MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES

DATE:	THURSDAY, APRIL 8, 2010
TIME:	9:00 A.M.
PLACE:	KALANIMOKU BUILDING LAND BOARD CONFERENCE ROOM 132 1151 PUNCHBOWL STREET HONOLULU, HI 96813

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:08 a.m. The following were in attendance:

MEMBERS

Laura Thielen
John Morgan
Rob Pacheco
Ron Agor
Jerry Edlao

STAFF

Dan Quinn/ PARKS
Morris Atta/LAND
Patti Edwards, DOCARE
Francis Oishi/DAR
Yara Lamadrid-Rose/DOFAW
Dan Polhemus/DAR
Sam Lemmo/OCCL
Paul Conry/DOFAW
Carty Chang/ENG

OTHERS

Bill Wynhoff, Deputy AG
Rick Kawananakoa, D-1
Waldeen Palmeira, D-1
Ha'aheo Kaho'ohalahala, D-1
Stephanie Nagata, K-2
Dr. Robert Toonen, F-3
Joanne Leong, F-3 to F-11
Ron Gibson, E-2
Clark Hatch, E-2
Michelle Matson, E-2
John Hart, E-2
Shawna Lynn Masuda, E-2
Mark Mellich, E-2
Julia Paulo, E-2
Linda Chow, Deputy AG
Liko Martin, D-1
Marti Townsend, D-1
Cory Matayoshi, D-9
Ernest Schmidt, D-5
Randy Kosaki, F-3 to F-11
Eric Leong, M-1
Peter Young, E-2
Sid Snyder, E-2
Sherry Vann, E-2
Hannah Bader, E-2
Steve Ozark, E-2
David Booth, E-2
Kimo Keawe, E-2

Nalani Choy, E-2
Linda Wong, E-2
Rick Egged, E-2
Vikram Watumull, E-2
Stephanie Matsumoto, E-2
Allen Alexander, E-2
Douglas Ing, D-14
Peter Hershon, E-2
James Manaku Sr., E-2
Bill Meyer, E-2
Holger Gruenert, E-2
Suzy Coleman, E-2
Bill Griffin, E-2
Steve Baczkiewicz, D-14

{Note: language for deletion is [bracketed], new/added is underlined}

Chair Thielen informed the public that because we're down to one Board meeting a month there are a large number of agenda items and that many folks are here to testify on those where she asked those testifying to summarize. Also, she will have to leave for a meeting with the Governor and Member Agor will cover, but she will return later. Two items: one related to unauthorized logging and the Diamond Head application will be heard later in the meeting and if people have to leave they can leave their information with the principles.

Item A-1 March 11, 2010 Minutes

Approved as submitted (Agor, Edlao)

Item A-2 March 25, 2010 Minutes (TO BE DISTRIBUTED.)

Minutes were not ready.

Item E-3 Approval for a Twelve Month Extension on a Grant-In-Aid Agreement with Hawaii Maoli (Contract No. 57100)

Chair Thielen announced that under State Sunshine Law section 92-7 with a 2/3 votes of all Board members an item can be added to the Board agenda during the Board meeting if it's not of major importance.

Member Pacheco moved to amend the agenda by adding Item E-3. Member Agor seconded it.

Unanimously approved as amended (Pacheco, Agor)

The Board approved to amend the April 8, 2010 Board of Land and Natural Resources meeting agenda by adding Item E-3.

Item F-3 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Robert Toonen, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Reef

Invertebrates Genetic Survey Activities. ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-4 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Brian Bowen, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Reef Fish Genetic Survey Activities.** ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-5 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Whitlow Au, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Deploy and Service Ecological Acoustic Recorders (EARs).** ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-6 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Carl Meyer, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Top Predator Movement Research Activities.** ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-7 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Ryan Nichols, NOAA Fisheries, Pacific Islands Fisheries Science Center, for Access to State Waters to Conduct Fish Growth Study Research Activities.** ***(SUBMITTAL TO BE DISTIBUTED.)***

Item F-8 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Derek Smith, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Biological Studies on Maritime Heritage Sites.** ***(SUBMITTAL TO BE DISTIBUTED.)***

Item F-9 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Loren Scott Godwin, National Oceanic and Atmospheric Administration, Papahānaumokuākea Marine National Monument, for Access to State Waters to Conduct Invasive Species Survey Activities.** ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-10 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Education Permit to Daniel Dennison, National Oceanic and Atmospheric Administration, Papahānaumokuākea Marine National Monument,**

for Access to State Waters to Conduct Filming Activities. ***(SUBMITTAL TO BE DISTRIBUTED.)***

Item F-11 **Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Research Permit to Dr. Greta Aeby, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Coral and Fish Disease Research Activities.** ***(SUBMITTAL TO BE DISTRIBUTED.)***

The Board may go into Executive Session pursuant to Sections 92-4 and 92-5(a)(4), Hawaii Revised Statutes (HRS), in order to consult with its attorney on questions and issues relating to departmental permits, Chapter 343, HRS, and personnel matters, as pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Written testimonies were distributed.

Member Morgan moved to go into Executive Session and was seconded by Member Edlao.

9:13 AM EXECUTIVE SESSION

9:50 AM RECONVENED

Member Pacheco moved to defer Items F-3, F-4, F-5, F-6, F-7, F-8, F-9, F-10 and F-11. Member Edlao seconded. The Land Board voted and the motion passed.

Deferred (Pacheco, Edlao)

Chairperson Thielen departed for another meeting where Member Agor took over as Chairperson.

Item D-1 **Denial of Request for Contested Case Hearing By Ms. Waldeen K. Palmeira.**

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Morris Atta, Land Division Administrator conveyed that this item had previously been before the Board and the County of Kauai for widening of the Kuhio Highway and during that hearing Waldeen Palmeira requested a contested case hearing. Since then the Attorney General's Office reviewed the request and concluded that Waldeen Palmeira does not have standing for a contested case hearing bringing this back to the Board with

the recommendation to deny standing and indicated the County of Kauai and the petitioner are present.

Rick Kauipa Kawananakoa representing the Office of the Hawaiian Kingdom distributed and served a written notice to cease and desist on issues pertaining to Kauai to either comply or continue as explained in the notice.

Liko Martin testified that he comes from a family line of Wailuanui and said that Waldeen is carrying a tremendous burden. It is the highest obligation of the State to protect his kupuna (ancestors) who are buried at Wailua and not to repeat the failures of the Naue burials. He wants the place back to its original condition that this is only the beginning of the contesting and asked to consider what has been done.

Waldeen K. Palmeira from Wailuanuianu, Kauai representing Hui Namakaiwa O Wailuanuianu testified that she submitted her written petition under duress a week after the last Board meeting. The County of Kauai started a re-evaluation of the final EA. She tried to be involved in the archaeological inventory survey of the property that wasn't done in 2004-2005 that disposition talks about crown ceded lands which is attached to significant historical and traditional cultural properties and burial grounds of our ali'i kupuna and the disposition of such lands they do have an interest and they do have a stand as Native Hawaiians because they can demonstrate that they are affected by the requested action that their interest is distinguishable from that of the general public shall be admitted as parties upon timely application. With regard to Native Hawaiian standing this court has stressed that the rights of Native Hawaiians are a matter of great public concern in Hawaii. Our fundamental policy is that Hawaii State courts should provide a forum for cases, raising issues of broad public interest and that judicially impose standing barriers should be lowered when the needs of justice would be best served by allowing the plaintiffs to bring claims before the court. Another part of the interest she has are the sands adjacent to the project because there was no archaeological survey done, but they as Native Hawaiians are preparing for it because there is a consultation process involved. What happens with this Federally Funded undertaking is that they were excluded from Section 106 and the re-evaluation. They were told of a process to submit information on historical significant properties which she did, but they were not given the courtesy of a call that the Federal Government, the State of Hawaii and the County of Kauai did not recognize these significant historic properties which of are cultural and religious significance. Without doing consultation with Native Hawaiians and without looking at what is ours that is there on this beach which was part of the national historic landmark. This is destruction of a national historic landmark and the managerial, custodial processes haven't occurred for awhile now. In the case of environmental law, this case involves three EAs in an area of such significance that an EIS would've been more appropriate so that the significant impacts to the environment and the cumulative adverse affects to historic properties are not documented before being destroyed citing State Historic Preservation has had problems, but she believes that there is any excuse. This is not a managerial problem that a lot of planning went into this. The touchstone of this court's notion of standing is the needs of justice and that standing requirements not be barriers to justice. One whose legitimate interest is in fact injured by illegal action of an agency or

officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal. In HAR 11-200.26, the project and piece of land in question involved an EA in 2007 where there was no destruction of a rock wall on Kuhio Highway and nothing went mauka of the rock wall and there was no concrete barrier and this project existed before the 2009 Kuhio Highway project. The people who did the re-evaluation were supposed to look at significant cumulative impacts on two projects. There was a note of exemption for an EA in today's and January 8, 2010 submittals which she objects to because there is segmentation of these two projects citing NEPA regulations. She is gathering information from the state and county which they requested on March 10, 2010 and she was told that their request for information on this environmental document is in the attorney's office so they don't have this today. This involves major changes which would result in a significant injustice to Native Hawaiian people and to the environment.

Member Pacheco noted that the Board is bound by State Law that the item submitted today has the legal arguments from the Board's counsel on why that denial should be granted and he wondered whether she had any specific comments to the different elements within the arguments in the submittal because that is all the Board can talk about. Ms. Palmeira said she doesn't agree and she is not a lawyer. Member Pacheco reiterated that the Board is bound by Hawaii State Law and to speak to anything specific within the submittal. Ms. Palmeira reiterated her previous testimony points on disposition of property that she does have an interest and planning should look at the larger projects. She questions whether the conditions were met by that developer. Member Agor said the Board understands the whole area is culturally sensitive, but they are looking at a particular site that has been scrutinized by environmental assessments that they are targeting a particular site that has been well scrutinized. Member Morgan said the issue before them is the contested case which is separate and aside from the issues with respect to the archaeological and cultural significance the argument is the contested case on whether there is standing or not. Ms. Palmeira said the environmental document is flawed especially when you have a second environmental document adjacent and connected to it. Member Agor said that they've heard the justification.

Marti Townsend representing KAHEA testified that KAHEA brought contested case requests and they've also been denied. You are given a form letter from the Attorney General's Office which is the same logic to everyone's contested case request. This is a problem with bogging down the court systems where she explained the purpose of a contested case hearing is for, but instead this item will go to the Circuit Court to try to make a decision on whether Ms. Palmeira has standing which is not the right venue for contested case hearings. Ms. Townsend said you don't have to have a deed or lease to hold a contested case hearing, only an interest that is affected. She suggested having a one day contested case hearing that way you have informed decision.

Ha'aheo Kaho'ohalahala is a second year UH law student who testified that you asked what Hawaii State Law is applicable here that there is a constitutional mandate that the State protect Native Hawaiian gathering rights and cited the PASH case where petitioners were not given a contested case hearing and had to appeal to the court resulting in it

thrown back to the agency to hold a contested case hearing. To provide judicial and agency efficiency she suggested granting the petition for a contested case hearing.

Bill Wynhoff, Deputy Attorney General testified that it is clear in the submittal that members of the public are not getting it correct. The discussion is not whether or not Ms. Palmeira has standing. The issue is whether the disposition is an appropriate area for a contested case hearing. When the Board comes here they do 20 leases, 15 easements and etc. which is what they are talking about. We don't believe that people are entitled to a contested case with respect to dispositions. The Board has listened to the testimonies very carefully and when they decided to make the disposition or not. When the Board made the disposition they are not entitled to a contested case hearing with respect to a disposition. Other things that were brought up whether there should be an EA or not, that has already been considered by the Board and is already in the courts. Staff and Mr. Wynhoff believe they made the right decision. They should find out next week whether or not Judge Kathleen Watanabe agrees with it. This is proceeding along correctly. The decision the Board made whether right or wrong is made and nobody is entitled to a contested case. On the question whether Ms. Palmeira has standing or has an interest in this area, it is a question whether Board dispositions are subject to contested case hearings. With respect to testimony when things bogged down, Mr. Wynhoff submits to the Board if they are going to let people have contested case hearings every time you do a lease or an easement then that is when you are talking about getting bogged down.

Member Pacheco asked in the submittal where they talk about contested cases are required by law as the hearing prior to please explain that. Mr. Wynhoff said that its difficult, when you look at the statute the statute governs whether a contested case hearing is required or not is in fact in HRS Chapter 91 the definition of a contested case hearing is something that happens after you have an agency hearing and the definition of an agency hearing is something that happens before a contested case. It isn't very helpful, it's circular. He doesn't think he could explain it any better. There hasn't been a so called agency hearing, yet. The Board meeting is not an agency hearing and what the petitioner is asking for is an agency hearing. An agency hearing is defined as the hearing held immediately prior to a judicial review of a contested case and a contested case is previously says it's a proceeding where the rights, duties, etc. required by law be determined after the agency hearing. It's circular. An agency hearing has not yet occurred. The Board's Sunshine ruling says it's not an agency hearing. He can't explain that much better that it is a poor definition. The more salient law is what you need to do in order to have a right to a contested case hearing. The case law is clear that not everything that the Board does is the proper subject for a contested case hearing. It has always been the Office of the Attorney General consistent position that dispositions are not the proper subjects for contested case hearings by law and also by policy. Mr. Wynhoff doesn't recommend the Board going down that road of contested case hearings.

Ms. Palmeira said there is no case in State Court for this project and there should be which Mr. Wynhoff agreed. Ms. Palmeira mentioned since November 14, 2009 there is extensive shoreline loss and hoped the County, State and Federal Government intends to do a new shoreline certification and follow all CDM.

Member Morgan moved to accept staff's recommendation. Member Edlao seconded it.

Member Morgan said clearly there is a lot of interest and emotion that the Board members are not attorneys and have to rely on the advice of counsel. There was talk with going back to the original condition; it is tough to imagine going back to something that might be considered original. With regards to gathering rights, it doesn't seem applicable in these situations. Then getting back to counsel's recommendation that it opens up a situation of having contested cases on dispositions like this and in due respect to the people who testified, he thinks it's the right thing to go along with that.

All voted in favor.

Unanimously approved as submitted (Morgan, Edlao)

Item D-9 Amendment of General Lease No. 4337, Hawaii State Chapter of the American National Red Cross, Lessee; Diamond Head, Honolulu, Oahu, Tax Map Key: (1) 3-1-042:029.

Mr. Atta communicated that the American Red Cross wanted a contractor to come in to provide training for their volunteers, but it turned out that the lease technically doesn't allow that and staff is in agreement with that request believing that is part of the Red Cross's mission statement. Staff recommends allowing the change to the lease to provide that use. Also, there was a restriction on sub-letting on the use of space which played into the same issue which is another change.

Cory Matayoshi, CEO of the Red Cross testified on the two amendments, the lease purpose was to establish the headquarters which has been there for 40 years, but is also used as mission related purposes and she noted their reliance on volunteers. They wanted to amend because of staffing and noted that General Lee (of State Civil Defense) supports this.

Unanimously approved as submitted (Morgan, Pacheco)

Item K-1 Conservation District Use Application (CDUA) HA-3530 for Security Gates on Private Access Road for Keawaiki Beach Lots, by Charles Bundrant, Located at Kahauloa, South Kona, Hawai'i, TMKs: (3) 8-3-005:001, 020, and 021

Sam Lemmo, Office of Conservation and Coastal Lands (OCCL) administrator reported that the applicant wants to put up a security gate to prevent vehicles from driving on the property and would maintain a pedestrian access. It's Kamehameha School's land who is concerned with damage to archaeological sites and preventing cars from going in will help protect those sites. Staff recommended approval with conditions

Member Pacheco moved to approve as submitted and Member Morgan seconded it.

Unanimously approved as submitted (Pacheco, Morgan)

Item K-2 Annual Status Update on the Development of Sub Plans and Management Actions Identified in the Mauna Kea Comprehensive Management Plan, Mauna Kea, Hamakua District, Island of Hawaii, TMKs: (3) 4-4-015:009&012

Mr. Lemmo told the Board that this is a briefing by the Office of Mauna Kea Management on their 103 management actions under the Mauna Kea Comprehensive Management Plan (CMP). He did receive a copy of the update and invited Stephanie Nagata to address the Board.

Stephanie Nagata, Interim Director of the Office of Mauna Kea Management (OMKM) distributed her copies and briefed that the Board that pursuant to the approval of the CMP on April 9, 2009 the University is required to report within one year of the CMP to provide in person and in writing the status of the development of the four sub-plans and each of the management actions of the CMP. On April 16, 2009 the Board of Regents (BOR) accepted the responsibilities for implementing the CMP and at the same time they delegated implementation to the University of Hawaii at Hilo, OMKM and Mauna Kea Management Board (MKMB). The University of Hawaii completed the four sub plans – the Cultural Resources Management Plan, the Natural Resources Management Plan, the Decommissioning Plan and the Public Access Plan which were shared with the public in Hilo, Waimea and Kona and all was approved by the MKMB which is a volunteer Hawaii Island based community advisory board and the BOR. On March 25, 2010 all were approved by the BLNR. Ms. Nagata reported on the 103 management actions from the CMP referring to table one and said she will summarize it. Twenty-four actions are currently being implemented, four have been completed and 24 will be implemented on an as needed basis. Most of the actions that are on-going relate to cultural and natural resources and activities and human uses. These include reporting disturbances on archaeological sites, conducting regular monitoring, maintaining a presence of interpretive personnel and maintaining the commercial tour permitting process. The four actions that have been completed include archaeological inventory of the Mauna Kea Access Road corridor and 3 that apply to obtaining statutory rule making authority pursuant to Chapter 91 requirements, regulating commercial activities and obtaining legal authority for establishing a law enforcement presence on the mountain. The actions that will be implemented on an as needed basis are primarily related to construction and decommissioning activities referring to Appendix A. Regarding the implementation of the remaining 51 management actions, OMKM assigned each action to a time category when these are planned for implementation – immediate (1-3 years); short term (4-6 years); mid-term (7-9 years); and long term (10+ years). Table 2 is a summary of the management actions implementation schedule by component and subcomponent plans. Appendix B lists the implementation schedule for each of the CMP management actions. She did an overview of the CMP Management Action Implementation on Research; Monitoring; Resources Management Programs; Education, Training and Outreach and Printed Materials and Public Forums. Appendix C is a table listing the agency and agencies responsible for implementing the management actions.

Item D-5 Amend Prior Board Action of August 28, 2009 (D-9), Consent to Assign General Lease No. S-3875, Paradise Auction, Ltd., Assignor, to Alternative Energy Marketing, Inc., Assignee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-2-50:93.

Mr. Atta conveyed noting this is one of the Kanoelehua industrial leases. The recommendation is to add a new recommendation #4 which he read. The existing language in the lease was very restrictive that the on-going use has been there for quite some time and by allowing this change will make the lease more marketable and allows the current use to continue.

Ernest Schmidt, representing Paradise Auction testified giving some history on the changes noting that this was reassigned.

Unanimously approved as submitted (Pacheco, Edlao)

Mr. Wynhoff noted to the Board that members of the public weren't given an opportunity to testify on Items F-3 through F-11 apologizing for that. Staff announced to people outside of the Board Room to come back in if they wished to testify.

Member Agor said that he was asked to bring back Items F-3 through F-11 which the Board has deferred, but he didn't ask whether the public wanted to speak on these items and he asked if anyone wanted to speak on these items.

Mr. Wynhoff also noted that the Board is required to accept testimony, but people don't have to testify and the Board isn't allowed to respond or discuss on your testimony in anyway shape or form.

Dr. Robert Toonen testified that he is doing a reef fish connectivity in the Northwest Hawaiian Islands (Item F-3) and this is the final year of a five year project and the project will fail by interrupting the process. The co-trustees have a strong support from the Monument Management Board. Please keep in mind we have scientists dedicated to conservation who went through this permitting process for the past four years.

Randy Kosaki, NOAA Deputy Superintendent for Papahanaumokuakea testified that all the research in the applications before the Board are on-going projects that were requested to be prepared by the Monument and HIMB which supports the Management Plan. He asked the Board to reconsider because there is some obligation by the State to prepare these in a timely fashion because their cruise leaves on May 10, 2010 and asked these permits be acted upon before that date because there is about half a million dollars in NOAA cruise time at stake here. There are ramifications for not having this research going forward.

Joanne Leong, Director of HIMB (Hawaii Institute of Marine Biology) asked what does deferred mean for today's proceeding. Mr. Wynhoff said it is not coming back to the agenda today.

Item M-1 Issuance of a Second Revocable Permit to Fourth Mate Productions, Inc. at Kalaeloa Barbers Point Harbor, Oahu

Eric Leong representing Department of Transportation, Harbors Division was here for any questions.

Unanimously approved as submitted (Edlao, Morgan)

Item D-6 After-the-Fact Consent to Sublease under General Lease No. S-4309, Western Pacific Investments, Lessor, to WESCO Distribution, Inc., a Delaware corporation, as Sublessee; Consent to Extension of Lease Term, General Lease No. S-4309 Western Pacific Investments, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-2-58:32.

Mr. Atta pointed out a typo on page 2 showing $156,6565.62 and asked to change it to $56,656.62. This item requires two actions: one is an after-the-fact to sublease and the second is a lease extension for proposed improvements to the properties to the amount of $114, 485 and this is pursuant to their standard lease provisions in Chapter 171.

The Board:

APPROVED AS AMENDED. The Land Board amended this item by correcting a typographical error on page 2 of the submittal, under the heading "ANNUAL SUBLEASE RENTAL:". The rental amount was changed to $56,656.62. Otherwise, the Land Board approved staff's recommendations as submitted.

Unanimously approved as amended (Pacheco, Edlao)

Item B-1 Request Board Approval to Enter Into a Federal/State Recreational Boating Safety Cooperative Agreement between the Department of Land and Natural Resources and the United States Coast Guard

Patti Edwards, Acting Assistant Administrator for Division of Conservation and Resources Enforcement (DOCARE) requested approval to enter into a Federal/State Recreational Boating Safety Cooperative Agreement with the Department and the US Coast Guard. The purpose is to define a relationship between the Department and the Coast Guard to conduct recreational boating and safety programs including mutual enforcement of laws relating to recreational boating and safety on waters of the State. This is an over arching document that provides funding to both the DOCARE and the Division of Boating and Ocean Recreation.

Unanimously approved as submitted (Morgan, Pacheco)

Item C-1 Request for Authorization to Negotiate and Sign a Contract(s) to Furnish and Deliver Fencing Material for the Division of Forestry and Wildlife, Statewide

Paul Conry, Division of Forestry and Wildlife (DOFAW) Administrator communicated in line four a change in date from [March 8] to March 30, 2010 on the State Procurement website closing on April 12, 2010 noting that this is their standard way to procure fencing materials where there is a separate purchase order process once the contract is in place and asked for approval and authorize the Chairperson to finalize.

The Board:

Moved to amend staff's submittal by deleting [March 8, 2010] and replacing it with March 30, 2010 and after the word website add closing on April 12, 2010.

Unanimously approved as amended (Edlao, Pacheco)

Item D-2 Mutual Cancellation of General Lease No. S-5479, Tatsuo and Elsie Nishi and Nikola and Claudia Nishi, Lessees, Waimea Valley, Waimea, Kauai, Tax Map Key: (4) 1-5-03: 01.

Mr. Atta reported that this lease is close to its termination and the Nishi's expressed a desire to cancel the lease because of hardship and staff concurs.

Unanimously approved as submitted (Morgan, Pacheco)

Item D-3 Mutual Cancellation of General Lease No. S-5561 to Pamela Kay Grant, Kalaheo, Koloa, Kauai, Tax Map Key: (4) 2-4-01: 05 & 2-4-02: 01.

Mr. Atta informed the Board that upon a request from the lessee staff is agreeing this lease should be mutually cancelled due to hardship and the property was rendered partially unusable.

Unanimously approved as submitted (Pacheco, Morgan)

Item D-4 Grant of Perpetual Non-Exclusive Easement to Kauai Island Utility Cooperative (KIUC) for Access and Utility Purposes Over Governor's Executive Order 4217 to the County of Kauai, for Firestation Purposes and Issuance of a Right-of-Entry for Planning, Construction and Maintenance. Wailua, Lihue, Kauai, Tax Map Key: (4) 4-6-14: 26.

Item D-7 Issuance of Revocable Permit to MC&A, Inc. for a Beach Volleyball Activities (Games) for The Abbott Diabetes Group at Wailea Beach, Wailea, Maui, at Tax Map Key:(2) 2-1-008: seaward of 109.

Item D-8 **Amend Prior Board Action of July 30, 2004, Item D-10; Request for Construction Right-of-Entry and Perpetual, Non-Exclusive Easement to the City and County of Honolulu for Bus Bay Purposes; Diamond Head, Honolulu, Oahu; TMK (1) 3-1-042:portion of 010; and**

Amend Prior Board Action of November 19, 2004, Item D-46; Request for Grant of Perpetual, Non-Exclusive Easement; Issuance of Construction and Management Right-of-Entry to the City and County of Honolulu for Bus Shelter Purposes; Honolulu, Oahu; TMK (1) 2-1-025:portion of 003.

Item D-10 **Set Aside to City and County of Honolulu, Board of Water Supply for Reservoir Site Purposes; Amend Prior Land Board Action of August 27, 1976, Item F-25, Waahila, Palolo, Honolulu, Tax Map Key: (1) 3-3-056:portion of 002.**

Item D-12 **Grant of Term, Non-Exclusive Easement to Burt T. Kaminaka Trust and Miriam K. Kaminaka Trust for Boat Ramp, Seawall, Gazebo and Lanai Purposes, Kahaluu, Koolaupoko, Oahu, Tax Map Key: (1) 4-7-030:seaward of 019.**

Item D-13 **Issuance of Direct Lease to the City and County of Honolulu for Emergency Operating Center Purposes, Lualualei, Waianae, Oahu, Tax Map Key: (1) 8-7-006:002 (por) and 008.**

Item D-15 **Issuance of Revocable Permit and Immediate Construction Right-of-Entry to Stable Road Beach Restoration Foundation, Inc., Sprecklesville, Wailuku, Maui, Seaward of Tax Map Key(s): (2) 3-8-002:071, 074, 077, 078 and 094.**

Item D-16 **Napili Kai, Ltd. Request to Waive Payment Requirement for Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. for Walkway and Landscaping Purposes, Kaanapali, Maui, Tax Map Keys: (2) 4-3-2:seaward of 26, 27, 28.** ***(SUBMITTAL TO BE DISTRIBUTED)***

Mr. Atta said there were no changes to these.

Unanimously approved as submitted (Edlao, Pacheco)

Item E-1 **Selection of Projects for Federal Grant Awards through the Land and Water Conservation Fund Program for Fiscal Year 2009**

Dan Quinn, representing State Parks reported of all agencies in the State last year of $286,672 be used for the two projects listed under the recommendation – Hapuna Beach State Recreation Area repairs and to the County of Hawaii for construction of the children's playground at Pana'ewa Zoo .

Unanimously approved as submitted (Edlao, Morgan)

Item D-11 Cancellation of Governor's Executive Order No. 2643 and Reset Aside to the Department of Land and Natural Resources, Division of Boating and Ocean Recreation for Heeia Kea Small Boat Harbor Purposes, Heeia, Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-6-06: 64, 67 and 69.

Mr. Atta conveyed that this item is to transfer from DOT Harbors to DLNR Boating Division which is for the transfer of the He'eia Kea Small Boat Harbor and staff is requesting an EO for the reset aside.

Unanimously approved as submitted (Morgan, Edlao)

Item E-3 Approval for a Twelve Month Extension on a Grant-In-Aid Agreement with Hawaii Maoli (Contract No. 57100)

Mr. Quinn reminded the Board that this was an added agenda item for work at the Royal Mausoleum at Mauna Ala and the project includes funding from a number of sources. Hawaii Maoli is a non-profit organization that is spearheading this project. The request is for a 12 month extension and authorizes any amendment to the Grant-In-Aid and for any future extensions grant the Chairperson the authority. This item includes renovating the grounds, the chapel itself, a number of the crypts and replacing the old restroom.

Unanimously approved as submitted (Morgan, Edlao)

Item F-1 Request for Approval to Temporarily Close the Bottomfish Fishing Season for All State Marine Waters Surrounding the Existing Bottomfish Restricted Fishing Areas in the Main Hawaiian Islands from May 1 through August 31, 2010.

Francis Oishi representing Division of Aquatic Resources conveyed that the Divisions requests consideration of a change. After Item F-1 was submitted staff consulted with NOAA Fisheries that total annual catch maybe reached on or around April 20, 2010. The Department is requesting consideration of changing the closer date from May 1, 2010 to April 20, 2010.

The Board clarified and said they will need to change the recommendation.

Member Agor reported that fishermen on Kauai claim staff is suppose to have a public information meeting before this is implemented. Mr. Oishi answered in the negative saying they are not required to consult with the public. The administrative rule provides that this be addressed by the Board. They have had hearings on proposed bottom fishing rule changes and there was an evaluation of those closed areas, but that is a separate

matter. This is annual closer of the fisheries and this is the third year they've done this in concert with NOAA Fisheries. Member Edlao commented that it's a misunderstanding.

Unanimously approved as amended (Edlao, Morgan)

The Board amended staff's recommendation by changing May 1 to April 20, 2010. Otherwise, the submittal was approved.

Item F-2 Request for Approval of the Division of Aquatic Resources' Review Policy of Special Activity Permits Involving the Take of Coral and Live Rock. ***(SUBMITTAL TO BE DISTRIBUTED.)***

Mr. Oishi requested to withdraw Item F-2.

Withdrawn (Pacheco, Morgan)

Item L-1 Approval to Issue Invitations for Bids for Federal Transit Administration Funded Maui County Ferry Improvement Projects with State Department of Transportation General Provisions and other Appropriate Documents and Forms

Item L-2 Certification of Election and Appointment of East Kauai Soil and Water Conservation District Directors

Carty Chang, Acting Administrator for Engineering Division reported no changes.

Item L-3 Application for a DLNR DAM Safety Construction/Alteration Permit Permit No. 38-Kapalaalaea Reservoir (HI000094) Outlet Pipe Repair, Paia, Maui

Mr. Chang communicated that an analysis was done and this item doesn't trigger an environmental assessment and anytime staff comes to the Board to ask for a permit they will conduct a 343 analysis where staff will review the applicant's analysis and make a recommendation. In the future the submittals will include some type of analysis for the Board's information on Chapter 343.

Unanimously approved as amended (Morgan, Edlao)

Item L-5 Application for a DLNR DAM Safety Construction/Alteration Permit Permit No. 42 - Upper Kapahi Reservoir (HI00013) Gate and Catwalk Repair, Kapaa, Kauai

Mr. Chang said this item is similar to the previous item that it doesn't include state lands and the exemption falls under the Land Division however, under the analysis it falls within one of the exemption factors.

Unanimously approved as amended (Edlao, Pacheco)

Item L-6 Application for a DLNR DAM Safety Construction/Alteration Permit Permit No. 43 - Wailua Reservoir (HI00060) Gate and Catwalk Repair, Wailua Homestead, Kauai

Mr. Chang explained that DLNR owns land and it does trigger Chapter 343, however it is under the same exemption class, routine maintenance and repairs.

Unanimously approved as submitted (Pacheco, Edlao)

Item L-4 Request for Authorization to Enter into Supplemental Agreements for Contract #57779 for Professional Services, Dam Safety Inventory and Database, Statewide; Contract #56302 for Professional Services, Dam Safety Investigations for the Island of Oahu; Contract #56248 for Professional Services, Dam Safety Investigations for the Island of Kauai; Contract #56249 for Professional Services, Dam Safety Investigations for the Island of Maui; Contract #57551 for Professional Services, Dam Safety Permit and Certificate to Impound Procedures and Guidelines, Statewide

Item L-7 Approval for Award of Construction Contract for: Job No. F00CF46C, Baseyard Storage Building at Kokee State Park Waimea, Kauai, Hawaii

Unanimously approved as submitted (Pacheco, Edlao)

11:12 AM RECESS

11:37 AM RECONVENED

Item E-2 Request to Use Diamond Head State Monument Once a Year for Two Years for a Two-Day Diamond Head Crater Celebration

A number of written testimonies were distributed.

Mr. Quinn relayed the contents of the submittal and some history background on events in 2006, 2007 and 2008 noting that under the recommendation staff deferred to the Diamond Head Citizens Advisory Committee (DHCAC) for recommendations on the submittal which is attached as Attachment #7. He clarified on the Honolulu Advertiser article regarding the State receiving payment of $50,000 for one of the earlier concerts which is not true because the State received considerably less. For the 2006 concert there was no payment and the 2007 concert there was in-kind services and cash around $16,000. The $50,000 was in reference to a new condition attached to the Board

submittal. The Division has made recommendations should the Board decide to approve these events which are identical to the earlier submittals with the exceptions of conditions #3, #4, and #5. Condition #3 specifies the park will remain open from 6 am to 12 noon on the days of the concert. Condition #4 is the agreement is subject to the review and approval by the Office of the Attorney General which was a Board condition on one of the earlier approvals and condition #5 - requiring a payment to the Division of $50,000 or 5% of gross revenues whichever is more for use of the Monument for the event. The rest of the conditions are unchanged from the earlier Board approval. He clarified and asked for the Board find on this submittal is that early on the 2004 submittal there was considerable discussion of the environmental compliance regarding this particular permit where the Board found in that approval that the event would have no minimal or no significant affect on the environment. Staff is asking that this be amended to clarify that finding of Chapter 343 is met. There are a lot of people who will testify on the submittal. And Mr. Quinn reiterated that this is a two day (Saturday and Sunday) event and the park will remain open on both days up to noon and the request is for two years in a row.

Board member Edlao asked whether the Diamond Head Advisory Committee supported this item and Mr. Quinn answered in the negative. The criteria from the Advisory Committee represents what kind of event would be appropriate in the Crater and the DHCAC is opposed to these large Crater gatherings and had so stated in earlier Board submittals. Referring to the first page of Attachment 7, #2 – a maximum of 400 people would not allow these events of 7500 people and staff is submitting these Advisory Committee criteria to this Board for consideration for any future events. If the recommendations from the DHCAC were no events at all then when staff creates their visitor center any group gathering would not be allowed in there. The discussion was if an event was held what would be the criteria appropriate in the crater. The Land Board has approved several of these gatherings prior to this time and the applicant requested for subsequent gatherings in the Crater staff wanted the Board to hear both sides of the issue. After Member Agor's inquiry Mr. Quinn reported on the first event in 2006 after the floods and the second event in 2007 where the applicant rendered in kind services to repair the grass. There was discussion to donate to the Diamond Head Foundation which is separate from the DHCAC which has not occurred.

There was some discussion regarding the applicant not paying the $50,000 fee which is true because the article in the paper was misleading. The requirement to pay $50,000 and/or a percentage is for this year said Mr. Quinn.

A Board member asked why use DOCARE officers for these events and Mr. Quinn said that DOCARE is more familiar with our rules and resources plus they used a dozen off duty DOCARE officers and about two dozen police officers at each event which was well policed.

Ron Gibson, Executive Producer and President of the Diamond Head International Music Festival (a Hawaii non-profit) testified that he and the DHCAC have the same beliefs and had met on multiple occasions. DHCAC encouraged them to bring in more Hawaiian performers and they are agreeing to the $50,000 minimum. He made reference to the

conditions and described the work they did at the 2006 and 2007 concerts and there were no official complaints at either event. They did offer a donation to the Diamond Head Foundation noting there is a lot of misrepresentation on some of the things that happened and didn't happen. And, he asked to grant the permit.

A Board member asked whether Mr. Gibson was successful at the previous events and his answer was they were except for the bottom line and that is why he is requesting a two day event noting that they donated $25,000 to the Fisher House, Tripler Hospital, the Waikiki Clinic and they supported the Boy Scouts and $8,000 to the Air Force. As for security there was over 27 Honolulu Police Department, 50 security and there were no incidents. He reiterated there were no noise or traffic issues.

Mr. Gibson also explained that they will not close the park that people will go from the backside setting-up going forward using the floor area and noted that people will continue to hike in generating revenue for the State and he assured no park closures. Set-up takes about four days, organize, set-up the stage and they provide security the entire time that they occupy the Crater - even through the night and are working with General Lee's people and Colonel Logan who have no issues with that abiding by their rules. The only thing different is they are guaranteeing the money and they minimized to 7500 where facility could hold more, but when you are bussing people in and out you can only move so many people and they provide for parking. The events provide over 400 jobs. All vendors are local where 50% of the artists are local and the rest are international. There are representations from halau. Plus donations and charities are welcomed and they will attempt to make it a green event as possible by recycling and using bio-diesel.

Member Edlao asked who will handle the cultural and natural briefings and Mr. Gibson said Sonny Ching and his halau. Member Edlao also asked whether or not the vendors working will be briefed about the significance of the area. Mr. Gibson confirmed that and they will be working with Ed Texeira from State Civil Defense to provide rooms for briefings on fires, evacuations, everything that could possibly happen that they have a plan where people could park downtown and take the shuttle.

Peter Young testified that he is working with Mr. Gibson as a volunteer because when he was at DLNR he recognized the opportunities for the public. There is extensive background information in the original submittal because they wanted what they proposed to be consistent with prior Land Board actions with planning and appropriate use of Diamond Head. The Advisory Group opposed the prior events as well and he respects them for that, but he disagreed with what it does for the Monument, DLNR and everyone who can participate. He hoped the Board looks at the conditions suggested in the submittal because they worked on those to address the complaints from the events in the 1960s and 1970s when the residents were affected and he reiterated there were no complaints from the 2006 or 2007 events. When something goes wrong DLNR and the Land Board will hear about it. The recommendations by the Advisory Committee go way beyond to the point where the event doesn't happen. The Crater had 75,000 people in the 60s and 70s, it can handle it. It is still the Monument everyone respects and it survived those large events. Mr. Gibson was willing to go with a smaller event to ensure

there is no impact. No one can park in the neighborhood to walk in and everyone has to take the shuttle. The Advisory Group said 70 decibels from the origin and that is unreasonable. A normal conversation is 55-65 decibels and anyone who raises their voice in today's meeting would violate that condition. The neighborhood kids were frustrated that they couldn't hear the music from outside the crater. Mr. Young confirmed the park closing at 1:00 pm and they agreed with that. They learned from State Parks that 80% of the people who enjoy Diamond Head come in the morning and that is a majority of the people and 7500 patrons will come to experience it later in the day. He likes this event because it brings people from Hawaii into Diamond Head that maybe might otherwise not come there and maybe it might influence them to come back to try the trail. He asked the Board to amend getting everyone out by 11:30 pm or 12 midnight because it takes awhile to shuttle 7500 people out. And, he would like to come back after the public testimony to address any issues and Member Agor agreed.

12:05 PM Chairperson Thielen returned.

Chairperson Thielen made the suggestion for representatives to come up then the general public and she asked them to limit their remarks noting that there will be an opportunity for dialogue afterwards.

Clark Hatch, President of the Diamond Head State Monument Foundation (DHSMF) and the Diamond Head Association, a member of the Diamond Head Citizens Advisory Committee and volunteers by working along Diamond Head Road testifying that he has submitted written testimony which he'll summarize. There is a Diamond Head Master Plan that they've worked on for 25 years and read from page 70 – "that large gatherings and any commercial use not be allowed that any such use would be a detriment and affect the natural crater environment of Diamond Head State Monument should be prohibited, including non-regulated vendors and non-profit activities." They think large gatherings don't qualify under the Master Plan or under the criteria developed for the DLNR that defines safe and appropriate use of the Crater. The tunnel is narrow hindering rescue efforts. It's an inconvenience to the regulars who exercise there and a burden to State Parks who are overloaded with work. The residents have found illegal parking and even with the shuttles on Diamond Head Road it makes it difficult to turn onto 18th Avenue. It sets a bad precedence for Diamond Head which is a historic icon; it's out of character with the Master Plan suggesting holding this event at the Waikiki Shell, the Aloha Stadium or Blasdell Arena. The State subsidized the 2006 event for about $20,000 which doesn't benefit the State. He asked the Board to read his written testimony and the criteria in the Master Plan.

Sid Snyder, an architect and Acting Vice-Chair for the DHCAC testified from his written testimony reiterating Mr. Hatch's testimony and mentioned the natural affects. Rent is not received in advance and changing the event from one day to two could be discriminatory questioning whether it's legal or fair and sets a precedent. Diamond Head is being used as a cache to sell tickets. There should be a pre-payment requirement of $50,000. He listed a list of possible problems and that it should be held somewhere else.

Michelle Matson is a member of the DHCAC and the DHSMF and testified from her written testimony in opposition of this item. She reiterated Mr. Hatch's and Mr. Snyder's testimonies and mentioned cultural and educational points.

Mr. Snyder distributed Representative Barbara Marumoto's written testimony in opposition.

Chair Thielen noted that the Board is governed by the Sunshine Law and cannot meet outside of a publicly noticed meeting and can only meet on what is on the agenda. Individual Board members may talk with people outside of Board events and various groups had sent in written testimonies which they had reviewed. There was a comment in the testimony of the Chairperson asking for certain information. The Department was requested by the applicant to bring forward this permit and they are aware the Advisory Committee opposed it, but she felt it was not appropriate to deny an opportunity to have a meeting. She wanted to provide timely information to the Advisory Committee and if there recommendation is "no" to provide some guidelines for the Board's consideration on what they would say "yes" to and then provide that to the applicant. They wanted to make sure there was full information. One of the things that came up was a request for the Board to adopt the DHCAC guidelines and per Sunshine Law that is not on the agenda today and that isn't something the Board can take up, but they would consider that these are the type of guidelines the DHCAC would prefer and commented on this particular event.

Sherry Vann, past Honolulu Chairman of the Transpacific Yacht Race distributed and read her written testimony in support.

Dr. John Hart, Professor and former Dean at Hawaii Pacific University distributed and testified on his written testimony in support.

Hannah Bader, a Co-Producer with Ron Gibson distributed and read her written testimony where she related an internship program with high school students, the experience, referred to Ed Texeira's letter and how the neighbor islands are affected.

Shawna Lynn Masuda, a past Diamond Head International Music Festival Scholarship recipient distributed her mother's written testimony and testified relating her background. They are in full support.

Steve Ozark representing Caterer to the Stars submitted his written testimony which he read from in support of this event.

Mark Mellick, President of Kahala Pacific, Inc. distributed and read his written letter that he experienced no problems with traffic and asked to approve the permit in support.

Ms. Bader distributed David Booth's and Rick Schneider's written testimonies in support.

Julia Paulo distributed and testified from his written testimony in support.

Kimo Keawe, Producer and director of Stars of Tomorrow, LLC and the face and voice of the Queen Lili'uokalani Keiki Hula Competition who submitted and read from his and Master Kumu Hula, Aloha Dalire's written testimony to endorse and support this proposal. He explained that Diamond Head is a special place of cultural and historical significance and this is the venue for that.

Nalani Choy testified on behalf of Na Leo and other Hawaiian musicians distributed and presented from her written testimony in support noting that there is not enough live local music in Waikiki per the tourists and it is valuable to the community. Local entertainers are not as big a draw as mainland or international artists. She confirmed that as a person from Hawaii she has never been to Diamond Head until she sang there and there are people who don't hike.

Peter Hershorn, a real estate broker and investor who is paralyzed and uses a wheelchair submitted and testified from his written testimony in support noting that this is an ADA compliant event.

Linda Wong, Diamond Head Sub-District Chairperson for Neighborhood Board #5 testified on and distributed her written testimony in support. After Chair Thielen's questioning, Ms. Wong confirmed that Mr. Gibson did come to the Neighborhood Board and that Board has not taken a position.

A representative from the Tourism Liaison Office for Marsha Wienert distributed and read her written testimony highlighting the main points in support.

James Manaku, Sr. related his concern as a Hawaiian to have to pay to get into Diamond Head and wanted to bring all of his 18 grandchildren to this event questioning whether it is pono (right) to commercialize Diamond Head, but he wants approval of the permits.

Rick Egged is President of the Waikiki Improvement Association (WIA) who sits on the DHCAC, was one of the founding members of the Diamond Head State Monument Foundation and is Vice Chair of Neighborhood Board #5 for Diamond Head/Kapahulu/St. Louis Heights submitted and testified from his written testimony in support. The Waikiki Improvement Association Board supports this. The DHCAC do not support the criteria submitted believing they are overly stringent.

Bill Meyer, an entertainment and intellectual property attorney distributed and testified on his written testimony echoing testimony from Ms. Choy and Mr. Keawe and read a list of musicians who couldn't be here, but supports this event. He asked for support.

Astreta Pezentiner owns Diamond Head Concierge who serves the Diamond Head/Kahala area distributed her written testimony and testified that there was some traffic on Diamond Head Road, but was amazed at how everything ran smoothly. After

talking to some neighboring clients they were shocked there was a concert because there was no noise or traffic and she asked to support this.

Vikram Watumull, owner of Happy Shirts submitted and testified on his written testimony in support reiterating there was no impact to his neighborhood.

A lady spoke reiterating previous testimony by Mr. Hatch, Mr. Snyder and Ms. Matson and the need to reaffirm the Master Plan.

Holger Gruenert representing Pacific Instruments distributed and testified on his written testimony in support.

Stephanie Matsumoto submitted her written testimony and testified from it in support. She highlighted the education and spirituality aspects of this event.

Suzy Coleman, a Hawaii State Hospital art teacher submitted her written testimony and testified from it in support and mentioned the charity event. She also distributed Bill Griffin's written testimony.

Allen Alexander representing one of the band members with Yvonne Elliman's Band submitted and testified from his written testimony in support. He referred to Yvonne Elliman's written testimony explains more.

Ms. Bader submitted written testimony from William Pie, Tour Manager for the Mick Fleetwood Band in support and from a number of other vendors and supporters.

Melody Maxwell submitted her written testimony and testified in support.

Board member Edlao asked about the Master Plan and Mr. Quinn said that the Department developed the Master Plan and the Board adopted it. The Board accepted the Master Plan for approval of consideration for Visitor Center size reduction and to accommodate occasional outdoor public gatherings in the Crater. We're here to discuss on what defines an occasional outdoor public gathering. The Chair asked to clarify whether the Board accepted and adopted the Master Plan with those two modifications and Mr. Quinn confirmed that happened in 1999. The Chair asked whether that was attached to the Board submittal where Mr. Quinn answered in the negative and said it was attached to the Master Plan. The Chair read this is a Board submittal dated December 10, 1999 with the recommendation to accept the Diamond Head State Monument Master Plan update, Tim Johns as Chair, and the recommendation was for the Board to accept the Diamond Head State Monument Master Plan update dated October 1998 and allows staff and the consultant to proceed with completing the EIS process for the Master Plan and allow design and development in accordance of the updated Master Plan and is approved for consideration for visitor center size reduction and accommodate occasional outdoor public gatherings in the Crater. A Board member asked whether a specific number was attached to that and there wasn't any said Mr. Quinn. Board member Morgan asked whether all this was final record already in the 2006 and 2007 submittals.

Mr. Quinn confirmed that and said the maximum was set at 7500 noting previous testimony that there were many more people than that at earlier events.

Member Pacheco asked what the actual language is in the Master Plan in regards to commercial activity where Mr. Quinn deferred to staff.

Yara Lamadrid-Rose, Diamond Head Coordinator for State Parks referred to the October 22, 2004 Board submittal, page 4, Attachment #1, last paragraph with the sub-sections that talks about the Board accepting the Master Plan update with those conditions where Mr. Quinn noted it is an excerpt of the Board submittal, but the Board submittal itself is not attached.

Member Pacheco asked about Policy 4 on page 5 of the submittal that says any large commercial use generally affected be restricted. Mr. Quinn said it is an excerpt from the 1979 Planning Report. Member Morgan asked that is if detrimental affecting the environment and Yara confirmed that.

The Chair said at this prior Board meeting there was a discussion whether this event sets precedence to future events referring to page 8 because there was a question regarding occasional. She asked during those prior Board discussions did the Board establish or set what would be occasional. Mr. Quinn answered in the negative. Not that he could recollect. Chair Thielen asked whether there was some discussion regarding the framework because one concern raised by DHCAC was how to distinguish between large events and how would another application coming in on the heels of this be treated. Mr. Quinn said that was one of the reasons they asked for criteria from the Citizen's Advisory Committee because staff does get regular requests for similar large kinds of events in the Crater and when they give those requesters the conditions that this applicant had to meet it's generally the last time they hear from them. It was extreme the conditions this applicant went through. This is a request for once a year and there is discussion whether more than that and if so what would be the criteria for those events assuming if they are allowed at all. But, nothing has been established and it's a point of discussion to the Board.

It was questioned by the Board whether there was revenue generated at the 2006 event and Mr. Quinn answered in the negative that these events use considerable staff time and coordination, but he doesn't recall receiving any. In 2007, the revenue received and in-kind services totaled about $16,000 where $5,000 went to fix the ground cover and the rest was in cash. Member Pacheco asked how does the State corroborate the revenue amount generated. Mr. Quinn said they do an audit based on the applicant's statement to pay a percentage of revenues they have. Member Pacheco asked what the up front costs were. Mr. Quinn said there was a $2100 requirement that was based on the average daily revenue that the State realizes when the Park is normally open. In this case the Park is closed on that particular day so that was the assurance that they would at least generate the revenue that they expect for that day. They do realize in the neighborhood of ¾ million per year. Yara said $800,000 - $900,000 gross they get and Office of Hawaiian Affairs (OHA) gets 20%. Mr. Quinn said the average daily is $2100, but hey have had up

to 3300 visitors on some days. Member Pacheco asked whether they had a fund or mechanism or anyway to put the money generated from this set aside for Diamond Head management. Mr. Quinn said they have the State Parks Special Fund which is used to run and operate Parks statewide together with the general fund. There is a separate sub-account established by the Legislature for a portion of the entry fees to be dedicated back to Diamond Head. And, outside of the State, the Diamond Head Foundation was established to improve and care for the Park and there are potential avenues for funds to go back to the Park.

There was some Board and staff discussion regarding when the music should stop and the difficulty of getting 7500 paid attendees out by 10 pm. Where Mr. Gibson described the past events were a learning curve noting the cost average over two days. He clarified that it is a maximum of 7500 people each day including workers and stage hands. There was some discussion on what Ticket master reports and whether the vendor concessions pay 5% and that script is used.

The Chair asked whether these were discussed earlier that the staff recommends changes to the following conditions if the Board were to grant the permit from the prior approvals on page 2 and 3 of the submittal to Recommendation #3 – agree to keep the park open to the public from 6 am to 12 pm on days of the events, #4 – sign the agreement with the Department with the non-refundable deposit and #5 – base amount or 5% or whichever is more. Mr. Quinn confirmed that they did briefly and explained those were the changes. At the earlier events the Park was closed on the day of the event and this condition allows the Park to remain open to noon. For condition #4, which the Board added, was the agreement be reviewed and approved by the Office of the Attorney General. And, #5 was for the minimum payment of $50,000. Chair Thielen asked whether staff came up with this non-refundable amount based on the average receipts on that day and not based on the potential impacts to the facilities and Mr. Quinn confirmed that is correct. The Chair asked how the minimum amount of $50,000 was derived. Yara reported there had been some discussion between Mr. Gibson and staff.

Chair Thielen apologized that she wasn't here earlier and asked whether the paying fee was covered. Mr. Gibson said that they were willing to keep the Park open until 1:00pm where the Department will still get about 80-90% of its normal revenue and the Park will benefit by closing in the afternoon for repairs. The $50,000 is against their gross receipts and with the two days of ticket sales they feel they could pay the 5%. He estimated the tickets to average around $75.00, but there will be some $49.00 tickets and VIP priced tickets. The Chair asked when you have an event at the Blaisdell or the Waikiki Shell is a non-refundable deposit required and what is it. Mr. Gibson confirmed that there is a contract fee and around $2,000. Member Pacheco said $5,000. Waikiki Shell is $13,000 pointing out the fee schedule which is on page 2 of the attachment dated 2006. Mr. Gibson also said that sometimes there is a ceiling to the deposit when negotiated. Member Pacheco asked whether the City requires a performance bond and Mr. Gibson said only comply with insurance noting everybody with a booth has to provide an insurance policy naming the State as beneficiary.

Chair Thielen asked whether the 21 conditions were acceptable to Mr. Gibson's organization clarifying the above amendments to Recommendations 3, 4 and 5 where Mr. Gibson agreed.

There was some discussion between the Board and staff regarding the 70 decibel issue referring to Attachment 7, #7. Mr. Gibson noted that they did do a decibel reading out on Diamond Head Road and there was nothing from the Crater, only from the road. Also, the Board needed clarification from the DHCAC whether the 70 decibel is from inside or outside the Crater. The Chair concluded it is from outside the Crater. Mr. Gibson reiterated there were zero complaints. Member Morgan referred back to DHCAC criteria #7 that they are saying from the source which negates all concerts.

Member Pacheco said he wanted to be clear in looking through the Master Plan and language and EIS whether by supporting this they will not be in conflict with the Master Plan or what is in the EIS. He referred to Attachment 1, pages 4 and 5 where that language to him opens the door for this kind of activity within the Park. Mr. Hatch said the Master Plan update on page 70 says, #4 that large gatherings and any commercial use not be allowed and any use which may detrimentally affect the natural Crater or Diamond Head safe environment be prohibited including non-regulated vendors and non-profit activities. On paragraph 2 of that same page – any proposed deviation from the adopted plan for areas within the Diamond Head State Monument will require an approved environmental assessment, negative declaration, or a full environmental impact statement from Chapter 343 HRS.

Chair Thielen noted that was the Master Plan where there was Board discussion after that in 2004 on that Land Board submittal where the Board at that point found that the event was within the occasional. But, she is not sure from this prior submittal whether this Board never really defined what occasional event might be and perhaps if there is action today to make it clear that there would need to be stringent conditions placed upon anything before the Board would consider noting that Mr. Quinn raised that there have been conditions raised with other applicants that have come before them. It is a valid concern particularly with an event going from a one day event to a two day event. It is a desirable area for an event and if the State doesn't charge for these commercial activities in a manner that is charged at private lands and in some ways drives commercial businesses there as we see in beach activities. She wanted to recognize one of the concerns raised by the DHCAC is not all promoters, not all events will be operated at this standard or have this track record. There should be something that they would address in here to say that they want to consider or commend specific requirements and conditions to standards of operation because it's at a much higher level.

Member Morgan noted that the applicant has pointed out the hurdles the promoters have to jump through is the first step and gets rid of the people who aren't able. He related his experience with concerts held at Kualoa Ranch and he is fully supportive of this event. The Master Plan was amended to allow this to happen. He doesn't believe these concerts inconveniences the regular users as being significant a thing and reiterated Recommendation #3 covering 80-90% of the users. As heard from repeated testimony

that the noise is not that significant to the neighbors. As for setting a bad precedence, it is his understanding that anything that happens it has to come back to the Land Board. It's understood that in order for the promoter to make money he needs a two day event. The term exploitation is an inflammatory one. More people going to the Crater is a good thing as long as the residual impact is negligible. He can attest to that also and said after Kualoa Ranch holds their concerts there is no lasting impact whatsoever. As for the comments regarding corporate gain, he resents the fact that companies making money is somehow a bad thing, but that is what makes America run and that is a good thing.

Chair Thielen said the DHCAC raised the performance bond item #9 requiring the commercial liability insurance naming the State is one that tries to address that. Dan they recently had notice from Department of Accounting and General Services (DAGS) about increasing the risk insurance amounts and asked are those amounts in item #9 aligned with the new requirements with the State. Mr. Quinn said this exceeds their minimum requirements.

Chair Thielen asked about the pre-payment that she recognized staff looked at the $2,100 as the average revenue generated by that entry fees, but she also recognized from testimony that it takes a lot of in-kind coordination from our staff for events like this and the entry fees are done by a contract vendor so it doesn't take that day-to-day time. Parks staffs are down because the Legislature cut the budget again and some additional positions where staff can't meet things like in previous years and asked whether the promoter were willing to do a $10,000 non-refundable deposit 90 days prior to the event which would enable staff to contract providing for that support. She asked whether the $2,100 is counted against the minimum and Mr. Quinn confirmed that. Mr. Gibson agreed to the non-refundable $10,000 and it being credited toward the $50,000.

Mr. Young asked about the discussion on vacating the premises by 10:00 pm and whether it could be later to accommodate time in moving people out. Mr. Gibson said all music will end at 10:00 pm describing a trickle affect suggesting using wording as use their best efforts and see what happens. Mr. Quinn said for the 2006 and 2007 events music was down at 9:00 pm and everyone out by 10:00 pm. Mr. Gibson said at that time they started the music at 1:00 pm and this time they will start around 4:00 pm. Mr. Quinn commented that 10:00 pm was consistent with the noise level issues in the neighborhood. Mr. Gibson said the Waikiki Shell stops the music at 10:00 pm.

*Member Morgan made a motion to approve the two-day concert for the two years with the amendment allowance that the music is over at 10:00 pm and premises vacated by 11:00 pm. On Item #4, change the non-refundable deposit amount of $2,100.00 to $10,000. Otherwise, staff's submittal is approved. Member Agor seconded it.

Chair Thielen summarized the music will be over at 10:00 pm and the park vacated by 11:00 pm and on item #4 that the non-refundable deposit is $10,000. She took a vote and all approved.

Mr. Quinn brought to the Chair's attention that while she was out at the beginning in the approval of the original event the Board found that the event would have minimal or no significant affect on the environment that the requested staff made was to have the Board clarify that this would be in compliance with 343 which he believes was the intent of that statement in the original Board approval.

Chair Thielen said we just voted, there was no opposition and the motion is passed. She thinks the minutes will reflect that statement is in the submittal and materials. When the Board had approved it, it refers back to those which are on the record.

The Chair summarized that this was the approval of the event with that amendment and recognized the work the DHCAC had done on the guidelines they had provided. It was important that they brought a lot of those issues forward and would hope that they do this as one of those occasional events under the history. She recognized DHCAC and others in the room that the Advisory Committee does do a lot of work on behalf of Diamond Head day in and day out. And while not everyone in the room agrees with their position on this, they do deserve a lot of credit for their effort they put into the Park over the years and for the things they've accomplished thanking them for that.

Mr. Hatch related his concerns that this will open the flood gates by setting precedence. Chair Thielen said a role for the Advisory Committee by helping to generate by bringing back to this Board through staff in a different submittal a better definition of occasional event because it would be helpful for other applications. She suggested Mr. Hatch talk to Mr. Quinn and she would be happy to talk to the Advisory Committee on ways to how to bring back that information back to the Board.

The Board:

Made the following amendments to the submittal:

1. **The music is over at 10:00 pm and the premises vacated by 11:00 pm.**
2. **Item #4, change the non-refundable deposit amount of [$2,100.00] to $10,000.00.**

Otherwise, staff's submittal is approved.

Unanimously approved as amended (Morgan, Agor)

2:10 PM RECESS

2:24 PM RECONVENED

Item D-14 Re-Submittal of Enforcement Action as to Steve's Ag Services, Ltd., Steve Baczkiewicz, Contract Milling, Wesley McGee, and Raymond McGee involving Removal of Koa and other Timber Resources and Road Construction on State Unencumbered Lands, Alika and Papa 1, South Kona, Hawaii, Tax Map Key: (3) 8-8-1:8.

Russell Tsuji, Land Deputy introduced himself and Deputy Attorney General, Bill Wynhoff reported that this is the third time that this submittal has been before the Board in 2010. The last time was March 2010 and with reluctance the Board deferred for one month to have the parties come up with an amicable dollar amount that they can agree upon as for the total fine. He and Mr. Wynhoff met with counsel for the loggers twice corresponding via e-mail various times and at the end the parties could not come to an agreement on a dollar amount that both sides could recommend to the Board.

Mr. Wynhoff said the loggers have submitted a detailed report to this Board and staff or he on behalf of staff have some comments and suggested what is most fair unless they have questions of staff for the loggers to present there side first before he starts rebutting there side.

Douglas Ing representing Raymond McGee and Wesley McGee who has relocated to the mainland, but is still a part of this citation and Steve Baczkiewicz is here. Mr. Ing had submitted a thick 3-ring binder and he doesn't imagine everyone having reviewed everything in there, but the most critical piece is the position statement which summarizes everything which he will go through briefly. It is their position that the Board should dismiss this action for the simple reason that the Attorney General's Office has no way they can present evidence that they had clear title back in 1997 – 1999 timeframe. They did submit a statement by Judge King which is dated November 2009. The very nature of a Quiet Title Action is that the title must be in dispute and definitely the title was in dispute in 1997 – 1999 timeframe. If the State cannot show they had clear title at that time then the State cannot cite the loggers for violations of State Law. Plan and simple and that is their position. The Quiet Title Action, although it came down in November of 2009 does not relate back to 10 years earlier. There is no evidence that the State can present that would be able to convince anyone that it had clear title at that time. That is not the only evidence that they will present. When they went through this earlier in 2004, they did present to the hearings officer evidence regarding the State's inability to show that it had title. And, the hearings officer did make certain findings. Among those findings and they quoted some of these in their position statement where he read starting from paragraph 56 of the hearings officer's findings: 1) It is undisputed that there are no legal documents of title reflecting the existence of the subject parcel. 2) It is undisputed that there are no legal documents of title reflecting ownership of the subject parcel by the State of Hawaii. 3) It is undisputed that when the western boundary of the ahupua'a of Kahuku and the eastern boundaries of the Alika Homesteads and Papa parcels were determined and conveyed the intention was that the boundaries would abut each other. There was no conscious intent to create a gap between the boundaries of the two properties and therefore no intent to leave a remainder parcel owned by the government between the ahupua'a of Kahuku and Alika Homesteads and Papa parcels. 4) It is undisputed that DLNR cannot establish by a preponderance of evidence the State's ownership of the subject parcel. This civil administrative enforcement action cannot proceed against the positions. These were findings of fact and conclusions of law by the hearings officer. In summary, on page 14 of his findings he said based on the record of this case the preponderance of available evidence of this case does not establish State

ownership of the subject parcel and there is a genuine dispute as to the existence of legal ownership of the subject parcel. The Land Board was presented with these findings and conclusions. The Land Board at the time adopted as its own the hearings officer's recommended findings of fact and conclusions of law decision adopted as its own. Now this was not appealed. So the Board has already made findings which established that the State did not own the parcel and could not show it owned the parcel at that time. This is in the record, it is a part of the record in this case and it is the law of this case. They have cited the law of the case doctrine, it has been adopted in the State of Hawaii and it applies to administrative proceedings. So you are now barred from the law of the case for making contrary findings. This has never appealed. That is the second reason why they think this matter needs to be dismissed. Third, he read through Judge King's decision and they certainly think that Judge King made a rather egregious errors of law. Probably the most blatant one is that he completely ignored the certificate of boundary 85. And, substituted language in the palls of the royal tax for the Alika and Papa parcels and he did not know how he reached that conclusion to ignore a century of Hawaii Law that certificates of boundaries are basically adjudications and once they are determined with few exceptions they have the force and affect of a judgment on the boundaries. Somehow in error of law, which they will appeal, Judge King just didn't apply the common law of the State of Hawaii and just completely ignored it which is terrible. There are two areas he wanted to cover. The first is the fines. If for some reason you've reached the conclusion the State can establish its ownership of the parcel 10 years ago when the loggers were on the property, the law prohibits you from fining them more than $500 per day. You are prohibited by Statutory Law from doing that. The Attorney General has somehow converted a fine of up to $500 per day to $500 per violation. When you read the statute, which he will read to you, it is very clear that it does not apply on a per violation basis and they had cited this in their position statement. Section 171-615 states any person violating any of the provisions of this chapter or any rule adopted hereunder for which a penalty is not otherwise provided shall be fined not more than $500 a day. It doesn't say a violation. It doesn't say a day for each violation. It doesn't say that. It says not more than $500 a day. Then it goes on to say liable for administrative costs and payment of damages. The Board's rules HAR § 13-228-3 has the same language whether you look under the rules or under the statute it's the same language. Surely the Legislature knows and understands the difference between $500 per day and $500 per violation because when the Department or the State to have the statute amended, at least he thinks for conservation violations, it now says a dollar amount of up to $15,000 per violation. Clearly, there is a difference between a per day maximum and a per violation maximum. And, here the only statute that applies is 171-615 and it is a per day violation. They have submitted through the written testimonies that have been prepared for the 2004 case evidence that were in the State claimed parcel for a maximum of 36, 37 days and if that's the case the State has no testimony to request because they weren't there. This is testimony from the lawyers. The maximum that they could be fined, and in anyway are they suggesting they apply the $500, would be about $18,000 maximum. The State argues that it should be per tree cut and they came up with 211 trees. Even that figure is in error. When the State went to do a tree count they ran transects along certain portions of the area and counted the number of stumps, but they didn't do that for the entire area of the State claimed parcel. What they did was they then

extrapolated from that and estimated the number of trees based on this one sample section. The loggers and their experts went in and actually counted the number of stumps that were there based on their method of cutting which is the Humboldt cut and determined in that area that the State claims they have ownership, they came up with 143 stumps. If you were to apply the $500 that is the maximum on a per day basis that could be applied and they don't suggest you apply the maximum because the loggers made good faith efforts to determine the boundaries. They spoke to the representatives and officers from the Damon Estate, they went to County Real Property Office to look for maps and they were given a deed by the Damon Estate managers. That deed is not in leaps and bounds, it is by ahupua'a. So they couldn't locate it using that. They went to the State Forester's Office and spoke to Roger Emoto where he gave them some aerial maps that do not have leaps and bonds descriptions and these they believe are all reasonable efforts to locate the boundary. There was no intent to poach on State land. They finally contacted a surveyor to see whether he could help them locate the boundary. The cost was prohibitive because this is an extremely remote area and it takes them three plus hours to get there one way from Hilo. So it was cost prohibitive. They did take in GPS devices to try to locate it and using those devices they did flag the lines and stayed above that line. The GPS devices in those days are not as accurate as the ones today and they are also reliant on the ability to reach a satellite. Once the cloud cover comes in which it does on a daily basis they have a difficult time getting good readings and the accuracy at that time at best, he believes, was a 100 meters. Given their good faith efforts to try to locate and determine a boundary we don't think that the maximum should be applied. He wanted to address the area of damages. We clearly do not agree with the State on that. They have assessed damages based on some bazillion figure of board feet and they are widely different on a number of board feet that resulted from the cutting of the logs. And, they have substantial testimony from Randy Sinat, Peter Simmons, Bob Peters and Richard Morris talking about the distressed nature of the koa trees in that area. This forest is on the lee side of Mauna Loa that doesn't get a lot of rainfall which is a dry area. It is not in conservation land. It is not conservation land. This is ag land having been used for cattle grazing for years. You know what cattle and feral animals do to native forests, they basically wipe them out and you don't get new growth. It's over run by weeds, at least at the time. The measure of damages under case law is stumpage and they have evidence and they cited the cases in their position statement. It is not the price of the board feet at Kawaihae. It is not the board foot price at some distributor of koa. It is stumpage and the reason for that is the loggers have to cut, haul it to a mill and cut it. Stumpage is probably the up stream effort that it takes to get a koa gavel or bowl which is an end product. There is a lot of work and a lot of cost incurred from the time you cut a koa tree in the forest to the time you get it to market as a finished product. The measure of damage is stumpage and they have evidence of what the State charges for stumpage in the record which is 75 cents per board foot so that is the figure that you need to apply and not the price of finished lumber in Honolulu or Hilo or at some koa shop. And, finally with respect to damages, since the case was dismissed in 2004 they don't believe they should charge anything that occurred prior to 2004 simply because the case was dismissed and you agreed that it needed to be dismissed and you found that the State could not prove it had title at that time.

Member Pacheco asked by the same argument he is making here for the quiet title action is a land owner has his resources stolen off his lands and he thinks it's his land, but the title isn't clear he has no recourse to get anything from those resources even if it is later found it is indeed his land. Is that what that argument is stating? Mr. Ing said no that's not what its saying. They thought Kahuku Ranch owned it. They actually paid stumpage to Kahuku Ranch for that and they had permission to log on Kahuku Ranch property. There was a separate DLNR action that involved conservation lands where the Board took action against Damon Estate/Kahuku Ranch for the logging on conservation land. They weren't poaching and they thought the land belonged to Kahuku Ranch and paid the stumpage for it. It wasn't like they were going to an unmarked parcel and not paying anyone for it. Member Pacheco said it is his understanding in his argument at the time of the incident the State couldn't prove they owned the land and they had no enforcement over that. Mr. Ing agreed saying the State title at that time was up in the air and was not resolved until November 2009. If someone goes in there today and takes koa the State has every right to go after them because they have clear title. Member Pacheco asked if that's the case and say it's under a private landowner's name and that landowner has no recourse with someone going in and taking resources off their property just because at that point there is no clear title, but later on it's proven that it is their land. Doesn't that ownership revert back to the time of the incident? Mr. Ing said there maybe a dispute between the then landowner who clearly thought it was title rested and the title documents and the certificate of boundary that has the effect of a judgment place title in the heirs of C.C. Harris which is the Damon Estate. They are not just saying the title was up in the air. Warren Hirano who was the Chief Legal Officer, Vice-President for Title Guaranty in his testimony said that the titles vested in the heirs of C.C. Harris which is today's Damon Estate, it wasn't unclear. The document showed that title vested the ahupua'a of Kahuku went to C.C. Harris and their successors and interest today which are the Nature Conservancy and the Federal Government. But, then at the time it was Kahuku Ranch. According to the title documents they paid who they thought were the lawful owners.

Chair Thielen said that Mr. Ing talked earlier about good faith. She thinks that the last time and they acknowledged when he came up that statute provides for the penalty regardless of intent. It's simply the taking of the trees on another's land. The intent is not something that is required to be proven under the Statute and she wanted to make that point because he was raising good faith. The Board may or may not take into consideration in determining the level of the fine, but I think they will look at the good faith actions over the entire course of the comment. Mr. Ing said he is not suggesting that innocent trespass is not trespass. The regulations provide for harvesting of natural resources for sale and that is a particular violation in this matter. Clearly, they harvested resources on State claimed parcel and they didn't think it was owned by the State. The good faith argument goes to the level of the fine is what he was arguing and apologized if he was unclear. Even in other cases he knows for example in the Damon Estate case the maximum fine was a $1,000 per violation. The Board at that time when they did fine Damon Estate didn't go to the maximum they kept it around $500 or $600 per tree he believes.

Bill Wynhoff, Deputy Attorney General representing staff said he will address some of the points that Mr. Ing raised first. With respect to Member Pacheco's question, this has never been a title issue and that is what frustrated him because this Board knows perfectly well that 95% of the land that comes before you don't have a deed to or title to and the law of the State of Hawaii is crystal clear that the State owns every piece of land in this State except where it has been somehow deeded out. Back to the Mahele there was lands that went to the ali'i and the konahiki and some of that came back as commendation. Other lands were retained by the State subsequently provided into government land and crown land. All of that land that was going into crown land at the end of the Mahele was State property and it's always been State property and there is not a deed for it. For him to have sat through three days of these people and the hearings officer as well saying you don't have a deed to the property is frustrating. It is not a titles question, it is a boundaries question. As Mr. Ing said the deed to the ahupua'a of Kahuku was deeded to C.C. Harris and Kahuku is now owned by his successors in the area that they are talking about which are the United States and the Nature Conservancy because they own the ahupua'a, but, the property isn't in the ahupua'a of Kahuku. It's in the ahupua'a of Alika and Papa and that is the whole dispute of where is it? Is it in Kahuku? No, its not, it's in Alika and that is what the court decided and that is what the facts clearly show. Then the question is what the loggers argued that it's in Kahuku and its not. On the other side, Mike Heir (for Yee Hop) came over and argued it's in Alika and they (Kahuku) said you're right it's in Alika and he said you sold Alika to us. They sold it up to a point, but they didn't include this property. That is why the State owns it and that is what the Judge said and that is what the evidence shows. Member Pacheco asked so that is why Yee Hop is involved. Mr. Wynhoff said they own the rest of Alika where they bought Alika at the time. Like he explained the last time, what the grants of Alika show that there was a specific amount of acreage, they show leaps and bonds – the length of the sides and those go to specific ahu boundaries markers. All of that are completely consistent, the lengths are consistent, the boundaries are consistent and one of the most important piece of evidence was when they sold this to Yee Hops predecessors he put a fence on what he thought was the boundary and so there are fence remnants from a 100 years ago on what they say is the boundary between Alika and our property. The discrepancy comes because the deeds to those properties say it goes to the ahu on the Kahuku border so you can't reconcile all of those facts. When the judge looked at it and he and they were there with Judge King for four days and the facts are that it is not in Kahuku and they didn't sell it to you people and so they own it. That was decided by a Federal Court and he honestly doesn't want to argue that again. He could because he was there and Mr. Ing wasn't there. They (the State) argued it and they won. With respect to the other argument that they didn't have clear title at the time he doesn't understand that argument. If you are going to come here and say and allow people to say well, you don't have a deed to your property and you can't enforce something against us is just ridiculous in the first place. And, in the second place there is no question there was a dispute in 2002-2003 as to who owned it. They (the loggers) raised the dispute where he didn't think it was a genuine dispute. You or your predecessors agreed it was. So fine, they went to court and they proved it and what they proved was they (the State) owned it forever because they never deeded it to anybody. The fact that there was an argument back in 2003 or dispute back in 1999 has absolutely nothing to do with whether they

owned it back then. They absolutely owned it back then. They proved it in the case back in 2003 and proved it back in 2000. It's not a question of going back. It's not like its adverse possession where they didn't own it in 1990 and now we got a deed or got it by adverse possession. They always owned it forever since the Mahele and they proved it. There was a dispute back then and there isn't a dispute now because they've owned it since the Mahele.

With respect to what this Board decided before, Mr. Ing read some of the findings and conclusions, but he didn't read the one that is most important here because what happened was the hearings officer recommended to this Board and this Board decided that given the existence of a genuine dispute as to the existence and legal ownership of the subject property the determination as state or some other third party as title will be given a quiet title. The hearings office does not have legal authority to make a ruling by best jurisdiction by a quiet title in the court. What the Board decided before is that the Board didn't have jurisdiction over this because of there was a dispute. The Board didn't decide we didn't own it and Mr. Ing repeatedly made that argument and that is wrong. The Board decided that it didn't have jurisdiction to decide who owned it. The hearings officer recommended that this case be dismissed without prejudice until the appropriate authority has determined the question of legal ownership of the subject parcel. He doesn't think that can be any clearer. It says dismissed without prejudice, go to court and then come back which is exactly what they did. Judge King's decision – he had a beautiful map that shows exactly why Judge King is right or wrong and he doesn't even want to show it to you because the fact of the matter is that Judge King had a four day trial on it and he decided that we own it. It's just with respect that you (the loggers) said go ask the court and it is not your kuleana now to say Judge King was wrong. If they were up in the Ninth Circuit and it gets reversed than fine. But, you can't come to this Board and say Judge King was wrong that he made an egregious errors of law because he was there and he doesn't agree with that. They will find out from the Ninth Circuit. Moving on to the substance of it that Mr. Ing read you the law and it says what it says – shall not be fined more than $500 per day. He guessed Mr. Ing's argument is if you go commit a violation and violate some rules that means you can go cut down some trees on some property and run over there to build a road and go some place else and do it. Obviously, that is not what that means. It says there's a violation of $500 a day, but obviously it means for each violation and he thinks that is an obvious reading of it. He knows that the Board has had this in front of them many times before. Per each violation there's a fine of $500 and it drags more than one day you are fined $500 the next day and that is the obvious common sense reading of it. There aren't any case laws that have interpreted it. He isn't aware of any statutory history. It's fair in a way that Mr. Ing comes over and says well, that is an obvious playing on an ambiguous reading of it. He'll (Mr. Wynhoff's) come over and say his interpretation is the only thing that makes any sense. It doesn't make sense for you to commit any violation you want and if you do 40 violations as long as you do them all in one day you will be fined only once and he thinks that is ridiculous suggesting to the Board that it is.

Member Pacheco asked that Mr. Ing says the violation was the cutting and taking of trees which was a violation and then bulldozing a road is another violation which is another

$500. There are people stealing rocks on the lava flow and you have a company that comes in with big truck and fills it up with rocks from the lava flow and drive away that is a violation and if they came back the same day and did it again and hauled another load away would that be two violations or one violation? Should a rock be a violation? Mr. Wynhoff said that is a very interesting question. It's really a sliding scale. Let's say they loaded up five rocks that weighed 2000 lbs. or 10,000 lbs. a piece you would have a good argument that is five violations a piece. But, on the other hand if you had a truck load of dirt or sand he doesn't think you can argue every grain of sand is a violation he wouldn't know, but he does know the violation of these rules and the rule we are talking about says no person shall destroy (dig, remove or possess) any tree. We are faced with somebody cutting down somewhere we say 211 and they say a 145 trees. He just don't think there is anyway to argue that is other than settling between 145 to 211 violations and he doesn't think the fact that they were able to cut down 200 of them on one day means that they have only one violation. There is a difference between a truck load of sand and a truck load of giant rocks and that even might be a difficult question, but they don't have any difficult questions here because it says no person shall destroy any tree. You cut down one tree that is one violation. Cut down two trees that is two violations even if it takes you one day to do it. 211 trees is the number staff got where they counted the stumps on 20% of the property and extrapolated that to 211. Mr. Ing testified that his people came out and counted 145 of their particular humbolt stumps, but what Mr. Wynhoff found interesting is how many of those stumps were not their trees. You don't hear that and that is a very salient point. The evidence that they have, Michael Constantinides from DOFAW is out of the country that he would say is he was up there for weeks and knows the area and the loggers themselves testified that they had to put in roads and the idea that there were other people up there cutting down trees and taking them out. The testimony that we would present is that is not physically possible because if other people cut down trees how do they get them out? There are no roads up there. If there are roads there already why did the loggers have to put them in? They said themselves they put the roads in. So where did the trees go if somebody else cut them down?

With respect to not the entire $500 per tree, obviously, that is up to the Board, he has gone over some detail. The logger's counsel went over some detail of the efforts that they made to find out where the boundaries are. Roger Emoto, Kahuku Ranch, Mr. Christianson and their GPS couldn't tell them where the boundaries are. Well then, you know what his and staffs' answer to that was if you don't know where the boundaries are then don't go there! If it's not good enough that nobody can tell you where the boundaries are then what are you doing there? You shouldn't be there! You can't just come by and say we really tried to find the boundaries, but nobody could tell us so we just went and cut it down because no one could tell them and it's not their fault. That's ridiculous. The idea that the GPS was off by a 100 meters, he has people who testified that there were ways even back then to make it more accurate. The fact of the matter that the loggers went a 1000 feet, 1200 feet beyond where they were suppose to be. If they had GPS that are a 100 meters which is 300 feet than why did they go 1200 feet? It just doesn't add up. Anyway, getting back to the $500, let's just say they didn't try, but the other thing to factor is these are big trees worth thousands of dollars and they got no right

for cutting them down. The other way to look at it is giving them a discount for good faith, but on the other had you don't want to give a discount because $500 is ridiculously little for this. The trees on Kahuku Ranch when Kahuku Ranch was fined $600 and staff recommended $150 or $250 a tree and the Board said no and charged them $675 a tree because that was a discount for the maximum amount of fine in the conservation district. Still more than what the loggers here should get which is up to the Board, but to him they are taking trees worth thousands of dollars and $500 is a slap on the wrist. The people next door got charged more and he doesn't see charging less than the maximum even if you found them in good faith which isn't something they agree with.

With respect to damages, the fact of the matter is the evidence will show that this is a dry area and that is a good point and that is why these trees are valuable because when the fog rolls in and dew collects on them and that is where the water comes from and these trees have been there forever. He believes evidence will show that this area was a virgin forest with 100 year old koa trees and its not an issue of it being used for cattle grazing even he doesn't think the loggers themselves would say that it was previously untouched. They have aerial photographs.

With respect to stumpage, in some way he does agree with the loggers on this because if you look at page 41 of their memo. This isn't the only incidence and you'll be surprised this happens all over the country. Where the cutting of trees is unintentional based upon a reasonable, but mistaken belief that the person has the right to cut the trees and the measured damage is stumpage value and Mr. Wynhoff thinks that is right. He thinks that does becomes an area where you have to give some thought to whether cutting of trees is unintentional and based on reasonable mistaken which he doesn't think that is so. But, if it isn't reasonable and based on a mistaken belief then the value isn't stumpage and becomes wholesale or retail and it goes up exponentially for reasons they already discussed. And, with regards to stumpage, the loggers did attach that it was true back in 1995 to 2000 they entered into a small number of contracts of people to take away fallen koa logs and charged them 75 cents a board foot for stumpage value. Those are special situations where it's one log, two or even nine logs that had fallen impeding other roads or other special situations where staff isn't going out to sell them to make a profit. The evidence will show this is a virgin untouched area with hundreds of old growth koa logs. Later they were getting stumpage for up to $2.85 per board foot.

Mr. Tsuji referred back to Mr. Pacheco's question regarding Mr. Ing's argument that on a single day you can cut a 100,000 trees, but the statute says $500 maximum fine. The historical Departmental view is the BLNR interpretation is anytime you use this provision cutting down of one tree is a violation and therefore $500 per violation. This is under the Department's 171-6 the BLNR Statute where the courts give administrative deference to the Department and the Board on interpreting its own statutes that it has to enforce. The Board and the Department has historically interpreted that way and considered that way. If you cut down 100,000 trees you are not going to get away with a $500 fine its up to $500 per tree because one single tree cut down is a violation. To this day no court has said that the DLNR or BLNR interpretation of $500 per tree or violation is illegal and has never been upheld so the Department's interpretation is shared by the courts.

Member Pacheco said in the submittal you bring up administrative fees in the contested case hearing and asked to comment on that. Mr. Wynhoff said the statute says that any person that has a violation shall be liable for administrative costs incurred by the Department for payment of damages. Member Pacheco asked that they prevailed in the contested case hearing and can they charge where Mr. Wynhoff agreed that we can. If they win then that means they didn't have a violation and therefore wouldn't be liable. Mr. Tsuji noted that those administrative fees goes to staff research and field work.

Chair Thielen asked the loggers' counsel who is here today that are the parties subject to these fines. Mr. Ing said Steve Backiewicz. The Chair said that last month he didn't join us, but his attorney acknowledged the trees were cut. It is on land that the judge's decision in Federal Court said is State land. That the statute provides for fines regardless whether it was intentional or unintentional and that it was a strict liability violation. What we're talking about is there is some liability, there are some damages and it was a matter of how much and they asked the parties to go back and talk. It seems to her then as it does now that we are talking relatively minor differences. We are saying 211 trees and you are saying 145 trees, we're saying $4.20 per board foot and you're saying may be $2.85 per board foot, board feet maybe close to the same. No question on some of the administrative costs. What she is asking that there was an acknowledgment that there was a violation of the law and some damages due to the State for trees taken on State land why was his counsel coming in last month and this month saying that you are going to go through a Federal appeal which is going to be a multiple year process to go and appeal Judge King, who is not a readily overturned judge, through a Federal Court Appeal process and a contested case hearing process when you've acknowledged a violation of law and why aren't we sitting here today listening to an offer to pay the damages due for the trees that were cut down that belong to the State? Mr. Backiewicz said we acknowledge when the appeal and title is settled once and for all and that might be the case, but they do not agree with Judge King's ruling and they have appealed it and the case is pending. They attempted to settle through negotiations, but that failed us.

Chair Thielen asked Mr. Ing that at the last Board meeting he represented that his client was destitute and was he planning to take this case free of charge through the Federal Appeal system? Mr. Ing said he didn't say they were destitute he was saying he was representing them at no charge at the time because he was concerned that they didn't have representation that he may be compensated and that was his exact words. He didn't imply they were destitute today and he didn't mean to. Chair Thielen said she recalled from her notes what Mr. Ing was saying at the time he was representing them free of charge and the concern that he had was they weren't able to pay the fine and that is why the Board encouraged him to go into discussion. So at this point you are saying they are not destitute? Mr. Ing confirmed that he said that because she was arguing with him with why he was going through hundreds of thousands of dollars of legal costs in order to take this to a contested case matter and he wanted to make sure she understood that its not hundreds of thousands of dollars to do pro-bono basis. Chair Thielen made the loggers aware that Mr. Ing acknowledged last month that it's clear that the land was not and is

not owned by the folks you had a contract with to cut the trees. You can go back to the record if you want to fight this in court.

Chair Thielen said if you want to appeal this decision of Judge King to go through the Federal Court to continue to contest that you are obviously free to do so. If you want to appeal if the Board makes a decision today and wants to go through a contested case hearing you are obviously free to do so, but it is clear on the record the trees were cut in the area where you had a contract to go and cut trees and you did cut a large number of trees and there is going to have some value paid for them. It still doesn't make sense to her the methods he is preceding at this point. You made it pretty clear that you stopped representations to your client that you shared with the Board last month that they agreed to give an extension to that had she known with what was provided to the Board today she would not have agreed to an extension at that time and she is really disappointed.

Chair Thielen asked counsel to the Board whether there is an option to consider a higher level of fines than what they have in front of them today because what she sees in the Board submittal are conservative estimates of damages and the last Board did make a decision on this came up with a higher level of fines than what was recommended by staff. Mr. Wynhoff said there is information in the Board submittal that indicates a higher number for the value of the koa. There is information in the first go around that talks about restoration and those are numbers that could be considered by the Board. There are numbers well within the range that could be justified and are higher numbers that they could justify.

Chair Thielen asked Division of Forestry and Wildlife (DOFAW) staff that there information in the prior numbers for restoration. There was 15 years of annual monitoring costs at $3,050 per year and asked why it was put in the earlier recommendation and not in this one? Paul Conry, representing DOFAW said he would think if you were doing the monitoring it would be to make sure the restoration was being effective would be the reason for monitoring it. The reason why it wasn't in this submittal was it was being accomplished by other means and in this particular case the area has been fenced through another cooperative project with the National Park Service. Mr. Wynhoff said what they've done is fenced the area between the private side and our property and evidence will show restoration there are young koa trees growing and restoration isn't as urgent as nine years ago. Mr. Conry said the management actions that occurred since would facilitate that where those actions didn't happen as a result of this case. Mr. Tsuji said it would take years and years to restore those trees and Mr. Wynhoff said nothing could restore hundred year old trees. Mr. Conry said that the reason for the fencing was to keep the ungulates from coming back in. Chair Thielen asked whether the fencing came at the cost to the Department or at the lost of being able to use those cooperative efforts? Did they forgo other opportunities in order to react to the damages proposed here? Mr. Wynhoff reported that was accomplished with some of the funding from the settlement with Kahuku Ranch who was instrumental in causing that to happen, the fencing.

Member Pacheco conveyed that forest wasn't virgin, but was impacted by ungulates for years, but those were huge trees that none of us will see again in our lifetime.

Mr. Ing said that there was evidence in the record that there was logging in the area previously that Bob Peters has been logging in that area on existing roads, but they did have to cut a portion of the road in one of the areas. Otherwise, there was logging in there previously and those statements are in the record. Mr. Tsuji implied that the State has the right to interpret its own provisions where Mr. Ing cited a case on page 32 of his position statement that says that an agency's interpretation of its statute is not entitled to deference. This is the Paul Electric case where the agency is not empowered with the authority to interpret its own statutory provisions. Member Pacheco asked what is deference? Mr. Ing said deference is entitled to make interpretation out of your own regulations. It is a doctrine that is recognized in administrative law that they have the right to primarily with respect to factual issues. He doesn't think necessarily to legal issues where here the statute is pretty clear – up to a maximum of $500 per day and he doesn't think that leaves room for interpretation on a per violation basis.

Member Pacheco wondered why there were trees left on the ground. Mr. Ing said he is not familiar, but it shows the amount of decay in the area referring to some of the photos.

Member Pacheco asked to show him what the difference was between a Humboldt stump and a non-Humboldt stump. Mr. Backiewicz explained the Humboldt cut which is a wedge shaped cut referring to photos. Member Pacheco asked why logs were left on the ground and Mr. Backiewicz said logs are good down to 10%, but a lot of logs didn't even meet the 10% and they tried to minimize dropping the trees, but that would be more work for them. You can't always predict 100% what you cut down. Mr. Ing referred to page 163 and 164 which are examples of trees of that area that wasn't cut.

Member Morgan commented that he was comfortable with the State's position on Mr. Ing's rebutting the first points and the State did own the land and did go through quiet title to perfect that ownship, but it did always own the land. He is comfortable with Judge King's ruling. In fairness, if there is a discrepancy in the fine he totally believes in the intent of the law is in violation because he agrees if there is a 100,000 trees to cut down its ridiculous to think $500 would do it. The issue seems to be how many trees were there and that is a matter they need to consider. And the damages part – stumpages versus retail value. He is not sure where they can increase the fines they are talking about, but unless it's categorized there is a punitive type of fine system. If we are talking about the value of the wood we should be talking about the value of the wood instead of a stumpage approach to things. These are comments of where he feels comfortable and where they need to deliberate.

*Member Pacheco said he was inclined to go with staff's submittal reiterating his and Member Morgan's concerns. This has been going on for years and what better outcome will they get here today by deliberating on what to charge and he made the motion to accept staff's submittal. Member Agor said he can accept that.

Chair Thielen summarized on the above.
Mr. Ing requested for a contested case hearing and he understands the written request should be in within 10 days.

Unanimously approved as submitted (Pacheco, Agor

APPROVED AS SUBMITTED. Doug Ing, attorney for the parties found in violation of destroying the koa trees without authorization, requested a contested case hearing on this matter.

Item D-16 Napili Kai, Ltd. Request to Waive Payment Requirement for Grant of Term, Non-Exclusive Easement to Napili Kai, Ltd. for Walkway and Landscaping Purposes, Kaanapali, Maui, Tax Map Keys: (2) 4-3-2:seaward of 26, 27, 28. ***(SUBMITTAL TO BE DISTRIBUTED)***

A couple approached the Board asking whether this item was heard because they did not hear the decision. They asked whether it could be reopened for them to testify.

Board member Edlao moved to re-open Item D-16 and Member Morgan seconded it.

There was testimony heard and some discussion between the couple, the Board and staff.

Member Edlao moved to amend No. 2 by replacing it with a recommendation to allow Napili Kai, Ltd. to arbitrate the recommended appraisal proposed by the Department within 30 days. Member Pacheco seconded it.

The Board:

APPROVED AS AMENDED. The Land Board amended Recommendation No. 2 by replacing it with a recommendation to allow Napili Kai, Ltd. to arbitrate the recommended appraisal amount of $68,108 proposed by the Department, provided that: (1) the arbitration is commenced within 30 days and completed within 120 days of the date of the Board's approval of this matter; (2) the findings of the arbitration shall be final and binding on the parties; and (3) Napili Kai, Ltd. shall pay the original amount of $68,108 within 30 days if the arbitration is not commenced or concluded within the time periods provided. Otherwise, the Land Board approved staff's recommendations as submitted.

Unanimously approved as amended (Edlao, Pacheco)

Adjourned (Pacheco, Edlao)

There being no further business, Chairperson Thielen adjourned the meeting at 4:05 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,

Adaline Cummings
Land Board Secretary

Approved for submittal:

Laura Thielen
Chairperson
Department of Land and Natural Resources