Kealoha Pisciotta
In behalf of Pisciotta,
Mauna Kea Anaina Hou
And Paul K. Neves
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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	)
District Use Application (CDUA) (HA-	) MAUNA KEA ANAINA HOU ET AL.
3568) The Thirty Meter Telescope at the	) JOINDER AND OBJECTIONS
Mauna Kea Science Reserve, Kaohe Mauka,	)
Hamakua District, Island of Hawai'i,	)
TMK (3) 4-4-015:009	)
_____	)

MAUNA KEA ANAINA HOU ET AL. JOINDER

NOW COMES Mauna Kea Anaina Hou, Kealoha Pisciotta and Paul Neves (hereafter "MKAH et al") and file this joinder to the Temple of Lono Motion for Reconsideration of Minute Order 44 and provide the following additional objections to Minute Order 44 (hereafter MO 44).

1. INTRODUCTION

MKAH et al agrees and joins with Temple of Lono's Motion for Reconsideration of MO 44 and provides the following additional arguments for reconsideration to MO 44.

2. ARGUMENT

En Masse Exhibit Submission Was Reasonable

The Hearing Officer (hereafter HO) in MO 44 did no include exhibits submitted that were submitted en Masse (e.g. "All B Series" at p. 7). We take issue with this for the following reason and would like to ask the HO to reconsider this ruling against the "B" series exhibits submitted en Masse.

When Petitioners MKAH ET al., Ms. Deborah J. Ward, Mr. Clarence Ku Ching,

Mr.E. Kalani Flores, Ms. Pua Case, and the Flores-Case ‘Ohana and KAHEA: The Hawaiian-Environmental Alliance) began their involvement in this Contested Case Hearing (hereafter CCH) we were represented by Mr. Richard Naiwi’eha Wurderman (attorney at law). However, due to the HO scheduling, Mr. Wurderman was not able to continue to represent us collectively in the CCH and all Petitioners except KAHEA: The Hawaiian-Environmental Alliance, who later retained legal council, continued in the CCH Pro Se.

When our original exhibits were first submitted and identified, they were done so in a collective (en masse) way and all carried the “B” designation. Therefore all the Petitioners where related to all of the collective “B Series” exhibits. So all Petitioners could use and reference to the “B Series” Exhibits during the hearing.

“Our” witnesses were submitted in a similar fashion, in that, the witnesses for the Petitioners where not assigned to individuals Petitioners and all Petitioners were related initially. During the CCH, the HO adopted procedures relating to the offers of proofs and or how Petitioners could object or not to witness testimony/statements and also how exhibits where offered. For example,the person who made offer of proof could not do cross or object. The Hearing Officer set the rule that exhibits would to be handled at the end of the hearing and therefore in practice provided for no actual opportunity for Petitioners to build a record in support of specific exhibits being admitted into evidence.

En Masse, filing were reasonable because the deadline for uploading all the exhibits was schedule before the transcripts were available and therefore there was no way to review the record to affirm which Petitioner used which exhibits during their specific cross exams or not. We wish the record to reflect that University or the Applicant (hereafter UH) did not object to Ms. Pisciotta’s expressed concern when it was voiced at the end of the hearing phase of the CCH that the UH may abuse the HO “inclination” and while we were allowed to record some verbal objections we were specifically told to wait until the end of the hearing when it came building the record of our specific objections on individual exhibits. The fact remains that no actual opportunity was provided to us at the close of the hearing to move exhibits into evidence based on a record or to address objections.

What was offered instead was that the HO expressed doubt that there would many objections since the HO’s inclination was to let most exhibits in anyways. However, what causes us concern here is that now the UH has made many large sweeping objections on the majority of the “B Series” exhibits yet we have had no opportunity to provide countervailing argument in support of our own exhibits.

Providing for motions for reconsideration is inadequate to cure the problem

created by the process. We are only being allowed to participate after the Hearing Officer has ruled on the admissibility of the exhibits. This biases us and violates our due process rights. We have now seen in practice, how this is done to the detriment of the Pro Se Petitioners.

Further, UH did not object to the HO's inclination, no the UH instead held their hand and then ambushed everyone after the close of the testimony phase of the hearing. This was A'ole Pono and while we agree they have right to object they did so in a way to deceive and to injure the Petitioners (by Papering us all). We are Pro Se and we do not have a large legal staff to call upon or public funds to purchase transcripts on a daily basis. This has biased us as Pro Se Petitioners and it violates our due process rights.

Therefore, MKAH et al., acting with an abundance of caution since because we were not afforded an opportunity to respond to objections, file the following responses and provide arguments to support reconsideration regarding our exhibits that have been excluded by the HO. General lua, HRS Section 91-10 provides for the admission of any oral or documentary evidence and therefore the law errs on the side of the admission of evidence so long as it is found to be relevant, material and not unduly repetitious.

The UH objected the entire "B Series" submitted by Pisciotta (exhibits B.01a-B.28) which amounts to approximately 74 individual exhibits (N.B. B.12b,B.12c, B.18b and b.18i were denied because they had no entries). We wish to respond regarding the exhibits that have been denied as follows:

1.Exhibit B.01d –HA-11-05 Pet. Opening Brief TMT CCH is not used here as legal argument but is used as evidence to demonstrate our previous statements of injury including statements regarding our constitutional rights for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
2. Exhibit B.01e—HA-11-05 Pet. FOF/COL, D&OTMT CCH 2011, is not used here as legal argument but is used as evidence to demonstrate our previous statements of injury including statements regarding our constitutional rights for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
3. Exhibit B.01f--Pet. Combined Exceptions to HO etc., is not used here as legal argument but is used as evidence to demonstrate our previous statements of injury including statements regarding our constitutional rights for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
4. Exhibit B.01g—Pet. Combined Responses to Applicants Exceptions…etc., is not used here as legal argument but is used as evidence to demonstrate our previous demonstrate our previous statements of injury including

statements regarding our constitutional rights for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
5. Exhibit B.01h—Kealoha Pisciotta WDT 2011, is not in fact duplicative because while it contained much of the same testimony it also contains new information and therefore it is not used here as legal argument but is used as evidence to demonstrate our previous statements of injury including statements regarding our constitutional rights for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
6. Exhibit B.01i—Kealoha Pisciotta's Closing Statement …2011, is not in fact duplicative it contains much of the same but also new information and therefore it is not used here as legal argument but is used as evidence to demonstrate our previous statements of injury for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
7. Exhibit B.01m—Kealoha Pisciotta and Kinohi Neves FEB. 2, 2013 oral arguments are not used here as legal argument but is used as evidence to demonstrate our previous statements of injury for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
8. Exhibit B.01r—Act 132, SLH 2009 is submitted for convenience as it is law, but we have submitted it as evidence of injury for this case.
9. Exhibit B.01u—ICA Mauna Kea Anaina Hou v BLNR is not used here as legal argument but is used as evidence to demonstrate injury for which this case was remanded by the Supreme Court of Hawai'i. Also they are now government records because they were previously received by BLNR.
10. Exhibit B.01a—Legal Fees Spike at UH, is a news story about cost of hiring out side legal council and it is an admission against UH interest and again we used it here as evidence of injury for this case.
11. Exhibits B.30 thru B. 23 I will respond here collectively since UH claims all of these exhibits are duplicative and that their exhibits under "A" Series are sufficient . This is maybe true however, we were never allowed to "compare" these documents or to challenge these the accuracy of the UH documents as the law allows.

HRS Section 91-10(2) reads as follows;
"Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;"

Lastly, The Hearing Officer stated "Exhibits improperly identified en masse were denied; e.g. "All B Series" Minute Order 44 at 7.

The decision to deny the MKAH exhibits was done in a discriminatory way. Intervener Leina'ala Sleightholm filed her motion to admit exhibits which said "I, J. Leina'ala Sleightholm, respectfully request to have the Hearings Officer accept my Pre-Hearing Statement, Written Direct Testimony of Nelson Ho and Noe Goodyear-Kaopua, and Exhibits into evidence." DOC-504 (emphasis added). The motion did not otherwise identify the exhibits.

Despite Ms. Sleightholm moving to admit exhibits en masse, the Hearing Officer ruled specifically on each exhibit, admitting all but one. Minute Order 44 at pages 45-46.

To specifically call out "All B Series" to be denied because they were submitted en masse is discrimination on the part of the Hearing Officer against the parties submitting the B Series documents.

A Fortiori Parties

We were remanded to redo this CCH, not because we failed but rather because the Board of Land and Natural Resources (hereafter BLNR), Attorney General (hereafter AG) and the responsible Deputies AG made reversible errors that violated our due process rights. We therefore are a fortiori parties, in that, we have been found to have standing by the BLNR, the lower courts and now the Hawai'i Supreme Court to raise this subject matter before this hearing. Why this is important is because many of documents have been previously admitted by BLNR and so they should be treated as government documents. For example, just as we can't now be found not to have standing after a higher court has already found us to have said standing (e.g. A fortiori Parties) neither can documents previously admitted as apart of the record of a case, that was remanded to be retried now be rejected as not relevant, material or duplicative. This would only frustrate the justice that the remand was intended to remedy.

HAR Section 13-1-32.4 reads regarding Records on file with board.
"Records directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such record."
[Eff and comp 2/27/09] (Auth: HRS §§91-2,171-6) (Imp: HRS §§91-2, 91-9, 171-6)

HRS Section 91-10 Rules of evidence; official notice section provides the

following:
In contested cases:
(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;
(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;"

The HO takes only the UH assertions and exhibits over and above the Petitioners documents from the previous hearings. We object to this because we have not been able to validate the accuracy of the UH documents by comparing the documents. For example, we are aware that Conservation District Use Application (hereafter CDUA) itself has been altered even after the close of the testimony section of the hearing has been close also. It was missing a signature and now has been signed after the witness (Mr. Lemmo) had been crossed on that specific document. In short, we object because we have not had an opportunity to compare the documents to make sure those two are in agreement and can be trusted.

Pro Se Parties
Pro Se parties, by law and precedent and in accordance with the Supreme Court of the United States decisions, may not be held to the same standard as a lawyer and/or attorney. Pro Se motions, pleadings and all papers should only be judged by their function and never their form. In summary, the Court must give additional latitude to Pro Se litigants who are to be held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519 (1972).

CONCLUSION

We join with Petitioner Temple of Lono and request that in addition to joining we request that all of the "B Series" exhibits submitted En Masse all be received into as evidence.

/s/ KEALOHA PISCIOTTA

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In behalf

Mauna Kea Anaina Hou, Paul K Neves and
Kealoha Pisciotta

Dated: April 27, 2017