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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 Application (CDUA) (HA- ) **TEMPLE OF LONO JOINDER TO**  
3568) The Thirty Meter Telescope at the ) **MAUNA KEA ANAINA HOU MOTION**  
Mauna Kea Science Reserve, Kaohe Mauka,) **REQUESTING TIME TO RESPOND TO**  
Hamakua District, Island of Hawai'i, ) **EXHIBIT OBJECTIONS AND**  
TMK (3) 4-4-015:009 ) **RELATED MATTERS**  
\_\_\_\_\_ )

**TEMPLE OF LONO JOINDER TO MAUNA KEA ANAINA HOU MOTION  
REQUESTING TIME TO RESPOND TO EXHIBIT OBJECTIONS  
AND RELATED MATTERS**

**I. INTRODUCTION**

The Temple of Lono ("Temple") herein joins the Mauna Kea Anaina Hou Motion ("MKAH Mot.") Requesting Time to Respond to Exhibit Objections and Related Matters and files supplemental support for that motion.

As noted by MKAH, the Hearing Officer did not schedule any time for parties to respond to objections filed to the admission of exhibits. MKAH Mot., Mem. at 2.

As also noted by MKAH, the Applicant and TMT/TIO filed multiple objections to more than 300 exhibits being moved into evidence. Id.

The Applicant and TMT/TIO also reserved the right to file additional objections once the transcripts are available and/or once additional information is

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available about certain exhibits, and/or as part of the findings of fact and conclusions of law.

This massive filing of objections raises many serious issues that call into question the viability of this proceeding.

## II. ARGUMENT

### **A. Due process, at a minimum, requires that parties moving exhibits into evidence have an opportunity to respond to objections.**

The Temple agrees with MKAH that denying the parties sponsoring exhibits the opportunity to respond to objections would be a clear violation of the sponsoring party's due process rights.

The motions made to admit exhibits and related filings into evidence initiated the exhibits litigation. If the filing of the motion ended the sponsoring party's right to argue for such admission and the discussion became limited to a discussion between the party objecting and the Hearing Officer, then the sponsoring party is improperly excluded.

The implicit assumption would be that the moving party offered all the available arguments for admission of the documents at the time the motion was filed.

Yet there was no instruction from the Hearing Officer that a party moving testimony and/or exhibits into evidence had to provide **any** arguments for admission, let alone an exhibit by exhibit argument. A review of the motions for admission of exhibits and/or testimony will find that the motions generally provide only the exhibit number and a brief description of the exhibit in conformance with the Hearing Officer's instructions, with some motions providing generic legal

argument for admission of the documents identified. See e.g. DOCs-472, 482, 483, 486, 487, 488, 497, 500, 505, 507, and 509.

With no requirement to provide arguments for the admissibility of each document when the motions seeking admission were made and no opportunity to respond to any subsequent objections, those parties sponsoring exhibits that now face objections will have had no opportunity to be heard on the legal and factual bases for admitting the specific documents objected to.

At a minimum, due process requires that the parties filing motions to admit evidence be provided an opportunity to respond to objections filed to such motions.

**B. The volume of objections requires substantial time to respond.**

The sheer volume of the objections filed requires either a substantial time be set aside for responses or all exhibits offered be accepted, with the Hearing Officer then deciding what weight to give to them.

The Applicant filed an unexpected deluge of objections to exhibits; DOC-514 [University of Hawai'i at Hilo's Opposition to Motions to Admit Exhibits and Written Direct Testimony dated March 16, 2017 ("UHH Obj.")]; supplemented with further objections from TMT/TIO. DOC-511 [TMT International Observatory, LLC's Memorandum in Opposition to Motions to Admit Exhibits and Written Testimony dated March 16, 2017 ("TIO Obj.")]

As noted by MKAH, the Applicant filed objections to approximately 237 exhibits. TMT/TIO objected to 76 different exhibits. The time needed to respond to such voluminous objections is substantial.

The form of objections filed makes the task even more burdensome. For example, just the limited objections to exhibits moved into evidence by the Temple of Lono require a voluminous response.

The Applicant identifies ten different objections as “General Objections.” UHH Obj. at 1-3. The Applicant then interposes all ten in objecting to fifteen of the exhibits that the Temple seeks to have admitted. *Ibid.* at 20-21 [“The University asserts its General Objections as to **each of the following exhibits and written testimony moved into evidence by the Temple of Lono** (citation omitted)” (emphasis added)].

With this blunderbuss approach to objections, the Applicant burdens the Temple with providing 150 responses to just the General Objections, i.e. ten objections to each of 15 exhibits.

The Applicant then proceeds to interpose specific objections to the same 15 exhibits, *id.* raising the total responses required to 165.

TMT/TIO identifies six legal or factual grounds for objections. TIO Obj. at 3. TMT/TIO did not, however, file general objections to any specific exhibit, apparently intending to interpose such general objections later in the process.<sup>1</sup>

TMT/TIO did file specific objections to four of the Temple of Lono exhibits, increasing the total number of responses the Temple needs to prepare to 169. TIO Obj. at 15.

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<sup>1</sup> Such objections would be untimely, if the schedule set by the Hearing Officer, which called for objections to be filed on March 16, is observed.

Preparing 169 responses to objections is obviously unduly burdensome on the Temple, particularly coming in the midst of preparing Findings of Fact and Conclusions of Law.

Other parties potentially face thousands of objections necessitating a response.

Granting sufficient time for all parties to respond to objections and adding that time to the time allotted for preparing findings of fact and conclusions of law is the minimum called for by these circumstances.

**C. The objections filed lack specificity or basis and, therefore, unduly burden the sponsoring party.**

The Applicant simply asserting all ten “General Objections” to an entire group of exhibits, see e.g. UHH Obj. at 20-21, is abusive pleading. At a minimum, the Applicant should have specified which of the ten general objections applied to each exhibit, rather than requiring the Temple to figure out or guess which ones are applicable.

Some objections ignore the record. For example, the UHH objection to Temple Exhibit L12 is that

[t]his exhibit constitutes direct testimony from Mr. Samuel Lono, who was not presented as a witness and did not testify in this proceeding. The University did not have an opportunity to cross-examine him on this exhibit. Accordingly, it should be stricken from the record.

UHH Obj. at 21.

The pre-filed testimony of Kahuna Nobriga states that Kahuna Nui Pali Ku Samuel Hoopii O Kalani Lono o Ka Makahiki Po Paki passed away in 1985. Prefiled Testimony of Frank Tamehama Kamehaloha Anuumealani Nobriga at 1. Obviously,

he could not have provided “direct testimony” to this proceeding. Nor could he be cross-examined.

As to the exhibit, Kahuna Nobriga testified as follows:

At the direction of Kahuna Sam Lono, I prepared a summary of these teachings for distribution publicly that provides more detail. That summary accompanies this testimony as Exhibit L12.

Ibid. at 5.

UHH, therefore, had the author of the document available for cross-examination and did not pursue any such examination. The objection should be denied.

More importantly, that simple example of what sponsors of challenged exhibits will have to go through possibly hundreds of times demonstrates the incredible burden that UHH/TMT/TIO have created for such sponsors and for the Hearing Officer.

**D. The avalanche of objections has apparently just begun.**

There is now a question of whether this proceeding is salvageable. The University included the following in its filing:

Because the transcripts of the evidentiary hearings remain incomplete as of the filing date of this opposition, the University is still unable to determine with certainty the appropriate **objections<sup>2</sup> to hundreds of exhibits sought to be introduced through the parties’ motions.** As such, the University hereby asserts each of its General Objections to any exhibits and written direct testimony to the extent applicable, and reserves the right to object further as transcripts become available.

UHH Obj. at 3.

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<sup>2</sup> The Applicant does not say that they are unable to determine whether to object to hundreds of more exhibits; UHH says it is unable to determine the appropriate objections to make.

The Applicant has apparently laid down a blanket objection to hundreds of additional documents, with details to be provided later.

While TMT/TIO does not identify exhibits to which TMT/TIO's general objections are applied, TMT/TIO states:

By not objecting to the admission of a particular exhibit or written direct testimony, TIO is not waiving and instead hereby expressly reserves its right to later argue in connection with the proposed Findings of Fact and Conclusions of Law ("FOFs and COLs") that any such exhibit or written direct testimony is irrelevant, immaterial, not credible, or should otherwise not be considered by the Hearings Officer.

TIO Obj. at 3.

UHH and TMT/TIO are unilaterally altering the process set out by the Hearing Officer, which stated that now was the time to file objections to the admissibility of any exhibits.

TMT/TIO is reserving its right to object to exhibits already admitted into evidence at this point, when the findings and conclusions are prepared later, i.e. claiming the right to object twice.<sup>3</sup>

If that claim is allowed, then TMT/TIO can burden the other parties with having to respond to admissibility arguments by TMT/TIO, while also preparing exceptions to proposed findings and conclusions filed by other parties. That detraction from the time available to prepare exceptions is unduly burdensome.

The preparation of findings and conclusions will also be hampered by not knowing whether the objections filed in the findings and conclusions by another

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<sup>3</sup> TMT/TIO can wait to see which exhibits are not successfully challenged by UHH and then object to the same exhibit with a different objection in the findings and conclusions.

party will lead to the removal from the record of testimony and exhibits already admitted.

Parties may end up having to reargue the admissibility of testimony and documents that have already been admitted in the proceeding and/or requesting time to revise findings and conclusions, if objections within the finding and conclusions lead to removal of testimony and/or exhibits relied upon in making initial findings and conclusions.

TMT/TIO will also have the advantage of litigation now informing the shape of objections to be filed later, i.e. if an objection is not successful this time, TIO may learn from the sponsoring party's arguments and/or the Hearing Officer's ruling how to restructure the objection when filed the second time in the findings and conclusions

This entire process is clearly untenable. Apparently the Hearing Officer's decision to wait until the completion of testimony in the hearing to address the admission of testimony and exhibits was a fundamental mistake, either initially or when the Hearing Officer assumed that UHH/TMT/TIO had accepted the plan to admit almost everything, leaving the Hearing Officer to determine what weight to give each admitted document.

Because UHH/TMT/TIO have now revealed their rejection of the Hearing Officer's decision on the process of admitting testimony and evidence and their intention to object to hundreds of exhibits now and possibly hundreds more later, there is very little the Hearing Officer can do to correct the mistake.



The Temple agrees with MKAH that sponsors of testimony and exhibits now challenged with objections face an impermissible burden. Because they followed what they thought was the process determined by the Hearing Officer, they did not establish the admissibility of testimony and exhibits when the witnesses were present to participate in that process. Now the sponsors of challenged testimony and exhibits have to make the case for admissibility without the assistance of their witnesses. That is clearly prejudicial and a violation of due process.

**E. The unexpected volume of objections may indicate a strategic decision by the Applicant and TIO.**

The applicant and TMT/TIO have filed what amounts to thousands of objections when the blanket assertion of general objections and specific objections are applied to more than 300 exhibits.

Perhaps having concluded that the Applicant failed to meet its burden of proof and that the opponents had made a strong case for denial of the permit, the Applicant and TMT/TIO decided to attempt excluding as much of the opponents' evidence as possible to weaken the case against the permit application.

The Hearing Officer should not allow such an attack on opposing parties to be successfully mounted, particularly in light of the Hearing Officer's repeated statements that all exhibits would be admitted, subject to the weight the Hearing Officer would give them, absent a significant objection.

**III. CONCLUSION**

The Applicant and TMT/TIO have essentially gamed the system by remaining quiet and tricked the Hearing Officer into getting the opposing parties to believe that all exhibits were going to be admitted subject to weight. That meant that there

was no need to establish admissibility during the testimony phase and no need to file objections when the testimony was complete.

The result is that the opponents of the permit basically did not file objections and the Applicant and TMT/TIO filed thousands, with the promise of more to come.

Arguably, UHH/TMT/TIO are estopped from rejecting the process determined by the Hearing Officer because they did not seek an order memorializing the Hearing Officer's decision, which could have then been the basis for certifying a question to a court for interlocutory treatment. Hawaii Revised Statutes § 91-14, as amended.

Instead they knew perfectly well that all the other parties were following the process set forth by the Hearing Officer and knew perfectly well that they intended to torpedo that process.

The Applicant and TMT/TIO have created a situation where the Hearing Officer is either called upon to admit hundreds of exhibits over the objections of the Applicant and TMT/TIO or to exclude hundreds of exhibits to the detriment of the opponents of the permit application. Either way creates the potential for a very significant due process challenge to the outcome of the contested case.

Perhaps the Applicant and TMT/TIO, knowing that their case is lost, are now doing their utmost to protect against an adverse agency decision by building in significant reversible error. Perhaps they would rather roll the dice on another remand, hoping that the third time is a charm and the Protectors will fade away, if required to go through this process again.

The Temple agrees that at least the suggested remedies found in the MKAH motion should be adopted. MKAH Mot. at 12-13. The Temple also joins in calling for a public hearing to discuss this matter. The actions of UHH/TMT/TIO have created a situation that may result in invalidating this lengthy proceeding. The discussion regarding what has happened and the implications are a matter of great public interest and should be discussed publicly.

March 21, 2017, Kurtistown, Hawai'i

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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 )  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day a copy of the **TEMPLE OF LONO JOINDER TO MAUNE KEA ANAINA HOU MOTION REQUESTING TIME TO RESPOND TO EXHIBIT OBJECTIONS AND RELATED MATTERS** was served on the following parties by email on March 22, 2017:

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Dated: March 22, 2017

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