

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721-0944
(808) 936-4428
lanny.sinkin@gmail.com
Lay representative for Temple of Lono

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 Permit (CDUP) (HA-3568 for))	TEMPLE OF LONO OPPOSITION
The Thirty Meter Telescope at the Mauna))	TO PUEO MOTION TO SET THE
Kea Science Reserve, Kaohe Mauka,))	ISSUES; CERTIFICATE OF
Hamakua District, Island of Hawai'i,))	SERVICE
TMK (3) 4-4-015:009))	
_____))	
)	TEMPLE OF LONO OPPOSITION TO PUEO MOTION TO SET THE ISSUES

Intervenor PUEO filed its Motion to Set Issues requesting an order from the Board of Land and Natural Resources, through its Hearing Officer, setting the issues for the contested case. Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set the Issues accompanied by its Memorandum in Support of Motion dated July 18, 2016. (Hereinafter "Issues Mem.")

The ostensible purpose of the motion is to have the Hearing Officer limit the issues to be heard in this proceeding to the eight criteria set forth in the Hawai'i Administrative Rules governing a Conservation District Use Application (CDUA). Issues Mem. at 4-7.

PUEO does acknowledge

that other issues related to the public trust doctrine and *Ka Pa'akai 'O Ka 'Āina v. Land Use Comm'n*, native Hawaiian traditional and customary practices, and the TMT sublease, may be raised in this proceeding.

Ibid. at 4-5.

As to these additional issues, PUEO seeks a ruling that

such issues and the evidence and testimony presented thereon on be considered only to the extent that they are relevant to the CDUA criteria and within the jurisdiction of the Board.

Ibid. 5.

PUEO seeks to subordinate the additional issues to the issues relevant to the eight criteria when in fact those issues stand on their own as requiring consideration. Even if an application produced a favorable finding on the eight criteria, the other issues would remain. For example, if the land use would adversely affect “native Hawaiian traditional and customary practices,” the application could still be denied despite satisfying the eight criteria.

The PUEO motion is both remarkable and unsupportable by existing law. PUEO is asking for nothing less than advance rulings on issues that might or might not be raised through motions, evidence, witnesses, or any other actual act of a party.

PUEO equates the Hearing Officer’s authority to determine her jurisdiction regarding an issue once raised with some non-existent authority to issue an advisory opinion on her jurisdiction over issues or the materiality and relevance of issues not yet raised. Mem. at 3 *citing* Hawai’i Administrative Rule § 13-1-29.1

What PUEO seeks is an autocratic determination by the Hearing Officer to exclude issues prior to those issues being raised or briefed or addressed through evidence and argument.

This argument for non-existent legal authority is so far beyond even a colorable legal argument that the motion could be subject to sanctions as frivolous, if filed in a court. Cf. Federal Rules of Civil Procedure, Rule 11.

PUEO attempts to convince the Hearing Officer to engage in prior restraint to prevent issues, that other intervenors have a due process right to raise, from being raised at all.

What PUEO seeks is to essentially reopen the process of objecting to a request to intervene in order to rule out issues those requests raised and possibly eliminate intervenors already admitted.

In the last contested case hearing and in various requests for intervention in this proceeding, claims related to ceded lands and sovereignty, among other things, have been asserted. To the extent that other parties may seek to introduce such issues or evidence supporting **solely** those unrelated issues or irrelevant evidence in this proceeding, PUEO respectfully requests that the Hearings Officer rule that such issues will not be heard and no evidence taken in this contested case hearing.

Mem. at 6 (emphasis in original).

The issue of granting or denying requests to intervene is already settled. No conditions were put on the grants of intervenor status in terms of the issues an intervenor could raise. What PUEO seeks now is to have the Hearing Officer retroactively reopen those requests and rule against any intervention seeking to raise issues that meet the vague test for exclusion proposed by PUEO.¹

The Hearing Officer has no such authority to reopen the grants of intervention status or set conditions as to what issues intervenors may raise.

