SCAP-17-0000059

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

E. KALANI FLORES,

Appellant-Appellee,

vs.

BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; SUZANNE D. CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources; STATE OF HAWAI'I,

Appellees-Appellants,

And

UNIVERSITY OF HAWAI'I,

Appellee/Cross-Appellant.

CIVIL NO. 14-1-324 (Hilo)
(AGENCY APPEAL)

APPEAL FROM THE:
(1) ORDER GRANTING IN PART AND DENYING IN PART APPELLEES STATE BOARD OF LAND AND NATURAL RESOURCES MOTION FOR STAY OF PROCEEDINGS, OR IN THE ALTERNATIVE FOR THE COURT TO ISSUE ITS DECISION ON APPEAL, FILED OCTOBER 25, 2016; VACATING CONSENT TO SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAI'I UNDER GENERAL LEASE NO. S-4191; AND REMANDING THE MATTER TO THE BOARD OF LAND AND NATURAL RESOURCES, FILED JANUARY 6, 2017;

(2) FINAL JUDGMENT, FILED JANUARY 6, 2017

THIRD CIRCUIT COURT

JUDGE: HON. GREG K. NAKAMURA

APPELLANT-APPELLEE E. KALANI FLORES' ANSWERING BRIEF TO STATE OF HAWAI'I, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND CHAIRPERSON SUZANNE D. CASE'S OPENING BRIEF

CERTIFICATE OF SERVICE

NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
Telephone: (808) 521-2302
Facsimile: (808) 537-4268

DAVID KAUILA KOPPER 9374
CAMILLE KAIMĀLIE KALAMA 8420
Attorneys for Appellant-Appellee
E. Kalani Flores

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I. INTRODUCTION

The State's continuing practice of denying contested case hearings in an effort to streamline development denies Native Hawaiians due process, impairing their ability to continue to exercise their traditional and customary practices.[1]

In 2014 the Board of Land and Natural Resources ("Board") approved a sublease between the University of Hawai'i ("University") and TMT International Observatory (TIO). The sublease disposes of land on the summit of Mauna Kea currently leased by the University from the Department of Land and Natural Resources ("Department") for the seemingly forgone conclusion of constructing the Thirty Meter Telescope. As has been its recent practice, the State approved the sublease without first deciding Appellant-Appellee E. Kalani Flores' intervening request for a contested case hearing. It was not until a month after the State approved the sublease did it deny Flores' contested case hearing request. Flores, a respected Native Hawaiian cultural practitioner who was then appearing *pro se*, timely appealed the denial of his petition for a contested case hearing to the Environmental Court of the Third Circuit. The Environmental Court, relying on *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015), found that the sublease approval, or "Consent," violated procedural due process as the State did not first hold a contested case hearing in spite of Flores' interest as a Native Hawaiian with constitutionally protected cultural practices on Mauna Kea.

As our State must be mindful of the contribution of its indigenous people to our current way of life, Hawai'i's appellate courts have been consistent in honoring the traditions of the Hawaiians of antiquity by its recognition that those interests are deserving of due process. Justice in the procedural sense commands a sequence in which agencies first provide a contested

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[1] *Pele Defense Fund v. Puna Geothermal Venture*, 77 Haw. 64, 881 P.2d 1210 (1994)("*PDF*"); *Mauna Kea Anaina Hou*, 136 Hawai'i 376, 363 P.3d 224; *Kilakila `O Haleakalā v. Bd of Land & Natural Res.*,131 Hawai`i 193, 317 P.3d 27, (2013)("*Kilakila I*"); *Kaleikini v. Thielen*, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010); *In Re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Hapuaena, Pulanau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula & Hanawi Streams,* 128 Hawai'i 497; 291 P.3d 395 (2012)(*Na Moku*).

case hearing prior to decision making in order to better inform those decisions, while at the same time providing a non-technical forum for the public to be heard. By proceeding directly to approval of the sublease without a hearing in this case, the State has once again signaled its preference to hold other interests over Native Hawaiian rights and due process.

The State appellants and the University are now attempting to shield itself under a pretext of "internal management," claiming that the Board's actions in leasing or approving the subletting of ceded lands are exempt from challenge or review under Hawai'i Revised Statutes Chapter 91, the Hawai'i Administrative Procedure Act. The State's denial of a contested case hearing under this exemption, for which there is little basis to assert in this case, is better understood in a vacuum: it is but one in a series of actions by the State calculated to guarantee the construction of the TMT project.

First, in 2011 the State approved the University's application for a conservation district use permit, and then for two years held a *pro forma* hearing after the approval. *Mauna Kea Anaina Hou*, 136 Hawai'i at 383, 363 P.3d at 231. The final version of the permit was practically identical to the preliminary approval, demonstrating that the State prejudged the approval of the TMT project. *Id.* In this case, after the Board approved the Consent it was then completely redrafted without further approval or public input. Then, when public protests and demonstration over the TMT project on Mauna Kea were allegedly interfering with site preparation for the construction of the TMT, the State improperly used an emergency rule process that bypassed public notice requirements in order to enact new administrative rules aimed at stopping the protests. *Flores v. BLNR*, CIVIL NO. 15-1-267K [ENVIRONMENTAL COURT]. When this Court issued its decision in *Mauna Kea Anaina Hou* invalidating the conservation district use permit for the TMT, the State refused to reconsider its vote on the Consent or its prior position that "Article XII, § 7of the Hawai'i Constitution [does not] entitle Flores to a contested case hearing." CAAP-17-0000382 Docket #39 Record on Appeal 895.[2] On appeal, the briefs of the appellants are substantively identical, demonstrating the congruity of

[2] The Record on Appeal, will be cited as ICA # ____ (Docket Number in CAAP-17-0000382) ROA ____ (pdf page number). All other filings with the Intermediate Court of Appeals will be cited as ICA # ____ (Docket Number in CAAP-17-0000382). All filings with this Court in SCAP-0000059 will be cited as DKT #_____.

their interests.[3] The State here is acting as an advocate for the TMT project, not a trustee of the State's natural resources.

The State's actions come at the expense of individuals such as Flores, a respected Native Hawaiian cultural practitioner and professor who tried to have a voice in the State's decision to approve the transfer of the possession of ceded lands. Flores followed the State's own administrative rules in requesting a contested case hearing on the approval of the sublease. A hearing would have provided Flores, a *pro se* litigant, a forum absent the formal procedural complexities and accompanying costs of a legal action in which to provide evidence and argument regarding the sublease to the State. The State instead denied the hearing in the claimed interest of efficiency and expediency. There is no merit to the denial of a contested case hearing here. The decision of the Environmental Court should be affirmed.

II. STATEMENT OF THE CASE

A. MAUNA KEA AND THE THIRTY METER TELESCOPE

Mauna Kea, traditionally known as Mauna a Wākea, has long been regarded as the most sacred place on Hawai'i island by Native Hawaiians of the past, and is still remembered and cherished by Hawaiians today. ICA #39 ROA 472. Mauna Kea is considered a temple and a site of pilgrimage as confirmed by the several hundred shrines found on the mountain. *Id.* It has been and continues to be used as a place to conduct traditional, customary, and religious practices. *Id.* As the University has stated:

> Mauna Kea has long been regarded by many Native Hawaiians as the most sacred place on the island, and that it has been, and continues to be used as a place to conduct traditional and customary practices. Cultural and religious practices associated with the mountain include prayer, burial, and other rituals, and construction of small shrines. There is clear evidence that resource extraction, including quarrying stone for adzes and bird gathering historically occurred on Mauna Kea. Oral and written histories have numerous references to human burials, the deposition of *piko* (the umbilical cord) and the presence of 'ahu on Mauna Kea. Physical evidence of human burials and 'ahu are present today and modern Native Hawaiians still frequent the mountain for the deposition of piko to scatter the ashes of deceased relatives and to engage in prayer or visit shrines.

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[3] Given that the State's and the University's opening briefs raise the same arguments and are substantively identical, their arguments are taken and addressed together. Accordingly, this Brief, and Flores' Answering Brief to Appellee-Cross-Appellant University of Hawai'i's Opening Brief are identical. They are nonetheless filed separately to comply with Hawai'i Rules of Appellate Procedure Rule 28(h).

ICA #39 ROA at 846-47.

In 1968, Department issued General Lease S-4191 to the University, conveying possession and management of 13,321.054 acres of certain lands on and surrounding the summit of Mauna Kea. ICA #39 ROA at 672, 680. The summit area covered by the General Lease falls within the Conservation District Resource subzone. *Id; Mauna Kea Anaina Hou*, 136 Hawai'i at 381, 363 P.3d at 229. The specified use for General Lease S-4191 was for a single observatory. ICA #39 ROA 674 ("The land hereby leased shall be used by the Lessee as . . . an observatory[.]"). The General Lease was made for a term of 65 years and will expire in December of 2033. ICA #39 ROA at 672. The summit now houses a "series" of no less than thirteen astronomical observatories, *Mauna Kea Anaina Hou*, 136 Hawai'i at 381, 363 P.3d at 229; ICA #39 ROA 934, and is encumbered by at least ten subleases. ICA #55 (the "State's Opening Brief") at 21-22. The University has been the subject of multiple state audits criticizing its management and stewardship of Mauna Kea. ICA #39 ROA 852-858.

On February 25, 2011, the Board approved the University's application for Conservation District Use Permit HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve (the "CDUP"). *Mauna Kea Anaina Hou*, 136 Hawai'i at 383, 363 P.3d at 231. After the Board approved the CDUP, it held a post-hoc contested case hearing in August of 2011. *Id.* On April 12, 2013, the Board issued its 126-page findings of fact, conclusions of law, and decision and order following the contested case hearing, upholding its prior approval of the CDUP in a form nearly identical to the permit approved two years prior. *Id.,* 136 Hawai'i at 387, 363 P.3d at 235.

In July of 2015 the State enacted a defective emergency rule, Hawai'i Administrative Rules ("HAR") § 13-123-21.2, aimed at stopping protests against TMT and prohibiting all those not affiliated with or a guest of any observatory or University facility from being on Mauna Kea during specified evening hours. Flores sued the Department, the Board and Chairperson Suzanne Case in her official capacity (collectively, the "State") to invalidate the rules pursuant to Hawai'i Revised Statutes ("HRS") § 91-7 in *Flores v. BLNR*, CIVIL NO. 15-1-267K [ENVIRONMENTAL COURT]. On October 9, 2015, The Environmental Court of the Third Circuit in *Flores* invalidated HAR § 13-123-21.2 as being issued pursuant to unlawful procedures. *See* CIVIL NO. 15-1-267K.

On December 2, 2015, this Court invalidated the CDUP for the failure to hold a contested case hearing prior to decision making. *Mauna Kea Anaina Hou*, 136 Hawai'i 376, 363 P.3d 224.

In May of this year, proposed legislation attempted to insulate the leasing and development of Mauna Kea from contested case hearings was included in a proposed bill purporting to facilitate the revitalization of Banyan Drive in Hilo. DKT #5 at 9.[4]

B. THE SUBLEASE

The University intends to sublease a portion of General Lease S-4191 to allow for the construction and operation of the "Thirty Meter Telescope" and supporting facilities (the "Sublease"). ICA #39 ROA 249. Pursuant to Hawai'i Revised Statutes ("HRS") § 171-36(a)(6), the validity of any sublease of Department managed lands is subject to the review and approval of the Board. The Consent is thus a necessary approval for the TMT project separate and apart from any permit needed for the project. *Id.*; ICA #39 ROA 1519 (Statement by the University that the Consent is "one of several entitlements that will be needed if the TMT is to be built atop Mauna Kea.")

The "Sublease" grants exclusive rights of possession and private enjoyment of at least 5.99886 acres of "ceded lands"[5] to TMT International Observatory ("TIO") for their exclusive use:

> Sublessor covenants and agrees with Sublessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Sublessee to be observed and performed, the Sublessee shall, and may have, hold, possess, and enjoy the premises for the term of this Sublease, without hindrance or interruption by the Lessor, Sublessor or any other person or persons lawfully claiming by, through, or under the Lessor or Sublessor.

JEFS #39 ROA 690, 1199. The Sublease requires the payment of rent in an escalating structure:

> In consideration for the use of the Subleased Premises, Sublessee shall pay to Sublessor annual rents based on calendar years during the term of this Sublease as set forth below[:]
>
> . . .

[4] An article describing the legislation can be found at http://hawaiitribune-herald.com/news/local-news/banyan-drive-bill-nixed.

[5] *See* ICA #39 ROA 249 (admitting that subleased area constitutes "section 5b lands of the Hawai'i Admissions Act"); *Trs. of Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 160, 737 P.2d 446, 450 (1987)(describing "ceded lands" as those ceded to the United States government upon annexation of Hawai'i and then subsequently transferred to the State of Hawai'i pursuant to the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

Year	Annual Rent	Milestone
1-3	$300,000	Civil construction
4-5	$400,000	Enclosure
6-7	$600,000	Telescope Structure
8-9	$700,000	Instruments and Mirrors
10	$900,000	Commissioning
11 and later	$1,080,000	Operations

JEFS #39 ROA 1189. TIO, as sublessee, is also required to pay all property taxes and assessments made on the premises. JEFS #39 ROA 1197. The Sublease allows transfers and assignments consistent with HRS Chapter 171. JEFS #39 ROA 11978. The Sublease also requires TIO to ensure that historic preservation activities are properly handled in compliance with the law. JEFS # 25 ROA 1202.

C. PROCEEDINGS BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

At a meeting of the Board held on June 13, 2014, the Board considered the University's application for a "Consent to Sublease under General Lease No. S-4191 to the University of Hawai'i, Lessee, to TMT International Observatory LLC, Sublessee, Kaohe, Hāmākua, Island of Hawai'i, Tax Map Key: 3rd/4-4-15:09 por" (the "Consent"). ICA #39 ROA 363. The University, its witnesses and supporters presented testimony in support of the Consent, including Don Straney, Chancellor of UH Hilo, Ed Stone, Executive Director of TMT, Michael Bolte, a professor from University of California, and James Hollstorm, licensed real estate appraiser. ICA #39 ROA 347-349. At no time was any attendee at the hearing, including Flores, expressly permitted to cross examine testifiers or offer rebuttal evidence. *Id.* Flores, appearing *pro se*, made an oral request for a contested case hearing before the close of the meeting. *Id.* The Board deferred action on the University's application until its next scheduled meeting on June 27, 2014. ICA #39 ROA 363.

At the Board meeting held on June 27, 2014, Flores again made an oral request for a contested case hearing on the Sublease approval. ICA #39 ROA 459. The Board, as it did in *Mauna Kea Anaina Hou*, approved the University's application without first holding a contested case hearing or otherwise acting on Flores' request for a contested case hearing. ICA #39 ROA 364. The Board then stayed the effectiveness of the Consent until administrative proceedings on any contested case requests were concluded. ICA #39 ROA 364, 464.

Flores 'written petition for a contested case hearing, dated June 27, 2014 and submitted on or about the same time, was filed by the Department on July 3, 2014. ICA #39 ROA 471. On July 25, 2014, a month after the Board approved the Sublease, the Board denied Flores' request for a contested case. ICA #39 ROA 487. The staff submittal addressing the denial of Flores' request asserted that Flores did not have any statutory or due process right to a contested case hearing under Article XII, section 7 of the Hawai'i Constitution. ICA #39 ROA 482-485. The Consent was executed on April 9, 2015 in a form substantially different than that approved by the Board in 2014. ICA #39 ROA 699-701(executed form); ICA #39 ROA 437 (form approved by Board but not executed).

D. ADMINISTRATIVE APPEAL

Flores timely appealed the denial of his contested case hearing request to the Circuit Court of the Third Circuit in Civil No. 14-1-324 (Hilo). ICA #39 ROA 20. On October 2, 2015 the matter was transferred to the Environmental Court of the Third Circuit. ICA #39 ROA 873-75.

On December 2, 2015, this Court invalidated the CDUP for the TMT, a separate approval, for the failure to hold a contested case hearing prior to decision making. *Mauna Kea Anaina Hou*, 136 Hawai'i at 399, 363 P.3d at 247.

On April 5, 2016, the Environmental Court remanded the Consent back to the Board pursuant to HRS § 91-14(e) for the limited purpose of supplementing the administrative record and reconsidering the validity of the Consent in light of the invalidation of the CDUP by the Supreme Court of Hawai'i. ICA #39 ROA 1131-35. According to the Environmental Court, "the Order of Remand reflects the Court's philosophy that the Board should deal with its issues as much as possible . . . and the Court should not intervene unless it is necessary or really appropriate to do so." ICA #23 at 12:12-18.

The State refused to act on the Environmental Court's remand, and instead filed its Motion For Stay of Proceedings, Or In The Alternative For the Court to Issue its decision On Appeal On October 25, 2016. ICA #39 ROA 1136.

On December 2, 2016, TIO moved to intervene in this case with the Environmental Court.

On January 6, 2017, The Environmental Court granted the Motion in part and issued its decision on the appeal. The court found as follows:

2. Appellant Flores filed a timely written petition for a contested case hearing on the Board's Consent to the Sublease. In his petition, Mr. Flores asserted that he is a Native Hawaiian who holds Mauna Kea sacred; that he "has substantial interest and connections to Mauna a Wākea (Mauna Kea);" and that he had "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease."

3. At a later meeting held on July 25, 2014, the Board denied Appellant Flores' request for a contested case hearing on the Board's Consent to the Sublease.

4. Appellant Flores timely appealed the Board's denial of his contested case request to the Circuit Court of the Third Circuit in Civ. No. 14-1-324.

ICA #39 ROA 1495-1496 (internal citations omitted). The Environmental Court then vacated the Consent and remanded the matter back to the Board for proceedings consistent with the order based on the following legal conclusions:

. . .

2. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

3. In *Mauna Kea Anaina Hou*, the Supreme Court concluded that "the substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea, the risk of an erroneous deprivation absent the protections provided by a contested case hearing, and the lack of undue burden on the government in affording Appellants a contested case hearing" entitled Native Hawaiian cultural practitioners to a contested case hearing on a Board action permitting the construction of the TMT telescope. *Mauna Kea Anaina Hou,* 136 Hawai'i at 390.

4. *Mauna Kea Anaina Hou* further explains the Board's constitutional duty to hold a contested case hearing on decisions involving constitutional rights:

> Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. Rather, an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations. In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved, and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it.

> In light of the unique position that an agency occupies, the agency may be at the frontline of deciding issues that involve various interests that implicate constitutional rights. Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore, should consider and honor state constitutional rights in the course of fulfilling its duties. Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai'i Constitution. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision.

Mauna Kea Anaina Hou, 136 Hawai'i at 414-15 (Pollack, J., *concurring*)(internal citations and quotations omitted).

5. Where a contested case hearing on a pending agency action is requested, it is improper for an agency to act prior to holding the requested hearing. *Id.* at 399.

6. Because Appellant Flores' request for a contested case hearing was not granted, his contested case hearing petition's assertion that he is a Native Hawaiian with "traditional and customary practices at the areas on Mauna Kea covered under the . . . proposed Sublease" must be taken as true. *Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai'i 193, 205 (2013).

7. Appellant Flores was denied the right to a contested hearing on the subject Consent to Sublease in violation of his constitutional right to a hearing under Article 12, Section 7 of the Hawai'i State Constitution and *Mauna Kea Anaina Hou,* and specifically section IV of the concurring opinion therein.

ICA #39 ROA 14975-98. Final Judgment was entered on January 6, 2017. ICA #39 ROA 1500.

The State filed its Notice of Appeal on February 3, 2017. ICA #39 ROA 1570.

On February 22, 2017, TIO's motion to intervene was denied. ICA #39 ROA 1653.

The University filed its Notice of Cross Appeal on February 21, 2017. ICA #39 ROA 1634.

E. E. KALANI FLORES

Professor E. Kalani Flores is a Native Hawaiian and respected cultural practitioner who holds Mauna Kea sacred pursuant to traditional and customary beliefs.[6] ICA #39 ROA 472; *Id.* at 1164. Flores sincerely considers Mauna Kea a temple and a site of pilgrimage in accordance with his traditional and customary beliefs. *Id.* Flores engages in traditional and customary practices at the areas on Mauna Kea covered under the Sublease, including his practice of maintaining a pilgrimage up the mountain and practicing aloha ʻāina and mālama āina. *Id.* He is "personally affected by the disposition and use of ceded lands." *Id.* He was granted standing in the contested case hearing on Conservation District Use Permit ("CDUP") HA-3568 underlying *Mauna Kea Anaina Hou.* ICA #39 ROA 1164. He was also granted standing in *Flores v. BLNR*, CIVIL NO. 15-1-267K [ENVIRONMENTAL COURT], wherein Flores successfully challenged the validity of emergency agency rules prohibiting the nighttime presence on Mauna Kea. *Id.* The Sublease causes Flores to suffer a deep cultural and personal injury because he recognizes his ancestral ties to Mauna Kea and the akua, ʻaumakua and kupuna who reside there. *Id.*

III. STANDARD OF REVIEW

In a secondary appeal, the standards of HRS § 91-14(g) are applied "to determine whether the circuit court decision was right or wrong." *Mauna Kea Anaina Hou*, 136 Hawai'i at 388, 363 P.3d at 236. The existence of subject matter jurisdiction is a question of law that is reviewable de novo under the right/wrong standard. *Kilakila I*, 131 Haw. at 199, 317 P.3d at 33. Deference to an agency is "particularly inappropriate in cases like this one, in which the constitutionality of the agency's rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority. The agency is not empowered to decide these questions of law." *Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192, 202, 891 P.2d 279, 289 (1995); *State v. Quitog,* 85 Haw. 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997) (recognizing the Hawai'i Supreme Court as the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai`i Constitution").

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[6]To the extent that the State attempts to rely on findings as to Flores' practices in the CDUP proceeding to challenge his entitlement to a contested case hearing, they are prohibited from doing so as that case is still ongoing and subject to the appeal of any party. *See Hawaiian Dredging Constr. Co. v. DOT*, 131 Hawai'i 60, 314 P.3d 850 (App. 2013)(finding that records of proceedings that are still ongoing and subject to "reasonable dispute" are not appropriate for judicial notice.)

IV. THE CONSENT IS INVALID DUE TO THE STATE'S FAILURE TO HOLD A CONTESTED CASE HEARING PRIOR TO DECISION MAKING

To determine whether a court can exercise jurisdiction over an appeal brought pursuant to HRS § 91-14, the following requirements are considered:

> first, the proceeding that resulted in the unfavorable agency action must have been a contested case hearing — i.e., a hearing that was (1) required by law and (2) determined the rights, duties, and privileges of specific parties; second, the agency's action must represent a final decision or order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved in the contested case; and finally, the claimant's legal interests must have been injured — i.e., the claimant must have standing to appeal.

Kilakila I, 131 Hawai'i at 200, 317 P.3d at 34. The denial of a contested case hearing is a "final decision or order" for the purposes of appeal pursuant to HRS 91-14. *Id.*, 131 Hawai'i at 203, 317 P.3d at 37.

There is no dispute that Flores was denied a contested case hearing prior to the approval of the Consent. ICA #39 ROA 364. Flores followed HAR § 13-1-29 in requesting a contested case, ICA #39 ROA 459, 471, and no party has appealed the Environmental Court's finding below that Flores timely requested a contested case hearing. ICA #39 ROA 1495-1496; *see* State's Opening Brief at 14-15; UH's Opening Brief at 9. Flores' standing has not been disputed, and his standing and whether the parties' rights were determined are inquiries otherwise subsumed in the analysis regarding whether Flores' due process rights entitle him to a hearing. *See* Section IV.A., *infra*. No party has disputed that where a required contested case hearing is not held prior to agency decision making, the agency action is invalid. *Kilakila I*, 131 Hawai'i at 206, 317 P.3d at 40; *Mauna Kea Anaina Hou*, 136 Hawai'i at 399, 363 P.3d at 247; *Lanaians for Sensible Growth v. Lanai Resorts, LLC*, 137 Hawai'i 298, 369 P.3d 881 (App. 2016). Therefore the only dispute before this Court is whether a contested case hearing was required by law. State's Opening Brief at 14-15; University's Opening Brief at 9.

The Consent is invalid as a contested case hearing was required by law, and there is no legal doctrine which exempts the State from holding a contested case in this instance. Flores' right to a contested case hearing as a Native Hawaiian with cultural practices affected by the Consent and Sublease is well settled. There is no basis to claim, as Appellants do, that the State's decision to issue the Consent is a matter of "internal management" exempt from

challenge. The interest of providing a forum for the protection of Native Hawaiian rights, and the practical function of a contested case hearing to provide a non-technical proceeding for members of the public to voice objections, should not be frustrated by Appellants' true desire: expediency and insulation from challenge in the approval of development. As there is no dispute that the State approved the Consent and Sublease without first holding a contested case hearing, the Consent is invalid and the ruling of the Environmental Court below must be affirmed.[7]

A. A CONTESTED CASE HEARING ON THE CONSENT WAS REQUIRED BY LAW PURSUANT TO CONSTITUTIONAL DUE PROCESS

"In order for an administrative agency hearing to be 'required by law,' it may be required by (1) agency rule, (2) statute, or (3) constitutional due process." *Kilakila I*, 131 Hawai'i at 200, 317 P.3d at 34.

Whether an individual has a right to a contested case hearing as a matter of due process requires the balancing of the following factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. *Mauna Kea Anaina Hou*, 136 Hawai'i at 390, 363 P.3d at 238; *Id.* 136 Hawai'i at 410, 363 P.3d at 258 (Pollack, J., concurring)(citing *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989)). Generally, a "property interest" will entitle a claimant to a due process hearing on an agency decision affecting that interest. *Aguiar v. Hawai'i Hous. Auth.*, 55 Haw. 478, 495-497, 522 P.2d 1255, 1266-1268 (1974). Where the agency's approval of an action implicates the applicants' property interests, an agency hearing will also be required where the action adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases. *PDF*, 77 Haw. at 68, 881 P.2d at 1214; *Mauna Kea Anaina Hou*, 136 Hawai'i at 390, 363 P.3d at 238.

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[7] Flores raised multiple meritorious arguments below as to why the Consent and Sublease are invalid. *See* ICA #39 ROA 716-53. However, as the Court cannot reach those arguments on this Chapter 91 appeal if Flores was not entitled to a contested case hearing, *PDF*, 77 Haw. at 67, 881 P.2d at 1213, and as the failure to hold a hearing prior to decision making invalidates that decision, *Kilakila I*, 131 Hawai'i at 206, 317 P.3d at 40, whether the State wrongfully denied Flores a contested case hearing is the determinative issue on this appeal.

Flores was entitled to a contested case hearing on the Consent as (1) the Consent implicates the University's property interests (2) Flores' interests in the Consent are entitled to due process (3) Flores' interests would be erroneously deprived without the protections of a contested case hearing, and (4) the State's alleged interest in expedient decision making does not outweigh due process and the interest of effective review.

1. THE CONSENT IMPLICATES THE UNIVERSITY'S PROPERTY RIGHTS

The Consent is an agency action affecting a lease, sublease, and possessory interest of land, thus it implicates the University's property rights. *PDF*, 77 Haw. at 68, 881 P.2d at 1214.

In Hawai'i, the possessory interest of real property constitutes a "property interest" for purposes of due process. *KNG Corp. v. Kim*, 107 Hawai'i 73, 80, 110 P.3d 397, 404 (2005)(finding that the summary possession statute, HRS Chapter 666, does not offend due process); *Mosier v. Parkinson*, 135 Hawai'i 219, 348 P.3d 496 (App. 2015)(possession of leased property "constitute property within the meaning of due process"); *Aguiar*, 55 Haw. at 495-497, 522 P.2d at 1266-1268 (deciding that current and prospective lessees for State affordable housing program's interest in receiving low cost lease was "property").

The University suggests that the Consent does not affect a property right because it involves a "sublease." UH's Opening Brief at 18-19. However, the title of an instrument is not determinative of whether the instrument constitutes property within the meaning of due process. "If the instrument in question passes to the plaintiff a right to use the land for a definite term for a specific purpose . . .it creates an 'interest' in the land, and therefore it does not create a license revocable at the will of the licensor[.]" *McCandless v. Estate*, 11 Haw. 777, 788-89 (1899). As this Court has noted,

> Their denomination or characterization of the transaction, however, is not binding, for as appellant correctly notes, quoting the bard, 'Whats in a name? that which we call a rose By any other name would smell as sweet[.]' There is a plethora of decided cases distinguishing between leases, which convey an interest in the land, and mere licences . . . . As we have pointed out, here we have a transfer of possession for a fixed term of 14 years of a definite parcel of real estate. The interest granted is not terminable at will. It is however, assignable, with the consent of the transferor, the trustee. It is mortgageable. The improvements are to be constructed, maintained and, in the event of destruction, replaced by the transferee.

Kapiolani Park Preservation Soc'y v. Honolulu, 69 Haw. 569, 578-79, 751 P.2d 1022. 1028-29 (1988).

The Consent implicates the University's and TIO's property rights. The Consent approves the Sublease, which grants exclusive rights of possession and private enjoyment of a definite 5.99856 acre parcel of "ceded lands" to TIO for their exclusive use.[8] JEFS #39 ROA 1199. The Sublease is for a fixed term of at least 16 years and up to 65 years and is not terminable at will. JEFS #39 ROA 1190-93. The Sublease requires the payment of rent, and TIO, as Sublessee is also required to pay all property taxes and assessments made on the premises. JEFS #39 ROA 1189, 1197. It allows for the construction of structures; namely, the TMT. JEFS #39 ROA 1188. It is assignable with the consent of the State and UH. JEFS #39 ROA 1198. It is "property" for purposes of due process. *Aguiar*, 55 Haw. at 496-497, 522 P.2d at 1267-1268 (holding that rent calculation changes and lease terminations for public housing leases affected property interests.).

Bush v. Hawaiian Homes Comm'n, 76 Haw. 128, 870 P.2d 1272 (1994) does not stand for the proposition that all "subleases" are excluded from the definition of "property." UH's Opening Brief at 18. In *Bush*, the Court held that certain "third party agreements" concerning Hawaiian Homelands leases did not constitute property. *Id.*, 76 Haw. at 136, 870 P.2d at 1280. The agreements at issue were contracts entered into pursuant to HAR §10-3-35 for the use of land only for cultivation and crops. *Id.* On the face of *Bush* the third party agreements did not sublease or transfer any leasehold interest, did not allow for the construction of buildings, and did not explicitly transfer exclusive possession or enjoyment. *Id.* In fact, though the *Bush* opinion suggested the TPA's could be defined as subleases under the Hawaiian Homes Commission Act § 208(5), that section, as it read during the relevant time in *Bush*, actually prohibited a lessee from subletting a homestead lease, and prohibited the transfer of a lease to a non-Hawaiian. *See Id.*, 76 Haw. at 136, 870 P.2d at 1280; Session Laws of Hawai'i 1985, Act 60; Session Laws of Hawai'i 1990, Act 305. *Bush*'s passing reference to the term "sublease" does not amount precedent establishing that subleases *per se* are not property in any and all situations.

[8] The Sublease also grants a nonexclusive easement to TIO for access purposes. JEFS #39 ROA 1187.

Mauna Kea Anaina Hou v. Univ. of Hawai'i, 126 Hawai'i 265, 269 P.3d 800 (Ct. App. 2012), a memorandum opinion, also does not sway the merits. In that case the Intermediate Court of Appeals ruled that the appellants were not entitled to a contested case hearing on a Comprehensive Management Plan for Mauna Kea as "no property rights are being granted or denied" and that the actions recommended by the management plan "cannot be implemented without [UH] rule-making authority. . . . these management actions are nothing more than considerations for the future" *Id.* This case is distinguishable here, as the University has admitted that the Consent is "one of several entitlements that will be needed if the TMT is to be built atop Mauna Kea," ICA #39 ROA 1519, and the Consent clearly affects the property rights of the University and the constitutional rights of Flores. *See* Section IV.2, *infra*. The Consent affects the University and TIO's property rights.

2. FLORES HAS DUE PROCESS RIGHTS IN THE CONSENT

Flores' interests as a Native Hawaiian with cultural practices on Mauna Kea and the subleased premises command due process in agency decision making affecting those rights.

Native Hawaiian traditional and customary practices are rights that require a contested case hearing where agency decisions may affect those rights. Native Hawaiian rights are protected by Article XII § 7 of the Hawai`i State Constitution.[9] *Pele Defense Fund v. Paty*, 73 Haw. 578, 616 – 621, 837 P.2d 1247 (1992)("*Paty*"); *Pub. Access Shoreline Haw. v. Hawai'i Cty. Planning Comm'n*, 79 Haw. 425, 442, 903 P.2d 1246, 1263 (1995)("*PASH*"). This provision places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights[.]" *Ka Pa'akai O Ka 'Āina v. Land Use Comm'n*, 94 Haw. 31, 45, 7 P.3d 1068 (2000). "[T]hose persons who are 'descendants of native Hawaiians who inhabited the islands prior to 1778' and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum." *PASH,* 79 Hawai`i at 449, 881 P.2d at 1270. The drafters of this constitutional amendment "emphasized that ***all*** such rights were reaffirmed and that they did not intend for the

[9] Article XII section 7 provides that "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." Haw. Const. Art. XII sec. 7.

provision to be narrowly construed." *Paty*, 73 Haw at 620, 837 P.2d at 1272 (emphasis is original).

Where a party is denied a contested case hearing the courts must accept all factual allegations of the party as true. *Kilakila I*, 131 Hawai'i at 205, 317 P.3d at 36. Further, the legitimacy of a Native Hawaiian cultural practitioner's beliefs cannot be questioned. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981)("beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection").

In *Mauna Kea Anaina Hou*, this Court recognized that the traditional and customary belief that Mauna Kea is a sacred place significant as the home of ancestral and spiritual entities was an interest worthy of due process. *Mauna Kea Anaina Hou*, 136 Hawai'i at 390, 363 P.3d at 238. By applying well settled principals of "due process" in contested case hearings, the Court left no doubt that Native Hawaiian rights and practices demands the procedural protections offered by a contested case hearing. *Id.*

Flores is a Native Hawaiian and respected cultural practitioner who holds Mauna Kea sacred pursuant to traditional and customary beliefs. ICA #39 ROA 472; *Id.* at 1164. As Flores wrote *pro se* in his timely written petition to the State for a contested case hearing:

> [Flores is a] Kanaka Maoli/Native Hawaiian cultural practitioner who hold[s] Mauna Kea sacred pursuant to traditional and customary beliefs.. Mauna Kea, traditionally known as Mauna a Wākea [Mountain of Wākea, sky father] has long been regarded as the most sacred place on the island by Native Hawaiians of the past and still remembered and cherished by Hawaiians today. Mauna Kea is considered a temple and a site of pilgrimage as confirmed by the several hundred shrines found on the mountain. It has been and continues to be used as a place to conduct customary and religious practice. [Flores] has substantial interest and connections to Mauna a Wākea. [Flores] has traditional and customary practices at the areas on Mauna Kea covered under the Master Lease and proposed Sublease.

ICA #39 ROA 472.[10] Flores, who was and is a party to the CDUP proceedings, was found to have interests deserving of a contested case hearing in *Mauna Kea Anaina Hou*, 136 Hawai'i at

[10] This Court found similar aspects of the appellants' interests in MKAH persuasive:

390, 363 P.3d at 238. The decision in *Mauna Kea Anaina Hou* therefore has a preclusive effect on Appellants' challenge of his right to a hearing in this case. Flores clearly has protected constitutional rights in the property demised by the Sublease.

Even if the sublease does not constitute property, or if this Court requires a showing that Flores possesses a property right, Flores' interests as a Native Hawaiian traditional and customary practitioner is "property" under two distinct theories. First, the rights of Native Hawaiians to engage in their practices are reserved in the title history to the States lands in a manner not unlike an easement, covenant, or title reservation. *PASH*, 79 Haw. at 446, 903 P.2d at 1267; *Palama v. Sheehan*, 50 Haw. 298, 300-01 (1968). Second, Flores' rights are conferred by custom and statute. HRS § 1-1; HRS § 7-1; *Kalipi v. Hawaiian Tr. Co.*, 66 Haw. 1, 9, 656 P.2d 745, 750-51 (1982)("We perceive [HRS § 1-1] to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law.") Flores' interests are undoubtedly "property" for the purposes of due process. *Aguiar*, 55 Haw. at 496, 522 P.2d at 1267 ("a benefit which one is entitled to receive by statute constitutes a constitutionally-protected property interest); *Tetlin Native Corp. v. State*, 759 P.2d 528, 533 (Alaska 1988)(holding that because "easements are property interests which can only be cancelled for cause, holders of such interests are entitled to due process before those interests are extinguished," which includes notice and a hearing under the Administrative procedures act).

3. FLORES' INTERESTS WOULD BE ERRONEOUSLY DEPRIVED WITHOUT A SEPARATE CONTESTED CASE HEARING ON THE CONSENT

Appellants argue that Flores' private constitutional interests as a Native Hawaiian cultural practitioner are not affected by the Consent. State's Opening Brief at 24-28; UH

> Mauna Kea is an origins place. "[I]t's where the heaven and the earth come together, where all life forms originated from. . . . It is a temple, but one not made by man but for man, so that man could learn the ways of the heavens and the laws of this earth, which mean how do we live with each other; how do we live in relationship to the earth; how do we live in relationship to the heaven."

Mauna Kea Anaina Hou, 136 Hawai'i at 386, 363 P.3d at 234.

Opening Brief at 22-24. Appellants also argue that the CDUP proceeding provided Flores with due process regarding his interests in the Consent. State's Opening Brief at 28-29;UH's Opening Brief 21-24. The State also argues that the Board's open meeting at which the Consent was considered provided Flores with due process. State's Opening Brief at 30-31. Their arguments have no merit.

a. Flores' Rights Are Directly And Adversely Affected By The Consent

Flores' rights are affected by the Consent separate and apart from the affects the possible granting of the CDUP could have on his practices. In order to engage in his practices he must have access to Mauna Kea and the subleased premises. However the Consent approves and makes affective the Sublease, which gives TIO the right of possession and enjoyment of the demised premises. ICA #39 ROA 1199. By now holding the possessory interests of the subleased premises, TIO would have the right to exclude those attempting to access the subleased premises. 25 Am Jur 2d Ejectment 6; The Restatement (Second) of Torts § 165 (1977)(entry of land in the "possession of another" is subject to liability for trespass). When the State approved the Sublease, it allowed the University to hand out the right to regulate or otherwise affect the ability of Native Hawaiians to engage in practices on the demised property to a non-governmental entity. Flores is likely to be excluded given that neither the Consent nor the Sublease contains specific terms which address the impact the transfer of the subleased premises to TIO has on Native Hawaiian rights and how those impacts are to be mitigated. By practically extinguishing Flores' right to access, the State had a duty to first provide Flores with a hearing. *See Tetlin*, 759 P.2d 533.

Further, Flores has the right to protect against the disposition of ceded lands which he holds sacrosanct. Considering property to be sacred is a traditional practice of Native Hawaiians:

> **'Āina was not a commodity and could not be owned or traded.** Instead, it belonged to the Akua (gods and goddesses), and the Ali'i (the chiefs and chiefesses who were the human embodiment of the Akua) were responsible for assisting ka po'e Hawai'i (the people of Hawai'i) in the proper management of the 'Āina.
>
> This system of joint responsibility and accountability maintained balance through an adherence to traditional principles. Precontact Hawaiians honored the natural life forces, which took many forms. . . . The islands were believed to be the offspring of Papa (the earth mother) and Wākea (the sky father). . . . This

> mo'olelo (history) illustrates the concept and practice of Mālama 'Āina, or caring for the land, which is the basis of the Hawaiian system of land tenure. Hawaiians nurtured and respected the 'Āina as an older sibling, which in turn provided protection, sustenance, and security. **The 'Āina was not a commodity to be owned or traded, because such actions would disgrace and debase one's family and oneself.** The Hawaiians were said to have had an "organic relationship" with the 'Āina, and the 'Āina was part of the 'ohana (extended family) that connected individuals with each other.

Jon M. Van Dyke, *Who Owns The Crown Lands of Hawai'i?* 11-12 (2008)(internal citations omitted). Native Hawaiians continue this practice and belief system today:

> **The health and well-being of the [n]ative [H]awaiian people is intrinsically tied to their deep feelings and attachment to the land.' Aina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople -- to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable.** The natural elements -- land, air, water, ocean -- are interconnected and interdependent. **To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians.** The aina is part of their ohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) (Footnotes omitted.) (Emphases added); *Chuck v. Gomes*, 56 Haw. 171, 179-80, 532 P.2d 657, 662 (1975)(Richardson, C.J., dissenting)("Mindful of our Hawaiian heritage, we must not lose sight of the cultural traditions which attach fundamental importance to keeping ancestral land.").

Flores is personally affected by the disposition of ceded lands. ICA #39 ROA 472. The Sublease causes Flores to suffer a deep cultural and personal injury. ICA #39 ROA 472, 1164. The subleased premises specifically are considered by Flores to be "a temple and a site of pilgrimage" where he engages in traditional and customary practices. *Id.* He filed this appeal *pro se* to further these interests, bearing alone the burden of this proceeding as part of his practice to protect the land on Mauna Kea. ICA #39 ROA1164 (referring to his practice of aloha 'āina mālama 'āina [caring for and protecting sacred lands]). Because these allegations must be taken as true, transferring a leasehold interest in these lands sacred to Flores without his input affects his interests to a degree that requires the protection of due process.

b. <u>A Contested Case Hearing Would Assist The State In Fulfilling Its Duties To Protect Native Hawaiian Rights and Cultural Resources</u>

A contested case hearing on the Consent is necessary to avoid the wrongful deprivation of Flores' constitutional rights as it would have assisted the State in fulfilling its trust duties to preserve and protect Native Hawaiian rights and practices.

"If the practice of native Hawaiian rights being exercised will be curtailed to some extent ... the [agency] is obligated to address this. Indeed, the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise, their impairment, and the feasibility of their protection." *Ka Pa'akai*, 94 Hawai'i at 50, 7 P.3d 1 at 1087. There are three minimum findings agencies must make in taking actions which may affect Native Hawaiian rights: (1) the identity of "valued cultural, historical, or natural resources" including Native Hawaiian rights and practices; (2) the extent to which those resources will be affected; and (3) the feasible action to be taken, if any. *Id.* Further, the State's duty as trustee of the public lands under its care obligates the State to take action to preserve and protect its trust lands. *State by Kobayashi v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977) ("Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use."); Restatement (Third) of Trust § 176 ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"). "[E]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 475 (2003). As Section IV of the concurring opinion in *Mauna Kea Anaina Hou* states,

> As a related matter, an agency is often in the position of deciding issues that affect multiple stakeholders and implicate constitutional rights and duties. . . . As a result, an agency is often the primary protector of constitutional rights and perhaps is in the best position to fulfill the State's affirmative constitutional obligations. . . . Consequently, an agency bears a significant responsibility of assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions. . . . **[T]he role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. Rather, an agency of the State must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations**. . . .. Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore, should consider and honor state constitutional rights in the course of fulfilling its duties. . . . An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai'i Constitution when such rights are implicated by an agency action or decision.

Mauna Kea Anaina Hou, 136 Hawai'i at 413-15, 363 P.3d at 261-63(Pollack, J., *concurring*).

A contested case hearing would provide the State with a full record to assist in the discharge of its duties under *Ka Pa'akai*, as trustee of the ceded lands trust, and as the "primary protector" of Native Hawaiian's constitutional rights. As Flores alleged *pro se*:

> The [State] have not fulfilled their statutory responsibilities and fiduciary duties to protect the interests, lands, resources, and rights of the public, beneficiaries, and Native Hawaiians associated with Mauna Kea[.]
>
> . . .
>
> Various terms and conditions of the proposed Sublease are in violation of Hawai'i Revised Statutes as well as constitute a breach of the State's high fiduciary duties to the public lands trust (also referred to as ceded lands). . . . The BLNR has failed to determine the fair market value of the proposed lease rent and the necessity for periodic rent openings in long-term leases to assure the State a fair return[.]
>
> Various terms and conditions of the proposed Sublease removes the oversight of the Lessor pertaining to significant provisions and relinquishes it to the Sublessor.

ICA #39 ROA 121-122. If the State investigated Flores' concerns and subjected the Consent to adversarial testing, it would have been better informed, and equipped, to meet its duty to actively protect the constitutional rights and interests of Flores and the public. *Mauna Kea Anaina Hou*, 136 Hawai'i at 413-15, 363 P.3d at 261-63(Pollack, J. concurring).[11] While the State claims that the sublease is already subject to Native Hawaiian rights and practices, State's Opening Brief at 6, the reservation would be "illusory" without findings and conditions by the State regarding impacts on and mitigation for Native Hawaiian rights and practices. *Ka Pa'akai*, 94 Hawai'i at 50, 7 P.3d at 1087. To approve the Sublease without first hearing from Flores erroneously places Flores' rights and the State's trust lands at risk of mismanagement.

The State also argues that any effect that the subleasing of Mauna Kea has is unreviewable now as it was authorized by the 1968 Master Lease for the summit. State's

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[11] The University's claim that *Mauna Kea Anaina Hou* and specifically Section IV of the concurring opinion has no bearing on this case is meritless. UH's Opening Brief at 29-30. Here the State is acting to approve the continued subleasing of ceded lands important to Native Hawaiian cultural practices. Given the State's right to review and approved all subleases, HRS §171-36(a)(6),and its role as "protector of constitutional rights," *Mauna Kea Anaina Hou*, 136 Hawai'i at 413-15, 363 P.3d at 261-63(Pollack, J. concurring), the State is neither obligated nor even permitted to sit idly by and watch as the University does as it chooses with the summit of Mauna Kea.

Opening Brief at 27 ("the Sublease . . . does not in any way alter the currently designated nature, purpose, or intended use of [Mauna Kea]."). In so arguing, the State incorrectly implies that it has no oversight over subleases for and related development of the Mauna Kea summit.

In approving the 1968 General Lease, the State did not, once and for all, commit to allowing UH unfettered discretion to sublease and develop Mauna Kea. When UH first obtained the General Lease for Mauna Kea, it contemplated a single "observatory." ICA #39 ROA 97. The summit now houses a "series" of no less than thirteen astronomical observatories, *Mauna Kea Anaina Hou*, 136 Hawai'i at 381, 363 P.3d at 229; ICA #39 ROA 934, subject to at least ten subleases. State's Opening Brief at 21-22. With each new sublease the University issues comes new impacts to the State's trust lands. It is critical to the State's duty to responsibly manage the State's trust lands to review UH's actions with more than a rubber-stamp approval of all subleases. *See In re 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications & Petition*, 128 Hawaii 228, 238, 287 P.3d 129, 139 (2012)("[T]his court will take a 'close look' at the action to determine if it complies with the public trust doctrine and it will not act merely as a rubber stamp for agency or legislative action."). Doing so would be consistent with the State's conditioning of the General Lease on the State's review and approval of all further subleases for Mauna Kea. ICA #39 ROA 675; HRS § 171-36(a)(6). It is also critical to informed decision making to allow the public to challenge the University's subleasing of Mauna Kea before the Board and the State. The infinite subleasing of Mauna Kea is not a done deal set into motion by the 1968 General Lease; the injuries it causes to those situated like Flores require the State to take a closer look through the holding of a contested case hearing.

c. Flores Did Not Receive Due Process

Appellants contend that the still ongoing CDUP contested case satisfies Flores' right to due process on his interests in the Sublease. State Opening Brief at 28; UH Opening Brief at 24. The State also argues that the open board meetings of the BLNR at which the Consent was discussed and ultimately approved satisfied Flores' right to a contested case hearing. State Opening Brief at 28-30. These contentions are not legitimate reasons for denying Flores a contested case hearing on the Consent.

Neither Appellant took this position before the Environmental Court, choosing instead to assert arguments antithetical to their current posture. The State admitted below that "[t]he contested case to the sublease and Thirty Meter Telescope permit ***are just two separate actions.***

One involves acquisition of land and one involves a permit to build on the land." ICA #23 at 4:6-9. The State also conceded that this case had nothing to do with the Permit that the Board issued to the University. ICA #39 ROA 889. The State even moved for a stay of this appeal pending the completion of the CDUP contested case hearing and argued that this case "will still be ripe after the [CDUP] contested case[.]" ICA #23 at 5:24-6:1 The University likewise admitted that the issues relating to the Permit are "not properly before this Court." ICA #39 ROA 1060.

Indeed, "the essence of justice is largely procedural." *Mortensen,* 52 Haw. at 220, 473 P.2d at 871. "Once a contested case hearing is mandated, due process requires that the parties be given a meaningful opportunity to be heard." *Mauna Kea Anaina Hou*, 136 Hawai'i at 391, 393 P. 3d at 239(citing *Application of Hawai'i Elec. Light Co.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984)). Hawai'i Revised Statutes Chapter 91, the Hawai'i Administrative Procedures Act ("Chapter 91") requires that "opportunities shall be afforded all parties to present evidence and argument on all issues involved." HRS § 91-9(c). Every party shall have the right to conduct cross-examination and shall have the right to submit rebuttal evidence. *In re Kauai Elec. Div.*, 60 Haw. 166, 182, 590 P.2d 524, 536 (1978) (holding that a hearing satisfied HRS § 91-9 where "all parties had been given ample opportunity to obtain and present all their evidence, to present testimony, both written and oral, to cross examine witnesses, and to argue the issues on the merits before the Commission."); *Lanaians for Sensible Growth*, 137 Hawai'i 298, 369 P.3d 881. As this Court explained in *Mauna Kea*:

> A contested case hearing affords parties extensive procedural protections similar to those afforded parties in a civil bench trial before a judge. These protections include the opportunity to issue subpoenas for witnesses to testify under oath or produce documents, to cross-examine witnesses under oath, and to present evidence by submitting documents and testimony under oath in support of their positions. Moreover, a contested case hearing affords parties the opportunity to obtain and utilize the assistance of counsel, comment on how a site visit by the hearing officer should be conducted, review the written decision of the hearing officer, and challenge the hearing officer's decision both in writing and verbally at a hearing before BLNR.

Mauna Kea, 136 Hawai'i at 391, 393 P. 3d at 239 (internal citations omitted). Violation of these proscribed contested case hearing procedures results in the invalidation of state agency actions. *Lanaians for Sensible Growth*, 137 Hawai'i 298, 369 P.3d 881 (invalidating decision of the

Land Use Commission for failing to allow all parties in a contested case to present witnesses and evidence).

The still ongoing CDUP contested case hearing does not provide Flores with a meaningful opportunity to be heard on the approval of the Sublease. The CDUP hearing addresses just that: the issuance of a conservation district use permit for the construction of the TMT facilities. Dkt #31 at 4-5. The CDUP hearing does not address issues presented by the Sublease and Consent: the transfer of the possessory interest of ceded lands important to Native Hawaiian traditional and customary practices to a non-governmental third party entity. *Id.* In fact, the Consent was excluded from the notice of the issues to be decided in the CDUP hearing. *Id.* Because the State did not give adequate notice that the Consent was at issue in the CDUP hearing, and therefore could not decide whether to approve the Consent in that proceeding, any opportunity Flores had to present evidence and cross examine witnesses in the CDUP hearing was not meaningful to his rights implicated by the Consent. HRS § 91-9 ("in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. . . . The notice shall include a statement of . . . the issues involved."); *Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai'i 247, 271, 320 P.3d 912 (2014). Given that the CDUP and the Consent address two distinct agency actions-a permit for the construction of a project verses the subleasing of ceded lands-the contested case hearing on the Consent would not be "duplicative" of the CDUP hearing.[12] *See* State's Opening Brief at 24; UH's Opening Brief at 24.

Even if the current CDUP hearing could conceivably satisfy Flores' right to a contested case hearing on the Consent, that proceeding is still pending three years after the BLNR voted to approve the Consent and Sublease. The Consent would therefore be invalid because again the Sublease was approved prior to the current CDUP hearing, a sequence definitively prohibited by prior decisions of this Court. *Mauna Kea*, 136 Hawai'i at 394, 363 P.3d at 242 (2015); *Kilakila I*, 131 Hawai'i at 206, 317 P.3d at 40.

The two open Board meetings at which the Consent was considered by the State could not have given Flores a meaningful opportunity to be heard. State Opening Brief at 29-31. The open meetings did not provide for the submission of evidence, nor was there any notice informing Flores of the right to present such evidence. ICA #39 ROA 347. Flores was not able

[12] Accordingly Appellants cannot rely on the administrative record in the CDUP proceeding to argue that Flores received due process.

to present witnesses or introduce exhibits. Flores could not cross examine those who provided testimony on behalf of UH, including, but not limited to Don Straney, Chancellor of UH Hilo, Ed Stone, Executive Director of TMT, or James Hollstorm, a licensed real estate appraiser for the University. ICA #39 ROA 347-349. At no time was any attendee at the meeting, including Flores, permitted to cross examine testifiers or offer rebuttal evidence. *Id.* There was no opportunity to submit draft findings of fact or written briefs on legal issues. Flores was not afforded a meaningful opportunity to make his case to the State.

The "flexible" nature of due process does not exempt the State from providing a formal contested case hearing with all the procedural trappings required by Chapter 91 and the case law cited *supra*. State's Opening Brief at 22-24; UH's Opening Brief at 17, 22-24. The cases relied upon by Appellants do not sway the merits. *Medeiros v. Haw. Cty. Planning Comm'n*, 8 Haw. App. 183, 194, 797 P.2d 59, 65 (1990) involved a statutory scheme that expressly exempted the subject agency action from Chapter 91 contested case hearing requirements. *In re Herrick*, 82 Haw. 329, 922 P.2d 942 (1996) involved a legislative action by an agency. And *Sandy Beach Def. Fund*, 70 Haw. at 370, 773 P.2d at 257 involved a decision of the Honolulu City Council, which is expressly exempt from Chapter 91's requirements. None of the cases cited by Appellants are analogous here where the strict procedure requirements of Chapter 91 apply.

If the State was truly concerned that Flores' written petition was not clear as to his interests, it had the option to hold a standing hearing pursuant to HAR §13-1-31(a), "within a reasonable time" following the previous board meeting, "to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case." HAR §13-1-31(a). The State chose not to do so, thereby calling into question its motive in denying Flores due process.

4. THE STATE HAS NO LEGITIMATE INTEREST IN REFUSING TO HOLD A CONTESTED CASE HEARING

The State argues that honoring Native Hawaiian practitioners' rights to a contested case hearing prior to decision making on leases and subleases would result in an increased volume of hearings that "could overwhelm the board." State Opening Brief at 32. The University claims that there is a prevailing interest to process land transfers expeditiously. UH's Opening Brief at 24. Both positions are without merit.

Whether the Appellants' claimed interests of expediency and efficiency are legitimate is questionable. This appeal appears to be another attempt in a continuing effort by the Board and the Department to test the boundaries of what *de minimis* appearance of due process they must maintain to avoid judicial intervention and public challenge of its decision making.[13] The Board has previously denied a contested case hearing because the Board believed that such hearings are discretionary even where Native Hawaiian burials were threatened with disturbance. *Kaleikini*, 124 Hawai'i at 17, 237 P.3d at 1083. The Board has denied a contested case hearing request that followed proper procedures. *Kilakila I*, 131 Hawai'i at 200, 317 P.3d at 34. The Board has attempted to use post-hoc hearings held after decision making to give the appearance that due process was satisfied. *Id*; *Mauna Kea Anaina Hou*, 136 Hawai'i at 399, 363 P.3d at 247. The Board used an emergency rule process to avoid Chapter 91's public notice requirements to expedite agency rules aimed at preventing protests on Mauna Kea without the same level of notice required by Chapter 91. In this case, the Board decided to issue the Consent without first deciding on Flores' request for a contested case hearing even though the Board was well aware such a sequence was prohibited by *Kilakila I*, a case it was a party to. *See* DKT #39 ROA 893. Even the form of the Consent was altered after the Board voted to approve the Consent to a form substantively different from what was approved by the Board. ICA #39 ROA 699-701; ICA #39 ROA 437. The State Appellants appear to be attempting to avoid challenge and review and are acting on behalf of some interest inconsistent with its role as trustee of the State's lands.

So too has the State and the University been consistent in denying that Native Hawaiian rights generally entitle one to a contested case hearing. This Court's prior succinct decisions in confirming Native Hawaiian rights as being substantial due process interests have fallen on deaf ears. Throughout this case, the Department and the University have argued that Native Hawaiian rights are not substantial rights warranting due process consideration by State Agencies. ICA #39 ROA 484 (July 25, 2014 Department staff submittal) ICA #39 ROA 895 ("Nor does article XII, § 7 entitle Flores to a contested case hearing.")(State's Answering Brief below); ICA #39

[13] This practice is relatively recent. Previously, the Board had followed the practice of other administrative agencies to hold contested case hearings prior to decision making. *Mauna Kea Power Co. v. Board of Land & Natural Resources*, 76 Haw.`i 259, 261, 874 P.2d 1084, 1086 (1994); *Morimoto v. Bd. of Land & Natural Res.*, 107 Hawai`i 296, 300, 113 P.3d 172, 176 (2005); *Keahole Def. Coalition, Inc. v. Bd. of Land & Natural Res.*, 110 Hawai`i 419, 421-423, 134 P.3d 585, 587-9 (2006).

ROA 1065 ("Article XII, section 7 of the Hawai'i State Constitution does not entitle appellant to a contested case")(University's Answering Brief below). Even after the decision in *Mauna Kea Anaina Hou* was published and this matter was remanded to the Board, ICA #39 ROA 1131, the Board refused to reconsider its prior position that Native Hawaiian rights are not entitled to a contested case hearing, and the University continued to assert the same position. ICA #39 ROA 895, 1214. The State's constant probing of the minimum Article XII section 7 and due process requires demonstrates that it is acting in dereliction of its duties under the State constitution.

Appellants' asserted interests of efficiency and expediency do not outweigh due process. *Boyle v. O'Bannon*, 500 Pa. 495, 499, 458 A.2d 183, 186 (1983)("[W]e cannot allow any action which permits denial of access to the courts in the name of judicial economy. Due process cannot be abolished to achieve judicial efficiency and convenience."). Constitutional rights are paramount:

> But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones

Stanley v. Illinois, 405 U.S. 645 (1972); *Grant v. Spellman,* 99 Wash. 2d 815, 825, 664 P.2d 1227, 1233 (1983) ("speculative arguments concerning possible administrative burdens should not be used to justify a denial of individual rights. It is well settled that constitutional protections cannot be denied for administrative expediency."); *Bowden v. Davis*, 205 Ore. 421, 451-52, 289 P.2d 1100, 1114 (1955)("Mere convenience, expediency, danger of losing a profit (whose profit?), or added expense will never justify a denial of an individual's constitutional right to due process[.]"). Any interest in the name of expediency the State has in denying contested case hearings to Native Hawaiian practitioners is outweighed by due process and constitutional rights.

There is no danger of this Court opening any flood gates by confirming Flores' right to a contested case hearing on the Consent. A review of the minutes of the Board dating back to January 2014 finds that out of the 33 requests for approval of subleases in the past three and a half years made to the Board, there was not one request for a contested case hearing other than Flores' in this case.[14] *See* State Opening Brief at 32. The State's levy is holding back no water.

[14] Found at http://dlnr.hawaii.gov/meetings/.

B. THE INTERNAL MANAGEMENT EXCEPTION DOES NOT PERMIT THE STATE TO DENY A CONTESTED CASE HEARING ON THE CONSENT

The Consent does not fall under the narrow "internal management" exception to Chapter 91 applicable to State agencies taking actions that do not affect the rights of the public. Extending or expanding this exception to agency decisions that determine or affect the private rights of the public is contrary to public policy.

1. NO PRECEDENT EXEMPTS THE ISSUANCE OF LEASES OR THE APPROVAL OF SUBLEASES FROM DUE PROCESS AND CHAPTER 91

The internal management exemption applies to a narrow category of agency decisions from the requirements of Chapter 91: those where no "private rights of or procedures available to the public" are affected. *Sharma v. Dep't of Land & Nat. Res.*, 66 Haw. 632, 637, 673 P.2d 1030, 1034 (1983). The internal management exception has its basis in Chapter 91's definition of the term "Rule";

> 'Rule' . . . . does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

HRS § 91-1(4). The exception is undoubtedly limited in scope:

> The exception to the definition of a 'rule' contained in HRS § 91-1(4) . . . [is] that '[t]he term does not include regulations concerning *only* the internal management of an agency *and* not affecting private rights of . . . the public' (emphasis added). The limited scope intended for this exemption from the HAPA's rule-making requirements is evident from the choice of words used to express it. It is 'only' those regulations concerning the internal management of an agency 'and' not affecting private rights of the public that may be adopted without an opportunity for public participation. One commentator has observed that even in those states where the statutory exemption is broader, covering 'all statements concerning matters of internal management, reliance must be placed on the courts to foreclose any tendencies that agencies might exhibit to avoid the rule-making requirements by casting regulations in terms of internal management.' 1 Cooper 116.

Aguiar, 55 Haw. at 488-89, 522 P.2d at 1262-63.

Whether regulations concern only the internal management of the agency turns on to whom the regulations are directed. "If the regulation is principally directed to its staff, then it is generally considered to be a matter of internal management." *Green Party of Haw. v. Nago*, 138 Hawai'i 228, 238, 378 P.3d 944, 954 (2016) (citing *Rose v. Oba*, 68 Haw. 422, 426, 717 P.2d

1029, 1031 (1986)(noting that the legislative history behind the definition of "rule" in Chapter 91 intended "that regulations and policy prescribed and used by an agency *principally directed to its staff* and its operations are excluded from the definition."); *Doe v. Chang*, 58 Haw. 94, 96, 564 P.2d 1271, 1273 (1977) (noting that "[t]he only persons purporting to be instructed or ordered" by the regulation were "the personnel of the department"); *In re Doe*, 9 Haw. App. 406, 412, 844 P.2d 679, 682 (1992)(exempting from Chapter 91 "field sobriety testing procedures established by the HCPD [because they] were instructional in nature directed only to HCPD police officers.")); *Waugh v. Univ. of Haw.*, 63 Haw. 117, 131, 621 P.2d 957, 968 (1980)(finding that "rules" were exempt from Chapter 91 as they "would affect only the staff and faculty of the University and not the private rights of or procedures available to the public."); *Big Island Small Ranchers Ass'n v. State*, 60 Haw. 228, 239-40, 588 P.2d 430, 438 (1978)(finding that an internal policy not to subdivide state lands was not a rule.).

But where agency actions or regulations concern the public, affects private rights, or declare the rights of the public, the internal management exception cannot apply. In *Aguiar v. Hawai'i Housing Authority*, the Court determined that the Hawai'i State Public Housing Authority's internal regulations were not internal management and affected private rights when the department established a rent schedule and maximum income limits for continued occupancy for tenants in public housing and issued lease termination notices. 55 Haw. at 489-90, 522 P.2d at 1262-63. The Court reasoned that the amendments plainly "'affected' in both a practical and legal sense the 'private rights' not only of those tenants actually living in public housing but also those members of the public who were interested in becoming tenants." *Id.*, 55 Haw. at 489, 522 P.2d at 1262. In *Burk v. Sunn*, the Department of Social Services and Housing's new policy in calculating food stamp benefits was not internal management as it had "a direct impact on the rights of Food Stamp recipients." *Burk v. Sunn*, 68 Haw. 80, 93, 705 P.2d 17, 27 (1985). In *Green Party of Haw. V. Nago*, the State's methodology for ordering, distributing, and calculating ballots were not subject to the internal management exception. The Court there concluded that the actions of the Office of Elections were subject to administrative review as it "***may*** result in the deprivation of the right to vote[.]" *Id.*, 138 Hawai'i at 240-41, 378 P.3d at 956-57.

Even if a matter only concerns issues of internal management of an agency, the exception still will not apply if it affects the "private rights or procedures available to the public" *Green Party of Haw.*, 138 Hawai'i at 238-39, 378 P.3d at 954-55 (citing *Nuuanu Valley Ass'n v. City &*

Cnty. of Honolulu, 119 Hawai'i 90, 100, 194 P.3d 531, 541 (2008); *Haw. Prince Hotel Waikiki Corp. v. City & Cty. of Honolulu*, 89 Haw. 381, 393, 974 P.2d 21, 33 (1999). In *Nuuanu Valley,* the Honolulu Department of Planning and Permitting's policy regarding public disclosure of engineering reports was not an exempt matter of internal management because, even though it was an internal policy, it "affect[ed] the procedures available to the public." *Id.*, 119 Hawai'i at 100, 194 P.3d at 541. In *Haw. Prince Hotel Waikiki Corp v. City & Cty. Of Honolulu*, this Court held "that a city appraiser's methodology for assessing the value of a golf course was a rule because the methodology 'undoubtedly affect[ed] the assessed value of the golf course and the future assessments of all golf course owners." *Id.*, 89 Haw. at 393, 974 P.2d at 33.

2. THE CONSENT IS NOT A MATTER OF INTERNAL MANAGEMENT AND AFFECTS THE RIGHTS OF THE PUBLIC

The internal management exception does not apply to the Consent and Sublease. No case, including *Sharma*, has ever applied the internal management exception to the issuance of a lease or sublease, and there is no statutory or factual basis to do so.

On the face of Chapter 171, sublease approvals do not fall under the internal management exception. In order for a lessee of Department-managed lands to dispose of leased ceded lands by way of a sublease, the lessee must first petition the Department for its approval. HAR §§ 13-1-11 (a) and (d). The application must then be heard at an open meeting of the Board. HRS § 171-5. The Board then determines whether to approve the sublease and under what conditions. HRS 171-36(a)(6). [15] The Board can reject, confirm, or even adjust upwards the lease rent, an action already confirmed by this Court to be outside of the internal management exemption.

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[15] Section 171-36(a)(6) states in pertinent part:

> The lessee shall not sublet the whole or any part of the demised premises except with the approval of the board; provided that prior to the approval, the board shall have the right to review and approve the rent to be charged to the sublessee; provided further that in the case where the lessee is required to pay rent based on a percentage of its gross receipts, the receipts of the sublessee shall be included as part of the lessee's gross receipts; provided further that the board shall have the right to review and, if necessary, revise the rent of the demised premises based upon the rental rate charged to the sublessee including the percentage rent, if applicable, and provided that the rent may not be revised downward[.]

HRS § 171-36(a)(6).

Aguiar, 55 Haw. at 488-89, 522 P.2d at 1262-63. It is clearly a process directed to the public and which concerns the rights of members of the public who possess a Department-managed lease or who seek a sublease of Department-managed lands.

Even if some sublease approvals could be exempt from Chapter 91 as issues of internal management, the specific Consent and Sublease here are not. The Consent is expressly directed to the University as "lessee" and TIO as "sublessee." ICA #39 ROA 699-700. It affects the rights of Native Hawaiians whose practices encumber the TMT sites by way of statute, HRS § 7-1, custom, HRS § 1-1, and Haw. Const. Art. XII sec. 7. As an approval of a sublease, the Consent determines the rights of UH in that it permits the exercise of the right to alienate leased property. It allows TIO to take possession of ceded lands important to Native Hawaiians. It requires UH to submit TIO's construction plans to State, and requires TIO to comply with the terms of the 2013 CDUP, even though UH was the only applicant for that permit and that permit has since been invalidated. *Id.* The Consent cannot be considered exempt from Chapter 91.

Simply because the State is acting in regards to land does not mean that it is automatically exempt from the requirements of Chapter 91; the dicta in *Sharma* referencing the state's right as a "landlord" is narrow in its application. For example, the State was acting as a landlord in deciding rental amounts for public housing leases, yet this Court recognized that State's decision to do so was not exempt as an issue of internal management. *See Aguiar*, 55 Haw. at 488-89, 522 P.2d at 1262-6 (holding that the internal management exception did not apply to exempt changes in rental calculations from a hearing by current and prospective lessees). The State as "landlord" nonetheless has complied with Chapter 91 on matters regarding State lands, including issues of access, hunting, camping, and recreation. *See* HAR§ 13-146 (State parks); HAR § 13-220 (auction of public lands); HAR §134-104 (activities in forest reserves); HAR §13-1521 (hunting). The term "landlord" is overbroad and subjective; courts instead must look to whom an agency action is directed, and whether the rights of the public are being affected in order to determine whether the internal management exception applies. *Green Party of Haw.*, 138 Hawai'i at 238, 378 P.3d at 954.

Sharma is limited. In *Sharma*, the appellant leased land from the Department under a general lease. *Sharma*, 66 Haw. at 634-35, 673 P.2d at 1032-33. The terms of the lease required the appellant to make semi-annual installment payments of rent, procure and maintain a public liability insurance policy, and post a performance bond. *Id.* The appellant failed to post the

performance bond, allowed the insurance to lapse and was delinquent on rent payments. *Id.* After providing notice of the default, the Department cancelled the lease and refused to grant a contested case hearing. *Id.*

In holding that no contested case hearing was required, this Court in *Sharma* recognized that there were no rights left to be determined as the rights of the appellant lessee were already determined by the lease and by statue. The appellant lessee was in clear default of the terms of his lease, which fact, pursuant HRS § 171-39, forced the State to cancel the lease without a hearing:

> **§171-39 Leases; forfeiture.** Upon the violation of any condition or term of any lease to be observed or performed by the lessee or tenant, ***the board of land and natural resources shall***, after the notice of default as provided in section 171-20, and subject to the rights of each holder of record having a security interest as provided in section 171-21, ***terminate the lease or tenancy and take possession of the leased land, without demand or previous entry and without legal process***, together with all improvements placed thereon and shall retain all rent paid in advance as damages for the violations.

HRS § 171-39. The State in *Sharma* had no choice but to cancel the lease without a hearing. The lease required it, DLNR's statute prohibited the appellant from receiving "legal process", and there were no due process rights left to adjudicate. However the *Sharma* court did not hold that whenever the BLNR makes a decision that affects the administration and control of public lands that no one has the right to a contested case hearing. Unlike the lease cancellation in *Sharma,* the approval of a lease or sublease by the State is not preordained by statute or contract and necessarily involves a determination of the rights of the public.

Neither is *Big Island Small Ranchers Ass'n,* 60 Haw. at 238, 588 P.2d at 437 persuasive. The dispute in that case was whether the State was required to subdivide large parcels of land prior to leasing, not whether the leasing of the subject land in and of itself was improper. *Id.* The Court in *Big Island Small Ranchers* merely held that the State's decision to create parcels of certain sizes was a matter of internal management.

As the law currently stands, the State is required to honor Flores' right to a contested case hearing prior to decision making on UH's application for sublease approval.

3. EXPANDING *SHARMA* WOULD FRUSTRATE THE PURPOSE OF CHAPTER 91 AND THE PUBLIC INTEREST

It would frustrate the purpose of Chapter 91 and contested case hearings to extend the internal management exception and to all agency actions on matters involving leases regardless of the effect on the due process rights of the public

Contested case hearings serve two purposes. First, they provide the agency with a full record upon which to render an informed decision mindful of its trust duties. *Mauna Kea Anaina Hou*, 136 Hawai'i at 391, 363 P.3d at 239 ("these procedures are designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made").

Second, they provide the lay person a venue to be heard short of the technicalities and expense of a formal legal action. As this Court recognized, Chapter 91 "is a remedial statute designed to give citizens a fair opportunity to be heard before the official of the agency who is charged with passing on that case." *Hawai'i Laborer's Training Ctr. v. Agsalud*, 65 Haw. 257, 260, 650 P.2d 574 (1982); *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)("The APA sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts."). Contested case hearings provide the public with a non-technical venue to be heard:

> The administrative tribunal or agency has been created in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. 1 Davis, Administrative Law Treatise 39-40, § 1.05 (1958).

Cariaga v. Del Monte Corp., 65 Haw. 404, 652 P.2d 1143, 1147 (1982). Flores was denied the benefits a contested case hearing offers to *pro se* litigants seeking to enforce and protect the constitutional rights of Native Hawaiians and was forced to bear the expense and difficulty of seeking judicial intervention.

Public participation in a forum more accessible to the lay person than the court system is important in this case involving Native Hawaiian rights:

> It is undisputed that the rights of native Hawaiians are a matter of great public concern in Hawaii. This court has repeatedly demonstrated ***its fundamental policy that Hawaii's state courts should provide a forum for cases raising issues of broad public interest***, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court.

Paty, 73 Haw. at 614-15, 837 P.2d at 1268-69 (citing *Life of the Land*, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981) ("Our touchstone remains 'the needs of justice.'")). Providing Native

Hawaiian practitioners a contested case hearing before agencies on matters concerning land is critical to support an agencies' trust duties to preserve and protect Native Hawaiian practices. *Ka Pa'akai*, 94 Hawai'i at 50, 7 P.3d at 1087 ("If the practice of native Hawaiian rights being exercised will be curtailed to some extent[,] . . . the [agency] is obligated to address this. Indeed, the promise of preserving and protecting customary and traditional rights would be illusory absent findings on the extent of their exercise").

Flores is also entitled to a forum to challenge the transfer of ceded lands as affecting his traditional and customary beliefs. This Court has recognized that the harm to Native Hawaiians when ceded lands are transferred confers standing to sue;

> [Appellant] Osorio alleges that, '[w]henever ceded lands are alienated from the trust, the trust res is permanently diminished, and the collective rights of the public, Hawaiians[,] and native Hawaiians are negatively impacted' and that such diminishment causes him injury as a member of the general public because, as a Hawaiian, 'his identity and cultural subsistence and religious rights are intrinsically tied to the land.'
>
> . . .
>
> Osorio is [claiming] simply that, as a Hawaiian member of the general public, he may suffer cultural and religious *injury* if ceded lands are transferred from the trust in violation of the State's fiduciary duties. Based on the foregoing, we conclude that Osorio, as a member of the general public and a 'beneficiar[y] of the public trust,' has sufficiently alleged particular and threatened injury based on his Hawaiian cultural and religious attachments to the aina or land.

Office of Hawaiian Affairs, 121 Hawai'i at 333-34, 219 P.3d at1120-21. Where the government seeks to dispose of trust lands, whether by lease or deed, the public must have recourse:

> If Kapiolani Park is the subject of a charitable trust, then the City is the trustee by virtue of the executive order of the governor turning the property over to it. Where a trustee of a public charitable trust is a governmental agency, such as the City, and that agency does not file periodic accounts of its stewardship, and will not seek instructions of the court as to its duties . . .the citizens of this State would be left without protection, or a remedy, unless we hold, as we do, that members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court.
>
> Were we to hold otherwise, the City, with the concurrence of the attorney general, would be free to dispose, by lease or deed, of all, or parts of, the trust comprising Kapiolani Park, as it chose, without the citizens of the City and State having any recourse to the courts. Such a result is contrary to all principles of equity and shocking to the conscience of the court.

Kapiolani Park, 69 Haw. at 572-73, 751 P.2d at 1025. These interests are paramount over what little justifiable interest the State's has in avoiding a contested case hearing. Before redisposing of a portion of the State's interest in this land to another entity, Flores should be afforded the opportunity to fight "against improvident dissipation of an irreplaceable res." *In re Wai'ola O Moloka'i, Inc.*, 103 Hawai'i 401, 422, 83 P.3d 664, 685 (2004).

V. CONCLUSION

For these and the foregoing reasons, the judgment of the Environmental Court should be affirmed and the Consent should be vacated.

DATED: Honolulu, Hawai'i, August 11, 2017.

/s/ David Kauila Kopper
DAVID KAUILA KOPPER
CAMILLE K. KALAMA
Attorneys for
Appellant-Appellee E. Kalani Flores