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Supreme Court  
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13-DEC-2013  
12:25 PM**

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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KILAKILA 'O HALEAKALA,  
Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES,  
THE DEPARTMENT OF LAND AND NATURAL RESOURCES,  
and WILLIAM AILA, in his official capacity as Interim  
Chairperson of the Board of Land and Natural Resources,  
UNIVERSITY OF HAWAI'I, and THOMAS M. APPLE, in his official  
capacity as chancellor of the University of Hawai'i at Manoa,  
Respondents/Appellees-Appellees.

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SCWC-11-0000353

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-11-0000353; CIV. NO. 10-1-2651)

DECEMBER 13, 2013

CONCURRING OPINION BY ACOBA, J., WITH WHOM POLLACK, J., JOINS

I concur in the result, but write separately to address four issues related to the right of Petitioner/Appellant-Appellant Kilakila 'O Haleakalā (KOH) to a contested case hearing

and subject matter jurisdiction.<sup>1</sup> First, I would hold that jurisdiction over KOH's claims arises independently under article XI, section 7 of the Hawai'i Constitution<sup>2</sup> in light of specific provisions therein protecting native Hawaiian rights. Second, Respondent/Appellee-Appellee Board of Land and Natural Resources (BLNR) was required to hold a contested case hearing prior to the issuance of a conservation district use permit (CDUP or permit), as a matter of constitutional due process, because Respondent/Appellee-Appellee University of Hawai'i (UH) had a "property interest" in the CDUP, and the issuance of the CDUP would adversely impact KOH's ability to engage in native Hawaiian traditional and customary practices as protected by art. XII, § 7 of the Hawai'i Constitution. See Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 881 P.2d 1210 (1994) (holding that constitutional due process protections mandate a hearing

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<sup>1</sup> I concur with the majority that this case is not moot, majority's opinion at 15, that BLNR's vote to grant the permit application constituted an effective denial of KOH's requests for a contested case hearing, majority's opinion at 24, and that the case should be remanded to the circuit court of the first circuit (the court) for further proceedings regarding KOH's request for stay or reversal of the decision to issue the permit, majority's opinion at 31.

<sup>2</sup> Haw. Const. art. XII, § 7 provides:

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 island prior to 1778, subject to the right of the State to regulate such rights.

"where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases."). Third, jurisdiction arises under the public trust doctrine set forth in art. XI, § 1 of the Hawai'i Constitution<sup>3</sup>. Fourth, BLNR's granting of the permit constituted an appealable contested case hearing, despite BLNR's assertion that it had not yet acted on KOH's petition for a contested case hearing, because this court has adopted a functional approach to contested case hearings that considers the effect of an agency decision rather than relying on an agency's characterization of that decision.

I.

This case involves appellate review of the December 1, 2010 decision by BLNR to grant the conservation district use application (CDUA) filed by UH. It is undisputed that KOH timely requested a contested case hearing before BLNR, in accordance

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<sup>3</sup> Haw. Const. art. XI, § 1 provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

with the procedures set forth by Hawai'i Administrative Rules (HAR) § 13-1-28(a) (2009)<sup>4</sup>, but BLNR did not take action on these requests. On December 2, 2010, the CDUP was issued.

On December 13, 2010, KOH filed an appeal in the court, challenging BLNR's decision on December 1, 2010 as "(a) effectively denying the timely request of [KOH] for a contested case hearing on [UH's CDUA]; and (b) approving this [CDUA] for a solar telescope project."<sup>5</sup> KOH stated that the court had jurisdiction over the appeal pursuant to HRS § 91-14(a) (Supp. 2004)<sup>6</sup>. UH filed a motion to dismiss KOH's notice of appeal,

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<sup>4</sup> HAR § 13-1-28 provides:

(a) When required by law, [BLNR] shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person.

(b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter.

(c) Any procedure in a contested case may be modified or waived by stipulation of the parties.

<sup>5</sup> The Honorable Rhonda A. Nishimura presided.

<sup>6</sup> HRS 91-14(a) provides:

(a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term 'person aggrieved' shall include an agency that is party to a contested case proceeding before that agency or another agency.

alleging, inter alia that the court lacked jurisdiction over the appeal. BLNR filed a joinder in UH's motion to dismiss.

In the meantime, on February 11, 2011, BLNR granted KOH's earlier request for a contested case hearing and subsequently appointed a hearing officer. BLNR conducted the contested case hearing on February 18, 2011.

Also on February 18, 2011, the court held a hearing on the motion to dismiss KOH's appeal, and the court orally ruled to grant the motion. The court filed its final judgment on March 29, 2011.

KOH appealed to the Intermediate Court of Appeals (ICA), alleging that the court had erred in dismissing its case for lack of jurisdiction. The ICA filed a memorandum opinion on June 28, 2012, and its judgment on July 30, 2012, affirming the circuit court's final judgment dismissing the appeal for lack of jurisdiction.

## II.

KOH asserts that the court has jurisdiction pursuant to HRS § 91-14(a) which provides that "[a]ny person aggrieved by a final decision and order in a contested case or a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this

chapter[.]” (Emphases added.) A “contested case” is defined as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.” HRS § 91-1 (1993). In determining whether the court had jurisdiction pursuant to HRS § 91-14(a) over KOH’s appeal from BLNR’s decision granting the CDUP to UH, the following test is applied:

[F]irst, 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 and 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.”

Kaleikini v. Thielen, 124 Hawai‘i 1, 16-17, 237 P.3d 1067, 1082-83 (2010) (emphases omitted) (brackets omitted) (quoting Public Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Comm’n, 79 Hawai‘i 425, 431, 903 P.2d 1246, 1252 (1995) (PASH)).

### III.

With respect to the first requirement, an agency hearing is “required by law” if “there is a ‘statutory, rule-based, or constitutional mandate for a hearing.’” E & J Lounge Operating Co. v. Liquor Comm’n of City & Cnty. of Honolulu, 118 Hawai‘i 320, 330, 189 P.3d 432, 442 (2008). The majority holds that BLNR was required to hold a contested case hearing pursuant

to the administrative rules governing Respondent/ Appellant-Appellant Department of Land and Natural Resources (DLNR) and BLNR.<sup>7</sup> Majority's opinion at 20. However, the Hawai'i Constitution provides constitutional mandates for a contested case hearing in this case through three separate means.

First, there is an independent basis for KOH's entitlement to a contested case hearing in the Hawai'i Constitution's protection of native Hawaiian rights pursuant to article XI, section 7. See Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 46, 7 P.3d 1068, 1083 (2000). Second, KOH may assert a protected constitutional interest in native Hawaiian rights that would be adversely affected by the issuance of the permit, and thus would be entitled to a contested case hearing pursuant to Puna Geothermal. Third, as the issuance of the permit in the instant case would implicate the public trust doctrine, KOH is entitled to a contested case hearing on the basis that it has standing to vindicate the public trust. See In re Water Use Permit Applications, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000) (Waiahole I).

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<sup>7</sup> The majority concludes that HAR § 13-5-40(a)(4) (2011) provided a basis for a contested case hearing that was "required by law." Majority's opinion at 20. HAR § 13-5-40(a)(4) states that "Public hearings shall be held . . . [o]n all applications determined by the chairperson that the scope of proposed use, or the public interest requires a public hearing on the application."

IV.

A.

It is well-established that "the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." Ka Pa'akai, 94 Hawai'i at 35, 7 P.3d at 1072 (citing PASH, 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43). To reiterate, the Hawai'i Constitution provides that, "[t]he 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, § 7. These "[t]raditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, o'opu, limo, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes." HRS § 174C-101(c) (1993).

In PASH, this court held that "those 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 [(2009)<sup>8</sup>] are entitled to protection regardless of their blood quantum.” 79 Hawai‘i at 449, 903 P.2d at 1270 (emphasis omitted) (citing Haw. Const. art. XII, § 7). PASH stated that “[c]ustomary and traditional rights in these islands flow from native Hawaiians’ pre-existing sovereignty.” Id. In Ka Pa‘akai, this court stated that, “[i]n order for the rights of native Hawaiians to be meaningfully preserved and protected, they must be enforceable[,]” and thus, “state agencies such as the [Land Use Commission] may not act without independently considering the effect of their actions on Hawaiian traditions and practices.” 94 Hawai‘i at 46, 7 P.3d at 1083.

Recently, in In re ‘Īao Ground Water Management Area High-Level Source Water Use Permit Applications, 128 Hawai‘i 228, 287 P.3d 129 (2012), one of the appellants was an organization whose supporters engaged in traditional and customary gathering practices and cultivation. 128 Hawai‘i at 241, 287 P.3d at 142. The concurrence noted that “where native Hawaiian Petitioners

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<sup>8</sup> HRS § 1-1 provides:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai‘i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage, provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

claim that their native Hawaiian rights are adversely affected by the [Land Use Commission's] decision . . . they may sue to enforce their rights under Article XII, section 7 of the Hawai'i Constitution." Id. at 271, 287 P.3d at 172 (Acoba, J., concurring) (citing Kaleikini, 124 Hawai'i at 31, 237 P.3d at 1097) (Acoba, J., concurring) ("native Hawaiians . . . have equal rights to a contested case hearing where these [traditional and customary] practices are adversely affected.").

B.

In connection with art. XII, section 7, KOH argues in its Application that there are constitutional rights at issue belonging to a group that engages in traditional and customary practices on Haleakalā.<sup>9</sup> In KOH's Statement of the Case filed with the court, it stated that: "[t]he objectives of [KOH] include protection of traditional and customary practices as well as natural resources[,] that "[a]t the heart of Hawaiian culture is mālama 'āina, or care for the land, a traditional and customary practice of [n]ative Hawaiians who inhabited the Hawaiian Islands

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<sup>9</sup> KOH's allegations are accepted as true for purposes of determining jurisdiction. See Office of Hawaiian Affairs v. State, 110 Hawai'i 338, 350, 133 P.3d 767, 780 (2006) (review of a motion to dismiss for lack of subject matter jurisdiction "is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff.") (emphasis added) (quoting Noriss v. Hawaiian Airlines, Inc., 74 Haw. 235, 239-50, 842 P.2d 634, 637 (1992) (internal quotation marks and citation omitted)).

prior to 1778[,]” and that “[t]he directors of [KOH] engage in traditional and customary practices on Haleakalā.”

KOH alleges that these practices would be adversely affected by the construction of the telescope that would be facilitated by BLNR’s grant of the CDUP. Specifically, KOH states that “[t]he construction of more facilities on Haleakalā will adversely affect directors of [KOH], including their ability to engage in traditional and customary practices as well as enjoy the vistas, natural beauty and quiet of the area.” It further alleges that “[t]he construction of more facilities on Haleakalā will adversely affect [KOH], including its ability to fulfill its mission.” According to KOH, the final environmental impact statement (FEIS) accepted by the University concluded that “[c]onstruction and operation of the proposed [] project . . . would result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources in the summit area.” KOH also quotes the FEIS as stating that mitigation measures “would not reduce the level of impacts.”

Inasmuch as KOH’s claim is that native Hawaiian rights are adversely affected by CDUP, KOH may enforce its right under article XII, section 7 of the Hawai‘i Constitution. In Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982), for example, the plaintiff, a native Hawaiian, brought suit claiming the right to enter the defendant’s undeveloped property for traditional

gathering pursuant to HRS § 7-1 (1976). 66 Haw. at 5, 656 P.2d at 748. This court decided the claim on the merits, assuming that it had jurisdiction over the case and that the plaintiff would have a right to sue to enforce his native Hawaiian rights. Id. at 7-8, 656 P.2d at 749-50. Kalipi stated that it is this "court's obligation to preserve and enforce such traditional rights [as] . . . part of our Hawai'i State Constitution." Id. at 4-5, 656 P.2d at 748.

Similarly, here, the court would have subject matter jurisdiction pursuant to Hawai'i Constitution article XII, section 7 to consider KOH's appeal. See also, In re 'Īao, 128 Hawai'i at 272, 287 P.3d at 173 (Acoba, J., concurring) (concluding that this court had subject matter jurisdiction pursuant to, inter alia, Haw. Const. art. XII, § 7, to consider a claim that the Land Use Commission's decision was affecting native Hawaiians in the exercise of their rights); AlohaCare v. Dep't of Human Servs., 127 Hawai'i 76, 87, 276 P.3d 645, 656 (2012) (noting that the Hawai'i Constitution vests judicial power in the courts to interpret the Hawai'i Constitution). KOH alleges that BLNR's decision adversely affects its constitutional rights, and thus KOH has a legitimate claim of entitlement under the Constitution. See Kaleikini, 124 Hawai'i at 31, 237 P.3d at 1097 (Acoba, J., concurring) ("native Hawaiians . . . have equal rights to a contested case hearing where these [traditional and

customary] practices are adversely affected.").

V.

KOH also had a constitutional right to a contested case hearing under the framework set forth by this court in Puna Geothermal. As noted, in order to satisfy HRS § 91-14(a) where no contested case hearing has in fact been held, a contested case hearing must have been "required by law." PASH, 79 Hawai'i at 431, 903 P.2d at 1252. Puna Geothermal held that a hearing can be "required by law" not only where required by statute or agency rule, but also where it is mandated by constitutional protections. 77 Hawai'i at 68, 881 P.2d at 1214.

The constitutional protections articulated in Puna Geothermal are present "whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Id. (quoting Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 136, 870 P.2d 1272, 1280 (1994)). Thus, in order to determine whether KOH is entitled to a contested case hearing pursuant to the Puna Geothermal framework, it must be determined whether KOH's asserted interest is a property interest "within the meaning of the due process clause of the federal and state constitutions." Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Haw. 361, 376, 773 P.2d 250, 260 (1960).

In addressing this question, Puna Geothermal is directly on point. In Puna Geothermal, this court held that "as a matter of constitutional due process, an agency hearing is also required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases." 77 Hawai'i at 68, 881 P.2d at 1214 (first emphasis in original, second emphasis added). See also In re 'Īao, 128 Hawai'i at 274, 287 P.3d at 175 (Acoba, J., concurring) ("Applying Puna Geothermal, [plaintiffs] would be entitled to a contested case hearing as a matter of due process if they claimed that their constitutional rights were adversely affected by the permit applications of [defendants]."); Town v. Land Use Comm'n., 55 Haw. 538, 548, 524 P.2d 84, 91 (1974) (allowing plaintiffs who owned adjoining property to challenge the Land Use Commission's approval of a landowner's petition to change the designation of his property as a "contested case").

First, BLNR's decision as to whether to issue the permit plainly affects the property interests of UH. UH sought the CDUP in order to build a solar telescope on the subject property near the summit of Haleakalā.

Second, BLNR's decision to issue the permit adversely affects the constitutionally protected rights of KOH. See Puna

Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214. As discussed supra, KOH asserts a right, as set forth in the Hawai'i Constitution, protecting the ability of native Hawaiians to engage in customary rights and practices. See, e.g., PASH, 79 Hawai'i at 449, 903 P.2d at 1270; Ka Pa'akai O Ka'Aina, 94 Hawai'i at 46, 7 P.3d at 1083; Kaleikini, 124 Hawai'i at 43, 237 P.3d at 1109 (Acoba, J., concurring).

KOH further asserts that the issuance of the permit in the instant case would adversely affect the ability of its directors to engage in customary rights and practices, because the proposed project would "result in major, adverse, short- and long-term, direct impacts on the traditional cultural resources in the summit area" that could not be reduced through mitigation measures.

Finally, KOH met all the procedural requirements set forth by BLNR governing participation in a contested case hearing.<sup>10</sup> With respect to contested case proceedings, DLNR promulgated HAR § 13-1-28, which, to reiterate, provides that

(a) When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person.

(b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter.

(c) Any procedure in a contested case may be modified or

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<sup>10</sup> As a result, KOH has also satisfied the third requirement from PASH, that "the claimant followed the applicable agency rules, and therefore, was involved in the contested case." PASH, 79 Hawai'i at 431, 903 P.2d at 1252.

waived by stipulation of the parties.

