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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF	) Case No. BLNR-CC-16-002
	)
A Contested Case Hearing Re Conservation	) TEMPLE OF LONO MOTION
District Use Permit (CDUP) (HA-3568 for	) TO RECUSE HEARING OFFICER;
The Thirty Meter Telescope at the Mauna	) MEMORANDUM IN SUPPORT;
Kea Science Reserve, Kaohe Mauka,	) COS
Hamakua District, Island of Hawai'i,	)
TMK (3) 4-4-015:009	)
_____	)

TEMPLE OF LONO
MOTION TO RECUSE HEARING OFFICER

Now comes the Temple of Lono to file its Motion to Recuse Hearing Officer.

This motion is based on clearly biased rulings and remarks by the Hearing Officer in this case.

This motion is supported by the memorandum accompanying this motion.

DATED: September 17, 2016

_____/s/_____
Lanny Alan Sinkin
Lay representative for Temple of Lono

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FOR THE STATE OF HAWAII

IN THE MATTER OF	) Case No. BLNR-CC-16-002
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A Contested Case Hearing Re Conservation	) TEMPLE OF LONO MEMORANDUM
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The Thirty Meter Telescope at the Mauna	) RECUSE HEARING OFFICER
Kea Science Reserve, Kaohe Mauka,	)
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**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF
MOTION TO RECUSE HEARING OFFICER**

I. INTRODUCTION

On June 20, 2016, the Temple of Lono filed its "Temple of Lono Motion for Partial Summary Judgment," DOC 78. The motion sought partial summary judgment on two issues based on facts the Temple argued were not in dispute. Id.

On August 1, 2016 at 5:00 p.m., the University of Hawaii filed the University's opposition to the Temple's motion for partial summary judgment. DOC-135. In its opposition, the University launched a sweeping *ad hominen* attack on the Temple of Lono. Id.

On August 3, 2016, although there was no schedule for filing a reply, the Temple filed a partial reply that addressed the attack. DOC-176.

There was no opportunity for the Temple to bring the full implications of the attack to the attention of the Hearing Officer by means of a motion because the deadline for filing pre-hearing motions had passed.¹

On August 7, 2016, given the expiration of time to file pre-hearing motions, the Temple of Lono filed its Motion to File Motion out of Time. DOC-179. This motion sought permission of the Hearing Officer to file a motion to dismiss based on the bigotry demonstrated by the Applicant. Ibid., Exhibit 2.

On August 12, 2016, at a pre-hearing conference, the Hearing Officer denied the Temple of Lono motion to file motion out of time.

At no time in the hearing on the motion for partial summary judgment or in the hearing on the Temple's motion to file motion out of time did the University ever offer any explanation for or defense of its attack on the Temple.

II. ARGUMENT

A. The Hearing Officer's denial of the motion to file motion out of time is a clear abuse of discretion.

1. The Temple of Lono had good cause for not having filed the motion prior to the deadline for filing pre-hearing motions.

The time to file pre-hearing motions ended on July 18, 2016. DOC-115 at 6.

The attack on the Temple of Lono appeared in a pleading filed on August 1, 2016. DOC-135.

¹ In a pre-hearing conference on June 17, the Hearing Officer set a schedule for pre-hearing motions to be filed by July 18 with responses to be filed by August 1. The Hearing Officer did not issue a Minute Order with that schedule prior to the expiration of the time filing pre-hearing motions on July 18. See DOC-115 dated July 21 at 6.

Thus, according to the schedule established by the Hearing Officer, the Temple could not have filed a motion to address the attack within the time frame of the Hearing Officer's schedule.

When the circumstances giving rise to the Temple's motion arose on August 1 in the Applicant's pleading, DOC-135, the Temple promptly brought the attack to the attention of the Hearing Officer, DOC-176 dated August 3. The Temple also promptly filed the motion requesting permission to file a motion to dismiss based on the attack. DOC-179 dated August 7.

Given that the circumstances prompting the Temple's motion to file motion out of time did not arise until the Hearing Officer's schedule to file pre-hearing motions had expired and that the Temple responded promptly once the circumstances did arise, the Temple had good cause for the filing out of time to be granted.

2. The granting of the motion to file motion out of time would not have delayed the proceeding.

While the Hearing Officer indicated a preference for holding a hearing in this matter in October, that hearing is not yet scheduled.

The issues to be heard are still being decided. See DOC-256. Responses to a proposed minute order setting the issues are not due until September 19. Ibid. at 3.

The Temple's filed its motion to file motion out of time on August 7. Had the Hearing Officer granted the motion at the pre-hearing conference on August 12, there would have been ample time for briefing and a decision on the motion to dismiss that the Temple sought to file, with no effect on the schedule for the hearing.

B. The Hearing Officer's denial of the Temple's motion to file motion out of time is clear evidence of bias.

1. The Applicant's attack on the Temple is *prima facie* bigotry.

As the Temple brought to the attention of the Hearing Officer, the attack on the Temple by the Applicant is bigoted and libelous. DOC-176. The description of the Temple by the Applicant attempts to portray the Temple as equivalent to Isis, an extremist organization attempting to impose its religious views on the rest of the world without concern for any harm caused. Id.

The University attack includes the following:

The Temple, by its papers and actions, rejects the sharing of Mauna Kea. The Temple is fundamentally adversarial (and ardently absolutist), by using this proceeding as a platform to advance its own religious agenda.

DO-135 at 14.

The Temple's "challenge" is not primarily about whether the State should issue the University a permit for the TMT at the TMT site; instead the "challenge" is about the Temple's "right ... to be respected and practiced in [Hawai'i]." The problem with fundamentalism in religion – **any religion** – is its intolerance and inability to compromise. Fundamentalist religion when confronted with a conflict between cooperation and conformity to doctrine invariably chooses the latter regardless of the harm it bring to the society of which it is a part. The Temple wants a religious servitude over all of Mauna Kea, for the purpose of advancing its own religious agenda.

Ibid. at 14-15 (emphasis in original).

In short, the Temple cannot use this proceeding to obtain a religious servitude over Mauna Kea, as part of advancing the Temple's fundamentalist agenda.

Ibid. at 15.

The Temple will try to use this proceeding to galvanize a religious movement. ... The Hearing Officer should not allow this proceeding to become a platform for the Temple to advance its religious agenda.

Id.

The Applicant's attack on the Temple did not provide any evidentiary basis for the charges Applicant made against the Temple. DOC-135. The only basis offered for the attack is the Temple's objection to the location chosen by the proponents of the Thirty Meter Telescope. *Id.*

2. The University attack on the Temple is disqualifying.

The Native Hawaiian traditional faith is protected by the Constitution of Hawai'i. Article XII, § 7:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.)

(emphasis added).

As the Hawaii Supreme Court observed in this case:

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised in the project area and was aware of the project's potential adverse impact on the "spiritual nature of Mauna Kea" and the "cultural beliefs and practices of many."

Mauna Kea Anaina Hou v. Board of Land and Natural Resources (hereinafter "Anaina Hou"), 136 Hawai'i 376, 363 P.3d 224, 251 (2015) (Justice Pollack concurring).

Justice Pollack provided an extensive discussion of the requirement to protect Native Hawaiian religious rights, noting the constitutional mandate. *Ibid.* at 248-251.

That presentation included the following:

In 1978, protection of traditional and customary Hawaiian rights was preserved within the Hawai'i Constitution. Article XII, Section 7 embodies the resolute promise by the State to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a [footnote omitted] tenants who are descendants of

native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right . . . to regulate such rights." Haw. Const. art. XII, § 7; *see In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications ('Iao)*, 128 Haw. 228, 247, 287 P.3d 129, 148 (2012). So robust is this promise that even though Article XII, Section 7 carves out for the State the power to regulate the exercise of customary and traditional Hawaiian rights, this court underscored that "the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *PASH*, 79 Hawai'i at 450 n. 43, 903 P.2d at 1271 n. 43.

Ibid. at 248 (emphases added).

The University seeks a permit to conduct an activity with "a potential adverse impact on the 'spiritual nature of Mauna Kea.'" *Ibid.* at 251.

The presence of that potentially adverse impact means that the Applicant must be committed to implementing whatever steps are necessary to meet the "resolute promise" that the State makes in its Constitution to protect the traditional faith. *Ibid.* at 248.

Given the disrespect and bigotry directed towards the traditional faith, demonstrated so clearly by the Applicant, DOC-135, the State cannot grant the Applicant a permit.

3. The Hearing Officer denying the Temple the right to be heard on the issue of disqualification is a gross violation of the Temple's Due Process rights.

In abusing her discretion by denying the Temple's motion to file motion out of time, the Hearing Officer denied the Temple of Lono the opportunity to be heard on the issue of whether the University attack disqualified the University from receiving the permit.

Another good cause for allowing the motion to dismiss to be filed out of time is the reprehensible nature of the University's attack on the Temple. Denying the

Temple the opportunity to file the motion gave a free pass to the Applicant's unfounded libel of the Temple.

The Hawai'i Supreme Court vacated the earlier decision by the Board of Land and Natural Resources granting the permit in this case because the Board made its decision without offering the opponents an opportunity to be heard. *Ainaina Hou*, supra.

In denying the Temple's motion to file motion out of time, the Hearing Officer essentially decided the disqualification issue without giving the Temple an opportunity to be heard.

The virulent nature of the attack, the potentially disqualifying nature of the attack, and the absence of any good reason not to grant the motion to file motion out of time leave the Hearing Officer's ruling as a clear violation of the Temple's Due Process rights to be heard.

4. The denial of the motion to file motion out of time can have no other basis than bias on the part of the Hearing Officer.

Finding that the Hearing Officer's denial of the motion to file motion out of time is a Due Process violation is not even a close call. The timeliness of the Temple's motion is not an issue. While the merits of the motion to dismiss could not be considered in deciding whether to allow the filing of the motion, the ugliness of the University attack clearly called for the Temple to be given an opportunity to address the truthfulness and implications of the attack.. The subject matter of the motion the Temple sought to file was clearly substantive and not frivolous.

In a case where the constitutional mandate to allow all parties to be heard has been such a central issue, ignoring that mandate can hardly be considered an acceptable exercise of discretion.²

There is no other rationale for the transparent injustice of the denial than bias against the Temple on the part of the Hearing Officer.

C. The Hearing Officer characterizing the Temple faith as opinion is a further indication of bias.

At a pre-hearing conference on August 29, the Hearing Officer took up PUEO's motion to set issues. DOC-99.

During the course of the discussion on that motion, the Temple presented its views of what the issues to be heard should be. The Temple stated that the nature of the traditional Hawaiian Faith would be presented by the Temple.

The Hearing Officer responded that such a presentation would simply be the Temple's opinion.

The Temple responded that the nature of the faith would be presented by a practitioner and was not a matter of opinion.

² At one point in the hearing on August 29, during the discussion on setting the issues for hearing, the Hearing Officer raised the question as to why Native Hawaiian traditional and customary practices should be an issue at all in this case.

Given the clear direction from the Hawai'i Supreme Court regarding the need of the agency to consider those practices, the question supports the argument for bias. The Hearing Officer was trying to eliminate possible challenges to the permit by eliminating issues that might create such a challenge, even if such exclusion ignored a specific Supreme Court direction.

Both PUEO and the Applicant had to explain to the Hearing Officer why she could not exclude those issues.

That, before hearing any evidence, the Hearing Officer would characterize the presentation of the traditional faith by the Temple of Lono as opinion is clear evidence of a bias toward protecting the TMT from any religious challenge.

In her remark about the faith being an opinion, the Hearing Officer revealed the game being run by the State in this proceeding.

First, the telescope proponents stated that they need a decision relatively soon on whether the State will give them the permit in order to decide whether to look for an alternate site.

<http://hawaiitribune-herald.com/news/local-news/exploring-alternatives-tmt-would-relocate-if-permit-not-secured-soon>

The Board responded to that pressure from TMT by rushing the decision to hold a new contested case and hiring a Hearing Officer.

One of the claims to be addressed is based on the arguments that the summit of Mauna Kea is held sacred by the traditional Hawaiian faith and that the traditional Hawaiian faith is still practiced.

If those two facts are proven to be true, then those facts trigger the State of Hawai'i statute on desecration of a sacred site. HRS § 711-1107.³ With Mauna

³ (1) A person commits the offense of desecration if the person intentionally desecrates:

(a) Any public monument or structure;

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both.

Wakea being a “place of worship or burial” and the proposed telescope having clearly sparked outrage,

<http://hawaiitribune-herald.com/news/local-news/standoff-tmt-protesters-block-access-site-12-arrested>

the desecration case would be relatively easy to make. See Temple of Lono Motion for Summary Judgment (Desecration) dated September 17, 2016.

The State would then face a challenge to its authority to issue a permit for a land use that would violate State law. Id.

To defeat that challenge would require negating at least one of the two remaining factual findings necessary to argue desecration.

The University took on attempting to destroy the reputation of the Temple as a means of delegitimizing the Temple as a continuation of the traditional faith. The University’s goal was to provide the Hearing Officer with a basis for finding that the Temple is be a threat to society and unreliable as a source of spiritual information.

The Hearing Officer then protected the University’s effort by denying the Temple’s motion to file motion out of time. That ruling denied the Temple’s right to respond to the Applicant’s attack.

The Hearing Officer also admitted PUEO into the proceeding despite having satisfied none of the requirements for becoming an intervenor. See DOC-69, DOC-98, DOC-119 at 4-7. PUEO’s real purpose is to claim spiritual expertise as a prelude to rendering their opinion that the summit of Mauna Kea has no special religious status.

<http://hawaiitribune-herald.com/news/local-news/native-hawaiians-tmt-ask-join-case-group-says-mauna-kea-no-more-sacred-rest-island>

PUEO will set the table and food for the Hearing Officer's feast of confusion. The Hearing Officer will find that the Temple's faith is just an opinion by a disreputable group and that the Temple's opinion is contradicted by PUEO's opinion.

Unable to determine the "truth" of the faith, the Hearing Officer will simply rule that the unresolved contradictory opinions preclude a finding that the telescope will adversely affect the faith.

"Perfect!"

III. CONCLUSION

Now that the Hearing Officer has revealed her true proclivities and her role in this charade of a proceeding, she should grant the Temple's motion and recuse herself from any further participation in this proceeding.

Dated: September 17, 2016

_____/s/_____
Lanny Alan Sinkin
Lay representative for Temple of Lono