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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) **TEMPLE OF LONO RESPONSE TO**
The Thirty Meter Telescope at the Mauna) **[PROPOSED] MINUTE ORDER NO. ____**
Kea Science Reserve, Kaohe Mauka,) **DENYING TEMPLE OF LONO MOTION**
Hamakua District, Island of Hawai'i,) **FOR PARTIAL SUMMARY JUDGMENT**
TMK (3) 4-4-015:009) **[DOC-78] [DOC-315]; EXHIBIT 1; COS**
_____)

TEMPLE OF LONO RESPONSE TO [PROPOSED] MINUTE ORDER NO. ____
DENYING TEMPLE OF LONO MOTION FOR PARTIAL SUMMARY JUDGMENT
[DOC-78] [DOC-315]

The proposed order gives three reasons that the motion should be denied.

The first reason is that the relief requested would

“violate the establishment clause of both the U.S. and Hawai'i Constitutions because it would require the Hearing Officer to recognize a religious servitude over the summit area of Mauna Kea.

Proposed Order at 3.

The question of whether a particular area, building, or other site is considered sacred by a particular religion is a factual matter. Finding that a religion does consider an area sacred does not establish some “religious servitude” of that site. The overblown argument presented by the proposed order exaggerates a simple question – Is the summit of Mauna Kea held sacred by the traditional Hawaiian faith? If answering that question in the affirmative has implications for

the telescope, that does not make the answer any less true.

The second reason the proposed order would have the Hearing Officer adopt as a basis for denying the motion is that the claim “that the summit of Mauna a Wākea is a sacred site of special significance to the traditional Hawaiian faith” and that “the traditional Hawaiian faith is still practiced” are “unsupportable by admissible evidence.”

The evidence that the order would have the Hearing Officer declare to be inadmissible is the presentation on the Applicant’s website that specifically states that the summit is an especially sacred site. DOC-78 at 3. That presentation in the context of this motion is an admission against interest.

The Hearing Officer does not have to rely upon that presentation to conclude the summit of Mauna a Wākea is an especially sacred place. The Supreme Court has already acknowledged the summit as sacred.

Rising to a majestic 13,796 feet above sea level, Mauna Kea, the highest mountain peak in the Hawaiian Islands, is of profound importance in Hawaiian culture. The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.

Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 363 P.3d 224, 248 (2015) (Justice Pollack concurring).

The Supreme Court has also noted that the Board of Land and Natural Resources is on notice of the “spiritual nature of Mauna Kea.”

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised in the project area and was aware of the project’s potential adverse impact on the “spiritual nature of Mauna Kea” and the “cultural beliefs and practices of many.”

Ibid at 251 (2015).

Based on the rulings in this case by the Supreme Court and on the admission by the Applicant, there is clearly admissible evidence to support the Temple's claim that the summit of Mauna a Wākea is an especially sacred site and a basis for the Hearing Officer to find that there is no genuine issue regarding the sacredness of the summit of Mauna a Wākea.

The other evidence that the order would have the Hearing Officer declare to be inadmissible is the Declaration Frank Tamehameha Kamealoha Anuumealani Nobriga, Kahuna of the Temple of Lono, and the exhibits to his declaration. There is ample evidence in those documents that the Kahuna is precisely who he says he is and that the traditional Hawaiian faith is still practiced. That evidence is also sufficient to support a finding by the Hearing Officer that there is no genuine issue of fact regarding the question whether the traditional Hawaiian faith is still practiced.

The third reason that the order would have the Hearing Officer adopt as a basis for denying the motion is that "summary judgment is an improper mechanism to determine factual issues."

This basis flies in the face of the definition of when a summary judgment motion is appropriate.

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fujimoto v. Au, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001)(citing *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Hawai'i 650,843 P.2d 144 (1992) (emphasis added).

Pursuant to Rule 56(a) of the Hawai'i Rules of Civil Procedure, a party seeking "to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." (emphasis added).

There is no genuine issue of fact regarding the summit of Mauna a Wākea being an especially sacred site or regarding the fact that the traditional Hawaiian faith is still practiced.

The Temple considers the two factual determinations sought to be a foundation for reaching a conclusion about this entire case. See Temple of Lono Motion for Summary Judgment (Desecration). DOC-264.¹

Given the false nature of the reasons offered by the Applicant for denial, the Hearing Officer would be better served by reversing the earlier ruling and granting the Temple's motion. See Exhibit 1.

Dated: October 7, 2016

_____/S/_____
Lanny Alan Sinkin
Lay representative for the Temple of Lono

¹ The Hearing Officer could merge the two motions and reach the ultimate issue raised by the summary judgment sought on the issue of desecration.

EXHIBIT 1

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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) **TEMPLE OF LONO PROPOSED**
District Use Permit (CDUP) (HA-3568 for) **ALTERNATIVE MINUTE ORDER**
) **NO. ____ GRANTING TEMPLE OF**
) **LONO MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT[DOC-78];**
The Thirty Meter Telescope at the Mauna) **COS**
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO PROPOSED ALTERNATIVE MINUTE ORDER NO. ____
GRANTING TEMPLE OF LONO MOTION FOR PARTIAL SUMMARY
JUDGMENT [DOC-78]

On June 21, 2016, the Temple of Lono filed its Motion for Partial Summary Judgment. DOC-78.

On August 1, 2016, the Applicant filed its Opposition to Temple of Lono Motion for Partial Summary Judgment. DOC-135.

On August 3, 2016, the Temple of Lono filed its Reply to the University of Hawaii at Hilo's opposition to Temple of Lono's motion for partial summary judgement. DOC-176.

On August 5, 2016, at a pre-hearing conference, the Hearing Officer orally denied the Temple Motion for Partial Summary Judgment.

Considering the entire record and upon further reflection, the Hearing Officer

herein reverses that decision and grants the motion.

IT IS HEREBY ORDERED that the motion is GRANTED for the following reasons:

Pursuant to Rule 56(a) of the Hawai'i Rules of Civil Procedure, a party seeking "to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." (emphasis added).

What the Temple seeks is a preliminary determination of two facts that will form the basis for a subsequent motion for summary judgment on a Temple claim.¹

The first fact is that the summit of Mauna Kea is sacred to the traditional Hawaiian faith.

The second fact is that the traditional Hawaiian faith is still practiced.

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fujimoto v. Au, 95 Hawai'i 116, 136, 19 P.3d 699, 719 (2001)(citing *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Hawai'i 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Hawai'i 650,843 P.2d 144 (1992).

In its motion, the Temple cites the website maintained by the Imiloa Astronomy Center, which is part of the Applicant's institution. Doc-78 at 2-3. That website acknowledges that the summit of Mauna Kea is a "sacred site" and

¹ The Temple did subsequently file such a motion. DOC-264.

considered a “realm of the Gods” where Human intrusion was rare. Ibid. at 3.

While the Temple is essentially arguing that this acknowledgment by the Applicants is an admission against interest that removes any genuine issue of fact as to the sacredness of the summit, such an argument is unnecessary. The Supreme Court has already acknowledged the summit as sacred.

Rising to a majestic 13,796 feet above sea level, Mauna Kea, the highest mountain peak in the Hawaiian Islands, is of profound importance in Hawaiian culture. The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.

Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 363 P.3d 224, 248 (2015) (Justice Pollack concurring).

The Supreme Court has also noted that the Board of Land and Natural Resources is on notice of the “spiritual nature of Mauna Kea.”

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised in the project area and was aware of the project’s potential adverse impact on the “spiritual nature of Mauna Kea” and the “cultural beliefs and practices of many.”

Ibid at 251 (2015).

Based on the ruling in this case by the Supreme Court and on the admission by the Applicant, the Hearing Officer finds that there is no genuine issue regarding the sacredness of the summit of Mauna Kea.

The Temple’s second factual issue is the continued existence of the traditional Hawaiian faith. The Temple seeks to correct what it considers an error in the Applicant’s website that portrays the traditional Hawaiian faith as no longer practiced in a reference that states: “The summit of Maunakea was considered a *wao akua* or ‘realm of the Gods.’” (emphasis added).

The presence of the Kahuna of the Temple of Lono as a party in this proceeding and his submissions, particularly DOC-78, Declaration of Frank Tamehameha Kamehaloha Anuumealani Nobriga, Kahuna of the Temple of Lono, accompanied by Exhibits A-C, demonstrate that the traditional faith practice of the Hawaiian civilization is alive and well.

Again, the Temple's position is supported by the Supreme Court's ruling in this case that included:

The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.

Mauna Kea Anaina Hou, supra. at 248.

Based on the rulings in this case by the Supreme Court and on the active participation of a Kahuna of the traditional Hawaiian faith in this contested case, the Hearing Officer finds that there is no genuine issue regarding the continued existence of the traditional Hawaiian faith.

The deadline for submission of any motion to reconsider this minute order shall be submitted no later than **Thursday, October 13, 2016 at 4:30 p.m.** Any **responses to motions to reconsider** shall be submitted no later than **Friday, October 14, 2016 at 4:30 p.m.**

Any motions to reconsider this Minute Order shall be treated as a non-hearing motion unless otherwise ordered by this Hearing Officer.

DATED: _____

Judge Riki May Amano (Ret.)
Hearing Officer

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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) **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 RESPONSE TO [PROPOSED] MINUTE ORDER NO. _____ DENYING TEMPLE OF LONO MOTION FOR PARTIAL SUMMARY JUDGMENT [DOC-78] [DOC-315], Exhibit 1** was served on the following parties by eMail on October 7, 2016:

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and first class mail on October 7, 2016:

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Honolulu, Hawai'i 96813

Dated: October 7, 2016

_____/s/_____
Lanny Alan Sinkin