

CARLSMITH BALL LLP

IAN L. SANDISON 5597
JOHN P. MANAUT 3989
LINDSAY N. MCANEELEY 8810
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED
2017 MAY -2 PM 3:46
DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

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'ohē Mauka, Hāmākua,
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 FOR
RECONSIDERATION OF MINUTE
ORDER 43** [DOC. 559]; EXHIBITS 1-5;
DECLARATION OF COUNSEL;
CERTIFICATE OF SERVICE

**APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S
OPPOSITION TO THE TEMPLE OF LONO'S MOTION FOR
RECONSIDERATION OF MINUTE ORDER 43**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), through counsel,
submits this Opposition to the Temple of Lono's ("**Temple**") *Motion for Reconsideration of
Minute Order 43* ("**Motion**") [Doc. 559].¹ The University respectfully requests that, pursuant to

¹ Hereto the University also submits this Opposition to the following: Deborah J. Ward's *Joinder to Temple of Lono Motion for Reconsideration of Minute Order 43* [Doc. 559], Mehana Kihoi's *Joinder to Temple of Lono Motion for Reconsideration for Minute Order 43* [Doc. 563], Mauna Kea Anaina Hou Et Al.'s *Joinder* [Doc. 564], Leinaala Sleightholm's *Joinder to Temple of Lono Motion for Reconsideration for Minute Order 43* [Doc. 565], Kamahana Kealoha's *Joinder to*

the authority delegated to the Hearing Officer under Hawai'i Administrative Rules ("HAR") §§ 13-1-32(c) and 38(a), the Hearing Officer deny the Motion.

I. INTRODUCTION

The Motion and Joinders request that the Hearing Officer vacate Minute Order No. 43 and rule on all motions for reconsideration of Minute Order No. 44 before establishing a deadline to submit a proposed decision and order, findings of fact and conclusions of law (collectively, the "FOF/COL"); or alternatively, that parties be given ninety (90) days, rather than thirty (30) days, in which to prepare their proposed FOF/COL. In support of this request, the Temple alleges - yet again - that the Hearing Officer's ruling constitutes a violation of due process. See Motion at 7. For the reasons set forth below, however, the University respectfully submits that the Motion and Joinders lack legal and factual support; and should, therefore, be denied.

II. ARGUMENT

A. THE HEARING OFFICER HAS BROAD AUTHORITY TO SET DEADLINES

The Temple contends that due process has been violated because Minute Order No. 43 was issued while questions relating to the admissibility of evidence were unresolved. In support of its claim, the Temple cites HAR § 13-1-38(a), which states in pertinent part: "After all evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law." The Temple alleges that since all evidence has not been taken, the Hearing Officer impermissibly set a deadline for the submission of the FOF/COL. Motion at 4-5.

Contrary to the Temple's assertion that "[c]learly the purpose of HAR § 13-1-38 was to define the point in the proceeding when setting the schedule for such filings was appropriate[.]" a

Temple of Lono Motion for Reconsideration of Minute Order 43 [Doc. 567], and Clarence Kukauakahi Ching's *Joinder of Temple of Lono Motion for Reconsideration of Minute Order 43* [Doc. 572] (collectively, the "Joiinders").

plain reading of the statute demonstrates that the rule was meant to govern the parties, not the presiding officer. The clause “[a]fter all evidence has been taken” modifies the subject immediately following it—*i.e.*, “the parties.” Plainly, the reference to “the presiding officer” is only meant to qualify “the time set[.]” not subject the presiding officer to the condition of waiting until all the evidence has been received before setting a time by which the FOF/COL must be filed.² In other words, HAR § 13-1-38(a) dictates when the *parties* may submit a proposed decision: “[a]fter all evidence has been taken,” and “within the time set by the presiding officer.” HAR § 13-1-38(a) imposes no limitation on when the presiding officer may set that time. The Temple’s mischaracterization of the rule distorts the plain language and would render it meaningless. Moreover, the Temple’s interpretation runs afoul of HAR § 13-1-32(c), which grants unfettered authority to the presiding officer to, *inter alia*, “fix times for submitting documents, briefs, and dispose of other matters that normally and properly arise in the course of the hearing . . .” without any conditions on when such times may be set. Where the statutory language is plain and unambiguous, a court’s “sole duty is to give effect to its plain and obvious meaning.” *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & County of Honolulu*, 114 Hawai‘i 184, 193, 159 P.3d 143, 152 (2007). If no ambiguity exists, then the plain meaning of the text is conclusive and the inquiry generally comes to an end. *See Lawrence v. City of Philadelphia, Pa.*, 527 F.3d 299, 316–17 (3d Cir. 2008). Therefore, HAR § 13-1-38(a) does not provide any support for the Motion.

B. UNTIMELY MOTIONS ARE INSUFFICIENT BASIS FOR FURTHER DELAY

The Temple argues that due process is being violated because substantive motions are

² Moreover, as the contested case proceeding has concluded and no new evidence is being admitted, all evidence in his case has been presented - motions for reconsideration notwithstanding.

still pending. According to the Temple, “[its] participation in this proceeding is replete with instances where the Temple filed a motion and the Hearing Officer simply ignored the motion.... The failure of the Hearing Officer to rule on those pending motions means that the record is incomplete.” Motion at 3. Aside from the record clearly demonstrating that the Hearing Officer has heard and issued rulings for several motions filed by the Temple,³ the Temple ignores that all the pleadings in the Temple’s *Motion to Schedule Unscheduled Motions* [Doc. 324] were filed well past the deadline for pre-hearing motions and were therefore untimely. The Hearing Officer was under no obligation to review the merits of the Temple’s prehearing motions that were filed without leave and well beyond the established deadline. *See generally* 60 C.J.S. Motions and Orders § 9 (noting that unauthorized motions are inoperative for any purpose). Thus, the Hearing Officer’s proper exercise of discretion to decline to consider untimely motions is not an adequate basis to support reconsideration.

C. THE HEARING OFFICER’S DEADLINES ARE MORE THAN REASONABLE

The Temple argues that due process is violated because the established deadlines contained in Minute Order No. 43 are unduly restrictive. The Temple complains that as “[t]he hearing in this proceeding took 44 days” in which “[s]eventy one witnesses testified[,]” the deadlines do not “reflect the reality of this proceeding.” Motion at 7. Again, rather than cite to facts or case law, the Temple proffers mischaracterization in support of its argument. The record clearly shows that the Hearing Officer did, in fact, take into account “the reality of this

³ The Hearing Officer did entertain argument and issue rulings on the Temple’s motions that were filed by, and even after, the July 18, 2016 deadline for prehearing motions. *See* Minute Order No. 23 [Doc. 346] (denying the Temple’s Motion for Partial Summary Judgment filed June 21, 2016); Minute Order No. 29 [Doc. 352] (denying the Temple’s Motion to Dismiss for Lack of Jurisdiction, filed July 22, 2016); Minute Order No. 17 (denying the Temple’s Motion to Vacate Ruling and Supplement Response Time, filed July 22, 2016); Minute Order No. 33 [Doc. 356] (denying the Temple’s Motion to File Motion Out of Time, filed Aug. 8, 2016).

proceeding.”

Specifically noting the length of the proceeding, the Hearing Officer generously afforded the parties more than triple the statutorily-provided 10 days by which to submit their FOF/COL. The governing rule for the deadline to submit findings and conclusions is set forth clearly in HAR § 13-1-38(a).⁴ The rule provides for FOF/COL to be submitted “not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.” *Id.* Nonetheless, on numerous occasions, the Hearing Officer stated that while the rules only provide for ten days by default, she intended to establish a two-week deadline. *See, e.g.,* Ex. 1, Tr. 10/31/16 at 249:22-250:1 (“So once the testimony is over, then I will give you . . . [t]wo weeks from the filing of the transcripts, to submit Findings of Fact, Conclusions of Law, Decision and Order.”); Ex.2, Tr. 11/16/16 at 11:23-11:24 (“And my intention at this time is to just give you two weeks [to submit your findings].”). This deadline was subsequently further extended to accommodate the requests of opponents of the project and in consideration of the length of the proceeding. *See* Ex. 3, Tr. 3/1/17 at 255:24-256:5 (“I know we have gone real long, and in case anybody is interested, today was the 43rd day of our hearing. . . . And so, it's a lot. So, therefore, my intention is to give you 30 days after the transcripts are completed.”). Ultimately, Minute Order No. 43 set a deadline that gives the parties 31 days *more* the ten day default period provided for in the rules, for a total of **41 days** after the parties were notified that DLNR had made the transcripts available in five different public libraries.⁵

⁴ As a preliminary matter, the University notes that the language of HAR § 13-1-38(a) is *permissive*, in that it merely provides that “the parties *may* submit . . . proposed findings of fact and conclusions of law.” Emphasis added. As such, there is no due process right to submit findings of fact, conclusions of law.

⁵ Under HAR § 13-1-38(a), the ten-day period to submit a proposed decision and order runs from when the transcript were “prepared and available.” According to Minute Order No. 43, which

Additionally, in order to assist in this drafting process, the parties have been granted access to multiple resources. Most significantly, the parties have been granted *free* access to full transcripts of the proceeding at multiple locations. As set forth in HAR § 13-1-32(d), in the event a party desires copies of hearing transcripts, such party “may obtain a certified transcript of the proceedings upon *payment* of the fee established by law for a copy of the transcript.” Emphasis added. That the parties have the benefit of full transcripts free of charge is an extraordinary accommodation. Moreover, at the suggestion of the Office of Conservation and Coastal Lands, the Hearing Officer also arranged for samples of FOF/COL to be available nearly five months before the close of the hearing to assist the parties—particularly those who are *pro se*. See Doc Nos. 408a, 408b, 408c; Ex. 4, Tr. 12/20/16 at 241:14-241:17 (“[Y]ou will be helping yourself a great deal if you take a look at the samples that were uploaded in October in the Documents Library....”). These resources are in addition to the Documents Library, which enables the parties to electronically access all the pleadings filed in this contested case, as well as the video archive on the naleo.tv website, which contains full recordings of every day of this contested case. As the record demonstrates, the Hearing Officer expended extensive effort to accommodate the parties. Given the drastically extended deadline and multiple resources available, the Temple’s allegation of lack of due process unfounded.

Moreover, the Hearing Officer made repeated reminders to the parties that they should begin working on their draft FOF/COL throughout the hearing. See, e.g., Ex. 2, Tr. 11/16/16 at 11:12-11:14 (“I’m going to ask that you use the in-between breaks to please start your drafting [of the findings and conclusions], because these are pretty extensive documents.”); Ex. 5, Tr.

was served on the parties on April 19, 2017, states that the transcripts were prepared and available as of April 18, 2017. For the sake of argument, the University used April 19, 2017 for deadline calculations.

12/13/16 at 218:4-218:7 (“Don’t forget folks, we have the Findings that you need to work on. Please take a look at it and sketch out, try to get information. Do yourself a favor.”); Ex. 4, Tr. 12/20/16 at 241:11-241:18 (“[P]lease don’t forget to work on your Findings of Fact, Conclusions of Law, Decision and Order. I know it’s asking a lot, but it’s a lot of work to do that, and you will be helping yourself a great deal if you take a look at the samples that were uploaded in October in the Documents Library, and you start to at least put an outline together for yourself[.]”). The Hearing Officer specifically warned the parties against waiting until the transcripts were available to begin drafting their respective FOF/COL. *See* Ex. 3, Tr. 3/1/17 at 259:24-260:2 (“If you think you are going to read through 40 plus volumes of transcripts to then begin writing your decision and order, it’s not going to happen. I don’t think anybody is going to be able to do it that way.”). In sum, for the Temple to now accuse the Hearing Officer of being unreasonable and restrictive in setting the deadlines, despite her countless attempts to accommodate the parties, shows that the Temple’s arguments are nothing more than a thinly veiled effort to try to create a procedural issue where there is none.

D. THE HEARING OFFICER TOOK INTO ACCOUNT THE PETITIONERS’ PRO SE STATUS

Throughout the Motion, the Temple makes much of the fact that many parties have represented themselves *pro se* during this proceeding. *Id.* (“That most of the Protector Intervenors are *pro se* parties only compounds the injustice in the Hearing Officer’s forced march to completion.”). As an initial matter, the Temple is not *pro se* and is represented by Mr. Sinkin, who is an attorney (albeit, not licensed to practice before the State Courts in Hawai‘i). Neither Mr. Sinkin nor the Temple represent the other parties; the Temple, thus, lacks standing to assert such objections on behalf of any other party.

Even if the Temple could assert the rights of *pro se* parties that it does not represent, the

record is clear that the Hearing Officer was mindful of the *pro se* status of the intervenors at every turn and made every reasonable effort to accommodate them. As discussed previously, the Hearing Officer established a system in which all the filed documents are available online, provided samples of FOF/COL as early as October 31, 2016, ensured access to complete transcripts of the proceedings free of charge, and tripled the time to prepare the FOF/COL — none of which are required by law or the administrative rules. The Hearing Officer has been abundantly conscientious of the *pro se* status of many of the parties and has endeavored to ensure the full and fair participation of all parties in this proceeding. The Motion and Joinders seemingly misunderstand the requirements of due process,⁶ and despite their efforts to assert arguments to the contrary, are unable to establish grounds for the relief requested.

E. LACK OF DILIGENCE BY THE TEMPLE IS INADEQUATE JUSTIFICATION FOR AN EXTENSION

The Temple's Motion offers no explanation as to how the *pro se* status of the other intervenors is justification for why the Temple, which is represented by Mr. Sinkin, an attorney, cannot meet the deadlines set by the Hearing Officer. The Temple cannot hide behind other parties it does not represent to excuse its own lack of diligence in preparing its FOF/COL.⁷

⁶ Due process is about the right to be heard in a meaningful way at a meaningful time. *See Sandy Beach Defense Fund v. City Council of the City and County of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (holding that the basic elements of procedural due process of law require notice and an opportunity to be hearing at a meaningful time and in a meaningful manner). It is not about extending deadlines for the purpose of delay, which plainly is the Temple's real agenda as it presents no legitimate excuse for not being advised to start the process of drafting and certainly cannot demonstrate why 30 days before the deadline even expires it needs a further extension given the above admonitions to begin drafts early on.

⁷ To the extent the Temple is advocating on its own behalf that it lacks sufficient time to address the University's objections to its exhibits and prepare FOF/COL, the University notes that the Temple filed the *Temple of Lono Joinder to Mauna Kea Anaina Hou Motion Requesting Time to Respond to Exhibit Objections and Related Matters* [Doc. 526] on March 22, 2017, approximately a month before Minute Order No. 44 was issued. During that month, the Temple failed to file any objections, responses, or memoranda regarding its exhibits. Thus, the Temple's

Moreover, as discussed in detail above, the Hearing Officer made it abundantly clear as early as October 31, 2016 that the parties should have been working on their FOF/COL well in advance of the close of the hearing. *See* Ex. 1, Tr. 10/31/16 at 249:22-252:4. In other words, as of the May 30, 2017 deadline, the parties will have had *six months* since the Hearing Officer first put them on notice to work on their submissions; and they will have had 89 days (nearly three months) since the close of the evidentiary hearing on March 2, 2017 to do the same. There is no excuse not to have started the effort and use the transcripts and final exhibits only for final citation reference. The Temple's complaint that the parties do not have enough time to draft a proposed decision and order, findings of fact and conclusions of law is truly a problem of their own making and does not constitute a sufficient basis for reconsideration of Minute Order No. 43.

III. CONCLUSION

For these reasons, the University respectfully asks that the Motion be denied.

DATED: Honolulu, Hawai'i, May 2, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

purported inability to address the University's objections and draft findings of fact, conclusions of law is solely the result of the Temple's own dilatoriness.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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'ohē Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

DECLARATION OF COUNSEL;
EXHIBITS 1 TO 6

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant University of Hawai'i at Hilo ("**University**") in the above-captioned 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 personal knowledge.
3. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts from the transcript prepared by Jean Marie McManus of the evidentiary hearing held on October 31, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.
4. Attached hereto as **Exhibit 2** is a true and correct copy of excerpts from the transcript prepared by Carol E.M. Sugiyama of the evidentiary hearing held on November 16, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.
5. Attached hereto as **Exhibit 3** is a true and correct copy of excerpts from the transcript prepared by Carol E.M. Sugiyama of the evidentiary hearing held on March 1, 2017 in the above-captioned matter, presided over by Judge Riki May Amano.

6. Attached hereto as **Exhibit 4** is a true and correct copy of excerpts from the transcript prepared by Jean Marie McManus of the evidentiary hearing held on December 20, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.

7. Attached hereto as **Exhibit 5** is a true and correct copy of excerpts from the transcript prepared by Jean Marie McManus of the evidentiary hearing held on December 13, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.

8. The highlighting included in these excerpts were added by our law firm for ease of reference.

This declaration is made upon personal knowledge. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, May 2, 2017.



IAN L. SANDISON

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF) CASE NO. BLNR-CC-002
)
Contested Case Hearing Re)
Conservation District Use)
Application (CDUA) HA-3568)
For The Thirty Meter) VOLUME 6
Telescope at the Mauna Kea)
Science Reserve, Ka'ohe)
Mauka, Hamakua, Hawai'i)
TMK (3)4-4-015:009)
-----)

CONTESTED CASE HEARING

Held on October 31, 2016, commencing at 9:00 a.m., at
Grand Naniloa Hotel, Crown Room, 93 Banyan Drive,
Hilo, Hawaii 96720.

BEFORE: Jean Marie McManus, CSR #156

1 hearings that we have to remain somewhat flexible but
2 efficient. All right.

3 So, Mr. Ching, you got those dates? You
4 like those dates?

5 MR. CHING: Clarence Ching, yes, I have.
6 My most, the date of most concern was November 28th
7 and then you heard about that, but since it's been
8 scratched, I'm in good shape. I will --

9 HEARINGS OFFICER AMANO: Well, what
10 happens -- it's been scratched.

11 MR. CHING: Yes, so that was the date I
12 really wanted to have off.

13 HEARINGS OFFICER AMANO: Okay.

14 MR. CHING: Other than that, I had an out
15 of state scheduled for the end of November, I have
16 already cancelled for this hearing. So thank you.

17 HEARINGS OFFICER AMANO: I'm still working
18 on mine, various things. All right. So great.

19 Now, just because I -- it's been my
20 practice to kind of let everyone know what's coming
21 down, give you as much notice as possible.

22 So once the testimony is over, then I will
23 give you -- it's a little complicated. Two weeks
24 from the filing of the transcripts, to submit
25 Findings of Fact, Conclusions of Law, Decision and

1 Order. Okay.

2 That's going to be way down after the last
3 witness. All right. Way down.

4 So what I'm saying is, there's some gaps
5 now. And what we did was, I asked Mr. Cain. He
6 actually asked me, it was his idea to put some sample
7 findings and conclusions, the decisions and orders
8 into the Document Library. It was uploaded today.
9 So you'll see samples A, B and C. So take a look and
10 see what you can do in advance to work it out. I
11 have to do the same thing.

12 And so at the end of all the testimony, you
13 still have time because, I don't know how long it's
14 going to take to get all the transcripts in. It's
15 usually not immediate. It's usually a couple weeks
16 after that. So you can be working on your -- the way
17 we do it is you work on your findings, and then when
18 the transcripts come, and we're working on arranging
19 for or trying to figure out how you can access the
20 transcripts because the findings have to refer to
21 line and page, page and line.

22 You're going to want to say this witness
23 testified about this and in parenthesis you'll put,
24 you know, November 2nd, page 11, line 22, to the next
25 page line 15, whatever it is.

1 So we usually use those references so that
2 we can all go right to the record. That's why I've
3 been trying to be meticulous about making the record
4 for you folks because once I'm out, I'm out. I don't
5 need it. You will need it.

6 All right. So having said that, I'm going
7 to repeat it again. Samples have been uploaded so
8 you can take a look at what the findings and
9 conclusions and decisions look like. Right. It's
10 just a kind of samples, they're not related to Mauna
11 Kea but other kinds. So you take a look and everyone
12 will have an opportunity to submit it by a deadline.

13 So what will happen is I will state it's
14 two weeks after the transcripts are done. As soon as
15 I know the transcripts are done, I'll issue a minute
16 order. And I'll say, minute order whatever number it
17 is by then, transcripts have been submitted on this
18 date. The deadline for submission of the findings
19 and conclusions are here, and then you will have two
20 weeks to read everybody's and then respond, if you
21 wish.

22 So it's a process that we're following.
23 You'll have a chance to respond to each other's,
24 whatever you want to do.

25 Meanwhile, you know, I'm going to be

1 looking forward to hearing from everyone, reviewing
2 all of yours as well as the responses, and issuing my
3 own findings and conclusions which I'm going to have
4 to do. Okay.

5 So we will continue to use the Documents
6 Library. I think it's been pretty effective for all
7 of us.

8 All right. And before recognizing those
9 who want to speak, unless you have to speak on this,
10 you should want to talk about Wednesday's schedule
11 and then I'll close with any other comments that you
12 need to make. Okay. All right.

13 So, Mr. Lui-Kwan, can you tell us about
14 Wednesday?

15 MR. LUI-KWAN: And, Judge, on Wednesday we
16 will bring on Mr. Baybayan, our first witness. We
17 will also have Robert McLaren, the associate director
18 of the IFA.

19 HEARINGS OFFICER AMANO: Okay.

20 MR. LUI-KWAN: We'll --

21 HEARINGS OFFICER AMANO: Two is enough.

22 MR. LUI-KWAN: Okay.

23 HEARINGS OFFICER AMANO: So everybody be
24 prepared for Mr. Baybayan with possibly -- is it
25 Dr. McLaren?

1 CERTIFICATE
STATE OF HAWAII)
2) SS.
COUNTY OF HONOLULU)
3

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on October 31, 2016 at 9:00 a.m., the
6 proceedings contained herein was taken down by me in
7 machine shorthand and was thereafter reduced to
8 typewriting under my supervision; that the foregoing
9 represents, to the best of my ability, a true and
10 correct copy of the proceedings had in the foregoing
11 matter.

12 I further certify that I am not of counsel for
13 any of the parties hereto, nor in any way interested
14 in the outcome of the cause named in this caption.

15 Dated this 31st day of October, 2016, in
16 Honolulu, Hawaii.

17
18
19 /s/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156
20
21
22
23
24
25

13:04:02 1

BOARD OF LAND AND NATURAL RESOURCES

2

STATE OF HAWAII

3

IN THE MATTER OF) CASE NO. BLNR-CC-16-002

4

Contested Case Hearing Re)

13:04:02 5

Conservation District Use)

Application (CDUA) HA-3568)

6

For the Thirty Meter)

Telescope at the Mauna Kea)

7

Science Reserve, Ka'ohe)

Mauka, Hamakua, Hawaii.)

8

TMK (3) 4-4-015:009)

VOLUME 9

9

13:04:02 10

11

TRANSCRIPT OF CONTESTED CASE HEARING

12

13

Taken at the Grand Naniloa Hotel, Crown Room,

14

93 Banyan Drive, Hilo, Hawaii, 96720 commencing at

13:04:02 15

9:00 a.m., on Wednesday, November 16, 2016.

16

17

18

19

REPORTED BY: CAROL E.M. SUGIYAMA, RPR, CSR NO. 295

13:04:02 20

21

22

23

24

25

ISLAND COURT REPORTING & TRANSCRIPTION SERVICES
 1132 Bishop Street, Ste. 2101 Tel: 808.518.7522

09:11:57 1 to start to change when we're in the Petitioners' side
2 of the case, and, of course, the number of witnesses
3 will probably change. But that is entirely up to you
4 folks, and we'll deal with it as we go forward.

09:12:09 5 The other thing I wanted to remind you of,
6 very, very important, you might remember that I told you
7 we uploaded samples of the findings and conclusions. We
8 gave you three different samples. They have nothing to
9 do with this case. I don't think they have anything to
09:12:22 10 do with telescopes. I don't know, I didn't look at them
11 myself, but I certainly will.

12 I'm going to ask that you use the in-between
13 breaks to please start your drafting, because these are
14 pretty extensive documents. And it's my intention to
09:12:38 15 give you, once we close the evidence, the court reporter
16 will need some time to complete her transcript, and
17 we're still working on the transcripts and trying to
18 check on whether they can be made available or not.

19 But after the transcripts are completed by the
09:12:57 20 court reporter, that is going to trigger, and I'll do it
21 by Minute Order, that is going to trigger the time you
22 have to submit your findings.

23 And my intention at this time is to just give
24 you two weeks. We can talk about that as we go forward,
09:13:11 25 because we have to evaluate it at the moment when we

16:23:24 1

2

C E R T I F I C A T E

3

STATE OF HAWAII

)

4

) SS.

COUNTY OF HONOLULU

)

16:23:24 5

6

I, CAROL E.M. SUGIYAMA, C.S.R., do hereby

7

certify:

8

That on November 16, 2016, at 9:00 a.m.,

9

the proceedings contained herein was taken down by me in

16:23:24 10

11

the machine shorthand and was thereafter reduced to

12

typewriting under my supervision; that the foregoing

12

represents, to the best of my ability, a true and

13

correct copy of the proceedings had in the foregoing

14

matter.

16:23:24 15

16

I further certify that I am not of counsel

17

for any of the parties hereto, nor in any way interested

18

in the outcome of the cause named in this caption.

19

DATED: December 21, 2016

16:23:24 20

21

S/S Carol E.M. Sugiyama

22

CAROL E.M. SUGIYAMA, C.S.R. #295

23

24

25

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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, Hamakua, Hawaii) VOLUME 43
 TMK (3)4-4-015:009)
)

TRANSCRIPT OF CONTESTED CASE HEARING

Taken at the Grand Naniloa Hotel, Crown Room,
 93 Banyan Drive, Hilo, Hawaii, 96720 commencing at
 9:00 a.m., on Wednesday, March 1, 2017.

REPORTED BY: CAROL E.M. SUGIYAMA, RPR, CSR NO. 295

17:06:01 1 When you write your decision and order and
2 proposed decision and order and findings of fact, that
3 is what you have to rely on, those exhibits.

4 And, again, I'll close the documentary
17:06:16 5 portion. So no more documents, no more testimony. And
6 that's it, so no more testimony after tomorrow. And I
7 know I'm repeating myself, but I want to really make
8 sure it's understood and heard. No more testimony after
9 tomorrow. No more documents after March 9th.

17:06:33 10 So you may have to submit some of the added
11 exhibits that were identified in the course of the
12 examination of witness. I get that that has to be
13 uploaded, and you want to move that in. And so that is
14 why I'm giving you the extra time to do that, gather
17:06:49 15 everything and put it all in one document.

16 I'll try to find out tonight the estimated
17 time for the completion of the transcripts. Pursuant to
18 rule, the deadline for submission of the proposed
19 decision and order including the findings of fact and
17:07:11 20 conclusion of law is 10 days. All along, I've been
21 saying to you all, well, two weeks sound more reasonable
22 to me.

23 But I told you I would reconsider at the end.

24 I know we have gone real long, and in case anybody is
17:07:26 25 interested, today was the 43rd day of our hearing. And

17:07:30 1 Mr. Kanaele is Witness No. 68. And so, it's a lot.
2 So, therefore, my intention is to give you 30
3 days after the transcripts are completed.
4 Now, obviously, you are going to be doing a
17:07:48 5 lot of work before that. And then once the transcripts
6 are completed, I'll have to issue a minute order laying
7 out the next deadline. And the next deadline will be 30
8 days from that to submit your proposed decision and
9 order, findings of fact, and conclusions of law.
17:08:06 10 I don't have a clue right now when that is
11 going to be because it's triggered by the transcript.
12 And I don't know when that is going to be completed.
13 Thereafter, after your 30 days, the proposals are in and
14 you will have two weeks from there to send your
17:08:24 15 objections, replies, joinders and whatever.
16 And then after that, I'll be issuing my own
17 decision and order, proposed decision and order and
18 recommendations to the Board. You might take a look at
19 the Hawaii Administrative Rules that lay out the next
17:08:44 20 process, which by then is out of my hands.
21 So, I can't give you any specific dates except
22 ones that I just gave you for the exhibits. Really
23 important, March 9th, documentary exhibits. You have a
24 week to object. A week after that, you will get a
17:09:03 25 minute order saying to you, these are the exhibits, this

17:09:06 1 is the evidence I'm going to consider. Okay. Any
2 questions?

3 Professor.

4 MR. FLORES: Just some clarity regarding the
17:09:21 5 30 days after the transcripts are completed. Is that 30
6 days after the transcripts are available to view?

7 So it might be completed one day, but access
8 to them, that's the question. So is it dependent upon
9 access.

17:09:35 10 HEARINGS OFFICER AMANO: Well, I think our
11 intention is to make it as close as possible to the same
12 time but, in fairness, it will be once we get the
13 transcripts and identify. I'll let you know that the
14 copies have been made and distributed, it could be an
17:09:52 15 extra week, I don't know.

16 MR. FLORES: Is it possible that if there are
17 some transcripts that are already finished that they
18 could be put out, because the last contested case, there
19 were hundreds of pages of transcripts. I believe this
17:10:06 20 is like thousands of pages of transcripts. And so just
21 to take in that volume of transcripts, if there is a way
22 or if there is something already available, could it be
23 put out already. I mean, we're in the process, but if
24 there is something that we can start with.

17:10:22 25 HEARINGS OFFICER AMANO: I asked myself and

17:10:23 1 the answer is we're going to distribute the transcripts
2 when they are completed.

3 MR. FLORES: In its entirety.

4 HEARINGS OFFICER AMANO: Yes.

17:10:31 5 MR. FLORES: Okay, that is my question.

6 Thank you.

7 HEARINGS OFFICER AMANO: Ms. Ward.

8 MS. WARD: Is there any chance it could be 30
9 working days, as in Monday through Friday?

17:10:41 10 HEARINGS OFFICER AMANO: No.

11 MS. PISCIOTTA: I'm trying formulate my
12 question. Are we going to do it simultaneously, so they
13 submit their proposed decision and order, and we do,
14 then we have an opportunity to object to those, so
17:11:02 15 another 10 days after?

16 HEARINGS OFFICER AMANO: Two weeks.

17 MS. PISCIOTTA: Two weeks.

18 HEARINGS OFFICER AMANO: Yes.

19 MS. PISCIOTTA: Okay, I just needed to know

17:11:13 20 that. Are we going to call those exceptions or
21 something or objections?

22 HEARINGS OFFICER AMANO: You guys call it
23 whatever you feel like calling it. I gave up trying to
24 set up a template. But I don't know what you mean --

17:11:25 25 objections, or responses, replies, joinders, the

17:11:31 1 deadline is going to be two weeks after the deadline for
2 the proposed decision and order.

3 MS. PISCIOтта: Right, okay.

4 HEARINGS OFFICER AMANO: The first question
17:11:42 5 you said was: Is it simultaneous. The answer is, yes,
6 kind of. Because if everybody submits it on the
7 deadline, then it is simultaneous. But if some people
8 submit early, which they can, it is what it is.

9 Nonetheless, the reply will be triggered by
17:12:01 10 the 30-day deadline that I will articulate by minute
11 order.

12 MS. PISCIOтта: Okay. I just wanted to say
13 that I think the last time we had six days or eight days
14 of hearing. And we had 30 days before. And so, I just
17:12:19 15 want to mark my objection that I think we might need a
16 little longer but...

17 HEARINGS OFFICER AMANO: Well, I've been
18 thinking two weeks, as you know. HAR says 10 days, and
19 so I'm thinking 30 days will be sufficient, but I've
17:12:34 20 been asking everybody to start working on it for awhile.
21 And you need to have that framework, so that when the
22 transcripts come, what you are just matching up is line
23 and page and accuracy as to the actual statement.

24 If you think you are going to read through 40
17:12:49 25 plus volumes of transcripts to then begin writing your

17:12:54 1 decision and order, it's not going to happen. I don't
2 think anybody is going to be able to do it that way.
3 So, you really have to be working from the
4 moment we end and starting to put your arguments
17:13:07 5 together. And, really, the transcripts are just to fill
6 in the blanks, okay.

7 MS. PISCIOтта: Okay.

8 HEARINGS OFFICER AMANO: Thank you.

9 Mrs. Freitas?

17:13:19 10 MS. FREITAS: Aloha. I object to the 30 days
11 because you minusing the days that the library is not
12 even open. And if there is a holiday, it limits us to
13 the dates, so you're losing eight days out of 30 days
14 automatically. So, if we can have that eight days and
17:13:43 15 if there's holidays applied to that.

16 Also does that include ordering the transcript
17 and what is the process and how long is the process.
18 Does that factor into the days?

19 HEARINGS OFFICER AMANO: Those are good
17:13:59 20 questions. I don't have control over production of the
21 copies of the transcripts, I can ask.

22 All right. Anyone else?

23 So tomorrow let's prepare to be focused and
24 prepare to stay a little longer if we have to because
17:14:21 25 we're going to finish all of the witnesses.

17:14:23 1 Mr. Ono.

2 MR. ONO: If someone files their motion to

3 admit exhibits early, is it seven days from that date or

4 is it still March 16th.

17:14:33 5 HEARINGS OFFICER AMANO: March 16th. We don't

6 want moving targets. Much easier if we don't have a

7 moving target.

8 Anything else?

9 Mr. Freitas.

17:14:39 10 MR. FREITAS: Any other supplemental exhibits

11 deadline is March 9th?

12 HEARINGS OFFICER AMANO: Yes. But remember

13 that your deadline for the motions is March 9th and so

14 better to upload everything beforehand.

17:14:58 15 You will have a week because after tomorrow

16 we're done with the testimonies.

17 MR. FREITAS: Right. But if I was starting on

18 preparing my facts and findings, at this moment, before

19 you even accept the exhibits, how would I know that?

17:15:21 20 HEARINGS OFFICER AMANO: That's good question.

21 I think what I would do is I would assume that

22 it's going to be admitted, and if it's not admitted, you

23 cross it off and figure out something else.

24 MR. FREITAS: Or argue the point?

17:15:33 25 HEARINGS OFFICER AMANO: No argument anymore.

17:15:34 1 MR. FREITAS: I don't want to argue but, you
2 know.

3 HEARINGS OFFICER AMANO: No, we're all tired
4 of arguing.

17:15:39 5 MR. FREITAS: Okay, Aloha.

6 HEARINGS OFFICER AMANO: Aloha.

7 Anything else?

8 Everybody, thank you very much. We'll see you
9 tomorrow morning at 9:00 a.m.

17:15:48 10 (The proceeding adjourned at 5:15 p.m.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, CAROL E.M. SUGIYAMA, C.S.R., do hereby
certify:

That on March 1, 2017, at 9:00 a.m., the proceedings contained herein was taken down by me in the machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

DATED: March 29, 2017

S/S Carol E.M. Sugiyama

CAROL E.M. SUGIYAMA, C.S.R. #295
Certified Shorthand Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF) CASE NO. BLNR-CC-002
)
Contested Case Hearing Re)
Conservation District Use)
Application (CDUA) HA-3568)
For The Thirty Meter) VOLUME 19
Telescope at the Mauna Kea)
Science Reserve, Ka'ohe)
Mauka, Hamakua, Hawai'i)
TMK (3)4-4-015:009)
-----)

CONTESTED CASE HEARING

Held on December 20, 2016, commencing at 9:00 a.m.,
at Grand Naniloa Hotel, Crown Room, 93 Banyan Drive,
Hilo, Hawaii 96720.

BEFORE: Jean Marie McManus, CSR #156

1 will, but I hope you are not planning to take any
2 holidays.

3 MR. SHINYAMA: I'm not.

4 HEARINGS OFFICER AMANO: Don't forget,
5 folks, we have the Findings that you need to work on.
6 Please take a look at it and sketch out, try to get
7 information. Do yourself a favor.

8 So I'm asking TIO if they can please try to
9 let us know who the witnesses will be for Monday and
10 Tuesday, and do it by email, and I think in Mr.
11 Vicente's case, you may have to do it by telephone.
12 Is that okay with you? And would you provide the
13 telephone number to Mr. Shinyama?

14 MR. VICENTE: He has my number.

15 HEARINGS OFFICER AMANO: Your e-mail, your
16 name, phone number, we are going to post it up on the
17 mountain. Just kidding. All right.

18 So, Mr. Shinyama, thank you for your
19 cooperation, and I really appreciate it if we can get
20 done so folks can start to prepare.

21 So this is what's going to happen. TIO
22 will then begin to put their witnesses on. The next
23 in line will then be the University. And then after
24 that, we go down the road for the others. They will
25 be able to ask questions after TIO, because they're

1 CERTIFICATE
2 STATE OF HAWAII)
3) SS.
4 COUNTY OF HONOLULU)

5 I, JEAN MARIE McMANUS, do hereby certify:

6 That on December 13, 2016, at 9:00 a.m., the
7 proceedings contained herein was taken down by me in
8 machine shorthand and was thereafter reduced to
9 typewriting under my supervision; that the foregoing
10 represents, to the best of my ability, a true and
11 correct copy of the proceedings had in the foregoing
12 matter.

13 I further certify that I am not of counsel for
14 any of the parties hereto, nor in any way interested
15 in the outcome of the cause named in this caption.

16 Dated this 13th day of December, 2016, in
17 Honolulu, Hawaii.

18
19 /S/ Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #157
21
22
23
24
25

1 BOARD OF LAND AND NATURAL RESOURCES

2 STATE OF HAWAI'I

3 IN THE MATTER OF) CASE NO. BLNR-CC-002

)

4 Contested Case Hearing Re)

Conservation District Use)

5 Application (CDUA) HA-3568)

6 For The Thirty Meter) VOLUME 16

Telescope at the Mauna Kea)

Science Reserve, Ka'ohe)

7 Mauka, Hamakua, Hawai'i)

TMK (3) 4-4-015:009)

)

9 CONTESTED CASE HEARING

10 Held on December 13, 2016, commencing at 9:00 a.m.,
11 at Grand Naniloa Hotel, Crown Room, 93 Banyan Drive,
12 Hilo, Hawaii 96720.

23
24 BEFORE: Jean Marie McManus, CSR #156
25

1 will, but I hope you are not planning to take any
2 holidays.

3 MR. SHINYAMA: I'm not.

4 HEARINGS OFFICER AMANO: Don't forget,
5 folks, we have the Findings that you need to work on.
6 Please take a look at it and sketch out, try to get
7 information. Do yourself a favor.

8 So I'm asking TIO if they can please try to
9 let us know who the witnesses will be for Monday and
10 Tuesday, and do it by email, and I think in Mr.
11 Vicente's case, you may have to do it by telephone.
12 Is that okay with you? And would you provide the
13 telephone number to Mr. Shinyama?

14 MR. VICENTE: He has my number.

15 HEARINGS OFFICER AMANO: Your e-mail, your
16 name, phone number, we are going to post it up on the
17 mountain. Just kidding. All right.

18 So, Mr. Shinyama, thank you for your
19 cooperation, and I really appreciate it if we can get
20 done so folks can start to prepare.

21 So this is what's going to happen. TIO
22 will then begin to put their witnesses on. The next
23 in line will then be the University. And then after
24 that, we go down the road for the others. They will
25 be able to ask questions after TIO, because they're

1 CERTIFICATE
2 STATE OF HAWAII)
3) SS.
4 COUNTY OF HONOLULU)

5 I, JEAN MARIE McMANUS, do hereby certify:

6 That on December 13, 2016, at 9:00 a.m., the
7 proceedings contained herein was taken down by me in
8 machine shorthand and was thereafter reduced to
9 typewriting under my supervision; that the foregoing
10 represents, to the best of my ability, a true and
11 correct copy of the proceedings had in the foregoing
12 matter.

13 I further certify that I am not of counsel for
14 any of the parties hereto, nor in any way interested
15 in the outcome of the cause named in this caption.

16 Dated this 13th day of December, 2016, in
17 Honolulu, Hawaii.

18
19 /S/ Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #157
21
22
23
24
25

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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](mailto:dwrightjvicente@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 KIHAI
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

DEBORAH J. WARD
cordylinecolor@gmail.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*

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

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

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

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

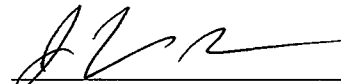
B. PUALANI CASE
puacase@hawaiiantel.net

PAUL K. NEVES
kealiikea@yahoo.com

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
w_holi@hotmail.com
*Witness for the Hearing Officer
(via email & U.S. mail)*

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

DATED: Honolulu, Hawai'i, May 2, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO