

1 IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

2 STATE OF HAWAII

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Intermediate Court of Appeals
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5 KAHEA: THE HAWAIIAN
6 ENVIRONMENTAL ALLIANCE, a
7 domestic non-profit
corporation; MAUNA KEA
ANAINA HOU, et al.,
Appellants,

8 vs.

9 BOARD OF LAND AND NATURAL
10 RESOURCES, STATE OF HAWAII,
et al.,
Appellees.
11 -----

CIVIL NO.
13-1-0349

12 TRANSCRIPT OF PROCEEDINGS

13 before the Honorable Greg Nakamura, Judge, First
14 Division, presiding on Friday, December 13, 2013.

15 ORAL ARGUMENTS

16 APPEARANCES:

17 RICHARD WURDEMANN, Attorney for
18 Appellants Kahea

19 JAY HANDLIN, Attorney for
20 Appellee University of Hawaii at Hilo

21 JULIE CHINA, Deputy Attorney General for
Appellees BLNR, DLNR, and William Aila, Jr.
22
23

24 REPORTED BY: Audrey Tanouye, CSR 225
25 Official Court Reporter, State of Hawaii
Audrey S. Tanouye, CSR 225
Official Court Reporter, State of Hawaii

1 FRIDAY, DECEMBER 13, 2013 9:07 O'CLOCK A.M.

2 --oOo--

3 THE CLERK: Calling Civil number 13-1-349, Mauna
4 Kea Anaina Hou versus Board of Land of Natural Resources,
5 State of Hawaii, et al., oral arguments.

6 THE COURT: State your appearance.

7 MR. WURDEMANN: Good morning, Your Honor. Richard
8 Naiwieha Wurdemann on behalf of the Appellants in this
9 matter, Your Honor.

10 THE COURT: Good morning.

11 MR. HANDLIN: Good morning, Your Honor. Jay
12 Handlin on behalf of Appellee, University of Hawaii at
13 Hilo.

14 THE COURT: Good morning.

15 MS. CHINA: Good morning, Your Honor. Deputy
16 Attorney General Julie China on behalf of Appellees Board
17 of Land and Natural Resources, Department of Land and
18 Natural Resources, and William Aila, Jr.

19 THE COURT: Okay. Good morning.

20 So first there is a request for extended coverage.
21 Mr. Wurdemann, any objection?

22 MR. WURDEMANN: No, Your Honor.

23 THE COURT: And Mr. Handlin?

24 MR. HANDLIN: No, Your Honor.

25 THE COURT: And Miss China?

1 MS. CHINA: No, Your Honor.

2 THE COURT: Okay. So the Court will grant
3 extended coverage. Okay, so who's the video person? Oh,
4 so you're set up already?

5 THE VIDEO PERSON: Yes, sir.

6 THE COURT: Okay. Um, I've been told that some of
7 you might have cell phones or other electronic devices
8 for the purpose of perhaps recording what is occurring in
9 court. But that is improper, okay. So I'm going to
10 direct you not to do that, okay. It's a -- would be a
11 violation of our court rules. And in lieu of that,
12 that's why we have the video going by way of the extended
13 coverage order. Okay.

14 So we have half an hour. I'm going to suggest
15 that -- I guess Appellant would have 15 minutes. And
16 Appellees split the remaining 15 minutes.

17 How would you like to split the 15 minutes?

18 MR. HANDLIN: Ten and five.

19 THE COURT: Okay. Who gets the ten?

20 MR. HANDLIN: Apparently I do.

21 THE COURT: Alright. Okay. And I did read the
22 briefs, and I did read the findings, conclusions,
23 decision order. But didn't go into the record yet. I
24 would suggest the best use of time would be for you to
25 address the two or three points that you really, really

1 want me to take a look at. But if you prefer to rehash
2 what's in the briefs, that's fine too, I'll go ahead and
3 listen.

4 Mr. Wurdemann?

5 MR. WURDEMANN: Thank you, Your Honor. And may I
6 reserve a few minutes for rebuttal as well?

7 THE COURT: Okay. You want some guidance from the
8 clerk or no?

9 MR. WURDEMANN: Yeah, if after ten they could flag
10 me down, I would appreciate that.

11 THE COURT: Alright. Okay. Go ahead, Mr.
12 Wurdemann.

13 MR. WURDEMANN: Thank you, Your Honor.

14 Your Honor, let's start off with the first point
15 of argument and that was the whole due process matter
16 that we submit was grossly violated in this case. The
17 BLNR ruled on the CDUP even before the contested case
18 hearings were held.

19 And Appellee, University of Hawaii Hilo, suggest
20 in their answering brief that, well, they state
21 construction during the contested case hearing so that
22 clears the problem. That doesn't. They ruled on the
23 CDUP permit. Everything subsequent to that was just
24 pro forma.

25 The ruling after the contested case hearings were

1 conducted, was essentially just the rehash of what was
2 done way back in February of 2011 when that approval was
3 made. The BLNR didn't have to make an approval. They
4 shouldn't have made the approval. But they did. And
5 that first and foremost was gross error. It violated the
6 Appellants' due process rights.

7 And the remedy for that, Your Honor, as I state in
8 the opening brief and also in my reply brief, is to
9 vacate and remand back to the BLNR. And let's conduct a
10 contested case hearing in front of a neutral hearings
11 officer and let's do it right. We can't compromise due
12 process. Due process is fundamental under the
13 Constitution as the Court knows. And post -- attempts at
14 post remedying the problem, other than just a pure
15 vacating, would not suffice in any way. And we submit
16 that that is a proper remedy for this Court.

17 The second point that I wanted to talk about were
18 the requirements for the issuance of the Conservation
19 District Use Permit under 13-5-30(c) of the Hawaii
20 Administrative Rules, keeping in mind that the applicant,
21 University of Hawaii Hilo, has the burden under the rules
22 for establishing each and every element that is set forth
23 in the rules.

24 And the first point, the proposed land use is
25 consistent with the purpose of the conservation district.

1 Your Honor, as I talk about in my briefs, the statutory
2 schemes that were adopted in 1994 by the Legislature, and
3 rules were promulgated consistent with those, emphasize
4 conservation, protection, and preservation. Conservation,
5 protection, and preservation. Not building huge concrete
6 industrial centers on a conservation land, which is
7 what's being done or proposed to be done in this case.

8 The -- if you look at just elements four, five,
9 and six of 13-5-30(c), not cause substantial adverse
10 impact, ah, proposed land use is compatible with the
11 locale and surrounding areas. Six, the existing physical
12 and environmental aspects of the land such as natural
13 beauty and open space characteristics will be preserved
14 or improved upon.

15 They're building a metallic 18-story
16 eight-and-a-half acre industrial complex on top of the
17 mauna in an area on the northern slope that had not yet
18 been developed. And it's completely disingenuous to say
19 that that is not -- that is somehow preserving or
20 improving upon the area, this conservation protection
21 that is required under the statute and the rules. That
22 in and of itself is clearly a noncompliance and the
23 substantial evidence does not support the granting of the
24 CDUP and the finding of the -- the subparagraphs having
25 been met.

1 The University of Hawaii Hilo and the BLNR also
2 make this comment in their findings and conclusions. And
3 on page 100, I believe, one conclusion that I'd like to
4 emphasize is under paragraph 128 there were conclusion
5 that the visual landscape on Mauna Kea in the summit
6 areas have already been substantially altered and
7 impacted. And that somehow this TMT project should be
8 assessed given that context. That's not what the law
9 requires. That's not what the rules require. That's not
10 what conservation and protection means.

11 They're saying it's already a mess up there, we'll
12 make it a little bit more of a mess, and it's okay.
13 We'll create some economic benefits for the community.

14 That's a mitigation, for example. That's not covered
15 under the rules. That's not proper mitigation under the
16 rules for 13-5-30(c), Your Honor.

17 The other points that I discuss about
18 substantially in my brief citing to the record, the other
19 elements of 13-5-30(c) have not been met either. And
20 obviously the remedy for the failure to meet and the
21 failure to be substantial evidence to support each and
22 every element being met is to vacate and reverse the
23 granting of the CDUP.

24 The next point that I'd like to talk about is the
25 Ka Pa'akai standards, Your Honor. What we have here, I

1 would submit to the Court, is really -- and if the Court
2 -- if I could focus the Court's attention on the exhibit
3 and appendix to the opening brief. There are substantial
4 support and testimony by various Appellants as to their
5 cultural practices up on the mauna. And we would submit
6 that they did -- we disagree and we challenge those
7 findings and conclusions that say that Native Hawaiian
8 and customary traditional -- custom and traditional
9 practices were not met.

10 But nonetheless, alternatively, the BLNR, we would
11 submit, has an affirmative obligation under the
12 Ka Pa'akai case and the statutory schemes that I cite in
13 my brief, to not just sidestep claims for custom and
14 tradition. They have an affirmative duty to pinpoint
15 exactly what those customary and traditional practices
16 are. Not -- I'm talking about the stipulation that was
17 done in there. Okay, we're just going to stipulate to
18 the Appellants being experts, let's move on with the
19 record. And essentially what was done in this point --
20 in this case. That's not what the duty of the BLNR is.

21 The duty is for them to take every conceivable
22 step possible to identify what the customary and
23 traditional practices are. To insure that those
24 practices are protected to determine how they're affected
25 and impaired, and to be protected.

1 And we would also submit, and as we talked about
2 in the brief, is that not only did they fail to do that,
3 but they passed the buck onto the University of Hawaii
4 Hilo. An improper delegation under Ka Pa'akai, to do the
5 job that the BLNR is legally required to do. And so the
6 UH Hilo is supposed to come up with reports once
7 annually, or whatever; that's the BLNR's job. That's an
8 improper delegation. That also requires reversal and
9 remand in this matter.

10 And I'd like to reserve the rest of my time for
11 rebuttal, Your Honor.

12 THE COURT: Mr. Handlin.

13 MR. HANDLIN: Morning, Judge.

14 Your Honor, I think at the very outset it is
15 extremely important here to identify what is actually
16 being appealed and the significance of the applicable
17 standards of review. It is a subject that was completely
18 not mentioned in the Appellants' opening brief. It was
19 mentioned in both the State's brief and the University's
20 opposition briefs, and it was completely unaddressed in
21 the reply brief. I think the standard -- the standards
22 of review that apply here frankly dispose of
23 overwhelmingly the issues that are raised here.

24 Overwhelmingly what are raised here are either
25 determinations of fact or mixed questions of fact and

1 law. Standard of review, as Your Honor knows, for
2 factual determinations is it's only going to be
3 overturned if it's clearly erroneous. Findings are going
4 to be upheld if they are supported by reliable,
5 substantial, credible evidence. Unless there is a firm
6 and definite conviction that a mistake was made. That is
7 a very, very high threshold. That same burden applies to
8 mixed -- determines of mixed questions of fact and law.

9 And overwhelmingly, particularly in looking at the
10 Appellants' challenges to the BLNR's determinations under
11 the eight criteria, and frankly under Ka Pa'akai, those
12 are either pure questions of fact or mixed questions of
13 fact and law. Determination of whether something
14 constitutes substantial and adverse impact is a mixed
15 question of fact and law and should not be overturned
16 unless they are clearly erroneous.

17 So I think, you know, the Appellants -- they
18 recite over and over again in their brief -- in their
19 briefs, they say, this is clearly erroneous, that's
20 clearly erroneous. Saying it doesn't make it so.
21 They've made no serious attempt to demonstrate that any
22 finding, much less any finding that is in any way outcome
23 determinative, is clearly erroneous.

24 So unless Your Honor has any questions about the
25 fact specific stuff, I do want to focus on kind of the

1 more -- the pure questions of law.

2 Starting with the due process question -- and I
3 think that Miss China is also going to touch on this --
4 but, you know, the State cites a number of cases from the
5 United States Supreme Court which really tell the story
6 here. They say that regulators, and frankly judges, need
7 the ability to be able to hear proceedings as they move
8 forward. This is -- this is not a new concept, this is a
9 practical concept. Um, there's a reason why this
10 happened in this order. One practical and one legal
11 reason --

12 THE COURT: I'm sorry, so this would be of record?
13 The reason why you would say that there was a decision
14 made before the contested case hearing, is of record? I
15 just want to make sure that --

16 MR. HANDLIN: I'm sorry?

17 THE COURT: I want to make sure it's of record
18 what you say.

19 MR. HANDLIN: Okay.

20 THE COURT: Okay. Shall I try again?

21 MR. HANDLIN: Please.

22 THE COURT: Okay. You're about to explain why in
23 this particular case apparently a decision was made by
24 the Board prior to the contested case hearing. And all I
25 wanted to do is make sure that if you articulate a reason

1 that that reason is of record.

2 MR. HANDLIN: Yes.

3 THE COURT: Okay. Thank you.

4 MR. HANDLIN: The DLNR's rules of practice and
5 procedure, um, Hawaii -- Hawaii Administrative Rule
6 13-1-28(b), it says, the contested case hearing shall be
7 held after any public hearing, which by law is required
8 to be held on the same subject matter. So you have a
9 sunshine hearing, the board votes, and then you have a
10 contested case. And that -- that's just -- that's what
11 the rules lay out, that's why it happened this way.

12 From a practical point of view that makes enormous
13 sense because, as I'm sure Your Honor knows, I'm sure the
14 Court can take judicial notice, agencies deny
15 applications all the time. So imagine if somebody comes
16 in and they're armed and ready to ask for a contested
17 case, and they get their contested case before the agency
18 has acted, the agency says, well wait a second, you know,
19 that was completely unnecessary cause we were going to
20 deny that application. Well if the Appellants have their
21 way, if their rule applies here, then you always have to
22 have the contested case first before the agency has even
23 said which way it's going to go before you even know if
24 there is a need for a contested case. So, respectfully,
25 that just doesn't make any sense.

1 Also, the standard that the Appellants are
2 proposing here frankly -- and again the State has cited
3 cases that the same standard applies to regulators and to
4 courts, and Appellants say the same thing. Well, Judge,
5 every time somebody comes before Your Honor, makes a
6 motion for preliminary injunction, the Court makes a
7 ruling of likelihood of success on the merits. Here's
8 the way I think this is going to come out. Under their
9 standard Your Honor can't hear the rest of the case
10 because you've already prejudged the merits. You've
11 already shown an inclination of how you're going to come
12 out. It just -- it doesn't make any sense, it cannot be
13 the law. It is not the law under the cases that the
14 State has cited.

15 Um, regulatory matters come back to the same
16 agency. The same matter comes back over and over and
17 over again. And if their standard were to apply, what do
18 you have to do? You have to reconvene a new board
19 everytime the thing comes back?

20 What happened here was that the Board -- it took a
21 preliminary conditional vote, which it said was
22 conditional. Which one of Appellants actually
23 specifically testified at that February 2011 hearing that
24 a conditional permit would be okay. They granted it
25 conditionally. But they said immediately, but time out,

1 time out, we're going to order on our own motion that a
2 contested case hearing be held and we're going to
3 condition anything happening on the project going forward
4 on whether or not we, the Board, ultimately decide after
5 a contested case is held, which we've just ordered be
6 held, after we decide whether or not to grant the permit.
7 The Board itself said that what it was doing was not
8 final, was not the final agency action. The March 3rd,
9 2011, document that embodies it, it says it conditions it
10 on the Board itself ultimately deciding after the
11 contested case, making a final ruling on whether or not
12 the project would move forward.

13 So, Your Honor, for all the reasons in the brief,
14 I think -- I think that it's just clear the standard
15 they're articulating just can't hold.

16 THE COURT: Let me ask you a little bit about this
17 contested case hearing requirement. Isn't that required
18 by some plan that -- that it's mandated actually?

19 MR. HANDLIN: That the contested case be --

20 THE COURT: That there be a contested case
21 hearing? No?

22 MR. HANDLIN: I mean, if it's been requested?

23 THE COURT: My impression is part of the process
24 had been that it would be something that's mandated,
25 yeah. Wrong about this? I thought I read that in the

1 conclusions of law or findings of fact.

2 MR. HANDLIN: I think required, Your Honor, in the
3 sense that the Board ordered it. So if no one else had
4 actually asked for one I think there would have been a
5 contested case anyway because the Board itself had
6 directed it wanted be held.

7 On the Ka Pa'akai case, very quickly, the findings
8 and conclusions are replete with citations in detail that
9 addressed all three of the Ka Pa'akai factors. So really
10 what it is that is said -- that is claimed not to have
11 been satisfied, is a bit of a mystery.

12 The notion that this stipulation was somehow
13 improper, Judge, as we've cited in the briefs, the
14 Petitioners in the contested case hearing asked -- they
15 wanted to be certified as experts. And there was some
16 wrestling about how that would work. You know, under
17 western legal standards what do you have to show for a
18 Native Hawaiian cultural practitioner to be certify as an
19 expert. So the University came in and said, we're going
20 to make this easy and agreed to what they've requested.
21 So the fact now that is being thrown back at us as if we
22 did something improper, it falls under the heading of no
23 good deed goes unpunished.

24 The proof, the testimony, went in in this case six
25 weeks before the contested case hearing started in

1 written direct testimony. So they got to testify to
2 everything that they wanted to testify to. So again,
3 what the complaint is, is a little hard to know.

4 Um, very briefly I just want to touch on something
5 that showed up in the reply brief that wasn't in the
6 opening brief. Which is, Counsel has argued that the
7 University didn't file an answer to the statement of the
8 case and therefore everything is deemed admitted. Well it
9 wasn't raised in their opening brief so they waived it.
10 It's also directly contrary to the Costa versus Sunn case
11 that Your Honor cited for the Parties back in -- at the
12 July hearing. And so it's just directly contrary to
13 that.

14 The last thing I just want to say very briefly --
15 I realize I'm eating into Miss China's time and I
16 apologize for that.

17 The Appellants' position here fundamentally is
18 that this project is responsible for reaching back in
19 time and mitigating things that other past projects have
20 done. They say it over and over and over again in their
21 papers. They say that because prior land uses on Mauna
22 Kea caused substantial adverse impacts, by definition
23 doing anything with this project causes substantial
24 adverse impacts. If Your Honor looks at 13-5-30(c)(4),
25 it's just not what it says. It asks the agency to look

1 at this project and determine if this project causes
2 substantial adverse impacts to existing resources. So
3 number one, the question is what does this project do.
4 Number two, you have to look at the existing condition,
5 the rule tells you you have to.

6 And for all the reasons we've laid out, again I
7 think we're into factual determinations and at most mixed
8 questions which are certainly not clearly erroneous. But
9 I think the Board was eminently correct in determining
10 that this project could move forward.

11 Thank you, Judge.

12 THE COURT: Miss China.

13 MS. CHINA: Your Honor, I just wanted to touch on
14 a couple of legal issues. First I want to talk about due
15 process.

16 In the first question presented the Appellants
17 claimed that the granting the CDUP at a sunshine meeting
18 and then holding the uncontested case, that violated the
19 due process rights. I think this timing issue is just a
20 red herring.

21 Ultimately I think the issue that we have before
22 us is that the -- that the decision maker in both the
23 sunshine meeting and in the contested case was the same
24 tribunal. But this is inherent in the way the reprocess
25 works, I'll briefly explain.

1 The Board of Land and Natural Resource is head of
2 the Department of Land and Natural Resources, so
3 therefore as administrative board all of their decisions
4 have to be made at a sunshine meeting. Okay. Under the
5 administrative rules a contested case can be requested
6 either before or after the Board makes a decision. And
7 that's 13-1-29. So in most instances a petitioner will
8 wait until the Board makes its decision before asking for
9 a contested case.

10 For example, in a violation situation what happens
11 is they'll wait for the Board to determine because if
12 there's -- if the Board finds no violation or finds a
13 violation but only imposes a small penalty, then chances
14 are you won't have a contested case request. And so by
15 the time we get to a contested case situation, we
16 generally have an administrative board that provided an
17 adjudicative hearing on an issue in which it made a prior
18 decision.

19 Now at the contested case the Board reviews
20 everything de novo. In arguing the Board cannot do this,
21 the Appellants are really asking for de facto revision of
22 the Board's administrative rules. Because that's how
23 inherently it's set up.

24 So returning to the real issue at hand, a hearing
25 on the same matter by the same tribunal is a regular

1 occurrence that does not violate due process.

2 The Board was unbiased in its decision making.
3 Appellants have not shown any disqualifying interest to
4 overcome the presumption of honesty and integrity.
5 Therefore, having the Board decide this matter both at a
6 sunshine meeting and at a contested case hearing is not a
7 due process violation.

8 I would also like to touch upon another issue of
9 law. Appellants claim that by looking at matters outside
10 the rule's eight criteria of 13-5-30(c), the Board
11 somehow abused its discretion. Well that's not case.
12 Board is not constrained by just those criteria. Courts
13 in -- in fact, Courts have imposed a duty on the Board to
14 look beyond its regulations.

15 Take for example Ka Pa'akai and Waiahole cases.
16 The Board was required to, and did make, the three
17 Ka Pa'akai findings. And in Waiahole the Court found
18 that the Public Trust Doctrine found in Article Eleven
19 Section One of the Hawaii Constitution required that
20 there be a balance between protection of the natural
21 resources and use that promotes the best economic and
22 social interest of the people.

23 So under the Public Trust Doctrine, the Board was
24 correct to look at the TMT's impacts. Both the impacts
25 as well as its benefits.

1 And so those are the two points of law that I
2 wanted to discuss. Thank you, Your Honor.

3 THE COURT: Mr. Wurdemann.

4 MR. WURDEMANN: Thank you, Your Honor.

5 First of all, the issue involving the contested
6 case hearing, UH Hilo talks about -- and BLNR as well, a
7 sunshine hearing that would be held at a public hearing.
8 That's all true. But the public hearing and the sunshine
9 hearing that the decision needs to be made at is the one
10 following the contested case hearing. Not the one
11 before.

12 And it clearly is -- you know, not to belabor the
13 point, but that's what was done in here -- the rules --
14 the administrative rule that Your Honor had asked Counsel
15 about provide for the contested case hearing process. If
16 the BLNR -- they ruled that UH Hilo talked about -- or
17 the procedure that they talked about on February 25th,
18 2011, that was held, they cited that, ah -- that the --
19 be done at any public hearing. Excuse me. But what
20 happened was they made a decision. And they didn't have
21 to grant the contested case hearing; they did. But they
22 already made the decision prior to all of this happening.
23 They didn't -- they weren't required to make the
24 decision, they shouldn't have made their decision if they
25 were going to then grant the Petitioner's request for a

1 contested case hearing.

2 There is no way other -- no other way to remedy
3 this but to vacate and remand before a neutral hearings
4 officer, Your Honor.

5 The other point that I wanted to touch upon was --
6 well before I move on. The point that the BLNR brought
7 up, they even used the word "red herring" as far as this
8 argument goes and cited a certain administrative rule. I
9 mean due process trumps everything. That is fundamental
10 in our constitution, Your Honor. And whatever -- I mean,
11 they ruled before evidence was presented, that's --
12 that's what happened. They felt that the Petitioners had
13 a -- something to say, they had a right to present
14 evidence, but they ruled before that was done. It's like
15 adjudicating someone guilty before they even have a
16 trial, and then adjudicating them guilty again. I mean,
17 that's what -- that's what was done in this case.

18 One other point that I wanted to touch upon that I
19 didn't raise during my opening comments was the -- a
20 point that was made by the BLNR in their answering brief
21 regarding the management plan. And they said that, well
22 subsequent -- essentially, subsequent to the management
23 plan that was submitted, along with the CDU or
24 application that was approved at that February 2011
25 hearing, the Board went and changed the rules. well the

1 rules don't allow for any -- or discuss any retroactive
2 effect when these amended rules went into place.

3 At the time that that CDUP was approved, and at
4 the time that that management plan was approved, it had
5 to meet the requirements that were discussed by Judge
6 Hara in the earlier matter when it was raised. And it
7 didn't. That can't be remedied through some subsequent
8 change of the rules that don't have retroactive effect at
9 a time when the approval was done. So we would in
10 response to that point that was raised, submit that that
11 was error as well.

12 THE COURT: So you're saying this -- what are you
13 saying about the time frame for this project base plan?

14 MR. WURDEMAN: The rules require that the --
15 along with the Conservation District Use Application,
16 there also must have -- there must be a management plan
17 submitted at the same time. That's what the rules
18 require.

19 Apparently -- it appears that at some point there
20 was -- the recognition that maybe the management plan
21 wasn't in fact sufficient to what it was supposed to do,
22 and then the BLNR went in and amended the rules to then
23 -- as Miss China discusses in her answering brief -- to
24 somehow remedy the error that was done at the time of the
25 application. That's what I'm saying.

1 THE COURT: So Judge Hara apparently was concerned
2 about the lack of a comprehensive management plan?

3 MR. WURDEMANN: It wasn't comprehensive, it didn't
4 include all of the things that it was supposed to
5 include. Yes.

6 THE COURT: Alright. And there was a rule
7 implemented that now allowed, presumably, a project base
8 plan?

9 MR. WURDEMANN: Yes. Essentially.

10 THE COURT: And you're saying, what about the time
11 frame. That occurred after the application? You're not
12 saying that?

13 MR. WURDEMANN: It was invalid at the time of the
14 application when the valid management plan should have
15 been presented. And that's the -- that's the -- the
16 existence of the law at the time of the application when
17 the approval was done is the standard that needs to be
18 followed.

19 THE COURT: Okay.

20 MR. WURDEMANN: I have nothing further, Your
21 Honor.

22 THE COURT: I'd like to -- yeah, sure. I'd like
23 to ask response on that issue.

24 MR. HANDLIN: Specifically on that point --
25 specifically on the point about the management plan,

1 first of all, the BLNR found expressly and correctly
2 found, for all the reasons that are in their findings and
3 conclusions and in both the University's and the State's
4 briefs, that to the extent that the requirement was for a
5 comprehensive plan, that the CMP unquestionably satisfies
6 that.

7 But the fact is that along the way, before the
8 hearing officer rendered a decision, and certainly before
9 in April of 2013 the Board of Land and Natural Resources
10 entered its final decision, the rules changed and said
11 you need a project or site based plan. There is
12 absolutely no question that the TMT management plan is a
13 project or site based plan. That was approved
14 simultaneously at the same time as the permit in April
15 2013.

16 If anything, Judge -- I mean, they're kind of
17 trying to argue both sides of this. They're saying BLNR
18 just rubber stamped things when it finally came its way.
19 In fact, BLNR said the rules have changed along the way.
20 They took a fresh look and they said, under the rules
21 that are now in effect this is what applies and this is
22 final.

23 But again the findings say -- document in detail
24 why both plans are sufficient. So whatever the standard
25 is. But I don't think there is any question at the time

1 BLNR made its final decision the rules required a project
2 or site based plan approved simultaneously with the
3 permit. which is what happened here. And they never
4 down in the entire contested case, in all of post
5 contested case briefing, they never said a word about the
6 TMT Management Plan. So honestly, I think they probably
7 waived that in never having raised it below. But to the
8 extent they can raise it now, I just think the objection
9 is without merit.

10 THE COURT: Alright.

11 MS. CHINA: May I make a comment since --
12 regarding the Board's approval. The Comprehensive
13 Management Plan -- there are two plans. The
14 Comprehensive Management Plan complies with both the
15 Court's 2007 order, Judge Hara's order, and the
16 pre-amendment Administrative Rules. Cause that was --
17 that was approved prior to the amendment of the
18 administrative rules.

19 Now the TMT Management Plan complies with the
20 present rules because it was -- it was approved after the
21 amendment of the rules. But in any case, the Board's
22 decision and order requires that the University comply
23 with all of the terms and all of the requirements of both
24 the Comprehensive Management Plan and the TMT Management
25 Plan. So they have to do everything.

1 Thank you.

2 THE COURT: So, Mr. Wurdemann, you want to have a
3 statement in rebuttal since the appellees had an
4 opportunity --

5 MR. WURDEMANN: Well I made my point. The point
6 is that the BLNR ruled in February of 2011 on this
7 permit. And, yeah, everything is red herring because
8 everything subsequent to that was red herring because
9 this was a rubber stamp process. And we stand by that,
10 Your Honor. The Board shouldn't have ruled the way they
11 did. They should have -- if they're going to grant a
12 contested case hearing then they should have sat back,
13 let the process occur, and then make their decision in
14 2013 when they did.

15 THE COURT: So I'll take this matter under
16 advisement. Thank you.

17 Take a recess.

18 THE BAILIFF: All rise. Court stands in recess.
19 (9:46 a.m.)

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Audrey S. Tanouye, CSR 225
Official Court Reporter, State of Hawaii