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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Application (CDUA) (HA-3568) The Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 **TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 44; MEMORANDUM IN SUPPORT; COS**

TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 44

On April 20, 2017, the Hearing Officer issued Minute Order 44. DOC-553 ("Order").

The Order addressed numerous objections to the admissibility of exhibits various parties sought to move into evidence.

The Temple of Lono moves the Hearing Officer to reconsider the Order based on both procedural and substantive issues.

The Temple motion is supported by the accompanying memorandum.

DATED: April 26, 2017

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

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TEMPLE OF LONO MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF MINUTE ORDER 44

I. INTRODUCTION

On April 20, 2017, the Hearing Officer issued Minute Order 44 (Documentary Evidence) ("Order"). DOC-553. The Order ruled upon numerous objections to the admissibility of exhibits various parties sought to move into evidence.

In doing so, the Hearing Officer implemented an unconstitutional process extremely prejudicial to some of the parties.

The Order denied admission of numerous exhibits offered by the Temple of Lono.

The Temple objects to the process and the rulings. The Temple moves to the Hearing Officer to reconsider both and offers this memorandum in support of that motion.

II. ARGUMENT

A. The procedure for filing motions to reconsider is further evidence of bias on the part of the Hearing Officer.

On page 9 of the Order, the following requirements appear:

> "**FILING/SUBMISSION PROCEDURES.** An original of the filing/submission **must be received** by the DLNR Office of Conservation and Coastal Lands, 1151 Punchbowl Street, Room 131, Honolulu, Hawai`i 96813; **no later than 4:00 p.m. on the deadline set forth**. (emphasis added). A digital copy in pdf form should be sent to dlnr.maunakea@hawaii.gov, or delivered to the above office, on the same deadline."

Ibid. at 9.

The requirement that "**[a]n original of the filing/submission**" be received at the DLNR offices in Honolulu by the deadline set is a change in the rules that applied to previous filings and is simply further evidence of bias on the part of the Hearing Officer.

When this proceeding began, the Hearing Officer and all parties, except for two, agreed to modify the rules on service. HAR §13-1-12(d) allows "the use of Internet-based or other electronic filing procedures." Most parties agreed to electronic filing of all pleadings in this proceeding. The two parties not agreeing either lacked Internet access or had unreliable access. Parties were instructed to serve those two parties by mail.

Up until this time, the revised procedure for filing pleadings has been to serve all parties by email (with the two exceptions served by mail), including, when relevant, to dlnr.maunakea@hawaii.gov, and to serve a hard copy by mail with an original signature to the DLNR offices. The email service, not the arrival of the original, met the requirements of the schedule deadline. There was no requirement

that the original signed copy be delivered to DLNR offices by the deadline for filing.

With the above instruction, the Hearing Officer has unilaterally changed the rule governing service in violation of HRS § 91-9(d), which states:

> Any procedure in a contested case may be modified or waived by **stipulation of the parties** and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

There was no discussion, let alone a stipulation, prior to the Hearing Officer changing the procedure for the filing of documents.

That change is both substantive and prejudicial.

The proponents of the permit have legal offices in Honolulu and can deliver their filing directly to DLNR offices up until the last moment.

The Protector Interveners[1] almost all live on the Island of Hawai'i. For a Fed Ex package from Hilo to be delivered to DLNR by 4:00 on Thursday, the package must be delivered to the Fed Ex office by noon on Wednesday.

So, under this new rule for service, the proponents of the permit have one and a half days more than the Protector Interveners to prepare their pleading.[2] With only five business days provided for the filing of motions for reconsideration, taking away one and a half of those days is a substantial injury to the Protector

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[1] The term "Protector Interveners" refers to those parties seeking to protect the sacred mountain from further desecration and includes all parties except the Applicant, TIO, and PUEO.

[2] As usual, the two Protector Interveners who receive service of Minute Orders by mail, not email, are not accommodated at all in the scheduling deadline in violation of HAR §13-1-13.2.

> §13-1-13.2 Additional time after service by mail.
> Whenever a person has the right or is required to do some act within a prescribed period after the service of a document upon the person and the document is served by mail, two days shall be added to the prescribed period.

Interveners. This scheduling clearly favors the proponents of the telescope over the Protector Interveners, violates the due process of the parties without representation on the Island of Oahu, and demonstrates yet again the bias of the Hearing Officer against the Protector Intervenors and in favor of the telescope proponents.[3] The sheer pettiness of the service rule change is evidence of an animus that will certainly find expression in the ultimate recommendations.

B. The procedure being followed by the Hearing Officer violates the due process rights of the parties.

There is an open question whether the Hearing Officer designed a process for addressing exhibits which deliberately intended to prejudice the Protector Interveners or simply made a fatal procedural mistake, which the Hearing Officer is now trying to hide beneath a clearly unconstitutional process.

The exhibits process had a bait and switch aspect to it. The Hearing Officer repeatedly expressed her "inclination" to take in all the proffered exhibits with very few exceptions. The Protector Interveners believed that would be the process, much to their detriment.

The process for admission of exhibits set forth by the Hearing Officer called for the parties to submit motions seeking such admission.

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[3] The application of this new requirement took place during a time period encompassing the Merrie Monarch Festival on the Island of Hawai'i. This annual festival is a major part of the cultural life of the island. To impose a 62 page order with a very short time frame for reconsideration into the Merrie Monarch time frame is simply further evidence of an intent by the Hearing Officer to obstruct the Protectors Interveners from putting on their case. The order has a quality of punishment to it.

The parties did file such motions. DOCs 480, 481, 482, 483, 485, 486, 487, 488, 489, 491, 492, 493, 494, 495, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 517, 519. The Temple filed one such motion. DOC-491.

The Hearing Officer enunciated many times that she expected few objections because she intended to simply grant all such motions and then decide what weight to give to the exhibits admitted into evidence.

The process as defined by the Hearing Officer meant that parties did not spend time establishing the admissibility of an exhibit while the witness associated with the exhibit was testifying. There was, therefore, no record that could be cited to later argue for admissibility of the exhibit.

Moving to admit exhibits was specifically not a part of the witness phase of the proceeding. The Hearing Officer rejected any attempt to admit an exhibit into evidence during the testimony phase based on the "all in at the end" nature of the proceeding as defined by the Hearing Officer.

A second impact was that the sponsor of an exhibit had no reason to make an admissibility argument when moving at the end of the hearing to admit exhibits. Not having developed a record to support admissibility, such an argument would be difficult, if not impossible, to make.

The result of this process was that the parties made motions for the admission of exhibits in a *pro forma* fashion without arguing the admissibility of the individual documents. See e.g. DOC-491 (Temple of Lono motion to admit opening statement, pre-filed testimony, and exhibits into evidence citing applicable rules without making argument for admissibility of each document moved into evidence);

see also DOC-451 (TMT International Observatory's motion to admit exhibits and written direct testimony into evidence citing generally the applicable statutes and rules without making any argument for the admissibility of each specific document); DOC-485 (Perpetual Unique Education Opportunities, Inc.'s Motion to Admit Written Direct Testimony and Exhibit making generic statement that all exhibits are admissible with references to applicable rules without making argument for the admissibility of each specific exhibit based on a record); DOC-502 (Mehana Kihoi's motion to admit exhibits and written direct testimony into evidence making generic reference to the relevant statute without making an argument for the admissibility of each specific exhibit).

The process as understood by some of the Protector Interveners was so automatic that they referenced exhibits *en masse*, rather than individually, which the Hearing Officer then rejected. Order at 7. Given the Hearing Officer's portrayal of the process of admission as basically automatic, moving in a group of exhibits *en masse* was not an unreasonable decision.[4]

The Hearing Officer, in almost all cases, therefore, had no initial exhibit-specific argument for admissibility from the exhibit sponsor to consider when deciding whether to receive a particular exhibit into evidence.

The parties facing objections had a rude awakening when the Hearing Officer decided to grant objections to exhibits before providing the parties any time to respond to objections by presenting arguments for admissibility.

[4] Acknowledging that the Hearing Officer did say that motions to admit exhibits should set out each exhibit individually, the *en masse* submission problem can be cured by the sponsor submitting an individualized list. See e.g. DOC-515. Allowing for such a correction is even more appropriate when the party is a *pro se* party.

Even if the Hearing Officer had provided time to respond to objections, that allowance could not cure the problem created by the fact the that admissibility of an exhibit could well depend on the testimony of the witness with whom the exhibit was associated. There was no reason or permission to seek such testimony when the witness was testifying and no opportunity to recall the witness once it became clear that the process was not going to be as portrayed repeatedly by the Hearing Officer.

Given that the process as described by the Hearing Officer meant that there was no reason for the parties to present arguments for admissibility of each document at the time motions to admit exhibits were filed, the proper procedure would have been (a) filing of motion to admit exhibit, (b) filing of objection to admission, (c) filing a response to the objection,[5] (d) ruling by the Hearing Officer in an order that provided reasonable explanation for ruling, (e) motions for reconsideration, (f) response to motion for reconsideration, and (g) final ruling.

As reflected in the Order, the Hearing Officer erroneously failed to provide time in the schedule for responses to objections to be filed. Order at 1.

Once the reality of hundreds of objections emerged, Intervener Mauna Kea Anaina Hou filed its motion requesting time to respond to exhibit objections and related matters. DOC-522. Other interveners joined that motion. DOCs 524, 526, 527, 528, 530, 532, 535, 538, 539, 540, 541, 545

The Temple filed a motion seeking a protective order "clarifying that

[5] Again noting that there was no reason for the sponsor of an exhibit to establish its admissibility at the time the associated witness was testifying. Any response to an objection later would be incurably handicapped by that absence of a reason to create a record.

there is no obligation on the part of parties whose testimony and exhibits have been subject to objections to file responses at this time." DOC-546. Other interveners joined in that motion. DOCs-547, 548.

The Hearing Officer never ruled on that motion.

When parties attempted to respond to the objections anyway, the Hearing Officer refused to review or consider such responses because they were "late." Order at 6 *citing* DOCs-515, 520, 521, and 525. Responses to objections could not be "late" when there was no schedule for them to be filed in the first place.

As a result of all these factors, the Hearing Officer made all decisions on admissibility of exhibits subject to objections without the sponsor of the exhibit having an opportunity present an initial argument for admissibility of the specific exhibit objected to or to be heard in response to the objection.

Misleading parties into not establishing the admissibility of documents when the related witness was testifying was a due process violation.

Not providing the exhibit sponsors to respond to objections prior to the Hearing Officer ruling on the objections was another due process violation.

Relegating all responses to objections to the reconsideration process denied those now responding the opportunity to present arguments for <u>reconsideration</u> of an initial order based on a process in which all parties participated. That denial is another due process violation.

Normally motions for reconsideration

> shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing.

Order at 8.

As there was no "original hearing," no reason to present admissibility arguments for individual exhibits, and no other opportunity to respond to the objections, applying the normal limitation on motions to reconsider as a basis for denying reconsideration, would be a further due process violation.

Another flaw in the process is the lack of information about one entire set of rulings made by the Hearing Officer.

In Minute Order 44, the Hearing Officer stated:

> In some cases, general objections were raised, sometimes followed by objections to specific exhibits; all general objections were considered but are not reflected in the spreadsheets.

Order at 7.

It is not clear what the term "general objections" refers to.

The Applicant uses the term "general objections." DOC-514 at 1-3. That use encompasses ten objections. Id. Those objections include the objections recognized in the rules, HAR § 13-1-35 ("immaterial, irrelevant, or unduly repetitious") Ibid. at 2. Those objections also include objections specific to this proceeding, such as "was submitted by parties after the close of the evidentiary hearing." Id.

It does not appear that the Hearing Officer is using the term "general objections" to mean those ten identified as such by the University.

The parties are left without any guidance as to the meaning of the Hearing Officer's statement that "general objections were considered but are not reflected in the spreadsheets." Order at 7.

The lack of clarity on this point is important because the Hearing Officer

states that such objections were considered. There is no record of what the objections were, what consideration those objections were given, whether they were accepted or denied, nor what the reasons were for the acceptance or denial of the objections. There is, therefore, no basis for filing a motion to reconsider those rulings.

There is also the related issue of whether the Hearing Officer is inviting the re-litigation of the exhibits issue in the findings of fact and conclusions of law. Minute Order 44 states:

> The rulings on exhibits and receipt of evidence does not imply nor control the weight, if any, to be given to any specific piece of evidence. Parties may still argue that evidence, although received, **should be disregarded**.

Order at 7 (emphasis added).

The Order appears to conflate the weight with the admissibility. For example, if an exhibit has been admitted into evidence over an objection of relevance, the admission of the exhibit is a ruling that the exhibit is relevant. If the weight then given the exhibit is zero, it means that the exhibit was not admissible in the first place.

The Hearing Officer cannot have it both ways, i.e. admit into evidence an exhibit objected to by a party and then say that ruling granting admission does not mean the exhibit was ruled admissible. Nor can the Hearing Officer admit an exhibit objected to by a party and then give the exhibit no weight.

Then the Hearing Officer says that parties can litigate admissibility, i.e. argue to disregard an exhibit already admitted, within the findings of fact and conclusions of law. That would seem to encourage the University and TIO to raise their

objections again, including the mysterious "general" objections," in the findings and conclusions. Reopening the admissibility question will force the sponsor of the exhibit to defend against the objection again.

To say that the objection can be raised again in the findings and conclusions, i.e. admissibility will be re-litigated in the findings and conclusions, means that the parties cannot rely upon the rulings made at this time when preparing their findings and conclusions. That uncertainty is another due process violation.

C. The process unfairly favored the proponents of the permit.

Given the automatic, "all in at the end" nature of the process as portrayed by the Hearing Officer, there was little or no reason for the Protector Interveners to object to exhibits offered by the University or TIO. The reasonable presumption would be that such objections would be denied, so there would be no point in wasting time and resources pursuing objections.

That the Protector Intervenors were misled into not filing objections is reflected in the objections filed. The Protector Interveners filed only a handful of objections. DOCs-510, 513, 520, 521. The University and TIO filed hundreds of objections. DOCs-511, 512.

The Hearing Officer denied only three exhibits offered by the Applicant and innumerable exhibits offered by the Protector Interveners. The latter now have a major hole in the case they presented.

The minimal disruption of the Applicant's case and the major disruption of the Protector Intervener case is *prima facie* evidence that the Hearing Officer set up a process favoring the University and TIO. By saying that the process would be "all

in at the end" and then not issuing an order setting that process, the Hearing Officer deceived the Protector Interveners and allowed the University and TIO to circumvent the process and essentially ambush the Protector Intervenors with objections.

The Protector Interveners are now severely prejudiced by their reliance on the Hearing Officer's representations.

Now that the process is clearly not what the Hearing Officer intended and/or portrayed, the Protector Interveners should be given an opportunity to consider whether to file objections to the exhibits moved into evidence by the University and TIO.

D. The rulings excluding Temple exhibits are erroneous.

1. The process for admitting documents into evidence in this proceeding is constitutionally flawed.

As set forth above, the parties, including the Temple of Lono, had a false picture created by the Hearing Officer of the actual process for the admission of exhibits.

That false picture led the Temple into not building a record for admissibility of exhibits while the related witness was testifying.[6]

Now the Temple and numerous other parties are forced to defend exhibits against unexpected objections when the witnesses related to the exhibits have long ago completed their testimony and stepped down.

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[6] At one point in the proceeding, the Temple started to move a document into evidence and was stopped by the Hearing Officer on the basis that all the exhibits would be coming in at the end of the testimony phase. The Temple abandoned any further attempts to build a record supporting admissibility when the related witness was testifying.

To require the Temple – or any other party – to answer an objection to admissibility under these circumstances is a denial of due process. This objection to the process by the Temple applies to all of the Temple's responses to the Hearing Officer's rulings presented below.

2. Prehearing Statement

The Applicant and TIO objected to the admission of the Temple of Lono's opening statement ("Op. Stmt."). Order at 47. The objection was that the opening statement is argument, not evidence. Id.

The Hearing Officer denied admission of the opening statement into evidence "in consideration of TIO and UHH objections. Pre-Hearing Statements are not evidence." Id.

There is an open question as to why the Hearing Officer called upon each party to prepare and submit an opening statement. The statements were not read into the record during the proceedings and are now being excluded from evidence. It seems unreasonable that the Hearing Officer would require the parties to prepare pre-hearing statement when there was apparently no purpose in requiring such statements. What makes more sense is that the parties should have been given time to read their opening statements at the beginning of the hearing phase of the proceeding.

At the same time, the Temple of Lono did provide a prehearing statement that included serious reservations about the conduct of the proceeding up to that

point and particularly the absence of a fair and impartial presiding officer. Op. Stmt. at 2-3.

To the extent the prehearing statement set at least part of the overall context within which the Temple would present its case, the prehearing statement is relevant and material to the question of whether exhibits offered fell within that context and were, therefore, relevant and material to the case the Temple intended to make for denial of the application.

The Opening Statement should be accepted into evidence over the objections.

3. Rubellite Kawena Johnson Declaration

The Applicant and TIO objected to the admission of a declaration from Rubellite Kawena Johnson. Order at 47, Exhibit L1. TIO objected that the declarant did not appear and could not be cross-examined. Id. The Applicant objected that the declaration was hearsay and could not be considered as evidence, that Ms. Johnson was not presented as a witness and did not testify, and that the Applicant did not have an opportunity to cross-examine. Id.

The Hearing Officer denied the motion to admit the declaration "in consideration of TIO and UHH objections." Id.

As to the hearsay objection, the Hearing Officer has repeatedly noted that the rules of evidence do not apply in an administrative proceeding and that hearsay is admissible.

As noted by the Kahuna, "[t]here s a concerted effort to pronounce the traditional Hawaiian faith as no longer practiced." Prefiled Testimony of Tahuna Frank Tamehameha Kamehalona Anuumealani Nobriga at 1 ("Kahuna Prefiled

Testimony"); see also ibid. at 1-2 ("There is a concerted effort to pronounce the traditional Hawiian faith as no longer practiced." *citing* and *quoting* Exhibit L2.

This exhibit is one of many that are presented to document the continued existence of the Temple of Lono and the position of Frank Nobriga as the Kahuna of the Temple. Ibid. at 2 ("I offer the evidence found in Rubellite Kawena Johnson's legal declaration in part to document that I am the Kahuna of the Temple of Lono, that the Temple is still a living practice, and that the Temple maintains the traditional faith of the Hawaiian people.")

The Kahuna testifies that he was part of the same lawsuit in which Ms. Johnson filed her declaration. Ibid. at 1. He is obviously familiar with her declaration. Id.

With the Kahuna present and testifying, the Applicant and TIO could have asked him any questions they might have had regarding the legal proceeding and the declaration.

Because the Hearing Officer did not allow moving documents into evidence during the proceeding and set out a process in which essentially all exhibits would be admitted at the end of the process, there was no need for the Temple to build a further record to make the declaration admissible.

To now deny the admission of the exhibit based on the absence of a record supporting admissibility would simply be another due process violation.

Exhibit L1 should be accepted into evidence over the objections.

4. Kahuna Nobriga article in Civil Beat.

The Applicant objected to the admission of the article written by the Kahuna about Kaho'olawe. Order at 47, Exhibit L3. The objection was that the article was immaterial and irrelevant. Id.

The Hearing Officer denied the motion to admit the article "in consideration of TIO and UHH objections." Id.

The Applicant created an issue as to whether the traditional Hawaiian faith still exists.

As part of telling the Temple's history and proving that the Temple is still active, the Temple offered an article written by the Kahuna documenting the work to restore the Temple of Lono on Kaho'olawe.

The documenting of the Temple's ongoing work to restore its temples is an essential part of making the Temple's case that the Temple still exists and the traditional faith of the Hawaiian people is still practiced.[7] The article is relevant and material to making that case.

The Temple asserts the same objection to the flawed process preventing the building of a record to make an exhibit admissible when the related witness was testifying. That process violated the Temple's due process rights.

Exhibit L3 should be accepted into evidence over the objections.

5. Applicant's opposition to Temple Motion for Partial Summary Judgment.

The Applicant objects to the admission of the Applicant's Opposition to the Temple's Motion for Partial Summary Judgment based on the document being legal

[7] The first motion filed by the Temple after its motion to intervene dealt with the issue of the continued existence of the traditional Hawaiian faith. DOC-078.

argument and attorney argument, not evidence, and based on the document not being presented as evidence during the hearing. Order at 47, Exhibit L4.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

The Kahuna testified that the document in question constituted a bigoted attack on the Temple by the Applicant. Kahuna Prefiled Testimony at 2. The Kahuna specifically identified pages of the document that were presented as a section separate from the legal objections to the Temple's summary judgment motion. Ibid. *citing* pages 14-15. The Kahuna testified that the attack raised the question of whether the Applicant was qualified to receive the permit at issue in this proceeding. Ibid. at 2-3.

The evidence of the attack is the attack, i.e. the document that the Applicant seeks to exclude from evidence.

As to whether the document was presented as evidence during the hearing, the document is specifically referred to by the Kahuna in his testimony. Kahuna Prefiled Testimony at 2-3. The document is also a document filed in this proceeding by the Applicant. DOC-135. The signature of Applicant's counsel on the document attests to the truth of the attack, which for the purposes of the disqualification issue is an attestation that the attack is the position of the Applicant. Cf. HRCP Rule 11.

On those grounds alone, the document is admissible.

The Temple also asserts the same objection to the flawed process preventing the building of a record to make an exhibit admissible when the related witness was

testifying. Requiring the Temple to now cite to a non-existent record to prove admissibility is a due process violation.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

Exhibit L4 should be accepted into evidence over the objections.

6. Temple's Motion to File Motion Out of Time.

The Applicant objects to the admission of the Temple's Motion to File Motion out of Time based on the document being legal argument and attorney argument, not evidence, and based on the document not being presented as evidence during the hearing. Order at 47, Exhibit L5.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

As just discussed, the Applicant filed an attack on the Temple demonstrating a disqualifying animus towards the Temple.

The Temple asserts that the "Hearing Officer in this proceeding has sanctioned bigotry directed against the Temple." Kahuna Prefiled Testimony at 2. To prove that the Hearing Officer sanctioned the bigotry, the Temple offered Exhibit L5. That exhibit is the pleading filed by the Temple seeking permission to file a motion to dismiss the case. The exhibit includes the procedural history leading up to that filing, which included the fact that the attack took place on the last day of the time period the Hearing Officer set for pre-hearing motions, so the Temple could not file a motion addressing the disqualifying nature of the attack.

Exhibit L5 shows that the Temple responded promptly to the attack by requesting an opportunity for the Temple to be heard on the implications of the attack.

That the Hearing Officer would not even allow the Temple's motion to be heard is offered as proof of bias on the part of the Hearing Officer. The proof of the bias is the motion denied, which the Temple proffered as Exhibit L5.

The exhibit is not offered for the legal argument or attorney argument contained therein. The exhibit is offered to document what the Hearing Officer would not allow to be heard.

By not allowing the Temple to be heard, the Hearing Officer *sub silentio* denied the Temple's motion to dismiss found in Exhibit L5 without allowing the matter to be litigated.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

Exhibit L5 should be accepted into evidence over the objections.

7. Temple of Lono Identification of Issues

The Applicant objects to the admission of the Temple's Identification of Issues based on the document being legal argument and attorney argument, not evidence, and based on the document not being presented as evidence during the hearing. Order at 47, Exhibit L6.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

The Temple's identification of issues was just that – an identification of issues to be heard in the proceeding. That document does not contain any legal argument or attorney argument.

Exhibit L6 is part of the Temple's evidence for its ongoing assertion that the Hearing Officer is biased against the Temple and conducted the proceeding accordingly.

Exhibit L6 contains the evidence that the Temple tried to have the question of the Applicant's character, and specifically the Applicant's attack on the Temple, identified as an issue in this proceeding.

The document does not contain legal argument or attorney argument, so the objection filed is not applicable and the denial is without foundation.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

The exhibit is offered to document the ongoing actions by the Hearing Officer demonstrating bias against the Temple. As will be seen in the next exhibit to be discussed, the Hearing Officer continued to demonstrate her bias by excluding the disqualification issue identified in Exhibit L6 from issues to be heard in this proceeding.

Exhibit L6 should be accepted into evidence over the objections.

8. Minute Order 19.

The Applicant objects to the admission of Minute Order 19 on the basis that the "Hearing Officers orders govern these proceedings and do not need to be admitted into evidence. Order at 47, Exhibit L7.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

As part of continuing the process of building the record of Hearing Officer bias, the Minute Order's exclusion of the disqualification issue constitutes further evidence of that bias and another due process violation.

The Minute Order is also evidence that the Hearing Officer failed to provide any reasoned explanation for the issues excluded, thereby denying the parties' whose issues were excluded a basis for filing a motion to reconsider. That denial of a reasoned explanation is a further denial of due process.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

Exhibit L7 should be accepted into evidence over the objections.

9. Temple of Lono first motion to recuse.

The Applicant objects to the admission of the Temple's Motion to Recuse based on the document being legal argument and attorney argument, not evidence, and based on the document not being presented as evidence during the hearing. Order at 47, Exhibit L8.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

Based on the accumulated record of due process violations and other rulings demonstrating bias, the Temple filed a motion to recuse the Hearing Officer providing the arguments and evidence for recusal.

The Hearing Officer ignored the motion.

At that point, the motion to recuse itself became evidence of bias.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

Exhibit L8 should be admitted into evidence over the objections.

10. Temple of Lono Motion to Schedule Unscheduled Motions.

The Applicant objects to the admission of the Temple's Motion to Schedule Unscheduled Motions based on the document being legal argument and attorney argument, not evidence, and based on the document not being presented as evidence during the hearing. Order at 47, Exhibit L9.

The Hearing Officer denied the admission of the document "in consideration of UHH objection." Id.

As part of its ongoing documentation of bias on the part of the Hearing Officer, Exhibit L9 compiled the numerous motions filed by the Temple that the Hearing Officer had never taken up. The bias reached the level of significantly reducing the Temple's participation as a full party in the proceeding and cumulatively constituted another due process violation.

The document is an identification of motions not scheduled. The document does not contain legal argument or attorney argument, so the objection filed is not applicable and the denial is without foundation.

The Applicant objection that the document was "not presented as evidence during hearing" ignores the fact that no documents were offered or admitted as evidence in the hearing per the instructions of the Hearing Officer.

Exhibit L9 should be accepted into evidence over the objections.

11. Imperial Plan for Hawai'i: A fictional perspective.

TIO objects to the admission of Exhibit 10 into evidence because it is

> irrelevant and immaterial. Exhibit L10 is authored by Mr. Lanny Sinkin. Though he represented ToL at the CCH, Mr. Sinkin did not testify. TIO did not have the opportunity to crossexamine [sic] Mr. Sinkin on Exhibit L10 or otherwise.

Order at 47, Exhibit L10.

The Applicant objects to the admission of Exhibit 10 into evidence because it is

> irrelevant and immaterial. Exhibit L10 is authored by Mr. Lanny Sinkin who did not testify as a witness. The University did not have the opportunity to cross-examine him on this exhibit. Accordingly, it should be stricken[8] from the record.

Id.

The Hearing Officer denied the admission of the document "in consideration of TIO and UHH objections."

In his prefiled testimony, the Kahuna addressed the attack on the Temple by the Applicant as "part of a long pattern of suppression." Kahuna Prefiled Testimony

[8] The question at the moment is whether the exhibit is accepted into evidence or denied. A motion to strike the exhibit from the record entirely is untimely. If the Hearing Officer intends to accept that objection as a motion to strike, the Temple reserves its right to respond to such a motion.

at 4. The Kahuna described the history of foreign civilizations and their pursuit of the genocide of the indigenous people. Id.

As to Exhibit L10, the Kahuna testified that this exhibit "is a fictional document **that illustrates the point I am making here**." Ibid. at 4 (emphasis added). Obviously the Kahuna considered the paper relevant to his testimony.

TIO and the the Applicant could have questioned the Kahuna about why the fictional document illustrated the point that he was making in his testimony.

Cross-examining the Temple's representative, who wrote the paper, as to the paper's meaning to the Kahuna would have been irrelevant.

TIO and the Applicant chose not to cross-examine the Kahuna on this document.

The Temple operated under the false impression, created by the Hearing Officer, that there was no need to create a record on the admissibility of the document and that attempts to do so would be stopped. To have to now defend the admissibility of the document after being foreclosed from creating a record to support admissibility is another due process violation.

Exhibit L10 should be accepted into evidence over the objections.

12. Ke Ao Loko O Lono (The innermost knowledge of Lono).

The Applicant's objection to the admission of Exhibit L12 is that

> [t]his exhibit constitutes direct testimony from Mr. Samuel Lono, who was not presented as a witness and did not testify in this proceeding. The University did not have an opportunity to cross-examine him on this exhibit. Accordingly, it should be stricken from the record.

Order at 48, Exhibit L12.

The pre-filed testimony of Kahuna Nobriga states that Kahuna Nui Pali Ku Samuel Hoopii O Kalani Lono o Ka Makahiki Po Paki passed away in 1985. Kahuna Prefiled Testimony at 1. Obviously, Samuel Lono could not have provided "direct testimony" to this proceeding. Nor could he be cross-examined.

The TIO objection at least acknowledges that Kahuna Samuel Lono is no longer alive. Id. TIO still objects that TIO did not have an opportunity to cross-examine him. Id.

The Hearing Officer denied the exhibit "in consideration of TIO and UHH objections." Id.

As to the exhibit, Kahuna Nobriga testified as follows:

> At the direction of Kahuna Sam Lono, **I prepared a summary of these teachings for distribution publicly that provides more detail. That summary accompanies this testimony as Exhibit L12**.

Ibid. at 5 (emphasis added).

Kahuna Frank Nobriga, not Kahuna Samuel Lono, authored Exhibit L12. The Applicant, therefore, had the author of the document available for cross-examination and did not pursue any such examination.

Exhibit L12 is also a further element in the Temple's proof of the continued existence of the traditional Hawaiian faith.

The Temple operated under the false impression, created by the Hearing Officer, that there was no need to create a record on the admissibility of the document and that attempts to do so would be stopped. To have to now defend the admissibility of the document after being foreclosed from creating a record to support admissibility is another due process violation.

Exhibit L12 should be received over the objections.

13. Temple of Lono Statement to the United States Supreme Court.

The Applicant objects to admission of Exhibit L13 because the exhibit is legal argument and attorney argument, not evidence, and immaterial and irrelevant as the exhibit concerns another case not relevant to this proceeding. Order at 48, Exhibit L13.

The Hearing Officer denied admission "in consideration of UHH objection." Id.

Exhibit L13 is further proof that the Temple still exists and is actively seeking to protect and restore the Temple's rights. The Temple makes that case in the face of efforts to deny the continued existence of the Temple. Kahuna Prefiled Testimony at 10-11 and exhibits cited therein.

Exhibit L13 contains a presentation on the history of the Temple and the Pu'uhonua, or spiritual land base of the Temple. That history includes formal assertions of the continued existence of Temple claims to its sacred land base, in this case through a notice filed by the Temple at the United States Supreme Court. See Exhibit L13 at 9-10.

The Temple operated under the false impression, created by the Hearing Officer, that there was no need to create a record on the admissibility of the document and that attempts to do so would be stopped. To have to now defend the admissibility of the document after being foreclosed from creating a record to support admissibility is another due process violation.

Exhibit L13 should be accepted into evidence over the objections.

14. *Nobriga v. Mooers* – suit naming Office of Mauna Kea Management.

The Applicant objects to admission of Exhibit L14 because the exhibit is legal argument and attorney argument, not evidence, and immaterial and irrelevant as the exhibit concerns another case not relevant to this proceeding. Order at 48, Exhibit L13.

The Hearing Officer denied admission "in consideration of UHH objection." Id.

The Office of Mauna Kea Management (OMKM) is a subsidiary of the Applicant. The OMKM adopted rules severely restricting traditional and customary spiritual practices of Native Hawaiians on Mauna Kea in response to actions taken by Native Hawaiians and others to prevent construction of the Thirty Meter Telescope. Such actions by OMKM are relevant and material to the question of the Applicant's character, the Applicant's commitment to respect traditional and customary rights of Native Hawaiians, and whether an absence of such character and respect disqualify the Applicant from receiving the permit at issue in this proceeding.

As to respecting traditional and customary rights, the Hearing Officer did accept Article XII, Section 7 of the Hawaiian Constitution as an issue in this proceeding. DOC-281 at 4. A contemporary example of the Applicant or its surrogate disrespecting the rights protected by that provision is certainly relevant to this proceeding.

The pleading is also offered as proof that the Temple still exists and is vigorously protecting the rights of the traditional Hawaiian faith.

The Temple operated under the false impression, created by the Hearing Officer, that there was no need to create a record on the admissibility of the document and that attempts to do so would be stopped. To have to now defend the admissibility of the document after being foreclosed from creating a record to support admissibility is another due process violation.

The Temple could have established the admissibility of this exhibit for all its purposes when witness Stephanie Nagata was on the stand. As the Hearing Officer had declared that she intended to admit all exhibits at the end of the hearing process, the Temple did not pursue establishing such admissibility.

Exhibit L14 should be accepted into evidence over the objections.

15. Hawai'i Tourism Authority – Visitor Expenditures.

The Applicant objects to Exhibit L24 as irrelevant and immaterial. Order at 48, Exhibit L24.

While the Hearing Officer did receive the exhibit over the objections, id., the Temple's response to the objection is not part of the record.

At one point in the hearing, a witness testified that the astronomy industry was as important to the islands economically as the tourism industry.

The Temple introduced two documents – L24 and L25 – to demonstrate that argument was false.

Given the short period of time provided by the Hearing Officer for filing motions to reconsider and for preparing proposed decisions, orders, findings of fact, and conclusions of law and the refusal of the agency to provide a searchable

transcript, the Temple did not have time to find the particular point in the transcript where these documents were discussed.

III. CONCLUSION

The Hearing Officer made a fatal mistake in adopting the process for addressing the admission of exhibits.

While a party would normally create a record for the admissibility of an exhibit at the time the witness associated with that exhibit was testifying, the Hearing Officer interposed a process in which supposedly all the exhibits would be admitted when the testimony phase was complete, prevented the creation of a record supporting admissibility, and foreclosed any attempt to move exhibits into evidence during the testimony phase.

The result is that the parties did not create a record for each exhibit when the witness related to the exhibit was testifying.

Another result was motions to admit exhibits being made in an almost *pro forma* manner without any detailed argument for the admissibility of individual documents.

Then came unexpected objections to hundreds of exhibits. Those facing the objections had not created a record to support admissibility and had not filed motions to admit based on any such record. That meant that the motions to admit exhibits did not provide the Hearing Officer with the arguments for admissibility of each exhibit.

The Hearing Officer nevertheless proceeded to rule on objections to the admissibility of exhibits without a substantive motion from the exhibit sponsors and

without giving the sponsors an opportunity to respond to the objections. The Hearing Officer essentially conducted a decision-making process that considered only whether to deny the exhibit based on the objection or not, without having any argument from the exhibit sponsor.

After conducting that process excluding the sponsor, the Hearing Officer then offered time for motions to reconsider as a cure for the initial violation of due process rights.

That cure is fatally flawed because exhibit sponsors are now supposed to present argument, based on the record, for admissibility when the sponsors had been told by the Hearing Officer that no such record could be or would be developed at the time the witness associated with the exhibit was testifying.

The Hearing Officer cannot undo what has been done. This proceeding is fatally flawed and no sleight of hand pretense that the process satisfies due process is credible.

DATED: April 26, 2017

_____/s_____
Lanny Alan Sinkin
Lay Representative for Temple of Lono

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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for The Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015:009	) Case No. BLNR-CC-16-002))) **CERTIFICATE OF SERVICE**))))

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 44** was served on the following parties by email on April 26, 2017:

Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlnr.maunakea@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, cordylinecolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <lsa@torkildson.com>, njc@torkildson.com <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <akulele@yahoo.com>, s.tabbada@hawaiiantel.net <s.tabbada@hawaiiantel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <hanahanai@hawaii.rr.com>, pohaku7@yahoo.com <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda

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and by first class mail on April 27, 2017 to:

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Dated: April 26, 2017 _____/s/_____
Lanny Alan Sinkin