr. Atta said it ordinarily it comes to the State and is set aside to DOT. The Chair summarized the land would originally come to DLNR and then there would be a set aside or executive order to DOT which Mr. Atta confirmed.

Chair Thielen asked whether Land Division needs some time to discuss with DOT to go through procedures we need to do for land acquisitions and Mr. Atta said that was a good idea because staff hasn't vetted out any acquisition issues involved, but he didn't know if there was a time element.

Mr. Stone said they are trying to close this agreement and purchase before the end of the month suggesting consent and the agencies work it out, but grant the approval and so they aren't delayed by coming back to another public hearing. Chair Thielen explained that this is more a State issue and doesn't involve dealing directly with Department of Transportation and is something Mr. Stone is not aware of, but if the underlying title initially goes to DLNR in acquisition issues they may need to satisfy DLNR on certain due diligence or underlying conditions of the property before approving that sale. She knows he has a timetable and it's something they could work expeditiously with DOT and Mr. Stone, but her recommendation is to defer and allow staff to work with DOT because this is an acquisition.

Mr. Stone pointed out Chapter 261-4 under HRS allows DOT to acquire property and it is not their intent to get involved with what the State wants to do, but they don't want to delay closing of the sale at the end of the month.

Chair Thielen asked what would not be able to happen by end of next month. Is there lapsing monies? This is so their counsel could work with DOT.

Mike Tressler representing Visionary testified that they have been at this deal for 3 years and the closing deadline was last summer, got pushed back to November and there was some question whether they needed DLNR approval and it was his understanding that DOT wanted to cover all basis. This transaction involves FAA money it's approved in the budget. There is a case that they didn't need DLNR approval, but DOT was being conservative and the closing got pushed back to December and now at the end of the month. He made a humble request to get the Board's approval and then we can work out the title issues between the agencies because there are significant deadlines by the end of January.

Member Morgan suggested making subject two a recommendation. Chair Thielen said what the Board could do if it wanted to was delegate to the Chair the ability to sign or not

depending upon Attorney General review. Her concern is you can't work out title issues after-the-fact. If this Board approves this and if title is under DLNR and we haven't had a chance to review anything with the property and a dispute arises later on they cannot undo that. She understands the seller's concerns, but as representatives of the State as the land manager she thinks they need that opportunity to have a review. The Chair recommends either defer or delegate it to the Chair subject to our Attorney's review to make a determination on whether to sign or whether it's even necessary to come before DLNR for approval.

Mr. Stone said it was ok with them to leave it up to the chair. The Chair said subject to our Attorney General's review, but they need to be clear on the title.

Member Goode pointed out the recommendation gives DLNR the leeway, but the Chair said the recommendation is subject to DOT and this would be a Board approval and if the Board wants our review then we would need to amend the recommendation to make it specific to delegate it to the Chairperson of the Department of Land and Natural Resources.

Member Edlao suggested approving the concept based on verification by the Chair. Chair Thielen said if you look at the recommendation which she read and suggested adding a new #2 – Subject to the review and approval of the Chairperson of the Department of Land and Natural Resources and re-number the existing #2 and #3 as #3 and #4.

Member Agor moved to approve as amended and Member Pacheco seconded it.

The Board:

Approved staff's recommendation by adding a new #2 – (2) subject to the review and approval of the Chairperson of the Department of Land and Natural Resources and re-number the old #2 as #3 and the old #3 as #4.

Unanimously approved as amended (Agor, Pacheco)

Item D-11 Amend Prior Board Action of February 27, 2009, Agenda Item D-3, Grant of Term, Non-Exclusive Easement to Tradewinds Forest Products, for Access Purposes, O'okala, North Hilo, Hawaii, Tax Map Key:3rd/3-9-01:06.

Mr. Atta reminded the Board of the prior Board action which originally called for annual payments. Subsequent to that decision Tradewinds Forest Products requested that they pay a lump sum and that is what this Board action is for to change from periodic annual payments to a single one time payment.

Chairperson Thielen asked whether or not there was a policy change because he mentioned current policy favors lump sum payments and why this change was done with rental re-openings earlier. Mr. Atta said he would have to check on the reasons for the

policy change. The Chair asked whether the division is recommending lump sum payments for term easements. Mr. Atta said that the lump sum issue comes up with the budget issues they are experiencing and are trying to work out terms that to relieve some budgetary constraints, but he hasn't spoken to his staff specifically to that. A lump sum payment is one way to defuse much needed capital to the State's revenues.

Sophia Maikui representing Tradewinds Forest Products requested to keep this payment on an annual basis for a few years and then a lump sum on the balance afterwards.

Mr. Atta said this has not been discussed with his Big Island staff and it was his assumption that it was after a Tradewinds request and it wasn't. The Chair recommended having Big Island staff discuss this with the applicant and suggested withdrawing this then re-submit later.

Member Pacheco moved to withdraw. Member Agor seconded it.

Withdrawn (Pacheco, Agor)

Item D-17 Re-Submittal Enforcement Action as to Steve's Ag Services, Ltd., Steve Baczkiewicz, Contract Milling, Wesley McGee, and Raymond McGee Involving Removal of Koa Timber Resources and Road Construction on State Unencumbered Lands, Alike and Papa 1st, South Kona, Hawaii, Tax Map Key: (3) 8-8-1:8

Deputy Attorney General, Bill Wynhoff reported that this is a case with a long and tortuous history. They've gone through the case at Federal Court and re-submitted in order to move forward. Upon re-submittal they were asked by the respondents to defer or withdraw and it is his and staff's point of view that they are willing to do so. If the representatives want a couple more months he and staff have no objections and if the Board willing to do so Mr. Wynhoff requested to withdraw the submittal for 2 months.

Chair Thielen asked that what Mr. Wynhoff is telling them is you are willing to withdraw the enforcement action, but the request is from the counsel representing the named parties to be given more time to prepare and Mr. Wynhoff confirmed that suggesting a withdrawal rather than a deferral with the understanding that they will be filing again for March. The Chair suggested that if the Board agrees to instruct staff to bring this matter back to the Board on a date certain of March 11, 2010 as suggested by Mr. Wynhoff.

Ron Self and Steve Baczkiewicz came up and said the extension would be acceptable and Mr. Baczkiewicz explained that he is involved in an appeal of the District Court decision that will control whether or not this Board may proceed. Chair Thielen said all that is in front of them today is whether to have a discussion to go into the merits or whether to give the requested extension for a couple months.

Emi Kaimulua representing the McGees says she accepts the extension for two months and would appreciate time to review the materials.

Chair Thielen said if the Board members wanted to they could take a motion to withdraw with the instructions to bring the matter back in front of the Board by the March 11th date.

Member Pacheco noted this have been going on for up to two years we are not going to be revisiting the decision that the prior Board made on this decision and he was not comfortable with another two months.

Member Morgan said he wasn't here earlier, but Member Pacheco is wondering what new information can come out probably. Member Pacheco said it is a serious violation, has gone through a contested case hearing and back and waiting for a Federal Court ruling which was in favor of the State and that ruling makes the State action valid and he doesn't know what two months would do for them. Chair Thielen said she thinks what is before them is a professional courtesy request between counsel to give counsel representing the named parties an opportunity to prepare their presentation to the Board because any administrative appeal would be based upon the records and submittal in front of us. And, the Chair agreed with Member Pacheco because this is a very lengthy case and some was due to a prior Board requiring some title efforts to be done which may have not been necessary, but it was done and to have this back in March given the professional courtesy to counsel to put the record forward. A message to them is you don't want to do extensions beyond that date because it has been a long period for a serious case.

Chair Thielen said the recommendation of their Deputy Attorney General is a withdrawal which gives him the opportunity based upon what information that comes in from this counsel he can provide it in an updated submittal and could provide the same submittal. The recommendation is to withdraw and the direction that this matter would be brought back to this Board no later than March 11, 2010.

Member Goode made a motion to withdraw this item and to come back to the Board by March 11, 2010 and no later. Member Morgan seconded it.

The Board:

WITHDRAWN. Upon request of the attorney for Steve's Ag Services, Ltd., Steve Baczkiewicz, Contract Milling, Wesley McGee, and Raymond McGee and the recommendation of the Deputy Attorney General, the Board withdrew this matter with a directive that it should be brought back to the Board no later than the March 2010 meeting for disposition.

Withdrawn (Goode, Morgan)

All voted in favor. Member Pacheco opposed.

Item D-21 Cancellation of Revocable Permit No. S-5384; Issuance of Revocable Permit to Mount Wilson FM Broadcasters, Inc.; Wiliwilinui Ridge, Honolulu, Oahu, Tax Map Key:(1) 3-6-004:026

It was explained by Mr. Atta that this was a housekeeping item that in 1986 the company was merged into a conglomerate as Mount Wilson FM Broadcasters and the existing permit was to Mauna Kea Broadcasting and this item was to identify the proper permittee.

Vernon Char representing Mount Wilson requested that the permit be reissued under the name of Mount Wilson and not Mauna Kea because Mauna Kea has merged with Mount Wilson.

Unanimously approved as submitted (Pacheco, Gon)

Item D-23 Grant of Two (2) Term, Non-Exclusive Easement to Brian W. Vinson for Seawall Purposes, Puuloa, Ewa, Oahu, Tax Map Key: (1) 9-1-007:seaward of 052 & 064.

This item came back after being deferred earlier in the meeting.

Chris Conner introduced himself as a Sea Grant Extension Agent placed with OCCL and Audrey Barker introduced herself as staff planner with OCCL.

Chair Thielen said that Mr. Vinson told them he had submitted building permits for the house and the inspector who has gone out verified that the wall in place is an integral part of the house and therefore he should not be fined because there were permits for that structure. The OCCL letter attached to the file said OCCL staff was unable to locate any construction permits authorizing the improvements and that historic aerial photographs show clear evidence that it wasn't present until 1975.

Mr. Conner confirmed that and said they use the aerial photographs to find evidence that it was there and staff assumed it wasn't. The aerial photographs don't show clear evidence that it was in place until 1996. At that point, they looked at the information that Mr. Vinson presented them on the permits he did have which was a sub-division permit and shows the slab and structure in place. They referred that to the statements from the inspector that the wall was an integral part of the slab and the structure even though they couldn't find it in the 1961, 1967 and 1975 photographs there was clear evidence that it existed prior to 1965 looking at the permit history. They were not able to prove that it was not in place and as a consequence DLNR cannot prove the encroachment is a conservation district violation. Because of that they do not recommend pursuing a violation case and the final outcome of this letter is they recommend the easements. So they could not prove it with a violation.

Chair Thielen said in this case because you are not seeking an after-the-fact permit OCCL has no intentions to say that this was require fines and Mr. Conner confirmed that.

Member Goode asked those fines are under OCCL. Audrey Barker acknowledged that and OCCL is not pursuing a violation, but Land Division may.

Member Morgan questioned whether there was beach erosion there and Mr. Conner confirmed that at some point the beach eroded and this structure may likely existed prior to that and it was clear in the photographs that the Beach eroded back towards the house, but not prior to. That was when they reverted back to building permits, subdivision plan and the inspector's statements.

Member Goode asked previously the high water mark in 1967 was makai (seaward) of the wall. Is it his understand that high water marks are certified for a year? Mr. Conner verified that is correct and said there is some distinction between a high water mark which may have different interpretations for various agencies and the certified shoreline and the certified shoreline is valid for 12 months because it does migrate especially on sandy coastlines.

The Chair said she knows what Land Division does in these cases is defer to OCCL on the fines and illegal encroachment. Mr. Atta said in terms of the issue of the fine he clarified that it seems there is reliance that these finds were brought under OCCL, they are not. They are being brought under the general HAR 171-6 encroachment violations for the Board. The legitimacy of the structure has always been an issue for the purposes of a certified shoreline for the Board, but the fact that the shoreline is moving over time the policy that was put forth before the Board was that all encroachments would be fined because it was a trespass onto State property and they would treat all encroachments the same. Clearly there will be instances where legitimate permitted structures would at some point and time with the movement of shorelines with the rise of sea levels become encroachments on State land. The fact that they were legitimate or authorized at one point doesn't change the fact that at a future point gives you natural conditions they become encroachments on State land at some point and time the Board came to the position that our shorelines are a mess with hundreds of these encroachments and we need to deal with it and somebody has to pay for the removal and correction of these problems. From a policy standpoint since they are a trespass whether they were originally legitimate or not at the point they become encroachment on State lands and public resources that they should be treated as such and treated the same and that's why the policy for a penalty. Some say its nominal and the impacted owner will always say its not, but relatively speaking it's a small fine.

Chair Thielen conveyed that her recollection that they dealt with past cases and here it's called an illegal encroachment and that is where the confusion is mixing it up with OCCL that they've dealt with it more as a non-exclusive easement and essentially rent to be able to keep it on State land recognizing in case with the shoreline migrating up. Mr. Atta said that is what this action does and legitimizes the encroachment from this point on, but the fine is for the existence of that encroachment up until now its been allowed to remain there. Arguably, to the detriment of the public, this is now State land and the public hasn't had the benefit of accessing that land. On the public access stand point, something needs to be done about this structure because it is obstruction of a public access and all these years the private owners benefited from that perception or legal title the public has been denied access to that portion of the State Lands which is where the concept of the fine came in. The issue of whether an easement should be granted or whether the

structure should be removed was given to OCCL to assess and OCCL felt there would be more harm to remove it the decision normally would be to allow it to remain, but they would have to pay for it because it is on State land.

The Chair said the recommendation then is for a fine to cover for the past encroachment plus an easement which would then have the terms and conditions to allow that structure to continue in place provided that it's a non-exclusive easement and opened to the public.

There was some Board discussion regarding the above policy with Mr. Atta who said the issue of the legality of the structure goes to the ability of the applicant to even apply for a certified shoreline because if you cannot prove the legality of the structure that is one of the automatic bars of the certification process moving forward. Once that's established and you've established where the certified shoreline is you still have an encroachment as a result of all of these investigations. We still have not dealt with the trespass on State lands and that is what this phase of it is.

Chair Thielen said under the OCCL determination that there is a statement that the Department cannot show that this is illegal therefore the applicant could move forward and get a shoreline certification. What makes her uncomfortable is given OCCL's statement to say that illegal encroachment, but she thinks more the unauthorized encroachment for that recommendation #1.

Member Goode asked if say 20 years from now Mr. Vinson or current owner needs to do another shoreline certification and sea level rises and there is more encroachment from 200 or something square feet for each parcel becomes 400 what happens then? Fine them again? Mr. Atta said hypothetically, yes. That has not been addressed and the shoreline laws are complex and complicated. This issue of creation of encroachments by natural processes or movement of the shoreline is tough for staff to deal with and until the law or legislature changes how we treat the shoreline and ownership issues. If the case law changes with any new Supreme Court decisions given our current regulatory structure we have to treat each new encroachment even if it is not news as a brand new encroachment. Staff would not charge those portions which were previously dealt with an easement, but if additional encroachment is created by rising sea levels that is under the current law and that is how they have to deal with it.

Member Pacheco asked if there was a big storm and the shoreline is extended out with sand would the structure no longer be. Mr. Atta said that would be a legal question, but you could arguably make that claim, but he couldn't give legal advice. The Chair noted that the Legislature recently changed the law on accretion and there was a recent court case on it. But, like Mr. Atta said these cases are complicated and winds its way through the courts.

Member Agor asked the only requirement for new certified shoreline in the future would be if the landowner would apply for a new model. Mr. Atta acknowledged that if they needed a building permit from the county. The need for a certified shoreline is usually generated by County requirements concerning the set backs and building requirements.

Barring that, people rarely seek certified shorelines. The Chair pointed out that this Board action and OCCL letter would be the document for the landowner that they could go ahead and get a shoreline certification because it is recognition that there is no evidence that this was illegal. Mr. Atta acknowledged that and it is two fold – the assessment of whether or not they could go forward to address the legality of the structure and the second part was an easement should be granted as opposed to removal.

Mr. Vinson asked whether the \$2,000 is the total fee of the lease and the fine or are they separate. Mr. Atta said they are separate. Mr. Vinson asked there is the matter of what how much the lease is going to be and the fine as well, right? Mr. Atta confirmed that. Chair Thielen asked there are guidelines for those and what are they? Mr. Atta said that there was a formula adopted by the Board awhile ago for determining sea wall type encroachment. Normally it starts with one half of adjacent fast lands value and there are certain factors whether it's a non-exclusive use versus exclusive use which is the gist of the approach and you apply that to the first square foot value to be covered. Starting point is the adjacent fast land value and half because they are technically talking about submerged lands.

Member Morgan said we are talking non-exclusive because it's under Mr. Vinson's house and he asked how is that going to work. Mr. Atta said that these sea wall type cases involve a sea wall that people could walk over if people knew it was public access. The Chair noted that the fishermen already use it that way sitting on the wall.

Member Pacheco said he was confused because he thought normally when they have these kinds of easements the fee is included in the submittal and asked when is it included. Mr. Atta noted it is included where it says subject to staff appraisal under the heading Consideration. Chair Thielen summarized staff will go do that analysis to get the appraisal and do that determination of the actual fee under those guidelines using that formula.

Mr. Vinson stated what would be good for people like him is if there was some website that they could put a rule of thumb or guesstimate on what these kinds of numbers are going to be because they have been trying for months and months to find out a guesstimate of how much this would cost. After talking to different people, it could be \$2,000 or \$25,000 per lot and it could be a very significant number that he was concerned that he could pay \$52,000 because the ocean is coming closer to his house. Chair Thielen said the reason for the variation is the starting point formula is based on the appraisal of the property itself and that it varies in Hawaii. She asked to have Mr. Atta share the formula with Mr. Vinson and he could work that out with his appraisal and she suggested Mr. Vinson sharing his appraisal with staff to help expedite things where Mr. Vinson agreed to do that.

Member Morgan asked on the fine whether there were any variations on the standard for any circumstances. Mr. Atta said for government structures they don't impose fines to sister agencies for drainage outfalls. From a private stand point, he isn't aware of any exceptions from that general policy on the fine.

Member Pacheco asked that the \$2,000 is for two lots where Mr. Atta said its two separate easements on two lots.

Member Morgan asked the reason why Mr. Vinson wanted the shoreline certification was to build on it and Mr. Vinson answered in the negative and said they were doing it to comply with the Department's request in the letter and is still waiting for the appraiser to do it. They are not building anything.

Member Morgan commented it seems that the homeowner is being penalized because the natural erosion has taken part of the property and the State comes in and fined him and if fined once fines him again. Mr. Vinson agreed because the shoreline could move a centimeter a year. The Chair said that could be initiated from inspections due to complaints.

Ms. Chow said only permitted structures that she believes the shoreline is set at the base of the wall so the shoreline is set because of the wall. Chair Thielen said which has happened in places like Lanikai and Waikiki where the shoreline is certified at the hardened structure

Member Agor said they wrestled with this in the past, but in this case there is clear evidence that the wall was permitted and would entertain a reduction of the fine and Member Pacheco agreed too.

Member Morgan moved to accept the recommendation accept the \$1,000 fine and change the word "illegal" to "unauthorized." Member Agor seconded it.

Mr. Vinson thanked the Board.

The Board:

Approved as amended. The Land Board amended the recommendation by replacing the existing recommendation No. 1 with the following: 1. Impose a \$1,000 fine for unauthorized encroachment, under Section 171-6(12). . Otherwise, the Land Board approved staff's recommendations as submitted.

Unanimously approved as amended (Morgan, Agor)

Item C-3 Request Review for Approval to Release for Public Review the Kaheawa Wind Power II Wind Energy Generation Facility Habitat Conservation Plan, Island of Maui, Hawai'i. (Attachments are available on the DLNR website: <http://hawaii.gov/dlnr/chair/meeting>)

Mr. Conry reported that this is to put a HCP back out for public review because what happened was the Board had sent it out once for public review, but the applicant received more information and preferred to move their tower location on the property which is a fair material change in the proposal and staff is going back out for public review because

of that. The ESRC has looked at it and determined it would not change the material aspects of the habitat conservation plan. This is a housekeeping process to do that.

Gregory Spencer, Wildlife Biologist representing Kaheawa Wind Power II said he was here for any questions.

Unanimously approved as submitted (Edlao, Pacheco)

Item C-1 Issuance of Immediate Right of Entry to Conduct Conservation Management for the Kaena Point Ecosystem Restoration Project on Kaena Point Natural Area Reserve and Kaena Point State Park, TMKS 8-1-001-006; 8-1-001-022; 6-9-001-030; 6-9-002-004; 6-9-002-009; 6-9-002-013, Oahu

Numerous written testimonies were distributed.

Mr. Conry conveyed that staff has done a great deal of outreach – 1800 people since the summer of 2007 via brochures, website, news articles and television. This item has gone through an MOA, contested case, a final EA and meetings with the public. In 2009 the final EA was approved and the SMA permit was granted. The cultural issues were the main concerns resulting in site visits. The design of the fence was revised to accommodate those concerns and SHPD (State Historic Preservation Division) went out to check on historic sites. There were a number of written testimonies in support and two opposing where Mr. Conry distributed signed handouts.

Lela Hubbar, a kupuna representing Na Koa Ikaika testified in favor of the fence relating that her family is from Waianae and fish at Kaena. She suggested having a volunteer inform people why the gates were there and explain what is out there. The fence can't keep out the fishermen who want to walk in.

Chair Thielen presented Ms. Hubbar the map and recommended that staff could assist her on it.

Huang Chi-Kuo, a biologist distributed his written testimony expressed his concern that fishermen and local people are being displaced and allowing eco-tourism to come in. He thinks the reason for the fence is for conservation is a lie that it is a waste of money reporting to the public via the media. Mr. Kuo compared Kaena Point to an off-shore island that eradicating one species of animal will cause suffering for another species citing the example of Chinaman's hat where there is an ant infestation. He doesn't understand how the EA was approved because it doesn't make sense to him. There will be destruction to the environment from the digging and concrete poles. Mr. Kuo is against this project because it is flawed resulting in worst invasions of non-natives. The EA is inadequate and biased which will result in the collapse of the eco-system and if this is approved he wants a contested case hearing.

Chair Thielen said to submit his written petition within 10 days to staff.

Summer Nemeth testified that she was confused why the contested case was denied due to lack of standing explaining that she comes from an 'ohana from the area and she doesn't identify as a lineal descendent as defined by the Federal Government. Ms. Nemeth has worked with advisory groups for 20 years and can't understand why the contested case points were refuted. She read item i. in the submittal saying that it has changed and a new CDUA is needed. Ms. Nemeth asked when the ecological monitoring was conducted referring to Mr. Kuo's testimony. As a cultural practitioner, there are many varieties of the arts and a study needs to be done first. She went on to express how culturally inappropriate this project was that this area is sacred with the leina (souls leap) and a gate is hewa (wrong) that this area is tied to their (Hawaiians) cosmology. When there is desecration there is death. Ms. Nemeth related that she worked in construction noting that this steel fence will degrade with all the salt in the air and speed up the oxidation and asked whether the repairs will be done fast enough to keep the rodents out. Also, she asked whether rodenticides would be used and impacts to the birds, especially the native pueo where chicks are fed poisoned rodents. Ms. Nemeth had concerns with the iwi burials on the upper slopes that could be negatively damaged. A New Zealand article was cited saying a completely enclosed fence is effective and used trapping instead of rodenticide. Kaena Point is being used as a guinea pig for this fence project. She wanted to know about the 2008 and 2009 dog attacks because she thinks it's false. Ms. Nemeth suggested bringing in an ethnobotanist rather than a fence or something not permanent. The birds are not native; the population has rebounded, is migratory and will move to other areas. The monk seals swim all over the place.

Johnlynn Kamoku-Kane, a senior from Waianae High School testified that she supports the fencing project to keep the cats and dogs out, but still allow the public in.

Ashley Adams, a senior from Waianae High School approves the fencing that Hawaiian culture and conservation is what we should do to save the wildlife and to keep the Hawaiian culture alive.

Audrey Kahooalii from Waianae High School supports the fencing project and reiterated Ashley Adams testimony. The solution is education that these plants didn't have threats before. She speaks for future generations, to have the security to still see these places and to work to care for them.

David Duffy, a scientist testified that the ant story is complicated that removing one species might be replaced with something else can't be predicted that we don't know what will happen and referred to Sheila Conant. He noted with the sea level rise some nests may be underwater and places like Kaena Point is important.

A Board member asked whether rats pre-date ant colonies and Mr. Duffy said no one has studied them and its complex.

Bill Standley submitted his written testimony in support of the fence.

Thomas Shirai, Jr., testified that he submitted written testimony as an individual, lineal descendent, Mokule'ia Association cultural advisor, member of the Kaena Point Advisory Council cultural delegate. The County passed the shoreline SMBS supporting Kaena Point as well as Waianae, Nanakuli, Mokuleia, North Shore all are unanimous. His family is from Waianae and Waialua that he wants this. Like what his grandfather would say "tomorrow, do the long range plans" and thanked the chair for allowing the children to speak and experience this.

Steve Montgomery representing Ahahui Malama I Ka Lokahi for Charles Burrows testified as an entomologist that it is important to have this fence. He spoke to bee and ant specialists and they support this fence.

Wayne Liggett submitted written testimony in favor of this fence.

Jacqueline Kozak, a Kauai resident with University of Hawaii (U.H.) supports the fence to protect their outdoor classroom and future wildlife.

Rachel Lavell supports the fence because it protects wildlife similar to the Northwest Hawaiian Islands which is a unique place.

Cynthia Rezentes, a Waianae resident testified that she supports the fence for the children relating what the area was like in the past – the dunes were different and the pueo was always out there – all need to be preserved for the future and that is the reason why the Waianae people support this fence. Kaena Point is a little bit of the Northwest Hawaiian Islands (NWHI) in the main Hawaiian Islands that most people could never experience. She has heard all the cultural concerns and many understand the need to accommodate what that culture means otherwise there is more destruction. People are bringing in dogs and there is need for a barrier.

Candace Fujitani, an English professor at U.H. said she does not support this because of the leina uhane that there is not enough discussion of the cultural and the souls from the land. She agrees with Mr. Kuo regarding commercial interest. The fence will prevent the souls from coming from the mountain to the leaping place. Burials will be found during construction and then it's too late. It seems more important to protect the plants and animals than the people who are there.

Dr. Sheila Conant, a Professor of Zoology at U.H. testified that she has taught for over 40 years and this fence will give organisms a chance. There is no objective to control ants and rats don't control ants. On eco-tourism, they approved closure of Ahihi Kinau because of damage from eco-tourism. The predator fence has been tested on the Big Island. Five of her grad students worked at Kaena Point on their thesis. A David Hooper studied bees at Kaena Point where there was competition from introduced bees. Another student studied coagulants on rats. Another studied the pueo and barn owls noting that pueo would have to eat more than its weight in coagulants to have any effect. There is more plastic in the albatrosses at Kaena, Kilauea and Kure Atoll. There are a new species

of arthropods infesting ants. Displacing millions of sea birds is a campaign to extinction. There is a need to give to the organism or drive it to extinction.

William Aila, Jr., an employee of DLNR distributed his written testimony and testified that he has 7 generations buried at Kaena and his grandfather had property there. He has taken his grandchildren out there many times. Mr. Aila spoke to people in New Zealand who say it is critical to fence because of the flightless birds. He is satisfied with the submittal pertaining to the concerns brought up today and he and OHA have been out at Kaena Point many times and this is the right action. Mr. Aila conveyed that he can speak on the leina, its use, the spiritual procession...that his people do the actual work by interring kupuna. The third gate allows the leina and he did not come up with this – the kupuna did. If all the doors and windows are all closed on your house that will not stop the kupuna from visiting you and a gate or fence will not impede an uhane from entering. He and his grandson know the process and how it works which is passing it on by living it. Mr. Aila agrees that protecting the living creatures is important that we need the birds to fish and that everyone was indigenous at one time.

Marti Townsend representing KAHEA testified that they did a lot of lobbying not for or against, but to keep the dogs out. She had a concern with eco-tourism citing Diamond Head. Ms. Townsend questioned why there is no CDUP for the fence that severs a connection between people and the land reiterating previous testimony that people are alienated, the rodenticide and cultural issues. She asked to engage with cultural practitioners and to defer this item to address concerns.

Lola Nitholen, Project Coordinator for Native Hawaiian Legal Corporation/Bar Association Peace Making Project – testified that they don't advocate for or against, but wants a cooperative consensus having been working with the fishermen on the fence issue. In the long run the fence will protect the land, but they don't want this to escalate into a battle. She wants consensus by the people to cultivate unity that most of the calls were concerned with the pueo asking to defer and her organization could help.

1:30 pm RECESS

1:41 pm RECONVENED

Chair Thielen summarized questions on sufficient number of gates to allow kupuna to have access, a volunteer to talk to people, off shore islands - the increase in ant population after rat eradication, the FONSI of the EA that said it didn't require an EIS whether it sufficiently addressed the impacts on invertebrates. Instead of staff addressing the denial of the prior contested case their Deputy AG will address it after the substantive discussions. The decision about no conservation district use permit (CDUP) requiring the fence be included in the 1982 (CDUP) and that determination by OCCL. The statement in the submittal that an invertebrate monitoring will be taking place – what monitoring took place prior to the determination of the fencing and of any monitoring after, if this goes through? There were a number of testimonies on the cultural impacts whether gates are sufficient and whether staff wants to address that. The salt and degrading of the fence

over time and will staff be prepared to do the required maintenance, also, whether the fence will draw water to it creating erosion affecting potential barriers on the upper slopes of the project. Whether the fence will work since it is not a complete enclosure of the area because it only goes to the high tide mark. What affect of anti-coagulants on the birds and whether all alternatives were considered including natural approaches. Also, whether or not Kaena Point is appropriate for piloting the fence. Is there information on the dog attacks – there was a statement that it has gotten worst over the years whether there was anything worst than what occurred in 2007. Are the birds native or endangered birds and why favor them if the population is stable. And, the impacts of the rat population on the monk seals since the monk seals are mobile creatures and not necessarily will be staying in the area and whether that is relevant.

Mr. Conry suggested having the experts come up to testify and introduced Lindsay Young as the Wildlife Society representative and Brent Lisemeyer, the Natural Area Reserve System (NARS) Manager on Oahu.

Mr. Lisemeyer testified that this is the biggest project that DOFAW tried to get consensus on, meeting with many groups to get the message out and spoke with Leilani at OHA where that consensus would be everyone agreeing on a certain issue which he thought would be difficult to reach. Kaena Point is a very dry area and the proposed fence path leads up to the bunkers that were established during WWII and will be not involve any digging. Once the fence line is put down there is a skirt that is covered with gravel to prevent rodents or dogs from digging down. The only concern is the talus slope which hasn't been impacted by prior construction. At site visits it's clear that the path follows a road which is already graveled. The drainage patterns existing at the site will not be affected by the fence since its compacted gravel, therefore no erosion. Staff is well aware of the fence degrading. When this was first proposed this came from Federal money and staff wondered whether there was Federal property that could be the guinea pig, but the best example was building it at Kaena Point. Staff built in monies to do the fence and noted there will be an impact - no one knows how quickly that material will degrade which will have to be replaced at some point, but the manufacturer has a 15 year guarantee on the materials. Mr. Lisemeyer views this as a demonstration project to see if this technology will work and what the impacts will be. Referring to previous testimony, Mr. Lisemeyer doesn't know of any direct correlation between rodents and ants, but there can be unattended consequences for getting rid of the rodents and staff is looking at alternate techniques. They are contracting with the Federal Government to trap predators from that area including rodent control. Staff has looked at snap traps for rats which is doable, but it would be impracticable and infeasible to trap mice. As for the CDUA, it was determined early on during the EA process that it was not required.

Randy Kennedy, representing DOFAW conveyed that the planner who was doing the EA consulted with OCCL who said it wasn't necessary and DOFAW went with that which is the same process staff has followed for many fences in the State.

Mr. Lisemeyer related that the dog attacks happened infrequently relating some history after blocking off-road vehicles and the return of the wedgetail shearwaters which reached a population of 1800. In 2006, attacks destroyed over 150 birds in a 2 night

period and this fence will help prevent catastrophic attacks, but the fence can't prevent people from bringing predators in.

Ms. Young testified that she is the Project Coordinator who the Wildlife Society consulted with to run this fence project and she did her Phd work at Kaena Point having gone out almost daily or weekly over a 7 year period and she is the first one to find dead birds. The sea bird population has gone up with the barricades in place and predator control, but that increase is due to immigration which is a 25% increase per year. They know this by the all the banded birds in the reserve. If that immigration were to stop with the current predation levels which is about 15% per year and this year's albatross has had 20% of the nests fail, those birds would be gone in 10 years with the current predator control. There is a misconception that there is growth through this recruitment, but it's through immigration and if that immigration were to stop that bird colony would be gone so we need a more effective method of predator control.

A Board member asked to explain why immigration is happening now when it wasn't before. Ms. Young explained that birds have been documented to cross sect here since the 1970s and noted in the old issues of "The Elepaio" – the newsletter of the Hawaiian Audubon Society and it was her knowledge that the birds were attempting to nest there, but were crushed by off-road vehicles or eaten by dogs. After the barricade went up albatrosses started arriving and she noted that they are social birds so more and more kept coming now it's reached around critical mass. DLNR has banded every albatross chick since 1992 so they know whether or not the bird is from Kaena or elsewhere.

Albatrosses and wedgetail shearwaters are not endangered, but it doesn't mean they aren't worth protecting or are not important. Both are protected under the migratory treaty acts and Laysan albatrosses are one of the most venerable sea birds because 99% of their population nest at sea level. If the NWHI were to go under due to climate change these birds will need a place and some can nest as high as 75 feet above sea level. These are native birds – Laysan albatrosses are found in the archaeological record of the main Hawaii Islands as are wedgetail shearwaters. There was a question of the effect of the anti-coagulant on seabirds noting that these birds eat only fish. Ms. Young logged her 500th field day at Kaena saying that there are quite a few barn owls and pueo are less common because pueo don't nest in the area and if they did the nest would have been found already. The idea that pueo would feed chicks poisoned rats is probably not entirely accurate. The pueo nest in grassy areas that is relatively undisturbed and those are far and few between in the Kaena area. As Sheila Conant pointed out, the pueo's main diet is introduced birds and not rats. The likelihood of that happening is very, very small.

The Chair said with the predator proof fence she assumed you would stop an influx of rats coming in and go through a period of remediation, but after that you would have less anti-coagulant rat in the area. Ms. Young agreed and said that there is buffer predator control that will need to continue on the edges of the fence because it is an open ended fence which is not a 100% barrier and you will have to be diligent on those ends. Staff has not determined the method of predator control. Orion Environmental has been

experimenting with large scale trap outs to reduce the use of poison in natural areas and staff could adopt that strategy so poison is no longer used for the long term at Kaena. There are alternatives they would consider and Kaena is a small area which is manageable.

A Board member asked whether the rodents will be removed and Ms. Young confirmed that the reserve will be staff 24/7 and the people doing the actual application will be responsible for removing as much as they can to minimize the target risk to other native animals in the area.

Mr. Lisemeyer explained they've done some baseline monitoring on rodents, plants and on some invertebrates that are there. Ms. Young confirmed that they've done a complete biological monitoring program where the birds were on-going for the past 7 years. They have U.H. design a plant monitoring survey throughout the entire reserve and will continue to survey every year. They have done preliminary ant surveys in the reserve and when they took the DOFAW entomologist out there she said the most appropriate time to do that survey is in March which will happen then. There is baseline data that exists – a three year pollination group studying at Kaena Point that has a complete invertebrate key. One of Sheila Conant's students studied the yellow face bee and that the main competitor is the native honey bee. One of the yellow face bee's main food sources is 'ohai which is one of the endangered plants in the reserve. The main impacts found on 'ohai was being eaten by rats and mice so if we continue to have this rat and mouse predation the source or the host plant for this animal disappears.

On off-shore islands, what was happening when rats were removed and ants invaded was not direct competition where the rats were actually eating the ants, but rather you have a closed eco-system where there is a limited amount of food. What happened was the rats were focusing on the birds and the inter-tidal invertebrates. When the rats were removed that created a whole new food source for these ants and because there is nothing else available being surrounded by water they have a finite amount that they can consume. It's different and not an appropriate comparison to Kaena because it's free for the ants to move in and out. They will not be food limited in there and there are tons of ants there now. The birds and plants seem to be tolerating them and that is not necessarily a reason why they shouldn't try. Obviously, there will be unknowns on what is going to happen, but that is part of the process is learning about what is going to happen once they take out those things. On the flip side, they've demonstrated numerous negative affects of rodents, cats, dogs and all the other invasive mammals so they know they're bad.

Chair Thielen said there was a comment on the rate population potentially infecting the monk seals. Ms. Young replied that the carrier of a disease they are talking about – canine distemper is carried by dogs. Mr. Lisemeyer said he was at the reserve last week and saw 5 monk seals on one day and 3 the next so there are seals spending a large amount of time in the reserve so a fence would help protect them.

Mr. Lisemeyer said there was talk of the access gates and making people walk extra distance. This is the same pathway that is currently being used is where the gate points

are going to be so there is no additional walking around. It's close to the shoreline and if you are walking along the shore you will hit the fence and will have to walk up 10 yards to the gate then back down to the shoreline. He reiterated the gate is on the current pathway and the only caveat is waiting for the first gate to close behind you before going through the next gate which is a concern for the NARS manager who has to go out and fix it all the time because of vandalism which is a concern. Mr. Lisemeyer confirmed that an ambassador is already out there having started in early November 2009 and has interacted with many of the visitors and fishermen in the area which will be strengthened when the fence goes in. As for the cultural impacts, staff recognizes this is a very sacred area and not just to Native Hawaiians but to anyone who appreciates creation and any Oahu resident who appreciates nature. Everybody recognizes how culturally important it is to the Native Hawaiian culture and to our culture today that it's important to connect with creation. Staff tried to encapsulate every opinion, but it's impossible to get every view point addressed and staff did its best to include as much as they can and hopes it a success.

Member Pacheco asked about the distance of the fence from the shoreline which Mr. Lisemeyer and Mr. Kennedy pointed it out on the map distributed earlier and there was some discussion about the fence and gate.

It was questioned by Member Pacheco whether the dogs were pet dogs. Mr. Lisemeyer said there were no collars on them and two of them had set up residence in the NARS despite the predator control people out there 3 times a week. Also, people use both ends of the trail – Mokuleia and Yokohama Bay as dumping points for strays and feral animals and they have evidence of cats going up the satellite tracking station and coming down. Ms. Young said it's 50/50 because usually when there are large catastrophic events there are two patterns where there is one animal they are all over the reserve which is usually a feral hunting pack that comes down from the mountain because they got lost and the second pattern where the kills are along the trails where someone is walking their dog and the dog dives into the nest to kill a shearwater and then comes back. There were two feral carriers in the reserve that got 20% of the albatross nests this year which are resident dogs because they see the tracks repeatedly on multiple visits.

Member Pacheco asked what are the trends on predator monitoring. Ms. Young said that they rely on USDA who is the contractor for the large predator control of dogs, cats and mongoose catch data. The new trapper last year has been very effective where the catch rate went way up resulting in a decrease of predation on the albatrosses. For the rats and mice they did a quarterly survey each season they went out there for one week and trapped everything throughout the entire reserve. There was a huge increase in early spring so they trapped in February, April, July and November and found there were twice as many mice as rats. Ideally to target rodents before they reproduce as to not leave behind any young.

Member Edlao asked whether there are penalties for people bringing in dogs. Mr. Lisemeyer said it falls to the courts that resource violations pitted against more serious crimes don't get the attention that they deserve. Catching people in the act and having an

officer on scene is difficult. Peer pressure and efforts of their ambassador to educate people on the impacts, posting signs on the border areas to keep dogs out of that buffer area are measures that could help.

Chair asked the penalty for violating those rules that is a petty misdemeanor under State Law which Mr. Lisemeyer confirmed.

Ms. Young said after spending 7 years out at Kaena Point she has noticed an increase in public awareness due to the newspaper articles in 2006 and 2007 and now if she sees someone with a dog she will explain to them why it's not appropriate and ask them to leash the dog. Members of the public are self policing and dogs aren't getting as far into the reserve as they used to where people with dogs are sent back by other members of the public. Having a fence is a symbol and signage that makes people read it.

A Board member questioned what characteristics of the fence will prevent rats from going over it where Ms. Young described the fence as 6-1/2 feet tall, the fencing is no smaller than 6mm aperture, a rolled hood on top and a mesh skirt which was pointed out on a diagram. On the Big Island trail in 2005/2006 they built an enclosure and put all of Hawaii's pests inside of it and used a video camera to determine whether or not these pests could get out. The mice got out and modified the design to prevent that. This fence was done as a trial, but not on an ecosystem level. This enclosed fence was on an a'a lava field which is rough terrain where the mice could crawl under so crushing up the a'a and cement the skirt down prevented the mice from escaping.

A Board member asked about the mechanism of the gate where Mr. Lisemeyer explained that it is mechanical where the first gate won't open until the second gate is closed, similar to an aviary. Ms. Young noted that they are doors and not gates because there is no locking mechanism. Mr. Lisemeyer said that it won't prevent people with fishing poles or bicycles to access it by foot.

Chair Thielen introduced Linda Chow, the Board's Deputy Attorney General and the Chair said that there was some question about how could somebody who is a descendent of the area lacks standing in that prior decision by the Board which was to move forward with a prior environmental assessment. Ms. Chow said it was her understanding that it was for the cooperative agreement which was between the parties, basically a contract between them because it didn't actively affect the land it wasn't going to produce any needed action on the land the interest of the descendents wasn't affected by that contract. In this current situation, any action by the Board moving this project forward would result in activity on the land then the basis for a contested case or the analysis of whether or not someone decided to contested case would be different based on the specific facts based on whatever decisions were made. The Chair summarized that in the prior decision it was based on an action by the Board that didn't trigger any movement on the ground. If the Board reached a decision today on the current item, there would be a whole separate analysis if there were a petition for a contested case filed to determine whether people had standing under the law and Ms. Chow confirmed that. Chair Thielen related an analogy where this Board approved a Comprehensive Management Plan for Mauna

Kea where there was a request for a contested case hearing and the analysis was the same that there is no standing based on a plan, but any subsequent action on the ground triggers a whole separate analysis and noted that it was recently upheld by the circuit court. Ms. Chows said it was different than that because in the circuit court that decision to deny the contested case was appealed as an administrative decision and the circuit court decided in that case because no contested case had been held than an appeal was improper. The Chair said if there is Board action today and there is a request for a contested case hearing based upon today's action there would be a whole separate analysis on whether the action triggered standing for a contested case and Ms. Chow confirmed that.

Member Morgan conveyed inclusion which he agrees with staff is an exhaustive process to agree on all points. Everyone wants to preserve the native biota. He appreciated the explanation of the removal of one animal result in more food for others, ants. Mr. Morgan related that he frequented Mokuloa Island all his life that there were plenty of birds there a long time ago and now there are none and there are a lot of ants now. He doesn't see any cause and affect relating to the ant situation. As for the cultural differences of opinion, that will never have complete agreement and he respects both sides, but there is compelling testimony that this project should go forward.

Member Edlao said that these problems have been going on for a long time and what has or hasn't been done is not working. This fence is an alternative and better than not having anything done. After Mr. Aila's and his cousin's testimony its gives Mr. Edlao peace that this fence is needed and supports it.

Member Agor said he was satisfied with the public outreach and he heard enough today to support the project.

Member Goode said he echoes his fellow Board members and their comments that if for some reason it doesn't work through clear analysis that can happen later.

Member Gon reported that this is the first actual practical effort to apply this kind of fencing in a natural area which is a relatively small application. Anytime you think of fences you think of a permanent thing, but in reality fences are ephemeral things requiring maintenance and attention. What is protected requires attention. He doesn't consider this the end all, but another on going efforts to protect extremely important natural and cultural resources that are represented at Kaena Point. Member Gon views the views elements of the natural world as intensely sacred things this effort to protect them is an effort to enhance cultural resources of Kaena for all of us and he supports this wanting to see this pilot project done and to see active efforts to manage and protect our resources rather than continue arguments over the fates and causes of the decline of our resources or we will be arguing the decline of those resources until they are gone. He would rather see this Board support and attempt to take action.

Chair Thielen related that there was some discussion today by people who are asking for deferral for conversation and collaboration and she respects those people who came up to say that, but there is an important point - there are many places around this state, and

Kaena Point is one of them, where they have chronic problems and that is not new. What is going on Kipapa Island is not new, what is going on at Kealahou Bay is not new and there have been many opportunities for grass roots groups, community organizations to develop without government action, solutions and they haven't. One of the reasons they haven't is because people are very adamant and divided then after many years of these problems degrading these areas creating conflicts, bitterness between people in these areas this Department has stepped forward in the last few years and taken some big actions over resource protection which she thinks is important. Hopefully, it would trigger people to come to the table and if they don't like the solution developed to then start to sit down and say what are some real alternatives. People in this Department have to be open that if our action drives community organizations and people that have been at odds to sit down and be willing to figure out other alternatives and to listen and work with them.

The Chair wanted to say to the two representatives from the Office of Hawaiian Affairs (OHA) that when she first came on there was some question that they had to make a decision asking whether this was a cultural practice or not. Who are we to decide? She spoke to U. S. Fish and Wildlife and the Department of the Interior and asked what does the Federal Government do relating to Indian Tribes because they give permits to hunt endangered species because it's a cultural practice. They said there is a tribal government where they sit down to negotiate government to government and the tribal government says this is how our cultural practices is for this entity and this is how many permits they are going to get and we as the tribal government will distribute them and will make sure the people who gets the permit do it in accordance to cultural practice. People at the Hawaiian Civic Club Annual Meeting approached her saying that they participate in those kinds of discussions. The different groups that disagree when they are meeting with the Board will not come to that conclusion when they meet with DLNR. These groups need to go away and in a safer environment to have that discussion to reach consensus and then to come back out. That's where she thinks OHA in the absence of a resolution on the Hawaiian Sovereignty movement; we need help because when DLNR is the one who sits down driving that conversation to consensus we are not the appropriate party and we are not going to reach those ourselves, we need help. We have tried to set up things like the Kaena Point Advisory Group, the koa logging and other things she thinks OHA should take a bigger role until they have some decision on the sovereignty DLNR needs OHA to help them to have that conversation to occur in a safe place and to come back to the Board.

With that, the Chair said to those who disagree with the Board action you may take any steps you may want to take on the administrative appeal process, but she asked for you to listen to that comment and you go and try to work it out – what is that forum that takes place for you to develop that, then come back to the Board as a group. They need to move beyond these arguments and this area needs help and it's very important. As long as we fight among ourselves we are never going to make progress. We are so far down the line after health, human services, public safety and things like that because we spend time fighting each other instead of coming to solutions and she asked to help us. The Chair suggested to go work with the cultural agency because DLNR is certainly isn't.

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

Chair Thielen said that two people have notified them that they wanted to file a contested case and for them to do the paperwork and get it in within 10 days which they will refer to the Office of Attorney General to do a new analysis whether there is standing for a contested case from this action and will come back to this Board on a recommendation on it.

Unanimously approved as submitted (Morgan, Pacheco)

Item D-24 RE-SUBMITTAL:

- (1) Grant of Perpetual, Non-Exclusive Easement to Kauai Island Utility Cooperative and Hawaiian Telcom Inc. for Utility Purposes Covering Tax Map Keys: (4) 4-1-3:portion 44 and 17;**
- (2) Issuance of a Right-of-Entry to the Department of Transportation, Highways Division for Construction, Staging and Work Area Purposes Covering Tax Map Keys: (4) 4-1-3:44, 17 and 4-1-4:portion 21, 22, 24;**
- (3) Cancellation of Revocable Permit No. S-7444 Covering Tax Map Key:(4) 4-1-3:17; and**
- (4) Issuance of a Revocable Permit to the Department of Transportation Highways Division for Field Office, Staging and Work Area Purposes Covering Tax Map Key:(4) 4-1-3:17, Located at Kawaihau, Kauai.**

Written testimony was distributed to the Board.

Mr. Atta reminded the Board that this item was previously submitted generating some controversy having to do with the Department of Transportation (DOT) Kuhio Highway widening project to add a second south bound travel lane within the existing right-of-way. Also involves an extension of a right turn storage lane onto Kuamo'o Road, as well as accessory improvements. The DOT representatives are here to explain in detail what changes occurred from the last submittal.

Gerald Sumada, Deputy Director for Highways at DOT apologized for not having staff here at the October 2009 BLNR meeting and his experts are here to answer any questions.

Ronald Sato representing Wilson Okamoto Corporation introduced himself, Darell Young, Project Manager with DOT- Highways is one of the DOT civil engineers. Mr. Sato referred to Exhibit 1 which shows the areas shaded for the construction parcels requesting an easement for KIUC and other utilities noting that it's required for mitigating measures by Fish and Wildlife Service who wants the utility lines and poles

relocated underground. DOT had some negotiations with KIUC in obtaining the funding to relocate to that. On the map, lines show various trenches that were conducted from prior archaeological studies within the Coco Palms property. Looking at the intersection of Kuamo'o Road and Kuhio Highway there are yellow lines showing test trenches along the former cane haul road. In 2003, Sandwich Isles Communication put in a telecommunication duct line along the mauka side of the highway between Coco Palms along this entire corridor where archaeological monitoring was done and no burials were found. Last year the County Department of Water Supply finished a water line project that went down the center of Kuhio Highway and didn't encounter any subsurface sites. In 1991, there was a County sewer force main put in on the makai side of the highway which ran the entire stretch of the highway. There was a lot of work, testing and monitoring done and with all these the State has done its due diligence to see if any sites were affected and to come up with measures to protect them. In that submittal, it talks about some additional conditions that will be implemented by DOT. Right now there are no discovered or historic properties that are being affected by the improvements within the Kuhio Highway right-of-way and part of it is archaeological monitoring where DOT has been coordinating with SHPD (State Historic Preservation Division). There will be more trenching during construction because it couldn't be done before because of all the vegetation there which will have to be removed. A Burial Treatment Protocols Plan will be worked on to identify steps and procedures if burials are encountered during the project which will be coordinated with SHPD, Burial Council and other interested Hawaiian groups. It's not a requirement, but DOT is going beyond that to be sensitive and address protocols if there are burials to treat it properly. DOT will fund a cultural monitor to serve as a liaison between the contractor, the archaeologist and the community to improve communication during the project construction in case there is something that does happen. Most of these conditions were coordinated with OHA and some of these were suggestions that OHA wanted and DOT agreed to do them. The cultural monitoring would be developed in accordance to OHA's guidance and management who will be the one to hire and manage the cultural monitor and OHA will fund the cost for that. The State has gone beyond its requirements to address some of the concerns.

Mr. Young said that DOT recognizes this area as significant with past history regarding archaeological and cultural practices. Based on our investigation they have not found any archaeological resources, but they recognize there could be burials and that is why DOT is agreeing to the conditions for cultural monitoring, archaeological monitoring, additional archaeological investigation and burial treatment protocol that they want to work with the community. There is a need for this project, but they understand the concerns and they want to address them.

Member Pacheco asked whether the work goes down further or is different from recent projects. Mr. Sumada said the subsurface work is to relocate the utilities underground within the Kuamo'o/Coco Palms area and the core of depth is about the same. Mr. Young said that they will be doing directional drilling under the Wailua River about 60 feet below the service and will come up south of the river by Kuhio Highway and North Liho Drive. Mr. Sumada said the archaeological inventory survey work that they did on this project included sub-surface testing in figure 1; they spoke with the Burial Council to

inform them of the work and to get their feedback if there were any other concerns. DOT did make a presentation to the Hawaii Historic Preservation Review Commission to get feedback from them.

Kimo David Frankel from the Native Hawaiian Legal Corporation representing Waldeen Palmeira who is here today and he testified that he wanted to talk about some of the legal issues on the case that they filed regarding the widening project and the issues inextricably linked to the court case and what to deal with today. Mr. Frankel noted that Wailua is important culturally referring to their written testimony and pointed out that the environmental assessment is not sufficient that the Board should not make a decision until an environmental impact assessment is prepared. He referred to the map on page 2 of his written testimony which reflects testimony presented over a century ago where kama'aina talked about a burial ground in the area. It's very clear that the burial ground is located between the fishpond and the sea and the highway goes right through it. We have historic testimony from kama'aina that this area is a burial ground and has been identified. This highway is going to impact a known and previously identified burial site. The first issue is how can anyone conclude that an environmental assessment is adequate. We need a full environmental impact statement. Yes, there were a couple projects that didn't find any burials, but he doesn't know why DOT didn't mention there were 85 sets of remains found in this area and reburied which should not have been omitted in their testimony. This is an area with a huge concentration of burials. On page 3 of Mr. Frankel's written testimony is another color map that was prepared in a separate environmental assessment and, curiously, this map was not included in the EA that was finalized in 2009 which was the bridge EA. The purple area directly overlapping the project area has a note "Area of substantially increased probability of human remains" and he wasn't sure why DOT hasn't mentioned that today. But, DOT's EA does say previous archaeological research has identified pre-contact cultural heirs and human burials in the immediate vicinity of the project area. This suggests there is still a probability not a possibility, but a probability of encountering sub-surface cultural deposits and/or human burials during project ground disturbance. This language is so important. When his organization first sued DLNR and others over the Ward Villages project, there were 11 burials and that mushroomed where dozens and dozens of others were found. The response from the developers was they said so that there was a sentence in their document that says there is a probability more would be found. What they found is archaeologists will identify some burials and say that would be good enough and rather than decision makers like yourself saying there is a probability of more burials here. We can't postpone dealing with that. Actually, what happens is decision makers are out of decision making and those burials are taken out of the ground. What they are asking the Board is rather than make an informed decision by having this issue go before the Burial Council, where it appropriately goes to, and have them make a decision as to what should happen to this burial site. It is clearly a burial site. It is identified, as the law says, in oral and written testimony. You cannot authorize construction without Burial Council Authorization.

Mr. Frankel noted that the Board's duty does not get done often and appropriately which is to investigate and protect customary practices. Staff is probably relying on DOT's

reliance on Cultural Service Hawaii's conclusion that no traditional customary practices were affected. The fundamental flaw of the analysis is Cultural Service Hawaii does not acknowledge one iota that the protection of burial sites is a traditional customary practice. If you don't recognize that as a traditional customary practice it is very easy to say traditional customary practices are not affected. You know that protection of burial sites is a traditional customary practice and is one not discussed in the environmental assessment and is one traditionally that government bodies has ignored. They are asking you not do that. You need to realize there are traditional customary practices associated with protecting burial sites. You need to defer this item and refer to the appropriate body, the Kauai Burial Council for a formal decision making.

Member Morgan asked if anytime anybody thinks there is more than normal probability of finding burials prior to any work outside of the governmental agency they have to go to the island burial council who has jurisdiction on what can occur on that property. Mr. Frankel said he wouldn't use that exact language and explained when there is a known burial site it has to go to the Burial Council and we know this is a known burial ground. Also, we know when there is lots of sand - beaches there is a high probability of finding burials.

Na'u Kamali'i introduced herself as the Health Services Director for Papa Ola Lokahi which is a recognized non-profit Native Hawaiian organization that was federally created by Congress to address the health and wellness of the Native Hawaiian people. She testified that in that capacity they serve as the lead for federal consultation. The Chair mentioned the Hawaiian Civic Club Convention and that was Ms. Kamali'i who talked to the Chair. Their organization has sat with tribes across the continent and Alaska over the past 10 years since the issuance of President Clinton's Executive Order regarding tribal consultation. Every year they sit in Tribal budget consultation at DHHS to discuss the process which is designed so Native Hawaiians, Native Alaskans and Indians have their fair shake at these governmental meetings. The reason why it rose to the level of an executive order is because departments such as DLNR and other governmental entities are checking boxes and disregarding the true import of those federal laws such as 106 and NAGPRA which is an issue in this case because we are talking about burials and listening to what the Native Hawaiian practitioners have to say. The reason why some of the regulations were implemented the way they were was because when you have EISs, CIAs, archaeologists and anthropologists that consult with a few Native Hawaiians it doesn't allow for the Federal, State or County government to sit in confidential discussions regarding chants or other ways their Native Hawaiian culture can disclose matters which need to be kept confidential. Instead, there are public meetings where they are recorded. In this one on December 7, 2009 there was a contentious meeting with two sides discussing bike paths. The reason why Ms. Kamali'i is here is because their practitioners called them because they engage in consultation regularly at that level. This is an ARA Funded project so Federal Highways is involved. We cannot escape that requirement it's a must - it's a shall. Since the October 13th letter on the supposed Burial Treatment Plan they had numerous discussions over the phone and a lengthy meeting with Federal Highways and it's clear to her organization that this consultation requirement was not met simply because there's an absence of policy and procedure to

even do the process. They sat down with the Federal Highways to help them develop a process so that they can meet. In the meantime, you are moving forward with the shovel ready, you've got deadlines and tribes across the nation are scrambling because ARA, the nature that it is you've got to get the money out. Where does that leave the Native Hawaiian? Dig it put it in a paper bag then figure out where to bury it. Its just isn't allowed anymore. The reason she says this is President Obama, since elected, has really thought about this and issued an Executive Memorandum on November 5th where he gave 90 days to all his agencies including the Department of Transportation which includes Federal Highways, ACHP and NAGPRA and all were to review their consultation policies. Why? Because the implementation is so poor tribes are in arms and President Obama is committed to tribes because we are written into those laws, Native Hawaiians, to make it right. This is the first time that they are hearing about this from DOT which gives an example. We got a State agency holding information about what they are going to do and the Native Hawaiian communities in the absence of process are not involved. There are few, but they have to file a lawsuit to get involved. With Federal Highways what they are looking at right now is a notice process where in the case of burials, lineal descendants are involved; they can come forward in a confidential environment without others, without consultants. Granted there are 8 or 10 people or so that they may have consulted, but were recorded in that report without them (lineal descendants) and they meet face to face with Native Hawaiians to hear the cultural perspective. Not only are these burial areas sacred, but to them the river is sacred. Wailua in its name speaks to the sacredness of that river. Department of Interior on January 4th allowed the entire Nantucket Sound to be eligible on the National Register. Wind farms on the north were disallowed. This is the kind of thing that is shaping how DLNR is going to conduct business. It is not as easy as calling OHA to point out a few Hawaiians to satisfy the requirement, it's not enough. They are coming to say they are working with Federal Highways to do this to deal with this measure and item D-1 and asked that this measure need to be deferred or withdrawn that it can't move forward. The Federal Highways if they do not comply they can't fund it. Will they go that far? Absolutely, they have to. It's too important for Native Hawaiians particularly Wailua's entire complex. There will be varying opinions on how sacred it is, but you are not going to be privy to that because that is going to be Native Hawaiians confidential meeting with the Feds as is afforded them as Native Hawaiians under law. Ms. Kamali'i called Federal Highways this morning saying that they will testify on their October 13th letter which proposes all these plans and they are going to have to address that because that cannot go forward as is without the absence of consultation. Federal Highways has not come up with a position, but they certainly can acknowledge that they are in discussion on the process. Ms. Kamali'i has letters from NCAI (National Congress of American Indians) where Papa Ola Lokahi is working closely with them on the Department of the Interior and all other agencies so that Native Hawaiian policies are developed and made available across the board. Next week, the Department of the Interior – Office of Native Hawaiian relations will be here to meet with Papa Ola Lokahi and will be talking about how they got caught in the State/County process which doesn't rise to the level of the Federal process with Native Hawaiians. There are two different processes and Native Hawaiians are entitled to all of it. She reiterated to defer or withdraw until they are given their day to consult.

Pi'ilani Smith representing Papa Ola Lokahi pointed out to the Board that when talking about the Native Hawaiian circumstance it's important to understand that when it comes to burials Native Hawaiians are dealing with NAGPRA, 106, the developer on how they may or may not handle 106 and NAGPRA. When talking about a known burial the complication is that a burial treatment plan will not rise to the level of Federal obligations with Native Hawaiians to address these important issues. There is no burial treatment that can satisfy those requirements and the reason why is the burial treatment is triggered once iwi (bones) are exposed and that will trigger NAGPRA and they will answer into it. Before that occurs they may or may not have the opportunity to deal with 106. It depends how the developer deals with the issue of burials. They know this as was seen with Mokapu and the military treats it as inadvertent discovery. Mokapu is a known burial area. Once there is one puka and find iwi that is excavation because they know that area is iwi. This is the same situation here on Kaua'i. There needs to be a level of sensitivity much higher than the business of day because this discussion has never come to the table. The Federal Government holds the obligation of which that those monies flow to the State and the State has an obligation to do right by the Native Hawaiians in the same regard, as does the County and developers. Consultation must occur before issuing a permit. Not just out of legality, but it's the right thing to do. Otherwise, you will constantly have this opposition and there will be no solution. And, kicking this issue to OHA does not rise to the level of obligation that Native Hawaiians hold and that the Federal Government holds for Native Hawaiians. The consultations are not met by telephone conferences. It isn't met by holding a community meeting like the one held on December 7th where cameras are rolling and both sides are there. It is not a formal Native Hawaiian consultation meeting under 106 or NAGPRA contemplated by the Feds when they are involved in the situation. It isn't met if you talk to a few people and put it in a report and that report becomes the basis for the development moving forward. EISs and CISs don't meet it either. It is a face-to-face engaging where cultural practitioners can talk about the sacred in confidence and that it must occur with Wailua.

Chair Thielen explained that she took to heart Ms. Kamali'i's comments the other day that Ms. Kamali'i is right that the State process, given the Sunshine Law - they don't have the authority to do the confidential and you mentioned that Native Hawaiian groups are entitled to consultation. Because there isn't recognition and because there is disagreement in the Native Hawaiian community on whether OHA is the appropriate office to go to, State agencies like ourselves are left with consulting every single individual Hawaiian. In addition to the entitlement, she is pushing back to Papa Ola Lokahi this obligation on the Hawaiian community to reach some type of decision on this because where do we go? Who do we go to? The default is every single individual Hawaiian may come up and say you didn't consult with me which is a much bigger discussion than what is in front of us today as far as how the State and County can deal with it. We heard your argument on the requirement. Ms. Kamali'i said in the absence of policy and procedure it is not going to play out as the Chair is saying because it's never played out in that way in Alaska or Indian country and she can see what the Chair is saying because we don't know how to identify everybody. The Chair said that is a bigger problem than what we have today and she thinks it's a good conversation that is overdue in Hawaii.

Ms. Kamali'i distributed a copy of the President's Executive Order and NCI's position on the lack of adequate consultation with native people. In absence of a process for consultation via the Federal Government, the State or the County there is no reason or excuse and to take this discussion to heart and to defer this particular permit.

Waldeen K. Palmeira testified that the process was amiss from the beginning of the project. Since then, the historic properties were not identified because there was no archaeological inventory survey for this specific project regardless of how many archaeological studies were done previously or how many reinforcements you put in the middle of Kuhio Highway including above Wailua River. Those are the areas that we have no information on, Kuhio Highway as well as Kuamo'o Road. Regardless of the test trenches it does not cover enough of the area to have enough information. Additionally, as far as the 106, this was done primarily with agencies. Her organization, Hui Namakaiwa 'O Wailuanuiaho'ano, submitted a request only after having been made aware of a pre-construction notice in June 2009 prior to the deadline. This request started in 2004 which will come up in Item D-1. We as a Native Hawaiian organization oppose the bike path on Wailua Beach. We were not invited for consultation and we did not know it existed, but they did provide comments and that was the extent of which they were invited for any kind of role to participate in the 106 process. Wailuanuiaho'ano is a National Historic Landmark known as the political, religious, cultural center traditionally. She referred to the previously mentioned 3 projects – the cane haul project, Kuhio Highway widening and the bike path did not identify through archaeological inventory surveys and cultural impact assessment, that none was done. To go through Wailuanuiaho'ano without these studies speaks to the fact of how these historic properties have not been identified because you cannot identify it if you do not conduct the survey and that speaks to HRS 343 as for the cultural impact assessment. On the comment by DOT where DOT is going above and beyond to be sensitive that is something they challenge because DOT never spoke to them in 2004 instead of 2009 prior to beginning construction which is what the 106 process should have done. However, a lot of processes have taken place in the area of the Coco Palms property and moving this project out of the Coco Palms SMA there are many details that were not brought before the Board. For example, the drilling under Wailua River they were never consulted with and did not have the choice to speak against this. An EIS seems to be something that would have given them more information about how safe something like that is. In addition to what Mr. Frankel presented there are many other details. When you have 3 EAs rather than one EIS and even with one EIS for a project like the Kuhio Highway widening where you have underground utilities going under Wailua River up Kuamo'o Road where you do not have any previous EIS for trenching. You have various parcels in Wailua being affected where you have cumulative significant impacts that have never been studied in a comprehensive way and the end result will be a significant impact on Native Hawaiian people and all people, on their health and on future generations. Changes through processes that were flawed and amiss reiterating the missing archaeological inventory survey, cultural impact assessment and EIS for understanding the complexities of the construction and the cumulative impacts on the significant historic properties of our kupuna. She mentioned one of their Kaua'i kumu hula, Kehau Kekoa reminded that what is missing is the Native Hawaiian voice of our kupuna.

*Member Pacheco moved to go into executive session to consult with the Board's attorney on the Board's rights, duties, privileges, immunities and liabilities. Member Gon seconded it.

3:18 pm EXECUTIVE SESSION

3:44 pm RECONVENED

Member Gon asked the DOT representatives that there was a contention that there was no cultural impact assessments conducted for any of the proposed projects and is that so?

Mr. Young conveyed that under the 343 requirements the environmental document needs to address cultural impacts and it doesn't say to do a cultural impact study and as far as the environmental document that was prepared it did address the cultural impacts and DOT did receive information from individuals that provided information on some of the cultural practices that occur in Wailua State Park and along the shoreline which was incorporated. As for the other two projects, he couldn't speak to that and referred to the County on the bike path.

Randy Rapoza, Director of Parks and Recreation for the County of Kaua'i testified that the bike path is a separate project from the 4-lane highway, but in the EIS process they used a study that was done for that whole Wailua corridor as a basis for the cultural practices of which was included as part of the EA.

Member Gon asked then no study was done because of the study of the larger area which was already cited and Mr. Rapoza confirmed that.

Chair Thielen asked Pua Aiu of SHPD that there were questions earlier that this was a known burial site therefore the determination should be made by the island burial council opposed to the State Historic Preservation Division and asked what is SHPD's position. Ms. Pua related that the burial site in question is Mahanapuoni referring to Figure 1 that the division has not made a determination as to the boundaries of this site, but they don't believe it extends as far as Kuhio Highway or Kuamo'o Road because of the studies and trenches that have already been done that no burials have been found there and it suggests the burials haven't gone that far either and that is why they gave notice to the property affected because they don't believe there is a known burial site in this area.

Member Pacheco asked whether that area is the same as the corresponding to where Ms. Aiu said it's slightly different that there is technical aspect to the drawing that the engineer would need to explain because some the drawings are a little bit off.

Hal Hemmit representing Cultural Service Hawaii testified that the drawing is a compilation of various sources, one of which is the LCA (Land Commission Award) maps and the other is the existing Weuweu Pond and they are trying to represent the location of the burial ground based on the information presented in both the native and foreign testimony of two LCAs in particular. One is 3346 to Mawai and the other is 3302

to the south which is the pink one to Mawai. In the foreign testimony for 3346 it refers to the burial ground as being south to the LCA and 3302 refers to the burial ground as being to the north where they sandwiched the location of the burial ground in-between these two LCAs. That is the extent of information they have on the traditional burial ground which Puoni refers to a sand dune. Also, they have the actual finding of the burials during the construction of one of the buildings of Coco Palms and they know the general location and which building was under construction when the burials were found. They know this by a short document prepared by Peter Kikuchi and by an interview of Val Ako who was one of the construction managers of Coco Palms at the time. Member Pacheco asked where is that from the land and Mr. Hemmit said that area is designated as site 681 which corresponds as the southeastern most building. Ms. Aiu said the answer to Member Pacheco's question is the old one. Member Pacheco asked whether there were any surface features and there are none because it's all developed now said Mr. Hemmit and Ms. Aiu.

Chair Thielen referred to the Figure 1 map and asked whether the lavender shaped ones are the areas SHPD has concurred as historic properties because they fall under one or more of the classifications for historic properties which Ms. Aiu acknowledged that they all have site numbers. The Chair said the square area where the construction is going to occur, the construction parcel and the easements do not...Ms. Aiu said that they haven't found anything.

Member Gon pointed out that the testimony presented by people who he respects and takes to heart the intense significance of this whole area and finds it disturbing too and to have to make a decision that exacerbates this particular situation. He knows there is a long history of development in this area and that the corridor in the sections being discussed have been subject to highway widening the utility placement and he also agrees there is lots of things wrong with the current law and processes of consultation and his vote will reflect those aspects.

Chair Thielen said for discussion purposes she asked the Deputy AG to clarify that their grants of easement and rights-of-entry on the standard language would require the recipient to comply with the State and Federal laws that are applicable and Ms. Chow confirmed it does. The Chair also said that would include any of the Federal consultation process and the like that may be required under this type of project which Ms. Chow acknowledged that it would.

Member Agor moved to approve staff's submittal and Member Pacheco seconded it. All voted to accept except Member Gon who opposed.

Chair Thielen said that if the parties in the room want to seek a contested case hearing they would need to make a statement at the meeting today to that affect and file a written request within 10 days. The Attorney General's Office will review it to determine if there was standing for that type of action, but we would need to be put on notice before the end of today's meeting.

Unanimously approved as submitted (Agor, Pacheco)

Item D-1 Cancellation of Revocable Permit No. S-7408 to Coco Palms Ventures LLC; Set Aside to Department of Transportation, Highways Division for Bike and Pedestrian Path Purposes; Re-Issuance of Revocable Permit to Coco Palms Ventures LLC for Restaurant, Landscaping and Related Purposes; and Issuance of a Right-of-Entry Permit to the Department of Transportation, Highways Division for Construction Purposes, Wailua, Kawaihau (Puna), Kauai, Tax Map Key:(4) 4-1-05:017.

Mr. Atta communicated that this item is related to the previous matter, but is focused specifically on the bike and pedestrian path that is proposed in the Wailua area and this allows DOT to proceed with construction.

The Chair asked whether this is the project that was under some discussion under the prior agenda item. Mr. Atta said some of the discussion refers to the bike path, but the previous item was for the widening. The Chair clarified that the same issues from the folks who came to testify would be relevant to this item and Mr. Atta confirmed that.

Chair Thielen asked the County whether there is anything different in this project that they feel the need to address in the submittal in addition to the conversation they just had on item D-24. Is there anything different in this construction project or that was done in the area?

Douglas Haigh representing County of Kaua'i, Department of Public Works testified that this is for the Lydgate – Kapa'a Bike Path Project which has gone through the full environmental process, the FONSI – 106 process which resulted in a Memorandum of Agreement between Federal Highway, State Historic Preservation Officer and the County of Kaua'i. In closing the 106 process a FONSI was published in 2007. The bike path through this area was identified in SMA permits for the Coco Palms Hotel project where they were committed in assisting them with the bike path coming through this area and very early on in their permitting process it shows the bike path. They also obtained an SMA permit for this bike path through this area where there is existing informal parking for the north end of Wailua Beach. They are asking for a 4 foot wide piece of DLNR land to be incorporated in the road right-of-way and their path is going to be partially in the road right-of-way and partially into this parcel. Coming up to the Papaloa Road intersection which is a very tight area because of the pump station and getting this is critical to make safe passage through this area.

Member Gon asked how Mr. Haigh would characterize the developed nature of the area in question. Mr. Haigh said it's a dirt parking lot which also has SMA permits both for Coco Palms to re-build the Seashell Restaurant and provide improvements for that and have the SMA permit come through with the bike path which would be adjacent to the highway where you have a driveway crossing the existing dirt parking lot.

Member Gon asked prior to that dirt parking lot was there a structure there. Mr. Haigh answered in the negative saying that the Seashell Restaurant has always been on the hill which is adjacent to it (the dirt parking lot). The restaurant was always there, but never had formal parking. Also, that dirt parking lot is used for beach access, too.

Mr. Frankel asked for clarification because the submittal says this bike path is part of the highway widening project because there are contradictions and whether it is a separate project or if it is part of the same widening project. And, whether these two separate agenda items are inextricably linked or not and if they are linked the Board need to consider all the issues cumulatively and if they are not arguably that duty is less so.

Waldeen K. Palmeira of Wailuanuiahoano, Kaua'i testified that this item should be deferred because it is not clear if these submittals reflect the SMA of 2007 as well as the EA and she hope it does. However, our organization and community has been involved in the issuing of this bike path where there has been a lot of discussion and meetings with on-going deliberations and it is not clear to her which plan is before the Board. She believes the part near the Seashells Restaurant is a necessary component for the original shoreline path which is an alternative to the boardwalk on the beach where many Native Hawaiian organizations, individuals including the Sierra Club has opposed. In addition, the 106 for this project is particularly disturbing because it included information from the Kapa'a route CIA which is the cultural assessment for the Kapa'a Beach route that covered this area. It did not cover the beach. It did not cover the culture of the shoreline in particular and there was no EIS for that beach area. They are not sure which proposal you are going to go forth with. Ms. Palmeira reiterated her previous testimony regarding Papaloa Road at Seashell as part of the original path which they are under the assumption is not an option and to consider that option to be moved. If it were moved to another right-of-way with the Kuhio Highway project there will be a whole new set of circumstances which were not involved in the original EA. Her organization is not against the project, its just they have not been consulted and do not know the exact details and are concerned as Native Hawaiians. They have legal standing to participate in this legal process under the Federal guidelines 106 for historic properties. The alternative route that was discussed concerns alternative 3 which is the canal route behind Coco Palms. Through this action the County is looking at continuing on the shoreline course one of two options, but they wanted to let you know that canal route would come up possibly on the north side of Kuamo'o Road which is part of the Draft EA and is one of the alternatives that was studied. Because all 3 projects were not looked at as a whole EIS they wanted to know the reasons why the canal path was not seriously considered as the alternative. Another reason why this seems premature is a matter of policy on their part citing the permit date, but anything involving Coco Palms is a mater of great concern and they would like to be ensured that revoking the permit and reissuing it to include the restaurant, landscaping, etc. was part of the original SMA permit. There is not enough information. She asked for clarification about the Executive Order which the Chair explained. Ms. Palemeira said they are in opposition of the bike path on the sands of Wailua Beach which is alternative.

Ms. Kamali'i testified that Pu'uoni is a burial ground and we are dealing with 106, but we are also dealing with NAGPRA where they have multiple consultation requirements that are being folded into this one thing. The notion that 106 is being met which is a planning process to expose all of these other requirements and facts unless you have a Native Hawaiians coming forth in that process you won't have all the facts to make that decision. The CIA that was done, there was a cultural practitioner that studied extensively in that and she was never discussed by the purposes of that CIA. Kehau Kekoa testified to that. You have documents you are relying on to make your decisions today that are not in order, that is one, NAGPRA. When doing an excavation, notice requirements needs to be put out to the community, that hasn't happened. Additionally, on the notice of consultation isn't something that is quote "met" and then we are done with that. It may be in regards to other communities, but not for Native Hawaiians. In the letter dated January 4th to Ms. Palmeira that talks about the invitation of her organization to be considered as a consultant party for consultation process as a Native Hawaiian organization. Papa Ola Lokahi is noted as a DOI Native Hawaiian organization for consultation and again these are requirements your staff and attorney say is being met, but they have a letter from Federal Highways that say it's an on-going process and can't be met if it's an on-going process. In fact, DOT can't possibly be before you until they have an opportunity to speak on the measure. This is another extension of the impact on this area of burials. Ms. Kamuali'i asked now whether an individual or department is aware of it - in the absence of this process, how can they possibly know if they haven't engaged in the process to hold discussions with Native Hawaiians. The only way is relying on the few people they talked to or OHA and what they see in that CIA. How can you possibly make that decision? They will continue working with the Federal agencies and will be back here again in regards to these permits. The thrust of 106 is to engage in these issues early in the planning process and waiting to defer it to the end until you dig up an iwi; you are again working against what 106 is created to do.

It was moved by Board Member Agor and seconded by Board Member Morgan. The Board approved.

Ms. Waldeen asked for a contested case hearing.

Chair Thielen asked our DOFAW representative to get the information for the forms for filing to DOT and she said what they need is within 10 days to file the application for a contested case hearing.

Unanimously approved as submitted (Agor, Morgan)

Item D-28 Cancellation of Revocable Permit No. S-6392; Issuance of Revocable Permit to Honolulu Polo Club, Inc., Waimanalo, Koolaupoko, Oahu, Tax Map Key:(1) 4-1-09:262.

Mr. Atta conveyed that the ownership was changed to the Honolulu Polo Club, Inc.

Alan Ho, President of the Honolulu Polo Club, Inc. testified that this was done 20 years ago which got lost in the process and appreciates the Department's efforts as public servants.

Unanimously approved as submitted (Morgan, Gon)

- Item D-2** **Amend Governor's Executive Order No. 2433, Wailua, Kauai, Tax Map Key: (4) 4-2-:1:portion of Kuamoo Road.**
- Item D-3** **Grant of Perpetual Non-Exclusive Easement to Kauai Island Utility Cooperative, for Access and Utility Purposes, Kapaa, Kawaihau, Kauai, Tax Map Key:(4) 4-6-14:36.**
- Item D-4** **Set Aside Portion to Department of Transportation, Highway Division for Highway Improvements Purposes and Issuance of a Right-of-Entry Permit, Lumahai, Hanalei, Kauai, Tax Map Key: (4) 5-6-03:portion of 4**
- Item D-5** **Forfeiture of General Lease No. 3160, Patricia Susan Nielsen, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: 2-1-07:26.**
- Item D-7** **After-the-Fact Consent to Sublease under General Lease No. S-4283, Kapalama Commercial Center, Lessor, to Foreign Auto Repair aka Raul Alvarenga dba Foreign Auto Repair, as Sublessee; After-the-Fact Consent to Sublease under General Lease No. S-4283, Kapalama Commercial Center, Lessor, to WESCO aka WESCO Distribution, Inc., a Delaware corporation, as Sublessee; Consent to Extension of Lease Term, General Lease No. S-4283, Kapalama Commercial Center, Lessee, Lot 13, Hilo Industrial Development, Pohaku Street Section, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-2-58:25.**
- Item D-9** **Grant of Perpetual, Non-Exclusive Easement to Department of Transportation, Highways Division; Issuance of Immediate Management and Construction Right-of-Entry onto State Lands for Emergency Earthquake Rockfall Repair, Federal Aid Project No. ER-15(21), Laupahoehoe, North Hilo, Hawaii, Tax Map Key: 3rd/ 3-6-04: portion of 15 & 17.**
- Item D-10** **Extension of Approval in Principle of Direct Lease to United States of America, Department of Agriculture for Research, Educational and Housing Facilities Purposes at Laupahoehoe, Hawaii, Tax Map Key: (3) 3-6-6:portion of 46**

- Item D-14** Termination of Revocable Permit No. S-6596 to Clyde Coatney (deceased); Issuance of Revocable Permit to Bougainvillea Plaza Limited Partnership for Parking and Loading/ Unloading Zone Purposes, Keauhou 1st, North Kona, Hawaii, Tax Map Key: 3rd/ 7-5-06: 34.

Mr. Atta asked to amend the title as 09HD-161 instead of 09HD-027.

The Board:

APPROVED AS AMENDED. The Land Board amended the recommendation by changing the PSF number on the first page to 09HD-161. Otherwise, the Land Board approved staff's recommendations as submitted.

Unanimously approved as amended (Gon, Agor)

- Item D-15** Consent to Assign General Lease No. S-5188, Patricia G. Greenwell, Trustee under that certain unrecorded Patricia G. Greenwell Revocable Living Trust dated May 5, 1983, Assignor, to Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Assignee, Auhaueae, North Kona, Hawaii, Tax Map Key: 3rd/ 7-5-09: 43.
- Item D-18** Issuance of Revocable Permit to Beach Games Spectacular, Inc. dba BGS Incentive Activities for Beach Volleyball Activity at Wailea Beach, Maui, Tax Map Key: (2) 2-1-23:seaward of 7.
- Item D-19** Cancellation of Revocable Permit No. S-5775 to Maui Hill Condominiums and Re-issuance of Revocable Permit to Association of Apartment Owners of Maui Hill, Wailuku, Maui, Tax Map Key: (2) 3-9-4:140.
- Item D-20** Consent to Mortgage with Estoppel Certificate, Lease of Non-Exclusive Easement S-5252, Meri-Jo Abrams Manuel, as Successor Trustee of the Lakala Trust, Lessee, Lahaina, Maui, Tax Map Key: (2) 4-5-1:seaward of 55.
- Item D-22** Grant of a Perpetual, Non-Exclusive Easement to the City and County of Honolulu for Drainage Purposes; Kamananui, Waialua, Oahu; Tax Map Key: (1) 6-7-015: seaward of 039
- Item D-26** Cancellation of Right-of-Entry Permit to Shell Wind Energy Inc. and Re-issuance of a Right-of-Entry Permit to Auwahi Wind Energy, LLC, for Access Purposes, Kanahena, Maluaka, Mooloa, Honuaula, Makawao, Maui, Tax Map Key:(2) 2-1-004:049 and (2) 2-1-005: 034, 055 and 077.

Item D-27 Rescind Prior Board Action of November 19, 2009, Item D-9, Issuance of Revocable Permit to Larry G. Alexander for Pasture Purposes, Honopou and Hoolawa, Makawao, Maui, Tax Map Key: (2) 2-9-002:012 and 017.

Item D-29 Forfeiture of General Lease No. S-5709, Daniel V. Kinikini, Lessee, Hauula, Koolauloa, Oahu, Tax Map Key: (1)5-4-014:3

Mr. Atta had no changes.

Unanimously approved as submitted (Gon, Agor)

Item C-2 Approval of an Updated Division of Forestry and Wildlife Shooting Preserve License, and Increase in the Fee from \$100 to \$200 Annually.

Mr. Conry asked the Board to withdraw this item because upon advice from the Attorney General's Office the basis for adding the mammals to our private and commercial shooting preserve was not supported in our statutes.

Withdrawn (Pacheco, Edlao)

Item C-4 Acceptance of Hearing Masters' Reports on Public Hearings for Two Proposed Additions to the Natural Area Reserves System on Hawaii Island and Molokai, and Approval and Recommendation to the Governor for Issuance of Two Executive Orders: Addition of Approximately 700 Acres (Pending Final Subdivision) to the Kanaio Natural Area Reserve; Kanaio, Makawao, Maui, TMK: 2-1-003-050 (por), and Addition of 5,794.88 Acres to the Kahaualea Natural Area Reserve; Kahaualea, Puna, Hawaii Island, TMK: 3-1-1-001-001 (Por).

Mr. Conry asked our Deputy Attorney General that they may have a problem with the title because of a mistake that says Hawaii Island and Molokai, but it isn't Molokai but Maui and later in the title it correctly identifies Maui as the TMK location. Ms. Chow said it was ok because the specific identifier already identified it which is the TMK. This is significant to their Natural Area Reserve System and asked for Board approval.

Member Gon commented that he is always pleased to see expansion enhancements to the Natural Area Reserve System.

Unanimously approved as submitted (Pacheco, Gon)

Item E-1 Requesting Approval to Grant a Month-to-Month Revocable Permit to the Sand Island Off Highway Vehicle Association (SIOHVA) for the Management of a 30 Acre Portion of Sand Island State Recreation Area, Oahu, for Off Highway Vehicle Recreation.

Curt Cottrell representing State Parks spoke saying that he stands on his submittal and asked for approval.

Unanimously approved as submitted (Gon, Morgan)

Item F-1 Approval for the Chairperson and/or Deputy Directors to enter into Agreements with the USFWS to Conduct Investigative Assessments of Marine Injuries Associated with the December 2009 Keawakapu Artificial Reef project

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, to consult with the Board's attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Francis Oishi representing Division of Aquatics said that he had no changes to the submittal.

Chair Thielen asked whether the Board has any questions for staff or need to go into executive session to consult with our counsel or are fine with the information where the Board said they were fine with the submittal.

Unanimously approved as submitted (Edlao, Pacheco)

Item M-1 Issuance of a Retail Concession Hilo International Airport and Kona International Airport at Keahole.

Item M-2 Issuance of Direct Sublease Hawaiian Sealife, Inc., 3239 Ualena Street Honolulu International Airport.

Item M-3 Issuance of Non-Exclusive On-Demand Airport-Based Shuttle Bus Concession Honolulu International Airport.

Unanimously approved as submitted (Pacheco, Gon)

Adjourned (Gon, Pacheco)

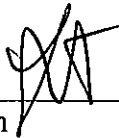
There being no further business, Chairperson Thielen adjourned the meeting at 4:25 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



Laura Thielen
Chairperson
Department of Land and Natural Resources