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BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAII

IN THE MATTER OF	) Case No. BLNR-CC-16-002
	)
A Contested Case Hearing Re Conservation)	
District Use Application (CDUA) (HA-	) TEMPLE OF LONO EXCEPTIONS TO
3568) The Thirty Meter Telescope at the)	) HEARING OFFICER'S PROPOSED
Mauna Kea Science Reserve, Kaohe Mauka,	) FINDINGS OF FACT, CONCLUSIONS
Hamakua District, Island of Hawai'i,	) OF LAW AND DECISION AND ORDER;
TMK (3) 4-4-015:009	) COS
_____)	

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I. INTRODUCTION

The Hearing Officer appointed by the Board of Land and Natural Resources to take evidence and make a recommendation regarding the University of Hawai'i at Hilo's application for a permit to build the Thirty Meter Telescope on Mauna Kea issued her Proposed Findings of Fact, Conclusions of Law and Decision and Order (hereinafter "HO Proposal") on July 26, 2017. DOC-783.

On July 28, 2017, the Board issued Minute Order No. 103 setting a schedule for the filing of exceptions to the HO Proposal with a deadline of August 21.

The Temple of Lono herein timely files its exceptions to the HO Proposal.

II. EXCEPTIONS

A. Preface

1. From the early stages of this proceeding, the Temple of Lono understood that the Hearing Officer viewed her task as developing a record that would support the approval of the permit sought to build the Thirty Meter Telescope and to protect the Applicant from any serious challenges.
2. Various examples of that bias will be discussed in the exceptions filed herein.
3. One form of bias is denying the Temple and other parties opposing the permit application the ability to take exceptions to the HO Proposal. See Temple of Lono Motion to Board of Land and Natural Resources to Remand Hearing Officer's Findings of Fact, Conclusions of Law and Decision and Order filed August 13, 2017.
4. As will be discussed below, the evidence of bias also includes simply cutting and pasting material from the UHH/TIO Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Hereinafter "App Proposal"). DOC-671.
5. The bias also takes the form of refusing to address the factual and legal findings found in the Temple's Proposed Decisions and Orders Including Findings of Fact and Conclusions of Law) (Hereinafter "ToL Proposal"). DOC-651.
6. One root of the bias is surely the fact that the Hearing Officer was hired by and is being paid tens of thousands of dollars by the agency that already voted once to grant the permit at issue. The subversive impact of that earlier illegal decision cannot be removed from this proceeding. See ToL Proposal ¶¶10-18; see also ibid. ¶¶19-35 (additional bias in this proceeding),

B. The Hearing Officer violated the applicable administrative rule by ordering the parties to prepare and submit findings of fact and conclusions of law before the record was complete.

7. The Temple takes an initial procedural exception to the Hearing Officer's scheduling of the preparation and filing of findings and conclusions.

8. The applicable rule states:

(a) **After all evidence has been taken**, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law.

HAR §13-1-38 (emphasis added).

9. The Hearing Officer initiated the process of filing proposed findings of fact, conclusions of law, decision and order prior to the close of the record. See DOC-552 (Minute Order 43 Setting Post-Hearing Deadlines) filed on April 19, 2017 setting a deadline for findings and conclusions on May 30, 2017; DOC-782 (Minute Order No. 102: Declaration of Record Closed) filed on July 25, 2017.

10. Parties objected to this premature deadline for filing findings to no avail. See e.g. ToL ¶¶ 210-213.

11. In the period between the May 30th deadline for filing findings and conclusions and the July 25th close of the record, more than 100 pleadings were filed, see DOCs-674-781, and the Hearing Officer issued 44 Minute Orders, many potentially affecting the record. See Minute Order Nos. 57-101.

12. HAR 13-1-38 requires that the record be complete before the initiation of findings and conclusions and the setting of deadlines for such filings.

13. That reading of the rule is the only one that makes any sense. To make findings on a changing record results in findings made obsolete by later rulings or forecloses findings altogether. See e.g. ToL Proposal ¶190 (finding that failure of Hearing Officer to rule denied due process right to motion for reconsideration); DOC-438 (denying the motion in question and doing so after the deadline for filing findings and conclusions). See also DOC-760 (Cindy Freitas motion to supplement the record with additional exhibits) filed on July 10, 2017; DOC-781 (denying motion to supplement the record) filed on July 24, 2017.

14. Numerous other examples could be provided demonstrating that initiating findings and conclusions and requiring their submission prior to the close of the record creates a dysfunctional process and a dysfunctional record.

15. The only reasonable explanation for the Hearing Officer forcing parties to prematurely prepare findings and conclusions is that the Hearing Officer was trying

to expedite the proceeding to meet the TMT Project's announced intention to leave Hawai'i, if the construction cannot begin by April 2018. <http://hawaii.tribune-herald.com/news/local-news/tmt-wants-resume-construction-2018-pace-contested-case-could-impact-deadline>

**C. The Hearing Officer denied opponents
of the permit the ability to file exceptions.**

16. In violation of the rules, the Hearing Officer's Proposal denied opponents of the application a meaningful opportunity to file exceptions.

17. The administrative rule applicable to the Hearing Officer's response to findings of fact presented by the parties states:

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. **If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented.** The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record.

HRS §91-12 (emphasis added).

18. The HO Proposal states:

Any proposed finding of fact submitted by the parties which is not specifically incorporated is **rejected for one or more of the following reasons:**

- They are repetitious or similar to the Hearing Officer's own findings of fact or conclusions of law or decision and order, and/or
- They are not supported by reliable and/or (probative evidence, and/or
- They are in whole or in part (not supported by and/or are contrary to the facts or law, and/or
- They are immaterial, superfluous, and/or irrelevant to the material facts, issues, and/or law of this case.

HO Proposal at page 7.

19. Unpacking this laundry list reveals that the reasons for rejection can be that the proposed finding meets one or more of the following tests:

(1) repetitious of the Hearing Officer's own
 (a) findings of fact,
 (b) conclusions of law
 (c) decision and order

(2) similar to the Hearing Officer's own
 (a) findings of fact,
 (b) conclusions of law
 (c) decision and order

(3) not supported by reliable evidence

(4) not supported by probative evidence

(5) in whole not supported by
 (a) the facts
 (b) the law

(6) in part not supported by
 (a) the facts
 (b) the law

(7) immaterial to
 (a) material facts of this case
 (b) issues of this case
 (c) law of this case

(8) superfluous to
 (a) material facts of this case
 (b) issues of this case
 (c) law of this case

(9) irrelevant to
 (a) material facts of this case
 (b) issues of this case
 (c) law of this case

20. These 21 different grounds for rejection are distinguishable for purposes of taking exception, if they were connected to a finding.

21. Instead, the proponent of a proposed finding of fact included in the Hearing Officer's wholesale rejection of findings, which are not specifically identified or ruled upon, is left to first search out which proposed findings disappeared. The party must then engage in pure speculation as to which of the 21 possible reasons for rejection is applicable to the disappeared finding.

22. Obviously that process is not a meaningful opportunity to file exceptions.
23. This approach by the Hearing Officer is a direct violation of HRS §91-12.
24. The Temple filed a motion with the Board seeking a remand to the Hearing Officer with instructions to comply with HRS §91-12. Temple of Lono Motion to Board of Land and Natural Resources to Remand Hearing Officer's Findings of Fact and Conclusions of Law and Decision and Order filed August 13, 2017.
25. The only reasonable explanation for the Hearing Officer's refusal to take the time required by HRS §91-12 to rule on each finding of fact presented by a party is that the Hearing Officer was trying to expedite the proceeding to meet the TMT Project's announced intention to leave Hawai'i, if the construction cannot begin by April 2018. <http://hawaiitribune-herald.com/news/local-news/tmt-wants-resume-construction-2018-pace-contested-case-could-impact-deadline>

**D. The Hearing Officer's treatment of
the desecration issue is further evidence of bias.**

26. Additional evidence of bias is the Hearing Officer's failure to independently consider the legal and factual presentations in the Temple's Proposal and, instead, simply adopting uncritically the Applicant's proposed findings and conclusions.
27. One example of that failure is found in the Proposal's treatment of the desecration issue.
28. As a comparative examination reveals, the entire section on desecration in the HO Proposal CoL ¶¶399-413, is cut and pasted from the App Proposal CoL ¶¶392-407.
29. {Note: While copying and pasting, the Hearing Officer forgot to change one of the paragraph numbers. *Compare* HO Proposal CoL ¶397 at page 250 and App Proposal CoL ¶397 at page 210.}
30. The requirement for independence in the Hearing Officer is a general principle in agency practice. For example, when an agency accepts information from an applicant for an environmental assessment, the agency is required to independently evaluate the information and make its own determinations regarding the import to be given that information. 40 C.F.R. § 1506.25(a), (b). Only after such an independent inquiry can the agency incorporate the information into its final determination.
31. Cutting and pasting is evidence of a predetermined outcome and/or bias.
32. Wholesale cutting and pasting also saves time increasing the opportunity for the granting of the permit before the TMT decides to leave Hawai'i.

<http://hawaiitribune-herald.com/news/local-news/tmt-wants-resume-construction-2018-pace-contested-case-could-impact-deadline>

E. The Hearing Officer misstates the desecration issue.

33. The omission of independent consideration is serious when the issue involved is serious. In this case, there could hardly be a more serious issue than whether the application for a permit to build the TMT in the Conservation District is, in fact, an application to break the law.

34. As the Hearing Officer and the Applicant are indistinguishable on this subject, the Temple will refer to them as the HO/A. Paragraph references will be to the Hearing Officer's copy.

35. The HO/A first argues as follows:

The BLNR does not have jurisdiction to adjudicate violations of the Hawai'i Penal Code. ... On the basis for the foregoing, the alleged desecration fails as a matter of law."

HO CoL ¶401.

36. The Temple agrees entirely with the first statement and takes exception to the second statement.

37. The desecration issue is not whether the Applicant **has broken the law**. The question is whether the Applicant **is requesting a permit to break the law**.

38. As this distinction is apparently not recognized by the HO/A, perhaps an example will suffice to illuminate the issue. Imagine that a party filed an application with the BLNR to excavate a burial site on Mauna Kea for purposes of removing the artifacts in the site and placing them in a protected display case at a local hotel.

39. The proposal is thus to deliberately (intentionally) dig up a burial site (mistreat) with almost certainly the knowledge that the removal and public display of the artifacts would cause public outrage.

40. The agency would have no problem determining that the applicant was asking for a permit to break the law by desecrating a burial. The agency would – and should – dismiss the application without needing to find the Applicant to be guilty or not guilty of any violation of the law.

41. Declining to consider an application to break the law is obviously different from prosecuting someone for breaking the law.

42. In this case, the Board of Land and Natural Resources decision to be made is **whether to grant a permit.**

43. The desecration challenge is made in the context of the application for a permit, not a criminal proceeding. If the Board lacks jurisdiction or the legal capacity to hear an application for a permit, then this entire proceeding is meaningless.

F. In the HO Proposal, the Hearing Officer erroneously interprets the desecration statute in a manner that relieves the Hearing Officer of having to address the issues raised by the Temple.

44. The desecration statute states:

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

(a) Any public monument or structure; or

(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.

45. The HO/A confuses the meaning of various terms in the statute to hide the obvious applicability of the desecration statute to the Applicant's proposal. HO CoL ¶¶397-407.

46. The first victim of this confusion is the term "intentionally." In the context of the statute, the term means nothing more than deliberate as opposed to accidental. The initial inquiry is satisfied once it is determined that the actor intends to commit the act. The inquiry then proceeds to the next test.

