

FLORES-CASE 'OHANA
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Petitioners pro se

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
A Contested Case Hearing Re)	
Conservation District Use Application)	FLORES-CASE 'OHANA'S RESPONSE
(CDUA) HA-3568 for the Thirty Meter)	TO APPLICANT UNIVERSITY OF
Telescope at the Mauna Kea Science)	HAWAII AT HILO'S DOC. NOS. 592 &
Reserve, Ka'ohe, Hamakua District,)	615; MEMORANDUM IN SUPPORT OF
Island of Hawai'i, TMK (3) 4-4-015:009)	RESPONSE; CERTIFICATE OF SERVICE
)	
)	Hearing Officer: Hon. Riki May Amano
)	(Ret.)
)	
)	
)	

**FLORES-CASE 'OHANA'S RESPONSE TO APPLICANT
UNIVERSITY OF HAWAII AT HILO'S DOC. NOS. 592 & 615**

Petitioner, E. KALANI FLORES, pro se, representing the FLORES-CASE 'OHANA, respectfully submits this Response to Applicant University of Hawai'i at Hilo's Doc. Nos. 592 & 615 based upon the supporting memorandum, any record and files herein, and pursuant to Hawai'i Administrative Rules ("HAR") §§ 13-1-32, 34, 35, 38, and 41. A written response is provided since this matter is being taken up as a "non-hearing" motion.

DATED: Pu'ukapu, Hawai'i, May 7, 2017



E. Kalani Flores
Representing Flores-Case 'Ohana

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MEMORANDUM IN SUPPORT OF RESPONSE

The FLORES-CASE 'OHANA contends that the Applicant University of Hawai'i at Hilo's Opposition (noted in Doc. Nos. 592 & 615) included inaccurate information and mischaracterization that also lacked factual or legal grounds in regards to the Motions filed by FLORES-CASE 'OHANA (Doc. Nos. 558 & 577). Therefore, the FLORES-CASE 'OHANA'S Motions for Reconsideration should be granted based upon the following reasons:

1) UHH has failed to demonstrate any prejudice against them as a party.

Despite all of the UHH's arguments in opposition to the FLORES-CASE 'OHANA'S Motions for Reconsideration, UHH failed to even mention or cite any prejudice or harm against them as a party should the Hearing Officer approve such Motions for Reconsideration. Instead, there would be direct prejudice, harm, and violations of due process upon the FLORES-CASE 'OHANA and other *pro se* parties should these motions for reconsideration not be approved.

2) Deadlines set forth in Minute Order No. 43 are UNREASONABLE.

Contrary to the UHH counsel's assumptions, the FLORES-CASE 'OHANA has been diligently working on its proposed findings of fact, conclusions of law, and decision order (hereinafter "document"). However, since the matter of admitting exhibits into evidence and pending motions hasn't yet been finalized, parts of our document can't be adequately completed. In addition, depending upon the final outcome of the exhibit list that has yet to be determined as of this date, it has the potential of adversely impacting us with major editing of portions of our draft document that we were previously advised to start working upon.

UHH counsel also attempts to divert attention from the fact that a significant part of the evidence is included in the transcripts of the direct testimonies and cross-examinations of **71 witnesses** conducted over the **44 days of hearings** during this contested case hearing (“cch”). In addition, there were numerous days of pre-conference hearings. This resulted in **over 50 volumes of transcripts totaling over 12,200 transcript pages**. That’s in addition to the enormous volume of about **800 exhibits and over 555 documents** filed in this cch. What further compounded this matter is that instead of releasing the completed transcripts periodically in smaller increments over the duration of the cch, they were all released in bulk at one time.

Having experience being in the first cch, I can personally attest to the amount of time that would be considered reasonable. This particular experience provides an **objective perspective**, not a “subjective opinion” as inferred by the UHH counsel. After the conclusion of the first cch, there were a total of 48 days before the documents were due. This was inclusive of 17 days after the completion and release of the transcripts. Even with such a schedule, it was extremely difficult for us petitioners in the capacity as *pro se* to submit our documents by the due date. There were only 7 hearing days and 25 witnesses in this first cch. Based upon an **objective perspective**, there were over 6 times more days of scheduled hearings in this second cch. With a simple math calculation of determining a reasonable time for the due date of the document from the date of release of the transcripts based upon a comparison with the first cch, *17 days (after completion of transcripts) x 6 = 102 days*.

Thus, the request for 75 days or 90 days based upon the Temple of Lono Motion for Reconsideration (Doc. No. 559)¹ is indeed reasonable. Also, in the first cch, the matter pertaining to admitting exhibits into evidence had been finalized prior to the setting of the due dates of the documents. We contend that any deadlines should NOT be set until all pending matters are resolved. If the due dates outlined in Minute Order No. 43 are imposed as such, this would result in an unreasonable condition and a violation of due process as noted above.

It is also very presumptuous for the UHH counsel represented by the private law firm of Carlsmith Ball LLP with a large contingent of paid staff, a team of skilled legal professionals, and over 65 attorneys to presume that *pro se* parties had any time during the proceedings of the

¹ Temple of Lono Motion for Reconsideration on Minute Order 43 (Doc. 559) also sets forth the following arguments: A. The motion for reconsideration is timely. B. Minute Order 43 refuses to acknowledge that the record is incomplete.

ch to work on their documents when any available time was consumed in preparing for witnesses and cross-examination as well as responding to the proliferation of motions during the duration of the ch.

Contrary to UHH counsel's statements, §13-1-38(a) permits the Hearing Officer to set the date for submittal of documents beyond ten days as "the presiding officer shall otherwise prescribe." In addition, it also stipulates that "[a]fter all evidence has been taken" is when such a date for submittal should be determined. However, the matters pertaining to which exhibits are to be admitted into evidence has yet to be determined.

3) Parties, such as the FLORES-CASE 'OHANA, have a due process right to access hearing transcripts as stipulated in Section 92F, Hawaii Revised Statutes.

UHH counsel attempts to assert inaccurate information into their motion regarding this matter. State law clearly protects the public's interest in this matter as noted in §92F-2, HRS below:

[§92F-2] Purposes; rules of construction. In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii. This chapter shall be applied and construed to promote its underlying purposes and policies, which are to:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;
- (3) Enhance governmental accountability through a general policy of access to government records;
- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy. [L 1988, c 262, pt of §1]

Section 92F-2, HRS

Furthermore, §92F-12(a)(16), HRS stipulates the DLNR's requirement, as a State agency, to make the transcripts of the cch proceeding available to the public which is inclusive of the FLORES-CASE 'OHANA as well as other parties. BLNR/DLNR apparently paid the court reporters their full retail fee for copies of the entire transcript with the use of public funds and now has an obligation to make the transcript available for review and copying as noted below:

§92F-12 Disclosure required. (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

(16) Information contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public.

Section 92F-12(a)(16), HRS

In addition, §92-21, HRS, provides that the agency "may" assess a reasonable fee "for the reasonable cost of reproducing" the transcript. For the agency to assess any substantial fee for the cost of reproducing the transcript in this proceeding would prejudice the parties with limited funds. Under §92-21, the agency could and should decide to waive that cost altogether. That obstacle to full participation would also be contrary to the contested case goal of providing public access to the governmental process. Uploading an electronic copy to the agency website would not cause any undue burden or cost upon the BLNR/DLNR as demonstrated throughout the hearings when hundreds of documents were filed and uploaded online by DLNR staff. Neither would this action prejudice or cause any harm to any parties in making these transcripts readily available online to all parties as well as the general public.

4) UHH didn't object to the reconsideration of an extension of time for the responses to DO/FOF/COL.

Since UHH's Doc. No. 529 as well as any other party didn't object to the FLORES-CASE 'OHANA's request for reconsideration for an extension of time for the filing of responses, **this deadline should be extended to at least 45 days after the deadline of the submittal of DO/FOF/COL.**

5) The FLORES-CASE ‘OHANA submitted ALL its exhibits in a timely manner and prior to March 9th and as such any objections in this regards should be dismissed. Likewise, it’s asserted that ALL of its exhibits submitted for consideration are material and relevant to this contested case hearing and are not unduly repetitious.

Without any written minute order regarding this matter, parties such as the FLORES-CASE ‘OHANA relied upon what was orally stated by the Hearing Officer as noted in UHH’s own Doc. No. 615, when the Hearing Officer stated, *“And I know I’m repeating myself, but I want to really make sure it’s understood and heard. No more testimony after tomorrow. No more documents after March 9th.”* Tr. 03/01/17 at 255: 4-15. (emphasis added) As such, the FLORES-CASE ‘OHANA submitted all its exhibits prior to March 9, 2017. Also, it is reasserted that ALL of its exhibits submitted for consideration are material and relevant to this contested case hearing and are not unduly repetitious.

6) The Hearing Officer, not the Applicant UHH, has the responsibility to determine the extent and all actions of spoliation of evidence.

UHH counsel attempts to provide speculative explanations as to why OCCL staff switched exhibits with totally different documents part way through the cch. Such a matter pertaining to spoliation of evidence would not be taken lightly in any court of law, neither should this action be so easily dismissed in this cch. As such, the FLORES-CASE ‘OHANA demands that the Hearing Officer provide full disclosure and corrective action regarding this matter.

CONCLUSION

Based upon the foregoing, the FLORES-CASE ‘OHANA respectfully requests that the Hearing Officer grant its Motions for Reconsideration as noted in Doc. Nos. 558 & 577.

DATED: Pu‘ukapu, Hawai‘i, May 7, 2017



E. Kalani Flores
Representing Flores-Case ‘Ohana

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

Contested Case Hearing Re
Conservation District Use
Application (CDUA) HA-3568
for the Thirty Meter Telescope
at the Mauna Kea Science
Reserve, Ka'ohē, Hāmākua,
Hawaii'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-002

Document title: FLORES-CASE 'OHANA'S RESPONSE
TO APPLICANT UNIVERSITY OF HAWAII AT HILO'S
DOC. NOS. 592 & 615; MEMORANDUM IN SUPPORT
OF RESPONSE; CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated below:

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