CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO THE TEMPLE OF LONO'S **MOTION TO BOARD OF LAND AND NATURAL RESOURCES TO DISMISS HA-3568** [DOC. 516]; EXHIBITS 1-6; CERTIFICATE OF SERVICE

APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO THE TEMPLE OF LONO'S MOTION TO BOARD OF LAND AND NATURAL RESOURCES TO DISMISS HA-3568

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), through counsel, submits this Opposition to the Temple of Lono's ("**Temple**") *Motion to Board of Land and Natural Resources to Dismiss HA-3568* ("**Motion**") [Doc. 516].

This Motion reiterates for the Board of Land and Natural Resources (the "**Board**") the same broad sovereignty argument that has been Temple's preoccupation from the onset of this contested case proceeding. Rather than present any challenge to the sufficiency of the

University's application, the Motion attempts to depict the Thirty Meter Telescope as an exacerbation of colonial trauma to form a basis for why the application should be denied. *See* Motion at 2 ("If such [detrimental effects to native Hawaiian health and welfare] have already been significant in the period of colonialization . . . the incremental impacts attributed to the telescope could amplify such effects and seriously affect the health and welfare of native Hawaiians going forward[.]"). This argument - aside from being unsupported and contrary to the record[1] - is just another reiteration of the same sovereignty-type arguments the Temple has been raising throughout this proceeding.

The Temple's participation in this contested case has focused on improperly framing the issues in this proceeding as pitting the entirety of native Hawaiian culture and identity against imposing Western forces and influence; this Motion is simply more of the same. *See id.* at 33 ("[The protected rights of Native Hawaiians] emanates from the prior status of the Native Hawaiian as sovereign and constitutes an attempt to protect the remnants of the Hawaiian civilization from ever expanding encroachment by the occupying civilization.")

Contrary to the Temple's erroneous characterization, the issues before the Hearing Officer are plainly articulated in Minute Order No. 19 [Doc. 281]; none of which involve comparing and contrasting Native Hawaiian sovereignty claims with colonial occupation. *See id.* at 34-36. Moreover, Minute Order No. 19 expressly disallowed arguments relating to the sovereignty of the Kingdom of Hawai'i. Unfortunately, despite the Hearing Officer's best efforts to focus the attention of the contested case proceeding on the relevant issues, the University has spent an inordinate amount of time and effort opposing the Temple's motions

[1] It is undisputed that not all native Hawaiians share the same view of the Thirty Meter Telescope as described by the Temple. Thus, the Temple's general reference to native Hawaiians as a homogenous group is disingenuous oversimplification.

which - like the instant Motion - improperly sought to place on trial the history and existence of the State of Hawai'i. *See id.* at 2. Attached as exhibits are the following oppositions filed by the University:

1. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Partial Summary Judgment, filed August 1, 2016 [Doc. 135]

2. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Reconsideration, filed August 11, 2016 [Doc. 200]

3. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion to Vacate Minute Order No. 39 or, Alternatively to Partially Reconsider Minute Order No. 39, filed November 17, 2016 [Doc. 417]

4. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Disqualification), filed December 30, 2016 [Doc. 433]

5. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion to Recuse Hearing Officer, filed December 30, 2016 [Doc. 434]

6. The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration), filed February 22, 2017 [Doc. 473]

("**Oppositions**"). Due to the baldly repetitive arguments contained in the Motion, the University hereby incorporates all arguments contained in the attached Oppositions.

As the Motion is a thinly-veiled attempt to get a judicial determination on the sovereignty of Hawai'i, the University respectfully asks the Board to deny the Motion.

DATED: Honolulu, Hawai'i, April 4, 2017.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 THE UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION TO TEMPLE OF LONO'S MOTION FOR PARTIAL SUMMARY JUDGMENT** [DOC. 78]; DECLARATION OF COUNSEL; EXHIBITS "1" - "2"; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR PARTIAL SUMMARY JUDGMENT [DOC. 78]

I. INTRODUCTION

The Temple of Lono ("**Temple**") improperly seeks summary judgment on two claims related to the Temple's alleged religious practices, arguing that:

(1) "the summit of Mauna a Wākea is a sacred site of special significance in the traditional Hawaiian faith ...."; and

(2) "the traditional Hawaiian faith is still practiced."

Temple Mem. at 4. The Hearing Officer has no authority under a purported Haw. R. Civ. P 56 motion to grant summary judgment as a matter of law, procedurally, or based on unproven and not properly attested facts. Consideration of these matters could only occur after an evidentiary

hearing.

If the Hearing Officer does consider the Temple's first claim that the whole mountain is a sacred site for the Temple's purposes, such a ruling would violate the ***establishment clause*** of both the U.S. and Hawai'i Constitutions. It would require the Hearing Officer to recognize a ***religious servitude*** over that small land area of Mauna Kea proposed for the TMT project (the "**TMT Site**").

The second part of the Temple's claim is too incomplete and unsupported to be relevant to the specific TMT site, based on controlling Hawai'i law (*Dedman*, discussed below). Under *Dedman*, for the Temple to claim any free exercise right concerning the TMT Site, it must show that the Temple traditionally practiced religion materially impacted by the TMT Site. Under *Dedman*, only proof that the Temple traditionally practiced religion at the specific TMT Site could state a claim, subject to other defenses addressed below. That conclusion, however, would require the Hearing Officer to decide critical, disputed facts, based on an undeveloped record regarding such alleged practices that is not supported by competent admissible evidence or a properly authenticated declaration under Haw. R. Civ. P. 56(e) (if that rule were applicable). *See Carriers Ins. Co. v. Domingo*, 1 Haw.App. 478, 480, 620 P.2d 761, 762-63 (1980).

Additional reasons for denying the Temple's motion are set forth below.

II. BACKGROUND

The Temple alleges that Mauna Kea is "sacred" and "especially sacred."[1] The late Judge Samuel King describes the Temple:[2]

---

[1] The Temple also states: "the peak of Mauna Kea (Mauna a Wākea) is ***especially sacred*** to the traditional Hawaiian faith ..." Temple Mot. at 1 (emphasis added); Temple Mem. at 1 (same). So, it not just "sacred"; it is "especially sacred." *Id.*

[2] The Temple likewise cites Judge King's statement. Temple Mem. at 5-6.

> Frank Nobriga is the active force behind the Temple of Lono movement which ***began in 1971***.[3] ***Their purpose is to maintain a spiritual land bank***, with temples throughout the islands. ***The first temple was established on Kahoolawe in 1976***,[4] having been conceived as a result of the involvement by Hawaiians in the recapturing of that island for civilian purposes. At the time he spoke for the video tape, there were ***a total of four such temples***.[5] The Temple of Lono is rediscovering the elements of ancient Hawaiian religion, including a four-God concept. Adherents believe that this is a form of cultural sovereignty.[6]

Based on these statements, the Temple seeks to establish a "spiritual land bank" over the top of Mauna Kea. In a nutshell, the Temple seeks to use the free exercise clause to create a ***religious servitude*** on state land where the University of Hawai'i ("**University**") seeks to build the TMT project.[7] The Temple seeks to raise the free exercise clause claim above other's property rights.[8]

III. RELIGIOUS FREEDOMS PROTECTED BY THE U.S. AND HAWAI'I CONSTITUTIONS

A. CONSTITUTIONAL CLAUSES PROTECTING RELIGIOUS FREEDOMS

The U.S. and Hawai'i Constitutions each have two provisions concerning religion: the

---

[3] If the Temple "began in 1971," logically it could not have ***traditionally*** practiced its ceremonies on Mauna Kea.

[4] If the Temple established its first temple in 1976, logically it could not have ***traditionally*** practiced its ceremonies on Mauna Kea.

[5] The Temple omits the sentence: "At the time he spoke for the video tape, there were a total of four such temples." The Temple fails to submit evidence that it traditionally had any temple on Mauna Kea, and more particularly, at any area materially impacted by TMT.

[6] Hon. Samuel P. King, *Hawaiian Sovereignty*, 3 HAWAI'I BAR JOURNAL 6, 9 (July 1999) (emphases added).

[7] The Temple considers the TMT project a "desecration of Mauna a Wākea." Temple Mot. Intervene, at 2. The Temple objects to the "desecration of Mauna a Wākea by the construction of telescopes." Temple Mot. Intervene, 5/27/16 Nobriga Dec. at 2 ¶ 12. For the Temple, "the mountain is sacred and ... the construction of the telescope constitutes desecration of a sacred site." Ex. 1 [*Nobriga v. Ige, et al.*, U.S.D.C. Hawai'i CV 15-00254DKWBMK, Complaint (filed 7/6/15), at 3 ¶ 10].

[8] *Cf. Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979) ("The Court has been cited to no case that conflates the free exercise clause with property rights. The free exercise clause is not a license in itself to enter property, government-owned or otherwise, to which religious practitioners have no other legal right of access."), *aff'd*, 620 F.2d 1159 (6th Cir.1980), *cert. denied*, 449 U.S. 953 (1980).

establishment clause and the free exercise clause. "Congress shall make no law respecting ***an establishment of religion***, or prohibiting the free exercise thereof ...." U.S. Const. am. 1 (emphasis added). "No law shall be enacted respecting ***an establishment of religion***, or prohibiting the free exercise thereof ...." Hawai'i Const. art. I, § 4 (emphasis added).

B. HAWAI'I COURT'S TREATMENT OF RELIGIOUS FREEDOMS

Hawai'i courts have declined to interpret the requirements of the Hawai'i Constitution on the free exercise clause to extend greater protection than the U.S. Constitution. Hawai'i courts have applied the test in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).[9] Hawai'i courts examine the legitimacy of the religious belief involved, the burden on the religious belief, the impact on religious practices, and the existence of a compelling state interest.[10] Generally, Hawaiian courts resolving cases involving religious freedoms look to first amendment principles and authorities.[11]

IV. ANALYSIS

A. THE HEARING OFFICER HAS NO AUTHORITY TO RECOGNIZE A *RELIGIOUS SERVITUDE* OVER ANY LANDS WITHIN THE MAUNA KEA SUMMIT

The Temple seeks to "land-bank" Mauna Kea for ***its own*** religious practices. In so doing, the Temple seeks to freeze and prevent the University from exercising its rights to use and seek permitted uses on its land interests. The Temple asks the Hearing Officer to find as a matter of law and undisputed fact that Mauna Kea is "a ***sacred site*** of special significance in the traditional Hawaiian faith...." Temple Mem. at 4 (emphasis added). The Temple signals a religious basis

[9] *Abrogated in part by Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-882 (1990)).

[10] *E.g., State v. Andrews*, 65 Haw. 289, 651 P.2d 473 (1982); *State v. Blake*, 5 Haw.App. 411, 695 P.2d 336 (1985).

[11] *See, e.g., Dedman v. Board of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988); *State v. Andrews*, 65 Haw. 289, 651 P.2d 473 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *State v. Blake*, 5 Haw.App. 411, 695 P.2d 336 (1985). *See generally Cammack v. Waihee*, 932 F.2d 765, 767 n.4 (9th Cir. 1991).

(*i.e.*, free exercise of religion) for preventing the TMT project on Mauna Kea.[12] The Temple seeks an exclusive, religious servitude over public land. Accommodating that religious freedom would violate another, equally important one: freedom from the establishment of religion. Such is the constitutional minefield into which the Temple wants the Hearing Officer to tread on a virtually nonexistent evidentiary record.

Courts have not been receptive to comparable Native American religious challenges to the government's authority to manage its land. In the seminal case of *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the U.S. Supreme Court decided whether government's development of its land held sacred by certain Indian tribes violated the U.S. Constitution. The *Lyng* court upheld that development because the affected Native Americans would not "**be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity ....**" *Id.* at 449 (emphasis added). The "coercion or penalty" requirement greatly narrows the types of facts that will support a legally cognizable claim based on a free exercise challenge to the government's actions on public lands held sacred by native peoples. Here, that requirement abruptly negates any reliance by the Temple on the free exercise clause concerning any lands within the summit of Mauna Kea.

The *Lyng* court rejected claims by Yurok, Karok, and Tolowa Indians that a U.S. Forest Service plan to build a logging road through the High Country would violate rights protected under the first amendment (and various federal statutes). *Id.* at 451-53. The plaintiffs alleged

---

[12] The Temple's challenge of the TMT project is analogous to Indian tribes' challenge to the Mt. Graham international observatory project in the 1990s. *See, e.g., Apache Survival Coalition v. U.S.*, 21 F.3d 895 (9th Cir. 1994); *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991). There, the Apache challenged the building of a huge telescope by the University of Arizona on a mountain that the Apache held sacred—and lost. *Apache Survival Coalition*, 21 F.3d at 898.

that the timber and road project irreparably would damage certain sacred sites and interfere with religious rituals that depended on privacy, silence, and the undisturbed natural setting of the High Country. *Id.* at 442. They argued that construction of the road would make it ***impossible for them to exercise their religious rights***. *Id. at 451.* The *Lyng* court nonetheless held that the government could go ahead with the project, for two reasons.

First, the first amendment only prevents the government from imposing penalties based on religious activity or coercing behavior that violates religious belief. *Id.* at 449. The free exercise clause does not prohibit "incidental effects of government programs," such as the road construction's impact on the High Country, which may interfere with the practice of certain religions. *Id.* at 450-51. Under *Lyng*, a burden is unconstitutional when governmental action ***coerces the parties into violating their religious beliefs***. *Id.*

The *Lyng* court reaffirmed the holding of *Bowen v. Roy*, 476 U.S. 693 (1986),[13] that the free exercise clause does not prevent all government action that may have incidental effects that interfere with the practice of certain religions. The free exercise clause does not require the government to act in ways that comport with the religious beliefs of individual citizens; the clause only protects individuals from ***certain forms of government compulsion***. *Lyng,* 485 U.S. at 448-49. The government's action in *Lyng* did not coerce the Indian tribes into violating their beliefs, nor did it penalize the exercise of those beliefs by denying adherents benefits or privileges enjoyed by other citizens.

---

[13] In *Bowen*, Native American parents refused to register their daughter for a Social Security number on the ground that, according to their religion, such action would tarnish the purity of her spirit. The *Bowen* court found for the government because "[t]he requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits involved." *Id.* at 708.

Second, the *Lyng* Court held that the constitutional right to free exercise of religion "must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Id.* at 452. "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* Thus, *Lyng* confirmed the breadth of the government's management authority over public lands: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 450-51, 453 (emphasis in the original). Under *Lyng*, the government has almost absolute authority to manage "its land" in the face of a free exercise challenge.

In *Lyng*, the U.S Supreme Court placed virtually no limit on what the government could do on its own property, except for the possibility of a ***constitutional problem***, if the government excluded only the Indians from sacred sites.[14] A dissenting Justice stated in *Lyng*:

> Similarly, the Court's concern that the claims of Native Americans will place "***religious servitudes***" upon vast tracts of federal property cannot justify its refusal to recognize the constitutional injury respondents will suffer here. It is true, as the Court notes, that respondents' religious use of the high country requires privacy and solitude. ***The fact remains, however, that respondents have never asked the Forest Service to exclude others from the area. Should respondents or any other group seek to force the Government to protect their religious practices from the interference of private parties, such a demand would implicate*** not only ***the concerns of*** the Free Exercise Clause, but also those of ***the Establishment Clause*** as well.[15]

Any state action (like a Board of Land and Natural Resources[16] or Hearing Officer decision) that creates a "religious servitude" by excluding persons (including the University) from Mauna Kea (or the TMT Site), in deference to native Hawaiians practicing their religion, raises the very

---

[14] *Lyng*, 485 U.S. at 452-53.

[15] *Id.* at 476 (Brennan, dissenting) (emphases added).

[16] "Board"

constitutional problem recognized in *Lyng*.

At least three federal courts have suggested that governmental protection of Indian religious practices may violate the establishment clause, in cases dealing with Indian sacred sites on public land.[17] The establishment clause expressly limits "religious servitudes"[18] on public land. Government protection of "sacred sites" is a *per se* violation of the constitutional prohibition against establishment of religion.[19] The Tenth Circuit, in *Badoni*, summarizes that construction of the establishment clause: "The First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.... We must accommodate our idiosyncrasies, religious as well as secular, to ***the compromise necessary in communal life.***"[20]

In *Badoni*, the Tenth Circuit held that accommodating Indian claims would violate the

---

[17] *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); *Inupiat Cmty. v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982) (observing "that the relief sought by the Inupiat creates serious Establishment Clause problems," and explaining that "a free-exercise claim cannot be pushed to the point of awarding exclusive rights to a public area," noting) (citing *Badoni*), *aff'd*, 746 F.2d 570 (9th Cir. 1984); *Crow v. Gullet*, 541 F. Supp. 785, 794 (D.S.D. 1982) (noting that "the government risks being haled into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become 'excessively entangled' with religion, in violation of the Establishment Clause.") (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)), *aff'd*, 706 F.2d 856 (8th Cir. 1983). Those courts relied upon the Establishment Clause as an additional basis to reject ***Indian*** claims regarding sacred sites. *See also United States v. Means*, 858 F.2d 404, 407-08 n.6 (8th Cir. 1988) ("Query whether granting a special use permit for the construction of a permanent religious community on 800 acres of public land would raise similar issues of government aid to religion in violation of the Establishment Clause."). ***Dedman* cited *Inupiat Cmty. and Gullet*, concerning limitations on the free exercise clause.** 69 Haw. at 262-63, 740 P.2d at 33-34.

[18] *See, e.g., Lyng*, 485 U.S. 439; *Badoni*, 638 F.2d at 179. *Cf. also Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.1980), *aff'g* 480 F. Supp. 608 (E.D.Tenn. 1979), *cert. denied*, 449 U.S. 953 (1980) (Cherokee Indians unsuccessfully sought to enjoin the completion of the Tellico Dam on the Little Tennessee River, claiming that the resultant flooding would consume what some Cherokee Indians regard as their "Jerusalem.").

[19] *See, e.g., Lyng*, 485 U.S. at 452; *Badoni*, 638 F.2d at 179.

[20] *Badoni*, 638 F.2d at 179 (quoting Judge Hand's opinion in *Otten v. Baltimore and O. R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)) (emphases added).

establishment clause, stating that ***excluding tourists from a Navajo sacred site*** "would seem a clear violation of the establishment clause."[21] Here, the Temple seeks to exclude the University from using lands within the Mauna Kea summit. In *Badoni*, the Tenth Circuit suggested that to require tourists to behave in a manner respectful to the Indian religious interests would create a "government-managed religious shrine." *Id.* Under this established constitutional precedent, the Temple cannot use this proceeding to land-bank Mauna Kea as a state-managed religious shrine. The establishment clause rejects the Temple's attempts to land-bank Mauna Kea for the Temple's own religious use. Because the free exercise clause claim challenges the establishment of religion clause, the Temple has no legal basis supporting its motion.

B. BASED ON THE RECORD, THE HEARING OFFICER CANNOT CONCLUDE THAT THE TEMPLE'S RELIGION HAS BEEN MATERIALLY IMPACTED ON LANDS WITHIN THE MAUNA KEA SUMMIT; ANYTHING SHORT OF THAT CONCLUSION IS IRRELEVANT

It is irrelevant to this proceeding whether "the traditional Hawaiian faith is still practiced," ***unless*** "the traditional Hawaiian faith" ***also*** was actually "practiced" on the Mauna Kea summit or within the TMT Site. That is the holding of *Dedman v. Bd. of Land and Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988). Under *Dedman*, the Temple has not even shown that it held or conducted any religious ceremonies in the area within the summit's astronomy precincts. Therefore, there can be no burden on the religious ceremonies, and, in turn, no viable claim under the free exercise clause.[22] *Dedman*

---

[21] *Badoni*, 638 F.2d at 179.

[22] *Dedman* exemplifies the conventional *Yoder* analysis used in deciding Native American freedom of religion claims. As developed below, the *Dedman* court implicitly rejected the notion that "sacred sites" have intrinsic religious value and significance apart from whether those "sacred sites" have been actively used in the practice of the religion. That is, absent any showing by native Hawaiians that they ***actually had performed religious ceremonies and activities on the land***, no discernible objective harm was evident, and they therefore failed to establish the requisite "substantial burden" on their religion was imposed by the owner's use of that land.

controls in this proceeding on that critical point. There is no admissible evidence that the Temple traditionally held religious ceremonies at any specific location within the summit of Mauna Kea, and any such claim would be genuinely disputed precluding summary judgment.

In *Dedman*, native Hawaiians challenged a Board's decision permitting geothermal development in an the *Wao Kele 'O Puna* rainforest, an area significant to native religious practitioners who honor the deity Pele.[23] The Pele practitioners claimed that the proposed development would impinge on their right to free religious exercise, because geothermal development requires drilling into the body of Pele and taking her energy and lifeblood.[24]

The *Dedman* court acknowledged the sincerity of the religious claims.[25] It then considered whether the Board's approval of the proposed geothermal development would unconstitutionally infringe upon native Hawaiian religious practice.[26] On that critical issue, the *Dedman* court found controlling **the absence of proof that religious ceremonies were held in the areas of development**.[27] Without proof of the free exercise of native Hawaiian religion, the *Dedman* court did not reach the question of a compelling state interest. The *Dedman* court concluded that no free exercise clause violation had occurred.[28]

Specifically, the *Dedman* court found that the uncontroverted testimony by Pele religious practitioners of the impact on their religion by private development of state-owned geothermal resources constituted nothing more than the "mere assertion of harm to religious practices" and

---

[23] *Dedman*, 69 Haw. at 256, 740 P.2d at 31.

[24] *Id.* at 259-260, 740 P.2d at 32. The area proposed for geothermal development was considered the home of Pele, the volcano goddess in traditional Hawaiian religion.

[25] *Id.* at 260, 740 P.2d at 32.

[26] *Id.*

[27] *Id.* at 261, 740 P.2d at 33.

[28] *Id.* at 261-62, 740 P.2d at 32-33

therefore did not meet the requirements of the burden prong. 69 Haw. at 262, 720 P.2d at 32-33;

The *Dedman* court reasoned:

> In order to demonstrate the coercive effect of the geothermal project, Appellants must show a "substantial burden" on religious interests. *Koolau*, 68 Haw. at —, 718 P.2d at 272; *Wisconsin v. Yoder*, 406 U.S. at 218, 92 S.Ct. at 1534. Yet it is uncontested that "[n]either of the [Appellants] nor any of the witnesses testified that ***they ever conducted or participated in religious ceremonies on this land.***" And the Board specifically concluded that "[t]here is no indication that tapping this heat source from the earth has diminished or negatively affected the eruptive nature of Kilauea Volcano." There is simply no showing of "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Wisconsin v. Yoder*, 406 U.S. at 218, 92 S. Ct. at 1534.
>
> To invalidate the Board's actions based on ***the mere assertion of harm to religious practices*** would contravene the fundamental purpose of preventing the state from fostering support of one religion over another. As Judge Learned Hand stated:
>
> > The First amendment ... gives no one the right to insist that in pursuit of their own interests ***others must conform their conduct to his own religious necessities***.... We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life[.]
> >
> > *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953). *Accord Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710, 105 S.Ct. 2914, 2918, 86 L.Ed.2d 577 (1985).
>
> We find no merit to Appellants' claim that the project will substantially burden their religious practices....

Dedman, 69 Haw. at 262-63, 740 P.2d at 33 (internal footnote omitted) (emphases added).

So, under *Dedman*, if there is no proof that religious ceremonies were held on the land of the development by the Temple, there can be no burden on the religious ceremonies, and, in turn, no viable claim under the free exercise clause.[29] Here, the Temple submits no such proof. The

[29] In *Dedman*, the Hawai'i Supreme Court applied the test adopted in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). 69 Haw. at 260-62, 740 P.2d at 32-33. In *Yoder*, members of the Amish sect refused to permit their children to continue formal education beyond the eighth grade. The Amish valued and practiced agricultural work and feared higher education would endanger their children's salvation. Their refusal to allow their children to attend school, however, violated Wisconsin's compulsory school attendance laws. The *Yoder* court reviewed the burden imposed

University submits that any such offers of proof are disputed, so the Temple's motion cannot be sustained.

The Hawai'i Supreme Court confirmed its position in *Dedman* that parties cannot assert that public land is "holy," to obtain some concession from the government concerning that land:

> It is simply insufficient that Abbot Ki felt that the property chosen would be convenient for parking, beautiful, ..., ***or even "holy."*** ***The Temple cannot force the City to zone according to its religious conclusion that a particular plot of land is "holy ground."*** *Cf. Dedman*, 69 Haw. at 259-63, 740 P.2d at 31-34 (rejecting a challenge to the designation of an area in the Kilauea Middle East Rift Zone, on the Island of Hawai'i, as a geothermal resource subzone by "Pele practitioners" who believed that the land in that area was sacred and that geothermal plants would desecrate the body of Pele).[30]

In *Sullivan*, a Buddhist temple filed appeals from administrative denials of applications for a height variance for its main temple hall. The trial court affirmed. On appeal, the *Sullivan* court found that the temple failed to show a substantial burden on its free exercise of religion, so the court did not evaluate whether the City's interest in enforcing its height regulations is compelling. It ruled the temple's free exercise rights, as protected by the first amendment to the U.S. Constitution and article I, section 4 of the Hawai'i Constitution, were not violated.[31]

In *State v. Armitage*, 132 Hawai'i 36, 319 P.3d 1044 (Hawai'i 2014), the Hawai'i Supreme Court continued to rely on *Dedman*.[32] In *Armitage*, several native Hawaiians were charged for entering the Kaho'olawe island reserve without state authorization. They claimed

---

by the school attendance law on Amish religion. The *Yoder* court then held that the state's interest in education was sufficiently compelling to overcome the free exercise clause protection of Amish religious practices. *Id.* at 234.

[30] *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Hawai'i 217, 248, 953 P.2d 1315, 1346 (1998) (internal citation omitted; emphases added) ("**Sullivan**").

[31] 87 Hawai'i at 249, 953 P.2d at 1347.

[32] The *Armitage* court relied on *Dedman* for this proposition: it is necessary to examine whether or not the activity interfered with by the state was motivated and rooted in a legitimate and sincerely held religious belief and whether or not the parties' free exercise of religion had been burdened by the regulation. *Id.* at 60, 319 P.3d at 1068 (citation omitted).

protection under the free exercise clause, for their religious practices on Kaho'olawe island.[33] The *Armitage* court rejected that defense, reasoning, in part: "[S]uch practices did not have to take place on Kaho'olawe as part of the practice of their religion."[34] Here, the Temple submits no evidence that its religious practices have taken place anywhere within the summit of Mauna Kea as part of the practice of its religion. The Temple has only reported other temple locations.

Finally, a commentator on native Hawaiian rights digested an earlier lawsuit concerning the Temple and its unsuccessful attempt to create a religious servitude over state land:

> In *State v. Lono*, members of the Temple of Lono were arrested and charged with camping without a permit at Kualoa Regional Park. Kualoa is a ***sacred site and the location of an ancient heiau dedicated to Lono***. Park regulations did not allow extended camping periods, and Temple members had entered and remained in the park for periods from three weeks to four months in order to perform various ceremonies. One of the religious practices involved sitting in a meditative state until experiencing *h'ike a ka po* or night visions, providing inspiration and guidance. In their defense, Temple members challenged the park regulation as an infringement upon religious freedom. The trial court determined that defendants "religious interest in participating in dreams at Kualoa Regional Park are not ***indispensable to the Hawaiian religious practices***, and further the Defendants' practices in exercising their religious beliefs ... ***are philosophical and personal and therefore not entitled to First Amendment protection***." The Hawaii Supreme Court also gave short shrift to the religious freedom argument, affirming the trial court in a memorandum opinion.[35]

In *State v. Lono*, there was a geographical and traditional tie between the Temple and the "sacred site." Despite that recognized tie, the Temple was denied free exercise clause rights to that "sacred site." Here, there is no proven tie between the Temple and the Mauna Kea summit areas, geographical or traditional. The Temple has not shown that holding ceremonies at such areas is "indispensable to the Hawaiian religious practices." The Temple submits no evidence

---

[33] *Id.* at 58, 319 P.3d at 1066.

[34] *Id.* at 61, 319 P.3d at 1069.

[35] Melody Kapilialoha MacKenzie, *The Lum Court and Native Hawaiian Rights*, 14 U. HAW. L. REV. 377, 388 nn.57-59 (1992) (internal notes omitted) (emphases added).

that it ever practiced its religion anywhere on the summit. Absent such proof, there is no basis to conclude anything about the Temple's alleged free exercise rights concerning the TMT Site.

V. POLICY CONSIDERATIONS FOR MOTION

The University believes that Mauna Kea can accommodate ***both*** the TMT project ***and*** traditional native Hawaiian religion: astronomy and the Temple's religion can thrive together on the mountain. The Temple, by its papers and actions, rejects that sharing of Mauna Kea. The Temple is fundamentally adversarial (and ardently absolutist), by using this proceeding as a platform to advance its own religious agenda. The Temple's motion and other papers show that the Temple seeks ***state recognition*** of the "traditional faith of the Hawaiian people,"[36] stating:

> The discrimination ***by the State*** [against "the traditional faith"] is a reflection of similar disrespect found elsewhere. The Mauna a Wākea[37] controversy surfaced the continuing bigotry towards the traditional faith.... As the Kahuna states: "The challenge is about the right of a faith to be respected and practiced in its own homeland."[38]

The Temple's "challenge" is not primarily about whether the state should issue the University a permit for the TMT at the TMT Site; instead, the "challenge" is about the Temple's "right ... to be respected and practiced in [Hawai'i]." The problem with fundamentalism in religion—***any religion***—is its intolerance and inability to compromise. 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. The Temple wants a

---

[36] The Temple complains: "In the eyes of the Temple, the disrespect shown for the traditional faith of the Hawaiian people is a matter of record for more than 100 years and most recently found expression through ***the State of Hawai'i actions*** that either suppressed the traditional faith, limited traditional faith practice, or relegated traditional faith practitioners to a second class citizenship unprotected by the Constitution and laws of the United States." Temple Mot. Intervene, 5/27/16 Nobriga Dec. at 2 ¶ 2 (emphases added).

[37] The "Mauna a Wākea controversy" is the University's plan to build the TMT on Mauna Kea.

[38] Ex. 2 [*Nobriga v. Ige, et al.*, U.S.D.C. Hawai'i CV 15-00254DKWBMK, Mem. in Supp. of TRO (filed 7/6/15), at 7 (quoting "Kahuna" Nobriga of ToL) (bracketed material added)].

religious servitude over all of Mauna Kea, for the purpose of advancing its own religious agenda.

The Temple's religious fundamentalism calls into play the tension between the establishment clause and the free exercise clause. The Temple wants ***full expansion*** of the free exercise clause regarding Mauna Kea. But the establishment clause holds that full expression in check. While the Temple may have certain free exercise rights concerning Mauna Kea, they are limited under applicable case law on the free exercise clause (*Dedman*, *Sullivan*, *Armitage*), and by case law invoking the establishment clause (*Lyng*, *Badoni*, *Inupiat Community*, *Crow*, *Means*). In short, the Temple cannot use this proceeding to obtain a religious servitude over Mauna Kea, as part of advancing the Temple's fundamentalist agenda.

The Temple will try to use this proceeding to galvanize a religious movement. Indeed, the Temple states that religion will be an essential part of this proceeding: "[I]ssues related to Traditional Hawaiian Faith are going to be ***an essential part of the contested case*** ...." Temple Mot. Intervene, Mem. Supp. at 2 (emphasis added). The Hearing Officer should not allow such diversions from the stated criteria to obtain a permit. Again, the establishment clause does not allow a religious servitude to be imposed over the summit of Mauna Kea; and the free exercise clause is not engrained with any property rights. The Temple's religious agenda for this proceeding therefore is unconstitutional. The Hearing Officer should not allow this proceeding to become a platform for the Temple to advance its religious agenda.

VI. CONCLUSION

The result that the Temple asks the Hearing Officer to reach would violate the establishment clause of both the U.S. and Hawai'i Constitutions, and is otherwise unsupported by admissible evidence and is irrelevant to these proceedings. Thus, the University respectfully requests that the motion be denied.

DATED: Honolulu, Hawai'i, August 1, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 For the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 DECLARATION OF COUNSEL; EXHIBITS "1" - "2"

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am a partner at the law firm of Carlsmith Ball LLP, counsel for UNIVERSITY OF HAWAI'I AT HILO, in the above-caption matter.

2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon my personal knowledge

3. Attached hereto as Exhibit 1 is a true and correct copy of the Complaint, filed on July 6, 2015, in *Nobriga v. Ige, et al.*, U.S.D.C. Hawai'i CV 15-00253DKWBMK.

4. Attached hereto as Exhibit 2 is a true and correct copy of the Memorandum in Support of Temporary Restraining Order, filed on July 6, 2015, in *Nobriga v. Ige, et al.*, U.S.D.C. Hawai'i CV 15-00253DKWBMK.

This declaration is made upon personal knowledge and is filed pursuant to Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai'i. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of August, 2016.

IAN L. SANDISON

EXHIBIT 1

Lanny Alan Sinkin
Tx. Bar #18438675
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

Frank Kamealoha Anuumealani Nobriga Petitioner Vs. David Y. Ige, et al. Respondents	Civ. No. _____ Memorandum in Support of Temporary Restraining Order

Jurisdiction

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, Petitioner seeks a Temporary Restraining Order preventing respondents from violating Petitioners rights to spiritual practice as protected by the First and Fourteenth Amendments to the United States Constitution.

This Honorable Court has jurisdiction under 28 U.S.C. § 1331.

Petitioner

Petitioner is the Kahuna of the Temple of Lono, a traditional faith of the Hawaiian people.

Respondents

David Y. Ige is Governor of the State of Hawai'i and is named in his official capacity.

Suzanne Case is Chairperson of the State of Hawai'i Department of Land and Natural Resources (DLNR) and is named in her official capacity.[1]

Kekoa Kaluhiwa is Deputy Director of DLNR and is named in his official capacity.

Gregory Mooers is Chair of the Office of Mauna Kea Management (OMKM) and is named in his official capacity.[2]

John Doe #1, yet to be identified, is also responsible for imposing rules or enforcing rules that restrict spiritual practice on Mauna a Wakea and is named in his or her official capacity.

Facts[3]

---

[1] The Department of Land and Natural Resources, headed by an executive Board of Land and Natural Resources, is responsible for managing, administering, and exercising control over public lands, water resources, ocean waters, navigable streams, coastal areas (except commercial harbors), minerals, and all interests therein. The department's jurisdiction encompasses nearly 1.3 million acres of State lands, beaches, and coastal waters as well as 750 miles of coastline (the fourth longest in the country). It includes state parks; historical sites; forests and forest reserves; aquatic life and its sanctuaries; public fishing areas; boating, ocean recreation, and coastal programs; wildlife and its sanctuaries; game management areas; public hunting areas; and natural area reserves. http://dlnr.hawaii.gov/about-dlnr/

[2] Office of Mauna Kea Management(OMKM) - The Maunakea Management Board provides the community with a sustained direct voice for the management of the Maunakea. The Board is comprised of seven members from the community who are nominated by the UH Hilo Chancellor and approved by the UH Board of Regents. The volunteer members represent a cross-section of the community and serve as the community's voice providing input on operations and activities, developing policies, reviewing and providing recommendations for land uses planned for Maunakea.

http://www.malamamaunakea.org/management/mauna-kea-management-board

[3] The facts set forth here are supported by the Declaration of Counsel that accompanies this memorandum.

This Honorable Court can take judicial notice that there is a major controversy over the proposal to build the Thirty Meter Telescope (TMT) on Mauna a Wakea, a mountain on the Island of Hawai'i.

Part of the basis for that controversy is the assertion by practitioners of the traditional Hawaiian faith that the mountain is sacred and that the construction of the telescope constitutes desecration of a sacred site.

On Wednesday, June 24, 2015, an attempt was made to bring a construction crew to the site of the TMT.

Hundreds of people gathered to protect the Mountain and prevent what they considered desecration.

The construction crew was first preceded by County of Hawai'i police officers.

From the 9,000 foot level and continuing up the mountain, hundreds of Protectors of Mauna a Wakea blocked the progress of the convoy.

While in the County jurisdiction, the moving blockade and the County police proceeded peacefully up the mountain.

In the County jurisdiction, there was only one arrest.

At the 10,000 foot level, the jurisdiction changed to the DLNR.

In the DLNR jurisdiction, the officers became more aggressive and arrests increased.

In response to the more aggressive DLNR actions, Protectors further up the Mountain placed rocks and rock walls in the roadway to obstruct the progress of the convoy without requiring interaction between the Protectors and the DLNR officers.

When the convoy reached the rocks, DLNR made the decision to abandon the effort to reach the TMT site.

The convoy turned around and descended the Mountain.

By Friday, June 26, 2015, the Protectors had removed all the rock obstructions from the road.

Subsequently, Rangers with the Office of Mauna Kea Management informed those engaging in spiritual practices on the Mountain that they would only be allowed to ascend the Mountain at 1:00 p.m.[4]

The Rangers also stated that only ten people would be allowed to ascend the Mountain to engage in spiritual practice.

The Rangers also stated that groups ascending the Mountain to pule (pray) are required to be accompanied by a Ranger.

Some Rangers have stated that they will try to accommodate spiritual practitioners at times other than 1:00 p.m. Attempts to make such arrangements have not been successful.

---

[4] Mauna Kea Rangers - Shortly after its founding in the fall of 2000, OMKM established the ranger program to provide daily oversight of activities on UH managed lands; to protect the resources and to provide for public safety. A key responsibility is informing visitors about the cultural, natural and scientific significance, as well as the hazards of visiting the mountain. They conduct daily patrols between mid-level (9,200') facilities and the summit. Patrol reports are submitted daily.

Rangers perform a variety of other duties including providing emergency assistance, assisting stranded motorists, coordinating litter removal, conducting trail maintenance, inspecting the observatories for compliance with their Conservation District Use Permits, and providing visitors with cultural information about Maunakea. http://www.malamamaunakea.org/management/mauna-kea-rangers

At this time, anyone not present at 1:00 p.m. may not be able to ascend the Mountain that day.

During the time these rules are being imposed on spiritual practitioners, the road up to the summit is open to astronomers, water delivery trucks, nitrogen delivery trucks, and others with no limitations.

In response to questions, the Rangers seem unclear as to who is issuing orders that impose the restrictions on spiritual practices on the Mountain.

When people tell the Rangers that they want to go up the Mountain for spiritual reasons, the Rangers refer them to the Protectors to determine whether they are qualified as spiritual practitioners.

The Protectors claim no such capacity on their part to determine who is legitimately engaging in spiritual practice.

Argument

In this case, there would seem to be little need for extensive discussion prior to reaching a conclusion that the Temporary Restraining Order should issue.

The State is restricting the access of spiritual practitioners to a site where spiritual practice takes place.[5]

At the same time, the State is allowing unlimited access to people ascending the Mountain for purposes other than spiritual practice.

The restrictions amount to discrimination on the basis of religious beliefs.

---

[5] Those wishing to ascend the Mountain for spiritual purposes arrived later than 1:00 p.m. on Friday, July 3, 2015. The Ranger refused to allow them to ascend, so on that day the spiritual practitioners were denied any access to their sacred sites.

At the same time, the restrictions are an acknowledgement by the State that there is a legitimate spiritual practice taking place.

There could hardly be a more compelling reason for judicial intervention to protect the rights of the spiritual practitioners as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The University of Hawai'i, a State institution, signed a lease with the TMT for the land on Mauna a Wakea.

The website of the University of Hawai'i 'Imiloa Astronomy Center states:

> **Cultural Significance**
>
> **"The Mountain of Wākea**
>
> The original name of Maunakea is *Mauna a Wakea*, or 'Mountain of Wakea.' In Hawaiian tradition *Wakea* (sometimes translated in English as 'Sky Father') is the progenitor of many of the Hawaiian Islands, and of the Hawaiian people. This mountain is his piko, or the place of connection where earth and sky meet and where the Hawaiian people connect to their origins in the cosmos.
>
> **'Realm of the gods'**
>
> As a sacred site, many of the physical features and environmental conditions of the mountain are associated with Hawaiian gods and goddesses. *Lilinoe, Poliahu,* and *Waiau* are just a few of the deities associated with this place.
>
> The summit of Maunakea was considered a *wao akua*, or 'realm of the gods' and was therefore visited only rarely by humans."

http://www.imiloahawaii.org/60/cultural-significance.

The heading "Cultural Significance" should really be Spiritual Significance. That statement says that the summit was considered to be the "realm of the gods." The use of the word was is an attempt to characterize the spiritual practice in question as no longer a practiced faith.

As shown in the Declaration of Declaration of Frank Kamealoha Anuumealani Nobriga, Kahuna of the Temple of Lono, Exhibit 2 and Exhibits A through C thereto, the traditional faith practice is alive and well.

Because the traditional faith is still practiced, the State is required to demonstrate some compelling purpose for placing such a heavy burden on the practice of the traditional faith as are found in the restrictions set forth above. See e.g. *Employment Div. v. Smith*, , 494 U.S. 872, 878-82 (1990); *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2760-61 (2014).

The burden becomes even higher when the State action is tantamount to denying access to a spiritual site.

> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions.

Lyng v. Northwest Indian Cemetery Prot. Assn, 485 U.S. 439, 453 (1988).

The discrimination shown by the State is a reflection of similar disrespect found elsewhere. The Mauna a Wākea controversy surfaced the continuing bigotry towards the traditional faith. See Exhibit 2.

http://www.civilbeat.com/2015/04/the-science-based-faith-of-the-hawaiian-people/

As the Kahuna states: "The challenge is about the right of a faith to be respected and practiced in its own homeland." Exhibit 1, Exhibit D at 2.

Conclusion

The severe restrictions the State placed on spiritual practitioners accessing

Mauna a Wakea for spiritual purposes are without minimal justification and clearly violate the constitutionally protected rights of the practitioners.

Respectfully submitted,

Lanny Alan Sinkin
Counsel for Petitioner

Dated: July 3, 2015

DECLARATION OF LANNY ALAN SINKIN

I, LANNY ALAN SINKIN, do declare the following to be true and correct to the best of my knowledge and belief.

1. On June 24, 2015, I was present on Mauna a Wakea from early in the morning until late in the afternoon.

2. I was present on the Mountain in my capacity as Ali'i Mana'o Nui (Chief Advocate and Spiritual Advisor) to Ali'i Nui Mō'i (High Chief/King) Edmund Keli'i Silva, Jr.

3. I was also present on the Mountain in my capacity as a haumana (student) in the Temple of Lono.

4. That day, I also served as a legal observer for the Protectors of Mauna a Wakea.

5. Hundreds of people gathered to protect the Mountain and prevent what they considered desecration that would result from construction of the Thirty Meter Telescope.

6. The construction crew was first preceded by County of Hawai'i police officers.

7. From the 9,000 foot level and continuing up the mountain, hundreds of Protectors of Mauna a Wakea blocked the progress of the convoy.

8. While in the County jurisdiction, the moving blockade and the County police proceeded peacefully up the mountain.

9. In the County jurisdiction, there was only one arrest.

10. At the 10,000 foot level, the jurisdiction changed to the DLNR.

11. In the DLNR jurisdiction, the officers became more aggressive and arrests increased.

Exhibit 1

12. In response to the more aggressive DLNR actions, Protectors further up the Mountain placed rocks and rock walls in the roadway to obstruct the progress of the convoy without requiring interaction between the Protectors and the DLNR officers.

13. When the convoy reached the rocks, DLNR made the decision to abandon the effort to reach the TMT site.

The convoy turned around and descended the Mountain.

14. On Thursday, July 2, I received an email that contained a posting on Facebook by one of the Protectors which stated:

> As of yesterday, July 1, 2015, they restricted our access for religious purposes and said that we could only to up at 1:00 p.m. everyday to do pule and that there is a 10 person limit to going to the summit. They are depriving us of our rights as kanaka to our own 'āina. Article XII Section 7, HRS 7-1, First Amendment, 14th Amendment equal protection of the law, Hawaii Case Law etc. they want to play the blame game when they open the road for workers to go up but not us to pray. There are two vehicles in this picture that were behind us while we were asking the Ranger Bruce if we could go up to Wai'au [a sacred lake]. We are able to schedule earlier times if we need but the ranger said no today. They want to bring up the possibility of layoffs because of the road and us but really, they are looking for every excuse to make us look bad. THE ROAD IS CLEAR. Over 25 cars have gone up today already but they won't let us go up. Even the water trucks have gone up. ... I am spiritually hurt and so is everyone else.

16. That same day, I went to the 9,000 foot level of Mauna a Wakea to speak with the Protectors.

17. In those interviews, I was told the following:

a. By Friday, June 26, 2015, the Protectors had removed all the rock obstructions from the road.

b. Subsequently, Rangers with the Office of Mauna Kea Management informed those engaging in spiritual practices on the Mountain that they would only

be allowed to ascend the Mountain at 1:00 p.m.

c. The Rangers also stated that only ten people would be allowed to ascend the Mountain to engage in spiritual practice.

d. The Rangers also stated that groups ascending the Mountain to pule (pray) are required to be accompanied by a Ranger.

e. Some Rangers have stated that they will try to accommodate spiritual practitioners at times other than 1:00 p.m. Attempts to make such arrangements have not been successful.

f. At this time, anyone not present at 1:00 p.m. may not be able to ascend the Mountain that day.

g. During the time these rules are being imposed on spiritual practitioners, the road up to the summit is open to astronomers, water delivery trucks, nitrogen delivery trucks, and others with no limitations.

h. By the time I spoke with the Protectors in the late afternoon, approximately fifty vehicles had been allowed to ascend the Mountain.

h. In response to questions, the Rangers seem unclear as to who is issuing orders that impose the restrictions on spiritual practices on the Mountain.

i. When people tell the Rangers that they want to go up the Mountain for spiritual reasons, the Rangers refer them to the Protectors to determine whether they are qualified as spiritual practitioners.

j. The Protectors claim no such capacity on their part to determine who is legitimately engaging in spiritual practice.

18. In a follow up telephone interview, one of the Protectors told me that those wishing to ascend the Mountain on Friday, July 3 had arrived later than 1:00 p.m., so the Rangers denied them the right to ascend that day.

Lanny Alan Sinkin

Declaration of Frank Kamealoha Anuumealani Nobriga

1. I, Frank Kamealoha Anuumealani Nobriga, do declare the following to be true and correct:

2. I am the Kahuna of the Temple of Lono.

3. The Temple of Lono is the men's temple of the Traditional Hawaiian Faith.

4. The Foundation of the Faith is the Four Gods – the Ocean, the Sun, the Earth, and the Fresh Water. See Exhibit A.

5. The Teaching Symbols of the Faith are the Square, representing the Four Gods; the Circle, representing the Ha or breath of God; and the Triangle, representing the Ancestors, the source of knowledge.

6. The Triangle is also the symbol of the central teaching for Human Beings: look into yourself, look at the Source, and look at the spiritual halo within.

7. These teachings are very simple and very deep, requiring years of self-exploration to determine their meaning for each individual.

8. Mauna a Wākea is the physical manifestation of the Triangle, standing as the highest reminder of the Faith.

9. That is why Mauna a Wākea is sacred in the Traditional Faith.

10. The Temple of Lono has a long standing involvement with the issue of sacred lands, particularly those forming a part of the spiritual land base of the faith. See Exhibit B.