47. The second victim of the confusion is the term "mistreating." The "mistreating" test is whether the action proposed would deface, damage, pollute or otherwise physically mistreat the site or object. The question of whether the desecration inquiry would continue is answered, in part, by whether the acts

physically mistreat the protected site? In the example above, the excavation of the burial site is physical mistreatment. If not, the inquiry ends. If so, the inquiry continues.

48. The third victim is the outrage test. Having misdirected attention to the terms “intentionally” and “mistreating,” the HO/A hides the last part of the test. The question to be answered is whether the actor “knows [the actions proposed] will outrage the sensibilities of persons likely to observe or discover the defendant’s action.” The question is the **expected response to the action by the people who consider the site sacred, not the mental state, e.g. ill-intent, of the actor**. In the example above, the public reaction to the excavation and display is predictably outrage.

49. The statute only requires a showing of **knowledge** that the action would provoke outrage.

50. Knowledge is distinct from intent. HRS §702-206(1), (2).

51. Knowledge only requires that the actor be aware of likely consequence of her action. *Ibid.* (2). The statutory definition that best fits the circumstances of this case is the following:

A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.” *Ibid.* (2)(c).

52. As will be discussed below, the Applicant was fully aware that a proposal to build the TMT on Mauna Kea would provoke outrage before the site was even selected. Failing to acknowledge the last test of the statute was an effort to prevent any attention being given to that fact and its implications.

G. The motives of the TMT proponents are far from benign.

53. The HO Proposal finds that the excavation of 62 tons of cinder from the sacred Mauna, putting in an artificial foundation, and building an 18 story building shows
no evidence [of] “specific ill-intent to mistreat Mauna Kea through defacing, damaging or polluting the mountain through the development of the TMT Project, where it is undisputed that the project has been proposed for the Astronomy Precinct within the Resource subzone of the Conservation District, in which by law, “astronomy facilities” are expressly permitted – and in fact currently exist.

HO CoL ¶410.

1. The Applicant knew that the selection of Mauna Kea as the site for the TMT would provoke outrage.

54. The motivations of the Applicant are hardly as benign as the Applicant attempts to argue.
55. Prior to selection of Mauna Kea as the site for the proposed TMT, Applicant commissioned a risk assessment. DOC-491, Exhibit L23 (Keystone Center Report).
56. This report documented the extensive *hewa* that the selection of Mauna Kea would cause in the Hawaiian community.
57. The Applicant, therefore, knew, before selecting Mauna Kea as the site for the TMT, that pursuing Mauna Kea as a site for the TMT would provoke significant community controversy, including significant opposition.
58. The Applicant proceeded to choose Mauna Kea anyway.
59. To proceed with a project that the proponent knows will generate public outrage satisfies that test for the application of the statute to the proposal.
60. The Board can take note that the predicted outrage did manifest. ToL Proposal ¶¶ 121-123.
61. Even after hundreds of people risked arrest by physically blocking an effort to construct the TMT, while TMT had a permit later vacated, and the legal challenge succeeded in ultimately vacating the permit, the TMT remains steadfast in its commitment to build the TMT on Mauna Kea, i.e. to continue to provoke outrage.
62. The predicted outrage that did surface constitutes evidence of the Applicant's disrespect for those who would be most negatively affected by a decision to build on Mauna Kea.

2. The Applicant openly attacked the Temple as extremist.

63. Contributing to that evidence of the Applicant's prejudicial motives are the statements made by the Applicant in the contested case hearing that attacked the Temple of Lono as an extremist organization. DOC-135 at 14-15; see also ToL Proposal ¶¶128-171.
64. That attack demonstrated a level of hostility towards the traditional Hawaiian faith that should disqualify the Applicant from receiving a permit. See DOC-179, Exhibit 2 (Motion to Dismiss Conservation Use Application HA-3586; Memorandum in Support).
65. To quote from the Memorandum that the Hearing Officer **refused to allow the Temple to file**, DOC-356 [(Minute Order No. 33, Order denying Temple of Lono's motion to dismiss out of time (Doc. 179))]:

The University twists that desire for equality into a drive for domination. According to the University, “the Temple seeks **state recognition** of the “traditional faith of the Hawaiian people.” [DOC-179 *citing* DOC-135 at 14 (emphasis in original)].

Indeed the Temple seeks State recognition that the Temple is entitled to practice its faith just like any other religion. The University’s own pleading documents that the Temple considers the State to be one actor guilty of trying to suppress the Temple. *Id.* In its search for mutual respect, the Temple finds “discrimination by the State” as an obstacle. *Id.*; *ibid.* at 14, n.36.

That State recognition does not constitute any special treatment; the Temple seeks the equality under the law guaranteed by the Fourteenth Amendment to the United States Constitution and the freedom to practice its faith as guaranteed by the First Amendment to the United States Constitution.

Having created a false picture of what the Temple seeks in terms of its right to practice without suppression, the University then uses that false picture as a platform to launch an attack on the Temple as a fundamentalist organization.

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 brings to the society of which it is a part.

[DOC-135] at 14 (emphasis in the original).

The breathtaking and libelous leap that the University takes from the reality of a faith emerging from more than 120 years of oppression and trying to establish its right to practice without further oppression to the University’s fantasy of the faith as a fundamentalist organization that is intolerant, unable to compromise, chooses conformity to doctrine over cooperation, and cares not if it inflicts harm on society while pursuing its goal of domination is evidence of a malice so deep as to be disqualifying.

DOC-179 at 6-7.

66. The Temple challenges each member of the Board of Land and Natural Resources -- Chairperson Suzanne Case, Stanley H. Roehig, Keith “Keone” Downing, James A. Gomes, Thomas Oi, Samuel “Ohu” Glon III, and Christopher Yuen -- to read Exhibit 2 to DOC-179 and decide for yourself whether the Temple **should have at least been allowed to file the Motion and Memorandum and receive a ruling on the disqualification issue.**

67. The Board may then understand the Temple’s argument that the Hearing Officer was biased against the Temple and in favor of the Applicant.

68. The University's attack also revealed the underlying goal of destroying the traditional Hawaiian faith's legitimate and constitutionally-protected – Hawaii Constitution, Article XII, §7 – claims to their sacred Mountain tracing back hundreds of years to be replaced with a State-managed, Astronomy-driven continuation of the desecration that began fifty years ago.

69. Choosing Mauna Kea despite the foreknowledge provided by the Keystone Center Report, attacking the Temple without cause or basis, directing overt hostility toward the traditional Hawaiian faith, and revealing the goal of delegitimizing the tradition faith satisfy any perceived requirement for *mens rea*.

70. Certainly all the tests for finding that the Applicant is seeking a permit to violate the desecration statute are met.

**H. Having misconstrued the desecration statute,
the HO/A defaults on addressing the Temple's findings.**

71. Having claimed to lack ill-intent and that the absence of such intent means the statute does not apply, the HO/A throws the rest of the statute overboard.

The foregoing sufficiently addresses Petitioners' and Opposing Intervenors' claims of alleged desecration, without the need to make any findings or conclusions regarding any other element of the statute, including whether the summit of Mauna Kea meets any of the definitions under HRS §711-1107(1)(a), (b), or (c). Petitioners' and Opposing Intervenors' alleged claims are not within BLNR's jurisdiction and are unsupported by any evidence, and therefore, rejected.

HO CoL ¶413.

72. The HO/A conclusion that the Temple's "alleged claims" are not within BLNR's jurisdiction is a repeat of the false claim that the issue is adjudication of criminal activity, rather than an application for a permit to break the law.

73. The HO/A conclusion that the Temple's "alleged claims" are unsupported by evidence is curious (and bogus) coming from a Hearing Officer who refuses to consider the Temple's arguments and evidence. HO CoL ¶413 (no "need to make any findings or conclusions regarding any other element of the statute").

**1. The HO/A position that because a telescope is allowed
in a Resource Subzone, the desecration statute does not apply is wrong.**

74. The HO/A argues that because:
it is undisputed that the project has been proposed for the Astronomy Precinct within the Resource subzone of the Conservation District, in which by law, "astronomy facilities" are expressly permitted – and in fact currently exist,

HO CoL ¶410,

[i]t is illogical that the University and TIO can be found to have the requisite intent to “mistreat” Mauna Kea by the development of the TMT project.. Id.

75. The argument that some artificial zone created by a state agency, within which the agency happens to allow astronomy facilities to be built, somehow negates the requirement that any facility not desecrate a sacred site is an example of *argumentum deliramentum*.

76. The creation of the Conservation District, the Resource Subzone, and an Astronomy Precinct did not repeal or amend the State law prohibiting desecration or in any way diminish the protections provided by that law.

77. That some agency rule allows an astronomy facility to be built in a Resource Zone does **not** mean that facility can be built there even if the facility violates the State law on desecration.

78. That BLNR adopted a rule that allows “astronomy facilities” in a Resource Subzone of a Conservation District does not alter the nature of the Mauna as a place of worship, a place of burials, or an object of veneration; does not mean that such a project would not cause damage to the Mauna; and does not mean that the proposal to build this telescope is not a cause of public outrage.

2. The Applicant’s proposal clearly meets the tests for desecration.

79. After embracing the false analysis requiring “ill-intent” to trigger the statute, the HO/A position is that there is then no need to answer to any of the tests of the statute, i.e.

80. -- Is Mauna Kea a place of worship?

81. -- Is Mauna Kea a place of burials?

82. -- Is Mauna Kea an object of veneration?

83. -- Will the proposed construction of the TMT damage the Mauna?

84. -- Will the proposed construction of the TMT generate public outrage?

85. Given that the answer to all of these questions is “yes,” the only way out for the HO/A is to pretend that there is no need to answer the questions because the motives of the TMT proponents are benign, i.e. lack of “ill-intent.”

86. That pretense avoids the obvious conclusion that would flow from answering the questions, i.e. the Applicant is requesting a permit to violate the desecration statute.

**I. The Hearing Officer refused to allow the Temple to
hold the Applicant accountable for
the disqualifying attack on the Temple of Lono.**

87. The Hearing Officer blocked every attempt by the Temple of Lono to litigate the question of whether the attack on the Temple by the Applicant disqualified the Applicant from receiving a permit. ToL Proposal ¶¶ 128-171, 184-190.

88. {Note: The missing transcript references in these latter findings are found in HO Proposal, Appendix A, DOC-438 [Denied by oral ruling (Tr. 1/26/17 at 12:12 – 12:24)]}.

89. {Note: Because the Hearing Officer required findings and conclusions to be prepared and filed prior to the close of the record, ToL Proposal ¶190 states that the Hearing Officer never issued a final order. As reflected in HO Proposal, Appendix A, DOC-438, the Temple's request for subpoena (DOC-438) was denied by Minute Order No. 66 (Doc. 689, filed 6/5/17), i.e. after the deadline for filing findings.

90. By the time the Minute Order issued, the testimony phase of the proceeding was over, see HO Proposal FoF ¶98, so a motion for reconsideration of the subpoena denial would have been useless – another due process violation.}

91. Alternatively, had the subpoena been granted after waiting so long for a ruling, the Hearing Officer would have had to reopen the hearings and provide additional time for findings – the dysfunctional result of a dysfunctional process.

92. The response by the Hearing Officer preventing the Temple from being heard was a turning point in the proceeding for the Temple. The Hearing Officer's determination to protect the Applicant and deny due process to the Temple demonstrated an incurable bias that infected the entire proceeding.

93. The Temple did attempt to cure the infection by requesting the Hearing Officer recuse herself. Ibid. ¶ 149, 151.

94. The Hearing Officer denied the motion. Ibid. ¶ 150.

95. That bias by the Hearing Officer from the beginning is one reason that the Temple takes exception to the entire HO Proposal.

J. The Hearing Officer improperly failed to address the jurisdictional issue.

96. The Temple filed a motion seeking to terminate this proceeding based on the application at issue being a request for permission to violate the law. DOC-264 filed September 17, 2016.

97. The Hearing Officer denied the motion seven and a half months later. DOC-654 filed May 27, 2017.

98. The entire legal discussion of the basis for that denial consisted of the following:

This Motion, filed on September 7, 2015, is a dispositive pre-hearing motion that clearly falls outside the filing deadline of July 18, 2016 set by the Minute Order.

...

Assuming *arguendo* that the Motion was timely, it fails on at least two other grounds. One, this tribunal lacks the authority to provide the relief the Temple of Lono seeks because this contested case hearing is an improper venue to adjudicate criminal law violations. Two, the Temple of Lono has failed to carry its burden that it is entitled to judgment as a matter of law and/or any material facts supporting the Motion are undisputed.

Ibid. at 4.

99. The Hearing Officer misstates the issue as whether she has jurisdiction over allegations of criminal behavior. As discussed earlier, the issue is whether the agency has jurisdiction to consider an application for a permit to break the law.

100. An agency cannot consider an application for permission to break the law.

101. The Temple motion was dispositive because granting the motion would mean that the agency never had jurisdiction over the permit application in the first place and that the application should be dismissed.

102. The principles of jurisdiction for this agency proceeding are the same as the principles for any adjudicatory or quasi-adjudicatory body. One of those principles is that a jurisdictional challenge may be made at any time.

103. That the Temple made its dispositive motion outside the time set by the Hearing Officer for pre-hearing motions is irrelevant. A jurisdictional challenge is always in order because if there is no jurisdiction there is no basis for the proceeding.

104. A motion challenging jurisdiction required the agency to promptly address that issue prior to taking any further actions.

"When it clearly appears that the court lacks jurisdiction, the court has no authority to reach the merits. In such a situation the action should be dismissed for want of jurisdiction."

Melo v. US, 505 F2d 1026, 1030 (8th Cir. 1974).

105. As *Melo* states, the Court obligation to address such a challenge is mandatory. See also *Joyce v. U.S.*, 474 F.2d 215 (3rd Cir. 1973) (“Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction.” [citation omitted]).

106. There is no hiatus after the filing of a jurisdictional challenge in which the Court can proceed to rule on other pending motions before addressing the jurisdictional issue. That is because any action by the Court when the Court lacked jurisdiction would be void.

107. In this proceeding, the Hearing Officer ignored the Temple’s jurisdictional challenge for seven and a half months while continuing to conduct the proceeding, including continuing to rule on motions, testimony, exhibits, and administrative matters.

108. Then the Hearing Officer ruled that the filing of the Temple’s motion challenging jurisdiction was untimely or, if not untimely, “failed to carry [the Temple’s] burden that it is entitled to judgment as a matter of law and/or any material facts supporting the Motion are undisputed.” DOC-654 at 4.

109. The first ruling is contrary to the principle that a jurisdictional challenge can be raised at any time.

110. The Hearing Officer says the issue she was addressing was whether she had jurisdiction to decide a criminal prosecution. DOC-654 at 4. Having misconstrued the issue in the first place, the ruling that the Temple failed to carry its burden on an issue not before the Hearing Officer is a meaningless ruling.

111. The second ruling also has the fundamental flaw that the decision was not based on litigation of the issues. The Hearing Officer never scheduled the Temple’s motion for briefing, so there was no opportunity for all parties to be heard or a record to be created.

K. The Board has avoided addressing the jurisdictional issue as well.

112. The Temple presented the desecration questions to the Board long ago. DOC-516 (Temple of Lono motion to Board of Land and Natural Resources to dismiss HA-3568) filed March 19, 2017. The motion argued that the Board lacked jurisdiction to consider an application for a permit to break the law.

113. Despite the jurisdictional nature of the challenge, the Board decided to wait for the recommendations from the Hearing Officer before addressing the Temple’s motion. DOC-751 (Minute Order No. 87, Order denying without prejudice Temple of Lono’s motion to Board of Land and Natural Resources to dismiss HA-3568) filed June 23, 2017.

114. That decision means that the Temple (and any other party having an interest in whether the Board ever had jurisdiction over the application at issue) will never have had the opportunity to fully litigate the issue.

115. The Board has no record of such litigation during the hearing process to rely upon and has not developed its own record.

116. All that the Board has is the Temple's motion, opposition by the Applicant in the form pleadings never substantively ruled on and proposed findings and conclusions, and the cut and paste presentation on the issue found in the Hearing Officer's Proposal.

117. Missing are: (1) an opportunity for other parties to participate in that litigation, (2) full briefing of the issues, (3) a reasoned explanation as to why the application to break the law should not be dismissed, and (4) rulings on each of the findings submitted by the Temple on this issue,.

L. The Hearing Officer and Board avoidance of the desecration issue has created a due process problem.

118. Had the Hearing Officer granted the Temple's Motion on desecration in September 2016, the proceeding would have terminated prior to reaching the evidentiary stage.

119. Instead, the Hearing Officer waited until May 27, 2017 to rule, by which time there had been 44 days of hearings and 71 witnesses.

120. To grant the Temple's motion at that point would have meant dismissal of the case without a decision because the agency never had jurisdiction. The pressure to deny the motion was immense and denied the Temple's right to a fair and impartial hearing.

121. When the Temple filed its motion to dismiss based on the desecration statute at the Board level, the Temple informed the Board that the jurisdictional challenge had been pending for some time. DOC-516 at 7, n. 7.

122. The Board chose to join in delaying a decision by dismissing the Temple's motion to dismiss and to await the proposed resolution of the desecration issue by the Hearing Officer. DOC-751

123. The Board and the Hearing Officer have delayed addressing a jurisdictional challenge until a decision on the issue can no longer be made objectively.

124. The proceeding continued despite the unresolved jurisdictional challenge.

125. If the Board now took up the desecration issue, despite the absence of an adequate record to review from the proceeding below, the Board would be faced with a choice of granting the motion and essentially vacating the entire proceeding to date or denying the motion.

126. The Board cannot make an objective decision in the face of a *fait accompli* allowed by the Hearing Officer, i.e. the Board cannot ignore the voluminous record of the proceeding and make an objective decision on whether the proceeding should have been held in the first place.

127. That lack of objectivity at the Board level denies the Temple's right to a meaningful hearing.

M. The Hearing Officer's Proposal systematically purged Temple findings.

128. The protocol adopted by the Hearing Officer to "reject" proposed findings of fact *en masse* without identifying the specific finding or providing the specific reason a particular finding was rejected, HO Proposal at page 7, provided the Hearing Officer cover for eliminating consideration of many essential parts of the Temple's case.

129. This systematic purging of the Temple's case is final confirmation of the Hearing Officer's bias against the Temple and in favor of the Applicant.

1. The Hearing Officer's Proposal ignores the Keystone Center Report.

130. The Temple set forth at some length the Keystone Center Report prepared for the Applicant by a consultant that evaluated the risk of selecting Mauna Kea as the site for the TMT. ToL Proposal ¶¶117-119.

131. The Report itself is nowhere to be found in the HO Proposal.

132. The Temple's findings on the Report are no where to be found in the HO Proposal.

133. There are no rulings on the Temple's findings in the HO Proposal.

134. The Temple takes exception to the Hearing Officer refusing to address the case presented by the Temple.

2. The Hearing Officer's Proposal ignores the Applicant's bigoted attack on the Temple.

135. The Temple also presented findings that dealt at some length with the Applicant's attack on the Temple, the implications of that attack for Applicant's qualifications to receive the permit, and the refusal of the Hearing Officer to allow

the Temple to be heard on this issue. ToL Proposal ¶¶ 128-171; see ¶¶267-269.

136. There is no discussion of the attack on the Temple found in the HO Proposal.

137. The Temple's findings on this issue are nowhere to be found in the HO Proposal.

138. There are no rulings in the HO Proposal on each of the Temple's proposed findings regarding the attack.

139. There is one reference to the pleading containing the initial attack found in the HO Proposal at Appendix A, DOC-78 (Referencing DOC-135), which simply identifies relevant pleadings without providing any discussion.

140. The Temple takes exception to the Hearing Officer refusing to address the case presented by the Temple.

3. The Hearing Officer ignored the numerous due process violations presented in the Temple's findings.

141. The Temple also made an extensive presentation on the due process violations that occurred in the proceeding. See ToL Proposal ¶¶ 10-35 (general due process considerations related to the Supreme Court vacatur of the previously granted permit), ¶¶ 36-56 (due process issues related to the nature of this proceeding), ¶¶ 174-183 (specific due process violations), ¶ 193-198 (motions not ruled upon, ¶ 199 (refusal to issue Minute Order), ¶¶ 200-245 (numerous due process violations during the proceeding).

142. In response to the innumerable due process issues raised in the Temple findings, the Hearing Officer had nothing to say.

143. The term "due process" appears five times in the Hearing Officer's 305 page Proposal: CoL ¶ 44 (generic claim due process provided to all parties); ¶ 65 (twice re limiting cross-examination); ¶ 113 (statement of general principle); Appendix A, DOC-338 (pleading caption). None of these mentions address the Temple findings on the due process issue, other than the issue of limiting cross-examination.

144. The HO Proposal completely ignored the plethora of additional due process violations presented by the Temple.

145. The remaining due process issues raised by the Temple are nowhere to be found in the HO Proposal.

146. The Temple's findings on these due process issues are nowhere to be found in the HO Proposal.

147. Rulings on the Temple's findings on these due process issues are nowhere to be found in the HO Proposal.

148. The Temple takes exception to the Hearing Officer refusing to address the case presented by the Temple.

4. The Hearing Officer ignored the Temple's findings on desecration.

149. The HO/A claim that the Applicant has no ill-intent and, therefore, the proposal is not subject to the desecration statute. See HO Proposal CoL ¶¶402-413.

150. Based on that factual fallacy, the HO/A argue that there is no need to address any of the other elements of the desecration statute. Ibid. ¶413.

151. The HO Proposal fails to address the possibility that the Hearing Officer is wrong on the law. That failure means that the Hearing Officer refuses to consider the Temple's entire presentation of findings related to the application of the desecration statute. ToL ¶¶ 1-9, ¶¶ 57-72, ¶¶267-269.

152. The discussion in the HO Proposal regarding the desecration issue is limited to the presentation by the Applicant. There is no discussion of the Temple's alternative case.

153. The Temple's findings on the desecration issue are nowhere to be found in the HO Proposal.

154. Rulings on the Temple's findings on the desecration issue are nowhere to be found in the HO Proposal.

155. The Temple takes exception to the Hearing Officer refusing to address the case presented by the Temple.

**N. The Hearing Officer's refusal to address
the Temple's case is another due process violation.**

156. Just in the four areas – the Keystone Center Report, the Applicant's attack on the Temple, the due process violations, and the desecration issue – the Hearing Officer supposedly "rejected" at least 200 Temple findings and sub-findings because those findings do not appear in the HO Proposal.

157. The Temple is provided with no ruling on each of those findings as to why they were rejected.

158. The Temple is, therefore, unable to take exception to the innumerable rulings supposedly rejecting the Temple's proposed findings on issues essential to the Temple's case.

159. The Hearing Officer has achieved her goal of eliminating the Temple's effective participation in this proceeding by simply refusing to acknowledge the Temple's findings and refusing to provide rulings on those findings.

160. This clear violation of HRS §91-12 is a fundamental and fatal flaw in the HO Proposal.

161. Foreclosing the Temple's ability to file exceptions is a fundamental due process violation that adds to the mountain of such violations already present in this proceeding.

O. The Hearing Officer's bias tainted the entire proceeding.

162. As discussed extensively above, the Hearing Officer demonstrated a clear bias against the Temple and in favor of the TMT. The only time the Hearing Officer addresses those objections to her presiding, she pronounces those objections meritless and limited to objections to adverse rulings.

Throughout the course of the contested case hearing, accusations of bias and prejudice were freely advanced by Petitioners and Opposing Intervenors. Adverse rulings, without more, are insufficient to establish bias or prejudice of an administrative officer. *See Peters v. Jamieson*, 48 Hawai'i 247, 264, 397 P.2d 575, 586 (1964) ("We adhere to the rule that mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice and cannot be made the basis for disqualification.")

HO Proposal CoL ¶43.

163. The Hearing Officer even reveals her bias when attributing bias to others. In discussing witnesses who have reached the conclusion that construction of the telescope is not a good idea, the Hearing Officer finds their professional opinion unpersuasive or tainted by their having reached that conclusion. See e.g. HO Proposal FoF ¶665, 970.

164. There is no evidence of the Hearing Officer finding proponents of the project to lack objectivity because they favor the project.

165. Indeed, objections to bias were heard "[t]hroughout the course of the contested case," precisely because evidence of bias ran rampant.

166. The Temple takes an overall exception to the HO Proposal in its entirety as the product of repeatedly demonstrated bias against the opponents of the project and in favor of the project itself.

167. As such, the Board cannot rely upon the HO Proposal or the record created

under this presiding officer as a basis for the Board's consideration of the permit application.

P. The faith issue is at the heart of this proceeding.

168. The desecration discussion above raises fundamental questions underlying this case.

169. Do Native Hawaiians have a right to declare a site sacred? Or more precisely, if Native Hawaiians have considered a site sacred for hundreds of years is that sacred space protected under the State's desecration statute?

170. The State's Constitution, Article XII, §7?

171. The United States Constitution, Amendments 1 and 14?

172. If so, does the law on desecration apply to that site in the same way it would apply to a sacred site declared by any other religion, faith, or spiritual practice?

173. If not, why does the Native Hawaiian faith have less freedom to determine a sacred site and less protection for its sacred sites than other religions, faiths, or spiritual practices have for their sacred sites, particularly when Native Hawaiian spiritual practices are specifically protected by the Hawaiian Constitution, Article XII, §7, as well as the United States Constitution, First and Fourteenth Amendments?

174. Related questions are:

175. Can an agency of the State of Hawai'i create a special district and then declare that the laws of the state do not apply in that district? More precisely, can the State of Hawaii adding "astronomy facilities" to the list of allowable land use in a State-created Resource Subzone eliminate the requirement that the construction of the facility not violate the States's desecration statute?

176. Can the State of Hawai'i refuse to grant the protections of a general law -- meant to protect all religious, faith, and spiritual practices and institutions -- to a particular faith?

III. CONCLUSION

177. The educational value of this proceeding is immeasurable. People all over the world had an opportunity to learn about Hawaiian spirituality and about the continued oppression of the Hawaiian people.

178. The Hearing Officer's refusal to allow witnesses to testify about the illegal annexation of the Kingdom and the implications of that illegality for the determination of the true title holder to the land where TMT wants to build prevented a comprehensive explication of the history.

179. As far as the legality of this proceeding, the Temple offered its view that impartiality was impossible because the Hearing Officer knew that the agency had previously approved the permit. ToL ¶¶10-35.

180. The influence of that prior decision appears to have created a bias on the part of the Hearing Officer, just as the Temple analysis predicted. *Id.*

181. The process also appears to have overwhelmed the Hearing Officer, leading to a record replete with failures to perform the required functions, legal errors, prejudicial rulings, due process violations, incomprehensible and irrational processes, and other flaws that are beyond salvaging.

182. The Temple is resubmitting its motion to dismiss that the Board earlier denied without prejudice to re-filing.

183. The Board can address the Temple's motion to dismiss now, DOC-516, and grant that motion to save all parties the time and expense of going through a judicial process where the outcome is so easily predicted. *See* Temple of Lono Resubmission of Motion to Dismiss filed August 15, 2017.

ADDENDUM

184. On August 13, 2017, the Temple of Lono filed its "Temple of Lono Motion to Board of Land and Natural Resources to Remand Hearing Officer's Findings of Fact, Conclusions of Law and Decision and Order."

185. On August 15, 2017, the Applicant filed The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion to Board of Land and Natural Resources to Remand Hearing Officer's Findings of Fact, Conclusions of Law and Decision and Order. (Hereinafter "App. Opp. Remand")

185. The Applicant argues that the Hearing Officer is not required to rule upon every finding of fact submitted by a party because:

186. There are too many findings in this proceeding to require the Hearing Officer to address them all.

187. The rule requiring that all findings submitted must be ruled upon applies to the decision-maker, not a Hearing Officer

188. The voluminous findings submitted in this proceeding are a direct product of the outrage predicted by the Keystone Center Report. *See infra* ¶¶ 54-62, 130-134.

189. To deny the parties a fair hearing on their findings would only confirm the intent of the Board to approve the TMT, no matter what the law says.

190. From an aroused community, emerged 25 parties willing to engage in what was certain to be a lengthy and costly proceeding. HO Proposal FoF ¶¶ 1-28 (not counting the Applicant and the Applicant's allies TIO and PUEO.)

191. While the record will reflect that some of those petitioner/interveners fell by the wayside under the pressures of participating in the pre-hearing process and 44 days of hearings, many remained at great personal cost.

192. Those that remained put on their cases and filed their 5,000+ findings of fact, conclusions of law and decision and order. App. Opp. Remand at 2, n. 1.

193. That their participation resulted in the filing of thousands of findings is irrelevant to the responsibility of the agency to address those findings. The statute says: **If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented.** HRS §91-12.

194. There is nothing in the rules that says the agency must make a ruling on each finding filed by a party UNLESS there are too many. The rules does not permit the agency to pick and choose which ones the agency will address and refuse to mention and/or rule upon the rest.

195. The Applicant at least agrees that the statutory provision applies to the Board, as the decision-maker for the agency.
App. Opp. Remand at 2-3.

196. The Applicant then misconstrues the role of the Hearing Officer as that of a *de facto* decision-maker, free to reject any proposed findings without the need to identify them or provide a particular reason for rejecting them.

197. The Hearing Officer provides the ultimate decision-maker, in this case the Board of Land and Natural Resources, with findings and conclusions to inform the decision-makers deliberative process.

198. The Hearing Officer is not the gatekeeper determining what reaches the decision-maker. The Hearing Officer addresses the entire record and **makes recommendations** to the decision-maker addressing the entire record. The entire record is composed of everything submitted, even submissions ruled irrelevant and immaterial.

199. If there are findings submitted by a party that the Hearing Officer does not rule upon, the responsibility of the Board is to either remand the proceeding back to the Hearing Officer to address those findings or conduct a *de novo* review of those findings and make a ruling. HRS §91-12.

200. The statute does not say that the board must rule on each finding submitted by a party UNLESS the Hearing Officer eliminates a party's findings before they reach the Board, i.e. unless the Hearing Officer usurps the authority of the Board.

201. If the Hearing Officer does not include a ruling on a party's finding in the proposed decision, the only means for the party presenting that finding to have the finding addressed by the Board is to file an exception specifying the finding not ruled upon and request the Board to make a *de novo* ruling.

202. What has happened in this proceeding is that a biased Hearing Officer has refused to provide rulings on hundreds of findings of fact, in some instances on findings going to the heart of a party's case.

203. Now a party whose finding is not specifically ruled upon is burdened with identifying that finding and then guessing why the finding was rejected by selecting from a menu of 21 possible reasons provided by the Hearing Officer.

204. That failure has limited the input of the Hearing Officer to the Board on numerous issues.

205. The result is that the Board itself must now either remand the proceeding back to the Hearing Officer to make rulings on the findings of fact not specifically identified or ruled upon by the Hearing Officer **OR** the Board must take up and rule upon the findings for which the Hearing Officer did not provide an identifiable ruling.

206. An identifiable ruling is a ruling that identifies the finding of fact and provides a ruling on that finding. Findings of fact rejected *en masse* based on any of a group of 21 possible different grounds does not satisfy the requirements of HRS §9-12.

207. In their filing, the Applicant relies heavily on *Mitchell v. BWK Joint Venture*, 57 Haw 535, 560 P.2d 1292 (Haw. 1977).

208. The case cited by the Applicant is easily distinguishable from this case and still provides useful guidance.

209. First of all, the decision-maker in the *Mitchell* case identified the findings rejected. *Ibid.* at 1295 ("The board in its decision and order of March 25, 1974, rejected appellants' proposed findings 12-23, 25-27, 30-37, 39, 41, 43-44, 48-55, and 57")

210. In this proceeding, the Hearing Officer made no effort to identify the findings rejected. That task is left to be done either within the parties' exceptions or later by the Board.

211. Unless the party whose findings were rejected and not identified now identifies those findings in the exceptions, the Board will have no knowledge of what findings were rejected. Identifying the findings will be almost impossible and, even if successful, will not provide the Board with the Hearing Officer's reason for rejecting the finding.

212. Second, the *Mitchell* court found that the reasons for rejecting the proposed findings satisfied any requirement of particularity *Ibid.* at 1297 ("considering the findings eventually made by the Board, the issues involved, and the detailed nature of the proposed findings which were rejected by the Board, we are of the view that the Board indicated to us **its reason for each ruling** with enough particularity to enable us to satisfactorily review it.")

213. In this proceeding, the HO Proposal does not identify the findings rejected and does not provide a reason for each rejection sufficient to allow the Board to review and approve or disapprove the Hearing Officer's ruling.

214. Third, the Court considered "the detailed nature of the proposed findings which were rejected." *Id.* There is nothing in the HO Proposal that discusses the nature of the proposed findings rejected because there is no discussion of those findings at all.

215. In *Mitchell*, the ruling in question relied upon limited grounds – the findings were "in whole or in part, contrary to the facts or the law or because they are immaterial." *Mitchell* at 1296 citing *NLRB v. Sharples Chemicals, Inc.*, 209 F.2d 645, 652-653 (6th Cir.1954). At most, those reasons are five separate grounds to be considered. Knowing which findings have been rejected, a party could prepare an exception based on disagreement with any of those five reasons.

216. In this proceeding, after failing to identify the findings rejected, the HO Proposal gives a list of 21 possible reasons for any one finding to have been rejected. HO Proposal at page 7.

217. *Mitchell* states: "The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency." *Mitchell* at 1296 citing *In re Terminal Transportation, Inc.*, 54 Haw. 134, 139 504 P.2d 1214, 1217 (1972).

218. The *Mitchell* court did issue a warning to agencies: "The Board takes its chances on having a ruling reversed because it has failed to explain its reason sufficiently, or the reason may be so general and all embracing as to justify the Court in reversing the ruling for lack of a specific reason." *Ibid.* at 1297.

219. The Board now faces a dilemma. For the ultimate decision to pass judicial scrutiny, the decision must at least identify the findings rejected and provide a

reason of sufficient particularity to foreclose the parties or the court having to guess at the reason for rejection.

220. The HO Proposal offers no such detail for the Board to review.

221. Again, the Board has to choose between remanding with instructions to at least identify the findings rejected and provide a reasonably identifiable basis for the rejection and the Board having to conduct its own search of the parties' submissions to identify the findings rejected and make a *de novo* determination as to whether the finding should be accepted or not.

Dated: August 16, 2017

Dated: August 15, 2017

Respectfully submitted,

/s/Lanny Alan Sinkin

Lay Representative for the Temple of Lono

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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

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

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER** was served on the following parties by email on August 16, 2017.

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Dated: August 15, 2017

_____/s/_____
Lanny Alan Sinkin