¹ PUEO identifies the issues it objects to as “claims related to ceded lands and sovereignty, among other things” with no further detail. Mem. at 6 (emphasis added).

Certainly, if intervenors raise issues that are outside the jurisdiction of the Hearing Officer and/or irrelevant and immaterial, the Hearing Officer can so rule once the issue is actually before her.

As far as the issues that really disturb PUEO, i.e. sovereignty and contested land claims, PUEO offers a drive-by briefing that PUEO argues should settle the matter of their consideration.

While issues like ceded lands and sovereignty may be of great public importance, such issues are nonjusticiable political questions reserved to the executive branch. Consequently, the Board does not have the ability to provide relief on matters that are political questions, for which the Board does not have jurisdiction.

Mem. at 5 (citations omitted).

Based on this minimal briefing on issues not before the Hearing Officer, PUEO argues that the Hearing Officer can now rule out such issues being considered in this proceeding.

As PUEO should well be aware, the appointment to the position of Hearing Officer does not confer Napoleonic powers to arbitrarily and unilaterally set the agenda of what the parties and intervenors may raise as issues.

It is understandable that PUEO would be sensitive to issues being raised in this proceeding that are “irrelevant and inapposite to the matter at hand.” Mem. at 6. The basis for PUEO’s request to intervene would fail the very test PUEO seeks to now apply to others.

Nowhere in the eight criteria set forth for evaluating an application for a CDUA is there a criteria that calls for acknowledging or giving any weight to whether the proposed land use will “support the pursuit of educational

opportunities for children of Hawai'i." Memorandum in Support of Perpetuating Unique Educational Opportunities, Inc.'s Motion to Intervene, dated May 16, 2016 (hereinafter "Intervention Mem.") at 4; HAR § 13-5-30(c). There simply is nothing in the criteria that makes educational benefits of a particular land use relevant, material, or in any other way related to the issues raised by a CDUA.²

Having founded their motion to intervene on an extraneous issue, PUEO then claims that position as unique and warranting intervention status. Intervention Mem. at 4. The unique aspect of PUEO's position is the complete absence of any law or rule that would arguably give PUEO intervenor status in this proceeding based on such an irrelevant interest.

Other than encouraging educational opportunities for children, the only ground PUEO offered as a basis for being granted intervention status was that "PUEO's Board Members are native Hawai'ians" who "exercise customary and traditional native Hawai'ian rights on Mauna Kea." *Id.* Based on this status, PUEO claimed the right to intervene, comparing PUEO's status to the status of Public Access Shoreline Hawai'i (PASH) in earlier cases. *Ibid.* at 6-8 and cases cited therein.

Yet as PUEO notes, PASH sought to "preserve and protect public access to beaches and shorelines." *Ibid.*, note 1 (emphasis added).

PUEO does not seek to preserve and protect customary and traditional native Hawaiian rights and makes no such assertion. To the contrary, PUEO seeks to argue

² Even were criteria 8 to be read so broadly as to include educational opportunities within "the public health, safety, and welfare" clause, HAR § 13-5-30(c)(8), that criteria calls for evaluating whether the land use will be "materially detrimental" to those interests and says nothing about considering whether the land use is beneficial to those interests.

that such rights are totally compatible with the TMT. Ibid. at 9. (“PUEO’s native Hawai’ian beliefs in support of the TMT project”).

The motion to set issues filed by PUEO actually clarifies that PUEO should have been denied intervenor status.

The organization’s main position regarding the educational opportunities for children that TMT will create is outside any considerations defined by the laws and rules applicable to a CDUA and, therefore, irrelevant and immaterial.

PUEO’s interests are defined by the organization’s three purposes: (a) to share the interaction of Hawai’ian culture and science; (b) to research and educate the public on the interaction of Hawai’ian culture and science and to inspire exploration; and (c) to further educational opportunities for the children of Hawai’i in the fields of science, technology, engineering, and mathematics.”

Ibid. at 5.

These interests have nothing to do with the question of whether the construction of a large project in a conservation district is an appropriate use of conservation district lands.