11. The Temple of Lono also has a long standing involvement with those objecting to the desecration of Mauna A Wakea by the construction of telescopes. See Exhibit C.

12. The Temple of Lono and the Hale O Papa (women's temple) issued a statement related to the current controversy over the proposal to build the Thirty Meter Telescope on Mauna a Wakea.

13. In the eyes of the Temple, the disrespect shown for the traditional faith of the Hawaiian people is a matter of record for more than 100 years and most recently found expression through State of Hawai'i actions that either suppressed the traditional faith, limited traditional faith practice, or relegated traditional faith practitioners to a second class citizenship unprotected by the Constitution and laws of the United States.

Frank Kamehaloha Anuumealani Nobriga

Dated: July 3, 2015

Exhibit A to Declaration of Frank Kamehaloha Anuumealani Nobriga
dated May 25, 2015

KE A'O LOKO O LONO
(THE INNERMOST KNOWLEDGE OF LONO)

As haumana of the Temple of Lono, we have come to know and understand the knowledge of the staff of life, pa halau o te atua, maiola (healing light, the knowledge of the temple) and aumakua (huna mana - ancestral worship, the source of knowledge) as the root and bone of Hawaiian spiritualism based on the Pu'uhonua and its sovereignty. The time has come to share our mana'o.

The foundation of the pre-contact traditional Hawaiian religion as passed down orally from Mahea O Kalani Lono O Ka Makahiki and Kahuna Nu Pali Ku Samuel Hoopii O Kalani Lono o Ka Makahiki Po Paki, is Pa Halau O Te Atua (the foundation of the four gods - Ku, Kanaloa, Lono, Kane). We of the Temple of Lono believe in the four gods as the foundation of traditional Hawaiian religion.

KU, the god of the ocean, should not be confused with the Western interpretation of Kamehameha's aumakua Kukailimoku. Ku is chronologically recognized first in the relationship to the staff of life. From the ocean our evolutionary life began and we continue to receive sustenance from this source. We reverence the ocean as a natural force that can give life and take life. HE TU, HE TU, ATEA TE TAI O TU.

KANALOA, is the god of the sun, whose light gives energy to all living things on earth; whose source of heat evaporates the waters on earth. KANALOA spins the clouds in the atmosphere. We reverence the sun as a natural force that can give life and take life. HE TANAROA, HE TANAROA, LAU WILI E TA OHU.

LONO is the god of the 'aina that provides the staff of life for man; whose magnetic force draws down the water of life from the clouds down to earth creating an abundance of food for all living things. "Oh LONO of the air, you speak in many ways soft or wild you sound through birds and trees. Your revered music rings through waterfalls. Let us see you and let us hear you so that our source is as real as ourseselves. Warm and brown and filled with seeds awaiting, may the sacred soil bring forth sweet fruit foods to strengthen and sustain us as we work. Oh LONO your face is seen in earth and rock." We reverence the 'aina as a natural force that can give life and take life. HE RONO, HE RONO, HE ULU TA MEA AI I TA POE HONUA.

KANE, the god of fresh water, completes the Kumulipo of the four gods. We reverence fresh water as a natural force that can give life and take life. HE TANE, HE TANE, TAHE TA WAI I TE TUAHIWI, HE RURI RURI I TA PO'O A TU, A TEA TE TAI O TU.

As we reverence earth, air, fire and water, may we each know and be Kumulipo. Receive and wisely use the huna mana and together we enjoy th reign of Mu.

Samuel Lono
TEMPLE OF LONO

Exhibit A
to Exhibit 2

From the Desk of
Lanny Sinkin
lanny.sinkin@gmail.com
April 27, 2015

Faith and the Mountain

The proposal to build the Thirty Meter Telescope on Mauna Kea takes place in a context of opposition to such telescopes stretching back for years. The Kahuna of the Temple of Lono asked me to share part of that history.

Ten years ago, well-known activist Hanalei (Hank) Fergerstrom helped to organize opposition to the construction of six extensions, known as outriggers, to the Keck Telescope on the sacred mountain of Mauna Kea.

For many years and over numerous objections, the University of Hawaii had been leasing lands at the peak for the construction of telescopes. The outriggers were the latest telescopes bring proposed.

Hank came to the Temple of Lono to request assistance in protecting the mountain from the abuse of the telescopes.

{ For insights into this faith, I would encourage you to read:
http://kingdomofhawaii.info/wp-content/uploads/2015/04/Temple-of-Lono-and-Hale-O-Papa.pdf }

For the Temple, the triangle (Ānu'u) of the mountain represented the ancestors, the highest source of wisdom.

The Temple responded that the appropriate way for Hank to ask assistance of the Ancestors would be to go into the Pu'uhonua O Honaunau at sea level, lands now within the United States National Park Service (NPS). As the Kahuna put it, the proper order was to lay the foundation within the Pu'uhonua before putting on the roof (Mountaintop).

The Temple provided guidance to Hank on the nature of the ceremony that should take place. That ceremony would include Moe Uhane and Hoike Po.

As part of that process, Hank notified the NPS that the Temple would be holding a ceremony within the Pu'uhonua

Later Hank called me to say that, in response to his notification, the NPS sent Hank an application for a permit to hold an event within the Pu'uhohua. He requested my legal opinion about the need for such an application.

Exhibit B
to Exhibit 2

I advised Hank that the Temple should not fill out the permit application. In my opinion, the Temple had a right, protected by the First Amendment to the United States Constitution, to practice their faith at their sacred site without asking permission of the United States Government. I suggested that the Temple send the NPS nothing more than a courtesy notice of the date and time of the Temple's visit.

Subsequently, I received a call from Palani Nobriga, the Kahuna of the Temple of Lono. I learned that the Temple never asked permission to practice its faith. The Temple would proceed with their ceremony without requesting a permit.

He invited me to attend the ceremony. I believe that everyone, including me, understood that my participation would be as an attorney prepared to challenge any attempt by the NPS to prevent the Temple from holding its ceremony.

The day of the ceremony, I was invited to participate as a haumana (student) of the Temple. The Kahuna, Hank, Keoni Choi, Kalei Victor, Jim McCrae, and myself participated in the ceremony.

The ceremony began with a procession from our campsite in the back of the Pu'uhonua to the Hale O Keawe (House of the Keawe Family) where the altar was located. The lead person blew the pū (conch shell) to call the Ancestors to witness what was happening.

Then came two others carrying long bamboo poles. These poles carried the flags of the Temple of Lono with the symbols of the sacred teachings.

Kahuna Nui Pali Ku Samuel Hoopii O Kalani Lono O Ka Makahiki Po Paki had created the flags, which contain symbols and colors, as a teaching tool for the next generation.

Then I followed with the offering bowl filled with fruit.

The last two completed the procession, with Jim stepping out occasionally to film the procession.

At the Hale O Keawe, we stood the flag poles up against the fence around the Hale and attached them with bungee cords. This ceremony was only the second time that the flags of the Temple had been raised.

Practitioners then removed the gate to the Hale and entered the area where the offering platform and the altar stood.

When the ceremony was complete, the practitioners left the Hale O Keawe to return to our campsite. We left the flags flying at the Hale O Keawe.

Soon thereafter, two Park Rangers came to ask whether we had put up some flags on the Hale O Keawe. They said that the flags looked very contemporary and not like a traditional spiritual practice.

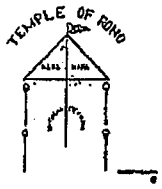
The Kahuna reminded them that the Catholic Church used to hold mass in Latin and now used English.

The Rangers left.

As it turned out, throughout the entire ceremony, even with the pū blowing, none of the Park Rangers had seen what we were doing.

While there is much more to tell of this tale, the ultimate outcome was that the outrigger telescopes were cancelled. http://www.newscientist.com/article/dn9702-judge-reverses-permit-for-new-hawaiian-telescopes.html#.VS4hXGa4NcQ. That cancellation was nine years ago.

Hank is now back on the mountain providing guidance to those protecting the sacred mountain from yet another telescope. For the Temple and the people who came every year for seven years asking the Ancestors for help, the ceremony ten years ago was just the beginning. As it is said, once you ask the Ancestors for help, you cannot call it back. The work to prevent the abuse of the Ānu'u continues.



A Message from the Temple of Lono
And the Hale O Papa

A member of the Human Family emerges from darkness to take a place in the chain of life.

Human survival relies upon the fertility of the land and the oceans.

The Gods were Ku (the Ocean), Kanaloa (the Sun), Lono (the Earth) and Kane (the fresh water). These Gods established the faith and foundation upon which our customs and civilization were built. These four Gods give breath to all things and provide the staff of life to feed all of us. Because the essential role of food is preserving and sustaining life, we worship food. That is why our temples are square, a constant reminder of the faith in these four elements.

As an island people, we would always need a secure source of food. The land dedicated to growing food was cultivated as a sacred responsibility and protected and honored as a center of peace within the greater civilization. This land is the Pu'uhonua. The life of the land is preserved in righteousness.

The kuleana: The areas of responsibility. The King had the power to take a life. The Tahunas were the priests, the doctors, and the teachers. The maka'ainana were the people who kept the garden healthy and productive for seven generations.

The Hawaiian understanding of the hydrologic cycle served to inform the unfolding of the religion, a personal matter -- the huna mana for each household to pursue in a form that suited their avocation, first as an 'ohana and then their role in the garden The study of the Gods led to an intricate and deep understanding of natural processes. We had more than a thousand years of observation.

Thus, when the missionaries arrived in the islands, they encountered a very sophisticated civilization founded on a strong faith rooted deeply in the people's understanding of natural processes. On that foundation of faith, the Hawaiians had developed a complex social system suitable for an island civilization and a highly effective economic system that sustainably supported hundreds of thousands of people.

Exhibit C
to Exhibit 2

While there were acts that Hawaiians considered wrong and even evil, there was no Devil in the islands. The missionaries taught the Hawaiians to believe in the Devil, superimposed the missionary Devil on to the traditional Hawaiian faith, and then taught the Christian Hawaiians to turn against their own faith as proof they rejected the Devil. The suppression included the passing of the Moe Kolohe Law, which banned numerous practices and customs, including the worship of ancestors – a central tenet of the faith. This law still stands. The passing of such a law today would be equivalent to forbidding our Asian brothers and sisters to hold Bon dances that honor their ancestral dead.

The suppression of the traditional faith has been a long-standing practice of the State of Hawaii. In a country that prides itself on the freedom of religion, this interplay of traditional faith with state disrespect is nothing new to the Temple of Lono and the faith of our people. The Temple found out a long time ago that the State of Hawaii does not think we are a people of faith. If they did our Temples wouldn't be historical sites for tourists.

In 1978, based on the passage of United States Public Law 95-341, the Temple of Lono emerged from decades of suppression to reclaim the Pu'uhonua Lehua at Kualoa. For this law said that we, as a people of faith, had the right to our sacred lands. The Temple rebuilt the Ma Pele at Kualoa to reconnect with the practice of Moe Ohane -- talking to our ancestors.

The State of Hawai'i brought in its bulldozers to destroy Sam Lono's work and arrested him for camping without a permit. After years of forcing him through one court proceeding after another and spending hundreds of thousands of public dollars, the State levied a $5 fine for the offense.

Do you see the people being arrested now on Mauna Kea because they are trying to protect that sacred mountain from the destructive actions of those seeking to put yet another telescope on sacred land?

The challenge is not about lease payments or terms. The challenge is about the right of a faith to be respected and practiced in its own homeland. The altar of the Temple of Lono is still in place at the Hale O Keawe in the Pu'uhonua O Honaunau. That Pu'uhonua, however, is now part of a national park operated as a tourist attraction by the United States National Park Service. The Temple is "allowed" to go into the Pu'uhonua to hold ceremony subject to the limitations of the park on the time and duration of worship.

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 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.

Tahuna Frank Kamealoha Anuumealani Nobriga
Temple of Lono

Darlene Pabre
Hale O Papa

Civil Beat: Community Voice
http://www.civilbeat.com/2015/04/the-science-based-faith-of-the-hawaiian-people/

The Science-Based Faith of the Hawaiian People
Describing traditional Hawaiian faith beliefs as 'superstition' involving 'irrational fears of pagan deities' is a misrepresentation of those religious ideas.
April 13, 2015 *By Lanny Sinkin*

There is a major controversy created by the initiation of construction of the Thirty Meter Telescope project on Mauna Kea, a mountain considered sacred by the Hawaiian people. Some comments on Civil Beat and other media websites about the nature of the controversy have revealed ignorance about the traditional faith of the Hawaiian people.

One commenter shared her perspective [http://www.civilbeat.com/2015/04/why-everyone-should-support-the-telescope-construction-blockade/] that the real issue was the legal obstacle to the telescope found in the conservation zoning status of the land. She noted that the law governing projects in conservation-zoned land prohibit projects with any significant environmental impact. That an 18-story building on 6 acres of land would have a significant impact seemed obvious to her. The violation of the law was equally obvious.

In making her case, however, she said that the issue was not "science versus superstition." The use of the word "superstition" denigrated the traditional Hawaiian faith and demonstrated a lack of understanding about that faith. In that lapse of awareness and sensitivity, she perpetuated the division created within the Hawaiian community by the introduction of Christianity and the suppression of the traditional Hawaiian faith.

Another commenter supported his perspective [http://www.civilbeat.com/2015/04/science-not-superstition-brought-polynesians-to-hawaii/] with the following statement: "It was science, not the irrational fear of pagan deities and inanimate objects, which brought Polynesians to Hawaii." This misrepresentation of the Hawaiian faith is stunning.

Yet another commenter shared his perspective [http://www.bigislandchronicle.com/2015/04/08/commentary-nonviolence-at-its-best-on-mauna-kea/] in the same "religion versus science" context. He wrote, "What science can tell us about our place in the universe is more honest, in at least the physical sense, than what any religion tells us, be it Christian, Hawaiian, Hindu, Muslim or Zoroastrian."

First, he lumped all religions together as if they all share the same characteristics. The five religions he listed are quite diverse and divergent from each other in their character.

Relevant to the telescope discussion, the Hawaiian faith is science-based. The faith of the Hawaiian people is founded on the four Gods: the Sun, the Ocean, the Land and the Fresh Water. Those elements create and support life, including providing the food that keeps humans alive. Hawaiians worshipped food. That is why the true center of the Hawaiian faith is the Pu'uhonua, the protected area where growing food to feed the people was the primary kuleana or responsibility.

The Hawaiian religion was the practice of the individual implementing that faith into daily life. That practice was based on a highly sophisticated understanding of the natural world based on

Exhibit 3

more than 1,000 years of observation. The traditional Hawaiians understood more about the physical world than the Europeans who reached the islands, because achieving that understanding was a spiritual practice and obligation. That understanding was very much grounded in knowing "our place in the universe."

In the Hawaiian cosmology, the spirit world was just as real as the physical world precisely because the spirit world reflected the Hawaiian understanding of the physical. Pele's moods reflect the observations of Pele's behavior. Accepting that connection between the physical and the spiritual gave the Hawaiians information and insights that are foreclosed to those who believe that science excludes a belief in realms science cannot measure with experiments that can be replicated.

The same commenter wrote, "Religion, originally, performed some of the same functions that science does: it offered explanations about who we are and where we came from."

The Kumulipo — the Hawaiian creation chant — is a textbook on evolution long before Darwin presented that concept. In the Hawaiian practice, all life forms that came before Humans are ancestors. That is simply the logic of evolution. To honor that history, the Hawaiians included ancestor worship in their spiritual practice. Hawaiians had no problem understanding who they were or where they came from.

For a more thorough examination of the place for the Hawaiian faith and religion in today's discussion, I would encourage everyone to read the "Temple of Lono and Hale O Papa Statement" found at www.KingdomofHawaii.info in the section titled "Protecting the Sacred Mountain."

http://www.civilbeat.com/2015/04/the-science-based-faith-of-the-hawaiian-people/

About the Author

Lanny Sinkin

Lanny Sinkin serves as ali'i mana'o nui or chief advisor to Edmund Keli'i Silva, Jr., ali'i nui mo'i or high chief/king of the Kingdom of Hawai'i. He is a writer, lecturer and commentator on a wide range of issues.

EXHIBIT 2

ORIGINAL

Lanny Alan Sinkin
Tx. Bar #18438675
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

Frank Kamealoha Anuumealani Nobriga, In his capacity as Kahuna of the Temple of Lono,

Plaintiff

Vs.

David Y. Ige, in his official capacity as Governor, State of Hawai'i,

Suzanne Case, in her official capacity as Chairperson, Department of Land And Natural Resources, State of Hawai'i,

Kekoa Kaluhiwa, in his official capacity as First Deputy, Department of Land and Natural Resoures, State of Hawai'i,

Gregory Mooers, in his official capacity as Chair, Maunakea Management Board,

John Doe #1, in his or her official capacity,

Defendants

Civ. No. CV15 00254 DKW BMK

COMPLAINT;
Petition for Temporary Restraining Order, Preliminary and Permanent Injunction;
Memorandum in Support of Temporary Restraining Order; with Exhibit 1
Declaration of Counsel; Exhibit 2
Declaration of Kahuna of the Temple of Lono; with Exhibits A-C
Proposed Order;
Certificate of Service

Exhibit 2

NOW COMES, FRANK KAMEHALOHA ANUUMEALANI NOBRIGA and files this Complaint seeking assistance from this Honorable Court in protecting the right of those embracing the traditional faith of the Hawaiian people to practice.

Jurisdiction

1. Plaintiff herein alleges that Defendants are suppressing the rights of those embracing the traditional faith of the Hawaiian people in violation of rights protected by the First and Fourteenth Amendments to the United States Constitution and in violation of 18 U.S.C. §242.

2. This Honorable Court has jurisdiction under 28 U.S.C. § 1331 (Federal Question).

Plaintiff

3. Petitioner is the Kahuna of the Temple of Lono, a traditional faith of the Hawaiian people.

Respondents

4. David Y. Ige is Governor of the State of Hawai'i and is named in his official capacity.

5. Suzanne Case is Chairperson of the State of Hawai'i Department of Land and Natural Resources (DLNR) and is named in her official capacity.[1]

---

[1] The Department of Land and Natural Resources, headed by an executive Board of Land and Natural Resources, is responsible for managing, administering, and exercising control over public lands, water resources, ocean waters, navigable streams, coastal areas (except commercial harbors), minerals, and all interests therein. The department's jurisdiction encompasses nearly 1.3 million acres of State lands, beaches, and coastal waters as well as 750 miles of coastline (the fourth longest in the country). It includes state parks; historical sites; forests and forest reserves; aquatic life and its sanctuaries; public fishing areas; boating, ocean recreation, and coastal programs; wildlife and its sanctuaries; game management areas; public hunting areas; and natural area reserves. http://dlnr.hawaii.gov/about-dlnr/

6. Kekoa Kaluhiwa is Deputy Director of DLNR and is named in his official capacity.

7. Gregory Mooers is Chair of the Office of Mauna Kea Management (OMKM) and is named in his official capacity.[2]

8. John Doe #1, yet to be identified, is also responsible for imposing rules or enforcing rules that restrict spiritual practice on Mauna a Wakea and is named in his or her official capacity.

Facts

9. This Honorable Court can take judicial notice that there is a major controversy over the proposal to build the Thirty Meter Telescope (TMT) on Mauna a Wakea, a mountain on the Island of Hawai'i.

10. Part of the basis for that controversy is the assertion by practitioners of the traditional Hawaiian faith that the mountain is sacred and that the construction of the telescope constitutes desecration of a sacred site.

11. On Wednesday, June 24, 2015, an attempt was made to bring a construction crew to the site of the TMT.

12. Hundreds of people gathered to protect the Mountain and prevent what they considered desecration.

---

[2] Office of Mauna Kea Management(OMKM) - The Maunakea Management Board provides the community with a sustained direct voice for the management of the Maunakea. The Board is comprised of seven members from the community who are nominated by the UH Hilo Chancellor and approved by the UH Board of Regents. The volunteer members represent a cross-section of the community and serve as the community's voice providing input on operations and activities, developing policies, reviewing and providing recommendations for land uses planned for Maunakea.

http://www.malamamaunakea.org/management/mauna-kea-management-board

13. The construction crew was first preceded by County of Hawai'i police officers.

14. From the 9,000 foot level and continuing up the mountain, hundreds of Protectors of Mauna a Wakea blocked the progress of the convoy.

15. While in the County jurisdiction, the moving blockade and the County police proceeded peacefully up the mountain.

16. In the County jurisdiction, there was only one arrest.

17. At the 10,000 foot level, the jurisdiction changed to the DLNR.

18. In the DLNR jurisdiction, the officers became more aggressive and arrests increased.

19. In response to the more aggressive DLNR actions, Protectors further up the Mountain placed rocks and rock walls in the roadway to obstruct the progress of the convoy without requiring interaction between the Protectors and the DLNR officers.

20. When the convoy reached the rocks, DLNR made the decision to abandon the effort to reach the TMT site.

21. The convoy turned around and descended the Mountain.

22. By Friday, June 26, 2015, the Protectors had removed all the rock obstructions from the road.

23. Subsequently, Rangers with the Office of Mauna Kea Management informed those engaging in spiritual practices on the Mountain that they would only be allowed to ascend the Mountain at 1:00 p.m.[3]

---

[3] Mauna Kea Rangers - Shortly after its founding in the fall of 2000, OMKM established the ranger program to provide daily oversight of activities on UH managed lands; to protect the resources and to provide for public safety. A key responsibility is informing visitors about the cultural, natural and scientific

24. The Rangers also stated that only ten people would be allowed to ascend the Mountain to engage in spiritual practice.

25. The Rangers also stated that groups ascending the Mountain to pule (pray) are required to be accompanied by a Ranger.

26. Some Rangers have stated that they will try to accommodate spiritual practitioners at times other than 1:00 p.m., although attempts to make such arrangements have not been successful.

27. At this time, anyone not present at 1:00 p.m. may not be able to ascend the Mountain that day.

28. During the time these rules are being imposed on spiritual practitioners, the road up to the summit is open to astronomers, water delivery trucks, nitrogen delivery trucks, and others with no limitations.

29. In response to questions, the Rangers seem unclear as to who is issuing orders that impose the restrictions on spiritual practices on the Mountain.

30. When people tell the Rangers that they want to go up the Mountain for spiritual reasons, the Rangers refer them to the Protectors to determine whether they are qualified as spiritual practitioners.

---

significance, as well as the hazards of visiting the mountain. They conduct daily patrols between mid-level (9,200') facilities and the summit. Patrol reports are submitted daily.

Rangers perform a variety of other duties including providing emergency assistance, assisting stranded motorists, coordinating litter removal, conducting trail maintenance, inspecting the observatories for compliance with their Conservation District Use Permits, and providing visitors with cultural information about Maunakea. http://www.malamamaunakea.org/management/mauna-kea-rangers

31. The Protectors claim no such capacity on their part to determine who is legitimately engaging in spiritual practice.

Relief

32. Plaintiff seeks relief in the form of a Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, attorneys' fees, and such other relief as the Court finds appropriate to prevent violations of the constitutional rights of traditional faith practitioners.

Respectfully submitted,

Lanny Alan Sinkin

LANNY ALAN SINKIN

Counsel for Plaintiff

DATED: July 6, 2015

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

JUDGE RIKI MAY AMANO (Ret.)
rma3cc@yahoo.com
Hearing Officer

JULIE H. CHINA, Deputy Attorney General
julie.h.china@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records (original + digital copy)

RICHARD NAIWIEHA WURDEMAN, ESQ.
rnwurdeman@rnwlaw.com
Counsel for Petitioners MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD;PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE

LINCOLN S.T. ASHIDA, ESQ.
isa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

RICHARD L. DELEON
kekaulike@msn.com

HARRY FERGERSTROM
hankhawaiian@yahoo.com

CINDY FREITAS
hanahanai@hawaii.rr.com

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

LANNY ALAN SINKIN, ESQ.
lanny.sinkin@gmail.com
Representative for the Temple of Lono

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

MEHANA KIHOI
uhiwai@live.com

MAELANI LEE
maelanilee@yahoo.com

STEPHANIE-MALIA TABBADA
stabbada@hawaiiantel.net

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(no email; mailing address only)

DATED: Honolulu, Hawai'i, August 1, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF	CASE NO. BLNR-CC-16-002
Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	THE UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION TO TEMPLE OF LONO'S MOTION FOR RECONSIDERATION, FILED AUGUST 7, 2016 [DOC. 178]**; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR RECONSIDERATION, FILED AUGUST 7, 2016 [DOC. 178]

The University of Hawai'i at Hilo ("**University**"), through its counsel, submits its Opposition to the Temple of Lono's ("**Temple**") Motion for Reconsideration ("**Motion**") filed on August 7, 2016 [Doc. 178].

The Motion, made pursuant to Hawai'i Administrative Rules ("**HAR**") § 13-1-39,[1] asks the Hearing Officer to reconsider what the Temple characterizes as an oral ruling at the August

[1] HAR § 13-1-39. Reconsideration. (a) Upon a motion of a party, the board may reconsider a decision it has made on the merits only if the party can show that:
(1) New information not previously available would affect the result; or
(2) A substantial injustice would occur.
(b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or not less than fourteen days prior to any deadline established by law for the disposition of the subject matter, whichever is earlier.

5, 2016 pre-hearing conference, which ruling stated that "the status of the State of Hawaii will not be an issue in this contested case hearing." Motion at 1; Temple Mem. in Sup. at 1. The Motion also asserts that the Hearing Officer's ruling is premature, because her ruling deals with issues set forth in Perpetuating Unique Educational Opportunities' ("**PUEO**") Motion to Set the Issues [Doc. 99], which will be heard at the pre-hearing conference scheduled on August 12, 2016. Temple Mem. in Sup. at 2.

To the extent that the Hearing Officer's statement on August 5, 2016 is characterized as a ruling, no formal written order has been issued by the Hearing Officer on this matter. Therefore, as a preliminary matter, the University objects to the Motion because it is premature.

The Temple also mischaracterizes PUEO's Motion to Set the Issues as requesting a ruling on the status of the State of Hawai'i. While PUEO's Motion to Set the Issues acknowledges that parties may, and in fact have, raised the status of the State of Hawai'i as an issue in this contested case, the Motion to Set the Issues does ***not*** ask for a ruling on the merits of the arguments dealing with the status of the State of Hawai'i. Therefore, the Hearing Officer's statements at the hearing does not yet constitute a formal order or ruling on the Motion to Set the Issues, which will be heard at the pre-hearing conference on August 12, 2016. Again, the Motion is premature.

Furthermore, the Hearing Officer's statement at the August 5, 2016 pre-hearing conference simply reiterated the Board of Land and Natural Resources' ("**Board**") ruling as set forth in Minute Order No. 14 [Doc. 124]. In Minute Order No. 14, the Board explicitly addressed the status of the State of Hawai'i, and rejected the arguments made by Mr. Dwight J. Vicente's *Motion to Disqualify Judge Riki Mae Amano (Ret.); State of Hawaii Lack of*

Jurisdiction in this Contested Case Hearing, filed July 22, 2016 [Doc. 80] ("**Vicente Motion**").[2] The Board held that the State of Hawai'i is a legal State in the Union and that there are no "issues with or cloud on the State's title to the land at issue in this matter," and that the Board has jurisdiction. Minute Order No. 14 at 2 [Doc. 124].

In response to Minute Order No. 14, the Temple filed its *Motion to Vacate Ruling and Supplement Response Time*, filed July 23, 2016 [Doc. 127] ("**Motion to Vacate**"). The Temple's Motion to Vacate, although not in name, is in form and essence a motion for reconsideration of the Vicente Motion, which presents the same arguments as to the status of the State of Hawai'i and its jurisdiction that the Temple asserts in its Motion and various other pleadings. At the pre-hearing conference on August 5, 2016, the Hearing Officer did not deny the Temple's Motion to Vacate, but rather took it under advisement to clarify the Board's rulings on its jurisdiction.

The Motion to Vacate should be denied because, as set forth in Minute Order No. 14, the Board has ruled that it has jurisdiction over the lands that are subject to this contested case hearing and the Temple's arguments to the contrary involve a determination on political questions over which the Board and Hearing Officer do not have jurisdiction to decide.

---

[2] In his motion, Mr. Vicente argued, *inter alia*, that the State of Hawai'i lacks jurisdiction to hear the above-captioned contested case due to the illegal annexation of the Kingdom of Hawaii to the United States. Vicente Motion at 1. While Mr. Vicente's and the Temple's arguments regarding the status of the State of Hawai'i are not verbatim, these arguments essentially amount to whether or not the Kingdom of Hawai'i still exists and seek to address issues which are political questions over which the Hearing Officer and Board do not have jurisdiction to address. *See The University of Hawai'i at Hilo's Substantive Joinder to [PUEO's]Motion to Set the Issues Filed July 18, 2016 [Doc. 99]*, filed August 1, 2016 [Doc. 140] ("**University Joinder**") at 11-13. Accordingly, under the doctrine of collateral estoppel, the University considers arguments made by one party and ruled on by the Board or Hearing Officer to apply to the same arguments on the same issues made by other parties. To the extent that arguments and objections made in the University Joinder address these same issues, the University Joinder is hereby incorporated by reference.

The Temple has repeatedly made the same arguments, without presenting any new information regarding the status of the State of Hawai'i and continues to ask the Hearing Officer to reconsider, and reconsider again, those same arguments, with no regard for judicial economy or the time of other parties to this matter.[3] *See* HAR § 13-1-39(a) (providing that the Board may consider a motion for reconsideration only if: "(1) New information not previously available would affect the result; or (2) A substantial injustice would occur").

For these reasons, the University respectfully requests that the Motion be denied as premature, because it has been filed in advance of any actual order, but also because it is improper since the Board has already ruled on this issue.

DATED: Honolulu, Hawai'i, August 11, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

[3] *See also The University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion to File Motion Out of Time [Doc. 179]*, filed August 10, 2016 (discussing the Temple's repeated attempts to relitigate similar or the same issues through various filings).

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

JUDGE RIKI MAY AMANO (Ret.)
rma3cc@yahoo.com
Hearing Officer

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

JULIE H. CHINA, ESQ., Deputy Attorney General
julie.h.china@hawaii.gov
WILLIAM J. WYNHOFF, ESQ., Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

RICHARD NAIWIEHA WURDEMAN, ESQ.
rnwurdeman@rnwlaw.com
Counsel for Petitioners MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD;PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(no email; mailing address only)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

RICHARD L. DELEON
kekaukike@msn.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96750
hankhawaiian@yahoo.com
(via email & U.S. mail)

CINDY FREITAS
hanahanai@hawaii.rr.com

WILLIAM FREITAS
pohaku7@yahoo.com

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

MEHANA KIHOI
uhiwai@live.com

GLEN KILA
makakila@gmail.com

MAELANI LEE
maelanilee@yahoo.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

DATED: Honolulu, Hawai'i, August 11, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION TO TEMPLE OF LONO'S MOTION TO VACATE MINUTE ORDER NO. 39 OR, ALTERNATIVELY TO PARTIALLY RECONSIDER MINUTE ORDER NO. 39 [DOC. 409]**; CERTIFICATE OF SERVICE

UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION TO VACATE MINUTE ORDER NO. 39, OR ALTERNATIVELY TO PARTIALLY RECONSIDER MINUTE ORDER NO. 39 [DOC. 409]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**") submits its opposition to Temple of Lono's ("**Temple**") *Motion to Vacate Minute Order No. 39 or, Alternatively to Partially Reconsider Minute Order No. 39*, filed on November 6, 2016 [Doc. 409] (the "**Motion**").

EXHIBIT 3

I. INTRODUCTION

On November 6, 2016, the Temple filed its Motion seeking to vacate or partially reconsider Minute Order No. 39 (the "**Order**"), issued by the Board of Land and Natural Resources (the "**Board**") on October 28, 2016. The Order denied various motions to disqualify the Hearing Officer in this proceeding. The Temple now seeks to vacate this Order, alleging that the Board's own statements limit its authority and jurisdiction to rule on motions to disqualify the Hearing Officer on non-jurisdictional grounds. However, it is indisputable that the Board and its Chair have the authority to delegate hearing responsibilities to and appoint a Hearing Officer. That authority inherently includes the power to revoke that appointment, if the circumstances require it. Contrary to the Temple's assertion, the Board's Order does not contradict the Board's authority, nor could it.

In the alternative, the Temple seeks a partial reconsideration of the Order, despite not presenting any new evidence or arguments that would warrant such relief. As demonstrated below, the Temple has failed to present any argument that would warrant vacating or reconsidering the Order. Accordingly, the University respectfully requests that the Board deny the Motion.

II. ARGUMENT

A. THE BOARD HAS JURISDICTION TO RULE ON MOTIONS TO DISQUALIFY THE HEARING OFFICER

The Temple does not dispute that the Board—through the Chair—has the authority to select and appoint the Hearing Officer. *See* Hawai'i Administrative Rules ("**HAR**") § 13-1-32(b). Implicit in the Board's authority to appoint the Hearing Officer is its authority to remove her, if appropriate. However, the Temple incorrectly argues that, by virtue of Minute Order No. 17, the Board narrowly defined its jurisdiction over motions to disqualify the Hearing Officer.

The Temple's sole basis for its argument is that the Board somehow ceded its jurisdiction due to allegedly conflicting statements in Minute Order No. 17. No such conflict exists. Rather, the Temple attempts to manufacture a contradiction by quoting portions of that Minute Order out of context. As discussed below, the Temple's arguments lack merit.

As an initial matter, the Temple's argument is based on the false premise that the Board is able to limit its jurisdiction by its own statements. There is no legal support for this position. The Board's jurisdiction is defined by the law and the implementing regulations, not the Board's own statements. As discussed above, the Board's power to rule on motions to disqualify—and effectively remove—the Hearing Officer is inherent in its authority to select and appoint the Hearing Officer. *See* HAR § 13-1-32(b). The Temple failed to cite any legal authority to support its contention that the Board lacks jurisdiction to rule on motions to disqualify unless they relate to jurisdictional issues or where the Hearing Officer has already ruled on the motion.

Even if the Board could limit its jurisdiction through its own statements, it did not do so here. The Temple asserts that the Board's statement that "only matters relating to the selection and appointment of the hearing officer are properly before the Board" is irreconcilable with the Board's subsequent statement that "the selection and appointment of the hearing officer and the task of addressing motions to disqualify the hearing officer clearly remain within the authority of the Board." *See* Minute Order No. 17 at 3, 6. The statements, taken on their face, are not contradictory, but, rather, are consistent with the fact that the Board's express authority to appoint a Hearing Officer carries with it the implicit authority to rescind that appointment. Nonetheless, the Temple appears to argue that in stating that "only matters relating to the selection and appointment of the hearing officer," the Board ceded its jurisdiction over motions to disqualify the Hearing Officer. However, that statement was made by the Board to clarify the

scope of Minute Order No. 14, which denied Dwight Vicente's *Motion to Disqualify the Hearing Officer and the State of Hawai'i for Lack of Jurisdiction to Hear the Contested Case Hearing* [Doc. 80] (**"Vicente Motion"**).

The Vicente Motion argued that because the Hearing Officer's authority is a result of the illegal annexation and overthrow of the Kingdom of Hawai'i, she should be disqualified for lack of proper jurisdiction. In Minute Order No. 14, the Board rejected Mr. Vicente's arguments that the State of Hawai'i is not legally a state and rejected Mr. Vicente's attempt to disqualify the Hearing Officer on jurisdictional grounds. After the Board issued Minute Order No. 14, the Temple submitted its *Motion to Vacate Ruling and Supplement Response Time* [Doc. 127]. The Temple subsequently submitted its Statement of Position on the already-decided Vicente Motion, urging the Board to rule on the sovereignty issues raised in the Vicente Motion. [Doc. 132 at 11]. Stephanie-Malia Tabbada and Dwight Vicente filed motions in support of the Temple's *Motion to Vacate Ruling and Supplement Response Time*, also advocating, *inter alia*, for the recognition of the Kingdom of Hawai'i and the illegal annexation of the State. As a result, in Minute Order. 17, the Board clarified that Minute Order No. 14 "only addresses Mr.Vincentes's motion to disqualify the hearing officer on the basis that the State of Hawai'i lacks subject matter jurisdiction to hear the contested case." The Board's statement that "only matters relating to the selection and appointment of the hearing officer are properly before the Board" merely reflects its decision that motions seeking an affirmative ruling on the issues of Hawai'i sovereignty or statehood are not properly before the Board, and does not restrict or conflict with the Board's jurisdiction over motions to disqualify the Hearing Officer. Indeed, the Board has repeatedly exercised its full authority to rule on issues of disqualification when it rejected the numerous, duplicative motions seeking to disqualify the Hearing Officer. *See, e.g.*, Minute Order Nos. 14,

17, and 39.

Because the Temple's attempt to vacate the Order is based on errors in fact and law, the Board should deny the Motion.

B. THE TEMPLE HAS NOT PRESENTED ANY NEW EVIDENCE OR ARGUMENTS THAT WARRANT RECONSIDERATION OF THE ORDER

The Temple's Motion should be denied because it does not raise any new arguments or evidence to warrant reconsideration of the Order. As noted by the Board in Minute Order No. 17 [Doc. 245], motions for reconsideration are not "a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." *Sousaris v. Miller*, 92 Hawai'i 505, 513, 993, P.2d 539, 547 (2000). The Temple does not present any new evidence or arguments that were not previously raised (or could and should have been raised) in the various pleadings addressed by the Order.

1. The Issue of Simultaneous Submissions Has Already Been Decided and the Temple's Motion Does Not Present Any New Argument or Evidence

The Temple argues that reconsideration of the Order is warranted because the Hearing Officer demonstrated bias when she wrongfully required all parties to submit their initial contested case documents—*i.e.*, opening statements, written direct testimony, witness lists, and exhibit lists (collectively, the "**Initial Documents**")—at the same time. However, Petitioners[1] already raised this argument in their *Renewed Motion to Disqualify Hearing Officer* [Doc. 340], and the Temple joined in this argument through its *Substantive Joinder and Supplement to Petitioners Mauna Kea Anaina Hou, et al.'s Renewed Motion to Disqualify Hearing Officer* [Doc. 343]. The Board ruled that the Hearing Officer acted within its discretion in setting the timeline for submission of the Initial Documents and that this decision did not demonstrate any

[1] "Petitioners" refers toMauna Kea Anaina Hou and Kealoha Pisciotta; Clarence Kukauakahi Ching; Flores-Case 'Ohana; Deborah J. Ward; Paul K. Neves; and KAHEA: The Hawaiian Environmental Alliance.

evidence of bias. *See* Order at 4. The Temple's Motion does not raise any new arguments, and merely argues that the Board erred in its ruling. This is not a proper ground for reconsideration.

To the extent the Temple has raised any "new" arguments, the Temple offers no justification as to why it could not have raised those arguments earlier in the proceeding. After Petitioners and the Temple raised their argument regarding the timeline for submission of the prehearing materials, the University responded, noting that that the Hearing Officer had the authority under HAR § 13-1-32(c) to require all parties to submit their prehearing materials simultaneously. *See* Statement of Position Regarding Petitioners' Renewed Mot. to Disqualify Hr'g Officer and Notice of Withdrawal of Counsel [Doc. 369] at 10-11 ("**Statement of Position**"). The Temple had every opportunity to respond to this argument, and in fact did file its response to the University's Statement of Position but declined to respond to address the University's argument regarding the Board's authority to set timelines under HAR § 13-1-32(c). [Doc. 386]. The Temple should not be permitted to have a second bite at the apple. The Temple gambled on its litigation strategy and lost. That—without more—is not proper basis for reconsideration of the Order. *See Sousaris*, 92 Hawai'i at 513, 993 P.2d at 547 (2000) (a motion for reconsideration is not "a device to relitigate old matters or to raise arguments or evidence that ***could and should have been brought during the earlier proceeding***") (emphasis added).

Moreover, to the extent that the Temple's "new" arguments could not have been raised previously, they still fail to provide a basis for reconsideration here. In its Motion, the Temple merely points out that the University, as the applicant, has the "initial burden of going forward" and therefore should be required to present its case before the remaining parties. Mot. at 6-8 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The Temple misrepresents the holding and language of *Cities Service Co.*, as the quote "initial burden

of going forward" does not appear anywhere in that opinion. Moreover, *Cities Service Co.* is not relevant here as it relates to the standards for summary judgment motions under Rule 56(e) of the Federal Rules of Civil Procedure ("**FRCP**"). *Cities Service Co.* at 289-290, 88. S.Ct. 1593. Nothing in *Citi Service Co.* relates to—much less supports—the Temple's assertion that the CDUA applicant is required to provide its prehearing materials first. Accordingly, the Board correctly relied on HAR § 13-1-32(c) in ruling that the Hearing Officer had the discretion to require all parties to submit file their prehearing materials simultaneously. Therefore, the Temple's request for reconsideration should be denied.

2. The Issues Regarding the Temple's Motion to File Motion Out of Time Have Already Been Ruled Upon and the Temple Presents No New Argument or Evidence Warranting Reconsideration of the Order

The Temple argues that reconsideration of the Order is warranted because the Board wrongfully affirmed the Hearing Officer's denial of its *Motion to File Motion Out of Time* [Doc. 179], and did so based on new arguments. The Motion states that, in making its ruling, the Board cited HAR § 13-1-32(c), which was not previously raised by the Temple or the other parties. The Temple argues the Board's citation of its own rules of practice and procedure somehow constitutes a new argument that establishes grounds to reconsider the Order. This argument is plainly illogical. Moreover, the Board's rules of practice and procedure have governed since day one of this contested case proceeding, and all parties should be aware of this fact. The Temple should not be allowed to now claim ignorance of these rules in an attempt to assert that the Board's Order raised "new" arguments that the Temple was unaware of. Whether or not it was raised with regards to the *Motion to File Motion Out of Time*, the Temple should have been aware of the Hearing Officer's authority under the administrative rules, and if the Temple believed it did not apply in that instance, it should have raised that issue in its previous pleadings.

The Temple also goes on to rehash old arguments regarding the Hearing Officer's failure to allow the Temple to be heard on its *Motion to Dismiss Conservation District Use Application HA-3568* [no docket number]. Mot. at 8-10. Again, simply restating arguments that were previously raised does not warrant reconsideration of the Order.

3. The Board's Alleged Mischaracterization of the Temple's Argument Does Not Warrant Reconsideration of the Order

The Temple argues that the Board should reconsider its Order because it misinterpreted the Temple's position regarding the deficiency of Minute Order No. 19 [Doc. 281]. The Temple previously sought disqualification of the Hearing Officer based on her order setting the issues in this proceeding (Minute Order No. 19). The Board's Order denied that motion, noting that the Hearing Officer did not demonstrate bias when "she set issues in the contested case hearing that [the Temple] did not agree with[.]" Order at 4. The Temple now asserts that it did not object to Minute Order No. 19 on the grounds that the Hearing Officer did not adopt its proposed issues, but instead, objected because the Hearing Officer did not provide a detailed explanation of its ruling. But in fact, the Temple asserted multiple grounds for bias, including, *inter alia*, that Hearing Officer demonstrated bias by not adopting its proposed issues in Minute Order No. 19. In its *Substantive Joinder and Supplement to Petitioners' Renewed Motion to Disqualify Hearing Officer* [Doc. 343], the Temple argues:

> Later, the Temple submitted the issues that the Temple asserted should be heard in the contested case hearing. The Temple included the character of the Applicant as one such issue. The Hearing Officer excluded that issue when deciding what issues will be heard. The Hearing Officer again violated the Due Process rights of the Temple.

Id at 3-4. The Temple argued the due process violations—including the exclusion of the Temple's proposed issue—was evidence of the Hearing Officer's bias, and she should be disqualified as a result. The Board rejected the Temple's arguments when it denied Petitioners'

Renewed Motion to Disqualify Hearing Officer. *See* Order. The Temple's attempt to mischaracterize its own pleadings to support this Motion is unavailing and does not warrant reconsideration of the Order.

4. Semantic Differences in the Board's Interpretation of the Facts Do Not Warrant Reconsideration of the Order

The Temple argues that the Board mischaracterized the disposition of its motion requesting recusal and its objection to the Hearing Officer's absence of written orders. Given that the Board has again denied the Petitioners' and the Temple's attempt to disqualify the Hearing Officer and the Hearing Officer has ruled on all timely filed prehearing motions, the Temple's complaints are moot. Moreover, the Temple cites to no new fact or authority that warrants reconsideration. Indeed, the Temple does not appear to seek reconsideration of the Order based on the alleged mischaracterizations. Rather, the Temple appears to simply be airing its grievances to the Board. Therefore, the Board should disregard those arguments.

III. CONCLUSION

The Temple has failed to provide any basis for vacating or reconsidering the Order here. The Temple incorrectly argued that the Board, by its own statements, did not have jurisdiction to issue the Order. Additionally, the Temple failed to produce any new evidence or arguments that warrant reconsideration of the Order here. The Temple merely rehashes old arguments and repeatedly states its dissatisfaction with the Board's ruling. These are not proper grounds for vacating or reconsidering the Order. Accordingly, the University respectfully submits that the Temple's Motion should be denied.

DATED: Honolulu, Hawai'i, November 17, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal Lands ("*OCCL*")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwightjvicente@gmail.com
(via email & U.S. mail)

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

WILLIAM FREITAS
pohaku7@yahoo.com

CINDY FREITAS
hanahanai@hawaii.rr.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

KALIKOLEHUA KANAELE
akulele@yahoo.com

GLEN KILA
makakila@gmail.com

MEHANA KIHOI
uhiwai@live.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

MAELANI LEE
maelanilee@yahoo.com

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

E. KALANI FLORES
ekflores@hawaiiantel.net

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

DEBORAH J. WARD
cordylinecolor@gmail.com

B. PUALANI CASE
puacase@hawaiiantel.net

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE

PAUL K. NEVES
kealiikea@yahoo.com

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
(no email; mailing address only)

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, November 17, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO TEMPLE OF LONO'S **MOTION FOR SUMMARY JUDGMENT (DISQUALIFICATION)**, FILED SEPTEMBER 17, 2016 [DOC. 263]; CERTIFICATE OF SERVICE

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

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), by and through its undersigned counsel, submits its *Opposition* to the *Motion for Summary Judgment (Disqualification)* filed by the Temple of Lono ("**Temple**") on September 17, 2016 [Doc. 263] ("**Motion**"). The Motion requests that the Hearing Officer "grant a summary judgment on the Temple's claim that the Applicant's bigoted and libelous attack on the Temple disqualifies the Applicant from being given a permit by the State." Motion at 1. The basis of the Motion appears to be certain arguments made by the University in its *Opposition to the Temple of Lono's*

Motion for Partial Summary Judgment [Doc. 78] (*see* Doc. 135) ("**MPSJ Opposition**"), which the Temple contends amount to uncontested bigotry and libel, that "entitles the Temple to a summary judgment on the issue of disqualification as a matter of law." Motion at 6. The University respectfully submits that the Motion should be denied because: (1) the Motion is plainly improper, given that the Hearing Officer previously denied the Temple leave to file such a motion; and (2) because the Temple plainly fails to carry its burden of establishing, through admissible evidence, that there are no genuine issues of material fact, and that the Temple is entitled to judgment as a matter of law.

I. ANALYSIS

A. THE MOTION IMPROPERLY DISREGARDS THE HEARING OFFICER'S PRIOR DENIAL OF THE TEMPLE'S REQUEST TO FILE A SUCH A MOTION

As a preliminary matter, the Temple admits that it has already brought to the attention of the Hearing Officer its belief that arguments in the University's MPSJ Opposition were bigoted and libelous, at least twice. The Temple first raised this issue in its Reply to the University's MPSJ Opposition. *See* Motion at 3, citing to Doc. 176 (the Temple's Reply to the MPSJ Opposition). As reflected in Minute Order 23, these arguments were considered by the Hearing Officer. *See* Doc. 346 at 2, 3. However, the Hearing Officer nonetheless denied the underlying motion, finding that "summary judgment, partial or otherwise, is an improper mechanism to determine the factual issues asserted by [the Temple] and further find[ing] that the positions set forth are not properly before the Hearing Officer in this contested case hearing." *See id.* at 3.

The Temple again raised its argument that the MPSJ Opposition evidenced bigotry and bias purportedly warranting dispositive relief in its *Motion to File Motion Out of Time*, filed August 8, 2016 ("**Motion for Leave**"). *See* Doc. 179; *see also* Motion at 5 (referring to the Motion for Leave at Doc. 179). In that motion, the Temple sought leave from the Hearing

Officer to "file a motion out of time directly addressing the implications of the University attack for the decision being made in this proceeding." *See* Doc. 179 at 3. More specifically, the motion sought leave to file a *Motion to Dismiss Conservation District Use Application HA-3568* ("**Motion to Dismiss**") on the grounds that the arguments raised in the MPSJ Opposition "disqualif[y] the University from receiving a conservation district use permit for Mauna Kea." *See* Ex. 2 to Doc. 179 at 1-2. The Motion for Leave (along with the supporting and opposing party submissions) came on for hearing on August 29, 2016, and was ultimately denied. *See* Minute Order 33 [Doc. 356].

Despite the Hearing Officer's unambiguous denial of the Motion for Leave, the Temple has proceeded with filing the Motion, a further dispositive motion on the basis of the arguments in the MPSJ Opposition—*i.e.* precisely the same arguments the Temple raised in its Motion to Leave and sought to introduce in the accompanying Motion to Dismiss. The Temple cannot circumvent the Hearing Officer's ruling on the Motion for Leave simply by recasting the Motion to Dismiss as a motion for summary judgment. The Motion, having been filed without proper leave and in the face of the Hearing Officer's denial of the Temple's prior Motion for Leave, is plainly improper and should, therefore, be denied.

B. THE TEMPLE HAS FAILED TO CARRY ITS BURDEN TO ESTABLISH THE ABSENCE OF GENUINE ISSUES OF MATERIAL FACT, AND TO SHOW THAT THE TEMPLE IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A party moving for summary judgment bears the burden of showing that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense addressed by the motion; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. *See Ralston v. Yim*, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013) (citation omitted). Only when this initial burden is satisfied does the burden shift to the

non-moving party to respond by demonstrating that a genuine issue worthy of trial exists. *Id.* at 56-57, 292 P.3d at 1286-87 (citations omitted). Furthermore, it is well established that a motion for summary judgment must be decided only on the basis of *admissible* evidence. *See Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 255 n.19, 59 P.3d 877, 890 n.19 (2002) (quoting *Takaki v. Allied Mach. Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App. 1998)). The Motion, however, is not supported by any evidence, much less admissible evidence; and the Temple's bare contention that it is undisputed that the University's MPSJ Opposition constituted bigotry and libel, warranting the dismissal of the University's conservation district use application, is entirely unsupported by fact or law.

The suggestion that the University somehow acquiesced in the Temple's characterization of the University's arguments by failing to challenge substantively those characterizations with admissible evidence in opposition to the Motion for Leave is a blatant red herring. The issue for purposes of the Motion for Leave was whether *leave* should be granted to the Temple to file a further dispositive motion, not whether the University actually engaged in libelous or other wrongful activities. Thus, the decision not to address substantively those allegations does not in any way constitute an admission or any waiver of any arguments in opposition to those allegations. As noted above, the Hearing Officer denied the Motion for Leave and did not allow the Temple to file its Motion to Dismiss. Therefore, the substantive arguments raised in the Temple's Motion to Dismiss involving the Temple's accusations of bigotry and libel were not—and have never been—properly before the Hearing Officer. Therefore, contrary to the Temple's assertion, the fact that the University has not responded substantively to those baseless allegations has no legal effect and more importantly, cannot be deemed to render this heavily disputed characterization "uncontested" and sufficient to warrant summary judgment.

Moreover, the Temple's allegations lack any factual or legal basis. Apart from conclusory, unsupported assertions, the Temple's Motion is conspicuously devoid of any admissible evidence, argument, explanation, or other attempt to carry its burden of persuasion. Not only does the Motion fail to provide evidence to establish any facts as undisputed, or cite—even once—the legal definition of libel, it also fails to provide for the Hearing Officer any case law demonstrating how libel has been evaluated in this jurisdiction, or any legal authority for its requested relief. Those omissions allow the Temple to avoid addressing unfavorable legal precedent and ultimately the invalidity of its accusation; but, as a matter of law, are fatal to the Motion.

To establish a libel or written defamation claim, four elements must be demonstrated: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm cause by the publication. *See Gonsalves v. Nissan Motor Corp. in Hawai'i, Ltd.*, 100 Hawai'i 149, 171, 58 P.3d 1196, 1218 (2002) (citations omitted). None of those factors are present here. The arguments contained in the MPSJ Opposition to which the Temple takes exception are just that—arguments, based on interpretations of the Temple's own arguments; they are not false or defamatory statements. Although the Temple may have felt that a slight was insinuated, that is not the standard for whether or not a statement is actionable. "The threshold question in defamation cases is whether, as a matter of law, the statements at issue are reasonably susceptible to defamatory meaning." *Gold v. Harrison*, 88 Hawai'i 94, 101, 962 P.2d 353, 360 (1998) (citation omitted). Noting the constitutional protections afforded to speech, the Hawai'i Supreme Court held in *Gold* that defendants are entitled to summary judgment on defamation

claims "[w]here the court finds that the statements are not susceptible to the meaning ascribed to it by the plaintiffs[.]" *Id.* That is clearly the case here. Nowhere in the MPSJ Opposition is the Temple referred to as an "extremist organization" or analogized to "ISIS," as the Temple contends. Motion at 3. That inference is purely of the Temple's own making. The arguments at issue, instead, reasonably and rationally tie directly back to and respond to the Temple's own arguments, and are therefore proper in the context of a pending legal proceeding.

Indeed, even if the arguments could conceivably be considered defamatory, the Temple's contention that these arguments are somehow improper and warranting of dispositive relief ignores the well-established principle of litigation privilege. "Hawai'i courts have applied an absolute litigation privilege in defamation actions for words and writings that are material and pertinent to judicial proceedings." *Matsuura v. E.I. du Pont de Nemours and Co.*, 102 Hawai'i 149, 154, 73 P.3d 687, 692 (2003). This absolute privilege provides that:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceedings, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Isobe v. Sakatani, 127 Hawai'i 368, 383, 279 P.3d 33, 48 (App. 2012) (internal quotations and citations omitted). The purpose of this doctrine is to uphold the basic tenant of the adversarial legal system—that attorneys must be free to zealously advocate on behalf of their clients. *See id.* at 382, 279 P.3d at 47 (noting that the doctrine of absolute litigation privilege is grounded on the important public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients). That the Temple lobs its accusation of libel, bias or bigotry against the University, rather than at the University's counsel, is of no consequence because the litigation privilege also applies to party litigants. *See* RESTATEMENT (SECOND) OF TORTS §§ 587–88 (1977) (recognizing an absolute privilege for private litigants, private

prosecutors, criminal defendants, and witnesses, provided the material at issue has some relation to the proceedings).[1] In filing this Motion, the Temple is asking the Hearing Officer to do the very thing the doctrine of litigation privilege is meant to prevent—to punish a party for zealous advocacy. Such a Motion should not be entertained and should be dismissed with prejudice, as a matter of law.

Additionally, the Temple did not and cannot cite to any statute, law or other regulation or legal authority that authorizes the summary disposition of a contested case proceeding related to a conservation district use application ("**CDUA**") on the basis of alleged bias. While there are standards and requirements against which a CDUA is evaluated, neither HAR § 13-5-30 nor HAR § 13-5-31 require that an applicant give up its right to respond to legal arguments made by other parties during the pendency of the proceeding and simply accept as true all representations by parties, because they are asserted to be constitutionally protected. Thus, the Temple's assertion that the University is somehow summarily disqualified as a CDUA applicant simply because it exercised its right to respond to arguments made by the Temple is meritless.

For all the reasons set forth herein, the University respectfully submits that the Motion should be denied.

---

[1] Section 587 of the Restatement (Second) of Torts provides: "A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications . . . during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding." While originally applicable to what would be considered "traditional litigation," courts have expanded the reach of the privilege to judicial and quasi-judicial proceedings. T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 931 (2004).

DATED: Honolulu, Hawai'i, December 30, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal Lands ("*OCCL*")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
SUMMER H. KAIAWE, ESQ.
skaiawe@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwightjvicente@gmail.com
(via email & U.S. mail)

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(*via email & U.S. mail*)

RICHARD L. DELEON
kekaukike@msn.com

WILLIAM FREITAS
pohaku7@yahoo.com

CINDY FREITAS
hanahanai@hawaii.rr.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

KALIKOLEHUA KANAELE
akulele@yahoo.com

GLEN KILA
makakila@gmail.com

MEHANA KIHOI
uhiwai@live.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

E. KALANI FLORES
ekflores@hawaiiantel.net

B. PUALANI CASE
puacase@hawaiiantel.net

DEBORAH J. WARD
cordylinecolor@gmail.com

PAUL K. NEVES
kealiikea@yahoo.com

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
(no email; mailing address only)

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, December 30, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO TEMPLE OF LONO'S **MOTION TO RECUSE HEARING OFFICER**, FILED SEPTEMBER 17, 2016 [DOC. 262]; CERTIFICATE OF SERVICE

UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION TO RECUSE HEARING OFFICER FILED SEPTEMBER 17, 2016 [DOC. 262]

Applicant UNIVERSITY OF HAWAI'I AT HILO AT HILO ("**University**"), by and through its undersigned counsel, submits its *Opposition* to the *Motion to Recuse Hearing Officer* filed by the Temple of Lono ("**Temple**") on September 17, 2016 [Doc. 262] ("**Motion**"). The University opposes the Motion on the grounds that it is simply another attempt to renew previously unsuccessful efforts to disqualify the Hearing Officer and plainly fails to provide any

EXHIBIT 5

evidence to substantiate its allegation of bias on the part of the Hearing Officer .[1]

As a preliminary matter, the University objects to the Motion as yet another unfounded attempt to seek disqualification of the Hearing Officer on the basis of purported bias. All such prior efforts have been rejected; and the Temple does not provide any viable, much less admissible, evidence to support this new Motion. Indeed, the Temple's arguments fail as a matter of established law.

The Temple argues that the Hearing Officer should recuse herself because the Hearing Officer's denial of the Temple's *Motion to File Motion Out of Time*, filed August 8, 2016 [Doc. 179] ("**Motion for Leave**") "is clear evidence of bias" and that her conduct demonstrates her "true proclivities and her role in this charade of a proceeding[.]" Motion at 4, 11. The Temple claims that based on the prior adverse ruling, the Hearing Officer cannot deny her bias and must now recuse herself from the proceedings. *Id.* at 4, 7-8 Such argument is as illogical as it is unsupported.

It is well established that claims of bias cannot be supported merely by unfavorable rulings—even if erroneous. *See State v. Ross*, 974 P.2d 11, 18, 89 Hawai'i 371, 378 (1998) ("We have long recognized, however, that petitioners ***may not predicate their claims of disqualifying bias on adverse rulings, even if the rulings are erroneous.***") (emphasis added); *see also Peters v. Jamieson*, 397 P.2d 575, 583, 48 Hawai'i 247, 257 (1964) ("It is the generally recognized rule as petitioner concedes that ***errors in rulings by the trial judge in the course of a judicial proceeding cannot be made the basis upon which bias or prejudice is predicable.***") (emphasis added). Consistent with this established precedent, the Board has ruled that adverse

[1] To the extent that the Motion raises and attempts to argue issues also raised in the Temple's Motion for Summary Judgment (Disqualification), filed September 17, 2016 [Doc. 263], the University incorporates by reference the arguments raised in its concurrently filed opposition thereto ("**Opposition to Disqualification MSJ**").

rulings cannot form the basis for a claim of bias because the Hearing Officer is authorized to "rule on motions and 'dispose of... matters that normally properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.'" Minute Order 39 [Doc. 406] at 5 (quoting Haw. Admin. R. § 13-1-32(c)).

Furthermore, contrary to the Temple's conclusory assertion, the denial of the Motion for Leave does not amount to a "gross violation" —or any violation—of due process. *See* Motion at 6-7. The Temple cannot show that legal arguments made by the University in the context of this proceeding somehow amount to actionable libel or defamation that provide grounds for disqualifying the University's conservation district use permit. *See* University Opposition to Disqualification MSJ at 3-6. There simply is no authority for this. *Id.* Nor can that argument stand in the face of the well established principle of litigation privilege. *See id.* at 6-7. Moreover, the Temple's claim that it has somehow been deprived of due process is further belied by the fact that it is a party to the ongoing contested case proceedings and has the ability to not only cross-examine witnesses, but to also put on its own witnesses, and to then submit post-hearing proposed findings of fact and conclusions of law and briefing. The Temple has been, and continues to be, afforded meaningful opportunity to be heard in these proceedings.

Finally, the Temple's claim that the Hearing Officer's "characterizing the Temple faith as opinion is further indication of bias" is also nothing more than unsupported argument. *See* Motion at 8. That the Hearing Officer did not accept as fact, prior to the contested case hearing and in the absence of admissible evidence, the nature and/or characterization of the Temple's claimed faith is consistent with her duties, not evidence of an abdication of those duties or any bias whatsoever.

As the Temple offers nothing by way of appropriate admissible evidence to substantiate its claims of bias by the Hearing Officer, the University respectfully submits that the Motion should be denied.

DATED: Honolulu, Hawai'i, December 30, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal Lands ("*OCCL*")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwightjvicente@gmail.com
(via email & U.S. mail)

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

WILLIAM FREITAS
pohaku7@yahoo.com

CINDY FREITAS
hanahanai@hawaii.rr.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

KALIKOLEHUA KANAELE
akulele@yahoo.com

GLEN KILA
makakila@gmail.com

MEHANA KIHOI
uhiwai@live.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

E. KALANI FLORES
ekflores@hawaiiantel.net

B. PUALANI CASE
puacase@hawaiiantel.net

DEBORAH J. WARD
cordylinecolor@gmail.com

PAUL K. NEVES
kealiikea@yahoo.com

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
(no email; mailing address only)

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, December 30, 2016.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO TEMPLE OF LONO'S **MOTION FOR SUMMARY JUDGMENT (DESECRATION)**, FILED SEPTEMBER 17, 2016 [DOC. 264]; CERTIFICATE OF SERVICE

UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO TEMPLE OF LONO'S MOTION FOR SUMMARY JUDGMENT (DESECRATION), FILED SEPTEMBER 17, 2016 [DOC. 264]

Applicant UNIVERSITY OF HAWAI'I AT HILO (**"University"**), by and through its undersigned counsel, submits its *Opposition* to the *Motion for Summary Judgment (Desecration)* filed by the Temple of Lono (**"Temple"**) on September 17, 2016 [Doc. 264] (**"Motion"**).

I. INTRODUCTION

The Motion requests that the Hearing Officer "grant summary judgment on the Temple's claim that the construction proposed . . . would constitute desecration under State law and, therefore, the permit for construction cannot be granted." Mot. at 1. The Temple argues,

without admissible evidence or legal authority, that the construction of the Thirty Meter Telescope ("**TMT**") would violate the Hawai'i Penal Code, specifically Hawai'i Revised Statutes ("**HRS**") § 711-1107; and that the University's Conservation District Use Application ("**CDUA**") should be rejected and the related contested case hearing be dismissed because "the agency lack[s] the jurisdiction to hear an application for a permit to break the law and the authority to grant a permit to break the law." Mot. at 5. The University opposes the Motion on the grounds that: (1) it is untimely; (2) it seeks to adjudicate issues that are not within the Hearing Officer's jurisdiction; and (3) the Temple fails to carry its burden of establishing that there are no genuine issues of material fact and that, based on undisputed facts, the Temple is entitled to judgment as a matter of law.

II. ANALYSIS

A. THE MOTION IS UNTIMELY

As a preliminary matter, the University objects to the Motion as untimely. On June 17, 2016, the Hearing Officer set a procedure and a schedule for pre-hearing motions, requiring, *inter alia*, that all pre-hearing motions be filed by July 18, 2016. *See* Minute Order No. 13 [Doc. 115]. The Temple, however, did not file the Motion until September 17, 2016—two months past the established deadline. The Motion does not identify any reason that it could not have been filed by the pre-hearing motions deadline. Indeed, as is evident from the face of the Motion, there is no such reason. None of the limited facts asserted, law cited, or arguments proffered arose after the motions deadline. The Temple has failed to show any good cause to excuse its failure to file the Motion by the ordered pre-hearing motions deadline, so the Motion should be denied as untimely.

B. THE HEARING OFFICER DOES NOT HAVE JURISDICTION TO ADJUDICATE VIOLATIONS OF THE HAWAI'I PENAL CODE

The Motion should also be denied as the enforcement of the desecration statute is not within the Hearing Officer's jurisdiction. The Motion seeks summary judgment on the basis of alleged anticipatory violations of the Hawai'i Penal Code, specifically HRS § 711-1107. Even if HRS § 711-1107 were applicable to the University—which, as discussed below, it is not—this contested case hearing is not the proper forum to adjudicate a ***criminal*** statute. Indeed, it is well established that the authority of an administrative agency is limited by the powers expressly granted to it by the legislature. *See Morgan v. Planning Dep't, Cnty. of Kauai,* 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004). The Temple fails to cite any authority that would transform this contested case proceeding, related to the permit application, into a criminal court or otherwise authorize the Hearing Officer to rule on alleged ***criminal*** violations under HRS § 711-1107, prospective or otherwise. Furthermore, HRS § 711-1107 does not create a private right of action. Therefore, the Temple lacks standing to prosecute alleged violations of that statute. Accordingly, for those reasons, the Motion should be denied.

C. THE TEMPLE HAS NOT CARRIED ITS BURDEN FOR SUMMARY JUDGMENT

Even if the Hearing Officer had jurisdiction to adjudicate the merits of an alleged act of criminal desecration under HRS § 711-1107, the Temple has not carried its burden to show it is entitled to summary judgment as a matter of law, nor can it. A party moving for summary judgment bears the burden of showing that (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense addressed by the motion; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. *See Ralston v. Yim*, 129 Hawai'i 46, 56, 292 P.3d 1276, 1286 (2013) (citation omitted). Only when this initial burden is satisfied does the burden shift to the non-moving party to respond by demonstrating

that a genuine issue worthy of trial exists. *Id.* at 56-57, 292 P.3d at 1286-87 (citations omitted). As described in greater detail below, the Temple has plainly failed to satisfy either of those essential requirements for summary judgment. Accordingly, the Motion must be denied.

The statute at issue, HRS § 711-1107, states as follows:

> (1) ***A person commits the offense of desecration if the person intentionally desecrates***:
>
> (a) Any public monument or structure; or
>
> (b) A place of worship or burial; or
>
> (c) In a public place the national flag or any other object of veneration by a substantial segment of the public.
>
> (2) "Desecrate" means ***defacing, damaging, polluting, or otherwise physically mistreating*** in a way that the defendant knows will outrage the sensibilities of person likely to observe or discover the defendant's action.
>
> (3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both.

In the Motion, the Temple argues that the construction of the TMT Project, as proposed in the CDUA, would constitute criminal desecration under HRS § 711-1107 because it is purportedly undisputed that: (1) Mauna Kea is a place of worship or burial, as provided for under HRS § 711-1107(1)(b); (2) the construction of the TMT Project would cause extensive and irreparable damage to Mauna Kea; (3) such damage would constitute desecration under HRS § 711-1107(2) *if it provokes outrage*; and (4) such outrage "is already proven".[1] *See* Mot. at 2-4. The Temple further argues that by submitting the CDUA, the University improperly seeks to engage in criminal actions; and that, if the requested permit is granted, the Board would be complicit in a

[1] The University presently addresses those issues raised in the Motion; it does so without waiver of its right to address additional issues or arguments that may be appropriate at a future time, which right is hereby expressly reserved

conspiracy to violate the law. *See id.* at 4-5. Thus, according to the Temple, the CDUA should never have been accepted, and the only appropriate response is to dismiss the case. *See id.* at 5. These arguments, however, fundamentally mischaracterize both the state of the record as being undisputed, and the applicable law. As set forth below, because the Temple has not established the absence of genuine issues of material fact or an entitlement to judgment as a matter of law, the Motion should be denied.

1. The Motion Is Unsupported by Any Admissible Evidence

It is well established that a motion for summary judgment must be decided only on the basis of *admissible evidence*. *See Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 255 n.19, 59 P.3d 877, 890 n.19 (2002) (quoting *Takaki v. Allied Mach. Corp.*, 87 Hawai'i 57, 69, 951 P.2d 507, 519 (App. 1998)). The Motion, however, contains no supporting declaration or accompanying *admissible evidence* to establish the absence of genuine issues of material facts with respect to the essential elements of a HRS § 711-1107 violation. The Motion seeks to establish facts solely through reference to a Supreme Court concurring opinion and two website links. Not only are those references unaccompanied by a proper showing and request for judicial notice, as set forth below, they are otherwise insufficient to establish the absence of genuine issues of material fact. *See* Mot. at 2-4. Because the Temple has failed to support the Motion with admissible evidence necessary to establish that material facts are undisputed, the Motion is plainly deficient as a matter of law. *See Sierra Club.*, 100 Hawai'i at 255 n.19, 59 P.3d at 890 n.19 (quoting *Takaki*, 87 Hawai'i at 69, 951 P.2d at 519) (acknowledging that it is well established that a motion for summary judgment must be decided only on the basis of admissible evidence). Having failed to carry that threshold burden, the Motion should be denied.

2. The Temple Has Failed to Establish Whether or to What Extent Mauna Kea is a Place of Worship or Burial Within the Meaning of HRS § 711-1107(1)(b)

The Temple asserts that "[t]he Supreme Court of Hawai'i has already made [the] determination" that Mauna Kea is a "place of worship or burial," as provided for under HRS § 711-1107(1)(b). Mot. at 2. That is simply not true. To support that flawed contention, the Temple cites to certain excerpts of a concurring opinion of the Supreme Court that states, among other things, that the "summit region" of Mauna Kea is "sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit region"; and that the Board was "aware of the project's potential adverse impact on the 'spiritual nature of Mauna Kea' and the 'cultural beliefs and practices of many'." As a threshold matter, statements made in a concurring opinion simply are *not* binding, indisputable factual determinations, as the Temple erroneously contends. Moreover, nowhere does the cited opinion refer to HRS § 711-1107 or otherwise state that Mauna Kea is a "place of worship or burial," within the meaning of HRS § 711-1107(1)(b). While the Temple appears to argue that the Court's references to areas on Mauna Kea being sacred or having a spiritual nature necessarily means that the mountain as a whole is a "place of worship or burial" under HRS § 711-1107(1)(b), that issue simply was not before the Court in the cited case and thus no such determination was made; nor does the applicable law support such a broad conclusion.

The Motion similarly cites to statements on the website for the Imiloa Astronomy Center that, according to the Temple, show that the University "accepts the sacred nature of the mountain and particularly the summit region." Mot. at 3. Again, it appears that the Temple's argument is that *anything* considered sacred to some, including expansive natural or environmental features such as *the entirety of Mauna Kea*, necessarily fall within the scope of HRS § 711-1107(1)(b) and cannot be built upon, even if such construction would otherwise be

lawful. As noted, however, the Temple has not shown that that is the intended scope of HRS § 711-1107. Contrary to the Temple's contention, the term "place of worship" is commonly used to refer to a specific structure, delineated space or otherwise designated locale, not an entire geographical feature. *See* HAR § 15-126-9 (requiring that an application for a community-based development grant state assurances that the *facilities* will not be used as a place of worship); HAR 15-217-8 (defining "religious *facility*" as a classification pertaining to places of worship); *State v. Pratt*, 127 Hawai'i 206, 208 277 P.3d 300, 302 n.7 (2012) (defining *heiau* as a Pre-Christian place of worship, noting that some were elaborately constructed stone platforms, while others were simple earth terraces); *Marsland v. International Soc. for Krishna Consciousness*, 66 Hawai'i 119, 121, 657 P.2d 1035, 1037 (1983) (finding that a *building* that was used as both a place of worship and residence qualified as a church as it related to permissible uses and structures). Having failed to provide any legal support or admissible evidence to support its proposition that the entirety of Mauna Kea is a "place of worship or burial," within the meaning of HRS § 711-1107(1)(b), or explain how such a conclusion would not run afoul of the Establishment Clause of the First Amendment to the U.S. Constitution, the Temple is unable to establish as a matter of undisputed fact or law whether or to what extent Mauna Kea in general, or the TMT site in particular, are sites that fall within the scope of HRS § 711-1107(1)(b).

3. The Temple Has Failed to Establish that Construction of the TMT Project Would Cause Extensive and Irreparable Damage, or that Any Damage Associated with Construction Would Constitute Desecration

The Temple contends that the construction of the TMT Project will cause "extensive and irreparable damage" that would "constitute desecration, if the damage provokes outrage in those aware of the damage." Mot. at 3. The Temple, however, has provided no admissible evidence whatsoever to support its factual claim of "extensive and irreparable damage." *See generally,* Mot. Nor has it appropriately supported its argument that the Hearing Officer should take

judicial notice of certain "expressions of outrage." *See* Mot. at 4. Accordingly, because the Temple has failed to establish the absence of genuine issues of material fact with respect to these issues, the Motion should be denied.

Moreover, to the extent the Temple claims that *any* damage to Mauna Kea that would occur through construction on the mountain that causes *any* outrage amounts to desecration as a matter of law, such claims are unfounded. Indeed, HRS § 711-1107 requires that the act of desecration be ***intentionally*** committed. Thus, to be guilty of criminal desecration, one must have the requisite *criminal mens rea*—that is, the ***specific intent to mistreat a protected site.*** The Temple has produced no evidence to support a finding that the University has such a criminal intent. Indeed, such an assertion is belied by the University's submission of the CDUA, and accompanying studies, and its ongoing efforts to comply with processes and requirements for lawfully obtaining the conservation district use permit necessary for construction of the TMT Project. Similarly, there is no evidence that the Board, in administering the processes provided for and making the decisions expressly contemplated under its rules, possesses any intent to commit the offense of desecration. To conclude that criminal desecration occurs whenever an agency considers granting a permit on lands that some may consider sacred could essentially halt all development and construction in this State. Such an impracticable results renders the Temple's proffered interpretation of the desecration statute unreasonable, and indeed, entirely implausible.

4. The Temple Has Failed to Establish that the University and the BLNR Can Be Guilty of the Criminal Offense of Desecration Under HRS § 711-1107

The Motion also fails to establish that, as a matter of law, actions by the University or Board can amount to criminal desecration of HRS § 711-1107. Indeed, by its own terms, HRS § 711-1107 does ***not*** apply to actions by either the University or the Board. As noted above HRS §

711-1107 refers to actions by a "person". HRS § 701-118 defines a "person" to include:

> any *natural person*, including any natural person whose identity can be established by means of scientific analysis, including but not limited to scientific analysis of deoxyribonucleic acid and fingerprints, whether or not the natural person's name is known, *and, where relevant, a corporation or an unincorporated association.*

(Emphasis added.) HRS § 702-229 clarifies that a corporation "***does not include*** an entity organized as or by a ***governmental agency*** for the execution of a governmental program." (Emphasis added.) Further, the commentary on HRS § 702-229 states: "***[i]t seems clear that, in dealing with corporate penal liability, government corporations must be exempt.*** Penal liability in such a case is pointless." (Emphasis added.) Thus, the basis for the Temple's argument fails as a matter of law as government corporations, like the University and the Board, are exempt from corporate penal liability.

III. CONCLUSION

For the reasons set forth above, the University submits that the Temple's claim that it is entitled to summary judgment because the University is purportedly seeking a permit for illegal activities, which the Board cannot grant, is unsupported by both fact and law. Indeed, the Motion fails to establish with admissible evidence or legal authority, among other things, that: (1) Mauna Kea, generally, or the TMT site, specifically, falls within the scope of HRS § 711-1107(1)(b), as the Temple contends; (2) the actions proposed by the CDUA, if approved, would constitute criminal desecration; (3) either the University or the Board has the requisite *mens rea* to commit the crime of desecration; (4) either the University or the Board can be guilty of the crime of desecration; (5) HRS § 711-1107 somehow trumps other governing laws and regulations applicable to the lands on the TMT site, or (6) otherwise lawful actions can be deemed violations of HRS § 711-1107. Accordingly, the Motion should therefore be denied.

DATED: Honolulu, Hawai'i, February 22, 2017.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal Lands ("*OCCL*")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
SUMMER H. KAIAWE, ESQ.
skaiawe@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwightjvicente@gmail.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

MEHANA KIHOI
uhiwai@live.com

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

E. KALANI FLORES
ekflores@hawaiiantel.net

B. PUALANI CASE
puacase@hawaiiantel.net

DEBORAH J. WARD
cordylinecolor@gmail.com

PAUL K. NEVES
kealiikea@yahoo.com

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
(no email; mailing address only)

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, February 22, 2017.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal Lands ("*OCCL*")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for ATTORNEY GENERAL DOUGLAS S. CHIN, THE DEPARTMENT OF THE ATTORNEY GENERAL, and DEPUTY ATTORNEYS GENERAL IN THEIR CAPACITY AS COUNSEL FOR THE BOARD OF LAND AND NATURAL RESOURCES and HEARING OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
SUMMER H. KAIAWE, ESQ.
skaiawe@wik.com
Watanabe Ing LLP
Counsel for TMT INTERNATIONAL OBSERVATORY, LLC

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington & Harris
Counsel for PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES (PUEO)

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwightjvicente@gmail.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

MEHANA KIHOI
uhiwai@live.com

STEPHANIE-MALIA:TABBADA
s.tabbada@hawaiiantel.net

DONNA H. KALAMA, ESQ.,
Deputy Attorney General
donna.h.kalama@hawaii.gov
Counsel for the Honorable DAVID Y. IGE, and BLNR Members SUZANNE CASE and STANLEY ROEHRIG

E. KALANI FLORES
ekflores@hawaiiantel.net

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

DEBORAH J. WARD
cordylinecolor@gmail.com

B. PUALANI CASE
puacase@hawaiiantel.net

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
Counsel for KAHEA: THE ENVIRONMENTAL ALLIANCE

PAUL K. NEVES
kealiikea@yahoo.com

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
(no email; mailing address only)

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

MOSES KEALAMAKIA JR.
mkealama@yahoo.com
Witness for the Hearing Officer

CRYSTAL F. WEST
crystalinx@yahoo.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, April 4, 2017.

IAN L. SANDISON
TIM LUI-KWAN
JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO