

Cc: A. Weston, Esq.  
D. Kopper, Esq.

2015 OCT -9 PM 1: 10

IN THE CIRCUIT COURT\* OF THE THIRD CIRCUIT

STATE OF HAWAII

L. KITAOKA, CLERK  
THIRD CIRCUIT COURT  
STATE OF HAWAII

|   |   |                                    |
|---|---|------------------------------------|
| E. KALANI FLORES,                       | ) | CIVIL NO. 15-1-267K                |
|   | ) |                                    |
| Plaintiff,                              | ) | FINDINGS OF FACT, CONCLUSIONS OF   |
|   | ) | LAW, AND ORDER GRANTING            |
| vs.                                     | ) | PLAINTIFF'S MOTION FOR PARTIAL     |
|   | ) | SUMMARY JUDGMENT, FILED            |
| BOARD OF LAND AND NATURAL               | ) | SEPTEMBER 14, 2015                 |
| RESOURCES; DIRECTOR SUZANNE             | ) |                                    |
| CASE, in her official capacity; and the | ) | <u>Hearing:</u>                    |
| DEPARTMENT OF LAND AND                  | ) | Date: October 6, 2015              |
| NATURAL RESOURCES,                      | ) | Time: 8:30 a.m.                    |
|   | ) | Judge: The Honorable Ronald Ibarra |
| Defendants.                             | ) |                                    |
|   | ) |                                    |
|   | ) |                                    |

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED SEPTEMBER 14, 2015

1. This matter came before the Environmental Court of the Third Circuit (hereinafter "Court"), the Honorable Ronald Ibarra presiding, on October 6, 2015, for hearing on Plaintiff's Motion for Partial Summary Judgment ("Motion or MPSJ"), filed September 14, 2015. David Kopper, Esq. appeared on behalf of Plaintiff and deputy attorney general Amanda Weston, Esq. appeared on behalf of Defendants. No other appearances were made.

2. At the hearing and in accordance with their opposition filed on September 28, 2015, Defendants argued for a continuance of Plaintiff's Motion pursuant to Rule 56(f), Hawaii Rules of Civil Procedure ("HRCP").

\* Environmental Court

I hereby certify that this is a full, true and correct copy of the original on file in this office.

  
Clerk, Third Circuit Court, State of Hawaii

3. Plaintiff's Motion requests summary judgment only as to Count I (Violation of Article XII § 7 of the Constitution) and Count IV (Failure to Follow Statutory Rulemaking Procedures) of the Complaint.

4. The Court granted the State's request for a Rule 56(f), HRCP continuance on Plaintiff's Motion as to Count I, and a continued hearing shall take place on October 13, 2015 at 8:00 a.m.

5. The Court denied the State's request for a Rule 56(f), HRCP continuance on Plaintiff's Motion as to Count IV, finding that further discovery would not be pertinent to the Court's ability to rule on these claims.

6. The following findings of fact, conclusions of law, and order address Plaintiff's Motion for summary judgment on Count IV only.

7. Count IV alleges that Defendants did not follow statutory rulemaking procedures because Defendants did not properly find that imminent peril to the public health, safety or morals, or to livestock and poultry health, requires adoption of the camping ban and nighttime ban upon less than thirty day's notice of hearing. Complaint, ¶ 67.

8. The Court, having considered the motion, the memoranda and declarations submitted in support and in opposition to the motion, the arguments of counsel, and the record and file herein, and good cause appearing therefor, hereby issues the following findings of fact, conclusions of law, and order:

**I. FINDINGS OF FACT**

The Court makes the following findings of fact based on a preponderance of the evidence. To the extent that these findings of fact contain conclusions of law, they shall be considered as such.

**A. Procedural History**

9. On July 15, 2015, Plaintiff filed his complaint in this matter.

10. On July 16, 2015, Plaintiff filed an *Ex Parte* Motion For Temporary Restraining Order and a Motion for Preliminary Injunction (“MPI”) requesting that the State of Hawai‘i (the “State”) be enjoined from enforcing Hawai‘i Administrative Rule (“HAR”) §13-123-21.2 (the “Emergency Rule”).

11. On July 21, 2015, the Court *sua sponte* held a hearing on the issue of venue. Hearing no objection from Defendants, and for good cause shown, the Court ruled that venue is proper.

12. On July 24, 2015, Plaintiff filed his First Supplement to the MPI.

13. On July 27, 2015, Plaintiff filed his Second Supplement to the MPI.

14. On August 4, 2015, Defendants filed their Memorandum in Opposition to the MPI.

15. On August 5, 2015, Defendants filed their First Supplement to their Memorandum in Opposition to the MPI.

16. On August 5, 2015, Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order came on for hearing before the Court.

17. On August 7, 2015, the Court denied Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order pursuant to the Findings of Fact, Conclusions of Law, and Order on Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order.

18. On August 11, 2015, Defendants filed their Witness List for the hearing on the MPI.

19. On August 12, 2015, Defendants filed their Exhibit List for the hearing on the MPI.
20. On August 14, 2015, Plaintiff filed his Witness List for the hearing on the MPI.
21. On August 14, 2015, Defendants filed their First Amended Exhibit List for the hearing on the MPI.
22. On August 17, 2015, Plaintiff filed his reply in support of the MPI and Exhibit List for the hearing on the MPI.
23. On August 20, 2015, an evidentiary hearing on the MPI was held and the Court heard testimony of witnesses and the arguments of counsel.
24. On September 11, 2015, the Court entered Findings of Fact, Conclusions of Law, and Order Denying Plaintiff's Motion for Preliminary Injunction, filed July 16, 2015.
25. On September 14, 2015 Plaintiff filed the instant Motion for Partial Summary Judgment.
26. On September 18, 2015, Plaintiff filed an *ex parte* motion to advance the hearing on Plaintiff's MPSJ, which Defendants opposed in their memorandum filed September 16, 2015.
27. On September 18, 2015, the Court entered an order denying Plaintiff's *ex parte* motion to shorten time.
28. On September 28, 2015 Defendants filed an opposition to Plaintiff's MPSJ.
29. On September 30, 2015, Plaintiff filed a reply in support of his MPSJ.
30. On October 5, 2015, Defendants filed a supplemental memorandum in opposition to Plaintiff's MPSJ.

**B. Parties**

31. Plaintiff E. Kalani Flores is a Native Hawaiian who descends from the aboriginal people who occupied and exercised sovereignty in the area that now comprises the State of Hawai'i prior to 1778. Plaintiff resides in Waimea on Hawai'i Island. Flores Testimony.

32. Plaintiff is a tenured professor with thirty years of education and experience in Hawaiian culture, traditions, and language education. Flores Testimony.

33. Plaintiff engages in traditional practices on Mauna Kea, which includes pilgrimages to the summit and/or various significant sites on Mauna Kea. Flores Testimony.

34. Mr. Flores is the individual Plaintiff in this case. This case is not a class action.

35. The Department of Land and Natural Resources (the "Department" or "DLNR") is the state agency charged to manage, administer, and exercise control over the State's public lands, including submerged land and beaches. Haw. Rev. Stat. § 26-15(b) (2009); Haw. Rev. Stat. § 171-3 (2011). The Department is headed by an executive board called the Board of Land and Natural Resources (the "BLNR"). Haw. Rev. Stat. § 26-15(a) (2009); Haw. Rev. Stat. § 171-3 (2011).

36. The BLNR has a statutory duty to oversee conservation district land. Haw. Rev. Stat. § 183C-3 (2011).

**C. Hawai'i Administrative Rule 13-123-21.2 ("Emergency Rule")**

37. On July 10, 2015, a public hearing was held before the BLNR regarding the Emergency Rule. Exhibit 4, 6.

38. On July 14, 2015, Governor Ige and the BLNR approved the Emergency Rule, effective on the same date, as follows:

Prohibited activities. (a) The area referred to in this rule as the "restricted area" is defined as any lands in the public hunting area that includes the Mauna Kea

Observatory Access Road and one mile on either side of the Mauna Kea Observatory Access road.

(b) As used in this rule, the term “transiting” means operating, or being a passenger in, a motor vehicle travelling at a reasonable and prudent speed and having regard to the actual and potential hazards and conditions then existing.

(c) No person shall at any time possess or control in the restricted area any of the following items: sleeping bag, tent, camping stove, or propane burner.

(d) No person shall enter or remain in the restricted area during the hours of 10:00 p.m. to 4:00 a.m., unless the person is transiting through the restricted area on the Mauna Kea Observatory Access Road or is lawfully within or entering or exiting an existing observatory or a facility operated by the University of Hawaii.

Exhibit 4.

39. The Emergency Rule is in effect for 120 days, or until November 11, 2015.

Exhibit 4.

40. As filed, the Emergency Rule states:

The Department of Land & Natural Resources finds that the immediate adoption of this emergency rule amendment upon less than thirty days’ notice of hearing is necessary to prevent an imminent peril to public safety and the state’s natural resources related to the presence of persons in portions of public hunting areas, Units A and K, Mauna Kea, Hawai‘i, referred to as the “Restricted Area”, between the hours of 10:00 p.m. and 4:00 a.m.

This Amendment to chapter 13-123, Hawai‘i Administrative Rules, on the Summary Page dated July 10, 2015, was adopted on July 10, 2015 without prior notice or hearing pursuant to emergency rulemaking authority provided in HRS 91-3(b).

Exhibit 4.

41. On its face, the Emergency Rule as filed does not articulate the reasons supporting a finding that the Emergency Rule is necessary to prevent an imminent peril to public safety and the state’s natural resources. Exhibit 4.

42. Defendants have enforced, and will continue to enforce, the Rule. Kamakau Testimony; Defendants’ Memorandum in Opposition To Plaintiff’s Motion For A Preliminary

Injunction Filed on July 16, 2015 at 7 (“The State fully intends to prosecute all who violate the [R]ule.”).

## II. CONCLUSIONS OF LAW

The Court, based upon the findings of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. This Environmental Court has subject matter jurisdiction pursuant to Haw. Rev. Stat. § 91-7 and jurisdiction over the parties.

### A. Standing

2. Plaintiff has standing to bring this action for declaratory relief pursuant to Haw. Rev. Stat. § 91-7(a), which states:

(a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

3. Plaintiff is an interested person because he resides on Hawai‘i Island and may be affected by the Emergency Rule if he visits Mauna Kea to engage in cultural and religious practices.

### B. Summary Judgment Standard

4. A moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), HRCPP; *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989).

5. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

*Hawaii Cmty. Fed. Credit Union v. Keka*, 94 Haw. 213, 221, 11 P.3d 1, 9 (2000).

6. On a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Id.*

**C. Emergency Rule Violates Haw. Rev. Stat. § 91-4(b)(2)**

7. Haw. Rev. Stat. § 91-4(b)(2) states:

An emergency rule shall become effective upon filing with the lieutenant governor in the case of the State, or with the respective county clerks in the case of the counties, for a period of not longer than one hundred twenty days without renewal unless extended in compliance with section 91-3(b) if the agency finds that immediate adoption of the rule is necessary because of imminent peril to the public health, safety, or morals, or to natural resources. **The agency's finding and brief statement of the reasons therefor shall be incorporated in the rule as filed.** The agency shall make an emergency rule known to persons who will be affected by it by publication at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies within five days from the date of filing of the rule.

(Emphasis added).

8. There is no genuine issue of material fact that the Emergency Rule as filed does not contain a brief statement of the reasons supporting a finding that the Emergency Rule is necessary to prevent an imminent peril to “the public health, safety, or morals, or to natural resources.”

9. Specifically, the “presence of persons in portions of public hunting areas, Units A and K, Mauna Kea, Hawai‘i...between the hours of 10:00 p.m. and 4:00 a.m.” is not a reason supporting a finding of imminent peril.

10. Additionally, without specific reasons or findings by the BLNR, the rule cannot be properly reviewed by this Court. The reasons are necessary for “facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative



consideration, helping parties plan their cases for rehearing and judicial review, and keeping [administrative] agencies within their jurisdiction.... [T]he most prominent reason ... is the facilitation of judicial review.” Gray v. Admin. Dir. of the Court, State of Hawaii, 84 Haw. 138, 145, 931 P.2d 580, 587 (1997).

**D. Declaratory Relief**

11. The Court must declare a rule invalid if it finds that the rule violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. Haw. Rev. Stat. § 91-7(b).

12. The Emergency Rule was adopted without compliance with the statutory rulemaking procedures set forth in Haw. Rev. Stat. § 91-4(b)(2) because it does not contain a brief statement of the reasons supporting a finding that the rule is necessary to prevent imminent peril.

13. Therefore, the Court must declare the Emergency Rule to be invalid.

**ORDER**

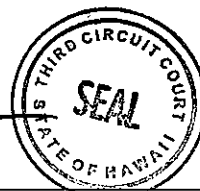
Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff’s Motion for Partial Summary Judgment, filed September 14, 2015, is GRANTED as to Count IV;

IT IS FURTHER ORDERED that Hawai’i Administrative Rule 13-123-21.2 is hereby declared invalid.

DATED: Kealahou, Hawaii,

10/9/15



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Judge of the above-entitled Court