The organization’s position that TMT is compatible with the native Hawaiian rights exercised by PUEO Board members means that those rights would not be adversely affected in any way should the CDUA be granted and, therefore, the native Hawaiian status of PUEO’s members provided no basis for an intervention. Certainly the Board of PUEO is not “directly and immediately affected by the requested action.” HAR § 13-1-31(b)(2).

The fact that five guys do not find the TMT proposal to adversely affect their native Hawai’ian rights is also irrelevant as to whether other native Hawai’ians are adversely affected. The PUEO five guys can speak only for themselves.

All the other intervenors appeared to contest the application. PUEO did not seek to contest anything; they appeared only as cheerleaders for the TMT.

While the error of admitting PUEO into this proceeding is apparent, that is not a matter for consideration at this point in the proceeding. As noted above, the intervention process is already concluded. PUEO's lack of qualifications to be an intervenor does, however, suggest any actions by PUEO imposing burdens on other parties to respond, such as the frivolous motion to set the issues be viewed with some skepticism.

As far as the identified issues that PUEO seeks to exclude, those issues are relevant and material to this case. For example, the issue of competing claims to the land in question is raised by the Notice of Absence of Necessary and Indispensible Parties (Hereinafter "Notice"), DOC-79. That Notice offers the Hearing Officer a basis for *sua sponte* raising the issue of her own jurisdiction based on the unresolved competing claims to the land at issue in this proceeding.

That inquiry does not require the Hearing Officer to determine the sovereignty over the land. For example, the Hearing Officer cannot rule that the Kingdom lacks a claim because such a ruling would be a finding as to the sovereignty issue, an issue outside the scope of the Hearing Officer's jurisdiction.

That does not mean that the Hearing Officer is barred from making a finding that the Kingdom still exists, whether recognized by the United States or not. The treaties, laws, and standards for establishing a government's existence can be applied to the relevant facts to determine whether the Kingdom meets the requirements as a matter of law.

If the Hearing Officer determined that the Kingdom still exists as a matter of law, then finding the possibility of a competing claim to the lands in question is also within the purview of the Hearing Officer. The implications of that finding for the question of Kingdom sovereignty can be left to the United States Executive Branch to address.

That level of inquiry may not be necessary. The inquiry is sufficient to raise a jurisdictional issue, if there is an unresolved question as to ownership of the land.

This case is about land use. If the Applicant for the use permit does not have an uncontested claim to the land, the Hearing Officer cannot recommend granting the permit without determining first whether she can resolve the contested claim or otherwise protect the interests of the competing claimants.

If there is even a question whether the Kingdom still exists, the United States grants that the Kingdom never relinquished its claims to its national lands, see e.g. Public Law 103-150: The Apology Resolution (“*Whereas*, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum”).

Just that acknowledgment of the history and current status of the Kingdom’s national lands raises a question regarding the Applicant’s right to use the land. The Applicant never asked permission of the Kingdom.

The Temple argues that the following questions can be answered by the Hearing Officer: (1) Does the Kingdom still exist as a matter of law? (2) If the Kingdom still exists, does the Kingdom arguably have some claim to the national

lands that belonged to the Kingdom prior to the overthrow? (3) Do the lands in question in this proceeding fall within the national lands that belonged to the Kingdom prior to the overthrow?

Answering these questions will assist the Hearing Officer in determining whether there is potentially a contested claim to the lands that the Applicant seeks to use pursuant to the permit application now pending before the Hearing Officer.

If resolving the contested claim requires the Hearing Officer to determine national sovereignty over the land, then the question is a political question that the Hearing Officer cannot resolve. The Hearing Officer's incapacity to decide that question precludes her recommending the granting of the permit application precisely because she cannot resolve the contested land claim issue and determine the right of the Applicant to apply for the permit or determine the rights of the Kingdom. Under those circumstances, the Hearing Officer must dismiss this case.

Similarly, the Notice argues that the mere existence of the unresolved land claims is a basis for dismissing this case because one of the claimants is the Kingdom of Hawai'i and the Kingdom is not subject to the jurisdiction of the Hearing Officer. With a claimant to the land being a necessary and indispensable party and beyond the jurisdiction of the Hearing Officer, the case must be dismissed. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); Notice DOC 79.

PUEO's motion fails because PUEO is asking the Hearing Officer to exercise a power she does not have to eliminate issues prior to those issues arising, to deny the due process rights of the intervenors to raise issues they consider relevant, and to eliminate issues that are within the jurisdiction of the Hearing Officer and relevant

and material to the decision the Hearing Officer is tasked with making regarding the CDUA.

In addition to seeking to “set the issues,” PUEO suggests that the Board request the Third Circuit Court to appoint a master or monitor to

assist the Board and/or the Hearing Officer in assuring that the issues to be determined in this contested case are correctly formulated and and [sic] the process for that determination is fairly conducted.

Issues Mem. at 6.

PUEO offers no reason to conclude that the Hearing Officer needs such assistance from a master or monitor to either formulate the issues in consultation with the parties or conduct a fair formulation process. The Hearing Officer is a retired judge with extensive experience.

Perhaps PUEO is seeking to insert a monitor or master to overcome any later challenge to the appointment of the Hearing Officer; see e.g. DOCs 5, 8, 13, 15, 31, 43, and 63; such that any error made by that appointment is harmless because the master or monitor somehow provides an independent validation to the rulings of the Hearing Officer.

Whatever the undisclosed reason, the Temple sees no merit to the suggestion that there is a need for a master or monitor to be appointed.

DATED: July 20, 2016

Respectfully submitted,

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

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com

Lay representative for Temple of Lono

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 Opposition to PUEO Motion to Set the Issues was served on the following parties by eMail:

"Judge Riki May Amano (Ret.)" <rma3cc@yahoo.com>, "Julie China Deputy Attorney General Land and Transportation Division" <julie.h.china@hawaii.gov>, "Michael Cain" <michael.cain@hawaii.gov>, "Ian Sandison" <isandison@carlsmith.com>, "Richard N. Wurdeman" <RNWurdeman@RNWLaw.com>, "Watanabe Ing LLP" <rshinyama@wik.com>, "Harry Fergerstrom" <hankhawaiian@yahoo.com>, "Richard L DeLeon" <kekaukike@msn.com>, "Mehana Kihoi" <uhiwai@live.com>, "C. M. Kaho'okahi Kanuha" <kahookahi@gmail.com>, "Joseph Kualii Lindsey Camara" <kualiic@hotmail.com>, "Lincoln S. T. Ashida" <lsa@torkildson.com>, "Jennifer Leina'ala Sleightholm" <leina.ala.s808@gmail.com>, "Maelani Lee" <maelanilee@yahoo.com>, "Lanny Alan Sinkin" <lanny.sinkin@gmail.com>, "Kalikolehua Kanaele" <akulele@yahoo.com>, "Stephanie-Malia:Tabbada" <s.tabbada@hawaiiantel.net>, "Tiffnie Kakalia" <tiffniekakalia@gmail.com>, "Glen Kila" <makakila@gmail.com>, "Brannon Kamahana Kealoha" <brannonk@hawaii.edu>, "Cindy Freitas" <hanahanai@hawaii.rr.com>, "William Freitas" <pohaku7@yahoo.com>

Dated: July 20, 2016

_____/s/_____
Lanny Alan Sinkin

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com

Lay representative for Temple of Lono

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 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 Opposition to PUEO Motion to Set Issues was served on the following parties by first class mail:

Riki May Amano
1003 Bishop Street
Suite 1155, Pauahi Tower
Honolulu, Hawai'i 96813
rma3cc@yahoo.com

Hearing Officer

Michael Cain, Custodian of Records
Office of Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813
Michael.cain@hawaii.gov

Harry Fergerstrom
P.O. Box 951
Kurtistown, Hawaii 96760

Stephanie-Malia:Tabbada
P O Box 194,
Naalehu, Hawaii 96772

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

Dated: July 21, 2016

_____/s/_____
Lanny Alan Sinkin