SCAP-14-0000873

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE'OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation, Petitioners-Appellants-Appellants, vs. BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; WILLIAM J. AILA, JR., in his official capacity as Chair of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources; and the UNIVERSITY OF HAWAII AT HILO, Respondents-Appellees-Appellees.	CIVIL NO. 13-1-0349 (Agency Appeal) APPEAL FROM: 1) FINAL JUDGMENT FILED ON MAY 5, 2014; 2) DECISION AND ORDER AFFIRMING BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING CONSERVATION DISTRICT USE PERMIT FOR THE THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE RESERVE DATED APRIL 12, 2013, FILED ON MAY 5, 2014 THIRD CIRCUIT COURT HONORABLE GREG K. NAKAMURA Judge

BRIEF AMICUS CURIAE OF **ABIGAIL K.K. KAWANANAKOA** IN SUPPORT OF MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE'OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE'S **APPLICATION FOR A WRIT OF CERTIORARI**

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Abigail Kinoiki Kekaulike Kawananakoa submits this amicus curiae brief in support of Appellants Mauna Kea Anaina Hou.

INTEREST OF THE AMICUS CURIAE

The Amicus Curiae is Princess Abigail Kinoiki Kekaulike Kawananakoa. She is the great grand niece of King David Kalakaua and Queen Kapiolani and the granddaughter of Prince David Laamea Kahalepouli Piikoi Kawananakoa and Princess Abigail Wahiikaahuula Campbell Kawananakoa. Her mother, Lydia Kamakaeha Liliuokalani Kawananakoa, in keeping with ancient *hanai* adoption, allowed the infant princess to be raised from an early age by her grandmother as a *punahele* child in the regal atmosphere of Hawaiian nobility. This unique upbringing and closeness to the royal legacy of our Hawaiian Monarchy has enriched Princess Kinoiki Kekaulike's cultural perspectives that has guided her in her chiefly role, as ali'i, or royal, as evidenced by her tireless commitment towards the preservation of authentic and traditional Hawaiian culture.[1]

Princess Abigail Kinoiki Kekaulike Kawananakoa is the highest-ranking ali'i alive today. She is the eldest granddaughter of Prince David Laamea Kahalepouli Kawananakoa, designated heir in succession to the Crown of the Hawaiian Kingdom by both King David Kalakaua and Queen Liliuokalani. Princess Abigail Kinoiki Kekaulike Kawananakoa's royal lineage clarifies her genealogical ties to the ruling chiefs of every island - Hawaii, Maui, Molokai, Lanai,

[1] University of Hawaii President David McClain noted: "Princess Kawananakoa's philanthropic work has been essential to the preservation of Hawaiian culture as a heritage for future generations. Through her dedication and generosity, she has helped to sustain authentic Hawaiian history, music, hula, literature and language", available at http:www.hawaii.edu/cgi-bin/uhnews?20081218151858.

Kahoolawe, Oahu, Kauai and Niihau. Senator Daniel K. Inouye noted that that the Amicus Curiae is "a member of the family with the closest blood ties to the Kalakaua dynasty."[2]

She is also a direct lineal descendant of Kukahau`ula and Lilinoe whose remains are noted to have been last viewed by Kauikeaouli, King Kamehameha III, in a cave on Mauna Kea.[3] It is her solemn obligation to protect the land illegally taken and ceded in trust.

ARGUMENT

Mauna Kea is part of the ceded lands trust which includes the Crown lands and the Government lands. The trust lands can only be understood in terms of Hawaii's unique history as noted by this court in Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i, 117 Hawai'i 174, 177 P.3d 884, 891 (2008).[4]

In 1893 the Kingdom of Hawaii was overthrown with the assistance of the United States. At the time of the Overthrow and in order to avoid bloodshed, Queen Liliuokalani placed her inalienable Crown lands together with the Government lands in the care of the United States "until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate me and the authority which I claim as the constitutional sovereign of the Hawaiian Islands." Declaration of Queen Liliuokalani, January 17, 1893, Joint Appendix, 22a. Accordingly, the ceded lands (to the extent the lands could be conveyed at all) were conveyed in trust.

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[2] Senator Daniel Inouye, "Anniversary Of Coronation Of King Kalakaua," 129 Congressional Record, 10,098 (April 27, 1983).

[3] This information is from an excerpt in Kepa Maly's 1997 work "*Mauna Kea – Kuahiwi Ku Ha'o i ka Malie*," that provide one of the few references to Kukahau'ula and Lilinoe. Its source is a translation made by Mary Kawena Pukui in her collection of Hawaiian Ethnological Notes (HEN) at the Bishop Museum.

[4] "The issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai'i, the surrender of 1.8 million acres of crown, government, and public lands to the United States, the admission of Hawai'i as a state of the Union, and the creation of OHA and the public lands trust." Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i, 177 P.3d 884, 891 (2008).

The oversight of the Board of Land and Natural Resources ("BLNR") is not limited simply to applying a list of criteria to the ceded lands. These are lands conveyed in trust and as such there is a fiduciary duty to the beneficiaries. This means, *inter alia*, that as to the ceded lands BLNR must act without even a hint of impropriety and must make certain that any use of the trust land does not cause substantial adverse impact to the land.

In its opposition to the Application for Transfer to the Supreme Court, University of Hawaii-Hilo argued that "the questions presented are routine."[5] The continuous breaches of trust regarding the ceded lands in general and Mauna Kea in particular are hardly routine. Not only is it the Amicus Curiae's solemn obligation to protect the ceded lands but it is the BLNR's fiduciary duty to protect the ceded lands.