(Emphasis added). It is undisputed that KOH filed a written petition for a contested case hearing regarding the CDUA on May 24, 2010.

HAR § 13-1-29 (2009) sets out additional procedural requirements for a formal written petition for a contested case hearing. It states as follows:

§ 13-1-29. Request for Hearing.

(a) On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.

(b) Except as otherwise provided in section 13-1-31.1, the formal written petition for a contested case hearing shall contain concise statements of:

- (1) The nature and extent of the requestor's interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case;
- (2) The disagreement, if any, the requestor has with an application before the board;
- (3) The relief the requestor seeks or to which the requestor deems itself entitled;
- (4) How the requestor's participation would serve the public interest; and
- (5) Any other information that may assist the board in determining whether the requestor meets the criteria to be a party pursuant to section 13-1-31.

(Emphases added.)

KOH submitted its petition for a contested case hearing "no later than ten calendar days after the close of the board

meeting at which the matter was scheduled for disposition," see HAR § 13-1-29(a). KOH also made an oral request for a contested case hearing on August 26, 2010 at the public hearing, which was before the close of BLNR's November 22, 2010 and December 1, 2010 meetings during which BLNR discussed and ultimately voted on the CDUP. Thus, KOH fully complied with HAR § 13-1-29(a) and therefore met the procedural requirements for participation in a contested case hearing.

Here, the issuance of a permit implicates the applicant UH's property rights, and would adversely affect the constitutionally protected rights of KOH as "other interested persons." See Puna Geothermal, 77 Hawai'i at 68, 881 P.2d at 1214. Further, KOH followed BLNR's rules governing participation in contested cases. See id. Accordingly, a contested case hearing was "required by law" as a matter of constitutional due process. See id.; see also In re 'Īao, 128 Hawai'i at 274, 287 P.3d at 175 (Acoba, J., concurring).

VI.

A.

Moreover, KOH is entitled to a contested case hearing because it has standing to vindicate the public trust doctrine. As noted, art. XI, section 1 of the Hawai'i Constitution provides that "[a]ll public natural resources are held in trust by the State for the benefit of the people." In Waiahole I, this court

held that “[t]he public trust . . . is a state constitutional doctrine. As with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai‘i rests with the courts of this state. 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000) (citing State v. Quitog, 85 Hawai‘i 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997)). Where such a public trust exists, the state is obligated to manage and preserve public resources “[f]or the benefit of present and future generations[.]” Haw. const. Art. XI, § 1; see In re ‘Īao, 128 Hawai‘i at 277, 287 P.3d at 179 (Acoba, J., concurring).

KOH’s Statement of the Case states that the construction of more facilities on Haleakalā will adversely affect the ability of Petitioner’s directors to “enjoy the vistas, natural beauty and quiet of the area.” As an organization, KOH therefore seeks to protect the natural resources, including cultural resources, of the area.

BLNR’s decision as to whether or not to grant UH’s CDUP application implicates the public trust in the same way that the use of state water resources implicated the public trust in In re ‘Īao. See In re ‘Īao, 287 P.3d at 143-45, 128 Hawai‘i at 242-244. In that case, this court held that “the ramifications of an erroneous [Interim Instream Flow Standard for a particular water

system] could offend the public trust, and [was] simply too important to deprive parties of due process and judicial review." Id. at 145, 128 Hawai'i at 244. Similarly, here, the ramifications of an erroneously-granted CDUP could impact the public trust, and thus KOH is entitled to judicial review of BLNR's decision to grant the CDUP. The potential impact to the public trust could occur as soon as the CDUP was granted, and therefore that was the appropriate time for judicial review, rather than during the post-permit contested case hearing.

B.

KOH has standing to assert a public trust claim and is therefore entitled to a contested case hearing. A "public trust claim can be raised by members of the public who are affected by potential harm to the public trust." In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182 (Acoba, J., concurring).

The current standing formulation for public trust claims, specifically the "injury in fact" requirement, see Akau v. Olohana Corp., 65 Haw. 383, 388-39, 652 P.2d 1130, 1134 (1982), conflicts with the broad constitutional basis underlying the public trust doctrine. See Waiahole I, 94 Hawai'i at 132, 9 P.3d at 444 ("Article XI, section I and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i.") Indeed, the "injury in fact"

test "relates essentially to individual harm and therefore emphasizes the private interest . . . ." In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182 (Acoba, J., concurring). "Such a formulation would appear ill-suited as a basis for determining standing to sue to vindicate the public trust doctrine." Id. (citing Akau, 65 Haw. at 388-89, 625 P.2d at 1134).

Thus, upon a determination that the plaintiff is asserting a claim pursuant to the public trust doctrine, a plaintiff should not be required to show an individualized injury in fact, but rather, any member of the public who is "affected by potential harm to the public trust" should be able to raise a public trust claim. Id. Under this test, a plaintiff would articulate how he or she, as a member of the public, is adversely affected by the potential harm to the public trust. Such a test accords with the notion that where the public trust is at issue, "the common good is at stake, and this court is duty-bound to protect the public interest." Id.; see Waiahole I, 94 Hawai'i at 143, 9 P.3d at 445 ("`Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust . . . . The check and balance of judicial review provides a level of protection against improvident dissipation of an irreplaceable res.'") (quoting Arizona v. Cent. for Law in Pub. Interest v.

Hassell, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991)).

This standing formulation for a public trust claim is supported by Waiahole I, which cites with approval National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), which held that "any member of the general public has standing to raise a claim of harm to the public trust."<sup>11</sup> 658 P.2d at 717 n.11; see Waiahole I, 94 Hawai'i at 140, 9 P.3d at 452; see also In re 'Īao, 128 Hawai'i at 282, 287 P.3d at 183 (Acoba, J., concurring). This Audubon holding, that "any member of the general public has standing to raise a claim of harm to the public trust[,]" see Audubon, 658 P.2d at 717 n.11, would support jurisdiction over the appeal pursuant to HRS § 91-14(a).

In the instant case, KOH is an organization whose directors are members of the public. KOH asserts that it will be adversely "affected by potential harm to the public trust[,]" In re 'Īao, 128 Hawai'i at 281, 287 P.3d at 182 (Acoba, J., concurring), as a result of the construction allowed to take place at the summit of Haleakalā, pursuant to the CDUP. Accordingly, KOH should have standing to bring a claim to enforce

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<sup>11</sup> In Audubon, the California supreme court stated that "[j]udicial decisions . . . have greatly expanded the right of a member of the public to sue as a taxpayer or private attorney general." 658 P.2d 716 n.11. According to the court in Audubon, an earlier California supreme court case, Marks v. Whitney, 491 P.2d 374 (Cal. 1971), "expressly held that any member of the general public has standing to raise a claim of harm to the public trust." Id. Thus, the Audubon court concluded that the plaintiffs in that case had standing to sue to protect the public trust. Id.

the public trust. KOH was entitled to a contested case hearing because such a hearing was mandated by the Hawai'i Constitution.

VII.

A.

Finally, it should be noted that BLNR's grant of the permit prior to holding a contested case hearing was improper, because, as KOH alleged, BLNR "put[] the cart before the horse." To reiterate, on December 1, 2010, BLNR approved the CDUA and granted a permit to UH. Only after granting the permit did BLNR determine that it would hold a contested case hearing as requested by KOH.

UH argued in its briefs that under HAR § 13-5-34, a contested case hearing need not be held before a permit is approved, because "[t]he aggrieved appellant or person who has demonstrating standing to contest the board action may request a contested case hearing . . . [,]" and no board "action" took place until the decision on the permit. This reading of the regulation would undermine the statutory definition of a contested case hearing, however, which is a proceeding in which "the legal rights, duties, or privileges of specific parties" are determined. HRS § 91-1(6).

For example, in this case, once the permit was granted, it is not clear what purpose a "contested case hearing" on the permit would serve, because "the legal rights, duties, or

privileges" of the parties had already been determined. See id. As KOH argued, there is nothing in BLNR's rules that would provide for a revocation of the permit in the event that KOH prevailed at the contested case hearing. Effectively, any grant of a contested case hearing was rendered meaningless as soon as BLNR made the decision to grant the CDUP, because the grant of the permit authorized construction to begin.

When KOH first appealed this case to the court, UH and BLNR urged that KOH had not yet exhausted its administrative remedies and that the claim was unripe because BLNR had not rendered a decision on KOH's request for a contested case hearing. However, even in the event that there was a contested case hearing (as was eventually granted by BLNR in this case) and KOH prevailed at that hearing, BLNR and UH did not make clear how the ultimate outcome would be any different, because BLNR had already granted the CDUP. Hence, BLNR's grant of the permit on December 1, 2010 was an "effective denial" of the contested case hearing, reviewable by the court.

B.

This case illustrates precisely why this court has taken a functional approach to what can be considered a contested case hearing for purposes of judicial review, consistent with the policy of "favoring judicial review of administrative actions." Alakai Na Keiki, Inc. v. Matayoshi, 127 Hawai'i 263, 279, 277

P.3d 988, 1004 (2012) (citing In re Matter of Hawai'i Gov't Emps.' Ass'n Local 152, AFSCME, AFL-CIO, 63 Haw. 85, 87, 621 P.2d 361, 363 (1980)) (citation omitted). The legislature did not define "contested case" with respect to the agency's classification of a particular proceeding as a "contested case", but instead defined the term with respect to the result. Thus, "it must be the substance of the agency proceeding, not its form, that controls." Kaniakapupu v. Land Use Comm'n, 111 Hawai'i 124, 143, 139 P.3d 712, 731 (2006) (Acoba J., dissenting, joined by Duffy, J.). In other words, "[t]he controlling principle is not the label accorded the motion or proceeding, but the effect of the agency's decision." Id.

Instead of requiring an agency to characterize a particular action as a decision in a contested case hearing, as discussed, we instead ask whether the unfavorable agency action "determined the rights, duties, and privileges of specific parties", PASH, 79 Hawai'i at 431, 903 P.2d at 1252 (internal quotation marks and citations omitted); an inquiry that reflects the language of HRS § 91-1(5), see Puna Geothermal, 77 Hawai'i at 67, 881 P.2d at 1213 (citing HRS § 91-1(5)); see also Kaleikini, 124 Hawai'i at 47, 237 P.3d at 1107 (Acoba, J., concurring) (concluding that a specific "procedural vehicle" is not required under HRS Chapter 91 as a prerequisite to a contested case hearing). In addition, the agency's action must also represent a

"final decision and order, or a preliminary ruling such that deferral of review would deprive the claimant of adequate relief[.]" PASH, 79 Hawai'i at 431, 903 P.2d at 1252 (internal quotation marks omitted).

As established, supra, the unfavorable agency action, in this case the grant of the permit, "determined the rights, duties, and privileges of specific parties." Id. The contested case hearing currently held by BLNR will not be deciding any legal rights, duties, or privileges, because those rights and privileges were already ruled on pursuant to BLNR's December 1, 2010 decision to grant UH's CDUP application. Any post hoc rationale by the agency to justify its earlier decision will not constitute a determination of UH's legal rights or privileges.

Moreover, for all the reasons described above, this action was a ruling for which "deferral of review would deprive the claimant of adequate relief[.]" PASH, 79 Hawai'i at 431, 903 P.2d at 1252 (internal quotation marks omitted). The ostensible effect of the permit was to authorize UH to begin construction.

Thus, in accordance with the presumption of appellate review over agency actions, see Alakai Na Keiki, Inc., 127 Hawai'i at 263, 277 P.3d at 1004, and the definition of "contested case" in HRS § 91-1(5), the court had jurisdiction to review BLNR's grant of the CDUP application after its December 1, 2010 hearing.

VIII.

Based on the foregoing, in my view, the Hawai'i Constitution provides a basis for a contested case hearing, through the Constitution's protection of native Hawaiian rights, due process protections, and protection of the public trust. Thus, in the instant case, KOH satisfies the requirement that a contested case hearing is required by law through constitutional means. Additionally, under the circumstances, BLNR's initial grant of the permit determined the rights of the parties, rendering any subsequent so-called "contested case hearing" meaningless.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack

