

STATE OF HAWAI'I

LAND USE COMMISSION

Hearing held on October 25, 2019
Commencing at 9:00 a.m.

The Grand Naniloa Resort-Crown Room
93 Banyan Dr., Hilo, HI 96720

VI. CALL TO RECONVENE

VII. CONTINUED ACTION

DR19-67 KU'ULEI HIGASHI KANAHELE

Consider Petition of Ku'uilei Higashi Kanahele
and Ahiena Kanahele, individuals, for a

"Declaratory Order concerning the invalid
classification of the de facto and improper
industrial use precinct on approximately 525
acres of State Land Use Conservation District
lands located in Mauna Kea and Hilo, County of
Hawai'i. Tax Map Key Nos. 4-4-015:009 (por)."

VIII. ADJOURNMENT

BEFORE: Laura Savo, CSR #347

1 APPEARANCES:

2 COMMISSIONERS:

3 JONATHAN SCHEUER, Chair
4 NANCY CABRAL, Vice Chair
5 EDMUND ACZON
6 DAN GIOVANNI
7 LEE OHIGASHI
8 GARY OKUDA
9 ARNOLD WONG

10 STAFF:

11 PATRICIA OHARA, ESQ.
12 Deputy Attorney General
13 DANIEL ORODENKER, Executive Officer
14 RILEY K. HAKODA, Planner/Chief Clerk
15 SCOTT DERRICKSON, AICP/Planner
16 ARIANA MASUOKA, Planner

17 ALSO PRESENT:

18 BIANCA ISAKI, ESQ.
19 1720 Huna Street, B401
20 Honolulu, Hawai'i 96817

21

22

23

24

25

INDEX

<u>PUBLIC WITNESSES</u>	PAGE
SHEA RODRIGUES Direct Examination	7
GENE TAMASHIRO Direct Examination	17
LANCE D. COLLINS, ESQ. Direct Examination	23
AHIENA KANAHELE Direct Examination	68
KU'ULEI HIGASHI KANAHELE Direct Examination	100

1 CHAIRPERSON SCHEUER: Good morning.

2 Aloha. This is the second day of our hearing -- our
3 meeting on Docket No. DR19-67 Ku'ulei Higashi
4 Kanahele to consider the petition of Ku'ulei Higashi
5 Kanahele and Ahiena Kanahele, individuals, for a
6 declaratory order concerning the invalid
7 classification of the de facto and improper
8 industrial use precinct on approximately 525 acres of
9 state land use conservation district lands located in
10 Mauna Kea and Hilo, County of Hawai'i, tax map key
11 Nos. 4-4-15:09, portion thereof.

12 The petitioners are with us here today.
13 Where we left off, commissioners and members of the
14 public, yesterday was that we had formally closed
15 public testimony with the exception of people who had
16 signed up prior to the close of the meeting
17 yesterday, and that left us with three individuals
18 who are going to testify, the two named petitioners
19 and Mr. Lance Collins.

20 This morning we've had three individuals
21 come forward who wish to testify who said that they
22 can consolidate their testimony into one three-minute
23 period, and I understand that there's another
24 individual who's showed up who would like to testify.
25 So that would, without questioning, extend our

1 proceedings by six minutes. I believe, from my
2 understanding of staff's discussion with the
3 petitioner, they do not need a very long time for
4 argument this morning.

5 MS. ISAKI: Yes, that's true.

6 CHAIRPERSON SCHEUER: So I believe our
7 time could accommodate it, but I want to put this
8 suggestion that these two additional members of the
9 public be allowed to testify to my fellow
10 commissioners.

11 COMMISSIONER WONG: Chair?

12 CHAIRPERSON SCHEUER: Commissioner Wong.

13 COMMISSIONER WONG: So it's only going to
14 be two individuals? Can I see who's going to -- just
15 wanted to make sure that it's only these two then?

16 CHAIRPERSON SCHEUER: That would be
17 correct. And then we will finally close public
18 testimony.

19 COMMISSIONER WONG: I have no problem
20 with that, Chair.

21 COMMISSIONER CABRAL: I also have no
22 problem with it. I just want to not have it come
23 back to us that when we closed it off yesterday very
24 clearly, that I don't want anyone else who didn't
25 come today because they were told they couldn't

1 testify then get upset because they were told we
2 wouldn't let somebody in. So out of the fact that
3 people did show up today and they're ready to
4 testify, then I would agree that they should be able
5 to testify if time permits. Thank you.

6 COMMISSIONER GIOVANNI: I agree.

7 CHAIRPERSON SCHEUER: Okay. Thank you.
8 So will the first individual please proceed to the
9 public witness box? Our procedure for this morning
10 and for our testimony is I will swear you in, which
11 is the practice of this Land Use Commission, and one
12 at a time, you will state your name and address for
13 the record. Then I will start the clock. You will
14 have three minutes to testify. After the three
15 minutes, I will indicate that the three minutes is
16 done and ask you to conclude your remarks. There
17 will then be the opportunity for clarifying questions
18 to be asked by the petitioner and any questions to be
19 asked by the members of the commission.

20 COMMISSIONER GIOVANNI: Chair?

21 CHAIRPERSON SCHEUER: Commissioner
22 Giovanni.

23 COMMISSIONER GIOVANNI: Can you ask the
24 two additional testifiers at their convenience to
25 sign in on the register, please, after?

1 CHAIRPERSON SCHEUER: Yes. Please do.
2 Please see Ariana with our staff who has stepped
3 outside for a moment.

4 Okay. Aloha, good morning.

5 MR. RODRIGUES: Aloha.

6 CHAIRPERSON SCHEUER: Do you swear or
7 affirm the testimony you are about to give is the
8 truth?

9 MR. RODRIGUES: I do.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

 SHEA RODRIGUES,
was duly sworn to tell the truth
and testified as follows:

 CHAIRPERSON SCHEUER: Okay. Please speak
right into the microphone. Is the button lit? There
you go.

 MR. RODRIGUES: Good enough?

 CHAIRPERSON SCHEUER: Yes. State your
name and address for the record and proceed.

 MR. RODRIGUES: My name is Shea
Rodrigues, and my address is 81 Manulele Street.

 I'm going to go through the list of
spills on Mauna Kea, and I want you guys to consider
whether these are consistent with conservation lands.
For the sake of time, I'm just going to say the year

1 and what was spilled.

2 1979, hydraulic fluid; 1982, diesel fuel;
3 1989, mercury; 1990, mercury; 1995, mercury; 1995,
4 diesel fuel engine and hydraulic oil; 1996,
5 antifreeze; 1998, mercury; 1998, sewage; 1998,
6 mercury; 1990 to 2000, hydraulic fluid; 2003,
7 crankcase oil and hydraulic fluid; 2003, transmission
8 oil; 2003, hydraulic fluid; 1998 to 2004, sewage;
9 2004, diesel fuel; 2004, antifreeze; and 2008,
10 sewage.

11 These spills are documented in the Mauna
12 Kea Management Plan in 2009. So they only go up
13 until that date. But we know that spills are still
14 happening because as recently as last year, we saw
15 hydraulic fluid leaking from the Keck Observatory.

16 Now, after each of these spills, the
17 earth is excavated and removed. Some of these lands
18 that our ancestors considered so sacred that they
19 wouldn't even walk upon them have been removed, and
20 do you guys know where they're taken to? Are you
21 guys aware?

22 CHAIRPERSON SCHEUER: Just please
23 proceed.

24 MR. RODRIGUES: They're taken to the
25 landfill. They're taken to the dump. So our sacred

1 lands are literally being treated the same as trash.
2 They're sitting with trash. And even if you guys
3 don't believe that that land is sacred, you should be
4 alarmed because Mauna Kea is home to endemic flora
5 and fauna found nowhere else in the world. When they
6 excavate that land, they don't isolate inorganic
7 matter from organic matter. It's all taken together.
8 So transporting culturally significant lands
9 containing living, endemic organisms, that is not
10 conservation. That is absolutely not conservation.
11 So we need to change that.

12 We become a reactive society which keeps
13 on pushing the boundaries. We say we can destroy
14 this because it's insignificant, or this will have
15 minimal impact, but the cumulative effects will
16 always be significant in a society that doesn't know
17 when to stop. Look at Mauna Kea. There's a city of
18 telescopes on top of there now, and they want more
19 and they'll always want more. That's not going to
20 change. TMT will take eight years to be built.
21 Mauna Kea has taken 800,000 years to be built. It
22 should be apparent which one we need to protect.

23 So I have just three requests: That you
24 require UH to submit an application for rezoning;
25 second, that you deny that application; and third,

1 that you reclassify all of Mauna Kea as protected
2 conservation land.

3 CHAIRPERSON SCHEUER: Thank you very
4 much. And are there any questions for the witness?

5 MS. ISAKI: No. But thank you very much
6 for your testimony.

7 CHAIRPERSON SCHEUER: Commissioners?
8 Commissioner Wong.

9 COMMISSIONER WONG: Thank you, Chair.
10 Two questions. The first was you have
11 that list. So how many buildings do you know of or
12 how many construction projects?

13 MR. RODRIGUES: It's spread throughout it
14 all. It's not any specific one.

15 COMMISSIONER WONG: No. How many that
16 you know of?

17 MR. RODRIGUES: How many buildings?

18 COMMISSIONER WONG: Yeah.

19 MR. RODRIGUES: At least seven or eight
20 of them.

21 COMMISSIONER WONG: Plus all the diesel
22 and all that?

23 MR. RODRIGUES: Yeah. Those are outside.
24 So not really associated with one particular
25 building. Some of them were generators. Some of

1 them were trucks.

2 COMMISSIONER WONG: So how many? 20?
3 30?

4 MR. RODRIGUES: Different occurrences?

5 COMMISSIONER WONG: Yeah.

6 MR. RODRIGUES: Yeah, about 20 or so.

7 COMMISSIONER WONG: Second thing, let's
8 say we do change the district to at least industrial.
9 What's going to change the fact that if there is one
10 spill, what's going to happen? Still going to the
11 dump; right? Wouldn't that still happen?

12 MR. RODRIGUES: It would, and that's why
13 I think -- so the basis of changing it to industrial
14 is not on the spills themselves. It's on the city of
15 telescopes up there. And that's why in my third
16 point, I would actually ask that you request -- that
17 I would request that it be protective zoning, and I
18 don't really know why it's not protective zoning.
19 When you look at all of the other treasures of this
20 island, how can Mauna Kea not be one of them? How
21 can it not be protective zoning?

22 COMMISSIONER WONG: Thank you, Chair.

23 CHAIRPERSON SCHEUER: Thank you,
24 Commissioner Wong.

25 Commissioner Okuda.

1 COMMISSIONER OKUDA: Thank you, Chair.
2 And thank you very much for your testimony. The Land
3 Use Commission has only limited powers. The
4 commission can only decide if there's a proper
5 petition brought before it, whether or not to
6 basically redesignate, some people use the word
7 rezone, land into four different types of districts:
8 urban, rural, agricultural or conservation.

9 We're going to have more discussion about
10 what the law is later on in this hearing, but one
11 view, anyway, of the law is that once the Land Use
12 Commission makes a designation of land within a
13 certain district, there's -- there's one view of the
14 law; that the Land Use Commission has to take hands
15 off as far as what takes place within that district.
16 So, for example, if -- if for some reason this land
17 gets redesignated into the urban district or urban
18 boundary, it basically means the Land Use Commission
19 has no further say, and whatever is allowed in an
20 urban district can take place.

21 So, you know, we hear what you're saying,
22 but if you can appreciate the fact that we're not
23 like the legislature that can just pass any law. We
24 have to follow the rules, the laws and the statutes
25 that have been cast.

1 But I have a different question, and I
2 don't know whether you were here yesterday, but I'd
3 like to just follow up with your testimony and your
4 thoughts in response to what we heard from the
5 University of Hawai'i. We heard from their
6 witnesses, including the chancellor, who I think has
7 been chancellor for less than -- or less than a year,
8 and, you know, you can use that to determine level of
9 credibility or whatever, but we've heard promises
10 that the University of Hawai'i is going to listen to
11 the community. And the question I'm going to ask you
12 and I'm going to have a follow-up, my first question
13 is really just a yes, no or I don't know answer is do
14 you --

15 Well, let me ask a preliminary question.
16 How many years have you been a resident here in
17 Hawai'i island?

18 MR. RODRIGUES: Well, my family's been
19 here since before the 1800s. So quite a long time.

20 COMMISSIONER OKUDA: Okay. That's before
21 my grandfather got here to Hawai'i, Waiakea House
22 Lots at the turn of the century. Okay. Your
23 family's been here longer than my family.

24 Do you believe the promises or
25 representations that are made by the University of

1 Hawai'i that things are going to be different, that
2 they're going to go and protect the summit at Mauna
3 Kea? And it's just a yes, no or I don't know.

4 MR. RODRIGUES: I can't believe them.
5 Fool me once.

6 COMMISSIONER OKUDA: Well, my next
7 question then is what do they have to do for you,
8 whose family goes back here on Hawai'i island for
9 generations, what does University of Hawai'i have to
10 do to earn your confidence?

11 MR. RODRIGUES: It's all in the action.
12 It's what they decide to do, and moving forward with
13 these things now is not listening to the people who
14 have clearly spoken. So I mean, I think the biggest
15 way forward in establishing trust -- establishing
16 trust would be to actually stop this from going
17 forward, actually take a step back and listen and
18 really look at what the community, as a whole, wants.
19 We haven't really --

20 We hear all this talk about minority,
21 majority. We haven't really come together and really
22 looked at it. I mean, there are some things that
23 can't be compromised on. Mauna Kea is not -- it's
24 not a bargaining chip. It's a piece of who we are.
25 So there's no way that we can compromise with that.

1 But there are other things that perhaps we can
2 negotiate.

3 COMMISSIONER OKUDA: And last question.
4 Without getting into whether or not things should be
5 compromised or not or what have you, 'cause, you
6 know, even though my father's family is from Hawai'i
7 Island. I grew up on Oahu, and my cousins who still
8 live here always tell me, "Hey, your Honolulu guys
9 should stop telling us here what to do."

10 So without getting into that, what do you
11 think is the first step the University of Hawai'i can
12 do, something concrete, without asking either side to
13 compromise? But what would be, in your mind, a
14 demonstration of good faith by the University of
15 Hawai'i?

16 MR. RODRIGUES: I mean, first off, have a
17 talk with the actual people who are on the mauna, the
18 actual people who are standing against their action.
19 I mean, it's one thing to talk to certain
20 organizations that supposedly represent us, but they
21 also have financial interests that are not the same
22 as people on the mauna who have no financial
23 interests and the only interest is protecting what we
24 believe in.

25 COMMISSIONER OKUDA: Okay. Thank you

1 very much for taking your time to come here today.

2 MR. RODRIGUES: Thank you. Thank you for
3 listening.

4 CHAIRPERSON SCHEUER: Hold on. Sir, you
5 can't just -- let's check if there's anything --

6 UNIDENTIFIED SPEAKER: I just want to --

7 CHAIRPERSON SCHEUER: Actually, I'm
8 addressing the person who's speaking first because I
9 want to make sure there were no further questions for
10 you. Okay.

11 MR. RODRIGUES: Thank you.

12 CHAIRPERSON SCHEUER: Thank you. Sir,
13 we've closed public testimony.

14 UNIDENTIFIED SPEAKER: I'm sorry. You
15 know, I'm new to this. I didn't know that -- I
16 didn't even know we needed to sign up, and I saw this
17 sheet yesterday in the middle. I didn't want to
18 interrupt. But if you give me a chance to have an
19 opportunity, it will be real short.

20 CHAIRPERSON SCHEUER: I really appreciate
21 that, but, unfortunately, we made one exception at
22 the beginning of this meeting prior to your coming in
23 where we were going to take two additional
24 individuals and then we were going to completely
25 close public testimony. Because otherwise -- and

1 it's not that what you have to say is not valuable,
2 but it is running into our procedures where people
3 continue to come in to ask --

4 UNIDENTIFIED SPEAKER: My work schedule
5 hinders my ability to be a part of this.

6 CHAIRPERSON SCHEUER: I appreciate that,
7 and it doesn't -- I don't enjoy it. I'm going to
8 deny this request, but I'm going to --

9 Okay. Mr. Collins. Oh, right. Thank
10 you. I got thrown off.

11 Do you swear or affirm the testimony you
12 are about to give is the truth --

13 MR. TAMASHIRO: The whole truth. I press
14 the button here?

15 CHAIRPERSON SCHEUER: Yes. The button --
16 there you go.

17 MR. TAMASHIRO: There we go. The whole
18 truth and nothing but the truth so help me Ke Akua.

19
20 GENE TAMASHIRO,
21 was duly sworn to tell the truth

22 and testified as follows:

23 CHAIRPERSON SCHEUER: So please state
24 your name and address for the record and proceed.

25 MR. TAMASHIRO: Okay. Whenever I'm in

1 public environments, I -- I not only state my name,
2 but I clarify my status. I am Gene Tamashiro. I'm a
3 true kanaka sovereign Hawaiian national. I'm lawful
4 in my own country, and Hawaiian Kingdom is in
5 continuity. So I live at 25-3447 Pakelekia Street,
6 Hilo 96720. That's a US ZIP designation.

7 Okay. Ready? Most importantly, when
8 there's controversy on land, land issues, the most
9 important thing, and I think Brother Lanny Sinkin I
10 heard mention this yesterday, and I'm grateful for
11 that, because we need to -- whenever there is a land
12 controversy, we are obligated to confirm and clarify
13 who actually has title. And this is something that
14 goes right at the heart of the false presumption that
15 the State of Hawai'i has lawful title.

16 Like, this false presumption continues in
17 today's paper. "Petition Testimony Continues: Land
18 at Mauna Kea summit is owned by the state, managed by
19 the Department of Land and Natural Resources and
20 leased by the University of Hawai'i."

21 Everyone in Hawai'i, and I would imagine
22 even you guys, knows what happened to our queen. No
23 contract is lawful at the point of a gun. No
24 territory was built in Hawai'i based on a lawful
25 treaty of annexation. Therefore, whatever election

1 or, excuse me, whatever referendum that occurred in
2 1959 was a referendum that occurred in an unlawful
3 entity, the Territory of Hawai'i, provably for the
4 public record not lawful.

5 So I know it's an inconvenient truth. I
6 know we all have the same vision for our beloved
7 Hawai'i, for our children, for the aina. But we are
8 constantly surrendering our right to our unalienable
9 right to substantive due process and full disclosure.

10 Now, I have made claims along with others
11 in this room about Hawaii's true political status,
12 and I follow this up to develop forensic evidence.
13 This is how the law works. If I make a claim and I
14 bring evidence and I serve it --

15 I served Mr. Aila, Chairman Aila a couple
16 days ago for him to take a notice and demand for
17 particulars, which means I claim as a sovereign
18 Hawaiian my status and the law. Now it's your turn.
19 In this case, it would be Mr. Aila.

20 Suzanne Case for the DLNR also asserts --
21 she's now three months in default. The mayor, the
22 county council, the corporate counsel and the
23 prosecutor all have been served notice in the public
24 venue. Demand for particulars, they don't answer.
25 Notice of dishonor and default, cease and desist,

1 they don't answer. So we took the responsibility to
2 create --

3 CHAIRPERSON SCHEUER: Three minutes. If
4 you could summarize, please.

5 MR. TAMASHIRO: Okay. Sure. I'm
6 basically saying that until this body or any body has
7 the integrity and the willingness to follow how the
8 rule of law actually works, and America was founded
9 on Ke Akua's natural law. Hawaiian Kingdom is a
10 natural law, constitution of monarchy.

11 So we have so much forensic evidence that
12 people representing the state of Hawai'i and county
13 are actually in default. Therefore, your claim or
14 the false presumption that carries on in the paper,
15 that's not true. And, guys, the pathway -- 'cause it
16 seems like an impossible thing to deal with, but
17 America has already -- is a party to treaties with
18 Geneva and with Hague. Okay? And what is the true
19 status of Hawai'i? It is 126 years of military
20 occupation because there's no treaty of annexation.

21 Now, in the law --

22 CHAIRPERSON SCHEUER: Could I ask you to
23 summarize, please?

24 MR. TAMASHIRO: Yes. In the law of
25 occupation, which America's treaty, Article VI

1 treaties, highest law in the land, we are obligated,
2 all of us, yeah, especially those working for the
3 corporation, to legislate, which is what you guys are
4 partially doing, and to enforce, okay, in accordance
5 to the law of the country being occupied.

6 So all the infrastructure in the state of
7 Hawai'i, in the county of Hawai'i, doesn't have to go
8 away. We just have to clarify with public record
9 evidence that is well-known who has title, therefore,
10 who has jurisdiction. Once that is clarified, all of
11 our dreams to be pono -- because Hawaiian Kingdom is
12 not a corporation. We operate in the truth and the
13 law with aloha. We are moving forward with
14 titleholders of the crown land to stop any false
15 presumption that the state has lawful jurisdiction.
16 If anybody here has proof that the state has lawful
17 jurisdiction of Mauna Kea or any of the crown lands,
18 raise your hand. Raise your hand if you have proof.

19 CHAIRPERSON SCHEUER: Thank you for your
20 testimony. I've let you go a couple minutes.

21 MR. TAMASHIRO: Okay. Thank you very
22 much. God bless you.

23 CHAIRPERSON SCHEUER: If you wanted to
24 serve to us as well, you can file them with --

25 MR. TAMASHIRO: Nothing to serve. This

1 is all public record venue. God bless you.

2 CHAIRPERSON SCHEUER: Thank you very
3 much. Can I see if there's questions for you?

4 MS. ISAKI: Thank you. No questions.

5 CHAIRPERSON SCHEUER: Commissioners?
6 Commissioner Aczon.

7 COMMISSIONER ACZON: Good morning.

8 MR. TAMASHIRO: Good morning.

9 COMMISSIONER ACZON: I just want to
10 clarify. So you were saying we don't have
11 jurisdiction, though, on this case?

12 MR. TAMASHIRO: State of Hawai'i does not
13 have lawful jurisdiction over the false claim that
14 they own Mauna Kea. I can prove that, yes.

15 COMMISSIONER ACZON: Okay.

16 MR. TAMASHIRO: Do you have evidence,
17 sir, that the State of Hawai'i is lawful on that
18 claim?

19 COMMISSIONER ACZON: Just trying to
20 clarify.

21 MR. TAMASHIRO: Okay. I made it
22 perfectly clear. Okay.

23 CHAIRPERSON SCHEUER: Anything further,
24 commissioners?

25 Thank you very much.

1 MR. TAMASHIRO: God bless you.

2 CHAIRPERSON SCHEUER: Mr. -- oh, what
3 order did you want to go in? I thought it was going
4 to be Lance Collins.

5 Good morning.

6 MR. COLLINS: Good morning.

7 CHAIRPERSON SCHEUER: Do you swear or
8 affirm the testimony you are about to give is the
9 truth?

10 MR. COLLINS: I do.

11 CHAIRPERSON SCHEUER: Please proceed.

12

13 LANCE D. COLLINS, ESQ.,
14 was duly sworn to tell the truth
15 and testified as follows:

16 MR. COLLINS: Aloha, good morning. My
17 name is Lance D. Collins. I'm an attorney, and I
18 represent the West Maui Preservation Association and
19 Na Papa'i Wawae 'Ula'ula who are in support of the
20 petition. And for my own UH disclosures, I obtained
21 my degrees from MCC and UH, and I've previously been
22 a lecturer in the Ilokano Language and Literature
23 Program, and I'm also an instructor of the Legal
24 Clerks Certificate Program at Maui college.

25 The petitioners are interested persons

1 within the meaning of 91-8 and can seek declaratory
2 orders from this commission. It is proper for the
3 commission to issue declaratory orders for the
4 requested relief and should not abstain from ruling
5 on the petition. The questions presented to the
6 commission are not barred by res judicata or by issue
7 preclusion. 91-8 and 205-2 confer subject matter
8 jurisdiction on the commission to entertain and rule
9 on the three questions presented in the petition.

10 The petition is significant to the
11 orderly administration of Chapter 205 and to prevent
12 indirect subversion of the clear mandate of the law.
13 The statutory language and framework of Chapter 205
14 provide this commission with the mandate to classify
15 lands into districts. 205-5(a) recognize that the
16 powers granted to the counties govern the use of land
17 within agricultural, rural and urban districts while
18 the DLNR governs the use of land within the
19 conservation district.

20 The most important word here is "within."
21 The counties and the DLNR govern the use of land
22 within a district. They do not have the authority to
23 classify lands into districts or to determine whether
24 district boundaries should be amended to reclassify
25 land from one district to another.

1 The authority conferred on the BLNR in
2 183C-3 is to identify and appropriately zone those
3 lands classified within the conservation district.
4 It confers no power on the land board to decide which
5 lands throughout the state should be within the
6 conservation district. That power is solely vested
7 in this commission. The Office of Planning argues
8 that 205-2 cannot be interpreted without reference to
9 statutory provisions not administered by the
10 commission. The power of the commission to classify
11 lands into districts or to reclassify lands into
12 other districts is not contingent or dependent upon
13 statutory provisions not administered by the
14 commission. No other authority of the state is
15 empowered to condition, limit or define the powers of
16 this commission to classify land into districts.

17 The Office of Planning, UH and TMT point
18 to a contested case hearing conducted pursuant to the
19 land board's power to control land use within the
20 conservation district and a subsequent decision
21 therefrom with the proposition that such a procedure
22 as well as subsequent judicial review foreclosed this
23 commission from ever considering whether land subject
24 to those proceed- -- proceedings, excuse me, are
25 subject to reclassification. This contention is

1 flatly wrong.

2 The primary reason why WMPA and Na Papa'i
3 are submitting testimony in support of this petition,
4 consider this hypothetical: A landowner seeks
5 approval to use a 14-acre parcel of land classified
6 in the agricultural district for uses which are
7 appropriate in the urban district. This approval is
8 contested by neighbors and concerned community groups
9 and county --

10 (Timer ringing.)

11 May I finish my paragraph?

12 -- and the county approvals challenge
13 unsuccessfully in the courts. Subsequently,
14 neighboring parcels of land in increments of 14 acres
15 or less are converted to similar use so that after 15
16 of these approvals, there's a 500-acre de facto urban
17 district within an agricultural district.

18 Under the Office of Planning, UH and
19 TMT's argument, this commission would be without
20 power to reclassify that land because one of these
21 approvals went through a contested case proceeding
22 that rendered a decision on the standards for zoning
23 within that district that was subsequently affirmed
24 by an appellate court.

25 The problem with this contention is that

1 the issue of what district the land should be
2 classified as was not before the appellate courts.
3 An appellate court can only review the case before
4 it, and the case would have been whether the county
5 decision-maker complied with the standards for the
6 approval requested. Neither the land board nor the
7 counties have the power to evaluate or to determine
8 whether to reclassify the land into a different
9 district. That authority is solely the authority of
10 this commission and one that is not -- never before
11 the land board and is never before the counties.

12 Act 187 of 1961 establishing this
13 commission and its powers to classify land into
14 districts stated, quote, "Inadequate controls have
15 caused many of Hawai'i's limited and valuable lands
16 to be used for purposes that may have a short-term
17 gain to a few, but result in a long-term loss.

18 WMPA and Na Papa'i urge you to grant the
19 declaratory orders requested in the petition. Mahalo
20 for the opportunity to provide testimony today.

21 CHAIRPERSON SCHEUER: Thank you.
22 Questions?

23 MS. ISAKI: Sorry. Just a clarifying
24 question. So who was WMPA and Na Papa'i?

25 MR. COLLINS: WMPA is the West Maui

1 Preservation Association. It is a West Maui
2 nonprofit organization that is dedicated to
3 preserving, protecting and restoring the natural and
4 cultural environment of West Maui.

5 Na Papa'i Wawae 'Ula'ula is an
6 unincorporated association of over 5,000 West Maui
7 residents and other shoreline and near-shore users
8 who are concerned about protecting and preserving the
9 quality of life and environment for West Maui
10 communities, particularly as it relates to public
11 uses and access of and to the shoreline.

12 CHAIRPERSON SCHEUER: Nothing further?

13 MS. ISAKI: Nothing further. Thank you.

14 CHAIRPERSON SCHEUER: Commissioners?
15 Commissioner Okuda.

16 COMMISSIONER OKUDA: Thank you,
17 Mr. Chair. Thank you for your testimony,
18 Mr. Collins.

19 You know, I understand the overall or one
20 view of the situation which might get summed up as
21 the fox guarding the fox who's eating the chickens.
22 Yeah? So I appreciate that. But as an attorney, you
23 do understand the issue of subject-matter
24 jurisdiction; correct?

25 MR. COLLINS: Yes.

1 COMMISSION OKUDA: That if a body has
2 subject-matter jurisdiction, the body or the
3 tribunal, the agency or the court can make a decision
4 about the matter which it has subject-matter
5 jurisdiction; correct?

6 MR. COLLINS: Yes.

7 COMMISSIONER OKUDA: But if the body does
8 not have subject-matter jurisdiction, then even if
9 the people who sit on that body or agency believe
10 strongly that somebody should do something about the
11 fox, if there's no subject-matter jurisdiction, then
12 any ruling by that body would be void; correct?

13 MR. COLLINS: That's correct.

14 COMMISSIONER OKUDA: And to determine --
15 and the Land Use Commission is not like the
16 legislature; correct?

17 MR. COLLINS: That's correct.

18 COMMISSIONER OKUDA: The legislature can
19 pass laws, and maybe the general public thinks the
20 laws don't make any sense, or maybe the general
21 public think the laws do make sense, but the
22 legislature has pretty broad authority, you know,
23 without violating due process rights. But the
24 legislature has broad powers to make decisions about
25 what takes place in a community; correct?

1 MR. COLLINS: That's correct. With some
2 limitations.

3 COMMISSIONER OKUDA: I'm sorry?

4 MR. COLLINS: With some limitations.

5 COMMISSIONER OKUDA: I agree with that.
6 With some limitations. For example, if the
7 legislature passed a law that specifically said no
8 telescopes are allowed on the summit of -- maybe we
9 shouldn't put it that way.

10 If the legislature passed a law
11 prohibiting the development of certain structures on
12 certain types of lands, unless there was a
13 constitutional violation, that restriction would be
14 upheld in most cases. You agree?

15 MR. COLLINS: Possibly. I think it would
16 depend on the facts, but quite possibly.

17 COMMISSIONER OKUDA: Well, assuming
18 there's no constitutional violation, probably upheld.

19 When you look at whether or not or when
20 we try to determine whether or not a body like the
21 Land Use Commission has subject-matter jurisdiction
22 over something that's in front of it, we have to
23 first look at what the legislature has said or
24 defined by statute or law as the jurisdiction of the
25 Land Use Commission; correct?

1 MR. COLLINS: That's correct.

2 COMMISSIONER OKUDA: And would you agree
3 that it's HRS section 205-5 that spells out the
4 subject-matter jurisdiction of the Land Use
5 Commission?

6 MR. COLLINS: Sorry. I was on a
7 different section.

8 I -- I think partly, but I also think
9 that it's 205-2, which is what provides -- which is
10 the basis of this commission's powers.

11 COMMISSIONER OKUDA: Okay. One rule of
12 statutory construction is, if the legislature has
13 provided specificity over something, the sections of
14 the law which provides specificity control over more
15 general provisions. Do you agree with that?

16 MR. COLLINS: That's correct.

17 COMMISSIONER OKUDA: And so let me read
18 to you again section -- HRS section 205-5, paren,
19 small paren (a), close paren, and I quote, "Except as
20 herein provided, the powers granted to the counties
21 under section 46-4 shall govern the zoning within the
22 districts other than in conservation districts.
23 Conservation districts shall be governed by the
24 Department of Land and Natural Resources pursuant to
25 Chapter 183C," close quote.

1 Did I accurately read that section?

2 MR. COLLINS: Yes.

3 COMMISSIONER OKUDA: Do you believe that
4 that's pretty specific about who governs what takes
5 place within certain districts?

6 MR. COLLINS: As I said, it does address
7 who governs the uses within a district, but it
8 doesn't address the commission's power to classify
9 which lands should be in which district. So there
10 are two separate things. So governing use of land
11 within a district is completely separate from this
12 commission's power to classify lands into a district.
13 And while the standards that are used to evaluate
14 what uses should be in which district and which lands
15 should be in that district, there is -- they're
16 rationally -- there's sort of like a rational
17 relationship between those two things. They're
18 completely different. And the main contention that
19 WMPA has is that the land board's power to govern
20 uses within districts and the county's power to zone
21 or to govern land use within districts does not limit
22 or in any way interfere with this commission's power
23 to classify which district land should go into. And
24 although there is overlap in terms of considering
25 uses, the powers that are conferred on the counties

1 and the state in this section are subordinate to this
2 commission's power to district. Because, otherwise,
3 the statute would say the land board can also,
4 basically, irrevocably put -- can trap certain land
5 into one district, and there's nothing in 205 that
6 gives the land board that power or the counties that
7 power.

8 COMMISSIONER OKUDA: Yeah. Well,
9 Mr. Collins, let me ask a more basic question just so
10 that we focus in on the law. Can you quote for us
11 specifically the section from the Hawai'i Revised
12 Statutes that provides that the Land Use Commission
13 can reclassify a parcel of land where the owner of
14 the land has not initiated the request for a boundary
15 redesignation?

16 What I'm asking for is a citation to the
17 statute, and for the benefit of myself and my fellow
18 commissioners, if you can quote word for word the
19 part of the statute which so provides that authority.

20 MR. COLLINS: Sure. Please give me a
21 moment because I have the rule that says that that
22 can be done, but I need to -- I need to pull up the
23 statutory reference.

24 The rule that allows for that is
25 15-15-46(1). It doesn't require a landowner.

1 COMMISSIONER OKUDA: Well, can you read
2 where the rule specifically says that the Land Use
3 Commission has authority to, basically, unilaterally
4 or, as us lawyers like to use Latin words which we
5 don't know what it really means, sua sponte
6 reclassify a parcel of property where the owner has
7 not so requested?

8 MR. COLLINS: I'm not sure if the Land
9 Use Commission has authority to sua sponte conduct
10 district boundary limits, if that's what you're
11 asking. I don't think that you folks have the
12 authority to do that.

13 COMMISSIONER OKUDA: Okay. We don't have
14 sua sponte authority, but let me get rid of the Latin
15 word then. Can you quote word for word and give us a
16 citation to the statute which specifically states
17 that the Land Use Commission can reclassify a parcel
18 of property where the owner has not requested the
19 reclassification?

20 MR. COLLINS: Well, in your rules, it
21 says "The following persons may initiate a petition
22 to the commission for district boundary amendment:
23 One, state departments or agencies; two, county
24 departments or agencies of the county in which the
25 property is situated."

1 COMMISSIONER OKUDA: Okay. And --

2 MR. COLLINS: So it's in your rules.

3 COMMISSIONER OKUDA: Yeah.

4 MS. COLLINS: There's, like, two of the
5 three people who can initiate that district boundary
6 amendment aren't landowners.

7 COMMISSIONER OKUDA: Okay. Has any state
8 department here attempted or requested or initiated a
9 request for a boundary amendment with respect to
10 lands located at the summit of Mauna Kea?

11 MR. COLLINS: Not that I'm aware of.

12 COMMISSIONER OKUDA: Is there ever -- any
13 evidence in the record that any county has initiated
14 or filed a request for a boundary amendment for lands
15 at the summit of Mauna Kea?

16 MR. COLLINS: Not that I'm aware of.

17 COMMISSIONER OKUDA: And this is not
18 intended as, you know, like the bar exam question or
19 a law school question.

20 MR. COLLINS: And, Mr. Okuda, I did find
21 it. It's 205-3.1, which is the statute that says
22 that any department or agency of the state or any
23 department or agency of the county in which the land
24 is situated can petition.

25 COMMISSIONER OKUDA: Okay. But there's

1 no evidence in the record that any department or any
2 county has attempted or filed a request to
3 redesignate the lands at the summit of Mauna Kea;
4 correct?

5 MR. COLLINS: Not in this docket because
6 it's a declaratory petition.

7 COMMISSIONER OKUDA: Okay. Do you have
8 any comment on whether or not the case that has been
9 discussed here, Citizens Against Reckless Development
10 versus Zoning Board of Appeals of City and County of
11 Honolulu, applies specifically as to the question of
12 whether or not a declaratory relief or declaratory
13 ruling proceeding is appropriate in this case?

14 MR. COLLINS: Definitely not in this
15 case, and as my prepared testimony indicated, holding
16 so would result in an absurd situation where anytime
17 any decision of a county or state agency about any
18 land is done, then the person that controls that land
19 could basically stop the Land Use Commission from
20 ever reclassifying land. I mean that's -- or making
21 a declaratory order that certain areas of land are
22 more appropriately in a different district, and I
23 think that that's not what -- the holding in CARD was
24 very specific. It's that the people in CARD failed
25 to take an appeal at the appropriate time, and

1 instead they sought to appeal the director's decision
2 through a declaratory petition. But this is not that
3 case because only a very small portion of the land
4 that's subject of this declaratory petition is
5 subject to the 2017 contested case and the subsequent
6 appeals.

7 The issues that are being addressed in
8 this petition, although I know that UH and TMT are
9 very passionate and emotional about this issue, the
10 petition -- the subject matter of this petition is
11 not about them. It's about the use of that entire
12 area as an urban precinct. That's what the issue of
13 this petition is. And so to say that because one
14 small area of this land got some agency approval that
15 was reviewed by a court forecloses this commission
16 from being able to reclassify land would be to
17 abandon the main function of this commission -- main
18 duty of this commission is to determine what is the
19 appropriate district for all land in this state.

20 COMMISSIONER OKUDA: Okay. And thank
21 you. I understand your argument, and I do appreciate
22 the fact, which the chair has also raised in certain
23 questioning of the University of Hawai'i
24 representatives, that one of the benefits -- policy
25 benefits of a district boundary amendment is, by its

1 nature, it requires more consultation with the
2 community, more impact. And, in fact, as this
3 commission recently a few weeks ago dealt with the
4 Waimanalo gulch landfill case on Oahu, you know, I
5 think, at least myself and a few other commissioners,
6 maybe more than a few, have a real problem with this
7 kind of incremental types of decisions where in the
8 very beginning, there's certain representation, and
9 when you get to the end of 30 years, it really looks
10 different. Okay? So believe me, we're sensitive to
11 that.

12 So let me ask you the last question. As
13 someone who also teaches at the University of Hawai'i
14 who has connections with the university like many of
15 us here on the commission, you were here and heard
16 the representations of the University of Hawai'i
17 about promises moving forward. Do you believe those
18 promises?

19 MR. COLLINS: Well, you know, I would
20 like to. You know, I would like to, and, you know,
21 I'm a person who thinks that actions speak louder
22 than words. And so I think if the university is
23 going to make promises, I think they need to back it
24 up with some kind of tangible action, and at this
25 moment, I don't -- I don't see that. That's with

1 that one -- that's only with the one issue that's a
2 very small part of this. That's me personally.
3 That's not WMPA or Na Papa'i.

4 COMMISSIONER OKUDA: Let me ask the final
5 question because we've spent a lot of time on this.
6 But what would have to be in your -- and this is your
7 personal view. I appreciate you might not be
8 speaking on behalf of your organization. But what do
9 you think is one of the things the University of
10 Hawai'i can do to demonstrate that this is not going
11 to be just words and talk, but there really is going
12 to be real action?

13 MR. COLLINS: You know, I think putting a
14 pause on the -- on the current construction plans at
15 the top of the summit to allow there to be a
16 political solution, I think, would be the way. And
17 to reference, like, the West Maui Preservation
18 Association, you folks had a matter before you when
19 you were on Maui a couple weeks ago where the West
20 Maui Preservation Association was involved in the
21 docket back 15 years ago, and it's been resurrected
22 by a new owner. And you folks recessed the -- you
23 didn't make a decision on the request to allow the
24 landowner to work with the community groups, and
25 that's what WMPA and the other community groups have

1 been doing since you guys basically paused a final
2 decision. And, you know, I think that the University
3 of Hawai'i, it would serve them well to de-escalate
4 the situation and to bring the real stakeholders to
5 the table and to figure out a political solution
6 because, otherwise -- but that's probably beyond the
7 scope of this, and that's just my personal feeling.
8 I don't have any authority from WMPA or Na Papa'i to
9 bind them to that.

10 COMMISSIONER OKUDA: I appreciate your
11 testimony. Thank you very much.

12 Thank you, Chair.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Okuda.

15 Further questions?

16 Commissioner Ohigashi.

17 COMMISSIONER OHIGASHI: Mr. Collins, can
18 you go over the analogy again? Because I had only
19 two cups of coffee this morning, and I just wanted to
20 make sure I got --

21 MR. COLLINS: So the analogy is that in
22 an agricultural district, there -- through some
23 procedure, a landowner gets 14 acres of land.
24 They're seeking approval for some special use that
25 really isn't urban use, but they're going through

1 that process. And the neighbors and the community
2 groups get involved. They oppose it. It gets
3 approved. It goes to the courts. The appeal is
4 unsuccessful. And so that 14 acres is essentially
5 allowed to engage in an urban use, but it's in the
6 agricultural district.

7 Well, once that happens, then 14 acre by
8 14 acre, suddenly you have a 500-acre area that's a
9 de facto urban district, but it's still in the
10 agricultural district. And if the Land Use
11 Commission got a declaratory order petition saying
12 that -- and the Land Use Commission were asked to say
13 that the use of this 500 acres should be in the urban
14 district, the argument of the Office of Planning or
15 one of the arguments of the Office of Planning,
16 because they argue alternatively, but then the
17 arguments of UH and TMT is because that one case that
18 dealt with one small part of this larger area of land
19 had been subject to a county approval that was
20 affirmed by the appellate court, and that ousts the
21 Land Commission -- Land Use Commission of its power
22 to reclassify land or the ancillary power, which is
23 to issue declaratory orders at some factual situation
24 that's appropriate for some agency action.

25 And I think that that can't -- it's an

1 absurd result from the theory. And I understand for
2 the TMT issue, people are very passionate about it
3 and that UH and TMT feel very strongly about it, but
4 I think that the legal theory that they are
5 propounding is not suitable generally for the
6 commission.

7 COMMISSIONER OHIGASHI: This is just a
8 comment then, and I like your analogy because now I
9 understand it. But I don't think it quite fits
10 within factual or the scheme that we're talking about
11 today. We're dealing with a conservation district
12 that is not within -- statutorily within the Land Use
13 Commission's purview versus your analogy deals with
14 an agricultural district, which specifically
15 identifies the Land Use Commission.

16 So I don't see the analogy quite working
17 out. It remains -- leaves me with the same question
18 that has been in my mind as to whether or not those
19 two separate districts or whether or not we can
20 identify determined uses within the conservation
21 district with a declaratory order. And you don't
22 have to answer that. It's just my comment is just
23 the analogy just doesn't fit in my mind.

24 MR. COLLINS: Okay.

25 CHAIRPERSON SCHEUER: Commissioners?

1 Commissioner Giovanni.

2 COMMISSIONER GIOVANNI: Thank you, Chair.

3 Mr. Collins, I'm just trying to grasp an
4 understanding of your basic contention regarding the
5 authority of this commission. So I'm going to give
6 you a hypothetical. Let's go to the other end of the
7 spectrum, but let's take an area of the district that
8 has been classified as urban, downtown Honolulu.

9 MR. COLLINS: Uh-huh.

10 COMMISSIONER GIOVANNI: It's fully
11 developed. Is it your contention that this
12 commission has the authority, if it so chooses on its
13 own, to reclassify that as conservation as stupid as
14 it may be?

15 MR. COLLINS: Well, I think, you know,
16 the commission doesn't have standardless discretion,
17 and that's I think the issue that Commissioner
18 Ohigashi is grappling with.

19 COMMISSIONER GIOVANNI: What was the
20 term?

21 MR. COLLINS: Standardless discretion.
22 Yeah. And I think because -- and I disagree with
23 Attorney General Yee that the districts are not
24 simply -- the difference between the districts is not
25 simply that there's different regulators or different

1 regulations. 205-2 makes it very clear what should
2 be in each district, and that decision of
3 interpreting 205-2 is with the commission.

4 So I think the question of could the
5 commission designate lands that are -- that have been
6 fully urbanized that are in the urban district, could
7 they -- could this commission reclassify it into the
8 conservation district? I think generally, yes, the
9 commission has the power to reclassify lands from one
10 district to the other, but I think in evaluating what
11 the legislature has picked to be for each of the
12 districts, I think that there might be an issue there
13 that probably could or would be challenged.

14 COMMISSIONER GIOVANNI: Just a quick
15 follow-up. And that authority that you contend that
16 we have to reclassify, is it furthermore your
17 contention that we can do that without a third party
18 bringing forth a petition to reclassify?

19 MR. COLLINS: No. I think -- I think in
20 order for -- in order for land to be reclassified
21 into a different district, that there needs to be a
22 petition to amend the district boundaries. What's
23 being asked in this petition is not to -- to change
24 the district boundaries, but to make declaratory
25 orders, that that would be the proper thing to do.

1 So it wouldn't -- I don't think this petition is
2 asking the commission to declare that.

3 And I understand that the chancellor, who
4 is new to Hawai'i and doesn't have a legal
5 background, said yesterday that regardless what the
6 commission does, you know, in this proceeding, that
7 the UH Hilo is not going to seek a district boundary
8 amendment. But I also know with my own legal
9 practice that generally the government will follow
10 the law. So I think if this commission makes a
11 declaratory order, that it is suitable or proper for
12 a district boundary amendment to be sought; that I
13 probably think that she'll either be overruled or
14 there will be reconsideration, at least some thought
15 put into that. I think it's just because it's not
16 her area of expertise and she's new that she may be
17 just --

18 CHAIRPERSON SCHEUER: Can you speak right
19 into the microphone? I notice some people struggling
20 to hear.

21 MR. COLLINS: I'm sorry. I just said
22 that I just think that because she's new to Hawai'i
23 and she doesn't have legal training, that I think
24 it's just -- I don't think that you guys should take
25 that to mean that the University of Hawai'i is going

1 to basically thumb its nose at the commission if it
2 decides to issue one or more of the declaratory
3 orders. At least I hope that the university would
4 take it seriously.

5 COMMISSIONER GIOVANNI: Thank you.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Giovanni.

8 Commissioners?

9 Many of the questions I have, and I have
10 about six, but they've been touched on in some form
11 or another by my fellow commissioners, and I don't
12 have a really structured order for them. The first
13 question, let me start with this: Given your
14 considerable legal acumen, if you were supportive of
15 seeing the TMT built on the summit of Mauna Kea, can
16 you construct an argument by which it would make
17 sense for the university to pursue urban
18 redistricting?

19 MR. COLLINS: Well, I think partly the
20 problem is that UH's interest is actually different
21 than TMT's in a broader sense, but because
22 everybody's sort of in this bunker mentality right
23 now, it's like everybody's merging.

24 COMMISSIONER GIOVANNI: Could you get
25 closer?

1 MR. COLLINS: I'm sorry. Everybody's
2 merging. So there's like this bunker mentality. So
3 I actually think it would -- I mean, if I were with
4 UH, I would actually file my own declaratory order
5 petition or seek a district boundary amendment.

6 CHAIRPERSON SCHEUER: Why is that?

7 MR. COLLINS: Well, at the minimum,
8 because there is this question. These are our
9 industrial uses. Scientific laboratories are
10 throughout the United States, under American zoning
11 principles, is an industrial use. And so to get some
12 clarity from this commission, I think is a very
13 sensible thing to do. So at minimum, if I were UH,
14 as soon as this petition was filed, I probably would
15 have worked and filed my own to try to address the
16 issues in the manner that was probably most suited to
17 UH. But that wasn't done. Or, alternatively,
18 petition for a district boundary amendment. I mean,
19 the commission can also state whether or not that's
20 appropriate or suitable. They can deny a petition
21 for a district boundary amendment and say it's not,
22 you know, proper.

23 But, you know, I think partly because of
24 the TMT issue, which is a small part of the land
25 that's under consideration here, that there's sort of

1 this bunker mentality and everything has to be this
2 either/or, and there's no consideration of the
3 broader issues, especially to UH's interests which
4 are not identically aligned to TMT's.

5 CHAIRPERSON SCHEUER: Thank you. Can I
6 ask you to comment on the question which I raised to
7 a number of the other parties of whether or not the
8 conservation district use permitting process allows a
9 comprehensive and cumulative look at land use on the
10 summit?

11 MR. COLLINS: Well, I think if we want to
12 use the example of the TMT contested case, I
13 wasn't -- I didn't represent anybody in that. I
14 wasn't a party --

15 COMMISSIONER GIOVANNI: Can you --

16 MR. COLLINS: Sorry. I didn't represent
17 anybody in that and --

18 CHAIRPERSON SCHEUER: Can you move the
19 microphone closer to you?

20 MR. COLLINS: I wasn't a party to it, and
21 I didn't represent anybody. But from what I was able
22 to read and from reviewing some of the transcripts,
23 it seemed that Judge Amano made it very clear that
24 the issues that are basically within the power of
25 this commission would not be considered in that and

1 were expressly not allowed to be considered in that.
2 And if those things aren't being considered, then I
3 don't see really how the issues of the cumulative
4 impacts and the issues of not just the project
5 itself, but all of the projects surrounding it are
6 being considered as a whole in the way that this
7 commission is supposed to consider that.

8 CHAIRPERSON SCHEUER: Thank you. My
9 third might be more -- more of a comment, not even
10 requiring a reaction. But I would tend to agree with
11 my -- with the concern you expressed over Attorney
12 General Yee's -- Deputy Attorney General Yee's
13 characterization of the districts. You know, because
14 the districts aren't named, like,
15 really-difficult-to-develop district,
16 sort-of-difficult-to-develop district,
17 pretty-easy-to-develop district, and
18 do-whatever-you-want district, right, than urban,
19 rural, agricultural and conservation?

20 MR. COLLINS: Yeah. You know, I think
21 one of the concerns -- and I understand the point
22 he's trying to make, and, you know, it's unfortunate
23 that TMT has so much gravity that this issue is
24 getting drawn directly to it as an example as opposed
25 to other things. But you folks see land developers

1 all the time and their projects, and I'm sure that
2 every single one of them would love to have deputy
3 attorney generals and UH counsel and this whole army
4 of attorneys come up with clever ways of indirectly
5 getting around what normal people that come to you
6 folks can't get around. And so I think even from the
7 perspective of the business community and investors
8 and developers, it's quite unfortunate that one or
9 two entities get selected for special and uneven
10 treatment. And I think the consequence to that, in
11 an economic sense, is that it actually drives up
12 transactional costs tremendously because then people
13 think if they can get some special edge with certain
14 favored state agencies and they don't have to go
15 through the normal process that everybody else has to
16 go through, that that is actually an alternative.

17 I know on Maui and part of the reason why
18 WMPA is so interested in this petition is because
19 what we have seen in West Maui is that all of Pioneer
20 Mill's lands south of Lahaina is now one giant city
21 of suburb of residences all on agricultural land, and
22 it's precisely because of this thing where what
23 cannot be done directly through this commission is
24 being done indirectly by urbanizing lands that are
25 not in the urban district through these end runs.

1 And so that's why from WMPA's perspective and Na
2 Papa'i's perspective, it's so important that the
3 commission distinguish between the classification and
4 reclassification of lands into districts, and the
5 separate power and subordinate power of the counties
6 and the state to govern the uses within the
7 districts.

8 CHAIRPERSON SCHEUER: Thank you. That
9 sort of leads into my next-to-last question which
10 really builds on the concerns that Commissioner
11 Ohigashi expressed.

12 The way the land use law is set up is we
13 have these four districts, and then there's this
14 acknowledgment that, like, you know what, sometimes
15 lands or uses are situated in a place that doesn't
16 quite fit into the district it's in. And so in the
17 ag district, we have this special use permitting
18 process that also applies to the rural district.
19 Obviously, you don't need that special exemption in
20 the urban district because everything's allowed. And
21 then in the conservation district, we have the
22 conservation district use permitting scheme. But in
23 the law, it does say if it's over 15 acres, right,
24 that permit has to come to us for review. There's no
25 sort of review process set into the statute for the

1 CDUPs.

2 So I'm trying to understand to what
3 degree can we look at -- you know, there's no case
4 law to my knowledge on CDUP's compliance with LUC
5 land use designations. There is case law on the
6 granting of agricultural special use permits and, in
7 fact, for the Waianae Board case rejected the use of
8 those permits and say, "No, that's actually an urban
9 use. You need to redistrict instead." So help me
10 understand why we might look at those cases to
11 interpret what should apply here given the
12 differences in the way the law is constructed.

13 MR. COLLINS: So I slightly disagree with
14 Commissioner Ohigashi with respect to -- I'm sorry.
15 I slightly disagree with Commissioner Ohigashi saying
16 that my example doesn't exactly apply because the
17 fact that the Land Use Commission deals with special
18 uses in the agricultural district for lands that are
19 over 15 acres, that is not the power that the Land
20 Use Commission exercises when it decides that some
21 area of land needs to be classified not in the
22 agricultural district, but the urban district.

23 So it's not because you folks have the
24 power to issue special use permits for lands that are
25 over 15 acres which gives you folks the power to

1 classify lands. They're completely separate. So
2 that's why I think that my analogy is identical
3 because the power that is addressed in both the
4 petition here and in my analogy is the Land Use
5 Commission's power to classify. And in the Waianae
6 Neighborhood Board case, that is actually an example.
7 It wasn't that -- the issue was not that the Land Use
8 Commission -- it was that the wrong power was
9 being -- was being exercised, not that there's some
10 joint power. The counties do not have joint power
11 over classifying lands into different districts.
12 There's no joint power. It's exactly the same as the
13 land board. There's no joint power between the
14 counties and this commission or the land board and
15 this commission with respect to classifying lands.

16 CHAIRPERSON SCHEUER: Thank you. And my
17 last question, and I appreciate the forbearance of my
18 fellow commissioners.

19 You've argued, some may believe
20 decisively, that we have this duty and power to
21 defend our powers and authorities. If the commission
22 chooses to not issue -- chooses to state that we do
23 not believe that we have the authority to rule on
24 this declaratory order, what would the consequences
25 of that decision be in your mind?

1 MR. COLLINS: Well, one possibility is
2 that it will be subject to an appeal. But, I mean,
3 that's probably regardless of what happens. This is
4 very likely going to end up in the courts. But I
5 think, you know, what happens -- what has happened on
6 Maui is that -- well, as the example of south of
7 Puamana, you basically have a giant suburb that's on
8 agricultural -- in an agricultural district. And so
9 I think what it does is it signals to market
10 participants, in particular, that there are these --
11 that they can -- if they get the right lawyers or
12 they think it out the right way, that there are ways
13 to get around -- if they do it indirectly and not
14 directly, that they basically can get around the
15 commission's regulatory powers and oversight. And I
16 think that's probably the biggest danger. And, you
17 know, it's really not a good -- I mean, even for
18 people in the business community, it's not a good way
19 of conducting business because then what people do is
20 they try to become the favorite of the person who's
21 going -- in government who's going to help them
22 through indirection instead of going through the
23 normal process that everybody else has to go through.
24 So that's, I think, the danger more than -- the
25 practical danger more than anything else if the

1 commission doesn't clarify its powers and the issues
2 that are before -- the questions that are before it.

3 CHAIRPERSON SCHEUER: Thank you. I have
4 nothing further.

5 Commissioners?

6 Commissioner Aczon.

7 COMMISSIONER ACZON: Sorry. I'm kind of
8 slow this morning because I only had one cup of
9 coffee.

10 So just kind of wondering, currently,
11 this land is under conservation district; correct?

12 MR. COLLINS: Yes.

13 COMMISSIONER ACZON: So let us say UH or
14 state come to us and petition for a district boundary
15 for urban district. So there's two options -- two
16 scenarios. The commission granted the urban
17 district. That would have left us -- that would have
18 left enforcement to the county. LUC is going to be
19 off, and then county's going to take over; correct?

20 MR. COLLINS: That's right.

21 COMMISSIONER ACZON: Second scenario is
22 we deny the petition. So what would happen? So it
23 goes back to the conservation district?

24 MR. COLLINS: It would remain in the
25 conservation district.

1 COMMISSIONER ACZON: So still the LUC is
2 not going to have the power to enforce anything?

3 MR. COLLINS: Well, the LUC doesn't have
4 the power to enforce anything, but if -- if this were
5 put in the urban district, the commission does have
6 the power and the authority to impose conditions on
7 the redistricting, and that's something -- it's true
8 that it's the county that enforces those conditions.
9 But at least in my view, that would potentially be a
10 better scenario than to basically have urbanization
11 in a nonurban district without any oversight by
12 anybody.

13 COMMISSIONER ACZON: I just kind of
14 wondered. We're kind of going in circles in this
15 one.

16 MR. COLLINS: Sure.

17 CHAIRPERSON SCHEUER: Thank you,
18 Commissioner Aczon.

19 Commissioner Okuda.

20 COMMISSIONER OKUDA: One follow-up
21 question based on the two commissioners that asked
22 questions. But there is a risk if the lands were
23 classified urban and an example of the risk as far as
24 delegating control just to the county is you can end
25 up with a situation like Hokule'a which ended up at

1 the Hawai'i Supreme Court basically affirming Judge
2 Ronald Ibarra's ruling where he basically said, "Hey,
3 you know, the county is giving all these permits for
4 what appears to be an urban development in an
5 agricultural zone. So, I mean, if you urbanize or
6 redesignate property as urban, in fact, it might be
7 delegating enforcement since you agree that Land Use
8 Commission has no enforcement powers. Even if there
9 are conditions placed on there, it really is whoever
10 can, you know, influence, either legitimately or
11 maybe some other way, county officials, it could be
12 open season on the land.

13 MR. COLLINS: Possibly, but, of course,
14 one difference between county government and the land
15 board is that county government is ultimately
16 accountable to the voters of the county, whereas the
17 land board isn't accountable to anybody.

18 COMMISSIONER OKUDA: Thank you.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner Okuda.

21 Commissioner Cabral.

22 COMMISSIONER CABRAL: I just wanted to
23 make a couple of follow-up comments in regards to
24 your references or the comments you made that made me
25 feel like that clever or sneaky lawyers or different

1 people can take end runs around this -- our body as
2 the land commission and redo -- improperly make use
3 of lands or get changes made because they're more
4 clever than -- and get away with things. And I kind
5 of, in a sense, take offense to that because I know
6 during my four-plus years on the Land Use Commission,
7 we worked really hard. And I have to agree there are
8 some times that we don't get to do what I really
9 would like to do, but then we have huge numbers of
10 laws. We're always going back to our attorney --
11 representative from the attorney general's office for
12 clarification, and there's been Supreme Court rulings
13 in that that really restrict what we're able to do in
14 a large number of ways.

15 So I kind of wanted to go on the record
16 to say, you know, we are not all things for all
17 choices for everything that anyone might want to have
18 done on land changes and that cleverer attorneys can
19 get around us, you know, because I think we're more
20 so limited by what the law allows or doesn't allow us
21 to do.

22 And then also, too, the references to
23 having the mountain or portions of the mountaintop
24 becoming urban really scare me. I would think that
25 better guardianship of a conservation is clearly

1 preferred over it going urban because of not just
2 the -- but bodies oversee that as part of that, but
3 also the fact that urban just allows for so much
4 open-ended development in different ways. I mean, we
5 could have Disneyland up there if we're not careful.

6 So, anyway, I'd like to just go on the
7 record to defend us to do what the law allows us to
8 do in the best way possible for our citizens. Thank
9 you.

10 MR. COLLINS: Sure, and I apologize. I'm
11 not -- my comments about clever lawyers or getting
12 special favors from certain politicians or so forth
13 was not intended to impugn any individual's
14 integrity, you know, and doing what they're
15 appropriately supposed to do. I would just say that,
16 you know, there are a lot of things the Land Use
17 Commission can't do. I definitely agree. And I
18 think that in instances where it's clearly, squarely
19 within the bailiwick of this commission for the
20 commission to refrain from acting, it would be
21 seriously -- seriously detrimental to the commission.

22 COMMISSIONER CABRAL: Thank you.

23 CHAIRPERSON SCHEUER: Thank you,
24 Commissioner Cabral.

25 Commissioner Ohigashi.

1 COMMISSIONER OHIGASHI: Slightly
2 disagreeing is like slightly pregnant.

3 Anyway, my question -- my question is
4 this. It's that everybody's been dancing around
5 this, and no one's really asked this question.
6 Assuming that we say, "Yeah, it looks like it's an
7 urban use." We issue a declaratory ruling saying
8 that it is and asking them to come to us to file a
9 petition for urban use, and assuming that they don't
10 or assuming that they deny it, they still have the
11 Supreme Court opinion saying that the use issued was
12 proper. So the question, in turn, is that does this
13 really do anything to remove any telescopes or reduce
14 the amount of time of telescopes on the mountain?
15 And that's what my basic dilemma is, is that, yeah,
16 we can issue a declaratory ruling. We can even deny
17 urban uses, but does that invalidate the permits that
18 they already have? And I'm not sure it does. That's
19 going through my mind, and I'm not -- you know, I'm
20 just saying that maybe nobody explained it or nobody
21 said it, but that's what's dancing around in my mind.

22 The second thing is I gotta give -- I
23 gotta stick up for the University of Hawai'i. I
24 didn't hear that they made that draconian type of
25 comment about marshals. I think more likely they're

1 said -- saying they're not right now applying, which
2 is true. So they're not planning right now to apply.
3 So I agree with you. I don't think that they made
4 such a definitive statement that they will never
5 apply if the circumstances arise that they should.
6 Jackson said, "Justice marshal made his decree. So
7 let him enforce it." I don't think he made that kind
8 of --

9 Anyway, that's my comment and that's my
10 thinking, and I just wanted to let you know that's my
11 thinking right now on both petitions.

12 MR. COLLINS: Sure. So to answer your
13 question or your first question, again, I understand
14 that UH and TMT feel very passionately about this
15 issue, but I don't think the declaratory order
16 petition is asking this commission to invalidate
17 anything. And I think it goes back to my original
18 contention that neither the land board nor the county
19 agencies can give any kind of approval that would
20 foreclose or limit this commission's power to
21 classify or reclassify districts. Because, you know,
22 taking that argument to the extreme, if somebody got
23 a -- improperly got a grading permit or properly got
24 a grading permit and graded land, then they can come
25 to this commission and say, "Oh, you can't reclassify

1 my land because the county approved my -- I have a
2 valid permit; that I got a valid approval, and this
3 is a collateral attack on my grading permit."

4 So I think that what the issue comes down
5 to is does the land board or do the counties have any
6 authority to limit this commission's power to
7 classify and reclassify lands, and I think the answer
8 is absolutely not. And I think all of the legal
9 theories that are used to try to stop or thwart this
10 petition that are based on a theory that the land
11 board or county governments have that power have to
12 be rejected. And if the commission is going to deny
13 this petition, that they -- you folks should make it
14 very clear that the counties and the land board have
15 no -- no power to limit or foreclose or condition
16 your folks' power because it's not in the statute and
17 there's nothing conferred on them that allows that.

18 CHAIRPERSON SCHEUER: Commissioner Aczon.
19 Thank you, Commissioner Ohigashi.

20 COMMISSIONER ACZON: Just a follow-up.
21 So I'm just kind of hearing that whatever we do
22 today, whatever we decide today, it doesn't
23 invalidate the TMT permit?

24 MR. COLLINS: No. It has nothing to do
25 with the TMT permit. I know that UH and TMT keep

1 saying that, but it really is not about them. This
2 has really very little to do with the TMT. Of
3 course, it has a lot to do with UH because it's UH's
4 precinct, but it really has -- TMT is a small part of
5 this issue, and the issuance of a declaratory order
6 does not invalidate the CDUP.

7 COMMISSIONER ACZON: I just wanted to
8 clarify their positions because I don't think we can
9 overturn the circuit court's ruling.

10 MR. COLLINS: Absolutely. Absolutely.

11 COMMISSIONER ACZON: Thank you.

12 MR. COLLINS: Yeah. No question.

13 CHAIRPERSON SCHEUER: Commissioners?

14 Just very brief follow-up. What
15 Commissioner Cabral took umbrage to I took as
16 actually a compliment towards us, at least how it was
17 intended was that basically this commission has
18 actually been fairly strenuous at upholding the Land
19 Use Commission laws. So instead of coming to us,
20 people have sought to go through other venues,
21 county, special use permitting and other venues to
22 try and achieve the same kinds of uses. Was that
23 what was intended by your comments?

24 MR. COLLINS: That's what -- that's what
25 I thought I was saying. I wasn't intending to impugn

1 everybody. I mean, that's the danger of not making
2 the law very clear is that that sort of thing
3 happens, and that's -- I think it's important not to
4 do that so that everybody has a clear understanding
5 of what the process is and to discourage people from
6 doing those --

7 CHAIRPERSON SCHEUER: Because at least in
8 parts of West Maui, that's actually exactly what's
9 happened. We've denied petitions, and then they've
10 gone through the county through a slightly different
11 process and --

12 MR. COLLINS: I had a case two years ago.
13 I represented a community group in West Maui where
14 they did a 201H-41, and the parcel of land was, like,
15 70 acres, but 14 of those acres had to be moved from
16 the agricultural district to, I think it's the rural
17 district. And if you looked at the whole project,
18 it's very clear they should have come to the Land Use
19 Commission for the district boundary amendment, but
20 they did it in a way where they got the county
21 council to agree that they only had to do this
22 14-acre thing and not the whole thing. And the
23 council approved the fast track subject to getting a
24 district boundary amendment, and they never approved
25 the district boundary amendment. So we ended up

1 dismissing the lawsuit, and then the fast track
2 expired. And now they've gone through -- they've
3 moved through a different process to accomplish the
4 same thing. But that's -- that's one of the problems
5 is that the more you allow the end runs, the more
6 it's going to happen because it signals to market
7 participants that there's this less expensive way of
8 accomplishing what they want to have accomplished.
9 So that's why clarity in the law is so important.

10 CHAIRPERSON SCHEUER: Commissioner Okuda.

11 COMMISSIONER OKUDA: Thank you. And, you
12 know, in a follow-up, I agree with what the chair has
13 to say. We really have tried to be very strict on
14 the application and requirements as set forth not
15 only in the statute by the constitutional provisions,
16 the constitutional provisions that, No. 1, state that
17 the community or the state's policy is the
18 preservation of lands for present and future
19 generations looking at self-sufficiency, you know,
20 the duty in the constitution to protect Native
21 Hawaiian practices and cultural rights. And even
22 where -- and with respect to that, we take really
23 seriously the admonitions and the requirements of the
24 Hawai'i Supreme Court as set forth in the Ka Pa'akai
25 case that it's not only -- we just can't sit back and

1 just take the developer or we shouldn't -- that's a
2 bad word. The applicant's representations that, "Oh,
3 don't worry. We're not going to touch the heiau.
4 You can believe us." That we have an affirmative
5 obligation to require and to test their
6 representation.

7 So we really try to be really strict
8 because that's the obligation and duty laid out by --
9 by the law and the constitution. But at the same
10 time, we -- the constitution and the law makes clear
11 we've got to treat everybody by the same strict
12 standards. And so, you know, I don't know what the
13 ultimate decision will be here, but I'll assure you
14 and everybody else that strictness applies across the
15 board because I think there's a real danger that if
16 we're strict in one sense and not strict in the
17 other, we could be hearing some arguments that we've
18 heard before by certain landowners who were kind of
19 upset that we said, "Hey, you promised this
20 affordable housing to the community 15 years ago.
21 Where is it? And if it's not here, we don't care
22 what prior commissions might have ignored. We're
23 going to enforce the law." But if we're going to be
24 strict in that situation, we've got to be strict to
25 everybody because the law's the law until the

1 legislature changes the law. So that's my only
2 comment.

3 MR. COLLINS: Yeah. And I guess we're
4 very thankful that you folks have held the line with
5 Kihei High School overpass/underpass because I think
6 that's really signaled to a lot of folks that you
7 can't just wait -- you can't wait until there's new
8 commissioners and then hope that you guys will
9 reinterpret your conditions. So thank you for that.

10 CHAIRPERSON SCHEUER: Is there anything,
11 commissioners? If not, thank you, Mr. Collins. It's
12 10:24. Let's break till 10:40.

13 (A recess was taken from 10:24 a.m.
14 until 10:42 a.m.)

15 CHAIRPERSON SCHEUER: It is 10:42. We're
16 back on the record. We concluded the testimony of
17 Lance Collins. Now, which of the two petitioners is
18 going to go first? Okay. Hello.

19 MR. KANAHELE: Aloha.

20 CHAIRPERSON SCHEUER: Do you swear or
21 affirm the testimony you're about to give is the
22 truth?

23 MR. KANAHELE: It is. Go?

24 CHAIRPERSON SCHEUER: Please proceed.

25 ///

1 AHIENA KANAHELE,
2 was duly sworn to tell the truth
3 and testified as follows:

4 MR. KANAHELE: This -- you know, I try
5 know most of you -- well, not you guys. This is not
6 really my wheelhouse. I was kind of nervous coming
7 in here yesterday. I didn't know what to expect
8 and --

9 CHAIRPERSON SCHEUER: Could you just
10 repeat your name for the --

11 MR. KANAHELE: Oh, do I have to go
12 through that, my address and everything?

13 CHAIRPERSON SCHEUER: No. Just your
14 name.

15 MR. KANAHELE: Okay. My name is Ahiena
16 Kanahele. I'm one of the petitioners. I live in
17 Hilo. Also, I worked up on Mauna Kea for about seven
18 years as a ranger up there for Office of Mauna Kea
19 Management. And so, yeah, but sitting through this
20 yesterday, I noticed a lot of the people came up to
21 speak and you guys as well, a lot of speaking from
22 the heart. I thought this was really going to be
23 litigious. So I'll say some of that.

24 I mean, if this border -- if this
25 boundary amendment is something that everybody kind

1 of has to go through, I think that you guys should
2 vote for them to have to go through the same process.
3 I mean, it's hard enough to go get a license at the
4 police department, you know, these forms of ID's.
5 And like Lance said and Mr. Okuda were going through
6 before that, you know, certain privileged parties can
7 skip over processes, you know, when it comes to
8 construction and development, and that's been an old
9 story in Hawai'i. You know, an old boy network and
10 fat cats. And, yeah, I mean I'm sorry. I'm nervous.
11 I don't know what to say. I tried to make bullet
12 points earlier.

13 CHAIRPERSON SCHEUER: We haven't lost a
14 patient yet.

15 MR. KANAHELE: Thank you. And that's
16 all. I mean, if -- if it is incumbent upon you guys
17 to make them go through the same process that other
18 people perhaps have to go through, I'm not sure, then
19 I think you should do that and not give any
20 privilege. I'm not sure if that's what going on. I
21 know you guys from what I heard --

22 I also want to say real fast that I've
23 been to DLNR and county council meetings, and as far
24 as councils go, you guys are pretty fair. I notice
25 when you go through some of that other stuff, a lot

1 of people have their minds made up already and, you
2 know, certain members of the councils, a lot of
3 scowling at. For the most part, you guys look pretty
4 objective. I don't know. I guess that's really all
5 I have to say. That's it.

6 CHAIRPERSON SCHEUER: Mahalo.

7 MS. ISAKI: Mahalo. No questions from
8 me.

9 CHAIRPERSON SCHEUER: Commissioners.

10 Commission Okuda followed by Commissioner
11 Cabral.

12 COMMISSIONER OKUDA: Thank you,
13 Mr. Kanahele. And I apologize if I'm asking some
14 obvious questions, but just so that we have it on the
15 record and we're clear, your family goes back how
16 many generations on Hawai'i island?

17 MR. KANAHELE: Geez, it's uncountable. I
18 mean, way back. Ancestors go -- my grandma is from
19 Pepe'ekeo side, and my grandpa's from Ka'u and go way
20 back before contact.

21 COMMISSIONER OKUDA: Before contact?

22 MR. KANAHELE: Yes, definitely.

23 COMMISSIONER OKUDA: And you've been a
24 lifetime resident of Hawai'i Island; correct?

25 MR. KANAHELE: I have.

1 COMMISSIONER OKUDA: And how many years,
2 again, did you spend as a ranger?

3 MR. KANAHELE: Approximately seven. A
4 little under seven years, you know.

5 COMMISSIONER OKUDA: So you regularly
6 were up at the summit or the upper levels of Mauna
7 Kea; correct?

8 MR. KANAHELE: Yes, correct.

9 COMMISSIONER OKUDA: Okay. I'll try not
10 to rehash all this stuff that we've been going over
11 because --

12 MR. KANAHELE: Oh, you can. You can.

13 COMMISSIONER OKUDA: No, no, no, that's
14 okay. I can tell people are thinking, especially the
15 legal arguments which I'm sure we'll get into with
16 your attorney. It's like beating the dead horse or
17 whatever kind of carcass you want to talk about. I
18 wanted to ask a more specific question.

19 MR. KANAHELE: Okay.

20 COMMISSIONER OKUDA: I know you've been
21 here when you heard the representations or promises
22 or descriptions being made by the University of
23 Hawai'i, the chancellor, and other people about what
24 they promise or say they're going to do moving
25 forward. Do you have confidence or believe them?

1 MR. KANAHELE: No. The short answer, no.
2 I mean, like I tried to say earlier, you know, it's
3 an old story. You know, through the '60s, '70s, '80s
4 and the construction boom and just this -- you know,
5 the old boy network. I mean, I'm sure putting this
6 big scary group of people that are making all these
7 decisions for us, but it's a lot more subtle than
8 that. You know, it's all, "Hey, you know, you get
9 this done or push that through. Land Use doesn't
10 have to do that."

11 And I think this is all coming to a head
12 right now, you know, and this is the -- the whole
13 Mauna Kea thing and the 20,000 people marching in
14 Honolulu simultaneously, 10,000 on Maui, and around
15 the globe, there's a lot of people -- I mean, in
16 Europe, my sister just came back from Europe. And at
17 every stop -- they were teaching classes, but at
18 every stop, it turned into a Mauna Kea meeting
19 because people in Europe know about it. They wanted
20 to know more about it. There's worldwide support.
21 You know, and I'm not only speaking for myself and
22 our side, but it's a movement. And it's more than
23 just Mauna Kea or Kahuku. It's going on all over the
24 world. It's even Hong Kong. Of course, Puerto Rico,
25 so on and so on, Germany. There's a shift now, and

1 there's a recognizing of that, that that few at the
2 top, the 80/20 that tell the rest at the bottom what
3 to do, mostly thanks to free internet, but not going
4 off on a tangent. That all speaks to the normal guy
5 who is intelligent, you know, that how can you trust
6 this already?

7 There's already been a long history of
8 abuse. Like, my other brother said earlier, you
9 know, "Fool me once." There's been too many cry
10 wolfs. With the stance of the university now,
11 there's obviously no -- there's no pliability. I
12 don't see any flexibility, any more willingness.
13 There's just a hard stance to "This is what we're
14 going to do. We're going to stick to this."

15 And it's like, "Okay. Well, if you're
16 not going to be pliable, then why should we?" This
17 is just really a -- this is a last-ditch effort. And
18 I'm not talking about this land use border amendment
19 thing, but the whole movement is a last-ditch effort
20 because you -- all the developments going on in
21 different places are very special, but Mauna Kea is
22 the pinnacle.

23 And I was talking to -- I just met this
24 gentleman outside. Apparently, he knew my grandma
25 and his grandma, and they're all from over here and

1 he said, you know, 50 years ago, we didn't -- we
2 didn't have a place to speak. You know, times were
3 different. And, you know, opposed Jim Crow and all
4 of that, and I know we're not black people, but we're
5 sure as heck are colored. And now we do -- we have
6 the opportunity to speak.

7 We're all educated. My wife is a
8 little -- she just has your dissertation. My mom, my
9 sister, my brother-in-law, they all got their
10 Ph.D.'s. You know, I don't, but my mental acumen is
11 no lower than theirs. We'll all educated people. So
12 the fact that we actually can stand up now and speak
13 for ourselves, that's the big -- that's the big
14 difference nowadays. And as far as trust, geez,
15 that's a lot to make up for. There's a lot of stuff.
16 We've heard that.

17 You know, it's, like, you're saying it
18 again. You know, what more can you do with community
19 outreach? I mean, what have the other 12 got? I
20 used to work out there. We used to do outreach days
21 and have Astro Day and other things like that, and
22 they're great, but the fervor is short lived, just
23 around a day, and I don't see any kind of large
24 giveback. And I know astronomy is not a lucrative
25 industry, but it is an industry. A lot of places

1 like the Keck, just to get time out there, you gotta
2 apply to a board. And especially if it's a good
3 scene, you know, to maximize the hours, you get 12 or
4 more hours. Not 12.

5 Anyway, my point is there's a lot of
6 money moving around there. It's like 15 grand an
7 hour just to use. That's an about; right? An hour
8 to operate the thing. And especially if you're
9 using, you know, using the infrared thing, using them
10 both. Anyway, there's a lot of money floating around
11 and there's the dollar-a-year thing going on, and
12 it's -- we're like, so what's -- and there's not a
13 lot of transparency as far as -- as far as all of
14 this. You know, you hear a dollar a year and jump to
15 the conclusion they're cheats and charlatans, but
16 there's not the transparency of people saying, "Oh,
17 this is why we're doing it. This is why we do, and
18 this is why it's still okay."

19 Sorry. That's kind of long-winded.

20 COMMISSIONER OKUDA: No, no. I
21 appreciate that because -- and I don't view it as
22 long-winded because, frankly, I think a lot of the
23 issues, you know, it's things that if possibly more
24 time had been spent, if people were more long-winded
25 on both sides, you know, maybe we wouldn't be as a

1 community here where we are, but here we are.

2 You know, I'm going to ask you this
3 question to wrap up, but let me throw it out right
4 here so you can think about it while I give you some
5 background just so that you can see the context I'm
6 asking it in. You know, my question is going to be
7 if there was one thing that the TMT -- or we
8 shouldn't say the TMT -- the University of Hawai'i
9 could do to prove to you that they are sincere, just
10 one thing, might be even just a little thing, to
11 demonstrate that they are in good faith because,
12 yeah, actions speak louder than words, what would it
13 be? But I'm not going to ask you to answer that
14 question yet. Because let me tell you what my
15 foundation or background is.

16 You know, No. 1, I believe in the rule of
17 law. Okay? If the law says that people have the
18 right to certain access under the law, they have a
19 right to access.

20 MR. KANAHELE: Uh-huh.

21 COMMISSIONER OKUDA: Whether it's
22 cultural practitioners or whether it's a construction
23 crew. I'll be just frank here, you know. I'm not
24 here to curry anyone's favor because I think as
25 citizens, people have a right to know what

1 decision-makers really think. But at the same time,
2 as I mentioned in my disclosures, when the farmers of
3 Waiahole and Waikane Valleys were protesting what
4 they believe were retaliatory evictions simply
5 because in the early '70s, they went to hold the
6 rezoning at the Land Use Commission, and right after
7 that got eviction orders, you know, there were a
8 whole number of us -- not a large group because at
9 that time it was not the right thing to do, and I put
10 that in quotes. Those of us who went down to
11 Waiahole-Waikane Valley with the understanding we
12 would be arrested --

13 In fact, I told my parents, "Look, I know
14 I want to go to law school, but I've researched this
15 and I think even though I'm going to be arrested and
16 convicted of petty trespass, I don't think that's
17 going to affect my ability to get into law school."
18 I know my parents were probably appalled, but they
19 gave me the opportunity to get arrested. I kind of
20 get the feeling they were planning to leave me in
21 jail.

22 But, anyway, I understand that if you
23 believe in what you believe in, you know, it's a
24 tradition in this country and the freedom in this
25 country to do what you think is right. And as long

1 as you don't hurt other people. Okay? And -- and
2 my -- my question is also asked in the context of the
3 fact -- I think you were probably here when I also
4 said that, you know, my father -- my father's family
5 grew up in the Waiakea House Lots. And, you know, in
6 the days before union protection, the luna would come
7 over to the house, and if you didn't feed the luna,
8 grandpa didn't work at the docks. Nine kids, you
9 either feed the luna and watch the humiliation of
10 members in the family that this is what your father
11 has to do to work; otherwise, he won't work and there
12 won't be money for food. Why aren't we here in this
13 situation today where the luna doesn't come to my
14 house or anyone else's house? Yeah, it's union
15 protection, but the fact that returning World War
16 veterans set up a system of public education where we
17 can get an education, so, No. 1, we would have
18 opportunities and we can protect ourselves.

19 So I understand the issues are really
20 complex. So getting to the question that I asked you
21 to think about, what would be the one thing the
22 University of Hawai'i could do to maybe not earn your
23 trust, but to try to chip away at the situation that
24 we have here today?

25 MR. KANAHELE: I'm going to go back and

1 respond to your rule-of-law perspective first. You
2 know, I mean, you guys know more about law than me,
3 and thank goodness we have First Amendment, but I
4 mean the law should be -- it is hard and fast to keep
5 order, but it also should be pliable; right? Dred
6 Scott, you know, Punana Leo, it was still illegal to
7 teach Hawaiian language. They could have been
8 arrested for teaching Hawaiian language at the time.

9 So I just want to say that because like
10 how you did, breaking the law is not always
11 injustice. You know, like Ken Lawson -- like Ken
12 Lawson said, you know, he teaches at Manoa. I
13 believe he teaches at Manoa. He said, you know, you
14 can teach -- he said to his students, "You know, I
15 can teach you guys law all day long, but I can't
16 teach you justice. Justice is something you know is
17 right and wrong inside."

18 And the same thing with that thing being
19 built up there. I worked up there for seven years,
20 and I seen all of her faces. I seen all the beauty
21 up there. And like Commissioner Cabral mentioned
22 earlier, you know, she's afraid that -- she mentioned
23 Disneyland up there, and that used to be one of my
24 old -- my old -- I used to be up there in the summit
25 bowl sitting around, and it has these giant things

1 buzzing away (indicating), and why don't they just
2 put a Jack in The Box up here so I can get curly
3 fries up here, or a Jiffy Lube because we got guys
4 breaking down all the time. And that sounds
5 ridiculous, but everybody has a limit. You know,
6 maybe your guys' limit. Not you guys specifically,
7 but maybe the government woven in with the UH and
8 future observatory, maybe their limit is 24. You
9 know, maybe their limit is 32. Maybe they want to
10 creep down the summit and build more. And for us,
11 you know, my mom's generation's stuff, their limit
12 was one in the whole -- you know, in 1961.

13 And at this time, there's been a lot
14 floated through and just like TMT trying to come
15 through this time, they just push it through before,
16 back in the days. I have a lot of relatives and
17 friends too who also work on the thing, you know.
18 We're all -- we're a community. So although you go
19 home at night with the families telling you, you
20 know, that thing is wrong up there. But we gotta go
21 work and weld up the Subaru.

22 So I just want to mention as far as the
23 complexities within the community and talking about
24 laws and how it should be. Hard and fast, but also
25 pliable. And thank goodness we live in the United

1 States of America and have the Constitution.

2 But, anyway, as far as what we can do to
3 grow in trust, geez, I mean, there's already 12 up
4 there. They're going to build the biggest one of
5 them all, twice as big as the last one. I mean,
6 what's the last one? Subaru, I believe, was the last
7 one. But Keck I and II, it's going to be way bigger
8 than that footprint.

9 I just want to say, first, that it's that
10 whole slippery-slope thing. When does it end? And
11 this is -- they're calling and saying this is the
12 next-generation scope, and it refers more to the
13 instruments that are used on it. But there's a whole
14 bunch of bigger telescopes coming off it, Peru and
15 Canary islands and other places. But the scopes are
16 just going to keep getting bigger and bigger.

17 And, you know, you talk about building
18 trust. One thing they're talking about is
19 decommissioning scopes as -- as some sort of tradeoff
20 to build this gigantic monstrosity. And I know
21 everybody's in good faith and if they say they're
22 going to decommission, they're going to decommission
23 and whatnot. But, you know, Mauna Kea, the scene up
24 there and the science you can get done and the data,
25 it's too valuable. I see them like really dragging

1 their feet just to get rid of the smallest telescope,
2 and I think the last one, UKIRT -- I'm not sure of
3 the order of it, but the last one is 32 years in the
4 future or VLBA would be taken down. And also say
5 they want to push that back to 60 years. And the new
6 scopes that come up, "Oh, you know, we'll take down
7 10 telescopes, but we want two more next generation,
8 giant 30-meter telescopes up there, and we'll make it
9 look like the landscape. So it won't be as ugly."
10 Okay. So how much do we compromise? How much do we
11 keep compromising and keep compromising?

12 And then there's also the next-generation
13 scopes referred to, like, space-based telescope or
14 the James Webb telescope. And there's also the Lunar
15 Observatory group of people. I mean, that seems
16 far-fetched, but look at how far technology has come
17 with things like SpaceX and the giant leaps we can
18 take. All these land-based telescopes may be
19 obsolete, and there's still going to be a thing,
20 like, "Oh, you know, you guys should decommission it
21 now that it's obsolete." It's like, "You know, we
22 still get a lot of good science out of it." It's
23 like the proper thing is keep collecting data and
24 keep getting good science out of it.

25 So when you talk about building trust,

1 there is a lot of building trust for now I think is
2 what you're talking about. But what's going to
3 happen a little bit down the road, you know, it's
4 going to push that line a little more, push that line
5 a little more. Of course, it's all in good faith.
6 That's not a fact what I'm saying, but you can come
7 to the conclusion that that's what happened in the
8 past.

9 COMMISSIONER OKUDA: Mr. Kanahele, your
10 points are really well taken, and I think the points
11 that you're raising raised personal concerns for not
12 only myself, but I'm sure other members on the
13 commission. My question is really a little bit more
14 narrow.

15 MR. KANAHELE: Simple.

16 COMMISSIONER OKUDA: As an example, I
17 don't know if Mr. Shinyama might be back there, but I
18 mentioned a very contentious litigation we had. And
19 one thing me and my cocounsel, and with
20 Mr. Shinyama's cooperation, we basically did was to
21 lower the temperature that we were all facing in the
22 litigation. We made it a point to sit down and talk
23 face to face even though I'm sure he rather not see
24 our face, and we probably didn't want to see his
25 face.

1 So I'm not asking for, like, something
2 that is going to solve all the problems. I'm just
3 asking is there a step, even a really little step,
4 that can be taken by the University of Hawai'i as
5 maybe just the little step to demonstrate good faith?

6 MR. KANAHELE: So what I think you're
7 saying is --

8 COMMISSIONER OKUDA: Let me ask you this:
9 I'm not saying it requires you to compromise what you
10 believe really has to be done.

11 MR. KANAHELE: Okay.

12 COMMISSIONER OKUDA: The question is kind
13 of throwing the ball in the university's court. What
14 is the little step or maybe, hopefully, not a little
15 step, but what's the first step that can be taken to
16 demonstrate that the university really is going to
17 stand behind its word or representations that have
18 been made here in this room or at this hearing?

19 MR. KANAHELE: I'm going to say two parts
20 to that. First, I'll answer your question. Geez,
21 little step. I guess, obviously, kind of what you're
22 alluding to is a few people on both sides sit down at
23 the table and talk. Yeah, that would be my answer to
24 that question. But, you know, the whole thing is
25 it's pretty clear the dividing line is -- I'm going

1 to say "they," but TMT, they just want it built, and
2 we just want it not to be built. We don't want to
3 drive -- be driving any more rebar into -- especially
4 that 23 north plateau where it's all rock. You know,
5 once you dig into that place, it cannot be
6 decommissioned. You can't just sweep the cinders
7 over and go, "Oh, good as new." We just don't want
8 them to build any more -- any more giant thing that
9 dwarfs all the rest of the telescopes.

10 So the dividing line is they are so --
11 there's no compromise. I mean, the compromise --
12 let's say they compromise. Okay. We tell them,
13 "TMT, what about you not build here?" Then the
14 conversation's over. We both go our separate ways.
15 "Okay. We won't build here." Then so TMT comes back
16 and says, "Okay. People of Hawai'i," because it's
17 not just Hawaiians, "what about if we build our
18 telescope, then we give you all of these -- then we
19 compromise and give you all of these things? We do
20 this, we do A, we do B, we do C." And that negates
21 the whole conversation too because we don't want it
22 even built at all, and we don't want a bribe for it.
23 And also, too, in the past, we've heard all those
24 things. So I guess --

25 COMMISSIONER OKUDA: I understand.

1 Again, and thank you for answering my question.

2 Again, it was just a really more narrow question.

3 MR. KANAHELE: Like a meeting, to just
4 sit down at a table and meet?

5 COMMISSIONER OKUDA: I wanted to know
6 your input because, you know, I do -- I do recognize
7 that you have firsthand experience at Mauna Kea as a
8 law enforcement officer. So I understand that, and I
9 appreciate that.

10 Thank you, Mr. Chair. No further
11 questions.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Okuda.

14 Commissioner Cabral.

15 COMMISSIONER CABRAL: I want to thank you
16 for being here. And actually before that, I'd like
17 to ask my fellow commissioners to stop referencing
18 dead horses. I mean, I own horses and my most
19 cherished Hawaiian connections have been pa'u, and I
20 do pa'u and I have been Pa'u Queen for Merrie
21 Monarch. I have the silver hair for that occasion.
22 And I'm very involved with rodeo and paniolo. So I
23 really appreciate that different level of in-depth
24 Hawaiian --

25 MR. KANAHELE: Cabral.

1 COMMISSIONER CABRAL: Cabral, yes. Yes.
2 You probably know my son, Jeff, who worked on Mauna
3 Kea.

4 MR. KANAHELE: Oh, I know Jeff. That's
5 your son?

6 COMMISSIONER CABRAL: Yes.

7 MR. KANAHELE: Wow, what a small world.

8 COMMISSIONER CABRAL: Yes.

9 MR. KANAHELE: He's not up there anymore.

10 COMMISSIONER CABRAL: And you probably
11 know Kenyan Beals.

12 MR. KANAHELE: Kenyan Beals, yeah. I
13 know his dad.

14 COMMISSIONER CABRAL: He's my dear
15 friend. His wife worked with me for years.

16 CHAIRPERSON SCHEUER: Do I need to take a
17 recess?

18 COMMISSIONER CABRAL: But I wanted to
19 thank you for being here, for both of you taking this
20 legal avenue. I know that there's -- that civil
21 disobedience and protest is -- is something we do
22 have to cherish in our democracy that we are able to
23 do that because in many -- throughout history, many
24 places, that's just not even allowed at all. And I,
25 like my fellow Commissioner Okuda, I actually was in

1 Washington D.C. in the '70s, way before you were
2 dreamt up, in protest there on items.

3 So I guess my -- and I want to thank you
4 too for your good comments because we really do, as a
5 group, try and make sure that this is an open
6 conversation and that everybody has the right to say
7 what they want to say. At the same time, we keep
8 repeating the fact that we are really limited again
9 by what the law allows us to do. And I do appreciate
10 because we have --

11 I remember Kihei High School too,
12 Mr. Collins.

13 So I guess you somewhat answered one of
14 my concerns. My big thing was that's the scary part,
15 I guess, is that isn't there someplace that
16 negotiation can take place? Because I know it keeps
17 being said on the TV we're never going to negotiate,
18 you know, and that's just -- not by you, but, you
19 know, other people involved with the protest. And
20 it's -- it concerns me because I see this great, huge
21 divide, and the pain it is really -- I'm here in
22 Hilo. It's hurting our whole community, and it
23 troubles me that we have the sense of civil war going
24 on with neighbors against neighbors and family
25 against family in some cases in this matter. And I

1 don't know what it would take, and I don't know, like
2 you said, it's one group definitely wants it built,
3 and the other group definitely doesn't want it built.
4 And I guess I was going to ask you if there was any
5 room for compromise, you know. And I guess
6 "negotiation" is one word, but maybe "compromise" is
7 another. And I don't know if you have any answer for
8 that.

9 MR. KANAHELE: Yeah. Thank you for
10 bringing up that point about the schism that is going
11 on now, but what I believe if the building is built,
12 if TMT building -- if TMT is built, that schism is
13 going to get way uglier because there's not going to
14 be all of a sudden all of those who were anti-TMT,
15 like, "Oh, well, I guess we'll just have to get along
16 with it." This thing is growing, and it has a life
17 of its own. And so that's -- you know, that's
18 something that sounds unpleasant, but is a reality, I
19 think.

20 You know, people -- this thing is not
21 organized by anybody, this resistance. And this is
22 the biggest resistance yet. But people come out of
23 the woodwork. They come from their homes. It's not
24 like they're part of this group that says, "Hey, we
25 should go" -- I mean, some people are "We should go

1 support these people, the Hawaiians, the people of
2 Hawai'i." People come out of their homes because of
3 how they feel. It's like, "That's not right. I'm
4 going up there. I'm going to drive up there tomorrow
5 and see what it's all about." And, you know, so that
6 schism cuts to the heart. You know, it's more than
7 just a paycheck. I'm kind of going off into the
8 weeds here, kind of losing my train of thought.
9 Sorry. Well, go ahead.

10 COMMISSIONER CABRAL: I have one more
11 question. I can appreciate that this is, obviously,
12 got a life of its own in many ways. Since you worked
13 on the mountaintop and you're involved with the
14 groups that are opposed to the mountaintop
15 development, there's been a number of references
16 where people refer to the fact that they were
17 prohibited from going to the mountaintop and
18 exercising their cultural and heritage rights. And I
19 wanted to know -- obviously, since July, that's
20 not -- there's -- access is restricted. But prior to
21 this, especially when working on the mountain, is
22 that actually true? Because I know from my own son
23 working there in all of the eight or nine years he
24 worked there, he only was aware of one time somebody
25 ever coming up and asking. Now, people may have gone

1 up and done their thing without anybody knowing, but
2 he was never aware of anybody ever being stopped from
3 doing anything. I mean, were people being stopped
4 from going on the mountain?

5 MR. KANAHELE: What's going on is at the
6 roadblock where we have ours, the cops have theirs
7 right above. DLNR is right there.

8 COMMISSIONER CABRAL: Yeah, but now I'm
9 saying before July, before this protest started.

10 MR. KANAHELE: It's public access.

11 COMMISSIONER CABRAL: Yeah. Wherever
12 people in those years, prior years when you were
13 working there, were cultural practitioners stopped
14 from being able to go up and practice anything?

15 MR. KANAHELE: No. The only thing you
16 couldn't do is go into the adze quarry area and take
17 rocks out. That's the only thing you couldn't do.
18 But everything else, yeah. One thing, it's public
19 land. You can -- we told people to hike only on the
20 trails, but truth be told they could have hiked
21 wherever they wanted.

22 COMMISSIONER CABRAL: Yeah. I mean, it's
23 so massive. And for their safety.

24 MR. KANAHELE: Well, it's public land,
25 for one thing.

1 COMMISSIONER CABRAL: Right. And some
2 people have hiked off the trails and died; right?

3 MR. KANAHELE: Yeah, yeah. I was there.
4 But -- oh, that's another thing I want to comment on
5 real fast is that the adze quarry area is in the
6 NARS -- I still believe that the NARS still -- it's
7 still in the NARS area and that is -- the NARS is
8 really strict. Like, forget conservation and
9 national parks. The NARS is strict about what you
10 can and cannot do and it's mostly cannot. I mean,
11 you can stay on footpaths in NARS area wherever they
12 have them with the stakes. And -- so I think -- how
13 do I put this? I should have thought more before I
14 started down that trail.

15 Anyway, that kind of restriction is what
16 the whole mountain deserves is what I'm trying to say
17 in my opinion. And that little pie piece that's cut
18 out, it's like, "Oh, we can't do that to this area,"
19 you know, is kind of -- it's kind of weirdly
20 hypocritical. But then, "Oh, let's step over here
21 and put up this giant building," you know.

22 COMMISSIONER CABRAL: Then the question
23 would be in -- if the mountain is going to be so
24 protected and so restricted, then I would think that
25 that's counter to what many of the folks that

1 testified today and yesterday would want because if
2 you're going to restrict it, you're going to restrict
3 it, and everybody would have to qualify, and who's
4 going to make a determination as to who gets to go up
5 and when they get to go up? I mean, in some ways, I
6 would hate to have it be that people can't go up, you
7 know, I mean, in the future. I'd like to think that
8 we can still take our kids up there that are old
9 enough to handle the elevation.

10 MR. KANAHELE: 14.

11 COMMISSIONER CABRAL: So, remember,
12 that's a slippery slope on the other side.

13 MR. KANAHELE: Well, it's not -- it's not
14 because that will never happen in reality. The NARS
15 is not going to take over the whole top, and it's not
16 going to become a national park. So we're stuck with
17 this conservation district. That's the closest thing
18 you can come to preserving. And a side comment in
19 regard to where we are in space and time, we have
20 to -- in 2020, essentially, we've gotta to start
21 preserving these wild spaces. You know, there's a
22 big movement on preserving our wild places. And,
23 yeah, we gotta fight harder to preserve instead of
24 worrying about, oh, too much preservation. You know,
25 not -- but that's -- that's not going to happen.

1 Something like the NARS is what I mean, you know,
2 some sort of actions that would be --

3 Well, I know that that will never happen.
4 You know, the NARS is not going to take over the top.
5 Anyway --

6 COMMISSIONER CABRAL: Thank you very,
7 very much for your input, and I really appreciate the
8 fact that you folks have come and tried to take a
9 legal avenue towards resolution. Thank you.

10 MR. KANAHELE: Thank you.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioner Cabral.

13 Are there further questions for the
14 witness? Commissioner Aczon.

15 COMMISSIONER ACZON: Just a comment and
16 maybe a question. I really appreciate Commissioner
17 Okuda and Ms. Cabral trying to reach some common
18 ground, and what I'm hearing from you is there no
19 real compromise. So even if the two parties sit down
20 together and negotiate, it's going to end up on a
21 stalemate. So what do we do?

22 MR. KANAHELE: That's your question, what
23 do we do? Rather than -- I think I kind of answered
24 that already. I mean, we could sit down at the
25 table, but there's those lines. And, look, if it

1 does get built, attitudes are going to become more
2 ugly. That's what I foresee. I don't know if I'm
3 right. Probably not. I've been wrong a lot. But if
4 it doesn't get built, you know, even if -- I mean,
5 what's going to happen? Astronomers are going to be,
6 "Oh, screw you, local people"? Like, these people,
7 we're from here. We're the people that actually live
8 here.

9 And, you know, I have a couple
10 Hawaiian -- young Hawaiian astronomer, one of my good
11 friends, Mana, he just graduated with a degree in
12 astronomy from Manoa. He just did some time at --
13 well, I don't know if I should be blowing him up.
14 Anyway, he just did his first time at the Gemini
15 earlier this summer before this all went down and,
16 you know, his dad got arrested and he's over there
17 all the time. You know, we don't need all this
18 anymore. That's the slippery slope is TMT goes up,
19 there's a big slippery slope. All this next-gen
20 stuff come up, you know, why not? Why not just take
21 out the SMA, put in another TMT? We can do adaptive
22 optics.

23 Anyway, sorry. What do we do is your
24 question? It's like, wow, we can sit down and talk
25 about it, but it's really -- to me, like I said,

1 compromise on their side is, like, "Okay. We won't
2 build here." And compromise on our side is, like,
3 there is no compromise because if they build here,
4 then what are they going to do? Give us bribes?
5 Like, "Here. Here's a cultural center or here's a
6 school, outreach activities for the kids, some
7 balloons and fans," whatever. Then that's not --
8 that's not what people want, you know. They want the
9 land to be protected already. Enough of that. Don't
10 just take the land and, you know, give us carbon
11 credits, "Oh, here, you know, take this instead."
12 That I feel is the settlement. Like I said, I only
13 can talk from my perspective and for myself.

14 COMMISSIONER ACZON: So that's why we're
15 kind of stumped here because you don't compromise,
16 and we have this TMT permit that we cannot
17 invalidate.

18 MR. KANAHELE: Yeah, I know. I get it.

19 COMMISSIONER ACZON: So we're stuck. So
20 I'm kind of wondering what's going to happen now.

21 MR. KANAHELE: Like, for the permit
22 thing, I just ask that, like I said earlier, if it's
23 the proper thing to do that they should get a
24 boundary amendment, if that is correct by the law, if
25 you have to do A to accomplish B, then you guys, if

1 it's incumbent upon you to do that, then you should.
2 You know, like I said, it's hard enough to do a lot
3 of bureaucratic things just to get a license and so
4 on and so forth and permits for your own house, and
5 none of us get a break. So they shouldn't get a
6 break, you know, just because -- sorry.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Aczon.

9 Is there anything further for this
10 witness? Commissioner Wong.

11 COMMISSIONER WONG: It's not for the
12 witness. It's just a question. So if you want to --

13 CHAIRPERSON SCHEUER: Oh, so briefly. So
14 we're going to -- briefly to follow up on
15 Commissioner Aczon's question, sometimes in very
16 complicated issues, anywhere in our lives, business
17 lives, professional lives, personal lives, we don't
18 know what the 20th step is, but we maybe know what
19 the next step is. What I thought I heard you say as
20 a partial answer earlier, as partial answer to what
21 Commissioner Aczon initially described was a pause of
22 some sort would be the next step. And I've heard it
23 from you and I've heard it from others that, "You
24 know what, we definitely don't feel right now that
25 there's any way in which we want to see the TMT

1 built, but we could use a pause right now."

2 MR. KANAHELE: You know what, yeah, I
3 don't know if I said -- I think Lance said that
4 maybe. I don't know if I did, but that sounds good.
5 That sounds like a good idea. Just to --

6 CHAIRPERSON SCHEUER: De-escalate, is
7 that the word you used?

8 MR. KANAHELE: Yeah. Just to stop the
9 boiling waters. And like I said, it's only going to
10 get uglier. So just to get people to kind of calm
11 down a little bit, a pause might be -- might be the
12 call for the day, you know.

13 CHAIRPERSON SCHEUER: So it's what is the
14 next most elegant step we can take? You don't know
15 20 steps, but maybe you can kind of figure out, "You
16 know what, I'm in the dark trying to find the
17 restroom at night in the hotel room. We're going to
18 take one step before I bang up against the wall."

19 MR. KANAHELE: Yeah.

20 CHAIRPERSON SCHEUER: Which happened to
21 me three days ago. That's why I'm saying this
22 metaphor.

23 Anything further, commissioners?

24 Thank you very much.

25 MR. KANAHELE: Thank you.

1 CHAIRPERSON SCHEUER: Commissioner Wong.

2 COMMISSIONER WONG: Chair, I just wanted
3 to know our time because I know some of us have to
4 catch flights. So just --

5 CHAIRPERSON SCHEUER: Yeah. So the
6 commissioners are scheduled to leave, those who are
7 flying to Oahu on a 4:27 flight, I believe. Is that
8 correct, Ariana?

9 MS. MASUOKA: There's one at 3:29.

10 CHAIRPERSON SCHEUER: But at the latest,
11 we have to be at the airport an hour before that.
12 We're shooting towards --

13 You're pau.

14 MR. KANAHELE: Thank you.

15 CHAIRPERSON SCHEUER: We're shooting
16 towards that. So, hopefully, we have one more public
17 witness and then -- then the petitioner will make
18 their presentation. Then we will go into
19 deliberation barring any of your requests to go into
20 executive session. I'm going to suggest since it's
21 11:24, we push through with the second witness --
22 with this final witness, and then we take a break for
23 lunch.

24 COMMISSIONER WONG: Thank you, Chair.
25 Just one other question. One other question is I

1 know that some of the commissioners here, we're all
2 looking for a compromise; however, I think -- I just
3 wanted to ask, I don't think it's in our purview to
4 look for a compromise; is that correct?

5 CHAIRPERSON SCHEUER: I believe the
6 questioning -- I would characterize that some of the
7 broader questioning at the end went towards the
8 larger issues, the social dilemma we're in, rather
9 than the specific docket before us.

10 Aloha.

11 MS. KANAHELE: Aloha.

12 CHAIRPERSON SCHEUER: Do you swear or
13 affirm the testimony you're about to give is the
14 truth?

15 MS. KANAHELE: Yes.

16

17 KU'ULEI HIGASHI KANAHELE,
18 was duly sworn to tell the truth
19 and testified as follows:

20 CHAIRPERSON SCHEUER: Okay. Please state
21 your name for the record and proceed.

22 MS. KANAHELE: Okay. Aloha. My name is
23 Ku'ulei Kanahale, and I come before you as a cultural
24 petitioner in chant and ceremony, and I would like to
25 actually continue on the subject of traditional land

1 use that was brought up by Shelley and others
2 yesterday. And I would like to preface it by saying
3 that in traditional society, we had about a dozen
4 different land designations. But for the most part,
5 we could categorize them into two main categories,
6 which wao kanaka and wao akua. And wao kanaka, as
7 the name suggests, wao is a region or a zone, and
8 kanaka is man. And so these are the areas where men
9 could live and work. So, basically, it equates to
10 the rural, urban and ag zones of today.

11 And, similarly, wao akua is those zones
12 where our akua are found. Okay? And it equates to
13 what we know now today as conservation land. And
14 these wao akua began at the forest line. So for
15 those of you familiar with Saddle Road, that's
16 approximately at the 12 to 15 mile marker. But to
17 understand wao akua from the Hawaiian worldview, I
18 need to define what akua is to myself and to my
19 family and other cultural practitioners and other
20 Hawaiians who are on that mauna.

21 And so akua -- before the missionaries
22 came to define akua as God, we thought of akua as an
23 element. And I think that's an important distinction
24 to make because God gives us a Western connotation of
25 what akua are. So akua are our elements, our water,

1 our sunlight, our lava. Okay. And to understand the
2 roles and responsibilities of each god, we have --
3 they say we have 400,000 gods each with its own
4 proper name. For example, Pele, to understand her
5 role and responsibility, all you have to do is open
6 up the dictionary and Pele means lava. That's who
7 our god is. Pele is not the god of the lava, the god
8 of the volcano. Pele is lava.

9 Similarly, with wakea, if you open up the
10 dictionary, wakea is a broad, open expanse. And
11 that's why we are firmly committed that we not have
12 any development on Mauna Kea because any development
13 destroys that broad, open expanse.

14 So when the wao akua -- so the wao akua,
15 again, as the name suggests, is designated for our
16 akua, and the wao kanaka is designated for kanaka.
17 We know where we belong in traditional society.

18 We have a fundamental belief from the
19 Kumulipo that says, 'o ke akua ke komo, 'a'oe komo
20 kanaka. It is --

21 (Timer ringing.)

22 It is for the akua to exist in that
23 space, not kanaka. The akua are our elements.
24 They're the waters that we drink. They're the air
25 that we breathe. They're the food that we eat. We

1 get our life from these akua. And so to penetrate
2 into that space, that's not our -- that's not our
3 place to go.

4 And I've heard the buzzer. So my ending
5 statement I have, I believe modern man, BLNR, has
6 this arrogance that they can issue CDUPs because we
7 have the luxury of importing goods to Hawai'i,
8 Matson, all of these goods we can --

9 But our ancestors, it was a
10 life-and-death matter. We could not desecrate that
11 area because if we did, we're dead. Where do we get
12 our water from.

13 So I ask UH, I ask BLNR, I ask this
14 commission to listen -- that was the theme of this
15 whole thing -- to what we are saying and what we have
16 been saying and to issue this declaratory order
17 concerning the improper use of Mauna Kea conservation
18 lands. Thank you.

19 CHAIRPERSON SCHEUER: Mahalo.

20 MS. ISAKI: And we have no questions.
21 Thank you.

22 CHAIRPERSON SCHEUER: Commissioner
23 Giovanni.

24 COMMISSIONER GIOVANNI: Thank you, Chair.
25 Thank you so much, Ms. Kanahale, for your

1 testimony and your words. My first question is about
2 listening, and you've asked for people to listen, and
3 you may have heard my questioning yesterday to the
4 university about listening --

5 MS. KANAHELE: Right.

6 COMMISSIONER GIOVANNI: -- and about
7 community. This commission, docket after docket
8 after docket, hears from the community that we're not
9 listened to; that we have public meetings or
10 outreach, but in most of those instances, we're being
11 told what's going to be done as opposed to an
12 interactive community meeting in which the community
13 really feels that they're part of the process.

14 So my question to you in that regard is
15 do you feel that your community has been part of the
16 process and has been actually listened to?

17 MS. KANAHELE: No, I don't feel we've
18 been listened to.

19 COMMISSIONER GIOVANNI: So to build on
20 prior questioning from Commissioner Okuda, what would
21 demonstrate in your mind -- I asked the university
22 yesterday to give a concrete example where you
23 actually heard the community and did something
24 concrete. I don't know if you were satisfied with
25 that answer.

1 MS. KANAHELE: I was not but --

2 COMMISSIONER GIOVANNI: But what would
3 constitute a concrete demonstration that you have
4 been heard in a community environment?

5 MS. KANAHELE: So, actually, the
6 university has proven time and time again that
7 they're not listening, and one concrete example I can
8 think of their not listening was that I actually read
9 an article yesterday with Stephanie Nagata of OMKM
10 saying they're going to decommission, right,
11 decommission Hoku Ke'a, but they're scouting a new
12 location at Hale Pohaku. So decommissioning Hoku
13 Ke'a and then putting it back up at Hale Pohaku,
14 they're not listening. We don't want anything on the
15 mauna. And then the fact that they're going --
16 they're offering us a cultural center up on the
17 mauna, they're not listening that we don't want
18 anything up there.

19 So what was the question? I'm just
20 saying they're not listening.

21 COMMISSIONER GIOVANNI: The question is
22 what would be a concrete demonstration --

23 MS. KANAHELE: Of them listening.

24 COMMISSIONER GIOVANNI: -- of them
25 listening? What would constitute --

1 MS. KANAHELE: Stop --

2 COMMISSIONER GIOVANNI: -- something
3 positive?

4 MS. KANAHELE: Stop putting things up
5 there.

6 COMMISSIONER GIOVANNI: Okay. I'm going
7 to shift gears on you a little bit. So Mr. Okuda --
8 Commissioner Okuda has taught me to express myself in
9 context. So I'm going to try and do that.

10 MS. KANAHELE: I noticed that.

11 COMMISSIONER GIOVANNI: 18 years ago, I
12 was not a healthy person, and I moved to this island
13 from New York City. And I found a home in Waipunalei
14 on the lower part of Mauna Kea, and I became healthy
15 again. I give a lot of credit to just living on that
16 mountain. But I also became acquainted with its
17 enormity, its size, its beauty, 360. I hear you say
18 and I've heard others say, "We don't want any
19 development anywhere." But to me, the mountain goes
20 all the way to the ocean.

21 MS. KANAHELE: Yes.

22 COMMISSIONER GIOVANNI: Is there -- are
23 there locations on the enormity of the mountain that
24 make sense to you and your community in terms of
25 development?

1 MS. KANAHELE: But like I said, there's
2 wao akua and wao kanaka.

3 COMMISSIONER GIOVANNI: So please expound
4 on that, if you will --

5 MS. KANAHELE: So our waos --

6 COMMISSIONER GIOVANNI: -- in the context
7 of where it would make more sense --

8 MS. KANAHELE: Yes.

9 COMMISSIONER GIOVANNI: -- to do this
10 type of development, but still on the mountain.

11 MS. KANAHELE: So our waos are not rigid
12 land zones. They're mostly delineated by the
13 vegetation we can find in each wao. So wao akua is
14 actually the lowest of the sacred waos. Wao akua
15 starts where the ohia forest line is, the mauka ohia
16 forest line, not the makai ohia forest line. So
17 there's wao akua. I wrote it down just to make sure.
18 Wao akua, ma'ukele, wao 'eiwa, wao lipo, wao nahele,
19 kuahea, kuamauna, kuahiwi, then the piko.

20 But below that are the wao kanaka. And
21 so Kaumana -- Kaumana City is, you can say, the --
22 the boundary of where that wao akua and wao kanaka.
23 So anything below that is still on the slopes of the
24 mountain, that's where kanaka belong.

25 COMMISSIONER GIOVANNI: Thank you.

1 CHAIRPERSON SCHEUER: Thank you,
2 Commissioner Giovanni.

3 Commissioners? Commissioner Okuda
4 followed by Commissioner Aczon.

5 COMMISSIONER OKUDA: Fast question just
6 for background. Did I hear from one of the other
7 petitioners that you are a Ph.D. candidate or you
8 have a Ph.D.?

9 MS. KANAHELE: I am ABD.

10 COMMISSIONER OKUDA: ABD. And just so
11 the record is clear, in what area of study?

12 MS. KANAHELE: Hawaiian language and
13 cultural revitalization.

14 COMMISSIONER OKUDA: And so it's all but
15 dissertation then?

16 MS. KANAHELE: All but dissertation.

17 COMMISSIONER OKUDA: Not to get too
18 personal, but do you have a dissertation topic
19 thought up already?

20 MS. KANAHELE: I do.

21 COMMISSIONER OKUDA: Can I ask what it
22 is?

23 MS. KANAHELE: It's actually -- it's
24 based on the Papaku Makawalu methodology from the
25 Edith Kanaka'ole Foundation, and it's on volcanology,

1 Hawaiian volcanology.

2 COMMISSIONER OKUDA: Okay. And your
3 institution of study would be?

4 MS. KANAHELE: UH Hilo.

5 COMMISSIONER OKUDA: Okay. Thank you
6 very much.

7 CHAIRPERSON SCHEUER: Commissioner Aczon.

8 COMMISSIONER ACZON: Miss Kanahele, your
9 testimony was interrupted by the alarm. I just
10 wanted to see if she can finish her testimony, if you
11 have anything else to add, or are you finished?

12 MS. KANAHELE: That was basically it.

13 COMMISSIONER ACZON: Okay. Thank you.

14 CHAIRPERSON SCHEUER: Anything further,
15 commissioners?

16 It was hard enough for me to be ABD. I
17 couldn't imagine being under oath discussing about
18 being ABD. So my sympathies. There will be.
19 Though, the university in the latter days is not too
20 (inaudible). My Ph.D. was actually in studying the
21 Waiahole water case and how state boards and
22 commissions treat (inaudible).

23 This example is a little lighter. So if
24 you believe there's -- help me reconcile this part of
25 your testimony. If you believe that there should be

1 nothing on the summit, but you're actually asking for
2 them to file a district boundary amendment to put it
3 into the urban district, can you help reconcile those
4 two steps?

5 MS. KANAHELE: Well, I would actually
6 like to -- I'm not a lawyer and I'm not versed with
7 the law, but I would like -- from my understanding,
8 we are asking for that district boundary amendment so
9 we have the opportunity to protest. Is that the
10 word? We have the opportunity to say we don't want
11 rezoning, and we've never had that opportunity to say
12 we wouldn't want it rezoned.

13 CHAIRPERSON SCHEUER: And so to follow up
14 on that, during the multiple CDUP processes, have you
15 ever been afforded the opportunity to speak on a
16 regulatory action regarding the management of the
17 entire summit?

18 MS. KANAHELE: I was never a part of any
19 of those discussions.

20 CHAIRPERSON SCHEUER: Thank you.

21 Is there anything further, commissioners?
22 Do you have something?

23 MS. KANAHELE: Yes. I was kind of hoping
24 Commissioner Okuda would ask me the question that he
25 asked some other people about what steps the UH can

1 do.

2 CHAIRPERSON SCHEUER: Why don't you go
3 ahead and respond to that.

4 MS. KANAHELE: So I -- like I just
5 disclosed, I'm a Ph.D. candidate at the University of
6 Hawai'i in Hilo. I'm also an employee. And so I
7 know for a fact that the university, President
8 Lassner, has put together an advisory committee
9 called Hawai'i Papa O Ke Ao, which seeks to make the
10 university the foremost indigenous-serving university
11 in the world. And I just got this off the UH's
12 website that UHH seeks to reflect Hawai'i, its
13 people, its culture, its history and the natural
14 environment.

15 And so by allowing all of this to be
16 built in the conservation district, it is not
17 fulfilling its own mission of making the university
18 in addition to serving the university to support
19 Native Hawaiian and -- yes, that's what I have to
20 say.

21 CHAIRPERSON SCHEUER: Anything further,
22 commissioners?

23 Commissioner Cabral.

24 COMMISSIONER CABRAL: You know, I feel
25 the conflict so heavily, and one of my conflicts is,

1 again, most of my Hawai'i -- Hawaiiana history is
2 with paniolo. So I'm way out of my league here with
3 anything with astronomy. But the first Hawaiians
4 were wayfarers. So, therefore, they studied the
5 stars.

6 MS. KANAHELE: They did.

7 COMMISSIONER CABRAL: They were
8 astronomers in that sense; correct?

9 MS. KANAHELE: Yes.

10 COMMISSIONER CABRAL: So I find some
11 conflict in that, but, obviously, the technology has
12 changed tremendously.

13 MS. KANAHELE: Our astronomers -- and we
14 still have -- some of my very dear friends are
15 navigators, and we don't need to desecrate our akua
16 in order to navigate. And our -- our navigators and
17 those that rely on astronomy were able to navigate
18 the oceans without having to hurt their land and
19 their oceans.

20 COMMISSIONER CABRAL: Okay. All right.
21 I can appreciate that. And I wanted -- you mentioned
22 the ohia forest along Mauna Kea, and I will brag that
23 I think over many, many different trail rides and
24 years, I have ridden on horseback all the way from
25 Waimea on Mana Road all the way to the access road

1 over many different camping trips, and it is
2 unbelievably beautiful and absolutely needs to be
3 something we can protect forever. Thank you.

4 MS. KANAHELE: Thank you.

5 CHAIRPERSON SCHEUER: Mahalo. I think we
6 are done with your testimony.

7 MS. KANAHELE: Awesome. Thank you.

8 CHAIRPERSON SCHEUER: So it is 11:40.
9 I'd like to break for lunch, reconvene at 1:00
10 o'clock.

11 MS. ISAKI: Chair, just in the interest
12 of time because I know people are trying to get to
13 their planes, if you want to have a shorter break, I
14 see no problem with that.

15 CHAIRPERSON SCHEUER: Okay. 12:30?
16 12:30. We'll reconvene at 12:30.

17 (Whereupon, a luncheon recess was
18 taken from 11:40 a.m. until 12:34 p.m.)

19 ///

20 ///

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HILO, HAWAII;

FRIDAY, OCTOBER 25, 2019

12:34 p.m.

-o0o-

CHAIRPERSON SCHEUER: Aloha. It is 12:34 p.m. on Friday, October 25th, and we have completed all public witnesses. Public testimony is closed, and we are now proceeding to presentation by the petitioners' counsel's argument and followed by deliberations by this commission. Ms. Isaki.

MS. ISAKI: Mahalo, Chair Scheuer and commissioners.

So the discussion has seemed to have two tracks. There's one line of questioning around the commission's authority to issue the declaratory order, and the other concerns the practical and reasonable question of what happens if this commission does nothing. And if the commission wants to address that, the question of whether the university's been engaging in comprehensive management, effective community engagement, that's actually a proper subject for a DBA petition.

Our petition didn't go through that because it's not necessary to interpreting Chapter 205. But I think -- and this is perhaps in response

1 to Commissioner Aczon's question, like, if there's no
2 compromise, then what? And that's something that can
3 be discussed in a DBA proceeding where observatory
4 proponents can come to you and explain how things --
5 they want things to go forward. You could then bring
6 more evidence in. Our petition really didn't really
7 bring that in.

8 So just to start simple, our petition is
9 asking this commission for declaratory orders as to
10 the applicability of Chapter 205 to a concentration
11 of industrial uses on Mauna Kea. HRS 205-2 gives you
12 the power to district lands. 205-3.1 specifically
13 provides this commission's authority to amend
14 conservation and urban district boundaries of lands
15 greater than 15 acres. 205-4 -- 205-4(a) authorizes
16 you to decide petitions to redistrict conservation
17 lands and urban lands greater than 15 acres.

18 So what we're asking for is to declare,
19 not necessarily to initiate a DBA, or that we're not
20 looking for a motion or not motioning for an order to
21 show cause or enforcement. We're asking you just to
22 interpret 205 and say the concentration of industrial
23 research facilities on Mauna Kea are appropriate uses
24 or are appropriate within the urban district or in an
25 urban district as prescribed by 205-2 and not the

1 conservation district. Further industrial uses must
2 comply with boundary amendment procedures to
3 reclassify those lands into the urban district. And
4 then we draw attention to the entirety of the
5 development on the summit or in the 525 acres of the
6 de facto industrial use precinct.

7 Even if a single research facility may be
8 appropriate in those nonurban districts, successive
9 approvals of multiple such facilities constitute
10 urban uses, and they're detrimental to a multi-use
11 conservation concept. And for that you need to get a
12 DBA. And that's just you interpreting your laws.
13 They're not requests to review BLNR decisions or
14 Supreme Court opinions affirming that.

15 In this -- actually, Ken Church's
16 testimony from yesterday was probably one of the most
17 illuminating, and it's really pertinent because there
18 you have BLNR. They issued him a CDUP, but that
19 doesn't stop this commission from also acting on a
20 DBA because that's what you're doing. And,
21 conversely --

22 And another pending docket you have with
23 Bishop Estate -- I can get the number, but that's
24 where the land board wouldn't issue a CDUP for cinder
25 mining because they have changed their conservation

1 district rules, and this commission is still
2 considering a DBA.

3 So I mean, I'm just trying to shift us to
4 think the question is about the integrity of state
5 land use districts, and we're seeking declarations
6 about this commission's authority -- exclusive
7 authority to determine the districts.

8 So just -- in support of our petition and
9 this, I think, hasn't really been gone over a lot is
10 these declarations are appropriate because industrial
11 structures constitute urban activities or uses as
12 provided by ordinance or regulations of Hawai'i
13 County. That's quoting 205-2(e).

14 And under Hawai'i County zoning codes,
15 research facilities are zoned for
16 commercial-industrial districts, and so they're
17 appropriate in the urban district and not the
18 agricultural or rural or conservation districts.

19 Under 205-2(e), they don't fit any --
20 industrial structures don't fit any of the
21 descriptions of conservation lands, including
22 permitted uses that are not detrimental to a multiple
23 use conservation concept.

24 So those -- like, just based on that, you
25 can grant the petition just interpreting those laws.

1 And I did set up just a few slides. I guess they
2 were part of the turnaround, and they're not really
3 super new. But just to kind of orient us, so what's
4 been up here for the past two days is a 1964 picture
5 of the Lunar/Planetary telescope on Poli'ahu. This
6 is from the university report on Mauna Kea -- Office
7 of Mauna Kea Management.

8 Next slide. The next one, this is also
9 from the UH report as an audit, and it just kind of
10 shows you -- labels the different telescopes, and you
11 see the VLBA is in the corner because it's not
12 actually in that concentration of 12 telescopes.
13 It's further down outside of the industrial use
14 precinct and closer to Hale Pohaku but still above
15 Hale Pohaku.

16 And then the next slide, I included this.
17 This one was actually taken by Kalani Flores, and I
18 just included this because in the other picture, you
19 couldn't really see the Submillimeter Array at the
20 end of the paved road.

21 And, finally, this is a map. This is in
22 the petition. And just to explain it a little, that
23 outside kind of squarish, looks like an upside down
24 Colorado, that's the 525 acres that we've been
25 talking about. The summit structures that have,

1 like, the yellow dots, this has 11, but that's really
2 12 because we're counting Keck I and Keck II as two
3 telescopes. We can start going into how many
4 structures each thing is. We can get to at least
5 maybe 23. But, anyway, that area is about 40.6
6 acres, and that's in two of the telescope sighting
7 areas.

8 All of those kind of block areas in the
9 center, those are telescope siting areas. And I'm
10 just repeating what I've read in UH documents that
11 are public documents.

12 Area E at the top, that one is the TMT
13 site, and that one is about 5 acres, and then there's
14 an access way that would take about 3.6 acres. So
15 that's -- that's the area we're actually looking at.

16 So, next, I wanted to go point by point,
17 and some of this maybe you've already talked about,
18 but I want to respond to some of the questions that
19 were posed.

20 Now, Commissioner Okuda has raised and
21 actually a lot of people have raised HRS 205-15.

22 CHAIRPERSON SCHEUER: Counselor, can you
23 speak slightly -- more slowly?

24 MS. ISAKI: Okay. 205-15, it's entitled
25 "Conflict: Except as specifically provided by this

1 chapter and the rules adopted thereto, neither the
2 authority for the administration of Chapter 183 shall
3 be affected." I'm just going through that. So --
4 but then like I mentioned, like, 205-2 specifically
5 provides for districting urban and conservation
6 lands. 205-3.1 also specifically provides authority
7 to amend conservation district and urban district
8 boundaries. So with 205-15, the conflict statute,
9 says except as specifically provided by this chapter,
10 you are specifically provided with the authority to
11 district lands, and you exercise that.

12 And, actually, I went through a lot of
13 your dockets, especially ones involving conservation
14 districts, and I'll talk about that a little bit
15 more, but you do --

16 Like, the way to interpret this is to say
17 except as specifically provided by this chapter means
18 that you can district lands. In fact, that is not
19 the same thing as affecting the administration of
20 183C. Chapter 205 puts this commission in charge of
21 redistricting district boundaries, and HRS Chapter
22 183C, the conservation district statute, is silent on
23 this because DLNR does not have that power. So
24 there's no -- the conflict statute doesn't prevent
25 granting of the petition.

1 And, again, sorry, in reference to
2 Commissioner Okuda's discussion of Citizens Against
3 Reckless Development, or CARD, that prohibits using
4 declaratory petitions to abuse specific agency
5 decisions.

6 And we're not seeking a review of BLNR's
7 decision because BLNR never had the authority to
8 redistrict lands and didn't make a decision on that
9 issue.

10 And I'll pull from there, that case on
11 page 155, "Use of the declaratory ruling procedural
12 device only makes sense where the applicability of
13 relevant law is unknown either because the agency has
14 not yet acted upon particular factual circumstances
15 or, for some reason, the applicability of some
16 provision of law have been brought into
17 consideration -- have not been brought into
18 consideration."

19 So I guess, again, saying there's support
20 for my statement that BLNR never acted on land use
21 districting in Mauna Kea. That's something separate.
22 The Supreme Court hasn't looked like that either.

23 And for similar reasons, Ku'ikahi --
24 Kuleana Ku'ikahi, the memorandum -- the memorandum
25 opinion, that also doesn't apply because those

1 petitioners sought the Land Use Commission to use a
2 dec order to enforce a county zoning law, a county
3 decision about subdivision. We're not seeking
4 enforcement of anything except for 205.

5 I won't repeat that.

6 So I guess the next question that I want
7 to go over is the Hawai'i Supreme Court already ruled
8 observatories are permissible in the conservation
9 district, and that's the decision we talked about in
10 re TMT or Mauna Kea 1. That didn't hold that
11 astronomy facilities are permitted under any regime
12 of law, but only that BLNR did not abuse its
13 discretion by permitting TMT construction under
14 BLNR's interpretation of 183C.

15 So this petition is -- again, it's
16 looking at this commission's authority under its
17 constitutional obligations and Chapter 205. The
18 Supreme Court never ruled on the commission's
19 authority to redraw the conservation or the urban
20 district. And let's see.

21 Like, some other people have raised
22 that -- actually, I feel like a lot of this we've
23 kind of gone over. But if there's any more questions
24 about the distinction between the TMT, the Supreme
25 Court opinions and BLNR's actions on that and what

1 we're asking of this petition about land use
2 districting, maybe I'll take that more up in
3 questions.

4 The next question, I guess, I want to go
5 over is, is the petition -- this was actually raised
6 by TMT, an impermissible collateral attack or res
7 judicata. And so this wasn't -- this isn't a
8 collateral attack because we're not looking at those
9 things, again, because the Kanaheles were not in any
10 previous litigation or privy with any of its parties.
11 That's the required element of this claim.

12 As we've pointed out, Ku'u lei Kanahele,
13 not to mention Ahiena Kanahele, was only
14 participating as a witness in a party on a TMT-CDUP
15 contested case. Being a witness for a case on a
16 single telescope doesn't make her, much less Ahiena,
17 a party to a proceeding on a petition for declaratory
18 orders on your powers to redistrict boundaries around
19 the entire summit.

20 So, for example, like an expert in a --
21 or just a witness in a product's liability case who
22 gets injured by the product later can still sue.
23 There's no -- you're not stopped from doing that.

24 And more to the point, though, we're in a
25 declaratory petition proceeding and not a contested

1 case. So, like, any discussions about privity or res
2 judicata are not really appropriate.

3 91-14 concerns aggrieved persons that are
4 required to have an injury in fact; whereas 91-8, a
5 declaratory order proceeding, concerns a very
6 different legal animal. And this is discussed in a
7 case called Asato versus Procurement Policy Board.
8 But the basic difference is, like, in the first where
9 in the 91-14 action, you're vindicating individual's
10 value preferences. It's all about your property
11 interest and whether you're an aggrieved person.
12 Whereas, 91-8 is a declaratory. You're asking a
13 state or agency to interpret a law, and that can also
14 be in the state's interest. I'll get into that a
15 little later, but I think we need to hold those two
16 things separate. The TMT or any contested case is
17 not the same thing as a declaratory order and
18 proceeding for a declaratory order.

19 And sorry. Again, Commissioner Okuda
20 raised the concept of virtual representation
21 discussed in the Dowsett case. That was a Hawai'i --
22 the ICA case in 1990, and that case notes, first of
23 all, that virtual representation is applied in the
24 area of probate proceedings to bind persons who are
25 unknown, ascertained or unborn. And it's used to

1 preclude relitigation of an issue that has once been
2 adequately tried by a person sharing a substantial
3 identity of interest with nonparty. And, generally,
4 these cases involve substantial elements of
5 participation. In the first litigation, apparent
6 consent to be bound by whatever happens in that
7 litigation and apparent tactical maneuvering or close
8 relationship between the parties. And these are
9 absent here because the Kanahelles, amongst other
10 things, did not consent to being bound to anything
11 that happened in the TMT case. They never really got
12 to put forward their property interests.

13 But in any case, there was a U.S. Supreme
14 Court subsequent to that in 2008, Taylor versus
15 Sturgell. I only have this for the court reporter, a
16 citation, but it's 128 S.Ct. 2161 and cite 2171.

17 They rejected the theory of virtual
18 representation because a person who is not a party to
19 a suit generally has not had a full and fair
20 opportunity to litigate the claims and issues settled
21 in this suit. So that theory wouldn't in any way
22 still bind them to this.

23 I think he -- and sorry. Not beating a
24 dead horse. I won't use that. But I do want to go
25 through this because --

1 CHAIRPERSON SCHEUER: Mongoose.

2 MS. ISAKI: Beating a dead mongoose.

3 Because I don't want -- I don't think this would be a
4 bar to you guys exercising your powers here.

5 And so the rationale of this Taylor
6 versus Sturgell case, it occurs with the 2015 Hawai'i
7 Supreme Court opinion -- again, sorry, in re TMT, the
8 Mauna Kea 1. But think about that here because
9 they -- in this case, they vacated the TMT permit
10 based on procedural violations. But they are -- but
11 the violation was, it was a due process violation
12 because the land board had thought you can have --
13 you can grant the permit to have a contested case and
14 that doesn't compromise anybody's due process rights.
15 Here it would be kind of similar because it's -- it
16 would be faulty logic. It's employed in the
17 assertion that Ku'u lei already had a contested case
18 on redistricting, which she didn't because she was a
19 witness, but where she didn't even get to or be aware
20 that she was litigating her rights or trying to
21 vindicate them.

22 So that was -- that was that question.

23 You know, I have a lot actually to say about OSP's --
24 sorry -- Office of State Planning's contention that
25 granting a petition for declaratory orders would

1 adversely affect the interest of the state and that
2 you should deny it on that ground alone. I didn't
3 see anyone else raise it, but I want to address it
4 because it was -- like a nerdy legal point, it was a
5 really interesting way to think about both how
6 declaratory petitions work as this, like, liberal
7 standing requirement where you're trying to get
8 clarity on a law from the agency that's meant to
9 interpret it and against this like -- against this
10 foreclosure based on a speculative state interest
11 that could reasonably be expected to arise.

12 Now, first of all, in this particular --
13 the way it was raised here is Office of State
14 Planning contends dismissal is warranted because if
15 the commission grants the petition, it would -- it
16 could adversely affect potential future litigation
17 with -- against the state for continuing with further
18 construction on the summit without seeking a DBA.

19 So the litigation is premised on the
20 assumption that the state or its employees would act
21 contrary to this commission's order and refuse to
22 seek a DBA. So that's not reasonably expected to
23 arise because the state's presumed to follow the
24 laws. So -- but, otherwise, the state's violation of
25 the very order issued gives rise to a requirement to

1 deny the petition, and that's absurd. And it's also
2 as --

3 It's an incorrect interpretation of the
4 rule -- I mean, as Justice Acoba pointed out in a
5 concurring opinion in Lingle versus HGEA, 107 Hawai'i
6 178 at page 190, all declaratory orders, whether
7 granted or denied, are susceptible to litigation.
8 So that would give you the power to pretty much deny
9 any -- any declaratory petition that came before you.

10 So -- and this is actually -- the second
11 point is actually a little more interesting because
12 construing the rule this way is also inconsistent
13 with the purpose of the statute and this commission's
14 authority to issue the declaratory order. It applies
15 to any interested person. And like, again, in that
16 case, Asato versus Procurement Policy Board, they
17 discussed -- Hawai'i Supreme Court Justice Pollock
18 discussed the liberal standing requirement that
19 allows any interested person to petition.

20 The reasons why it does not require them
21 to have injury-in-fact standing or aggrieved-person
22 standing under 91-14, because injury-in-fact standing
23 is there to prevent people from doing, quote, "no
24 more than vindicating his or her own value
25 preferences through the judicial process."

1 However, in a declaratory petition
2 proceeding, they're seeking an interpretation of law,
3 and this type of action cannot be said to be one that
4 vindicates, in this case, Asato's own value
5 preferences through the judicial process because,
6 again, in that case, if the regulation isn't valid,
7 then the action brought by Asato will actually serve
8 to uphold the legislature's intent in the government
9 procurement area.

10 So kind of comparing it to this case,
11 like, the Kanahelles are seeking this commission's
12 interpretation of land use laws. And so the action
13 isn't vindicating their own value preferences.
14 They're asking you to give everyone a better
15 understanding of the meaning in Chapter 205 and land
16 use districting.

17 I had some other like -- it would also --
18 I have some more arguments about it. If there's
19 other reasons -- if you're not persuaded by that
20 reason for not denying the petition on the basis of a
21 state pending litigation or a reasonably expected
22 litigation --

23 Well, I guess one of them also, and this
24 would actually point to maybe a rule being invalid,
25 which would be that the construction of the rule

1 permitting denial would basically give the commission
2 standardless discretion. And, again, standardless
3 discretion, you're not allowed -- or agencies aren't
4 allowed to have that. I was looking actually more at
5 the Supreme Court case, Thomas versus Chicago Park
6 District, 534 US 316, page 323. It is a 2000 case,
7 and I actually quoted a bunch of other Supreme Court
8 cases. And that was a zoning case, actually, but
9 they were talking about exercises of discretion and
10 why they must be governed by adequate standards to
11 guide the official's decision and render it subject
12 to judicial review.

13 So a denial rule that accepts all -- all
14 these different -- any interested person can raise
15 things, but then also lets you refuse it whenever
16 speculative interest on the part of any state officer
17 or employee could be positive -- posited, that would
18 basically give you any discretion to deny it.

19 Okay. So the fifth question I want to go
20 to is petitioners are not -- well, the question was
21 raised, petitioners have standing to institute a
22 boundary amendment proceeding. You know, I think
23 that Chair Scheuer did raise the PASH-Pilago case,
24 and we can talk about property interests and the way
25 property is different in Hawai'i, but the fact is

1 that they did not initiate a district boundary
2 amendment proceeding. They didn't -- they actually
3 said in their declarations that they don't want the
4 district boundary to be amended. They want -- they
5 want the proper procedures to be implemented where
6 they might say no. Probably -- well, they told me
7 they're going to say no, but I think --

8 And, yet, the discussion yesterday when
9 Chair Scheuer did say that a DBA may allow this
10 commission to oppose conditions on uses that are
11 already there anyway. That might give us something
12 to think about. But we're not -- we're not yet
13 there. We're still just asking you to clarify this
14 law.

15 And, oh, I just wanted to also note that
16 the Supreme Court has also weighed in. This is in
17 the Lingle versus HGEA case as well that this
18 declaratory petition statute 91-8 was adopted to
19 induce agencies to issue declaratory orders more
20 frequently than they have been doing in the past.
21 And there's actually a wealth of, like, law review
22 knowledge on this about why declaratory orders are
23 actually a really good way of making sure that the
24 law gets applied the right way without having to go
25 through -- well, I guess it's not always a contested

1 case, but something judicial.

2 So at this point I have just a bunch of
3 notes of specific points I wanted to raise to other
4 commissioners' questions. Commissioner Cabral
5 emphasized that, you know, we're limited to what the
6 law allows us to do. And I mean -- and that -- and
7 that there's -- and that people are looking for a
8 compromise. Again, I think that you're authorized to
9 say what Chapter 205 says about land use districting.
10 And as for a compromise, that, again, would be the
11 DBA proceedings. That's when all of this discussion
12 about management plans and what goes forward should
13 come in.

14 So -- and sorry. I did want to note in
15 response to -- and I might be mischaracterizing
16 Office of State Planning's characterization or
17 statement that the level of intensity is not how you
18 distinguish the state land use districts. I'll just
19 point out that in a 1981 case, like in the Lam
20 against Supreme Court case, they did say that land in
21 an urban district tolerates the highest degree of
22 development and conservation the least. So there is
23 kind of the characterization of each district.

24 Oh, this was also -- this is a question
25 that almost tripped me up for a little while. Office

1 of State Planning raised that the commission lacks
2 rules on how to implement, if you were going to
3 implement, a multiple-use conservation concept or
4 some of these other things in 205. But if you look
5 at the definition of rule under 91-1, it
6 specifically -- I'm sorry -- HRS 91-1, which is the
7 definition section in the Hawai'i Administrative
8 Procedure Act, that specifically excludes declaratory
9 orders. So you don't need rule-making to do a
10 declaratory order when you're interpreting a statute.
11 It's like kind of this different exception.

12 And we're also not asking you to
13 determine whether those uses are appropriate to the
14 conservation district because we're just asking you
15 to say these are urban uses because we're talking
16 about telescopes.

17 And I guess the petition also asks you to
18 interpret -- well, I guess I think that -- I can't
19 remember which commissioner. It might have been
20 Commissioner Ohigashi had asked about examples of
21 laws or authorities on your powers to redistrict or
22 talk about redistricting from conservation to
23 something else and based on, like, uses and, you
24 know, where -- the question's about enforcement
25 authority. And I know that we've all kind of agreed

1 this commission doesn't enforce in the conservation
2 district. But I did want to raise, like, in 2000,
3 there was -- this commission granted the Sierra
4 Club's petition for declaratory orders as DR00-23,
5 and that was about Kealahou land. And that one,
6 they declared that a district boundary amendment was
7 required for prospective construction in Kealahou.
8 It was an agricultural district, though. But what
9 was important is that the petition opponents argued
10 that the commission lacked the authority because the
11 county was supposed to be enforcing its agricultural
12 uses. And the commission, of course, noted that the
13 Chapter 205 does give you certain -- different kinds
14 of jurisdiction over agricultural uses. But the
15 important thing is that you noted the important
16 distinction between a declaratory order and an
17 enforcement action. And you stated "The petition
18 before the commission requests, amongst other things,
19 a declaratory ruling. This order is in the nature of
20 a declaratory ruling. This is not an enforcement
21 order assessing penalties or imposing injunctive
22 relief for actual uses in violation of statutory
23 requirements." That was your conclusion of law,
24 paragraph 4.

25 And so while legal regimes administering

1 ag lands are different from conservation lands, that
2 order bears comparison in that we are also not
3 presenting you with a DBA or a motion for an order to
4 show cause. We're just asking you to interpret that
5 law.

6 You know, Chair Scheuer asked a couple
7 times whether the University of Hawai'i has a
8 comprehensive plan or if it's encapsulated by the
9 CDUPs, and there was a mention of the 2009
10 comprehensive management plan and that -- you know, I
11 don't even have to go that far back to this because
12 this was actually in a case. This is in a 2012 ICA
13 memorandum of opinion, this Mauna Kea Anaina Hou
14 versus BLNR. But in that one, they actually
15 mentioned that the comprehensive management plan --

16 And, John, if you can advance the slide
17 one more. This is -- this is -- this is just from
18 the comprehensive management plan, but the text is in
19 the opinion of the ICA, "issues beyond the scope of
20 this CMP," and it says, I guess, four or five down,
21 "proposed issues beyond the scope include the
22 30-meter telescope." So when we're --

23 Can you put the slide back to the one
24 before, too, after?

25 So when we're talking about whether or

1 not there's a -- if the management plan in 2009 was
2 comprehensive, it didn't really look at everything.
3 And there was later a TMT management plan, but that
4 also didn't look at everything. That was in
5 reference to the CDUP proceeding.

6 I have a couple -- I have a bunch more
7 notes, but I actually would rather get to your
8 questions if that's okay. Thank you.

9 CHAIRPERSON SCHEUER: Thank you.

10 Commissioners?

11 Commissioner Okuda.

12 COMMISSIONER OKUDA: Thank you,
13 Mr. Chair.

14 Thank you, Dr. Isaki, for your
15 presentation.

16 You know, just by way of clarification,
17 the reason why we were discussing the Citizens
18 Against Reckless Development case and Kuleana
19 Ku'ikahi, even though it's an unreported case, you
20 cited those cases in support of your petition; is
21 that correct?

22 MS. ISAKI: Yes, that's correct.

23 COMMISSIONER OKUDA: So that's one of the
24 reasons why we were raising the question about the
25 substance of those cases because, you know, you had

1 cited --

2 MS. ISAKI: I'm sorry.

3 COMMISSIONER OKUDA: Go ahead.

4 MS. ISAKI: And I was going to say CARD
5 was actually a reported case, wasn't it?

6 COMMISSIONER OKUDA: Yeah, it was. And
7 maybe we can go to CARD first because just so that,
8 you know, I don't quote it out of context, but we're
9 talking about what the Hawai'i Supreme Court said at
10 114 Hawai'i Reports, 184 at 196 to -97. In that
11 case, the Hawai'i Supreme Court was discussing when a
12 use of a declaratory ruling is appropriate; correct?

13 MS. ISAKI: Yes, that's correct.

14 COMMISSIONER OKUDA: And what the -- what
15 the Supreme Court said in that case, and let me have
16 the -- let me give you the direct quote here, and I
17 recognize that, you know, it's long, but I think the
18 substance is really important for what we're doing,
19 you know, in this proceeding. It says -- okay. As
20 both the title, paren, quote, "Declaratory Rulings by
21 Agencies," close quote, close paren. And the
22 pertinent text, paren, quote, "a declaratory order as
23 to the applicability for a statute agency rule or
24 order," close quote, close paren, "make clear,"
25 comma, "the declaratory ruling procedure of HRS

1 section 91-8 is meant to provide a means of seeking a
2 determination of whether and in what way some
3 statute, agency rule or order applies to the factual
4 situation raised by an interested person. It is not
5 intended to allow review of concrete agency decisions
6 for which other means of review are available.

7 Reading HRS section 91-8 in a commonsense fashion and
8 hearing in and" -- excuse me "and bearing in mind the
9 plain meaning of the term," quote, "applicability,"
10 close quote, "it cannot seriously be maintained that
11 the procedure was intended to review already made
12 agency decisions. For such decisions, like the DPP
13 director's issuance of the CUP to Walmart," comma,
14 "the agency has already spoken to the, quote,
15 "applicability," close quote, "of the relevant law to
16 the factual circumstances at hand, implicitly or
17 explicitly -- explicitly. It has found the relevant
18 legal requirements to be met. There is no longer a
19 question of how the relevant laws, in this case, the
20 LUO," quote, "apply," close quote, period.

21 Did I accurately read --

22 MS. ISAKI: Yes, you did.

23 COMMISSIONER OKUDA: -- that section of
24 the decision?

25 MS. ISAKI: Yes.

1 COMMISSIONER OKUDA: Yes. Okay. So --
2 and the court said, you know, it's not intended to
3 review, you know, the prior decision or -- or factual
4 circumstances, and it says "implicitly or
5 explicitly." Okay?

6 So let me ask you this: The Supreme
7 Court and what we've been calling Mauna Kea 2,
8 wouldn't the court and the underlying Board of Land
9 and Natural Resources' decision have to at least
10 recognize the fact that astronomy use or the type of
11 uses that you have placed up on the slide is -- is
12 appropriate for a conservation district?

13 MS. ISAKI: Yes, that's what they ruled.

14 COMMISSIONER OKUDA: Yes. So, in other
15 words, that determination was already made by the
16 Board of Land and Natural Resources, and the board's
17 decision was affirmed by Hawai'i Supreme Court;
18 correct?

19 MS. ISAKI: Yes. And I'll just draw your
20 attention back to what you quoted because it's about
21 the relevant, legal requirements. And in that
22 proceeding, the relevant, legal requirements were the
23 eight criteria -- were the conservation district
24 rules. But they never looked at the standards or the
25 entire land use regime that you guys were required to

1 look at.

2 COMMISSIONER OKUDA: Okay. But my point
3 is the bottom line, the bottom line of the Board of
4 Land and Natural Resources' decision and the bottom
5 line of the Supreme Court decision was at least,
6 implicitly, recognizing the fact that astronomy uses,
7 telescopes, are a permissible use in a conservation
8 zone; correct?

9 MS. ISAKI: They ruled that about the TMT
10 based on certain mitigation, yes.

11 COMMISSIONER OKUDA: Okay. Okay. And
12 you're correct. They ruled regarding TMT. Okay. So
13 what is the legal effect if we were to grant your
14 petition? Or let me be more specific. Is your
15 petition requesting that somebody be ordered or
16 somebody would have to file a request for a boundary
17 amendment?

18 MS. ISAKI: I think that's a really good
19 question because what -- yeah, what is the legal
20 effect of the declaratory order? It's the same
21 status as other agency orders, but the way that we
22 phrased it is that you would just be saying they did
23 something wrong. That --

24 COMMISSIONER OKUDA: Yeah.

25 MS. ISAKI: I'm sorry. Go ahead.

1 COMMISSIONER OKUDA: No. Go ahead.

2 MS. ISAKI: That this concentration of
3 industrial uses shouldn't be subject to a DBA. So
4 sorry. I know I'm using the same language over and
5 over, but because we're talking about the in re TMT 2
6 decision, which was about conservation district uses,
7 let's not forget that you also have this power to
8 talk about industrial uses in urban districts. And
9 these are the industrial uses under 205-2, you know,
10 describing what industrial or urban uses are.

11 COMMISSIONER OKUDA: Yeah. Well, okay.
12 What is your intended or your client's intended
13 effect if we grant your petition? Is it just to
14 have, like, esoteric, intellectual legal statement in
15 the law books, or are you looking for some kind of
16 concrete result which would flow from -- from the
17 fact that the Land Use Commission, if it does, grants
18 your petition?

19 MS. ISAKI: Yes. I mean, as I said, the
20 expectation is that all state agencies will follow
21 your orders or will want to comply with the law. So
22 we would want -- we want to have a chance to -- as I
23 said before, we were going into this thinking like we
24 wanted -- we want an opportunity to say no to this
25 urbanization that's already happened, but maybe we'd

1 have to think more about what it would mean to put
2 conditions on things that are already there anyway.

3 COMMISSIONER OKUDA: Okay. But is it
4 your expectation or your intention if your petition
5 is granted that the legal effect of your petition is
6 to -- is to force the State of Hawai'i or whoever
7 might be considered the landowner of the land on
8 which the telescopes sit to have to file a request
9 for a boundary amendment?

10 MS. ISAKI: I think in order to keep
11 things as they are, yes.

12 COMMISSIONER OKUDA: Okay.

13 MS. ISAKI: Or to go forward. Yeah,
14 either way.

15 COMMISSIONER OKUDA: I'm sorry. What
16 else?

17 MS. ISAKI: Or if they want to build more
18 or if they want to keep it how it is, yes, then
19 they'd have to do a DBA.

20 COMMISSIONER OKUDA: Okay. So if we
21 grant your petition, the legal effect in your view
22 would be to force whoever owns the land on which the
23 telescopes sit, that that owner, that entity, would
24 have to file a petition to redesignate the summit or
25 that land -- that land to the urban district;

1 correct?

2 MS. ISAKI: If they want to continue
3 doing the 12 observatories plus, yes.

4 COMMISSIONER OKUDA: Okay. Can you point
5 to a specific statute or case, and I've asked this
6 question before --

7 MS. ISAKI: Right.

8 COMMISSIONER OKUDA: -- which -- and if
9 you can quote the words because, as you know, we've
10 got to follow the plain language of the law. Can you
11 quote the words that specifically state that the Land
12 Use Commission has the power to issue an order which
13 would force a party to file a petition for a boundary
14 amendment?

15 MS. ISAKI: I don't think 205 says one
16 way or the other. But, no, there's not a specific
17 statement in 205.

18 COMMISSIONER OKUDA: And you do agree
19 that when we deal with statutory construction, the
20 rule is specific statutes generally or usually
21 control over statutes with more general words --

22 MS. ISAKI: Yes.

23 COMMISSIONER OKUDA: -- correct?

24 Now, don't you think that HRS section
25 205-5, paren, small (a), close paren, is pretty

1 specific about who has the power of enforcement
2 within certain land use districts?

3 MS. ISAKI: Yes. And we're not asking
4 you to enforce it. I know that it's -- it's a gray
5 area of law what is -- like, with this declaratory
6 order, but we're not asking you to enforce
7 conservation district uses.

8 COMMISSIONER OKUDA: No. We're not
9 talking about enforcing anything. I'm looking at the
10 plain language. So if we look at the plain language
11 in that section with respect to conservation
12 districts, it says and I quote, "Conservation
13 districts shall be governed by the Department of Land
14 and Natural Resources pursuant to Chapter 183,"
15 capital "C." Did I accurately --

16 MS. ISAKI: Yes.

17 COMMISSIONER OKUDA: -- section of the
18 law?

19 What does the word "govern" mean?

20 MS. ISAKI: Well, it can never be
21 governed under standardless discretion. So it would
22 have to be governed by the rules of 183C. But I
23 mean, you also can't have one statute, like,
24 completely nullify another, which is why I think
25 we've also been talking about what does it mean to

1 have a land use called conservation if there is a way
2 of getting around it.

3 COMMISSIONER OKUDA: Yes. My only
4 question is --

5 MS. ISAKI: I understand. Right.

6 COMMISSIONER OKUDA: -- what does the
7 word "govern" mean?

8 MS. ISAKI: It means to implement the
9 laws, I guess, in this case under its Chapter 183C,
10 yes.

11 COMMISSIONER OKUDA: And 183C gives the
12 discretion -- and by the way, we may disagree with
13 how discretion was exercised. So I'm not saying, you
14 know, just because an agency has discretion, we've
15 got to agree, you know, with the discretion as a
16 political matter. Maybe that's something we've got
17 to change at the ballot box. But bottom line, the
18 statute specifically says that the Department of Land
19 and Natural Resources basically has the exclusive
20 power to govern lands which are in the conservation
21 districts; correct?

22 MS. ISAKI: Right. Those lands that are
23 in the conservation district, but we're asking you to
24 use your powers to say that they're not in the
25 conservation district, and I think that you can

1 interpret your statutes in this way, especially
2 relying on, like, some constitutional obligations to
3 recognize, like, other needs or public interest.

4 COMMISSIONER OKUDA: Let me just comment
5 on that. The statutes are passed by the legislature
6 to implement constitutional provisions; correct?

7 MS. ISAKI: Yes.

8 COMMISSIONER OKUDA: And, in fact, one of
9 the purposes of the legislature passing statutes is
10 basically to limit the power of government agencies
11 and, frankly, government bureaucrats. You agree?

12 MS. ISAKI: Yes.

13 COMMISSIONER OKUDA: And the public
14 policy behind providing these limitations is so that
15 we don't have abuse of discretion, for example, where
16 it's to prevent us from figuring out or saying, "Gee,
17 you know, these constitutional provisions which are
18 usually a lot broader than specific statutes, well,
19 my friend, Mr. Edmund Aczon, has come here for a
20 permit. Gee, it looks like he doesn't comply with
21 the standards, but I'll just refer to these broad
22 provisions and give him the permit because he's my
23 friend." It's to prevent --

24 MS. ISAKI: Right.

25 COMMISSIONER OKUDA: -- basically helping

1 your friends and forcing people who aren't
2 necessarily your friends to jump through the
3 bureaucratic hoops; correct?

4 MS. ISAKI: Correct. And you do have
5 standards. They're under 205-2.

6 COMMISSIONER OKUDA: Yeah. Well, I just
7 want to make clear there's a public policy why the
8 law may strictly require us to follow certain
9 things -- certain things strictly. But in any event,
10 just so that I can end my questions, you do agree
11 that when you read the plain language of 205-5, paren
12 small (a), close paren, it's basically saying that
13 the Department of Land and Natural Resources has
14 exclusive jurisdiction over governing what takes
15 place in conservation-zoned property; correct?

16 MS. ISAKI: Yes. As long as you have
17 already-districted conservation lands, yes.

18 COMMISSIONER OKUDA: Okay. Okay.
19 Exclusive jurisdiction. And exclusive
20 jurisdiction -- well, last question. Is there
21 anything in 205-5 which similarly gives the Land Use
22 Commission any jurisdiction to govern, and I use the
23 word "govern" as it's used in 205-5(a), is there
24 anything in Chapter 205 which gives the Land Use
25 Commission similar power, power similar to the

1 Department of Land and Natural Resources, to govern
2 what takes place in conservation districted lands?

3 MS. ISAKI: No, not in conservation
4 district.

5 COMMISSIONER OKUDA: Okay. Thank you.
6 No further questions, Chair.

7 CHAIRPERSON SCHEUER: Thank you. It's
8 1:19. We're going to take a six-minute break to
9 1:25.

10 (A recess was taken from 1:19 p.m.
11 until 1:25 p.m.)

12 CHAIRPERSON SCHEUER: Thank you for your
13 questions, Commissioner Okuda.

14 Other commissioner? Commissioner
15 Giovanni.

16 COMMISSIONER GIOVANNI: Thank you, Chair.
17 I don't have a legal question, but I have a question
18 about the intent. So if I understood your -- the
19 petitioners and several of the supporting witnesses
20 from the community, they are asking the commission to
21 effectively order a petition for a district boundary
22 amendment and then to deny it, which would revert it
23 back to where we are started today. What is the --
24 if I'm following that logic, what's the intent here?

25 MS. ISAKI: Well, that's a very good

1 question, and I guess I should answer it by also
2 referencing again some of our discussion here about
3 perhaps a pause in things going on and creating,
4 like, another process where there can be discussion
5 about what's already existing on the mauna and how
6 things go forward.

7 So the intent of bringing this was, like,
8 actually very simply we wanted to see the process
9 applied equally to also university lands or
10 university-held lands as with other people. We did
11 say that we want an opportunity to say no. I know
12 that we've also -- I mentioned that we might want to
13 talk about that some more in light of what conditions
14 can be put on a DBA. So that's the answer.

15 COMMISSIONER GIOVANNI: I didn't hear
16 that you wanted an opportunity to say no. I heard
17 that you wanted us to say no. So what does that
18 mean?

19 MS. ISAKI: I said that -- well, I think
20 maybe other people who have testified have said that
21 they will say no to a -- and that we would want you
22 to say no, but as -- after the chair raised some kind
23 of thought -- asks us to think through, like, how
24 conditions we put on was actually existing, again,
25 maybe we have to think about that. But I don't think

1 in our petition we asked for you to deny a DBA that
2 came before you. We just asked you to say that,
3 well, you know, the three things that we asked for.

4 COMMISSIONER GIOVANNI: I think, if we
5 check the record, your client under public testimony
6 said they wanted us to say no to it.

7 MS. ISAKI: I think that -- yeah, well,
8 this is probably correct that it would be --

9 I think if you do say no to this, to a
10 DBA petition, that it wouldn't necessarily mean it
11 goes back to conservation. It would mean that there
12 would have to be another petition because industrial
13 uses are supposed to be in urban district, and these
14 are industrial uses.

15 Sorry. I know I'm going fast.

16 Then they would have to, I guess,
17 re-petition.

18 COMMISSIONER GIOVANNI: I'm good.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner.

21 Commissioner Wong followed by
22 Commissioner Ohigashi.

23 COMMISSIONER WONG: Thank you for your
24 testimony. Thank you, Chair.

25 Okay. This is really bothering me. I

1 can see the points you're bringing up and the issues
2 of before. What I'm worried about, and this is what
3 I'm worried about is, let's say, again --

4 Someone's -- I think one of my esteemed
5 commissioners said this.

6 What if they want to say in Mount
7 Wai'ale'ale or even the Ko'olaus, we want to change
8 the conservation district to urban and put a
9 Disneyland or, as I said, high-rise apartment because
10 we're going to start this process. I mean, I'm
11 just -- I have that in the back of my mind, yeah,
12 that the watershed, you know, the land is going to be
13 affected. You know, some -- I have to use good words
14 instead of some words that are in other docs, but
15 some people may come and say, "You know what, I want
16 to change this to urban, and I want to build on it."

17 Right now it's -- let's say Ko'olaus, the
18 watershed up there, is conservation. And be it good
19 or bad, Department of Land and Natural Resources
20 right now is in charge of conservation districts.
21 They may not do a good job. They may not do a bad
22 job. It depends on whoever you talk to. But if it
23 goes to urban, then it's -- after us, we say, "Let's
24 change the district. It's the county's, you know,
25 kuleana." We don't have any effect -- then let's say

1 there's some bad county people that says, "I don't
2 care about natural resources. I just want the money.
3 I want the tax issued." That's what I'm worried
4 about, that we start this process. I don't know how
5 to say --

6 I know where you guys are coming from and
7 I understand, but I'm really worried about the
8 consequences for other places. If you could try and
9 alleviate that somehow.

10 MS. ISAKI: I think that's a good
11 question, and I don't know of many situations besides
12 Mauna Kea, perhaps Haleakala, which the lands are a
13 little different, where you have, like, things that
14 are -- have already kind of snuck around you. I
15 won't characterize it that way, but have gone around
16 a land use districting process to become what it is.

17 You know, where that's happened, like,
18 maybe I can only think of perhaps, like, Kauai
19 Community College where there was like -- or West
20 Maui where that's happened. So I guess if the
21 concern is that, oh, the Land Use Commission will
22 allow this to happen in Mauna Kea, like, it's already
23 happened, and so this is imposing a process on it
24 where, like, there could be conditions that are
25 related to -- actually related to what's going on or

1 the use or the use proposed.

2 Maybe I'm not answering your question
3 because I'm not -- I'm struggling to think of how
4 this happens exactly in the same way elsewhere, like,
5 how not imposing a process on it would help. Like --

6 COMMISSIONER WONG: I guess through our
7 various hearings, the counties -- I'm not saying
8 which one, sometimes we put certain conditions, and
9 they just say, "Yeah, yeah, put it down, but we're
10 not going to enforce it," and that's what I really am
11 worried about it. Because once you take it out of
12 conservation, once you take it out of DLNR's hands,
13 again, for good or for bad, the counties may say,
14 "Yeah, yeah, yeah, whatever." And that's what I,
15 again, worry about. You know, we have either county
16 or state. I am hoping, with the big quotes, that the
17 DLNR will be a little bit more better with
18 conservation district and the lands that they're
19 supposed to protect with the quotes, yeah. And
20 that's what I really am worried about. I don't know
21 how you can alleviate me on this issue.

22 MS. ISAKI: I can just mention that maybe
23 the building height codes are more restrictive under
24 the county urban zoning codes than at least what's
25 allowed under the CDUP for the TMT. I don't know if

1 county or DLNR, if neither one is imposing or
2 enforcing -- that's not necessarily a question for
3 this petition.

4 COMMISSIONER WONG: Yeah, I understand
5 that. It's just that I don't want to --

6 MS. ISAKI: No.

7 COMMISSIONER WONG: -- start a
8 precedence, if I can use that term, that we're going
9 to, say, come forward now and do anything you want.
10 I mean, that's what I'm really worried about. I
11 mean, we have a lot of people here on the islands
12 that is -- like, for the NARS, for example, that is
13 trying to protect the land, trying to, you know, make
14 sure there's no undulance in the area, et cetera. I
15 just want to make sure we have NARS area, we have
16 places that are not going to be touched and it's
17 going to be for our future. That's what I worry
18 about.

19 MS. ISAKI: Well, it's a very practical
20 question, and you're clearly very worried about, you
21 know, the real impacts of this. So if we play this
22 out and a DBA came before you to rezone this urban,
23 and you couldn't find a way for it to not be spot
24 zoning or not be a continuous land mass that where
25 it's appropriate, then you would deny it. And so

1 those structures would either have to come down, or
2 they would reapply and try to find another way to
3 mitigate it better. And so I'm not -- we're not
4 asking you to grant the DBA.

5 COMMISSIONER WONG: No. As you see, I'm
6 just in that quandary right now. And, you know, I'm
7 looking at the map. Right now it's less than 15
8 acres where -- you know, not talking about TMT now.
9 Just the other yellow dots we have, the other
10 observatories.

11 MS. ISAKI: The 40 acres?

12 COMMISSIONER WONG: Oh, it's 40?

13 MS. ISAKI: It's 40.6.

14 COMMISSIONER WONG: I thought it was 3.2.

15 MS. ISAKI: That's the access way.

16 COMMISSIONER WONG: So, yeah, I was just
17 worried about the counties will say, "Hey, yeah, keep
18 on going." So if that's the case, it will still come
19 in front of us, but I just was worried about that
20 too. Thank you.

21 MS. ISAKI: Thank you.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Wong.

24 Commissioner Ohigashi followed by
25 Commissioner Cabral.

1 COMMISSIONER OHIGASHI: So the court
2 reporter said I should speak all in caps. For some
3 reason, being old, I don't understand that quite.

4 Let me ask you some questions. I'm going
5 to play a game or not game, but propose to you some
6 analogies under your scenario. Your scenario is
7 essentially that because this use is more properly
8 urban, that we should require a district boundary
9 amendment to become urban; is that correct?

10 MS. ISAKI: Yeah.

11 COMMISSIONER OHIGASHI: All right.
12 Honolulu City and County, I was informed, does not
13 allow large-scale agricultural pursuits in urban
14 areas. So if I was to decide to have a sunflower
15 farm right in the middle of Honolulu, I own so much
16 land, I want to put a sunflower farm, and I get a
17 permit from Honolulu City and County that says,
18 "Yeah, you can do that," then under your
19 interpretation, we would have to -- they would have
20 to get a DBA to do it agricultural; is that correct?

21 MS. ISAKI: Yeah, if it's not -- yeah, if
22 it's not allowed under the --

23 COMMISSIONER OHIGASHI: However, if I
24 decide to put a large sunflower farm right in the
25 middle of Wailuku that allows in a zoned -- highly

1 zoned area of agricultural uses, I would still have
2 to be required to get a DBA?

3 MS. ISAKI: Sorry. If you put a
4 sunflower -- sorry. Could you repeat that?

5 COMMISSIONER OHIGASHI: Okay. I'm giving
6 two scenarios. The first, you understand, was
7 Honolulu County didn't want to allow agricultural
8 pursuits in urban areas. And in that scenario,
9 you're saying, yeah, we should get a DBA to put this
10 agricultural farm that's right in the middle of an
11 urban district.

12 MS. ISAKI: Or whatever DBA special --

13 COMMISSIONER OHIGASHI: Right. Do an
14 agriculture -- do an agricultural --

15 MS. ISAKI: Or there's other --

16 COMMISSIONER OHIGASHI: We don't have
17 special use permits because this 40-acre farm that I
18 plan to put is obviously a nonconforming use within
19 that area. So, therefore, we have to go -- the city
20 has to get a DBA to change it to agriculture so that
21 I can pursue this; right?

22 MS. ISAKI: Yeah. If you want to pursue
23 it if it's appropriate.

24 COMMISSIONER OHIGASHI: However, if I do
25 the same thing in Wailuku, which county zoning that I

1 sometimes -- somewhere in my past may have held the
2 right, indicates that we can do this, that same 40
3 acres would not require a DBA or would require a DBA?

4 MS. ISAKI: Sorry. Is the Wailuku area
5 zoned agriculture?

6 COMMISSIONER OHIGASHI: No. It's urban.
7 Wailuku is an urban place.

8 MS. ISAKI: I'm not -- I guess I don't
9 know --

10 COMMISSIONER OHIGASHI: You don't know?

11 MS. ISAKI: I'm not understanding that.

12 COMMISSIONER OHIGASHI: Because the point
13 of my analogy is this: It's that in the urban area,
14 it is clear that agricultural pursuits are not
15 allowed in the City & County of Honolulu in the urban
16 area and, therefore, cannot be granted. But in the
17 urban area in Wailuku, agricultural pursuits are
18 permitted because of progressive zoning. And because
19 of that, we wouldn't have to require a change in
20 special use permit?

21 MS. ISAKI: Okay.

22 COMMISSIONER OHIGASHI: We wouldn't have
23 to require a DBA to change it into agriculture. So
24 my question to you is given the fact that we
25 established that the use of astronomy facilities are

1 permissible uses within the CDUA, within that zone
2 the board has determined and has the right to
3 determine just like the city councils have the right
4 to determine what's in their urban areas, wouldn't
5 that negate the need to require a DBA?

6 MS. ISAKI: I think -- I think -- well,
7 so you're saying under your example, there's, like,
8 two cities. One city is granting a permit or --

9 COMMISSIONER OHIGASHI: I'm using them as
10 examples. You know, Honolulu city and county says no
11 agriculture in urban areas. I want to get a 40-acre
12 sunflower farm, and under your scenario, I'm required
13 to get a DBA because it's not a permitted use?

14 MS. ISAKI: Right.

15 COMMISSIONER OHIGASHI: However, when we
16 go to Wailuku, which has in its urban zoning, permits
17 the use of agriculture, I can build -- I can have a
18 40-acre sunflower farm but --

19 MS. ISAKI: But it's inconsistent with
20 this --

21 COMMISSIONER OHIGASHI: -- they're not
22 going to require me to get a DBA. So my question to
23 you is how is that dissimilar to the situation here
24 where we have the Board of Land and Natural
25 Resources --

1 MS. ISAKI: Because you're saying, like,
2 the county is allowed to determine what's in urban?

3 COMMISSIONER OHIGASHI: Yes.

4 MS. ISAKI: Okay. Like -- well, again,
5 like, the Land Use Commission does also still have a
6 power to redistrict if they wanted to if there is a
7 petition asking you to or if someone submitted that,
8 yeah.

9 COMMISSIONER OHIGASHI: I'm just
10 trying -- I'm just trying to understand the theory
11 you're coming after and using -- trying to use
12 practical examples or examples that can be practical,
13 I guess, or examples that exist in the law, and I'm
14 having a hard time getting over the fact that where
15 it's permitted, they're not -- when one is permitted
16 and one is not permitted, the not-permitted one
17 should get a DBA to allow it to go into the proper
18 land use designation. And the one that is permitted
19 under urban zoning need not get a DBA unless you're
20 telling me both need a DBA.

21 MS. ISAKI: Well, I mean, I'm saying that
22 you have the power to district in both cases, but
23 it's -- I mean, the county does have the power to
24 govern urban uses.

25 COMMISSIONER OHIGASHI: Exactly. So does

1 the Board of Land and Natural Resources have
2 the right to govern --

3 MS. ISAKI: Right. But you also have the
4 power in both situations to determine what's in the
5 ag district or the --

6 COMMISSIONER OHIGASHI: So -- but
7 following your declaratory logic, the County of Maui
8 cannot allow me to put a 40-acre agricultural use in
9 an urban zone because it's more -- it looks more like
10 an agricultural use; is that right?

11 MS. ISAKI: I'm sorry. I guess I'm
12 getting turned around because I didn't look a whole
13 lot in the agricultural part of your 205. Like, the
14 counties are allowed to define what's in the urban
15 district, but that's not what BLNR can do. They
16 can't decide what's in the conservation district.

17 COMMISSIONER OHIGASHI: Don't they have
18 exclusive jurisdiction and governance of that
19 district?

20 MS. ISAKI: They can -- they can -- they
21 can govern in the district, yeah.

22 COMMISSIONER OHIGASHI: Don't they have
23 to define the uses of that district?

24 MS. ISAKI: Yes.

25 COMMISSIONER OHIGASHI: Okay. So what's

1 the difference between the county and the Board of
2 Land and Natural Resources?

3 MS. ISAKI: Let me look at the statute.
4 It was like 205-2(b). So it's -- so in urban
5 districts, like -- I'm reading 205 to be "urban
6 districts shall include activities or uses as
7 provided by ordinances, regulations of the county
8 within which the urban district is situated." And
9 there is -- I guess there's an ordinance for that, as
10 you're saying, with the progressive ordinance. So
11 the analogy is that if the county can govern in the
12 urban district, the --

13 COMMISSIONER OHIGASHI: My question is
14 very simple. Very simple. The County of Maui can
15 say, "We want agricultural uses in an urban
16 district." The City and County of Honolulu says, "We
17 don't want agricultural uses in the city."

18 MS. ISAKI: Okay. I get it now, yes.

19 COMMISSIONER OHIGASHI: So what we're
20 saying is that -- what I'm getting from your
21 interpretation --

22 Are you listening to me?

23 MS. ISAKI: Oh, sorry.

24 COMMISSIONER OHIGASHI: I'm just asking
25 who you're listening to. But if you understand my

1 analogy, it's quite simple. It's just a question
2 asking -- I'm not trying to argue with you. I'm
3 trying to get you to explain to me your logic and how
4 it's specifically applied. Because the way I see it
5 applied is that you're saying that the County of
6 Maui, in its Wailuku District, doesn't have to seek a
7 DBA even though the use -- because the use is
8 allowed. The City and County of Honolulu that
9 doesn't allow the agriculture use has to seek a DBA
10 because it's not allowed.

11 MS. ISAKI: Right.

12 COMMISSIONER OHIGASHI: So I'm asking you
13 how does it apply to the Board of Land and Natural
14 Resources' power to determine what uses are
15 available?

16 MS. ISAKI: Yeah. Sorry. Let me --
17 thank you, Commissioner. Sorry I'm so thick. I
18 am -- I'm looking at 205 again, in kind of urban uses
19 and agriculture a little bit more. Because under the
20 districting and classification statute, that one
21 says -- that the urban district shall include
22 activities that the county decides; right? But then
23 if you look at (e), it doesn't say that. It doesn't
24 say the Board of Land and Natural Resources has that.
25 It just says "conservation district shall include."

1 It's a really long paragraph, but it doesn't say --
2 it doesn't -- so the parallel doesn't work when
3 you're talking about the actual districting.

4 COMMISSIONER OHIGASHI: So my
5 understanding is that you're saying that the Board of
6 Land and Natural Resources does not have the power to
7 determine the use within their --

8 MS. ISAKI: It's not provided for, yeah,
9 under the -- when you're talking about the
10 districting.

11 COMMISSIONER OHIGASHI: Is that your
12 premise that the law -- that the Board of Land and
13 Natural Resources does not govern or establish uses
14 within that area. I just want to know that.

15 MS. ISAKI: So hard. It does, but when
16 you look at your statutes, it's only when they're
17 looking at DBAs. That's when you're looking at
18 permissible uses, not in the initial districting.
19 And, yeah, maybe I'm talking around you.

20 COMMISSIONER OHIGASHI: I have no idea.
21 My question really is from a simple premise. The
22 premise is that urban areas are controlled by the
23 county. Conservation district uses are controlled by
24 the board. The same rules should apply to the county
25 as to the Board of Land and Natural Resources. I'm

1 trying to -- I'm trying to determine whether or not
2 the rules that you're trying to make us determine or
3 interpret or you're asking for us to interpret, how
4 that rule would apply in a situation that I indicated
5 to you. That's why I preface my questions as to if
6 the Board of Land and Natural Resources have the
7 right to do all these things, and it appears that
8 they're the same. The counties are the same as well
9 as the board.

10 MS. ISAKI: I think --

11 COMMISSIONER OHIGASHI: Unless you can
12 point to me that they cannot do it. And if they
13 cannot do it, then for 12 telescopes, they shouldn't
14 have been doing it, plus telescopes up at Haleakala.
15 And if that is your attack, then that should be
16 clear.

17 MS. ISAKI: Can I have -- can I step back
18 a little bit and then talk about, like, so once it's
19 already districted, yes, the BLNR, you know, when
20 you're talking about DBAs, when you're talking about
21 permissible uses, BLNR deals with that. But under
22 your statutory scheme -- sorry -- the statutory
23 scheme of 205-2 when you're talking about the initial
24 districting and classification, which is the power
25 that we're asking you to exercise, it specifically

1 says that when you're determining urban uses that
2 you -- that the counties are the ones. You refer to
3 the ordinance of the county. But when you're
4 determining the districts, if you look at (e),
5 BLNR --

6 Maybe I'm repeating myself. The BLNR
7 doesn't have the same, like, deference or referential
8 status.

9 COMMISSIONER OHIGASHI: Status.

10 MS. ISAKI: Status, yes.

11 COMMISSIONER OHIGASHI: That's your
12 position?

13 MS. ISAKI: Yeah.

14 COMMISSIONER OHIGASHI: Okay.

15 CHAIRPERSON SCHEUER: Commissioner
16 Cabral.

17 COMMISSIONER CABRAL: Well, Commissioner
18 Ohigashi's questions made me come up with a question.
19 Under your premise that your petition is asking for,
20 would a landowner who owns land in an area that,
21 let's say, it is currently zoned -- doesn't matter
22 what it's currently zoned, and they're denied the
23 ability to change and do what they want to, it would
24 seem like from your petition that then that landowner
25 could come to this body, to the Land Use Commission,

1 and say, "I request to petition that you change the
2 zoning of that land so that I can do what I want to
3 do." Is that what you're somewhat proposing that
4 this body be a method by which a landowner -- or even
5 not the landowner, but that someone else can go and
6 ask for a change in zoning of a land?

7 MS. ISAKI: I think that's functionally
8 what does happen and -- but I think it's -- but you
9 look at a different set of standards. So you can
10 change the district if you meet those standards. You
11 can apply for whatever permits in the scenario. It
12 seems like those are two things that can happen, but
13 the land use districting statute is -- they first
14 determine where the things are. And so it should
15 be -- the standards are a little more stringent than
16 they should be.

17 COMMISSIONER CABRAL: But your petition
18 is saying that even if somebody is not the landowner,
19 that they would still have the right to come to the
20 Land Use Commission and ask for a change in what that
21 zoning would be?

22 MS. ISAKI: I think if they have a
23 property interest or if there's a state agency or
24 county, I think that's what you're --

25 COMMISSIONER CABRAL: His question made

1 me think of that question.

2 My initial question was it was said --
3 now, it gets somewhat confusing because you are the
4 attorney for the petitioners. So I'm trying to
5 clarify what you're saying versus what others have
6 said, even what the petitioners have said. And I
7 think Ku'u lei said that he understood that this would
8 not -- such a change in zoning would not or any of
9 this action would not have any effect on those who
10 have a current permit and a current lease to be on
11 Mauna Kea mountain. I think he referenced it in that
12 manner. Is that your understanding that if we were
13 to move forward, that it would have no effect under
14 the current leases, the current permits that are
15 currently already been granted to parties?

16 MS. ISAKI: I can't -- you're talking
17 about Ahiena or Kuulei?

18 COMMISSIONER CABRAL: Ku'u lei. I think
19 it was Ku'u lei that said that.

20 MS. ISAKI: I might not have been --

21 COMMISSIONER CABRAL: Because I took some
22 notes here and he talked about something that,
23 well -- oh, no, it was Mr. Collins that said
24 something about generally the government will follow
25 the law. But I think Ku'u lei said that the area --

1 that he understood that it would not have any effect
2 on the current -- current buildings and the current
3 permits that were up there. And I know that
4 questions and answers can get confusing for people.

5 Then my question for you is if we were to
6 move ahead with your petition and if that were to
7 continue to go forward, is your vision that it would
8 have no effect on the current permits and the current
9 leases that have ongoing rights many years into the
10 future?

11 MS. ISAKI: I mean, yeah, certainly there
12 would be like questions about property rights,
13 grandfathering and, like, you know, what were
14 reasonable investment expectations. It's a tricky
15 legal question. It wouldn't not effect, like, going
16 forward the leases or the renegotiation of leases and
17 such.

18 COMMISSIONER CABRAL: Okay. So I'm not
19 clear on your answer.

20 MS. ISAKI: My answer is that those who
21 have a current permit on Mauna Kea, it was never
22 granted not subject to all the rules of the state,
23 and you have always had the power to redistrict. So
24 I think it would probably go to litigation, but my
25 position would be that it would have an effect and

1 I -- I can't remember what Ahiena or Ku'u lei
2 specifically said about that. It might have been --

3 COMMISSIONER CABRAL: Like I said, it's
4 very confusing when these questions and answers
5 happen. So what I'm hearing from you is that if your
6 petition were to be granted and it just moved ahead
7 without challenge, et cetera, that it would
8 potentially be such that it would completely override
9 everything that's the lease, the university's lease
10 till 2033, and all of the subleases, that would no
11 longer be valid?

12 MS. ISAKI: I think that they -- it
13 wouldn't be that they weren't validly issued. I
14 think it would be they -- that they would be somewhat
15 required to be engaging with the DBA process.

16 COMMISSIONER CABRAL: Okay. Well, that's
17 confusing also. Okay. I got my initial answer.
18 Thank you very much.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner Cabral.

21 Commissioners?

22 Commissioner Aczon.

23 COMMISSIONER ACZON: So it's your
24 position that the petitioner has the legal standing
25 to ask the Land Use Commission for a district

1 boundary amendment? Secondly, it's your position
2 that we can force the owner to submit to petition a
3 DBA?

4 MS. ISAKI: Well, I think under your
5 statutes and your rules, it says somebody with a
6 property interest. I think that your rules might
7 also require, like, to comply with all the rules for
8 a district boundary amendment as nonlandowners. I'd
9 have to get back to you on that. But I do think the
10 property interest and, first glance, if they wanted
11 to apply for a DBA, that I would want more time to
12 think about that.

13 Sorry. And your second question was?

14 COMMISSIONER ACZON: Can you force the
15 landowner -- can you force the owner to come to us
16 and ask for the DBA?

17 MS. ISAKI: I think by virtue of saying
18 that those uses are outside or supposed to be in the
19 urban district, that in itself, because the agencies
20 are expected to comply, would -- would put them
21 out -- would put them in a situation where, yes, they
22 would have to do a DBA.

23 COMMISSIONER ACZON: So your position is
24 we can force the owner to come to us or voluntarily
25 come to us?

1 MS. ISAKI: If they want to continue to
2 use the land in the way that we described in the
3 petition, yes.

4 CHAIRPERSON SCHEUER: Commissioner Wong.
5 Thank you, Commissioner Aczon.

6 COMMISSIONER ACZON: Thank you, Chair.

7 COMMISSIONER WONG: Going to Commissioner
8 Aczon's questioning, so he stated that we can force
9 the owner to come to us for a DBA; right?

10 MS. ISAKI: Uh-huh.

11 COMMISSIONER WONG: What if they don't
12 want to?

13 MS. ISAKI: Then their uses would be
14 noncompliant with the land use law.

15 COMMISSIONER WONG: So I'm going back to
16 my statement about the counties that sometimes thumb
17 their nose on some of our conditions. How do we --
18 what do we do? Because right now in our statute, we
19 have only one thing we can do is order to show cause.
20 We cannot fine them. I mean, this is a legislature
21 issue, but I'm just saying we cannot fine them. We
22 cannot go and slap their wrist pretty much, except
23 order to show cause. Let's say -- what do we do?

24 MS. ISAKI: How do you enforce your
25 orders?

1 COMMISSIONER WONG: Or say we wanted to
2 say, "Hey, you know what, we want to do a DBA on
3 you," but let's say the county didn't want to show
4 up. What are we going to do? The question for me as
5 just a local guy saying, "I'm not going to go and
6 drag them by the neck because I'd be arrested, but do
7 a titty hold or slap them around first and then bring
8 them to the table, but I mean, how do we do it then?"

9 MS. ISAKI: Again, outside of, like, what
10 I've raised, but, I mean, I think the fact of you
11 making that order would in itself have legal effect
12 and if they want to remedy their compliance with the
13 land use law and they should want to do that, as
14 coequal state agencies, that they would do it. But
15 your question about enforcement and making people
16 follow the law and making counties and other agencies
17 follow your law or your orders, I'm sorry, I don't
18 know.

19 COMMISSIONER WONG: I'm sorry. I come
20 from the background of public school. So I would
21 just slap them, yeah. Sorry. Thank you.

22 CHAIRPERSON SCHEUER: Thank you,
23 Commissioner Wong.

24 COMMISSIONER CABRAL: I'll slap him.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Cabral. That is appreciated.

2 Commissioner Ohigashi.

3 COMMISSIONER OHIGASHI: Doctor, I'm
4 talking loud because they told me to, but I'm trying
5 my best not to do it, but I didn't --

6 My question really revolves around this
7 is that do you have -- assuming that we issue a
8 declaratory order, what time frame must the
9 university or any part of that can file for a
10 boundary amendment, what time frame should they come
11 in by?

12 MS. ISAKI: I think that -- I mean, as
13 soon as possible, but that's just off the top of my
14 head. But I think in order for them to do anything
15 else, anything else with the land, leasing,
16 construction building permits, that kind of thing,
17 whatever the timeline is for that, that would --

18 COMMISSIONER OHIGASHI: Well, they have,
19 according to my understanding, the building permits
20 and things like that; right?

21 MS. ISAKI: Yeah. They're is one --

22 COMMISSIONER OHIGASHI: They have the
23 permits -- they have their permits to do that.

24 MS. ISAKI: But I assume that they need
25 further --

1 COMMISSIONER OHIGASHI: So when should
2 they come in?

3 MS. ISAKI: I need a little more time to
4 look at like -- because I know they have different
5 things they want to do with the land,
6 decommissioning. They just built a parking lot.
7 There's a whole bunch of --

8 COMMISSIONER OHIGASHI: These are things
9 that are in my mind for practical purposes. Is your
10 clients going to seek a restraining order or
11 injunction if you get this declaration?

12 MS. ISAKI: We haven't discussed that,
13 but I don't know.

14 COMMISSIONER OHIGASHI: I commend you for
15 saying that because, normally, the practice if
16 lawyers try to game out extensively what they want to
17 do, and if you're representing to us that your
18 position is you haven't gamed that out, I accept
19 that.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Ohigashi.

22 Commissioners, any further questions?

23 If there's none, I have a couple of
24 questions asking for clarification on your argument,
25 particularly as related to two of the questions from

1 my fellow commissioners.

2 The first is, and I'll try and frame this
3 as a question, had to do with a line of questioning
4 from Commissioner Giovanni because, indeed, I was
5 thrown for a loop when I understood you and your
6 clients' position to be we want to compel the
7 university to apply for a district boundary amendment
8 which we will oppose, which seemed a little bit
9 circular. But is the distinction that you and your
10 clients are raising that if the -- if this is granted
11 and the petition you seek is granted by us and the
12 university is, therefore, under the law, if they wish
13 to be compliant with our ruling and going to apply
14 for a district boundary amendment, you're letting us
15 know that your clients would oppose it. But the fact
16 that they get to oppose it and look at the summit in
17 a comprehensive way is really the relief that they're
18 seeking even though we may choose to grant the urban
19 districting?

20 MS. ISAKI: Yes. Yeah. That's an
21 accurate characterization.

22 CHAIRPERSON SCHEUER: Okay. And then
23 regarding the questions from Commissioner Ohigashi
24 with the analogy that was drawn with a 40-acre
25 sunflower farm in Honolulu or Kahului --

1 COMMISSIONER CABRAL: Wailuku.

2 CHAIRPERSON SCHEUER: Oh, excuse me.
3 Wailuku.

4 And there was some discussion about the
5 language in Chapter 205-2. So 205-2(b) says, correct
6 me if I'm wrong, "Urban districts shall include
7 activities or uses as provided by ordinances or
8 regulations of the county within which the urban
9 district is situated."

10 MS. ISAKI: Yes.

11 CHAIRPERSON SCHEUER: 205(e) does not say
12 conservation uses shall include activities or uses as
13 provided by rules of the Board of Land and Natural
14 Resources?

15 MS. ISAKI: Right. Yeah, that's my point
16 on that one.

17 CHAIRPERSON SCHEUER: Rather, it actually
18 specifically states what may occur in a conservation
19 district. And then later in the statute, it says
20 that the BLNR is in charge of doing this, but the
21 clear implication is unless we are to conclude that
22 the language in 205-2(e) is irrelevant and should be
23 ignored, that whatever is done by BLNR has to comply
24 with what's in 205(e)?

25 MS. ISAKI: I think you don't have to

1 review their decisions, but, yeah, I think that it is
2 not standardless. So as you're saying, like, there
3 is some integrity to the conservation district, and
4 it's laid out in 205-2(e). So I'm just agreeing with
5 you, I think, if that's not confusing.

6 CHAIRPERSON SCHEUER: Sorry. So you are
7 disagreeing with me or you are --

8 MS. ISAKI: Agreeing.

9 CHAIRPERSON SCHEUER: I think you said
10 that "just agreeing with you," but I heard it as
11 "disagree."

12 That was it for me. Is there anything
13 further? If not, then I think what we're going to do
14 is take a quick break, and then the commission will
15 go into deliberation, obviously in public session.

16 So let's take a 10-minute break. It's
17 2:05. We'll break until 2:15.

18 (A recess was taken from 2:05 p.m.
19 until 2:14 p.m.)

20 CHAIRPERSON SCHEUER: Thank you for your
21 presentation. I will now remind the petitioner and
22 the audience that this is a proceeding in response to
23 a request for a declaratory ruling. As such, the
24 decision of the commission will be made on written
25 briefs on the file and posted to our website. This

1 is not a contested case hearing nor an evidentiary
2 hearing. Any oral presentations made today and oral
3 testimony will be taken into account in the
4 decisions -- commission's decision-making process.

5 According to the commission's
6 administrative rules, section 15-15-100, within 90
7 days after receipt of a petition for declaratory
8 order, the commission shall either deny the petition
9 in writing stating the reasons for the denial, issue
10 a declaratory order, or set the matter for hearing as
11 provided in section 15-15-103 of the commission
12 rules.

13 In addition, section 15-15-102 of the
14 commission rules provides that the commission, for
15 good cause, may refuse to issue a declaratory order
16 by giving specific reasons.

17 The commission may so refuse where, one,
18 the question is speculative or purely hypothetical
19 and does not involve existing facts or facts that can
20 be expected to exist in the near future;.

21 Two, the petitioner's interest is not of
22 the type that would give the petitioner standing to
23 maintain an action if the petitioner were to seek
24 judicial relief;

25 Three, the issuance of the declaratory

1 order may affect the interest of the commission in a
2 litigation that is pending or may reasonably
3 expect -- be expected to arise;

4 Or, four, the matter is not within the
5 jurisdiction of the commission.

6 The commission will now conduct formal
7 deliberations on this matter. And I will note for
8 the petitioner and the public that during the
9 commission's deliberations, I will not entertain any
10 additional input from the petitioner or the public
11 unless those individuals or entities are specifically
12 requested to do so by me as the chair. If called
13 upon, I will require that any comments be limited to
14 the questions at hand.

15 Commissioners, let me confirm that each
16 of you have reviewed the record and are prepared to
17 deliberate on the subject docket. After I call your
18 name, would you please signify with an aye or a nay
19 that you're prepared to deliberate on this matter.

20 Commissioner Aczon.

21 COMMISSIONER ACZON: Aye.

22 CHAIRPERSON SCHEUER: Commissioner
23 Cabral.

24 COMMISSIONER CABRAL: Yes.

25 CHAIRPERSON SCHEUER: Commissioner

1 Giovanni.

2 COMMISSIONER GIOVANNI: Aye.

3 CHAIRPERSON SCHEUER: Commissioner
4 Ohigashi.

5 COMMISSIONER OHIGASHI: Aye.

6 CHAIRPERSON SCHEUER: Commissioner Okuda.

7 COMMISSIONER OKUDA: Yes.

8 CHAIRPERSON SCHEUER: Commissioner Wong.

9 COMMISSIONER WONG: Aye.

10 CHAIRPERSON SCHEUER: The chair is also
11 prepared to deliberate on this matter.

12 So, commissioners, what is your pleasure?
13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Thank you,
15 Mr. Chair. Mr. Chair -- and I make this motion with
16 all respect to everyone here who's testified and for
17 the presentations made by all parties. Based on the
18 record, I move that the Land Use Commission deny the
19 petition for declaratory orders.

20 COMMISSIONER OHIGASHI: Second.

21 CHAIRPERSON SCHEUER: A motion has been
22 made to deny the petition for declaratory order, and
23 seconded by Commissioner Ohigashi. Our rules require
24 that reasons be stated.

25 Are you going to be speaking to the

1 motion, Commissioner Okuda?

2 COMMISSIONER OKUDA: Yes. Yes, I will
3 whenever, Chair, you so direct me to.

4 CHAIRPERSON SCHEUER: You may proceed.

5 COMMISSIONER OKUDA: Thank you,
6 Mr. Chair. Let me first say what is not the reason
7 for this motion. This motion is not being made
8 because I believe we have sufficient record to state
9 or to conclude that we should trust the University of
10 Hawai'i as far as the management of Mauna Kea.
11 Possibly, there's grounds to trust or believe in
12 representations that have been made to the commission
13 during these proceedings. Maybe there's sufficient
14 evidence to indicate that these representations
15 shouldn't be relied on. But that really is not the
16 issue here. Frankly, it's not going to be this
17 commission in the end who's going to be the ultimate
18 determinator of whether or not the representations
19 being made by the University of Hawai'i should be
20 believed or not believed. In the end, that's going
21 to be a community decision, not ours.

22 But for purposes for why I'm bringing
23 this motion, it's basically because there is no
24 subject-matter jurisdiction. We, as the commission,
25 are duty bound to follow the law. We're bound to

1 follow the law even if we disagree with the law. And
2 there's many practical and legal reasons for that.
3 One reason is, frankly, to prevent people getting
4 special treatment just because they're friends,
5 acquaintances or relatives in government or places
6 that make decisions. We have the law because the law
7 is supposed to set a standard by which everyone's
8 behavior as citizens in a community have to be
9 followed. There's not supposed to be two sets of
10 rules, three sets of rules or different sets of rules
11 just because you know somebody or you don't know
12 somebody, or whether because you're rich and powerful
13 or you have fancy academic degrees or you don't.

14 The fundamental principle of our
15 community and our democracy is the fact that the
16 rules apply to everyone equally across the board.
17 Now, there's a price to pay for that rule, and the
18 price that we pay is many times, oftentimes we're
19 going to have to stomach decisions we don't like.
20 But at this point in time, I might have my own
21 personal opinions about what has taken place by -- by
22 the university as far as the management of the
23 summit, but exercising our duty to follow the law in
24 my view, we have to first look at whether or not the
25 Land Use Commission has what we call subject-matter

1 jurisdiction over this case, whether we can even make
2 that decision.

3 And the reason why I conclude and I would
4 urge my commissioners to support the motion is I
5 believe that the statute is clear on its face. The
6 law is clear on its face that governance of what
7 takes place within the conservation district is
8 exclusively vested with the Department of Land and
9 Natural Resources. We may disagree whether that's a
10 good policy given what's happened up at Mauna Kea,
11 but that's what the plain language of the law says,
12 and it seems like all the attorneys that were
13 involved in this proceeding agree that the law should
14 be followed based on its plain language.

15 And what that statute says -- that's
16 205-5, paren, small (a), close paren, and I quote,
17 "Conservation district shall be governed by the
18 Department of Land and Natural Resources pursuant to
19 Chapter 183C," close quote. And so that's the law,
20 and the law says that the body that makes the
21 decisions about governance of what takes place within
22 a conservation district is the Department of Land and
23 Natural Resources. We might not like that law, but
24 that's what it basically says.

25 Now, the next question is, well, we saw

1 the evidence and the slides about the number of
2 telescopes that are up on the Mauna Kea summit. But
3 the Hawai'i Supreme Court in the Supreme Court
4 decision that has been discussed, which is commonly
5 called Mauna Kea, Roman numeral II, and that's found
6 at volume 143 of the Hawai'i Reports at page or
7 starting at page 378, in essence and as a foundation,
8 has held that telescope is a permissible use.
9 Because if that was not the fundamental decision of
10 the Hawai'i Supreme Court, it could not and would not
11 have affirmed the decision of the Board of Land and
12 Natural Resources regarding the TMT telescope.

13 Now, I listened very carefully and
14 actually tried to go back last evening and look
15 through the case law and the statutes with respect to
16 a number of the arguments that the petitioners have
17 raised. I carefully considered those arguments. But
18 based on my review and the responses to the testimony
19 here or the colloquy or questions that were raised,
20 especially to the attorneys, there's no specific
21 authority that has been cited which gives the
22 commission -- the Land Use Commission the authority
23 to order a property owner to file a boundary
24 amendment. The statute sets forth and, by essence,
25 limits the Land Use Commission to its stated

1 authority, and there's nothing in the law that says
2 the Land Use Commission can directly or even
3 indirectly compel a landowner to seek out a boundary
4 amendment.

5 There's a fundamental question also
6 whether this legal proceeding here, the use of a
7 declaratory order is a proper proceeding to raise
8 these issues. And we had discussions about the case
9 Citizens Against Reckless Development versus Zoning
10 Board of Appeals of City and County of Honolulu, and
11 we've cited that case before, but for purposes of my
12 explanation, that's found at 114 Hawai'i Reports,
13 184, a 2007 case, where the Hawai'i Supreme Court
14 made clear that a declaratory order proceeding is not
15 a permissible way to appeal or change an agency
16 decision where that agency decision has not been
17 appealed.

18 Well, in this case, the department of --
19 the Board of Land and Natural Resources' decision
20 regarding the TMT telescope has not only been made by
21 the Board of Land and Natural Resources. It was
22 appealed to the Hawai'i Supreme Court and affirmed in
23 the Mauna Kea II decision. And, therefore, under
24 CARD, the use of a declaratory order proceeding is
25 simply not a permissible method of -- not permissible

1 under the circumstances that have been presented in
2 the petition.

3 Let me also address the -- the thought or
4 intention that -- that the landowner, even assuming
5 we get over this big hump, that there's no authority
6 for the Land Use Commission to order or compel a
7 landowner to seek a boundary redesignation. I
8 frankly find redesignating the property, which is
9 clearly conservation property or property which
10 should be subject and included and protected in the
11 conservation zone, to be dangerous. We may disagree
12 with how land has been managed by the Department of
13 Land and Natural Resources, and there's plenty of
14 criticism, but I don't believe the criticism
15 necessarily should be directed at the individuals
16 there because I know of plenty people who work for
17 the DLNR who are -- their goal in life is to protect
18 Hawai'i's natural beauty and resource, and they do so
19 when they can get a lot of higher paying jobs
20 elsewhere. That's how committed the people at the
21 DLNR are to protecting Hawaii's resources.

22 But redesignating property into the urban
23 zone really unleashes a whole bunch of reduction of
24 protections for that land. And even if that argument
25 would be supportable under Hawaii's law from a public

1 policy standpoint, I think it's a really, really
2 dangerous way of addressing bona fide issues on how
3 we protect land.

4 And let me just say this: This ruling is
5 not and should not be taken as a ruling which
6 precludes the Kanahale petitioners from any of their
7 other rights to preserve and protect Hawaii's natural
8 resources. The Hawai'i Supreme Court, I believe, has
9 been very clear recognizing the constitutional
10 provisions in the Hawai'i State Constitution of
11 protecting natural resources and Hawaii's beauty to
12 be very liberal about granting standing to individual
13 citizens of this community and environmental
14 organizations to bring actions, to seek redress in
15 the courts, including injunctive relief where
16 government agencies or others have not adequately
17 protected the resources. And for that I would cite
18 to the Sierra Club versus the Department of
19 Transportation, 115 Hawai'i Reports 299.

20 So, again, for me personally, I
21 appreciate that the Kanahales brought this petition,
22 and I appreciate everyone's testimony here, those in
23 favor of the petition and those who have testified
24 against the petition. In fact, you know, my hat's
25 off to Mr. Stone who testified initially against the

1 petition. It takes a lot of courage for somebody to
2 show up when he knows everyone in the community might
3 not be cheering him on. But I think that's how our
4 community functions where there's active dialogue,
5 where people talk. And I have confidence that people
6 on both sides of goodwill will do something which
7 this commission doesn't have the power to do at this
8 point in time and doesn't have the subject matter to
9 handle at this point in time, and that's basically
10 trying to bring a reasonable resolution of the
11 situation, whatever that resolution would be.

12 And so, Mr. Chair, those are my reasons
13 in favor of and in support of my motion.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Okuda.

16 Commissioners, we are in discussion on
17 the motion. Commissioner Aczon.

18 COMMISSIONER ACZON: Thank you, Chair.
19 I fully concur with Commissioner Okuda, but I will be
20 very short.

21 For me, it all boils down to the
22 jurisdictional issue. Based on Hawai'i Revised
23 Statute 205-2, the commission clearly has the
24 authority to set the standards for and determining
25 the boundaries of the conservation district while HRS

1 205-5(a) and HAR, administrative rules, 15-15-26
2 clearly delegate the authority regarding the uses
3 within the conservation district to DLNR. Therefore,
4 I don't believe that this commission has the
5 jurisdictional capacity to issue a decision on these.
6 So, therefore, I'll be voting in favor of the motion.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Aczon.

9 Commissioners? Commissioner Ohigashi.

10 COMMISSIONER OHIGASHI: I second the
11 motion essentially because I had to decide in my mind
12 whether or not we had jurisdiction or not, and that's
13 essentially the crux of the case whether we had
14 subject-matter jurisdiction or not. And based upon
15 the statutory criteria outlined by Commissioner
16 Okuda, I believe that we don't have jurisdiction.

17 I am not ecstatic over the comments made
18 by the university as well as the various state
19 officials. However, I can understand your position
20 for the purposes of this hearing. I only hope that
21 their position, in Japanese, is not katai or
22 hardened, and that their actual position is one that
23 will try to resolve some of the issues in the
24 periphery and perhaps ease the main issue into some
25 kind of peaceful resolution. I will be supporting

1 the motion.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Ohigashi.

4 Commissioners, we are in discussion.
5 Commissioner Giovanni.

6 COMMISSIONER GIOVANNI: I'd like to think
7 that when we cast a vote in support of a motion or
8 not, that we're moving a matter towards resolution of
9 of an issue or resolution of a problem or settlement
10 in a positive way. I feel that the arguments to be
11 made in a legal sense that I've listened to are
12 compelling; that they lead us in a direction that
13 we're not adding to a resolution of the elephant in
14 the room, which is the fundamental issues that
15 brought us here in the first place.

16 I have to -- I accept -- I've been
17 convinced by my fellow commissioners that we don't
18 have subject-matter jurisdiction to make a clear
19 decision in support of the petition. That doesn't
20 mean that I'm happy to vote that way. I feel
21 compelled to vote that way. As a matter of fact, I
22 share similar feelings with Commissioner Ohigashi.
23 It seems clear that the Department of Land and
24 Natural Resources has the responsibility and the
25 authority to govern this land that's conservation,

1 but I find myself critical of not only the DLNR, but
2 the university in how they governed and managed the
3 land, which leads us to where we are. Nonetheless, I
4 will be voting in support of the motion to deny.

5 CHAIRPERSON SCHEUER: Thank you,
6 Commissioner Giovanni.

7 Commissioner Wong.

8 COMMISSIONER WONG: When I was a little
9 kid, my dad always says, "Answer the questions, or
10 I'm going to slap your head. Yes or no?" Yeah, you
11 see my head all slapped up. But there's only one
12 question here. It's not the question of how well
13 someone manages. To me, that's a bigger issue. My
14 feelings irregardless of --

15 I'm just going to say I think the
16 management kind of sucks. Okay? But the question
17 remains is, you know, just the question itself.

18 Now, looking at the statutes and hearing
19 everyone, it's very hard to say if we have
20 jurisdiction or not for me. Even though I want to
21 say, yes, we have jurisdiction, but listening to
22 everyone, especially the public witnesses that was
23 speaking from the heart. I'm an emotional guy. I
24 wanted to vote with them because of their heart, the
25 koko; however, the logic side of the law has to stand

1 up because we are supposed to follow the law. So I
2 have to support the motion even though I don't want
3 to.

4 And as I told you, I think the management
5 sucks. I think people not talking to each other, you
6 know, they're not listening. As we said, "Listen and
7 try open your heart." They're not opening their
8 hearts. That's the biggest problem. And
9 institutions no matter what don't have a heart to me.
10 People have hearts. So I just wanted to say that.
11 Thank you.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Wong.

14 Commissioner Cabral.

15 COMMISSIONER CABRAL: I've served on a
16 Land Use Commission now just over four years, and I
17 was appointed in a somewhat unique manner, but
18 there's a lot of times we have -- we make decisions
19 that seem pretty clear-cut and, occasionally, we make
20 everybody happy as rare as that might be. And most
21 of the time, somebody's really unhappy and often
22 that's someone who's the developer and the money and
23 that because we're coming back and saying you had to
24 do something and you didn't do it. So now I think
25 Attorney Collier mentioned that -- Collins, that we

1 have done that a few times. So there's those kind of
2 times we can feel good about our decision. But all
3 of the times we have to do what the law allows for us
4 to do, and sometimes there are varying degrees as to
5 a yes or no. They've done what they should or
6 shouldn't. There's a little bit of judgment in
7 there. But in this case, I have to agree with my
8 fellow commissioners to this point that the law
9 doesn't really give us that power to do what the
10 petition -- petitioner is asking. And so I will be
11 supporting that motion.

12 But I also want to make two other
13 comments, and one of them is sort of -- and this
14 isn't really fair to the young people in the room,
15 but maybe more so to myself. I'm old enough and I've
16 been in Hawai'i 45-plus years, and some of the other
17 kupunas around that, you know what, sort of shame on
18 all of us. This has been going on. It wasn't like
19 it was hidden. We all got to see it, and in many
20 ways our community supported that development on the
21 mountain. So, you know, it's not just bad job,
22 university, bad job, DLNR. It's they did at that
23 time what in many cases seemed like a great thing.
24 I'm sure there's newspaper articles cheering on the
25 fact that these developments were taking place

1 because it would bring jobs and economic development
2 and that. So a lot of ways the shift in what's going
3 on now in a lot of ways needs to take place so we
4 don't just pave paradise and make it a parking lot,
5 as Joni Mitchell said, I believe.

6 So, you know, good for the awakening
7 that's taking place. At the same time to come and
8 look at every little way that anybody can just go
9 back and get the eraser and totally clean the
10 blackboard of what took place in the past, we can't
11 go back and change everything that's happened in
12 history throughout the universe because everything
13 would be considerably different if that could happen
14 at any given time. None of us have that power,
15 certainly none of us on the Land Use Commission. So
16 in that regard, I will be supporting the motion.

17 And then one thing I want to say is that
18 I hear things in this community because I live here,
19 and I certainly do not want to think that my life
20 will be threatened or my business or my personal
21 property or my business property will be threatened
22 in any way for the fact that I take a vote in a
23 manner that I'm sworn or taken an oath to take.
24 Because I hear that people's lives are threatened and
25 their properties are threatened because they support

1 30-meter telescope, et cetera, whatever avenue, but I
2 heard people directly tell me that they themselves
3 have had things happen to them. So I really, really,
4 really hope that we are not moving to the point of
5 anarchy because if that's what that type of action
6 takes us, and I live here and I really hope that
7 people will help pass on that you may not get what
8 you want, but that this group would sincerely listen
9 and felt like we had to do what the law required us
10 to do. Thank you.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioner Cabral.

13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Chair, having heard
15 the deliberations, I'd just like to add a clarifying
16 point to my motion and my explanation. My motion is
17 not intended in any way to indicate a support or
18 approval of the conduct of the University of Hawai'i.
19 You know, I believe the record is probably
20 insufficient to make factual findings, but, you know,
21 I am troubled like my fellow commissioners of the
22 fact whenever we have this type of creeping
23 development which seems in the end to, on its face,
24 raise serious issues of strict compliance with our
25 land use laws.

1 I really believe that we in government,
2 when we in government make a representation to the
3 community, we should stand behind our word. That's
4 one of the fundamental reasons why people don't trust
5 the government, and it becomes a source of a lot of
6 problems. You know, so I find -- I find definitely
7 troubling the fact that you have what appears to be
8 major urbanized uses and not a clear record of
9 community consultation and not a presentation of a
10 clear record of the type of compliance that we
11 normally would see in a boundary amendment. That's
12 one of the points.

13 The other point is I don't believe that
14 the university's presentation here was highly
15 persuasive. In fact, in the beginning when the
16 chancellor spoke giving at least me the impression
17 that she had personal knowledge of what was taking
18 place regarding this issue and finding out later that
19 she only arrived really recently, I felt that that --
20 that type of presentation was almost a violation of
21 this case called AIG versus Bateman, and you folks
22 can go look that up in the law books if you want.

23 I don't think that type of engagement is
24 helpful not only for a government commission that has
25 to deal with this type of serious issue, but for

1 communications with the community. That type of
2 presentation, making it seem like, oh, these really
3 are the facts and I have personal knowledge, and then
4 finding out later the person really doesn't have
5 personal knowledge, it's really hard, if we were in a
6 situation where we had to judge credibility of the
7 witnesses, to find that witness credible. So I just
8 want to be sure that the record is clear. My motion
9 is not an endorsement of what has been taking place.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Okuda.

12 Is there anything further before the
13 chair shares remarks?

14 So the tradition of being the chair is
15 that you don't make a motion. You let the body make
16 the motion, and then you speak last. So I've
17 somewhat foregone my ability to try and convince my
18 fellow commissioners who I have tremendous respect
19 for, but it was not the motion I would have made. So
20 I will not be voting for it.

21 The case -- the petition before us brings
22 up novel issues never litigated before. The
23 University of Hawaii's attorney admitted as much.
24 We're not relitigating Mauna Kea II here.

25 The petition has brought up some irony,

1 and I don't think I've been in a room where Hawaiian
2 nationals agreed with the State of Hawai'i Office of
3 Planning that we had no jurisdiction, but here we
4 are. Although, of course, they think we have no
5 jurisdiction for very different issues.

6 I find myself thinking of the day when
7 the Office of Hawaiian Affairs took formal ownership
8 of Wao Kele O Puna on this island, 25,000 acres of
9 so-called ceded lands that were taken by the
10 revolutionary government, ceded to the federal
11 government and then to the state, and the state later
12 sold them to a private entity. I think it remains on
13 this island the site of the largest number of arrests
14 for civil disobedience when people were protesting
15 the development of geothermal energy at Wao Kele O
16 Puna. And decades later, we managed to take it into
17 protective ownership for permanent protection. And
18 at that ceremony, Haunani Apoliona asked "How can the
19 past not be a trap, but be a liberation?"

20 I ask, you know, are we, all of us, Maui,
21 haole, are we brave enough, are we creative enough to
22 see our way through the current standup and find a
23 Hawai'i that is far better than we can even dare to
24 imagine now.

25 I know some people, and I don't live on

1 this island, and so, really, I have a great deference
2 for what Commissioner Cabral has said. I know some
3 people are feeling a schism and perhaps an
4 unprecedented schism. I actually take the point of
5 view however that it's not that things are getting
6 worse, but things are being revealed that have been
7 hidden for too long.

8 If we first look backwards and we ask how
9 did we get here, I really believe the statements of
10 testifiers Shelley Muneoka and Debbie Ward that had
11 the University of Hawai'i come to this body with our
12 powers originally, we would not be in the mess we are
13 now. It's a shame.

14 So jurisdictional issues aside, I think
15 we have a clear picture that if they had followed the
16 proper process, this process, we would not be in the
17 dilemma we are now. And I say that because I come to
18 it from an understanding of the law that this
19 commission is charged with implementing. Why did
20 Hawai'i pass, when this become HRS 205, the only
21 comprehensive land use law among the 50 states? So
22 1961, two years after statehood, jet engines just
23 invented. So we're getting this tremendous economic
24 pressure; right? We just had the democratic --
25 so-called democratic revolution. So, finally, after

1 more time since anytime since 1893, the average
2 person in Hawai'i had some say over how government
3 was going and, yet, all the land in Hawai'i was still
4 largely owned by the Big Five or the state.

5 So we passed this law to try to give the
6 people this wedge, this step in being able to approve
7 how our state moves forward and how our land is taken
8 care of. And we set these four districts, three at
9 the time. We added rural later. And really one of
10 the things that this process allows, it does not say
11 that what is in conservation shall be permanently
12 protected. Land use law does not say that we will
13 always never harm the public trust. But, actually,
14 what it says is it gives us the process by which, as
15 a society, we can say, you know what, we need to do
16 something for the collective good. It will cause
17 harm. It will cause permanent harm. It will cause
18 irrevocable harm. That harm may be disproportionate
19 to one community or one group. But we're allowed to
20 go through the district boundary amendment to
21 thoughtfully consider those impacts. And to quote
22 the Hawai'i Supreme Court in Waiahole, the state may
23 compromise public rights in a resource pursuant only
24 to a decision that is made with a level of openness,
25 diligence and foresight commensurate with the high

1 priority that these rights command under the laws of
2 our state. Instead, what we've had is incremental
3 decision-making, CDUP by CDUP by CDUP with no one
4 ever looking at the entirety of the summit and the
5 impacts. That process very clearly from the record
6 of this proceeding does not allow for that
7 possibility even if cumulative impacts were looked at
8 in the last CDUP issued. The permit itself says
9 here's the conditions that will be addressed by the
10 new telescope. Here's the conditions that will be
11 addressed by the state, but these conditions are all
12 severable. So we can go forward without any
13 addressing of the comprehensive impacts.

14 To me, this question -- this petition
15 focuses on two issues. One is, is it urban? Are the
16 collection of these uses urban? And for me, you
17 know, if it look likes a duck, it quacks like a duck,
18 it's a duck. The summit no longer looks like a
19 conservation district even if individually, clearly,
20 individual telescopes are allowed to exist in a
21 conservation district.

22 And the second issue is do we have
23 jurisdiction? You know, I respectfully hear and
24 listened to the arguments of my fellow commissioners,
25 but I can't reconcile that against the obvious

1 language in 205-2 that defines what's in the
2 conservation district. And if it's not up to this
3 commission to ensure that the four districts' lines
4 are respected, I don't know who it's up to. There's
5 not a case -- there's not an ability to go on a
6 single CDUP in front of the BLNR and contest the
7 entirety of their actions that are all the previous
8 ones. There's no avenue. So somebody has to do it,
9 and I'm wrong -- I'm wrong every day usually before I
10 get out of bed. So I could well be wrong on this
11 one. But I'd rather be told that I'm wrong by the
12 courts, that you overreached our protective actions
13 of the statute than to be overly cautious and not be
14 told it. And so I actually hope that this gets
15 appealed because I think this commission really needs
16 clarity on what the limits are of our abilities and
17 our protections.

18 The last thing I'll say before we vote, I
19 just want to, for the record, wholly reject two
20 statements that were made on the record by witnesses.
21 As I mentioned before in discussions, the assertions
22 by the deputy attorney general for the State Office
23 of Planning, that the only district -- distinction
24 between our land use districts was the level of how
25 difficult it was to get a permit would make -- if you

1 implemented that, it would make a mockery of our
2 entire land use scheme work -- scheme up.

3 And I would also reject the discussion
4 that was made by a member of Mauna Kea Management
5 that said that we can't find solutions in a
6 regulatory process. I think the dilemma that we have
7 had is that we've had all these listening sessions
8 and these soft processes where people's individual
9 rights and collective rights can't be addressed. And
10 that a regulatory process like the LUC's DBA process
11 is actually the avenue to give finality to the rights
12 that the people have. Mahalo.

13 Mr. Orodenger, please poll the
14 commission.

15 COMMISSIONER GIOVANNI: One moment,
16 please.

17 CHAIRPERSON SCHEUER: Commissioner
18 Giovanni.

19 COMMISSIONER GIOVANNI: May I ask the
20 chair for a point of clarification? I think you made
21 the statement that if UH had followed the proper
22 process, we wouldn't be in this situation now. I
23 assume that to mean that if they had applied upfront
24 for a DBA instead of a series of CDUPs, that's what
25 you meant; is that correct?

1 CHAIRPERSON SCHEUER: That is correct.
2 The kinds of conditions we could have put in place
3 would have been overall conditions in the number of
4 buildings, the acreage of impervious surfaces and
5 various other requirements the way we do on other
6 DBAs.

7 COMMISSIONER GIOVANNI: I've been
8 persuaded by your discussion. I'm going to vote in
9 opposing the motion.

10 CHAIRPERSON SCHEUER: Thank you.
11 Mr. Orodanker, please poll the commission.

12 EXECUTIVE OFFICER: Thank you, Mr. Chair.
13 The motion is to deny the petition for
14 declaratory order because the LUC does not have
15 subject-matter jurisdiction.

16 Commissioner Okuda.

17 COMMISSIONER OKUDA: Yes.

18 EXECUTIVE OFFICER: Commissioner
19 Ohigashi.

20 COMMISSIONER OHIGASHI: Yes.

21 EXECUTIVE OFFICER: Commissioner Cabral.

22 COMMISSIONER CABRAL: Yes.

23 EXECUTIVE OFFICER: Commissioner
24 Giovanni.

25 COMMISSIONER GIOVANNI: No.

1 EXECUTIVE OFFICER: Commissioner Aczon.

2 COMMISSIONER ACZON: Yes.

3 EXECUTIVE OFFICER: Commissioner Wong.

4 COMMISSIONER WONG: Yes.

5 EXECUTIVE OFFICER: Chair Scheuer.

6 CHAIRPERSON SCHEUER: Nay.

7 EXECUTIVE OFFICER: Thank you, Mr. Chair.

8 The motion passes with five affirmative votes and two
9 negative.

10 CHAIRPERSON SCHEUER: Before we adjourn,
11 I want to thank the petitioners and to everybody who
12 testified.

13 Contrary to media accounts, the
14 discussions around Mauna Kea are harsh and difficult.
15 I found this room filled with tremendous listening
16 and respect, and I thank you all for that and for the
17 time that you've shared with each other on this. And
18 there being no further business, I declare this
19 meeting adjourned.

20 (Whereupon, the hearing adjourned
21 at 2:57 p.m.)

22

23

24

25

C E R T I F I C A T E

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

I, LAURA SAVO, a Certified Shorthand Reporter in and for the State of Hawai'i, do hereby certify:

That the foregoing proceedings were taken down by me in machine shorthand at the time and place herein stated, and was thereafter reduced to typewriting under my supervision;

That the foregoing is a full, true and correct transcript of said proceedings;

I further certify that I am not of counsel or attorney for any of the parties to this case, nor in any way interested in the outcome hereof, and that I am not related to any of the parties hereto.

Dated this 12th day of November 2019 in Honolulu, Hawai'i.

s/s Laura Savo
LAURA SAVO, RPR, CSR NO. 347