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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 MAUNA KEA ANAINA HOU ET AL.'S JOINDER AND OBJECTIONS**; DECLARATION OF COUNSEL; EXHIBITS 1 TO 2; CERTIFICATE OF SERVICE

UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO MAUNA KEA ANAINA HOU ET AL.'S JOINDER AND OBJECTIONS

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**University**"), through counsel, submits its Opposition to Mauna Kea Anaina Hou, et al.'s ("**MKAH**") *Joinder and Objections* [DOC. 578] ("**Joinder**").[1] The University respectfully requests that, pursuant to the authority

[1] Hereto the University also submits this Opposition to: Clarence Kukauakahi Ching's Joinder of 1) Temple of Lono Motion for Reconsideration of Minute Order 44 and Memorandum in Support, 2) Flores-Case 'Ohana's Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence, and Memorandum in Support Dated April 26, 2017, and 3) Mauna Kea Anaina Hou et al. Joinder to the Temple of Lono Motion for Reconsideration of Minute Order 44

delegated to the Hearing Officer under Hawai'i Revised Statutes ("**HRS**") § 91-10 and Hawai'i Administrative Rules ("**HAR**") §§ 13-1-32 and 35, the Hearing Officer deny the Joinder and the objections therein.

I. ARGUMENT

A. THE HEARING OFFICER PROPERLY DENIED ADMISSION OF EXHIBITS "*EN MASSE*"

MKAH's Joinder argues that the Hearing Officer improperly denied its "*en masse*" submission of its "B Series" exhibits (the "**Exhibits**"). Although the Joinder is difficult to decipher, it appears to argue that the Hearing Officer should admit the Exhibits without making individual determinations as to admissibility, erroneously assuming that the Hearing Officer is somehow obligated to admit the Exhibits *en masse*, simply because MKAH filed a motion to do so. This argument fails to recognize the unambiguous authority delegated to the Hearing Officer under HRS § 91-10(1) and HAR § 13-1-35(a) to exclude evidence that is irrelevant, immaterial, or duplicative. More importantly, MKAH's argument ignores the Hearing Officer's clear instructions to the parties that any motions to admit evidence must list the testimony and exhibits sought to be admitted. Ex. 1, Tr. 12/20/16 at 231:20-233. By attempting to move in the Exhibits "*en masse*," MKAH violated the Hearing Officer's express instructions and must bear the

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and Objections Dated April 27, 2017, Certificate of Service, filed April 28, 2017 [Doc. 587] ("**Ching Joinder**"), to the extent that the Ching Joinder addresses arguments made in MKAH's Joinder here. The University also notes that the Ching Joinder is an improper attempt to join in a joinder and should be denied on this basis.

Additionally, hereto the University submits this opposition to the Temple of Lono's (the "**Temple**") Response to Mauna Kea Anaina Hou et al. Joinder and Objections [Doc. 591].

Finally, the University hereby incorporates by reference the arguments set forth in its Opposition to the Temple of Lono's Motion for Reconsideration of Minute Order 44.

consequences of that decision.[2] MKAH has failed to show that it has suffered prejudice or harm as a result of the Hearing Officer's ruling, particularly since the overwhelming majority of the "B" exhibits are already in evidence. MKAH's Joinder fails to identify a single exhibit not received into evidence that is critical to MKAH's ability to make its case. If such exhibits exist, MKAH should have sought reconsideration showing how those exhibits were utilized in the proceeding and good cause as to why they should be admitted. Accordingly, the Hearing Officer properly refused to consider MKAH's attempt to admit the Exhibits "*en masse*."

MKAH's argument that it should be allowed to collectively move in the Exhibits because they were filed collectively is unavailing. First, the "B" Petitioners demanded to be treated as individual parties, rather than as a collective, for purposes of the evidentiary hearing so that each individual member of the group would have a separate opportunity to cross-examine witnesses, make arguments, and present evidence. Throughout the evidentiary hearing, each of the "B" Petitioners filed their own supplemental exhibits and other filings. Ms. Ward, KAHEA, and the Flores-Case 'Ohana each filed separate motions to admit exhibits. Likewise, MKAH filed its own motions to admit on behalf of MKAH, and not for any other of the "B" Petitioners. Therefore, there was no ambiguity that each of the "B" Petitioners would be responsible for their respective exhibits, and it is disingenuous for MKAH to now allege that it was acting on the assumption that the Exhibits of the "B" Petitioners would be treated collectively.

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[2] MKAH also complains of discriminatory treatment because the Hearing Officer denied admission of the MKAH Exhibits while admitting all but one of Leina'ala Sleightholm's exhibits. As discussed above, the Hearing Officer has broad discretion to admit exhibits, and MKAH has not demonstrated any prejudice resulting from the Hearing Officer's refusal to consider MKAH's blanket motion. To the extent MKAH is seeking reconsideration of the admission of Sleightholm's exhibits, the University takes no position.

B. NOTHING PREVENTED MKAH FROM INDIVIDUALLY IDENTIFYING ITS EXHIBITS

MKAH appears to argue that it was unable to individually identify its exhibits due to the fact that transcripts were not available prior to the deadline for motions to move exhibits into evidence. MKAH's argument plainly fails, as evidenced by the fact that nearly every other party—including the other "B" Petitioners—was able to properly identify the individual exhibits in their respective motions to admit evidence. The Hearing Officer simply required a list identifying the exhibits sought to be admitted—not transcript citations to when each exhibit was referenced during the hearing. Accordingly, hearing transcripts were entirely unnecessary to comply with the Hearing Officer's requirements. It is the responsibility of the party sponsoring the exhibit to know what exhibits it used during the hearing. MKAH should have kept track of such usage throughout the proceeding, as did each of the other parties. The fact that the other parties—including Ms. Ward, KAHEA, and the Flores-Case 'Ohana—were able to individually identify their exhibits without issue demonstrates that MKAH's argument here is nothing more than an *ad hoc* justification for its own lack of diligence.

C. MKAH HAD ADEQUATE TIME TO RESPOND TO OBJECTIONS TO EXHIBITS/EVIDENCE

MKAH argues that it did not have adequate time or opportunity to respond to the objections made to admission of its exhibits—*i.e.*, the University's Opposition to Motions to Admit Exhibits and Written Direct Testimony [Doc. 514] (the "**University's Objections**"). As a threshold matter, MKAH has not shown that it had any *right* to file a response to the University's Objections to its designated Exhibits, rather than simply address any concerns it may have with the Hearing Officer's ruling through the motions for reconsideration expressly provided for by Minute Order 44. However, even if it did, the record indicates that MKAH had more than a month to submit a response to the University's Objections, but failed to act. The University's

Objections were filed on March 16, 2017, and on March 21, 2017, MKAH filed its Motion Requesting Time to Respond to Exhibit Objections and Related Matters [Doc. 522]. Notably, MKAH's Joinder—and the record—are devoid of any evidence that MKAH ever attempted to submit a response to the University's Objections. More than ample time existed between the filing of the University's Objections and the issuance of Minute Order No. 44 to file responses to the University's Objections; but, MKAH failed to do so. Accordingly, MKAH cannot now argue that it lacked opportunity to respond when it made no efforts to do so within the available timeframe.

D. MKAH'S ARGUMENTS REGARDING INDIVIDUAL EXHIBITS ARE GROUNDLESS

1. General Arguments

MKAH makes a series of arguments as to why certain exhibits should be admitted into evidence. MKAH generally cites to two main arguments, each of which is groundless.

First, MKAH argues that, although many of its exhibits constitute legal argument, they are being offered here as evidence to demonstrate previous statements of injury regarding constitutional rights, etc. However, it is well-established that legal argument is not evidence. *See Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1312 (9th Cir. 2003) ("Argument is not evidence"); *Alleva v. New York City Dept. of Investigation*, 696 F.Supp.2d 273, 278 (E.D.N.Y. 2010) ("legal argument is not evidence"). The fact that MKAH made a legal argument in the past does not transform that argument into evidence.

MKAH also appears to argue that because its exhibits were part of the prior 2011 contested case, they are government records that should automatically be admitted into evidence. That argument also lacks legal basis. First, although government records may not need to be authenticated, that is irrelevant to the consideration of whether the exhibits are otherwise

properly introduced during the course of the hearing and are relevant, material, or not duplicative. MKAH's Joinder does not address these issues, which are germane to the consideration regarding the admissibility of those exhibits. Even assuming, arguendo, that all such exhibits were in fact introduced during the course of the hearing, just as not all evidence proffered in *this* proceeding is irrelevant, immaterial, and duplicative, not all statements, legal arguments, or documents made in in the prior 2011 contested case are necessarily relevant to the Conservation District Use Application ("**CDUA**") at issue.

Also, as MKAH is well aware, the Hawai'i Supreme Court vacated the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, and Decision and Order from the prior 2011 proceedings. *See* Order for Remand filed on Feb. 22, 2016, in Civil No. 13-1-0349. Based on that ruling, MKAH's former counsel, Richard Wurdeman argued at the May 5, 2016 prehearing conference that all documents from the past proceeding, other than the CDUA, should not be made part of the record here. Mr. Wurdeman argued that the hearing should start "anew," and the only item before the Hearing Officer should be the CDUA, and nothing else should be carried over from the prior proceedings. Ex. 2, Tr. 5/16/15 at 10:11-11-23, 15:1-17:23; 24:9-13. In light of Mr. Wurdeman's argument on behalf of Petitioners, *only* R-1 through R-8—all of which predate the 2011 contested case proceeding—were admitted as record documents in this proceeding. Having successfully excluded the prior hearing documents from the record at the outset, MKAH is estopped from now claiming those same documents from the prior contested case hearing are automatically admitted.[3]

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[3] In its Response to Mauna Kea Anaina Hou et al. Joinder and Objections, the Temple attempts to bolster MKAH's argument regarding automatic admission of government records. The University notes that the Temple lacks standing to argue the admissibility of another parties' exhibits. MKAH is estopped from arguing that its exhibits from the prior contested case hearing

2. Specific Arguments

MKAH also makes individualized arguments regarding certain exhibits. As discussed below, each of these arguments fail.

Exhibit B.01h. MKAH argues that Exhibit B.01h is not duplicative, and therefore, should be admitted. MKAH appears to have misread Minute Order No. 44, which indicates that Exhibit B.01h was excluded as irrelevant and immaterial, not because of duplicity.

Exhibit B.01i. Similarly, MKAH argues that Exhibit B.01i is not duplicative, and therefore, should be admitted. Again, MKAH appears to have misread Minute Order No. 44, which indicates that Exhibit B.01i was excluded as legal argument, not based on duplicity.

Exhibit B.01r. MKAH argues that Exhibit B.01r (Act 132, SLH 2009) is somehow evidence of injury in this case. Besides being illogical, there is no authority supporting the proposition that law constitutes evidence. To the extent MKAH wishes to rely on law, it may cite to it in its proposed decision and order.

Exhibits B.30 thru B.43[sic]. MKAH argues that Exhibits B.30 thru B.43 should be admitted because it has not had the chance to compare these documents to the University's versions and determine the accuracy of the documents. This argument is irrational as the University's exhibits have been available on the Department of Land and Natural Resources' Document Library since October 11, 2016. Nothing barred MKAH from reviewing or objecting to the accuracy of those documents during the contested case, or in its response to the University's motion to admit exhibits. MKAH's repeated attempts to shift the blame for its own lack of diligence should be rejected.

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should be automatically admitted into evidence. The Temple's restatement of MKAH's argument does not change this fact.

II. CONCLUSION

For the reasons set forth above, the University respectfully requests that the Hearing Officer deny the argument and objections in the Joinder.

DATED: Honolulu, Hawai'i, May 3, 2017.

IAN L. SANDISON
JOHN P. MANAUT
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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 DECLARATION OF COUNSEL; EXHIBITS 1 TO 2

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 December 20, 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 Jean Marie McManus of the prehearing conference held on May 16, 2016 in the above-captioned matter, presided over by Judge Riki May Amano.

5. 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 3, 2017.

IAN L. SANDISON

EXHIBIT 1

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 Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i TMK (3) 4-4-015:009	VOLUME 19

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

I wanted to wait until the University and TIO closed their witnesses so then you folks would have a chance, the opposition would have a chance to determine what witnesses they needed to subpoena. And I think I said sometime back that we would take it up at the right time.

So my deadline for notice of subpoenas and witnesses will be one week after the close of TIO's case. All I want is the notice, and then we will have time for objections, then we will set it for a hearing, and I'll make a decision and then we'll issue subpoenas if it's appropriate.

So to me, it needs to be, I want to call this person, and these are the reasons why, this is my offer of proof. Does that make sense? And when we get the witnesses to come, we may have to take those witnesses out of order or at the end of all the current witnesses. We'll just have to see how that works.

And the last matter that I wanted to cover, that I am covering -- okay. We decided early on also, we tried different things, but what we came out of this was at the end of all of the testimony, we would then consider the receipt of exhibits. We haven't received any exhibits.

So what I'm going to ask the University and TIO when they are done with their witnesses, I'm going to ask them to file motions for admission of exhibits and list the exhibits. We won't deal with it right now, but I want everybody to know which exhibits are being offered, and I expect those lists to include the written direct testimonies, because they already testified. So to me, I have to receive the written direct testimonies of those persons who testified, I have to receive that in evidence. Makes sense, right?

MS. ALULI: Unless they didn't write it. Like Mr. Nees, he used a template. He only verified that he had written --

HEARINGS OFFICER AMANO: But we cross-examined him on the written statement, so if you don't have it in the record, and I don't receive it as an exhibit, it's going to be difficult. As far as how much weight to give it, that's up to me later on, and we will have to deal with that then, but right now I want a way so that everyone knows which exhibits are being offered.

So then at the end we will have -- then I'll have a process for objections, and then we will deal with what I admit and what I don't admit.

MS. ALULI: This is just for UH and TIO, right?

HEARINGS OFFICER AMANO: Once Ms. Ward is done with her case, I expect her to do one on her behalf, same with each offer. So then at the end of everybody's case we will have the whole list of exhibits, everyone will have had plenty of time to consider everything, and we can deal with it at that time. I'm expecting a lot of this will be stipulated by that time. But I leave it to folks to think about what they want to do, and I'll make decisions so -- Mr. Fergerstrom.

MR. FERGERSTROM: Will you also be able to take the two motions I sill have pending? One is to recall Mr. Stone, and the second one is to disqualify TIO as a party to the contested case and its entries into evidence.

HEARINGS OFFICER AMANO: I think I told you to go ahead and file your motion, but they will be non-hearing motions. You can do that any time you want.

MR. FERGERSTROM: We were kind of holding off until we got stuff from the court, but the motion to recall Mr. Stone several weeks ago.

HEARINGS OFFICER AMANO: Go ahead, that's

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on December 20, 2016, at 9:00 a.m., the proceedings contained herein was taken down by me in 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 this 20th day of December, 2016, in Honolulu, Hawaii.

/S/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156

EXHIBIT 2

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF	) CASE NO. BLNR-CC-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, Hawai'i TMK (3) 4-4-015:009	)

PREHEARING CONFERENCE

Held on May 16, 2016, commencing at 12:00 p.m. at the Board of Land and Natural Resources board room, 1151 Punchbowl Street, Honolulu, Hawaii 96813.

BEFORE: Jean Marie McManus, CSR #156

officer --

HEARINGS OFFICER AMANO: Where in the process is the public hearing?

MR. WURDEMAN: I think it should have certainly been noted on the agenda that the case has now been received back from DLNR. This is what we intend to do. We, as a board, are going to either conduct a contested case hearing or we're going to delegate it to hearing officer.

They just did that on their own without even notifying us even as parties.

But it now makes the process very difficult. And we certainly made our record on that issue already. But it makes the process difficult because now we're -- or you as a hearing officer, are put in that position that should have been resolved by the board previously. That's what I believe.

So I think in answer to your question, the proper way would have been for the board to hold a public hearing which it didn't.

HEARINGS OFFICER AMANO: My question is what should my record be as we proceed with this hearing, the contested case hearing?

So I read the Supreme Court decision -- I'll get to you, Mr. Lui-Kwan, as well -- it looked

to me like the Supreme Court said, once the contested case hearing was requested in the middle of the public hearing they were holding, that the board should have stopped and referred the case out for hearing. Is that correct?

MR. WURDEMAN: Well, what actually happened, the board remanded for a new contested case hearing, of course.

HEARINGS OFFICER AMANO: You mean the Supreme Court?

MR. WURDEMAN: Supreme Court, yes.

And what it did was -- and the court even asked about the composition of the board, because they wanted to make sure that it wasn't being sent back to the same board.

But if you note in the decision, it clearly stated that it -- or a new hearing officer, because they wanted to make sure that the same taint of predetermination wasn't going to be the issue down below.

So what happened is, the permit, there was a public hearing phase back in February 25th, 2011, when comments were taken and objections were made, and the board granted the permit.

And then after it was done with that, the

next item on the agenda was, well, let's talk about contested case hearing now. So then the contested case hearing requests were made, and they were granted. But this was all done before the big concern that the Supreme Court had was that they railroaded this application in right before the contested case hearing process even started.

So it just made the whole contested case hearing process meaningless and formality. And, I mean, obviously you recognized or saw all of that in the opinion.

I think outside of -- yeah, I think we're starting essentially anew and basically be the application maybe.

HEARINGS OFFICER AMANO: That's what I was going to ask.

MR. WURDEMAN: And if I could think about that a little bit more, but I think the application, obviously there's nothing else that should be before you in these proceedings.

HEARINGS OFFICER AMANO: Just the application?

MR. WURDEMAN: At a maximum, yes.

HEARINGS OFFICER AMANO: Okay. Mr. Lui-Kwan.

MR. LUI-KWAN: Judge, I have a different recollection of what happened. I was at the February 25th, 2011 proceedings.

So the board on its own motion actually moved for the contested case, actually ordered contested case on some motion. There were verbal requests made on the procedure that DLNR has in its tools for requesting a contested case.

They have to make a verbal request if you're asking for contested case at the public hearing before it closes, which was made, a number of requests made verbally.

And what they did, after they took -- it was a very long hearing that they actually had -- went through more than one day, started the previous meeting.

And again, you know, before you can actually order the contested case hearing, you have to close the public hearing, which was closed.

So the public hearing and the application was completed, was closed. The board went into its order, and it did order the contested case.

And, again, as Mr. Wurdeman mentioned, they did approve the permits subject to these conditions.

So we believe it actually starts at the

point in time in which they ordered the contested case. And I believe that even the Supreme Court, in their opinion, sort of recognized that there was an order made by the Land Board to order that contested case. So even if the requests weren't made for contested case, the board would have held a contested case anyway.

HEARINGS OFFICER AMANO: What would the hearings officer had in his or her file? That's all I want to know.

MR. LUI-KWAN: So they would have, at the start of the contested case, they would have the application, the EIS, the testimony that was submitted.

HEARINGS OFFICER AMANO: What testimony?

MR. LUI-KWAN: There was testimony submitted on the application at the public hearing. So written and verbal.

It would also have the minutes of the meeting, and a copy of the order of the Land Board on that. And I think the date of that was March 3rd. It would have all of that.

MR. WURDEMAN: See, that's the problem is that during that public hearing, that's where the sin was committed by the DLNR by approving the permit

before they even got to the contested case hearing.

HEARINGS OFFICER AMANO: Is there an EIS?

MR. LUI-KWAN: Yes.

HEARINGS OFFICER AMANO: That was part of the application?

MR. LUI-KWAN: Yes.

MR. WURDEMAN: There's probably an outdated EIS at this point, but there was an EIS. But that's for another issue to be addressed in proceedings to come.

MR. LUI-KWAN: There was no objection to the closing of the public hearing. There was no issue made as to closing the public hearing even through the appeal. There was no objections given as to how the public hearing was conducted.

There was no -- again, they maintained their objection on the sequence of how the Land Board voted, and issued, and then held a contested case, but there was nothing that went to any objections that were raised, and none were even identified even in the Supreme Court opinions, or the majority opinion.

HEARINGS OFFICER AMANO: So there is application, EIS. Isn't there an OCCL recommendation as well?

MR. LUI-KWAN: The staff report, which is also part of the record.

MR. WURDEMAN: That certainly shouldn't be in the record.

HEARINGS OFFICER AMANO: Why is that?

MR. WURDEMAN: That's all part of the predetermination that was ruled upon by the board based on the staff recommendation. And that was a whole issue.

HEARINGS OFFICER AMANO: Let me ask this question.

If a hearings officer had been appointed at the beginning of the public hearing, or even before the public hearing, wouldn't that hearings officer have that entire record? That's all I'm trying to find out.

MR. WURDEMAN: Well, if it had been done properly and pursuant to the constitution, what would have happened is once the requests at public hearing were made for contested case, it should have been done right there without consideration of the staff recommendations and without any vote on the permit.

So that's the record that would have gone to the hearing officer.

MR. LUI-KWAN: Judge, the staff

recommendations are just recommendations. They're not the order of the board.

HEARINGS OFFICER AMANO: I just want to be sure. You're saying that the staff recommendations don't normally go to the hearings officer?

MR. WURDEMAN: No, because there would have been a contested case hearing before all of that was even considered.

HEARINGS OFFICER AMANO: My understanding is you have the application to which is attached the EIS, and then it gets filed with OCCL in the CDUA type of application. And then the staff makes the recommendation, and it goes to the Chair, and the Chair decides finally whether it is granted or not granted. And then it goes to the board for a meeting, the board meeting. Is that the process?

MR. WURDEMAN: That's the process, but once a contested case hearing is being requested, they have to stop there, and the Supreme Court made that very clear. You, BLNR, you guys can't keep doing this kind of stuff, you need to follow the law.

(Interruption from the audience.)

HEARINGS OFFICER AMANO: Excuse me, Mr. Wurdeman, just a minute.

So conferences are generally private, and I

really wanted to keep everything open for everyone. But I do have to ask if you don't mind, if you don't mind keeping your comments to yourself, because I just want to get this thing going and make sure that counsel have a chance to input.

We have a lot of issues. Lot folks want to participate that we are going to have to talk about as well.

(Interruption from audience.)

HEARINGS OFFICER AMANO: So I'm just asking for cooperation so that we can continue to include everyone as much as possible.

In any event, pardon me for interrupting you, Mr. Wurdeman. Go ahead.

MR. WURDEMAN: But in any event, the staff recommendation is not relevant to the determination of the rights, duties and privileges of the parties, which the contested case hearing is supposed to decide.

And, in fact, I think it's -- even having it as part of the record is consistent with the taint and the predetermination that was invalidated by the Supreme Court. So that's our position.

HEARINGS OFFICER AMANO: So let me ask you this.

The Supreme Court and Judge Nakamura on remand did not say remanded to the beginning of this case. Specifically it said, remanded for a new contested case hearing.

And so that's that point in time I'm trying to figure out. And it looks to me like at a minimum that -- assuming the hearings officer would get the record to that point, we would have an application, whatever the appendages are. We would have the staff report. The recommendation of the chair. And from this record, I think the contested case hearing was sought in the midst of a public hearing, I'm not sure what point.

So I'm thinking that what I just described should be the record. I don't know about testimony or the record of testimony given at the public hearing. I'm kind of disinclined to take that, but I'll hear your --

MR. LUI-KWAN: The staff report also contains the recommendation that the board on its own motion conducted a contested case, which the board accepted.

Again, they only accepted it after close of the public hearing. That's the only time that the board actually rules on a contested case.

HEARINGS OFFICER AMANO: Do you have a date and time, or time in the record?

MR. LUI-KWAN: Yes, February 11 -- sorry. February 25th, 2011. And I don't have the exact hour that they actually voted.

HEARINGS OFFICER AMANO: So are you saying then that any testimony given at the public hearing up to that point should be part of the record?

MR. LUI-KWAN: Sure. It usually is in any appeal.

HEARINGS OFFICER AMANO: Mr. Wurdeman, what are your thoughts?

MR. WURDEMAN: Yeah, I think the public hearing aspect should be, but I think the whole staff recommendation, and the reliance upon the board improperly on those recommendations, has no relevance to these proceedings.

Trying to clear up the due process issues. The cart before the horse, that's the terminology that the Supreme Court used on several occasions.

HEARINGS OFFICER AMANO: So do you agree that the testimony given at the hearing, the transcript, should be part of the record that I have in front of me before we start?

MR. WURDEMAN: I think that's fair to

include.

HEARINGS OFFICER AMANO: So here's my decision, and you're welcome to make a motion to reconsider if you choose to do so and I'll give you a deadline.

I'm going to start with the application and the appendages. The OCCL or staff report, I guess you'd call it. The Chair's report or recommendation if there's a written one. And any record of the testimony at hearing up until February 25th, 2011.

And that's where we start, for me. I don't know anything else that was said, done after that, except what was reported in the Supreme Court decision. That's all I know.

And when I get these pieces of information, which I will wait to get until after I -- whether you folks are going to file motions to reconsider on this decision or not, I'll wait.

Because I want to start out as fresh a slate as I'm supposed to. You can have your objections, that's fine, but somebody has to decide and we need to begin.

So would five days be enough time, Mr. Wurdeman and Mr. Lui-Kwan, to object to -- I'll put out in a minute order what I've decided, and you can

have five days after that to kind of consider the order, if you wish. But until I get to that point, I'm going to go ahead -- I will not go and obtain these things until after I hear from whether there is a motion to reconsider and the decision on that. Okay?

MR. LUI-KWAN: Judge, one last thing.

We would also ask the record on appeal that went up to the Supreme Court be part of the record of this proceeding, and we will include that in our comments on your procedural order.

HEARINGS OFFICER AMANO: What do you think is the record on appeal?

MR. LUI-KWAN: The record on appeal included all the testimony that went through. It's, again, not for the truth of the matter, but just to provide more flexibility, and just for judicial economy and convenience. Because, again, I think there's going to be a lot of repetition in the evidentiary proceedings, and for the parties to have the ability -- I mean, we can always draw out various parts of the testimony to resubmit, but having the written testimony that was submitted. It was extensive written testimony and exhibits submitted by the Petitioners, Mr. Wurdeman's clients in that one

too.

So it would assist all the parties, and I think it would greatly help the hearings officer conduct the contested case by having those documents in there.

HEARINGS OFFICER AMANO: Before I speak, Mr. Wurdeman's comments on that. I would be very concerned about making the same mistake, because then I would have all the information that the other hearings officer had, and that the Supreme Court criticized.

So that's why I've been so careful not to look at anything, because I think the idea was I was supposed to look at it fresh. It's the process. I'm supposed to consider it anew, and that's what I'm trying to do.

I've been very careful even -- by the way, for the record, I should have introduced Deputy Attorney General Julie China who is the counsel for the testimony, for the -- for me. And we have our court reporter as well. And her name is Jean McManus. And you're welcome to get transcripts. I'm sure you know how.

So that would be my worry, because pretty much everything you say is going to be part of this

record I'm going to review. And if we put the whole prior record to be part of this for me, I'm looking at --

MR. LUI-KWAN: I understand. It was the sense of that there are certain things that were actually in the Findings of Fact, Conclusions of Law, the permit was not supported by Supreme Court, that's understood.

So, again, it's not necessarily for, you know, this is going to be your record. But, again, this is a means if there's any duplicative. It's not for the intent to speed things in or otherwise put things in.

But to the extent that they're sworn statements, they're actually given under oath during the contested case and --

HEARINGS OFFICER AMANO: Well, I thought about that too, and to me sworn statements are sworn statements. They're useable for impeachment purposes and that's it. And you don't have to have the whole other trial transcript as part of your trial in order to use the testimony given in that trial for impeachment. So my thinking is that needs to be a separate matter.

MR. LUI-KWAN: That's fine. I wanted to

bring that up just for a matter of convenience and economy.

HEARINGS OFFICER AMANO: Mr. Wurdeman, what are your thoughts?

MR. WURDEMAN: Yeah, I mean, obviously all those proceedings were invalid.

HEARINGS OFFICER AMANO: So your thinking is like mine, not to take it?

MR. WURDEMAN: Yes. And, you know, if during the process there seems to be an agreement between the parties about, you know, certain stipulations, if that even comes up, then that's one thing. But for now, I think we're starting anew.

HEARINGS OFFICER AMANO: So I'm going to reject the request to have the prior record included as part of this record.

MR. LUI-KWAN: By the way, Your Honor, before you do, that kind of goes into the whole thing about parties.

Part of that record on appeal during the period of time that we started the contested case includes the standing hearings, and our stipulation as to Mr. Wurdeman's clients also being parties.

So a large part of that, a part of that is part of that testimony. And in hearings I believe

CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on May 16, 2016, at 12:00 p.m., the proceedings contained herein was taken down by me in 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 this 16th day of May, 2016, in Honolulu, Hawaii.

/s/ Jean Marie McManus

JEAN MARIE McMANUS, CSR #156

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:

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