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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) **TEMPLE OF LONO**  
District Use Permit (CDUP) (HA-3568 for ) **SECOND SUPPLEMENT TO**  
The Thirty Meter Telescope at the Mauna ) **PETITIONERS MAUNA KEA ANAINA**  
Kea Science Reserve, Kaohe Mauka, ) **HOU ET AL.'S RENEWED MOTION**  
Hamakua District, Island of Hawai'i, ) **TO DISQUALIFY HEARING OFFICER;**  
TMK (3) 4-4-015:009 ) **COS**  
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**TEMPLE OF LONO SECOND SUPPLEMENT TO PETITIONERS MAUNA KEA  
ANAINA HOU ET AL'S RENEWED MOTION  
TO DISQUALIFY HEARING OFFICER**

On October 10, 2016, Petitioners Mauna Kea Anaina Hou, et al. (Petitioners) filed their Renewed Motion to Disqualify Hearing Officer.

Also on October 10, 2016, the Temple of Lono filed its joinder in support of the Petitioners' recusal motion and the Temple's supplement to that motion (Temple Joinder).

The Temple herein provides its second supplement to the Petitioners' motion.

**The Disqualification Issue**

In its first supplement, the Temple focused on the Hearing Officer repeatedly denying the Temple any opportunity to be heard on the issue of whether the libelous and bigoted attack by the Applicant on the Temple supported a finding that

the Applicant is disqualified from receiving the permit sought in this proceeding. Temple Joinder at 1-4.

On October 3, 2016, the Hearing Officer ordered that the prevailing party on all the motions ruled upon orally and for which a written ruling had not yet been issued prepare a proposed order for each ruling. DOC-345, note 1.

Those orders were due on October 5, 2016 before 4:30 p.m. Id.

Responses to those orders were due on October 7, 2016 before 4:30 p.m. Id.

At the October 3 5<sup>th</sup> pre-hearing conference, the Hearing Officer scheduled herself to issue the orders on October 10, 2016.<sup>1</sup>

On October 5, Applicant filed its proposed order denying the Temple of Lono's Motion to File Motion out of Time. Doc-318.

On October 7, the Temple filed its response to the proposed order. DOC-336.

On October 10, 2016, as per the schedule, the Hearing Officer issued a series of orders based on the proposed orders. DOC-344 through DOC-350. Those orders did not include an order denying the Temple's motion to file out of time.

The absence of this order is simply one more attempt by the Hearing Officer to protect the Applicant from the consequences of their attack on the Temple. The denial of the Temple's request to file a motion out of time constituted an obvious and indefensible abuse of discretion on the part of the Hearing Officer. Rather than even try to justify that denial, the Hearing Officer just skipped issuing that order.

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<sup>1</sup> No minute order has yet been issued. The Hearing Officer has repeatedly refused to make the transcripts available for review by all parties, so those parties that cannot afford transcripts, such as the Temple, cannot cite to or provide copies of the relevant pages to support pleadings such as this one.

The Hearing Officer provided two days to file motions to reconsider the orders that the Hearing Officer was supposedly going to issue on October 10. The failure of the Hearing Officer to issue orders on two out of three proposed orders affecting the Temple denied the Temple the time allotted for filing such motions – yet one more violation of the Temple’s due process rights.

The Temple notes that the Temple is the only party filing a responsive pleading to a proposed order on October 7, 2016. See DOC-328 through DOC 337.

There are three Temple responses. DOC-334 thorough DOC-336.

The Hearing Officer chose to respond to only one. DOC-346.<sup>2</sup>

### **Failure to Perform**

The fact that the Hearing Officer allowed rulings to pile up with no written orders is just one example of a general failure to perform.<sup>3</sup> Among the orders piled up was the Temple’s motion for partial summary judgment filed on June 21, 2016. DOC-78. The Hearing Officer issued the written order on October 10, 2016. DOC-356. The Hearing Officer failed for almost four months to prepare an order on a relatively simple matter. DOC-356.

When the Hearing Officer did issue orders, some of those orders were legally deficient in not providing a reasoned explanations for the ruling. See DOC-286.

The Hearing Officer issued minute orders related to pre-hearing matters well

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<sup>2</sup> The other proposed order for which the Hearing Officer did not issue an order addresses issues related to the Kingdom; DOC-310, DOC-335; another issue that the Hearing Officer does not want to deal with. DOC-281 at 5.

<sup>3</sup> The fact that the Hearing Officer did not address such orders until the intervenors were burdened with a very expedited schedule to prepare for the Contested Case Hearing is another indicia of bias against the intervenors.

after the pre-hearing conferences took place,<sup>4</sup> See e.g. DOC-344 (Minute Order 21 re Pre-Hearing Conference on August 29 issued on October 10).

The Hearing Officers left some matters without being scheduled at all. See DOC-324.

### **Burdensome Scheduling**

There is no reason to rush this proceeding, other than the threats by the TMT to go somewhere else if the permit is not promptly reissued.

Nevertheless, the Hearing Officer is driving the proceedings as if there is some valid urgency.

For some time, the Hearing Officer did express a wish to begin the Contested Case Hearing in October. That wish never had a date attached until September 20, 2016. DOC-276.<sup>5</sup>

At the pre-hearing conference on October 3, 2016, Mr. Wurdeman, representing parties, who has served as counsel to parties who intervened at the very beginning of this proceeding years ago, objected to the scheduling of the Contested Case Hearing in October based on his having agreed to numerous other hearings, trips, and similar obligations the involved judges, witnesses, attorneys,

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<sup>4</sup> The delayed minute orders made intervenor access to the transcripts of those pre-hearing conferences even more important and the refusal of the Hearing Officer to arrange such access even more burdensome.

<sup>5</sup> Even the handling of that scheduling order added to the burden on intervenors. The order was not served by email, as every other document entered into the record has been. Instead, the notice of an advertisement having been placed was added to the Document Library and notices were sent by registered mail. Had the order been served by email, all parties would have been on notice immediately of that scheduling decision.

and others during the month of October. He stated that many of those commitments were made months before. He also pointed out that he had submitted what he considered a reasonable schedule based on the prior contested case hearing.<sup>6</sup>

The Hearing Officer essentially ignored Mr. Wurdeman's objections and proceeded to set a pre-hearing conference and four days of hearings in October, as if the TMT proceeding is more important than any other proceeding now going on.

Mr. Wurdeman then withdrew as counsel. Notice of Withdrawal of Counsel dated October 10, 2016.

The Hearing Officer drove Mr. Wurdeman out of this proceeding with abusive scheduling. That abuse seriously prejudices his prior clients on the eve of the Contested Case Hearing.

That other intervenors contesting the permit, particularly those with no counsel, have also been prejudicially burdened by the Hearing Officer's abusive scheduling.

For the above and foregoing reasons and for the reasons provided by the Petitioners' motion and the Temple's initial joinder and supplement, the Hearing Officer should promptly remove herself or the Board should remove her.

The damage is beyond salvation and must be addressed before all parties waste their time in a hearing that is so obviously tainted.

Dated: October 10, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin  
Lay representative for Temple of Lono

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<sup>6</sup> The record of Mr. Wurdeman's objection is available in the transcript to which the Temple does not have access.

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IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
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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 SECOND SUPPLEMENT TO PETITIONERS MAUNA KEA ANAINA HOU ET AL'S RENEWED MOTION TO DISQUALITY HEARING OFFICER** were served on the following parties by eMail on October 11, 2016:

Michael Cain <michael.cain@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, cordylinecolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <'douging@wik.com'>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <'lsa@torkildson.com'>, njc@torkildson.com <'njc@torkildson.com'>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <'akulele@yahoo.com'>, s.tabbada@hawaiiantel.net <'s.tabbada@hawaiiantel.net'>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <'hanahanai@hawaii.rr.com'>, pohaku7@yahoo.com <'pohaku7@yahoo.com'>, Ivy McIntosh

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served on October 10, 2016 on the following party by Fex Ex with jump drive:

and will be served by first class mail on October 12, 2016:

1. Dwight J. Vicente  
2608 Ainaola Drive  
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2. Harry Fergerstrom  
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3. Michael Cain, Custodian of Records  
Conservation and Coastal Lands  
1151 Punchbowl, Room 131  
Honolulu, Hawai'i 96813

Dated: October 11, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin