IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

The OFFICE OF HAWAIIAN AFFAIRS, a body corporate pursuant to Hawai'i Revised Statutes Chapter 10, Plaintiff, vs. SEAN O'KEEFE, in his capacity as Administrator, National Aeronautics and Space Administration; ROLF-PETER KUDRITZKI, in his capacity as Director, University of Hawai'i Institute for Astronomy; et al., Defendants.	CIV. NO. 02-00227 SOM/BMK ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS; (2) DENYING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT RE TIMING; (3) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; (4) DENYING DEFENDANTS' MOTIONS TO STRIKE AND TO SUPPLEMENT

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I. INTRODUCTION.

The Office of Hawaiian Affairs ("OHA") has sued Sean O'Keefe ("NASA") and Rolf-Peter Kudritzki ("Kudritzki") (collectively "Defendants"), alleging that Defendants have violated the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331 to 4346b ("NEPA"), the National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x (the "NHPA"), and the Hawaii Environmental Policy Act, Haw. Rev. Stat. § 343 to 344 ("HEPA"), in connection with the proposed construction of four to six

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outrigger telescopes on the summit of Mauna Kea on the island of Hawaii (the "outrigger telescopes project"). In the Complaint, OHA asks this court to order that Defendants prepare an environmental impact statement ("EIS") for the outrigger telescopes project, as well as for all other federally funded projects affecting Mauna Kea. The Complaint further asks the court to enjoin activity by Defendants in connection with the telescopes on Mauna Kea pending the resolution of the EIS process. OHA also asks this court to declare that Defendants violated NEPA, the NHPA, and HEPA, and to award litigation costs.

This court has previously issued a number of rulings in this case, including (1) an order granting judgment on the pleadings to Defendant Kudritzki on the HEPA claim against him, and (2) an order denying OHA's motion for partial summary judgment on the NEPA and NHPA claims against Defendant O'Keefe ("OHA's First Timing Motion"). See Order Granting in Part and Denying in Part Defendant Rolf-Peter Kudritzki's Motion for Judgment on the Pleadings (filed Oct. 31, 2002) ("October 31 Order"); Order Denying Plaintiff's Motion for Partial Summary Judgment and Denying Defendants' Motion to Strike Or, in the Alternative, Amend Portions of Plaintiff's Statement of Facts (filed Nov. 20, 2002) ("November 20 Order").

There are six motions presently before the court: (1) OHA's Renewed Motion for Partial Summary Judgment re Timing, or

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Hawaii (the "outrigger telescopes project"). In the Complaint, OHA asks this court to order that Defendants prepare an environmental impact statement ("EIS") for the outrigger telescopes project, as well as for all other federally funded projects affecting Mauna Kea. The Complaint further asks the court to enjoin activity by Defendants in connection with the telescopes on Mauna Kea pending the resolution of the EIS process. OHA also asks this court to declare that Defendants violated NEPA, the NHPA, and HEPA, and to award litigation costs.

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There are six motions presently before the court: (1) OHA's Renewed Motion for Partial Summary Judgment re Timing, or

in the Alternative, Motion for Remand Against Defendant Sean O'Keefe, which essentially "renews" OHA's First Timing Motion; (2) OHA's motion for summary judgment on all claims; (3) NASA's motion for summary judgment on all claims; (4) Kudritzki's motion for summary judgment on all claims and joinder in NASA's motion for summary judgment; (5) Defendants' motion to strike extra-record materials from OHA's filings; and (6) Kudritzki's motion to supplement the administrative record.

The court GRANTS in part and DENIES in part OHA's motion for summary judgment on all claims. The court holds that the environmental assessment ("EA") prepared by NASA for the outrigger telescopes project was inadequate and directs NASA to prepare a new EA in accordance with this opinion. The court specifically holds that the present EA does not adequately consider the impact of development of the outrigger telescope site when added to other past, present, and reasonably foreseeable actions.

The court GRANTS summary judgment to NASA on a portion of the Fifth Claim. The court denies summary judgment to all parties on all other claims, including that portion of OHA's motion asking that this court enjoin Kudritzki from relying on the present EA in its state permitting application. The court denies the motion to strike and the motion to supplement as moot given their relation to claims other than the one decided herein.

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The factual background for this motion was set forth in this court's previous orders and is supplemented herein only as necessary.

II. STANDARD OF REVIEW.

Summary judgment shall be granted when:

> 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.

Fed. R. Civ. P. 56©); see also Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See id. at 323. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000).

All evidence and inferences must be construed in the light most favorable to the nonmoving party. T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th

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III. OHA HAS STANDING TO PURSUE THE CLAIMS ASSERTED IN ITS COMPLAINT.

In their initial filings on the present motions, Defendants do not challenge OHA's standing to bring the claims asserted in the Complaint.[1] The court, however, has "an independent obligation to examine [its] own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1014 (9th Cir. 2003) (quotations omitted). O'Keefe's Answer asserts as an "affirmative defense" OHA's lack of standing to bring this action at this time. Fed. Def.'s Amended Answer at 22. The court asked the parties to submit supplemental briefing on the issue of standing. In its supplemental brief, NASA argued that OHA did not have standing because it could not show "injury

[1] All references to the Complaint are to the First Amended Complaint for Declaratory and Injunctive Relief, filed on October 1, 2002.

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in fact," a requirement for Article III standing. This court disagrees and concludes that OHA does have standing.

1. OHA's Standing to Assert the NEPA Claims.

As to OHA's NEPA claim, OHA alleges injury to Native Hawaiians and Hawaiians (collectively "Native Hawaiians"), not to OHA itself.[2] See Compl. ¶¶ 4, 50-51. "[A]n association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and ©) neither the claim asserted nor the

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[2] In its pleadings, OHA refers to both Native Hawaiians and Hawaiians as "Native Hawaiians." As used in the chapter governing OHA, "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. "Native Hawaiian," on the other hand, means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Id.

The Supreme Court has used the term "Hawaiian" to refer to a citizen of the state of Hawaii. See Rice v. Cayetano, 528 U.S. 495, 499 (2000) (noting the Hawaii constitutional and statutory definitions of "Hawaiian" and "Native Hawaiian" and stating that plaintiff is "a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term"). Because of the potential for confusion, this court, like OHA, uses the term "Native Hawaiian" to refer to people of aboriginal descent regardless of blood quantum. In other words, "Native Hawaiian" herein includes both "Hawaiians" and "Native Hawaiians" as defined by state law.

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a. Native Hawaiians Are "Members" of OHA.

A state agency like OHA is not a "traditional voluntary membership organization." Id. at 343. The court first addresses whether Native Hawaiians may be considered "members" of OHA for the purpose of determining whether OHA has standing under NEPA. Having analyzed a line of cases on the issue, the court decides that Native Hawaiians are indeed members of OHA.

The court begins by examining the Supreme Court's conclusion in Hunt that the Washington State Apple Advertising Commission ("the Apple Commission") had standing to challenge a North Carolina statute on behalf of the Washington apple industry. The Court observed that, although the Apple Commission was a state agency, it "perform[ed] the functions of a traditional trade association representing the Washington apple industry," and its purpose was "the protection and promotion of the Washington apple industry." Id. at 344. The Court stated that the Washington apple growers and dealers possessed "all the indicia of membership in an organization," noting that "[t]hey alone elect the members of the [Apple] Commission; they alone may serve on the [Apple] Commission; they alone finance the [Apple] Commission, including the costs of this lawsuit . . . ." Id.

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Finally, the Court noted that the interests of the Commission itself might potentially be affected by the outcome of the case because the challenged statute could affect the size of the market for Washington apples, and the Commission depended on assessments levied on the apple industry. Id. at 345.

OHA relies on Central Delta Water Agency v. United States, 306 F.3d 938 (9th Cir. 2002), to argue that it has organizational or associational standing in the present case. See Pl.'s Mem. Re Standing (filed June 26, 2003), at 5 (quoting Central Delta's statement that a "public agency has standing to seek judicial review of governmental action affecting the performance of its duties"). Two of the plaintiffs in Central Delta were public water agencies that were statutorily charged with protecting the water supply in their respective areas. The Ninth Circuit held that those water agencies had standing to challenge actions by the United States Bureau of Reclamation, a division of the Department of the Interior, in part because the water agencies were analogous to the Apple Commission in Hunt. The Ninth Circuit noted that (1) the water agencies had charters providing that the water agencies had to represent their constituent water users' interests; (2) the board of directors of each of the water agencies was "elected by the water users within the agency's jurisdiction"; and (3) each landowner's vote was "proportional in weight to the assessed value of his land." 306

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F.3d at 951 n.8. As a result, the water agencies, "like the Apple Commission in Hunt, . . . ha[d] qualities often found in private associations." Id.

OHA also has a statutorily mandated purpose to promote the interests of its "constituents," Native Hawaiians. OHA's statutory purposes include the "betterment of conditions of [Native Hawaiians]" and "[s]erving as the principal public agency in [Hawaii] responsible for the performance, development, and coordination of programs and activities relating to [Native Hawaiians]." Haw. Rev. Stat. § 10-3 (1)-(3). OHA is also charged with "[a]ssessing the policies and practices of other agencies impacting on [Native Hawaiians], and conducting advocacy efforts for [Native Hawaiians]." Id. § 10-3(4).

However, OHA differs from the state agencies in Hunt and in Central Water because neither its leaders nor the people who elect those leaders are all Native Hawaiians. OHA is governed by a board of trustees who are elected. Id. § 10-7. All registered voters in Hawaii are eligible to vote in the OHA trustee elections. Id. Neither the trustees nor the voters who elect the trustees must be Native Hawaiian. See Haw. Rev. Stat. §§ 13D-2 to 13D-3; Rice v. Cayetano, 528 U.S. 495 (2000) (holding that it is unconstitutional to allow only Native Hawaiians to vote for OHA trustees); Arakaki v. State, 314 F.3d 1091 (9th Cir.

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2002) (holding that it is unconstitutional to restrict candidates for OHA trustee to only Native Hawaiians).

OHA may be closer to the public entity examined in Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003) ("OAC"). In OAC, the Ninth Circuit held that the Oregon Advocacy Center ("OAC"), a "federally authorized and funded law office" established under a federal statute, had standing to challenge a state hospital's delay in accepting mentally ill criminal defendants for evaluation and treatment. Id. at 1105. OAC "represent[ed] the rights of people with disabilities, including mentally ill individuals." Id. OAC received most of its funding from the federal government, and OAC's constituents, i.e., people with disabilities, were neither the only ones who chose the leadership of OAC nor the only ones who could serve as leaders. Id. at 1111.

The defendant in OAC had argued that OAC lacked associational standing because mentally ill defendants, although constituents of OAC, were neither "members" of OAC or the "functional equivalent of members." Id. at 1110. Essentially, the defendant's argument was that, "because individuals with mental illness [did] not actually control OAC's activities and finances, OAC [could not] claim standing to represent their interests." Id.

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