

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **TEMPLE OF LONO MOTION FOR**
3568) The Thirty Meter Telescope at the) **RECONSIDERATION OF MINUTE**
Mauna Kea Science Reserve, Kaohe Mauka.) **ORDER 43; MEMORANDUM IN**
Hamakua District, Island of Hawai'i,) **SUPPORT; COS**
TMK (3) 4-4-015:009)
_____)

TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 43

On April 19, 2017, the Hearing Officer issued Minute Order 43. DOC-552.

The Minute Order set a schedule for the filing of a proposed decisions and orders, including findings of fact and conclusions of law. *Ibid.* at 2-3.

The Order provided for motions for reconsideration to be filed no later than 5 business days after the date of the Order. Or April 26, 2017. *Ibid.* at 3.¹

The Temple of Lono herein files its motion for reconsideration supported by the accompanying Memorandum in Support.

DATED: April 25, 2017

_____/s/_____
Lanny Alan Sinkin
Lay Representative for the Temple of Lono

¹ The Custodian of the Records transmitted the email containing Minute Order 43 to the parties at 4:46 p.m. on April 19. As the Order was distributed after normal business hours, the Order can legitimately be considered as issued on April 20, with the time for motions to reconsider moved to April 27.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 April 25 2:01 pm

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Lay representative for Temple of Lono

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FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **TEMPLE OF LONO MEMORANDUM**
3568) The Thirty Meter Telescope at the) **IN SUPPORT OF MOTION FOR**
Mauna Kea Science Reserve, Kaohe Mauka,) **RECONSIDERATION OF MINUTE**
Hamakua District, Island of Hawai'i,) **ORDER 43**
TMK (3) 4-4-015:009)
_____)

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF MOTION FOR
RECONSIDERATION OF MINUTE ORDER 43**

I. INTRODUCTION

On April 19, 2017, the Hearing Officer issued Minute Order 43. DOC-552 ("Order"). This Order set a schedule for the filing of "proposed decisions and orders, including findings of fact and conclusions of law and responses thereto." *Ibid.* at 2.

The Order set May 30, 2017 as the deadline for filing the proposed decisions and orders. *Id.*

The Order set June 13, 2017 as the deadline for the filing of responses to the proposed decisions and orders. *Id.*

The Order provided for motions for reconsideration to be filed no later than 5 business days from the date the Hearing Officer issued the Order of April 26, 2017.

The Temple of Lono herein files its motion for reconsideration and offers this memorandum in support of said motion.

II. ARGUMENT

A. The motion for reconsideration is timely.

The Hearing Officer issued the Order on April 19, 2017 and provided up to 5 business days for a motion for reconsideration. *Ibid.* at 3. The deadline for a reconsideration motion would, therefore, be April 26, 2017 at the earliest. *See* note 1 *supra*.

The Temple's motion for reconsideration is filed within that time period.

B. Minute Order 43 refuses to acknowledge that the record is incomplete.

The Order states that the deadlines for filing proposed decisions and orders is "[b]ased upon HAR §13-1-38(a), all applicable law, and **the entire record.**" *Ibid.* at 2 (emphasis added). The record, however, is not determined.

Subsequent to issuing Minute Order 43, the Hearing Officer issued Minute Order 44. DOC-553. That Minute Order made rulings on innumerable objections to the admission of prefiled testimony and exhibits. *Ibid.* at 6-60.

Minute Order 44 provided for motions to reconsider the rulings. *Ibid.* at 8.

¹ The Custodian of the Records transmitted the email containing Minute Order 43 to the parties at 4:46 p.m. on April 19. The heading on the email is:

From: Michael Cain <michael.cain@hawaii.gov>

Subject: TMT Doc 552 Minute Order 43

Date: April 19, 2017 4:46:26 PM HST

As the Order was distributed after normal business hours, the Order can legitimately be considered as issued on April 20, with the time for motions to reconsider moved to April 27.

Obviously, until all issues regarding which exhibits will be admitted as evidence are resolved, there is no final record.

In explaining why an order scheduled to be issued on March 23, was not issued, the Hearing Officer acknowledged that “the volume, extent and complexity of the exhibits, motions and responses necessitated significantly more time than anticipated.” Minute Order 44 at 1. The Hearing Officer will now have to again address that extensive material as the motions to reconsider are filed.

2. There are motions pending.

The Temple of Lono’s participation in this proceeding is replete with instances where the Temple filed a motion and the Hearing Officer simply ignored the motion. See e.g. DOC-324 (Motion to Schedule Unscheduled Motions).

The motions not ruled upon are substantive and some of them are potentially dispositive of this case. Id.

The failure of the Hearing Officer to rule on those pending motions means that the record is incomplete.

3. At least one pending motion would be dispositive of the entire case.

On March 19, 2017, the Temple of Lono filed a motion to the Board seeking dismissal of this entire proceeding. DOC-516. Other interveners joined in that motion. DOCs 518 (Fergerstrom), 523 (William Freitas), 529 (Cindy Freitas), 531 Kanaele), 537 (Ching), 542 (Pisciotta, Anaina Hou, Neves), 543 (Ward).

The Board has never ruled on that motion.

Obviously, an affirmative ruling on that motion would have a substantial impact on the record, i.e. there would be no record. The record cannot be complete until that motion is ruled upon.

Also, before spending innumerable hours preparing proposed decisions and orders, findings of fact, and conclusions of law, the parties are entitled to know whether the proceeding is going to be dismissed.

The failure of the Board to respond to the motion to dismiss constitutes a violation of due process. For the Hearing Officer to ignore the pending motion to dismiss and proceed to order the parties to prepare proposed decisions and orders anyway is simply another due process violation.

4. The determination of what constitutes evidence in this proceeding is still underway.

While the Hearing Officer has entered rulings on almost all of the exhibits as to their admissibility, the time for reconsideration has just begun. Minute Order 44 at 8. Only when all motions for reconsideration are decided will the final record be known. Given the innumerable exhibits facing objections, those decisions could potentially have a major impact on the final record, tossing out whole segments of a party's case.

HAR §13-1-38 begins “[a]fter all the evidence has been taken in” (emphasis added). There are no final rulings on the admissibility of numerous exhibits and related documents. Whether those challenged documents will eventually be evidence or excluded is yet to be determined. All the evidence has not, therefore, “been taken in” because decisions on admissibility are still subject to motions to reconsider. Application of HAR §13-1-38 is premature.

To prematurely require the parties to prepare findings of fact and conclusions of law based on an incomplete record violates HAR §13-1-38.

5. Setting the schedule in violation of HAR §13-1-38 is a due process violation.

The Hearing Officer improperly imposed a schedule for proposed decisions, orders, findings of fact, and conclusions of law. While specifically citing the applicable rule, the Hearing Officer ignored the provision of the rule requiring the record to be complete as a prerequisite for application of the rule. The imposition of a schedule under these circumstances violated the due process rights of the parties.

The cure for this violation is to withdraw the scheduling order.

6. The illegal schedule is also unduly restrictive as to the time provided for filing of decisions, orders, findings of fact, and conclusions of law.

The schedule for filing proposed decisions, orders, findings of fact, and conclusions of law does not provide adequate time to the parties.

The Order sets May 30, 2017 as the deadline for filing.

As noted above, there are innumerable exhibits and related documents under challenge. Without knowing which exhibits will be admitted and which will not, the parties cannot prepare proposed decisions, orders, findings of fact, and conclusions of law. Clearly the purpose of HAR §13-1-38 was to define the point in the proceeding when setting the schedule for such filings was appropriate, i.e. after all the evidence was in.

The rationale for such a rule is apparent. As long as the record is not complete, the parties cannot prepare their filings with any confidence that the proof used will ultimately be admitted into evidence.

Conversely, with so many exhibits under challenge, preparing the proposed filings without using any of the challenged prefiled testimony or exhibits significantly handicaps the parties, particularly the parties whose prefiled testimony and/or exhibits face extensive challenges.

The emergence of the exhibits issue, see DOC-522 (Mauna Kea Anaina Hou motion requesting time to respond to exhibit objections and related matters), characterized by the Hearing Officer as involving significant “volume, extent and complexity,” Order at 1, has required the parties to respond with numerous filings addressing the issues. See DOCs-522, 524, 525, 526, 527, 528, 530, 532, 533, 535, 538, 539, 540, 541, 545, 546, 547 548, 550. The time being taken up by the exhibits issue is time taken away from preparing the proposed decisions and orders scheduled in Minute Order 44. That extra time being spent is directly attributable to the Hearing Officer’s enunciation of a misleading exhibits process.

Rather than responding to the imposition of the exhibits complication with an expansion of time, the Hearing Officer set a schedule providing only six weeks from the date of the Order for the filing of the proposed decisions, orders, findings of fact, and conclusions of law, with the time for addressing the exhibits issues included in that time frame.

The parties are, therefore, obligated to prepare the proposed rulings without a final record while also litigating what that final record will include.

That most of the Protector Intervenors are *pro se* parties only compounds the injustice in the Hearing Officer’s forced march to completion.

While due process violations in this proceeding are so frequent that they have become expected, this final attack by the Hearing Officer on the ability of the Protector Interveners to participate and make their case is so blatant that a motion to recuse would be warranted, if it were not for the fact that the Hearing Officer will simply ignore such a motion. See DOC-262 (Motion to Recuse Hearing Officer) never considered or ruled upon.

7. Alternatively, a reasonable schedule should be set.

If the Hearing Officer is going to insist on ignoring HAR §13-1-38 and proceed with setting a schedule for proposed orders, decisions, findings of fact, and conclusions of law, then that schedule should reflect the reality of this proceeding.

The hearing in this proceeding took 44 days. Seventy one witnesses testified.

Given that most of the Protector Interveners are *pro se*, a reasonable time to address “the volume, extent and complexity of” the record in this proceeding is at least ninety days. Compared to the time given in the first contested case, even ninety days would apparently be considerably less than what was provided in that case.

The Hearing Officer should wait until the record is truly complete before setting a new schedule.

III. CONCLUSION

Because the record is incomplete and the setting of deadlines for preparation of proposed decisions and orders is based on the presence of a complete record, there is no basis for the Hearing Officer to impose deadlines at this time for the filing

of decisions and orders. Minute Order 43, as it relates to setting such deadlines, should be withdrawn.

Alternatively, if the Hearing Officer is determined to violate the rules by setting a schedule before the record is complete, then that schedule should give ample time for *pro se* parties to address a voluminous and complex record, with at least ninety days from the completion of the record being a minimum.

DATED: April 24, 2017

Lanny Alan Sinkin
Lay Representative for Temple of Lono

Lanny Alan Sinkin
P. O. Box 944
Hilo, Hawai'i 96721
(808) 936-4428
lanny.sinkin@gmail.com
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the **TEMPLE OF LONO MOTION FOR RECONSIDERATION OF MINUTE ORDER 43** was served on the following parties by email on April 25, 2017:

Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlnr.maunakea@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiintel.net>, Pua Case <puacase@hawaiiintel.net>, cordylinicolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, tluikwan@carlsmith.com, John P. (Pete) Manaut <jpm@carlsmith.com>, Lindsay N. McAneeley <lmcaneeley@carlsmith.com>, T. Shinyama' <RShinyama@wik.com>, douging@wik.com <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, lsa@torkildson.com <lsa@torkildson.com>, njc@torkildson.com <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, akulele@yahoo.com <akulele@yahoo.com>, s.tabbada@hawaiiintel.net <s.tabbada@hawaiiintel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, hanahanai@hawaii.rr.com <hanahanai@hawaii.rr.com>, pohaku7@yahoo.com <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, Kealamakia Jr. <mkealama@yahoo.com>, Patricia Ikeda

<peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>

and by first class mail on April 25, 2017 to:

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

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

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

Dated: April 25, 2017

_____/s/_____
Lanny Alan Sinkin