

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) **TEMPLE OF LONO MOTION TO**
The Thirty Meter Telescope at the Mauna) **STRIKE UNIVERSITY OF HAWAI'I AT**
) **HILO'S OPPOSITION TO TEMPLE OF**
) **LONO'S MOTION FOR SUMMARY**
) **JUDGMENT (DISQUALIFICATION)**
) **FILED SEPTEMBER 17, 2016 [DOC-**
Kea Science Reserve, Kaohe Mauka,) **263]; MEMORANDUM; COS**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MOTION TO STRIKE UNIVERSITY OF HAWAI'I AT HILO'S
OPPOSITION TO TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT
(DISQUALIFICATION) FILED SEPTEMBER 17, 2016 [DOC-263]**

Perhaps seeing the Hearing Officer take it personally that the Temple considers the Hearing Officer to be biased against the Temple and favoring the telescope, the University decided to raise the whole matter again, despite the absence of any right to do so, in hopes of gaining some advantage with the Hearing Officer.

The Temple has no choice about protecting what it perceives to be its rights as a party.

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On September 17, 2016, the Temple of Lono filed its Motion for Summary Judgment (Disqualification) [DOC-263].

On December 30, 2016, the University of Hawai'i at Hilo filed its opposition to the Temple's motion.

The Temple herein moves to strike the University's opposition.

DATED: Kurtistown, Hawai'i, December 30, 2016

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

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Hilo, Hawai'i 96721
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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 MEMORANDUM**
District Use Permit (CDUP) (HA-3568 for) **IN SUPPORT OF MOTION TO**
The Thirty Meter Telescope at the Mauna) **STRIKE UNIVERSITY OF HAWAI'I AT**
) **HILO'S OPPOSITION TO TEMPLE OF**
) **LONO'S MOTION FOR SUMMARY**
) **JUDGMENT (DISQUALIFICATION)**
) **FILED SEPTEMBER 17, 2016 [DOC-**
Kea Science Reserve, Kaohe Mauka,) **263]; COS**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF MOTION TO STRIKE
UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S
MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION) FILED SEPTEMBER
17, 2016 [DOC-263]**

I. INTRODUCTION

On September 17, 2016, the Temple of Lono filed its Motion for Summary Judgment (Disqualification) [DOC-263].

On December 30, 2016, the University of Hawai'i at Hilo filed its opposition to the Temple's motion ("Opp.")

The Temple herein moves to strike the University's opposition.

II. ARGUMENT

A. The University Motion is filed in violation of the administrative rules.

Hawaii Administrative Rules ¶13-1-34 Motions states:

(a) ... The presiding officer shall set the time for filing all motions **and opposing memorandum.**"

(emphasis added)

At no time since the filing of the Temple's motion for summary judgment, DOC-263, has the presiding officer ever set a time for the filing of a memorandum in opposition to that motion.¹

With no time set for the filing of an opposition, the University's opposition is filed without proper leave and, therefore, premature. The opposition should be struck.

B. Alternatively, the University delay in filing its opposition is tantamount to a default

If there is somehow the presumption that an opposition could be filed without permission of the hearing officer, then surely waiting more than three months to file such an opposition is tantamount to defaulting. Hawaii

Administrative Rules ¶13-1-34 Motions. states:

(c) Failure to serve or file ... [a] **memorandum in opposition to a motion** ... shall be deemed a **waiver of objection** to the granting or denial of the motion.

(emphasis added)

C. As the opposition motion is improperly before the Hearing Officer, the arguments presented unfairly prejudice the Temple, requiring response.

In filing an opposition in violation of the administrative rules, the University has placed numerous arguments before the Hearing Officer without authorization.

¹ This failure on the part of the presiding officer is replicated numerous times. See e.g. DOC 324 and 371. The refusal of the presiding officer to take up motions filed by the Temple is evidence of bias against the Temple and has reduced the Temple to second-class status as a party.

To protect its rights, the Temple files its responses to those arguments.

D. The Temple's previous attempts to have the disqualification issue heard are not a basis for dismissing the motion at issue.

The Temple did indeed repeatedly attempt to be heard on the issue of disqualification to exhaust all possible avenues for remedy.² When the hearing officer steadfastly protected the University from being held accountable for its attack, the Temple eventually filed an appeal directly with the Supreme Court. SCOT-16-0000804, which the Court denied on jurisdictional grounds. *Ibid.*, Order Dismissing Appeal for Lack of Appellate Jurisdiction dated December 20, 2016.

The Temple never successfully had an opportunity to be heard on the merits of its disqualification argument. Consequently, the Hearing Officer never ruled on the merits of the Temple's disqualification argument.

The University agrees. Opp. at 4 ("the Temple's accusations of bigotry and libel were not – and have never been – properly before the Hearing Officer.")

The University now attempts to use this remarkable failure on the part of the Hearing Officer to justify dismissing the Temple's Motion for Summary Judgment (Disqualification).

Such a dismissal would simply continue the Hearing Officer's obstruction of the Temple's attempt to get justice.

² See DOC-262 (Motion to Recuse Hearing Officer for refusing to allow Temple to be heard on disqualification issue); DOC-265 (Temple identification of hearing issues to include "Has the Applicant demonstrated a hostility toward the traditional Hawaiian faith that disqualifies the Applicant from receiving the permit requested?"); DOC-286 (Temple motion seeking reasoned explanation for excluding the disqualification issue from issues to be heard); DOC-324 (Temple Motion to schedule pending motions being ignored by Hearing Officer, including motions related to disqualification issue); DOC-371 (Temple identification of unresolved matters, including motions related to disqualification issue)

E. The University misdirects to Hearing Officer's attention to argue for dismissal.

The University attempts to make the issue whether the University attack on the Temple legally constituted libel. Opp. at 5-6.

The issue is not libel or bigotry. The question is not whether the University libeled the Temple. The issue is disqualification. As the Temple explicitly stated:

While the Temple considers the libel to be irrelevant, false, and motivated by malice, it is the content of the libel, not that act of libel, that is the focus of this motion.

DOC-179, Exhibit 2, Memorandum at 1, note 1.

When the Temple uses the terms libelous and bigoted attack, the key word in that phrase for this proceeding is attack. It is the fact that the University attacked the Temple and the nature of that attack that merits disqualification, whether the attack is characterized as libelous or bigoted or not.

The question before the Hearing Officer is whether the Applicant is qualified to be granted a permit. Whether the attack rose to the level of libel or defamation is a secondary issue that is not determinative of whether the attack is disqualifying. While the attorney may claim to be absolutely privileged to defame the Temple, Opp. at 6, that argument is irrelevant. The Temple is not seeking any sanctions against the attorney. Nor has the Temple filed suit against the attorney or the University for libel. It is the University that is seeking the permit that is responsible for the attack on the Temple. It is disqualification of the University that the Temple seeks.³

³ The attorney signing the attack is now claiming immunity from the consequences of his actions based on a litigation privilege. Opp. at 7. The attorney and his client may claim to be privileged when they characterize the Temple as an extremist organization. That does not mean that their characterization does not demonstrate

To make it simple, if the University had filed a pleading as part of this proceeding in which the University stated that it had no intention of complying with the mandates of Article XII, Section 7 of the Hawai'i Constitution because the University had no respect for the spiritual practices of the Native Hawaiians, that position would perforce be disqualifying.

The disqualification stems from the fact that the constitutional provision constitutes “the resolute promise by the State to ‘protect all rights customarily and traditionally exercised for subsistence, cultural, and religious purposes possessed by” Native Hawaiians. *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224, 248 (2015) (Justice Pollack concurring).

a disqualifying antipathy towards a faith and a people they are obligated to protect, should the permit be granted.

While the University and the attorney may be immune from penalty for the attack, Opp. at 5-7, the University, as the Applicant, is responsible for the attack apparently authored by its attorney and subject to the consequences of the demonstrated animus toward the traditional faith found in that attack.

The Petitioner voluntarily chose his attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent without system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all facts, notice of which can be charged upon the attorney.” *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L.Ed.2 734 (1962) citing *Smith v. Ayer*, 101 U.S. 320, 326 (1879).

The attorney also falsely characterizes the attack on the Temple as responding to “legal arguments made by other parties.” Opp. at 7.

The attack on the Temple found in DOC-135 at pages 14-15 is not a legal argument. The attack is a purely *ad hominem* attack unsupported by any evidence.

Nor is the attack a response to legal arguments made by the Temple.

An objective examination of the Temple's motion for partial summary judgment reveals that pleading to be a simply motion seeking to establish two facts, i.e. that the summit of Mauna Kea is sacred and the traditional Hawaiian faith is still practiced. DOC-263. These are not radical proposals and certainly provide no justification for the University's attack.

Because “the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible”, id., the State cannot give a permit to an applicant who rejects that obligation.

The University argues that nowhere in its opposition to the initial motion for partial summary judgment did the University refer to the Temple as an “extremist organization.” Opp. at 6.

The University’s pleading speaks for itself:

-- “The Temple is **fundamentally adversarial** (and **ardently absolutist**).” DOC-135 at 14. (emphasis added).

-- “The problem with **fundamentalism** in religion – **any religion** – is its **intolerance and inability to compromise.**” Id. (emphasis in original of “any religion”)⁴

-- “**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.**” Ibid. at 4-5.

-- The Temple will use this proceeding to **galvanize a religious movement.** Ibid. at 4.

The emphasized words taken from the University’s pleading, DOC-135 at 14-15, certainly define the term “extremist.” The absence of that particular word hardly obscures the intent of all the other words.

For the University to say that the inference that the University is characterizing the Temple as “extremist” is “purely of the Temple’s own making,”

⁴ The insertion of “any religion” does not mitigate the fact that it is clearly the Temple that is being described by the University.

Opp. at 6, can only be accepted if the meanings of the words in the University's attack are ignored.

As to the characterization of the Temple as equivalent to Isis also being a construct of the Temple, *id.*, popular reality demonstrates otherwise.

Nowadays, we tend to associate the word *extremist* with "terrorist," and use the two words almost interchangeably to define someone who holds radical political or religious views.

<https://www.vocabulary.com/dictionary/extremist>

That is why there really is no issue of fact. There is no question about what the pleading says. DOC-135 at 14-15. As a filing in this proceeding, the pleading is admissible; the attorney's signature on the pleading attests to the truth of the pleading, i.e. the sentiments expressed are the views of the University.

The plain English of the University attack can only be read as the University condemning the traditional Hawaiian faith as an extremist organization bent on imposing its will on everyone else, regardless of the harm it does to society.

With that belief guiding their actions, the University cannot be expected to protect the rights of Native Hawaiians and, therefore, cannot be given a permit by a State of Hawai'i agency for a project that may have "potential adverse impacts on the 'spiritual nature of Mauna Kea' and the 'cultural beliefs and practices of many.'" *Mauna Kea Anaina Hou*, *supra.* at 251.

Assuming, for the sake of argument, that the attack by the University did not meet the tests for libel, the bigotry demonstrated in the attack is itself disqualifying. The Board of Land and Natural Resources cannot grant a permit application to an applicant that demonstrates disdain for the Native Hawaiian traditional and

customary practices, including religious practices, that are protected by the State Constitution, Article XII, Section 7. The attack itself is evidence of bad character and demonstrates an unwillingness to comply with constitutionally-mandated protections granted to Native Hawaiians.

F. The University misconstrues the Hearing Officer's rulings to date.

The University attempts to portray Minute Order 23 as addressing the Temple's disqualification argument in the denial of the Temple's motion for partial summary judgment. *Opp.* at 2 citing DOC-346 at 2, 3.

The hearing officer's ruling denied the motion for partial summary judgment that had nothing to do with the disqualification argument. *Ibid.* at 3-4. The hearing officer said nothing about the University's attack or the Temple's objection. *Id.*

The University attempts to portray the Hearing Officer as denying the Temple's disqualification argument when the Hearing Officer denied the Temple's motion to file a motion out of time. *Opp.* at 3 *citing* DOC-356.

The sole ground for the denial of the Temple's motion to file a motion out of time was timeliness; the ruling said nothing about the substance of the Temple's disqualification argument found in the motion the hearing officer refused to allow the Temple to file. *Id.* Again, the Hearing Officer did not address the merits of the Temple's disqualification argument.

III. CONCLUSION

The University opposition to the Temple's motion creates a conundrum for the Hearing Officer.

If the filing is accepted as part of litigating one of the many Temple motions still not addressed, then all the other such motions should also be litigated.

If the Hearing Officer permits the University to file its opposition in violation of the administrative rules, then the Hearing Officer is granting the University some extra-judicial status that other parties do not have.

If the Hearing Officer denies the Temple motion after accepting the University filing, that denial will then be based on granting the University an exception to the rules, confirming the bias perceived by the Temple.

If the Hearing Officer strikes the University opposition, then the Temple's motion remains unheard and unscheduled.

The Temple argues that a level playing field at a minimum requires striking the University's pleading.

DATED: Kurtistown, Hawai'i, December 30, 2016

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

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

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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
)
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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 MOTION TO STRIKE UNIVERSITY OF HAWAII AT HILO'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION), FILED SEPTEMBER 7, 2016** was served on the following parties by email on December 30, 2016:

Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands
dlnr.maunakea@hawaii.gov, Kealoha Pisciotto-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 <lmcanealey@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@gmail.com
<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

<3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda <peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>

and will be served by first class mail or hand delivery on December 31, 2016 to:

1. Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

2. Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

3. Michael Cain, Custodian of Records
Conservation and Coastal Lands
1151 Punchbowl, Room 131
Honolulu, Hawai'i 96813

Dated: December 30, 2016

_____/s/_____
Lanny Alan Sinkin