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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 Permit (CDUP) (HA-3568 for) **TEMPLE OF LONO MOTION**
The Thirty Meter Telescope at the Mauna) **FOR RECONSIDERATION;**
Kea Science Reserve, Kaohe Mauka,) **MEMORANDUM IN SUPPORT;**
Hamakua District, Island of Hawai'i,) **CERTIFICATE OF SERVICE**
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION FOR RECONSIDERATION

Now comes the Temple of Lono pursuant to Hawaii Administrative Rules § 13-1-39 and moves the Hearing Officer to reconsider the ruling pronounced orally at the pre-hearing conference in which the Hearing Officer said "The status of the State of Hawaii will not be an issue in this contested case hearing."

This motion is supported by the accompanying Memorandum.

Dated: August 7, 2016, Kurtistown, Hawai'i, Kingdom of Hawai'i

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

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FOR THE STATE OF HAWAI'I

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

I. INTRODUCTION

On August 5, the Hearing Officer convened a pre-hearing conference.

In the course of that conference, the Hearing Officer addressed various motions that raised issues concerning the continued existence of the Kingdom of Hawai'i and the implications of that continued existence for the status of the State of Hawai'i and the jurisdiction of the Hearing Officer.

At one point in the proceeding, without notice of her intent to do so or opportunity for the parties to respond to such an intent, the Hearing Officer ruled broadly that "the status of the State of Hawaii will not be an issue in this contested case hearing."

There is a motion “to set issues,” DOC-99, scheduled for hearing later which argues for the exclusion of certain issues from this proceeding, including issues related to the status of the State of Hawaii.

The Temple of Lono urges reconsideration and vacating of the ruling issued in the August 5 pre-hearing conference, leaving that issue open for the next pre-hearing conference where the issue can appropriately be addressed by all parties.

II. ARGUMENT

A. The Hearing Officer’s ruling is premature and violates the Due Process rights of parties.

One of the motions that did not get argued at the August 5 pre-hearing conference was DOC-99. That motion by PUEO seeks a ruling from the Hearing Officer that any discussion of sovereignty and the “ceded” lands be excluded from the issues to be heard in the contested case.

The PUEO motion is scheduled for hearing on August 12.

The Hearing Officer has thus repeated the pattern that permeates this proceeding – rulings made before all parties have an opportunity to be heard.¹

The Temple of Lono is among the parties filing objections to the PUEO Motion, DOC-119, that the Hearing Officer has now granted in part prior to a motions hearing.

¹ Those rulings include the granting of the permit prior to the holding of a contested case, see *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai’i 376, 363 P.3d 224 (2015); the Board Chair selecting a hearing officer prior to the Board deciding whether to assign the contested case to a hearing officer, see e.g. DOC-13 at 6; the Board contracting with the Hearing Officer before taking public comments on the proposed appointment, see DOC-130 at 3-4; and the Board denying Mr. Vicente’s Motion prior to the time set by the Hearing Officer for responses to the motion expiring. DOC-124; see DOC-127.

The Temple explicitly objected to the attempt by PUEO to exclude the issues related to the Kingdom. Id.

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?

Ibid. (Memorandum at 8-9).²

² TMT challenges the right of the Temple to raise the sovereignty issues by falsely stating:

Notably, however, ToL's Motion to Intervene does not discuss or even mention sovereignty or the Kingdom of Hawaii. ToL therefore did not seek through its Motion to Intervene to present issues relating to sovereignty or the Kingdom of Hawai'i.

DOC-152 at 4, n.3.

Setting aside the erroneous legal assertion that an intervenor is less than a full party and can only raise issues included in the intervenor's initial petition, the statement regarding the Temple's intervention motion is factually incorrect.

In its Motion to Intervene, the Temple stated:

The failure of the occupying power and even our own people to recognize the traditional faith of our people calls for a reconciliation. That reconciliation includes the recognition of **the key role that the Pu'uhonua played in establishing the jurisdiction of the Kingdom.**

Watching the Hawaiian landscape, the **Temple of Lono witnessed various people stepping forward to reclaim the position of King or Queen.** One measure of the validity of such a claim would be their relationship with the Pu'uhonua.

Only one embraced that relationship by acknowledging that the King's kuleana is based on the foundation of the Pu'uhonua. **King Edmund Keli'i Silva, Jr. claimed his rightful position as protector and sovereign over the Pu'uhonua O Honaunau.** The King put the issue of restoring the sacred land base directly before the National Park Service.

The King announced his intention to enter the Pu'uhonua and remain there for an extended period to engage in spiritual practice, seek reconciliation, and confirm his claim to the spiritual land base.

The response was to threaten to arrest the King should he over stay the time period the National Park Service would allow him to enter and remain on the Pu'uhonua.

The Temple argued that consideration of those issues would be germane to the Hearing Officer determining whether the Kingdom had a competing claim to the land that the State of Hawaii, through subordinate institutions, seeks to lease to a private, foreign corporation. Ibid. at 9.

The continued existence of the Kingdom may indeed have implications for the status of the State of Hawaii. The ruling by the Hearing Officer would seem to foreclose the Kingdom issues being considered because such consideration might raise questions about the status of the State of Hawaii.

The premature ruling by the Hearing Officer partially determining the issues to be heard in this proceeding denies interested parties the opportunity to argue for a different result at the pre-hearing conference to be held on August 12.

The ruling by the Hearing Officer also misconstrues the United States judicial process. The basis for the ruling appears to have been that previous courts have decided the issues being raised regarding the status of the State of Hawaii.

There are two problems with that approach.

First, the law in the United States is a living thing – it changes over time.

The foundation of the faith in the Pu'uhonua reaches to the heights of Mauna Kea. From the sustenance of food provided by the Pu'uhonua to the realm of the Gods on Mauna Kea, the faith encompassed all.

When the time is right, the King, supported by the Temple of Lono and others who recognize the need to reconcile the religious schism created within the Hawaiian community by the teachings of the missionaries, will enter and reclaim the Pu'uhonua. On that day, a great step forward will take place in renewing the civilization that once provided an example of wise stewardship of our Earthly Garden.

DOC-50, Exhibit C to Declaration of Frank Kamehameha Tamealoha Anuumealani Nobriga at 2-3 (emphasis added).

Once the United States Supreme Court ruled that African Americans, whether free or enslaved, could not be citizens and could not be given standing in federal court. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Later came the Fourteenth Amendment to the Constitution to overturn that precedent.

Once African-Americans could be assigned to segregated schools. The Supreme Court changed the law. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

Once the President of the United States issued an executive order sending Japanese Americans to concentration camps. Executive Order 9066; F.R. Doc. 42-1563; Filed, February 21, 1942; 12:51 p.m. The order was later repealed.

Once women were not allowed to vote. Then came the Nineteenth Amendment to the Constitution granting that right.

Once gay people could not legally marry. The Supreme Court changed the law. *Obergefell v. Hodges*, 576 U. S. ____ (2015).

Once the Kingdom of Hawai'i was illegally seized by the United States of America. While that injustice has yet to be corrected, the precedents of other injustices later corrected offers hope to the Hawaiian people.

Denying that the law could change denies that hope and incorrectly encases United States law in a deep freeze.

Second, the basis for arguing a change in the law would be that new facts and arguments have emerged that were never previously considered by the Judicial or Executive Branch. Those facts and arguments can only be placed in the record if

those who intend to argue for a change in the law are given an opportunity to create that record.

While the Hearing Officer may ultimately rule that she does not have the authority to change the law, she cannot foreclose the parties from developing the record supporting that change being made by an appellate level court.

There is a third problem with the absolute denial of consideration for broadly stated issues, i.e. status of the State of Hawaii, sovereignty and ceded lands. There may be issues within those issues that are relevant to the question of whether the permit in this proceeding should be or can be approved.

For example, the Hearing Officer cannot determine whether the Kingdom of Hawai'i Government should be recognized by the United States. That is a political question that is reserved to the Executive Branch.

The Hearing Officer can, however, make a factual finding that the actions of the Kingdom Government offered in evidence constitute a sufficient basis for finding that the Kingdom Government does have the attributes of statehood required by international law, treaties, and cases to be recognized as a state, again without addressing the question whether the United States should give diplomatic recognition to that state.

The Hearing Officer can make findings regarding the legitimacy of the annexation resolution, an issue that has not been ruled upon by the courts previously and which the Executive Branch now evades discussing. DOC-132 at 8-10.

If the Hearing Officer were to find that the Kingdom Government qualifies as a state, although not recognized by the United States, and/or found that the annexation of the Kingdom was legally ineffective, the Hearing Officer could find that the Kingdom arguably has a claim to the lands at issue in this proceeding or could find that the Kingdom does not have an arguable claim to the lands or could find that the Kingdom might have a claim that the Hearing Officer cannot resolve. However the Hearing Officer decided the issue, the issue would have been addressed and a record on appeal developed.

Those who seek to change the law could then build on the foundation of the record on these issues to make their arguments at the appellate level. To foreclose the creation of such a record would violate the Due Process rights of those who seek to change the law.

III. CONCLUSION

The ruling by the Hearing Officer that the status of the State of Hawai'i will not be an issue in this proceeding partially preempts the consideration of the PUEO motion to be heard on August 12 and appears to foreclose the ability of the parties to build the record necessary for arguing a change in the law.

For the above and foregoing reasons, the Temple moves the Hearing Officer to vacate the pre-hearing conference ruling and proceed to consider the issues raised in the hearing on the PUEO motion without predetermination.

Dated: August 7, 2016, Kurtistown, Hawai'i, Kingdom of Hawai'i

Respectfully submitted,
_____/s/_____
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TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the Temple of Lono Motion for Reconsideration and Memorandum in Support was served on the following parties by eMail:

"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: August 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the Temple of Lono Motion for Reconsideration and Memorandum in Support was served on the following parties by first class mail:

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Dated: August 8, 2016

_____/s/_____
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