

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF)
)
Contested Case Hearing Re Conservation District) **Minute Order No. 51**
Use Application (CDUA) HA-3568 For the) (Amending Minute Order No. 44
Thirty Meter Telescope at the Mauna Kea Science) and Granting In Part/Denying In Part
Reserve, Ka`ohe Mauka, Hamakua, Hawai`i) Reconsideration of Minute Order
) No. 44)
)
)
) **Certificate of Service**
)
_____)

MINUTE ORDER NO. 51

(Amending Minute Order No. 44 and Granting In Part/Denying In Part Reconsideration of Minute Order No. 44)

Minute Order No. 44 (Setting Post-Hearing Deadlines) (“Minute Order No. 44”), was filed in the Documents Library on or about April 20, 2017. The document bears the date “April 20, 2017” above the signature of the Hearing Officer. The deadline to file any motion to reconsider Minute Order No. 44 is April 27, 2017, 5 business days after April 20th. The deadline to file responses to any motion to reconsider is May 4, 2017, 5 business days after April 27th.

The following documents have been filed in relation to reconsideration of Minute Order No. 44:

Doc. #	Filed	Party	Title
554	23-Apr-17	Fergerstrom	Motion to Reconsider (Doc 553, Minute Order 44); Recently Found Document Not Previously Uploaded to Doc. Library, WDT (Copy Attached); Motion to

			Upload WDT into Evidentiary Submittals, and Then Moved into Evidence; Good Cause Showing
555	24-Apr-17	TIO	TMT International Observatory, LLC's Motion for Clarification or, in the Alternative, Reconsideration re: Minute Order No. 44 [Doc. No. 553], Memorandum in Support of Motion; Declaration of Ross T. Shinyama, Esq; Exhibits "1" - "7"
556	24-Apr-17	UHH	University of Hawaii at Hilo's Substantive Joinder re [Doc. No. 555] TMT International Observatory LLC's Motion for Clarification or, in the Alternative, Reconsideration re: Minute Order No. 44 [Doc. No. 553]
566	26-Apr-17	Fergerstrom	Motion to Reconsider (Doc 553, Minute Order 44); Motion to Include WDT and Pre-Hearing Statement into Evidence; Motion to Include as a Submission of Record, the Testimony of Williamson Chang; Memorandum of Support; Good Cause Showing
569	26-Apr-17	Lono	Temple of Lono Motion for Reconsideration of Minute Order 44; Memorandum in Support
570	26-Apr-17	Fergerstrom	Motion to (sic) Temple of Lono's Motion to Reconsider Minute Order 44; Memo of Support
571	26-Apr-17	C Freitas	Cindy Freitas Motion to (sic) Reconsideration to Minute Order 44; Memorandum in Support; COS
574	27-Apr-17	Vicente	Dwight Vicente's Motion to Reconsider; COS
575	27-Apr-17	W Freitas	William Freitas Motion to (sic) Reconsideration of Minute Order No. 44; Memorandum in Support of Motion to (sic) Reconsideration of Minute Order No. 44; COS
576	27-Apr-17	Sleightholm	J. Leina`ala Sleightholm's Joinder to the Temple of Lono's Motion to Reconsider MO 44
577	4/27/2017*	Flores-Case	Flores-Case Ohana's Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence; Memorandum in Support of Motion; Exhibit "A" * Received on 4/26/17

578	27-Apr-17	Anaina Hou et al	Mauna Kea Anaina Hou et al. Joinder and Objections
579	27-Apr-17	UHH	Applicant University of Hawaii at Hilo's motion to reconsider Minute Order No. 44 [Doc. 553]; Memorandum in support of Motion; Declaration of Counsel; Exhibit 1
580	27-Apr-17	Kihoi	Mehana Kihoi's joinder to the Temple of Lono motion to reconsider MO 44
581	28-Apr-17	Ward	Deborah J. Ward joinder to Temple of Lono motion to reconsider Minute Order 44
586	28-Apr-17	Kahea	Kahea: The Hawaiian Environmental Alliance's motion for reconsideration of Minute Order No. 44; Memorandum in support of motion; Exhibits "A-E;"
587	28-Apr-17	Ching	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 Manau Kea (sic) Anaina Hou et al. joinder to Temple of Lono motion for reconsideration of Minute Order 44 and objections dated April 27, 2017
588	28-Apr-17	TIO	TMT International Observatory LLC's statement of position re: Harry Fergerstrom's motion to reconsider (Doc 553, Minute Order 44); et al., filed 4/23/2017 [Doc. No. 554]; Exhibit "1"
589	1-May-17	UHH	The University of Hawaii at Hilo's joinder to TMT International Observatory LLC's statement of position re: Harry Fergerstrom's motion to reconsider (Doc 553, Minute Order 44) recently found document not previously uploaded to document library, WDT (copy attached); Motion to upload WDT into evidentiary submittals, and then moved into evidence; good cause showing filed 4/23/17 [Doc 554]
591	2-May-17	Lono	Temple of Lono response to Mauna Kea Anaina Hou et al. joinder and objections

599	3-May-17	UHH	The University of Hawaii at Hilo's opposition to The Temple of Lono's motion for reconsideration of Minute Order 44; Declaration of counsel; Exhibits 1 to 5
601	3-May-17	TIO	TMT International Observatory, LLC's joinder to the University of Hawaii at Hilo's opposition to Mauna Kea Anaina Hou et al.'s joinder and objections
603	3-May-17	TIO	TMT International Observatory, LLC's joinder to University of Hawaii at Hilo's opposition to the Temple of Lono's motion for reconsideration of Minute Order No. 33*; (2) J. Leinaala Sleightholm's joinder to the Temple of Lono's motion to reconsider MO 44; and (3) Harry Fergerstrom's motion to Temple of Lono's motion to reconsider Minute Order 44 *Typo in Documents Library; should be 44
605	3-May-17	TIO	TMT International Observatory, LLC's statement of position and opposition to Harry Fergerstrom's motion to reconsider (Doc 553, Minute Order 44); Motion to include WDT and pre-hearing statement into evidence; et al., filed 4/26/17 [Doc. No. 566]; Exhibit "1"
606	3-May-17	UHH	The University of Hawaii at Hilo's joinder to TMT International Observatory, LLC's statement of position and opposition to Harry Fergerstrom's motion to reconsider (Doc 553, Minute Order 44); Motion to include WDT and pre-hearing statement into evidence; et al., filed 4/26/17 [Doc. No. 566]
608	3-May-17	UHH	The University of Hawaii at Hilo's opposition to Mauna Kea Anaina Hou et al.'s joinder and objections; Declaration of counsel; Exhibits 1 to 2
611	4-May-17	C Freitas	Cindy Freitas memorandum in opposition to applicant University of Hawaii at Hilo's motion to reconsider Minute Order No. 44 (Doc. 553) filed April 27, 2017
612	4-May-17	TIO	TMT International Observatory, LLC's opposition to Dwight Vicente's motion to reconsider [Doc. No. 574]
613	4-May-17	TIO	TMT International Observatory, LLC's opposition to Cindy Freitas motion to reconsideration of Minute

			Order No. 44 [Doc. No. 571]; Declaration of Ross T. Shinyama, Esq.; Exhibit "1"
614	4-May-17	TIO	TMT International Observatory, LLC's opposition to William Freitas motion to reconsideration of Minute Order No. 44 [Doc. No. 575]; Declaration of Ross T. Shinyama, Esq.; Exhibit "1"- "3"
615	4-May-17	UHH	Applicant University of Hawai'i at Hilo's opposition to Flores-Case 'Ohana's motion to reconsider Minute Order No. 44 and spoliation of evidence, filed April 27, 2017 [Doc. 577]; Declaration of counsel; Exhibits "A"-"G"
616	4-May-17	UHH	The University of Hawai'i at Hilo's joinder to TMT International Observatory, LLC's opposition to William Freitas' motion to reconsideration of Minute Order No. 44 [Doc. No. 575]
617	4-May-17	UHH	The University of Hawai'i at Hilo's joinder to TMT International Observatory, LLC's opposition to Cindy Freitas' motion to reconsideration of Minute Order No. 44 [Doc. No. 571]
618	4-May-17	UHH	The University of Hawai'i at Hilo's joinder to TMT International Observatory, LLC's opposition to Dwight Vincente's motion to reconsider [Doc. No. 574]
620	5-May-17	TIO	TMT International Observatory, LLC's statement of position re: Kahea: The Hawaiian Environmental Alliance's motion for reconsideration of Minute Order No. 44, filed 4/28/17 [Doc. No. 586]
621	5-May-17	UHH	The University of Hawaii At Hilo's joinder to TMT International Observatory, LLC's statement of position re: Kahea: The Hawaiian Environmental Alliance's motion for reconsideration of Minute Order No. 44, filed 4/28/17 [Doc. No. 586]
623	5-May-17	Flores-Case	Flores-Case Ohana's response to applicant University of Hawaii at Hilo's doc. Nos.592 & 615; Memorandum in support of response

DECISIONS ON MOTIONS

Timely motions for reconsideration (“motions”) were reviewed for timeliness and good cause. Further, motions used to “reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing” were denied. *AMFAC, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 114 (1992). Timely oppositions and joinders were also considered in rendering decisions on the motions. All Witness Direct Testimony (“WDT”) were received if the witness testified at the hearing.

Doc. No. 554 *Fergerstrom* GRANTED. WDT of Harry Fergerstrom received. **Doc. Nos. 588 and 589** were considered in this decision.

Doc. No. 555 *TIO* GRANTED. For good cause shown, Minute Order No. 44 will be amended to reflect that Moses Kealamakia, Jr., Ivy McIntosh and Crystal West have “waived any right to testify at the contested case hearing or to claim that they have been deprived of an opportunity to provide their position and information as part of these proceedings.” Doc. No. 555 at page 4. **Doc. No. 556** was considered in conjunction with the decision of this motion, Doc. No. 555.

Doc. No. 556 *UHH* This is a substantive Joinder to Doc. No. 555 and was considered in conjunction with the decision on that motion for reconsideration.

Doc. No. 566 *Fergerstrom* DENIED. WDT of Harry Fergerstrom received in evidence per Doc. No. 554. Pre-hearing Statements are not evidence. Exhibit D-2 (Written Direct Testimony of Williamson Chang) was specifically not offered into evidence by Mr. Fergerstrom (*see*, Doc. No. 494). It is untimely and improper to offer D-2 into evidence through a motion for reconsideration. **Doc. Nos. 605 and 606** were considered in conjunction with this motion, Doc. No. 566.

Doc. No. 569 *Lono* DENIED. The Temple of Lono contends that the Hearing Officer excluded its exhibits because of bias, unfairness and lack of due process. “The Hearing Officer cannot undo what has been done. This proceeding is fatally flawed and no sleight of hand pretense that the process satisfies due process is credible.” Doc. No. 569 at page 30. Contrary to that argument, every ruling on the evidence proffered is consistent with the directives in HAR §13-1-35(a) to “exclude evidence that is irrelevant, immaterial, or unduly repetitious evidence as provided by law with a view of doing substantial justice.” Prior to undertaking the procedure to move exhibits into evidence, the Hearing Officer considered the process carefully and, after declaring the testimonial evidence closed (Vol. 44, 287:17-19), the Hearing Officer said: “All right. So, let’s deal with the exhibits first. I want to repeat that the way I’m asking that the exhibits be moved into evidence is by written motion. It should say, Deborah Ward Motion to Move Into

Evidence, and lay out whatever exhibits you want. The deadline for that is March 9th. So if you have things coming up today or yesterday or last week and didn't have the time to move it into the document library so that it could be uploaded, do that before March 9th. Because then on March 9th, you're going to move everything that is in the document library for you into evidence. After that, we're not going to take any more uploading. A week later, March 16th, you may file if you wish, objections, responses, replies, joinders to the motion that were made. So if you have an objection to B-12, you may file an objection saying that we object to whoever is offering B-12, and here's the reason why." Vol. 44, 287:24 to 290:16. The process was clearly articulated and no objections were noted. Reconsideration of Minute Order No. 44 for the reasons set forth in Doc. No. 569, is not warranted. **Doc. Nos. 576, 578, 580, 599 and 603** were considered in conjunction with this motion, doc. No. 569.

Doc. No. 570 *Fergerstrom* Doc. No. 570 is misnamed "motion." It is a joinder to Temple of Lono's motion to reconsider minute order 44. This motion **Doc. No. 570 and Doc. No. 603** were considered in conjunction with the decision on Doc. No 569.

Doc. No. 571 *C Freitas* **DENIED IN PART/GRANTED IN PART.** Three of the exhibits originally moved into evidence (Doc. Nos. 481, 492) could not be found in the Documents Library. Based on the motion for reconsideration, the Hearing Officer found Exhibit 18L after being directed to Cindy Freitas Seventh Supplemental Exhibit List, filed on 2/12/2017. Therefore, the original denial of Exh. 18L is reversed and Exh. 18L is received in evidence. Despite further searching for Exhs.18b 1 and 18b 2, the Hearing Officer was unable to locate those exhibits in the Documents Library and the ruling of "Denied" stands. Ms. Freitas' due process arguments are meritless. Ms. Freitas' remaining positions are rearguments and the rulings stand. **Doc. Nos. 613 and 617** were considered in conjunction with this motion, Doc. No. 571.

Doc. No. 574 *Vicente* **DENIED.** The exhibits offered by movant are irrelevant, immaterial and beyond the scope of the issues identified in Minute Order No. 19. **Doc. Nos. 612 and 618** were considered in this decision.

Doc. No. 575 *W. Freitas* **DENIED.** T-1.c, T-2.4, T-3.1, T-3.2, T-3.3, T-3.6, , T-3.k, T-3.k1, T-3.k2, T-3.k3 were denied in Minute Order No. 44. W. Freitas claims he needs these exhibits for his FOF/COL. T-1.c, T-2.4, T-3.2, T-3.3, and T-3.6 are laws or statutes that may be cited and referenced by W. Freitas without being admitted into evidence and therefore are superfluous. T-3.1 is identical to Ex. A-9. Ex. A-9 is admitted into evidence and may be cited and referenced by all parties including W. Freitas; therefore, T-3.1 is superfluous and redundant. T-3.k, T-3.k1, T-3.k2 and T-3.k3 were submitted by W.Freitas after the close of testimonial evidence. No one had the opportunity to cross-examine W.Freitas about said exhibits; therefore, the decision to deny admission of said exhibits stands. Movant's due process arguments are meritless. **Doc. Nos. 614 and 616** were considered in conjunction with this motion, Doc. No. 575.

Doc. No. 576 *Sleightholm* Joinder to Temple of Lono’s motion to reconsider minute order 44. This **Doc. No. 576 and Doc. No. 603** were considered in conjunction with the decision on Doc. No 569.

Doc. No. 577 *Flores-Case* **DENIED IN PART/GRANTED IN PART.** The Flores-Case `Ohana challenge the evidentiary rulings on the basis of due process violations, OCCL’s management of the documents library and filings submitted for uploading, and “spoliation” of evidence. Aside from broad accusations, the Flores-Case `Ohana fails to identify specific exhibits excluded by the Hearing Officer in violation of the law, except for those exhibits that the Flores-Case `Ohana believes are inappropriately excluded as “duplicative” of exhibits A9 through and A48. (See, Doc. No. 577 at page 4.) To wit: “The submittal of alternate copies is in alignment with the oral instructions of the Hearing Officer when the matter regarding such discrepancies were brought forth during the hearings. As such, we were instructed to submit our own alternative copies. An example of such discrepancies was brought to the attention of the Hearing Officer in the response filed on March 16, 2017 by the FLORES-CSE `OHANA regarding Exhibits A-9 and A-48.” These exhibits would be: B28, B37a, B37b, and B.38. By Minute Order No. 44, Exhs. A-9 and A-48 have been received in evidence over the objections of the Flores-Case `Ohana. In order to preserve the arguments, set forth by the Flores-Case `Ohana that A-9 and A-48 are flawed, B28, B37a, B37b and B.38 will be received in evidence. Otherwise, all other rulings on the Flores-Case `Ohana’s exhibits are consistent with HAR §13-1-35(a) and will stand.

Doc. No. 578 *MKAH* **DENIED.** This reconsideration seeks have the Hearing Officer reconsider denial of several exhibits. HAR §13-1-35(a) directs the Hearing Officer to “exclude evidence that is irrelevant, immaterial or duplicative.” In order to accomplish this level of review of evidence, the exhibits need to be identified with specificity. An *en masse* request to admit “all of B series” exhibits does not provide the necessary specificity to allow a proper review of proffered exhibits. *En masse* offers are not acceptable. MKAH also objects to the denial of exhibits arising from a prior contested case hearing. The first contested case hearing in this matter has been disallowed by the Supreme Court. This second contested case hearing was designed to look at the issues with fresh eyes and without the influence of premature decision-making by the BLNR. Measured steps to limit the information given to the Hearing Officer to meet the purposes of the remand, were undertaken. Any recommendation by way of a D&O, FOF/COL coming from this second contested case hearing will be based upon information appropriately deduced from evidence untainted by the flawed process undertaken prior to the Supreme Court remand. The decision on MKAH’s motion stands and the requests are denied. To the extent that Doc. No. 578 is a Joinder to Temple of Lono’s motion to reconsider minute order 44, it was considered as such in conjunction with the decision on Doc. No. 569. **Doc. Nos. 591, 601 and 608** were considered in conjunction with this motion, Doc. No. 578.

- Doc. No. 579 UHH GRANTED.** For good cause shown, Exhibit A-142 is received into evidence. **Doc. No. 611** was considered in conjunction with this motion, Doc. No. 579.
- Doc. No. 580 Kihoi** Joinder to Temple of Lono’s motion to reconsider minute order 44 and was considered as such in conjunction with the decision on Doc. No 569.
- Doc. No. 581 Ward DISREGARD.** This is a joinder to Temple of Lono’s motion to reconsider minute order 44. However, the document was received and filed on April 28, 2017, past the deadline of April 27, 2017.
- Doc. No. 586 KAHEA GRANTED.** Through inadvertence, KAHEA failed to list Exhibit B.53, David Kimo Frankel-Written Direct Testimony, in its Motion to Admit Exhibits and Written Direct Testimony into Evidence. Moreover, this motion for reconsideration was submitted and filed on April 28, 2017, past the deadline of April 27, 2017. Mr. Frankel testified at the hearing; his WDT had been filed in the Documents Library prior to his testimony. For reasons of substantial justice and despite the oversight of not moving the Frankel WDT into evidence in timely fashion and not submitting the motion for reconsideration in timely fashion, B.53 is received in evidence. **Doc. Nos. 620 and 621** were **disregarded** as untimely.
- Doc. No. 587 Ching DISREGARD.** This is a joinder to various motions for reconsideration of minute order 44. However, the document was submitted and filed on April 28, 2017, past the deadline of April 27, 2017.
- Doc. No. 623 Flores-Case DISREGARD.** This document was submitted on May 7, 2017, in response to oppositions submitted in Doc. Nos. 592 and 615. However, responses to oppositions are not part of the process established for moving exhibits into evidence. This Doc. No. 623 was not considered.

All changes to Minute Order No. 44 will be reflected in Amended Minute Order No. 44 and its attachments. Amended Minute Order No. 44 and attachments, will be filed once the appropriate changes are made.

IT IS SO ORDERED.

DATED: Honolulu, Hawai`i, May 25, 2017.



Judge Riki May Amano (Ret.)
Hearing Officer

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

BLNR Contested Case HA-16-02
Document title: **Minute Order No. 51**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on May 26, 2017 and by regular mail on May 26, 2017:

Carlsmith Ball LLP
Ian Sandison, John P. Manaut, Lindsay N. McAneeley
1001 Bishop Street
ASB Tower, Suite 2200
Honolulu, HI 96813
isandison@carlsmith.com
jpm@carlsmith.com
lmcaneoley@carlsmith.com
Counsel for the Applicant University of Hawai'i at Hilo

Law Offices of Yuklin Alulu
415-C Uluniu Street
Kailua, HI 96734
yuklin@kailualaw.com
Co-Counsel for Kahea

Dexter K. Kaiama
111 Hekili Street, #A1607
Kailua, HI 96734
cdex@hotmail.com
Co-Counsel for Kahea

Kealoha Pisciotta and Mauna Kea Anaina Hou
PO Box 5864
Hilo, HI 96720
keomaivg@gmail.com

Clarence Kukauakahi Ching
64-823 Mamalahoa Hywy
Kamuela HI 96743
kahiwaL@cs.com

Flores-Case 'Ohana
E. Kalani Flores, B. Pualani Case
PO Box 6918
Kamuela, HI 96743

ekflores@hawaiiantel.net
Deborah J. Ward
PO Box 918
Kurtistown, HI 96760
cordylinicolor@gmail.com

Paul K. Neves
380 Nahale-a Avenue
Hilo, HI 96720
kealiikea@yahoo.com

Watanabe Ing LLP
J. Douglas Ing, Ross T. Shinyama, Summer H. Kiawe
First Hawaiian Center 999 Bishop Street, 23rd Floor
Honolulu, HI 96813
rshinyama@wik.com
douging@wik.com
Counsel for TMT International Observatory, LLC

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

Mehana Kihoi
PO Box 393
Honaunau, HI 96726
uhiwai@live.com

C. M. Kaho'okahi Kanuha
77-6504 Maile St
Kailua Kona, HI 96740
kahookahi@gmail.com

Joseph Kualii Lindsey Camara
192 Kualua Pl.
Hilo, 96720

kualiic@hotmail.com

Torkildson, Katz, Moore, Hetherington & Harris
Attn: Lincoln S. T. Ashida
120 Pauahi Street, Suite 312
Hilo, HI 96720-3084
lsa@torkildson.com
nic@torkildson.com
*Counsel for Perpetuating Unique Educational
Opportunities (PUEO)*

J. Leina'ala Sleightholm
P.O. Box 383035
Waikoloa, HI 96738
leinaala.mauna@gmail.com

Lanny Alan Sinkin
1429 North 17th Street
Bismarck, North Dakota 58501-2858
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
4 Spring Street
Hilo, HI 96720
akulele@yahoo.com

Stephanie-Malia:Tabbada
P O Box 194,
Naalehu, HI 96772
s.tabbada@hawaiiantel.net

Tiffnie Kakalia
549 E. Kahaopea St.
Hilo, HI 96720
tiffniekakalia@gmail.com

Glen Kila
89-530 Mokiawe Street
Waianae, HI 96792
makakila@gmail.com

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom


Brannon Kamahana Kealoha
89-564 Mokiawe Street
Nanakuli, HI 96792
brannonk@hawaii.edu

Cindy Freitas
PO Box 4650
Kailua Kona, HI 96745
hanahanai@hawaii.rr.com

William Freitas
PO Box 4650
Kailua Kona, HI 96745
pohaku7@yahoo.com

Wilma H. Holi
P. O. Box 368
Hanapepe, HI 96716
w_holi@hotmail.com
Hearing Officer's witness

Moses Kealamakia Jr.
1059 Puku Street
Hilo, HI 96720
mkealama@yahoo.com
Hearing Officer's witness

Signature: 
Name: Alex J. Roy
Date: May 26, 2017