A. The Approval Process Has at a Minimum the Appearance of Impropriety.

The argument that no contested hearing was required prior to the February 25, 2011 approval because the approval was merely "conditional" is not credible. Approvals for virtually all Conservation District Use Permits are "conditional" in the sense that the applicant must comply with certain conditions. In other words, the permit is granted so long as you do certain things. This is entirely different from "conditioned" upon the favorable outcome of a contested case hearing. There is no right to any approval – conditional or otherwise - until after the contested case hearing. The opportunity to be heard at a meaningful time and in a meaningful manner must mean at some time before the rabbit is placed in the hat. The BLNR and the Circuit Court obviously relied heavily upon the hearings officer and the BLNR justified its decision by relying on the findings that it at least appears to have sought. Therefore, at a minimum, the "conditional approval" prior to the contested case hearing has the appearance of impropriety.

[5] See University of Hawaii Hilo's Opposition to Petitioners/Appellants' Application for Transfer to the Supreme Court of the State of Hawaii at p.4.

B. The Project is Part of the Cumulative Substantial and Negative Impact on the Land Including Cultural Resources.

The Final Environmental Impact Statement ("FEIS") is not the first or the last document detailing the continuous, incremental negative impact upon Mauna Kea. The 1998 state auditor's report meticulously documented the abysmal performance of the University of Hawaii. The 2005 auditor's report and the most recent report show little improvement. The Appellees seem to think that the Thirty Meter Telescope's impact on Mauna Kea should be evaluated as if either nothing has happened at Mauna Kea for 45 years or that because the negative impact has been so substantial that Mauna Kea cannot be degraded anymore. Given the abysmal state of affairs, the BLNR claims that the *cumulative* impact of the use need not be considered but only the impact of this particular project. University of Hawaii Hilo goes so far as to claim that if an acceptable impact were a 10 and the then existing impact already 20, then there is no substantial impact to the existing natural resources if a proposed project's impact is less than 10. This is patently absurd and is not the law. Assume an airport with an acceptable noise level of 100 and an existing level (one runway) of 90. Appellants' argument dictates that a new runway with its own noise level of 80 would have no substantial impact.

Moreover, not only is the argument absurd but it is contrary to the common sense interpretation of the regulation. The EIS is required to discuss the cumulative impacts:

§11-200-17 Content Requirements; Draft Environmental Impact Statement

A. The draft EIS, at a minimum, shall contain the information required in this section.

B. The draft EIS shall contain a summary sheet which concisely discusses the following:

1. Brief description of the action;

2. Significant beneficial and adverse impacts (including cumulative impacts and secondary impacts);

3. Proposed mitigation measures;

4. Alternatives considered;

5. Unresolved issues; and

6. Compatibility with land use plans and policies, and listing of permits or approvals.

It would be absurd after requiring the EIS to discuss cumulative impacts for the cumulative impacts then to be disregarded under HAR 13-5-30(c)(4). That is exactly the position of the Appellees.

The issue of substantial impact is not novel and is not unique to HAR 13-5-30(c)(4). The National Environment Policy Act ("NEPA") also considers the significant impact of an action. It is well settled that the *cumulative* impacts must be considered:

> "(b) Cumulative Impacts
>
> NEPA requires that where several actions have a cumulative or synergistic environmental effects, this consequence must be considered in an EIS." Kleppe v. Sierra Club, 427 U.S. 390, 410, 96 S.Ct. 2718 2730, 49 L.Ed.2d 576 (1976); Save the Yaak Committee v. Block, 840 F.2d 714, 721 (9th Cir.1988); 40 C.F.R. Sec. 1508.7. Sierra Club v. Penfold, 857 F.2d 1307 (C.A.9 (Alaska), 1988)

The NEPA has a definition for the exact issue faced in the present case:

> **40 CFR 1508.7: Cumulative Impact**
>
> *Cumulative impact* is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

It is undisputed in this case that the FEIS determined significant cumulative adverse impact. In fact the FEIS concluded that the project would *add* a limited increment to the current

level of cumulative impact. "**Therefore, those resources that have been substantially, significantly, and adversely impacted by past and present actions would continue to have a substantial, significant, and adverse impact with the addition of the project.**" JEFS 214 at 16. Yet the BLNR turned the requirement to consider the cumulative impact on its head. BLNR stated in Conclusion of Law 95 that "**Petitioners also argue that because the summit area of Mauna Kea has suffered significant and adverse impacts in the past, no project can be undertaken in that area without first reducing the existing cumulative impacts to a level that is less than significant and adverse. Petitioners offer no legal basis for that position.**" The BLNR goes further in Conclusions of Law 96 on page 95 to state "**In other jurisdictions, where projects have been proposed for locations that were already substantially impacted by previous development, courts have assessed the proposed new projects on their own merits. . .**". This is remarkable in that the University is to be rewarded for its existing degradation of Mauna Kea. Again what is the point of requiring a discussion of the cumulative effects only to judge a project "on their own merits". Nothing in HAR 13-5-30(c)(4) suggests that the project is to be judged only on its own merits or that the cumulative degradation is to be ignored.

CONCLUSION

The BLNR has failed to discharge its duty to protect the trust lands. The public is left with the perception that the approval process merely yielded a foregone conclusion. The BLNR and the Circuit Court clearly were erroneous, arbitrary and capricious in concluding that consideration need only be given to the impact of the TMT by itself and not the continuing, cumulative impact of the degradation of Mauna Kea to which the Appellant's admit the TMT will add.

This Court should grant the Application and vacate the Circuit Court's Order and Judgment. The matter should be returned to the BLNR with an instruction that it is to have a

contested case hearing with a new hearings officer and that the BLNR determine the cumulate effect of the use of the land in determining substantial impact upon the natural and cultural resources.

DATED: Honolulu, Hawaii, July 22, 2015.

Respectfully submitted

VAN BUREN & SHIMIZU LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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