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Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
A Contested Case Hearing Re Conservation) **TEMPLE OF LONO PROPOSED**  
District Use Permit (CDUP) (HA-3568) for ) **DECISIONS AND ORDERS INCLUDING**  
The Thirty Meter Telescope at the Mauna ) **FINDINGS OF FACT AND;**  
Kea Science Reserve, Kaohe Mauka, ) **CONCLUSIONS OF LAW; COS**  
Hamakua District, Island of Hawai'i, )  
TMK (3) 4-4-015:009 )  
\_\_\_\_\_)

**TEMPLE OF LONO PROPOSED DECISIONS AND ORDERS INCLUDING**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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**TEMPLE OF LONO PROPOSED DECISIONS AND ORDERS INCLUDING**  
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**I. PREFACE**

*The challenge is about the right of a faith to be respected  
and practiced in its own homeland.*

DOC-50, Exhibit C to Declaration of  
Kahuna Frank Kamehameha Tamehaloha Anuumealani Nobriga  
Dated May 27, 2016

*"Oh, honest Americans, as Christians hear me for my downtrodden people! Their form of government is as dear to them as yours is as precious to you. Quite warmly as you love your country, so they love theirs. With all your goodly possessions, covering a territory so immense that there yet remain parts unexplored, possessing islands that, although new at hand, had to be neutral ground in time of war, do not covet the little vineyard of Naboth's, so far from your shores, lest the punishment of Ahab fall upon you, if not in your day, in that of your children, for 'be not deceived, God is not mocked.' The people to whom your fathers told of the living God, and taught to call 'Father,' and now whom the sons now seek to despoil and destroy, are crying aloud to Him in their time of trouble; and He will keep His promise, and will listen to the voices of His Hawaiian children lamenting for their homes."*

Lili'uokalani, Hawaii's Story by Hawaii's Queen, 373-374  
Boston: Lee and Shephard 1898

*“Our ancestors were able to create a harmony between their science, intelligence, spirituality, technology, nature, and wisdom.”*

Ali'i Nui Mō'i (King/High Chief) Edmund Keli'i Silva, Jr.

The astronomers are one fragment of a fragmented civilization. Spirituality is relegated to “superstition” by those whose worldview consists of only what they can perceive with their five physical senses, like the lawyer for the Astronomers, who called unfamiliar spiritual practices “far fetched and speculative.”<sup>1</sup>

Kahuna Lanny Alan Sinkin  
Temple of Lono  
Ali'i Mana'o Nui to  
Ali'i Nui Mōi Silva

“There are fears in Hawai'i State being motivated by economic greed that statehood will turn Hawai'i, as someone has said, into a great spiritual junkyard filled with smashed dreams, worn out illusions, that will make the Hawaiian people lonely, confused, insecure, empty, anxious, restless, disillusioned, and this is what is happening with our people.

Stephanie Tabbada  
Transcript 8/5/2016 (Prehearing Conference)  
V. iv 79:20 – 80:2

“Let me ask you why the Native Hawaiian traditional and customary practices should be issue [sic] in this contested case hearing.”

Hearing Officer  
Transcript 8/29/2016 (Prehearing Conference)  
V. vi 62:13-15

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<sup>1</sup> Transcript (Tr) 1/19/2017 (Ing) Volume 27, Page 238, Line 19. Such references will appear below as Tr 1/19/2017 V27 238:19.

## II. INTRODUCTION: THE QUESTION PRESENTED.

The question posed in this proceeding is: Should the State of Hawai'i Board of Land and Natural Resources (BLNR) approve the University of Hawai'i at Hilo's (UHH) application HA 3568 for a permit to be used by the TMT Corporation/TMT International Observatory LLC (TIO)<sup>2</sup> to build a thirty meter telescope on Mauna Kea?

The BLNR initial approval of the application for this permit was vacated by the Hawai'i Supreme Court, which remanded the case back to the BLNR for further proceedings. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015).

The BLNR appointed a Hearing Officer to conduct a contested case hearing on the UHH application. A Hearing Officer is supposed to be fair and impartial. The Hearing Officer is charged with making a recommendation to BLNR on whether the permit application should be granted or not.

An initial, threshold question is whether what UHH/TMT/TIO are proposing to do is legal or would violate the State statute prohibiting desecration of sacred sites. HRS § 711-1107. That question will be discussed below.

If the project is not disqualified from receiving a permit by reason of law, the next question is whether the CDUA presents a project proposal that meets the requirements for permits, such as the one at issue in this proceeding. There is a particular focus on whether the project meets the eight criteria set forth for projects in Conservation Districts, all of which must be satisfied for a project in a Conservation District.

The next question is whether UHH's prior record of management (or mismanagement) of the Mauna, failure to protect Native Hawaiian rights, and performance in this proceeding demonstrate that UHH is not qualified to receive such a permit, even if the proposal met all the requirements for a permit.

An additional issue arose during this proceeding as to whether the Hearing Officer is biased against the Temple of Lono and in favor of the Applicant. The evidence of that bias will be set forth in this filing.

Relevant to the Hearing Officer's recommendation to the BLNR will be an examination of the CDUA in light of at least<sup>3</sup> the issues that the Hearing Officer allowed to be heard in this proceeding, including:

Is the proposed land use, including the plans incorporated in the application, consistent with Chapter 183C of the Hawai'i Revised Statutes, the eight

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<sup>2</sup> The application identifies the TMT Corporation as the third party beneficiary of the permit sought by UHH. That corporation has been at least partially replaced by TIO. Whether that replacement required an amended application, which was not filed, has been an issue raised in this proceeding.

<sup>3</sup> The issues identified in the first contested case hearing are also relevant to this second contested case.

criteria in HAR §13-5-30(c), and other applicable rules in HAR, Title 13, Chapter 5 Conservation District?

Is the proposed land use consistent with Article XII, Section 7 of the Hawai'i State Constitution, and *Ka Pa`akai O Ka`Aina v. Land Use Comm'n. State of Hawai'i*, 94 Hawai'i 31, 7 P.3d. 1068 (2000)?

Is the proposed land use consistent with Article XI, Section 1 of the Hawai'i State Constitution and the public trust doctrine?

DOC-281 (Minute Order 19: Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues [Doc. 99]; Order setting issues).

### III. FINDINGS OF FACT

#### A. The spiritual implications of granting the permit at issue are central and dispositive issues in this case.

1. A central question in this proceeding is the respect and legal protection due the traditional Hawaiian faith.
2. The Applicant argued that the traditional Hawaiian faith should not be an issue in this proceeding at all because it would be a diversion.  
The Temple will try to use this proceeding to galvanize a religious movement. Indeed, the Temple states that religion will be an essential part of this proceeding: “[I]ssues related to Traditional Hawaiian Faith are going to be **an essential part of the contested case ....**” [DOC-135] Temple Mot. Intervene Mem. Supp. at 2 (emphasis added) The Hearing Officer should not allow such diversions from the stated criteria to obtain a permit.  
DOC-135 (The University of Hawaii at Hilo’s opposition to Temple of Lono’s motion for partial summary judgment [Doc. 78]) at 15 (emphasis in original).
3. The Final Environmental Impact Statement (FEIS) prepared by the Applicant has a list of applicable statutes, rules, regulations, and requirements that the Applicant considered relevant to this project. Exhibit R-3 (Final Environmental Impact Statement, Volume 1 in Section 3.1) at pages 3-4 and 3-5.
4. The FEIS list does **not** include HRS § 711-1107, the Hawai'i statute that makes desecration of a sacred site a criminal offense.
5. That omission speaks volumes about the Applicant’s unwillingness to acknowledge the traditional Hawaiian faith and the implications of such a denial for the application.
6. The Temple argued that the proper application of this statute required the dismissal of the application for a permit to build the Thirty Meter Telescope (TMT).



DOC-264 [Temple of Lono motion for summary judgment (desecration)]; DOC-516 (Temple of Lono motion to Board of Land and Natural Resources to dismiss HA-3568)

7. The Hearing Officer never ruled on the first motion.
8. The Board never ruled on the second motion.
9. The Temple of Lono will address more comprehensively the issues related to the spiritual impact of the TMT later in this filing.

**B. Threshold questions invalidate this proceeding.**

**1. Is the objectivity of this proceeding incurably compromised?**

10. In 2011, the Board of Land and Natural Resources granted the permit sought by the University of Hawai'i at Hilo (Applicant), only to have that decision vacated by the Hawai'i Supreme Court on due process grounds. *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015).

11. The flaw in that first proceeding was that the BLNR voted to grant the permit application before holding the contested case hearing. *Ibid.* at 239 ("In sum, BLNR put the cart before the horse when it approved the permit before the contested case hearing was held. Once the permit was granted, Appellants were denied the most basic element of procedural due process—an opportunity to be heard at a meaningful time and in a meaningful manner. Our Constitution demands more.")

12. While the agency did not commit the same "cart before the horse" premature approval error regarding the scheduling of a second contested case, the impact of that initial due process violation irrevocably tainted this second contested case.

13. In response to the Supreme Court ruling and subsequent remand, the Board of Land and Natural Resources selected a new hearing officer, who then began this new contested case.

14. Yet the Supreme Court recognizes that

[a]s well-intentioned as the hearing officer may be, he or she knows BLNR's position on the permit before the first witness is sworn in. *See Murchison*, 349 U.S. at 136, 75 S.Ct. 623 (explaining that the "stringent rule [to avoid the appearance of prejudice] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties").

*Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 363 P.3d 224, 239 (2015) (emphasis added).

15. The agency cannot un-ring the bell. The new hearing officer knows that the BLNR approved the permit earlier. The hearing officer knows that the approval came before the contested case was held. *See e.g.* Tr. 8/29/17 at 52:8-10 (“I am aware that the supreme court set [sic] this case back for this contested case hearing because of a failure to follow process ....”)

16. That earlier process on the part of the BLNR demonstrated a powerful agency commitment to granting the application for a permit of which the new hearing officer is completely aware.

17. The influence on the objectivity of the hearing officer of concern in the first proceeding remains in the second proceeding.

18. If there is any evidence that the required objectivity is not present, the entire proceeding is called into question.

Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." *Sussel*, 71 Haw. at 108, 784 P.2d at 870 (quoting M. Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84 (1986)); *see Sifagaloa*, 74 Haw. at 190, 840 P.2d at 371 (same); *see also Cinderella*, 425 F.2d at 590 (disapproving of circumstances "which give the appearance that [a decisionmaker] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves"). It is abundantly clear that "[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance" due to "some identifiable potential bias." Redish & Marshall, *Adjudicatory Independence*, 95 Yale L.J. at 483 (emphasis in original); *see Williams-Yulee v. Florida Bar*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1656, 1666, 191 L.Ed.2d 570 (2015) (stating that "public perception of judicial integrity" is a governmental interest of "the highest order") (quotations omitted).

*Mauna Kea Anaina Hou*, *supra*. at 238.

19. A similar concern about “identifiable procedural bias” appears in the legal counsel for the Hearing Officer and the Board in this proceeding. The same counsel represented the Board in defending the initial decision to grant the permit. *See* DOC-95 (Petitioners’ Motion to Disqualify BLNR’s and Hearing Officer’s Counsel), DOC-130 (Petitioners’ supplemental arguments on motion to disqualify BLNR’s and Hearing Officer’s counsel), DOC-188 (Wurdeman correspondence addressed to Hearing Officer Judge (Ret.) Riki May Amano and BLNR Chair Suzanne Case re: Hearing on Petitioners’ motion to disqualify BLNR’s and Hearing Officer’s counsel, DOC-389 (Minute Order 38, Order denying motion to disqualify BLNR’s and Hearing Officer’s counsel).

20. Having vigorously advocated for the granting of the permit initially, the ability of such counsel to be impartial and objective in this proceeding is questionable. If

BLNR had been at all sensitive to the seriousness of the initial violation of due process, the agency would have brought in counsel other than the prior counsel on this case to advise the Hearing Officer. To be even more demonstrative of rectitude, the agency would have hired private counsel and not relied upon the Attorney General's office where prior counsel work.

21. The initial Petitioners and the Applicant requested the Board select a new Hearing Officer, to replace the one the Board selected earlier, based on evidence of possible bias. Minute Order No. 9 (Order denying Petitioners' motion for reconsideration of Minute Order No. 4, Filed on May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various Members and Hearing Officer) at 8-9.

22. The Board denied that request. Ibid. at 9-12.

23. A third basis for questioning the objectivity of this proceeding is the fact that the Master Lease between BLNR and the Applicant expires in 2033.

24. If there is no new Master Lease, there will be no basis for a sublease agreement between the Applicant and the TMT Telescope Project. If such a sublease has been signed, the sublease will be void without a new Master Lease.

25. There is no question that, if the TMT Project knew today that the BLNR was not going to approve a new Master Lease, the TMT Project would move to the Canary Islands. There would be no point in building a telescope with an expected useful life of at least fifty years, if the lease for the land on which to build will expire sixteen years from now.

26. Yet BLNR is proceeding with consideration of the TMT Project permit application prior to determining whether a new Master Lease will be approved. That means that the entire TMT application process is either speculative or based on some secret agreement to approve a new Master Lease.

27. If the application process is merely a speculative endeavor that will be abandoned, if a new Master Lease is not approved prior to the initiation of construction, then there was and is a due process violation in requiring parties opposed to the TMT Project to go through an extensive contested case process for a project that may never be built, even if the application is approved.

28. This process is similar to the "cart before the horse" approach that led to vacating the first proceeding. The BLNR should have made the determination on whether a new Master Lease is going to be approved prior to considering applications for projects that would not be built or would be prematurely terminated, if a new Master Lease is not approved.

29. The due process impact on those opposing the TMT Project is exacerbated by having to go through a second contested case hearing based on an earlier procedural error by the agency.

30. In addition, if the TMT application is approved and the TMT is constructed, the BLNR will have compromised its objectivity on the question of approving a new Master Lease. To subsequently fail to approve a new Master Lease would terminate the TMT Project prematurely, causing massive financial losses to the TMT Project. That loss will certainly be argued by those supporting adoption of a new Master Lease and be a source of significant inappropriate pressure on the BLNR to approve a new Master Lease.

31. The termination of the Master Lease without a replacement might even create legal liability for the State and that potential liability would provide another inappropriate argument for approval of a new Master Lease.

32. Choosing to create these pressures on itself by approving the TMT application at issue in this proceeding prior to a decision on a new Master Lease would be evidence of bias and predetermination on the part of BLNR regarding a new Master Lease.

33. Alternatively, the fact that BLNR is processing the TMT CDUA is itself a signal to the TMT Project that BLNR intends to approve a new Master Lease. Why would BLNR spend its time and public resources processing the TMT application, if the agency did not intend to approve a new Master Lease? Why would the TMT Project be spending millions of dollars in pursuit of a permit that might be meaningless in a few years unless the TMT Project knew the new Master Lease was going to be approved? These questions give rise to at least the appearance that BLNR is not a fair and impartial tribunal.

A "fair trial in a fair tribunal is a basic requirement of due process." *Sifagaloa v. Bd. of Trs. of Emps.' Ret. Sys.*, 74 Haw. 181, 189, 830 P.2d 367, 371 (1992) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955))

*Mauna Kea Anaina Hou*, supra. at 228

As this court noted in *Sifagaloa*:

The Supreme Court teaches us . . . that justice can perform its high function in the best way [only if it satisfies] the `appearance of justice.' For in a popular government, `justice must not only be done but must manifestly be seen to be done . . . .'

74 Haw. at 189-90, 840 P.2d at 371 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954), and *Murchison*, 349 U.S. at 136, 75 S.Ct. 623).

*Mauna Kea Anaina Hou*, supra. at 228-229.

34. The agency's premature approval of the permit application, the Hearing Officer being advised by attorneys that supported and defended the initial due process

violation, and the premature consideration of the permit application when the question of a new Master Lease has not yet been resolved are all evidence of a lack of concern for due process from the very beginning of this case and continuing into this second contested case. That lack of concern challenges the legitimacy of this proceeding.

35. The extensive record of due process violations in the second contested case is a predictable result of the initial due process violations that could not be cured. See FoF 10-34.

## 2. What is the nature of this proceeding?

36. The Supreme Court vacated the permit granted during the initial process. *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawa'i 376, 363 P.3d 224, 229 (2015).

37. The Supreme Court remanded this case to the Board so that “a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion.” Id. (emphasis added).

38. The Board characterized the Supreme Court ruling as remanding the case so that the prior contested case hearing could be resumed. DOC-14 [Minute Order No. 4 (“The contested case resumed upon remand ...”)] at 4-5 (emphasis added); DOC-63 {Minute Order 9 [“The Board has construed these (Supreme Court) instructions to mean that upon remand, the contested case that was initiated in 2011 resumed ...”]} at 5.

39The Supreme Court said “a” contested case, not “the” contested case.

40. In that same sentence, the Board stated the “no chapter 92 public meeting was required to start up the contested case, including delegating the contested case to a hearing officer and authorizing the Chairperson to appoint one.” Id. (emphasis added).

41. These statements are in conflict. Remanding the matter so that “a contested case hearing can be conducted” clearly identifies the proceeding as a new contested case. To call this proceeding “resumed” is clearly an error.<sup>4</sup>

42. The confusion regarding the nature of this proceeding is reflected in the conflation of a petition for a contested case with a request to intervene.

43. In Minute Order 7, the Hearing Officer referred to a “[d]eadline for **intervention** applications, motions or request.” DOC-44 at 2 (emphasis added). In Minute Order

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<sup>4</sup> The record of the first contested case is part of the record of the second contested case. HAR § 13-1-32.4

8, the Hearing Officer again referred to a “[d]eadline for intervention applications, motions or request [sic].” DOC-49.

44. The parties to a contested case are first determined by a requirement to file a request for a contested case.

§13-1-31 Parties.

(a) Except as otherwise provided in section 13-1-31.1, parties to a contested case shall be determined within a reasonable time following the ten-day period following the board meeting, the presiding officer shall notify all persons and agencies, including the applicant or alleged violator, as the case may be, who timely petitioned for the contested case hearing of the date and time for a hearing to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case.

45. Under this rule, the parties to the contested case are limited to the people who "timely petitioned for the contested case hearing." There is no rule that provides for "intervention" by new parties after the contested case is initiated.<sup>5</sup>

46. If the remand of the case was treated as a resumption of the initial contested case, then there was no opportunity for new parties because the time to request a contested case had long since expired. The parties would be limited to those who were parties in the first contested case.

47. If the remand of the case was treated as the opportunity for initiation of a new contested case,<sup>6</sup> then the process had to provide some means for people to qualify as parties by requesting the contested case, such as a public hearing where such requests could be made. HAR § 13-1-29.

48. This proceeding ended up as a hybrid recognized nowhere in the rules.

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<sup>5</sup> When the rules intend to allow intervention, they do so.

§13-1-27 Petition for declaratory ruling

(e) In its discretion, the board may permit interested persons to intervene in proceedings for declaratory orders when it finds that such participation will assist the board in its consideration of the matter.

There is no such clause in the contested case section of the rules. The omission of intervention in contested case rules, while permitted in declaratory ruling cases, reinforces the conclusion that, in contested cases, people apply to be parties by filing requests for the contested case, not by filing a petition to intervene after the contested case is already initiated.

<sup>6</sup> The Board did not have to proceed with a contested case. The Supreme Court said a contested case or "other proceedings consistent with this opinion." *Mauna Kea Anaina Hou*, supra, at 229.

49. The parties from the first contested case became parties in the second contested case without any action on their part, as if the proceeding was a resumed proceeding. See Minute Order No. 7 (identifying the Applicant and the Petitioners from the first contested case as parties) at 1. DOC-44.

50. Then people were allowed to file motions to intervene and become parties, as if a motion to intervene in a case already initiated was the same as filing a request for a contested case prior to the initiation of the case. Minute Order 13 (Order on the hearing on admission or intervention as a party). DOC-115.

51. In her order granting intervention status to new parties, the Hearing Officer's legal discussion starts at HAR Section 13-1-31 (b) and (c), *ibid.* at 3, skipping over the prerequisite limiting such parties to those "who timely petitioned for the contested case hearing." 13-1-31 (a).

52. The confusion resulting from the hybrid case approach to this proceeding caused difficulties for the parties. Tr. 7/17/16 at 14:18 – 15:16; *ibid.* 26:16 – 27:16; *ibid.* 36:10 - 38:20.

53. The confusion may also have arisen from a political problem. The telescope promoters wanted to be a party to this contested case, rather than having the University (Applicant) represent their interests. DOC-002 (Motion to have TMT International Observatory, LLC [TIO] admitted as a party in the contested case hearing) filed April 8, 2016.

54. Given that TIO was not a party to the first proceeding and had not requested the second contested case, a new avenue for becoming a party had to be created.

55. So the concept of "intervention" was introduced into the contested case process despite there being no rule allowing for such an action.

56. Once TIO was permitted to seek intervention status, the door opened for any other potential interveners in the contested case.

### **3. Is the CDUA an application for permission to break the law?**

#### **a. Desecration is against the law in Hawai'i.**

HRS §711-1107 Desecration.

(1) A person commits the offense of desecration if the person intentionally desecrates:

(a) Any public monument or structure; or

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) “Desecrate” means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant’s action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both.

#### **b. Procedural History of Desecration Issue in this Proceeding**

57. In the Final Environmental Impact Statement (FEIS), the Applicant lists the statutes, rules, regulations, and requirements that the Applicant considered applicable to this project. Exhibit R-3 (Final Environmental Impact Statement, Volume 1 in Section 3.1 at pages 3-4 and 3-5.)

58. The list does **not** include HRS §711-1107 Desecration. *Id.*

59. The Temple of Lono (“Temple”) is an intervener in this proceeding. DOC-115 (Minute Order No. 13: Order on the hearing on admission or intervention as a party; second prehearing conference) at 6.

60. The Temple sought intervener status, in part, to object to desecration of Mauna Kea:

(1) Tahuna Frank Kamehameha Tamealoha Anuumealani Nobriga is the Tahuna of the Temple of Lono. As such he has a unique understanding of the traditional Hawaiian faith and the application of that faith to the spiritual issues that are likely to be raised in this case.

(2) Based on his unique, comprehensive, and relevant knowledge concerning the traditional faith of the Hawaiian Civilization, the Tahuna is entitled to mandatory intervention under HAR § 13-1-31(b)(2) because desecration of Mauna a Wākea will directly affect the Temple of Lono, both as a violation of a sacred space and as an act in furtherance of a long-pursued campaign to suppress the traditional faith of the Hawaiian people.

(3) Alternatively, the BLNR should grant discretionary intervention pursuant to HAR § 13-1-31(c) because the Temple has a substantial interest in this case and the Tahuna is the only person qualified to represent that interest.

DOC-50 [Request of Temple of Lono to intervene (Motion) at 2] (emphasis added). See also *Ibid.* Declaration of Tahuna Frank Kamehameha Tamehaloha Anuumealani Nobriga ¶ 12.

61. The Temple of Lono specifically raised the issue that the desecration statute called for dismissal of the CDUA. DOC-264.



62. The Hearing Officer never addressed the desecration issue raised by the Temple's DOC-264. <http://dlnr.hawaii.gov/mk/documents-library/> *passim*
63. The Temple raised the issue of the Hearing Officer failure to consider the desecration issue. DOC-324 (Temple of Lono motion to schedule pending motions), Memorandum at 1; DOC-371 (Temple of Lono: Unresolved matters) at 1.
64. The Hearing Officer did not respond to these Temple pleadings. . <http://dlnr.hawaii.gov/mk/documents-library/> *passim*
65. UHH filed an opposition to the Temple desecration motion. DOC-473.
66. The Temple moved to strike the UHH opposition. DOC-474.
67. TMT/TIO joined UHH in opposition to the Temple's desecration motion. DOC-484.
68. The Temple moved to strike TIO opposition. DOC-490.
69. The Hearing Officer did not take up the UHH and TIO oppositions. <http://dlnr.hawaii.gov/mk/documents-library/> *passim*
70. The Hearing Officer did not take up the Temple's motions to strike. <http://dlnr.hawaii.gov/mk/documents-library/> *passim*
71. On March 19, 2017, at the close of the evidentiary hearing, the Temple filed a motion to the Board seeking dismissal of the application based on the application seeking a permit to violate the desecration law. DOC-516.
72. The Board has not responded to the Temple's motion to dismiss.

**c. Mauna Kea is a place of worship.**

73. Justices on the Hawai'i Supreme Court acknowledge Mauna Kea as a place of worship. In a concurring opinion, Justice Pollack wrote:  
Rising to a majestic 13,796 feet above sea level, Mauna Kea, the highest mountain peak in the Hawaiian Islands, is of profound importance in Hawaiian culture. **The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.**  
*Mauna Kea Anaina Hou v. Board of Land and Natural Resources* (hereinafter "*Anaina Hou*"), 363 P.3d 224, 248 (2015) (Justice Pollack concurring) (emphasis added).

74. The Justice continued:

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised **in the project area** and was aware of the project's **potential adverse impact on the "spiritual nature of Mauna Kea" and the "cultural beliefs and practices of many."**

*Ibid* at 251 (2015) (emphasis added).

75. In its FEIS, the Applicant states:

‘Āina mauna, or mountain lands, reflects a term used affectionately by elder Hawaiians to describe the upper regions of all mountain lands surrounding, and including, Maunakea. The area was frequented by native practitioners and contained a native and cultural landscape that provided among other things:

- Places to worship
- Places to gather stones
- Kanu iwi (places to bury human remains)
- Kanu piko (places to bury umbilical cords)
- Places to traverse, i.e. for those who were crossing from one region to another
- Places to gather food, and catch birds
- Sacred and safe area

Exhibit R-3 at 3-10.

76. This extensive list of uses supports a finding that Mauna Kea is a place of worship. HRS §711-1107(1)(b).

77. The list also identifies uses that support a finding that Mauna Kea is a place of burial – *kanu iwi*. *Ibid.* (1)(b).

78. The list also identifies uses that support a finding that Mauna Kea is an object of veneration – *sacred and safe area*. *Ibid.* (1)(c).

79. The Cultural Impact Assessment (CIA), submitted by the Applicant, recommended that:

Project proponents strongly consider no further development, including the TMT Observatory Project, and the TMT Mid-Level Facility at Hale Pōhaku, take place on Maunakea.

Exhibit R-5 (CIA) at xiv.

80. The author of CIA recommendation testified that:

There was a tremendous amount of historical data and public input that indicated the extreme sacredness of Maunakea, a place that may be the most sacred place in Hawaii, a place most sacred to Hawaiian people.

Exhibit B.57 at 4.

81. The author further explained:

A "no further development" on Maunakea recommendation is strictly based on the data collected throughout the six-to-eight-month period that the research was conducted.

Id.

82. The FEIS states:

Maunakea bears much significance because it is believed that the points of highest altitude are sacred and open the gateways to Heaven. Six main zones can be found on the slopes of Maunakea; Kuahiwi, the core summit area, is the highest and most sacred. Tradition tells us that access to the summit was limited to high chiefs and priests.

Exhibit R-3 at P-1.

83. The burial of the piko or umbilical cord on the Mauna is part of the practice of ancestor worship.

Other cultural practices on Maunakea include the deposition of a baby's piko, or umbilical cord. In an account by Puanani Kanaka'ole Kanahale, the symbolism of this practice was described as:

... the part of the child that connected the child back to the past. Connected the child back to the mama. And the mama's piko is connected back to her mama and so on. So its takes it back, not only to the wā kahiko [ancient times], but all the way back to the Kumulipo ... So it's not only the piko, but it is the extension of the whole family that is taken and put up in a particular place, that again connects to the whole family line. And it not only gives mana or life to that piko and that child, but life again to the whole family.

Ibid. at P-2.

84. In the quote found in FoF 83, as is often the case, an expression of the traditional Hawaiian faith is treated as a cultural expression, rather than a spiritual expression.

85. The burial of the piko is a highly important expression of the ancestor worship aspect of the faith, linking the baby to all the past generations, not a cultural practice, like eating musubi.

86. Mauna Kea itself is "known as 'ka piko o ka moku' meaning 'the navel of the island.'" Ibid. at P-1; see also ibid. at S-3 ["Maunakea is understood to be symbolic of the piko (umbilical cord) of the island-child Hawai'i that connects the land to the heavens; Mauna Kea is known as 'ka piko o ka moku' meaning the navel of the island."]

The origins of Maunakea and its central place in Hawaiian genealogy and cultural geography are told in mele (poems, chants) and mo'olelo (stories, traditions). Native Hawaiian traditions state that ancestral akua (gods, goddesses, deities) reside within the mountain summit area. Several natural features in the summit region are named for, or associated with, Hawaiian

akua; these associations indicate **the importance of Maunakea as a sacred landscape. Each part of the mountain contributes to the integrity of the overall cultural, historical, and spiritual setting.**

Ibid. at 3-11 (emphasis added).

87. The CIA gives an overview of Mauna Kea as follows:

Maunakea is a sacred cultural landscape; symbolic of Wākea (the “Sky Father” to all Hawaiians), home of Poli’ahu, the goddess of snow and foe of Pele (the fire goddess), and of many other resident deities and supernatural deities (e.g. Līlinoe, Kūkahau’ula, and Mo’oinanea), and the *piko* (umbilical cord) of the island-child Hawai’i which connects the lands to the heavens (Maly and Maly 2005:v); home of Waiau, the highest permanent lake in the Hawaiian Islands; location of the highest and most extensive basalt quarry in all of Polynesia and perhaps the entire world; and numerous trails, *ahu* (stone markers), *heiau* (temple, place of worship) and cinder cone *pu’u* (hills).

Exhibit R-5, CIA for the TMT Observatory and TMT Mid-Level Facility Project at iii.

88. The Office of Hawaiian Affairs

acknowledges the different perspectives on Maunakea as a spiritual, sacred space, home to “wau akua” (dwelling, place of the gods) and the place where the presence of numerous *ahu* and *iwi kūpuna* provide silent testimony that **generations of Hawaiians have worshipped and buried loved ones at “the highest point possible to rest in peace.”**

Ibid. at x.

89. Interviews in the community confirmed these characterizations of the sacred Mauna.

The results of cultural consultations indicate that there are major concerns (and several ancillary ones) regarding potential adverse impacts on cultural and natural resources and associated beliefs and practices as a result of the proposed development of the Thirty Meter Telescope, construction of the staging area for the TMT Observatory Project and the HELCO electrical transformer needed to supply electrical power to the TMT Observatory Project:

1. **All of the community members interviewed for this study stress that Maunakea is a sacred landscape** and that any future development activities on the mountain proceed with greater awareness of, and the utmost respect for Hawaiian culture, Hawaiians’ spiritual connection to the mountain, and the sanctity of Maunakea.

...

3. Ten of the community members interviewed, and three of the respondents who provided brief commentary, explicitly stated their opposition to the proposed actions on Maunakea which is traditionally, and continues to be, **one of the most sacred locations in all of Polynesia, not to mention Hawai’i.** These participants

voiced sadness, frustration, and negative feelings about the cumulative impacts of past and present developments on Maunakea. In the words of one participant, referring to the telescopes on the summit of Maunakea, “When is enough, enough?”

R-5 at vi-vii (emphasis added).

90. The FEIS and related documents offered in support of the CDUA contain ample proof that the summit of Mauna Kea is a place of worship, satisfying that part of the desecration test found in HRS §711-1107(1)(b).

91. The Applicant’s Imiloa Astronomy Center website acknowledges Mauna Kea as a sacred site:

The original name of Maunakea is *Mauna a Wakea*, or ‘Mountain of Wakea.’ In Hawaiian tradition *Wakea* (sometimes translated in English as ‘Sky Father’) is the progenitor of many of the Hawaiian Islands, and of the Hawaiian people. This mountain is his piko, or the place of connection where earth and sky meet and where the Hawaiian people connect to their origins in the cosmos.

**‘Realm of the gods’**

As a sacred site, many of the physical features and environmental conditions of the mountain are associated with Hawaiian gods and goddesses. *Lilinoe*, *Poliahu*, and *Waiiau* are just a few of the deities associated with this place.

The summit of Maunakea was considered a *wao akua*, or ‘realm of the gods’ and was therefore visited only rarely by humans.”

<http://www.imiloahawaii.org/60/cultural-significance> (emphasis added) cited *inter alia* DOC-264 at 3.

92. Setting aside Mauna Kea as a sacred space for use as determined by Native Hawaiians has a precedent. The Legislature created the Kaho’olawe Island Reserve, which is defined as

**the entire island of Kaho’olawe** and those waters and submerged lands seaward of the shoreline of Kaho’olawe island to a distance of approximately two miles.

HAR § 13-261-3 (emphasis added).

The legislation says that the Reserve is to be used **solely and exclusively** for the preservation and practice of all rights customarily and traditionally exercised **by native Hawaiians** for cultural, **spiritual**, and subsistence purposes.

HAR Rules § 13-261-1 (emphasis added).

93. Considering an entire geographical feature as sacred is not limited to indigenous religions. Mount Sinai, where Moses received the Ten Commandments, is considered a holy mountain by Christians, Jews, and Muslims. Exhibit T-2 at 2.

**d. Mauna Kea is a place of burials.**

94. The FEIS states:

The subject of the presence of burials in the Maunakea summit region is a topic of considerable differences between the scientific, archaeological perspective, on the one hand, and the Native Hawaiian perspective on the other hand.

R-3 at P 3-15.

95. Western scientists grant at least 29 burials or possible burial sites. Ibid. at 3-16.

96. Native Hawaiians, based in part on documentary evidence, believe that there are or were many more sites. Id. See also ibid. at P-2.

97. There is also the concern that if burials have been going on for hundreds of years, there is every likelihood that the bones will have deteriorated and be undetectable.

98. Relying only on identified sites in making the determination of whether Mauna Kea is a burial ground is highly problematic.

99. Intervener Fergstrom filed the Written Direct Testimony of Michael Lee that contained the following:

Our family has clocked into record on August 02, 2016 at SHPD [State Historic Preservation Division] a Burial Registration Form showing the exact location of my 13th great uncles a [Mō'i] of Maui's burial location of his [kā'ai] and **another burial site on the proposed access road to the TMT site.**

I was taught our 'Ohana's Mo'olelo of my Keawe and Piilani bloodlines and how my 13th great uncle was taken to this isolated site and why.

This genealogy and the site location of my family's information is restricted from the public access [pursuant to HRS Chapter 6E-43.5 (e)] confidential only to be seen by SHPD Burial experts and the Hawaii Island Burial Council. Exhibit D-1 at 3 (emphasis added).

100. The FEIS discussion on the subject of burials does not reach any definitive conclusions. Ibid. at P 3-15-16.

101. In the Hawaiian civilization, wisdom resided in the Kupuna (the Elders). If the Kupuna say “Our family is up there,” *id.*, that should settle the matter as to whether there are burials on the site.

102. From the non-Hawaiian perspective, i.e. for those who refuse to take the word of Hawaiian Kupuna regarding the burial ground, there is sufficient evidence to conclude that Mauna Kea has been used as and continues to be a burial ground.

103. Of particular importance is the location of one burial through the testimony of Mr. Michael Lee as being on the access road to the proposed site for the Thirty Meter Telescope. Exhibit D-1 at 3. That close proximity raises the broader issue that there are no metes and bounds defining a “cemetery” on Mauna Kea that would allow a determination of which areas are part of the burial grounds and which are not. With at least one burial in close proximity to the site for the Thirty Meter Telescope, a reasonable assumption is that the site is within a burial ground.

104. Even if no burials had been identified in Area E, that did not mean Area E would not be used at some future time for burials.

105. Certainly the Applicant is not qualified to make that determination.

106. On the record, there is at least one burial identified on the access road to the Thirty Meter Telescope proposed site. The fact that others have not been detected does not mean that they are not present. Given the proximity of an identified burial to the proposed Thirty Meter Telescope site, the potential expansion of burials into the area of or within the site is a reasonable expectation, absent the construction of the telescope.

107. The evidence in the record is that Mauna Kea has been and continues to be a burial ground. That designation satisfies Section (1)(b) (place of burials) of the desecration statute.

**e. Mauna Kea is an object of veneration.**

108. The desecration statute also refers to “[i]n a public place, any other **object of veneration** by a substantial segment of the public.” HRS § 711-1107(1)(c) (emphasis added).<sup>7</sup>

109. The FEIS, Volume 1 states:

Some Native Hawaiian spiritual practitioners continue to view Maunakea as the first-born of the Wākea and Papa union and, thus, revered as a connection to all Native Hawaiian people and gods.

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<sup>7</sup> To venerate is to adore, deify, glorify, revere, reverence, or worship.

<https://www.merriam-webster.com/dictionary/>

Exhibit R-3 at 3-13.

110. The FEIS, Volume 3 states:

Numerous comments were received regarding cultural resources, and while the comments expressed a wide range of sentiments, **all** made it clear that Maunakea is **a sacred place revered by many**.

Exhibit R-5 at B-01 (emphasis added).

111. The extensive expressions of strong opposition to the Thirty Meter Telescope provide further support for a finding that Mauna Kea is an object of veneration. See {FoF #s}

**f. The construction of the Thirty Meter Telescope will damage the sacred site.**

112. The construction of the Thirty Meter Telescope will involve short-term adverse construction impacts on Mauna Kea.

Project construction will require the excavation of rock from the TMT Observatory site and along the Access Way.

DOC-R-1, Appendix B at Page B-3.

113. The construction impacts will include the following:

Construction Noise. Construction of the proposed facilities, particularly Observatory site and Access Way grading, will involve the use of heavy construction equipment, including that needed for excavation of relatively dense rock. It will also entail periodic operation of construction equipment on the concrete Batch Plant Staging Area site.

DOC-R-1 at Page 2-31.

The foundation will extend below grade and will require considerable excavation to remove and significant material to backfill the voids.

DOC-R-1 at Page 4-43

Preliminary engineering plans indicate that the total volume of excavated material ("cut" material) will be 64,000 cubic yards.

DOC-R-1, Appendix B at Page B-3.

114. The long-term impacts will include the following:

The total dome height will be 184 feet above the finished grade, with an exterior radius of 108 feet.

DOC-R-1 at Page 3-3.

115. In sum, the Thirty Meter Telescope will excavate a vast amount of material in order to prepare a foundation and then build an eighteen story building on that foundation.



116. There is no question that this huge construction project will damage the pristine site where construction is proposed, satisfying that element of the desecration test. HRS § 711-1107(2).

**g. The proponents of the telescope knew that  
the selection of Mauna Kea as the site for the TMT  
would likely produce outrage among those who revere the site.**

117. Before the TMT Corporation selected Mauna a Wākea as the site for the Thirty Meter Telescope, a telescope funder commissioned an independent risk assessment from the Keystone Center. Exhibit L23 (“Assessment of the Risks for Siting the Thirty Meter Telescope on Mauna Kea”).

118. The Keystone Center report predicted strong adverse community reactions to the selection of Mauna Kea as the site for the telescope.

**A Sour History and Heavy Baggage.** Unfailingly, almost every interviewee we spoke with, even those who are great proponents of placing observatories on Mauna Kea, acknowledge a complex and, for many, **a bad history on the mountain.** Hawaiians, both Native and non-Native, speak of **poor planning, bureaucratic bumbling, broken promises, technocratic arrogance, and a persistent failure to engage the Native Hawaiian community in meaningful and appropriate ways.** Some of this has been reported in two legislative audits. While there are many fine individual efforts underway to rectify long-running problems, the situation remains **contentious** and confusing. **Should TMT decide to pursue a Mauna Kea site, it will inherit the anger, fear, and great mistrust through previous telescope planning and siting failures and an accumulated disbelief that any additional projects, especially a physically imposing one like the TMT, can be done properly.**

Ibid. at 3-4.

119. The report is filled with the many challenges to be expected from the community, such as the following:

a. There is **a long litany of perceived problems** that includes **poor master and management planning, placing telescopes on inappropriate sites, poor disposal of rubbish and waste, the failure to consult Native Hawaiians in management decisions, and inadequate access for cultural and spiritual practices.**

Ibid. at 4 (emphasis added).

b. As well-intentioned as they are, we were told by many individuals that the [Institute for Astronomy] has **failed in its interactions with non-university communities of interest.**

Id. (emphasis added)

c. **Sentiments against further telescope development are strong.**

Ibid. at 5. (emphasis added)

d. To succeed at a Mauna Kea site, TMT must **run a gauntlet** that entails a number of potential challenges, not all of which are of TMT's making and some of which could be potential showstoppers if TMT's schedule and timing do not have great flexibility.

Id. (emphasis added)

e. The Science Reserve sits on ceded lands, another long-standing and highly **contentious** issue.

Ibid. at 6. (emphasis added)

f. [The Thirty Meter Telescope] will be **physically imposing and visible from Waimea** on the north side of the island if it is sited at or around test site 13 North.

Ibid. at 7. (emphasis added)

g. Traditionally, EIS documents are a **battleground** for development projects and it would seem likely that TMT will be a **magnet for litigation**, especially if prior issues (CMP, lease, ceded land payments, visual issues) have not been meaningfully addressed and resolved.

Id. (emphasis added)

h. **The PanSTARRS EIS, telescope issues on Haleakala, unsettled clean-up issues on Kaho'olawe, EIS concerns for the Superferry on Kauai and Maui, disputes over depleted uranium shells, and the realignment of Saddle Road on Hawaii Island** may fuel environmental issues related to TMT.

Id. (emphasis added)

i. The **history of poor or no consultations with Hawaiians**, both Native and non-Native, was chronicled repeatedly in our conversations as a **serious problem**. None of this is TMT's fault, but **all of it will be inherited**.

Id. (emphasis added)

j. The long-running history of disputes on Mauna Kea has been disappointing for many who are deeply supportive of both Native Hawaiian culture and a solid Hawaii Island science industry. Moreover, **possibilities for a successful reconciliation of the two are, for many, diminishing**. "It is the **wrong mountain at the wrong time by the wrong people**," one interviewee told us. "It might have been alright 20 years ago, but not today. **They've broken our hearts.**"

Id. (emphasis added)

k. "Letting the scientists lead has created a **cultural disconnect of epic proportions.**"

Ibid. at 8. (emphasis added)

120. The Keystone Report did propose "Options for Consideration." Ibid at 9-13.

121. History has demonstrated that either the options proposed were not adopted or, if they were adopted, had little effect on public opposition.

122. The outpouring of public opposition took many forms, including:

- a. disruption of the ground-breaking ceremony, Exhibit T-2 at 4;
- b. multiple confrontations between law enforcement and people objecting to the telescope to protect the Mauna, id.; DOC-135 (Declaration of Counsel at ¶3 and Exhibit 1 at 3 and Declaration of Lanny Alan Sinkin at 1-2;
- c. hundreds of people blocking access to the construction site by the construction company to protect the Mauna, id.;
- d. people subjecting themselves to being arrested, see T-2 at 4; and
- e. a petition opposing the project signed by 66,554 people.  
<https://www.change.org/p/governor-david-y-ige-stop-tmt-construction-and-arrests-of-mauna-kea-protectors>

123. The public gatherings in opposition had a spiritual quality, with those participating calling themselves Protectors of the Mountain, not protestors. Exhibit T-2 at 4.

#### **IV. CONDUCT OF THE CONTESTED CASE HEARING**

##### **A. The Hearing Officer denied the Temple’s right to be meaningfully heard on the issue of the Applicant’s disqualifying character.**

124. Temple of Lono (“Temple”) is an intervener in this proceeding. DOC-115 (Minute Order No. 13: Order on the hearing on admission or intervention as a party; second prehearing conference) at 6.

125. The Temple sought intervener status on the following bases:
- (1) Tahuna Frank Kamehameha Tamealoha Anuumealani Nobriga is the Tahuna of the Temple of Lono. As such he has a unique understanding of the traditional Hawaiian faith and the application of that faith to the spiritual issues that are likely to be raised in this case.
  - (2) Based on his unique, comprehensive, and relevant knowledge concerning the traditional faith of the Hawaiian Civilization, the Tahuna is entitled to mandatory intervention under HAR § 13-1-31(b)(2) because desecration of Mauna a Wākea will directly affect the Temple of Lono, both as a violation of a sacred space and as an act in furtherance of a long-pursued campaign to suppress the traditional faith of the Hawaiian people.
  - (3) Alternatively, the BLNR should grant discretionary intervention pursuant to HAR § 13-1-31(c) because the Temple has a substantial interest in this case and the Tahuna is the only person qualified to represent that interest.

DOC-50 [Request of Temple of Lono to intervene (Motion) at 2].

126. The Temple offered arguments and evidence in support of its motion to intervene. Ibid. (Memorandum and Exhibits thereto).

127. The Hearing Officer admitted the Temple as an intervenor. DOC-115 (Minute Order No. 13: Order on the hearing on admission or intervention as a party; second prehearing conference) at 4. See also DOC-074 (Statement of Representation)]; DOC-076 (Declaration of Frank Tamehameha Kamehaloha Anuumealani Nobriga re: Appointment of Lanny Alan Sinkin as an officer of the Temple of Lono).

128. On June 21, 2016, the Temple filed its Motion for Partial Summary Judgment. DOC-78 (Temple of Lono motion for partial summary judgment). The motion sought partial summary judgment on two factual issues: (1) the summit of Mauna Kea is held sacred by the traditional Hawaiian faith and (2) the traditional Hawaiian faith is still practiced. Id.

129. On August 1, 2016, the University of Hawai'i at Hilo (UHH), applicant for the conservation district use permit at issue in the proceeding below, ("Applicant") filed its opposition to the Temple's motion. DOC-135 [(The University of Hawaii at Hilo's opposition to Temple of Lono's motion for partial summary judgment (DOC-78)].

130. In this pleading, the University included a libelous and bigoted attack on the Temple of Lono. Ibid. at 14-15.

131. On August 3, 2016, the Temple filed a reply bringing the matter of the attack to the attention of the Hearing Officer and challenging the attack as an *ad hominem* attack with no factual basis. DOC-176 (Temple of Lono reply to the University of Hawaii at Hilo's opposition to Temple of Lono motion for partial summary judgment).

132. On August 5, at a pre-hearing conference, the Hearing Officer provided an opportunity for oral argument on the Temple's motion for partial summary judgment. Tr. 8/5/16 at 26:21 – 23.

133. The Temple brought up the issue of the attack. Ibid. at 27:25 – 29:20.

134. The Applicant objected to the Temple's motion on procedural grounds and offered no response to the Temple's challenge to the attack. Ibid. at 29:23 – 30-2.

135. The Hearing Officer orally denied the motion for partial summary judgment without mentioning the attack. Ibid. at 45:20 – 23.

136. Pursuant to a schedule set by the Hearing Officer, the time for pre-hearing motions expired on August 1. DOC-115 at 6.

137. The Applicant filed its attack on August 1. DOC-135.

138. On August 8, 2016, the Temple filed its Motion to File Motion out of Time. DOC-179 (Temple of Lono motion to file motion out of time).
139. The Temple sought permission of the Hearing Officer to file a motion out of time seeking to dismiss the application on the grounds that the attack demonstrated that the Applicant has a disqualifying animus towards the traditional Hawaiian faith. DOC-179, Exhibit 2 (Memorandum at 2-4, 9-10).
140. The Temple argued that the animus was disqualifying because the Applicant would be constitutionally required to protect that faith, should the permit application be granted. Id.
141. Intervener Sleightholm filed a joinder to the Temple's motion. DOC-193 (Leina'ala Sleightholm joinder to Temple of Lono motion to file motion out of time).
142. Intervener Sleightholm also filed a memorandum in support of the Temple's motion. DOC-235 (J. Leina'ala Sleightholm's Memorandum in Support of Temple of Lono Motion to File Motion Out of Time).
143. Intervener Kila filed a memorandum in support of the Temple's motion. DOC-221 (Glen Kila memorandum in support of Temple of Lono motion to file motion out of time).
144. The Applicant opposed the Temple's motion solely on timeliness grounds. DOC-194 (The University of Hawaii at Hilo Opposition to Temple of Lono's motion to file out of time).
145. The only other opposition was also solely on timeliness grounds. DOC-183 (TMT International Observatory LLC's objections to ... (2) Temple of Lono motion to file out of time ....).
146. On August 29, 2016, the Temple's motion to file motion out of time came before the Hearing Officer. Tr. 8/29/16 19:10 – 24:25.
147. In the hearing, the Applicant did not offer any defense of or explanation for the attack. Ibid. at 25:2 – 27:19.
148. After hearing argument, the Hearing Officer orally denied the motion to file a motion out of time without mentioning the attack. Ibid. at 28:9 – 12.
149. On September 17, 2016, the Temple also filed its Motion to Recuse Hearing Officer. DOC-262 (Temple of Lono motion to recuse Hearing Officer).
150. The Hearing Office did not rule on the Motion to Recuse Hearing Officer until May 2, 2017. DOC-595 (Minute Order No. 46; related to Temple of Lono motion to recuse Hearing Officer). See also DOC-610 (Temple of Lono motion for reconsideration of Minute Order No. 46).

151. The basis for recusal was primarily the refusal of the Hearing Officer to permit the Temple to even file a motion challenging the Applicant's attack as disqualifying. Id.

152. On September 17, 2016, the Temple filed its Motion for Summary Judgment (Disqualification) arguing that the Applicant's attack was an undisputed fact that disqualified the Applicant from receiving the permit. DOC-263 [Temple of Lono motion for summary judgment (disqualification)].

153. The Hearing Officer did not rule on the Motion for Summary Judgment (Disqualification) until May 4, 2017. DOC-609 [Minute Order No. 47; related to Temple of Lono Motion for Summary Judgment (Disqualification) (DOC-263)]; see also DOC-619 (Temple of Lono motion for reconsideration of Minute Order No. 47.)

154. On September 17, 2016, the Temple also filed its proposed issues for the Hearing. DOC-265 (Temple of Lono proposed issues).

155. The issues proposed by the Temple included a category titled "Character" and in that category included the following: "Has the Applicant demonstrated a hostility toward the Traditional Hawaiian Faith that disqualifies the Applicant from receiving the permit requested?" DOC-265, Exhibit "A" at 1.

156. On September 23, 2016, the Hearing Officer issued an order setting the issues for the hearing. DOC-281 (Minute Order 19: Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues)]. That order excluded the character disqualification issue the Temple sought to litigate. Id. passim.

157. On September 26, 2016, the Temple filed its Motion for Reasoned Explanations and Extension of Time. DOC-286 (Temple of Lono motion for reasoned explanations and extension of time). That motion sought explanations for the Hearing Officer's exclusion of many issues identified by the Temple as relevant and material to this case, including the character disqualification issue. Id.

158. On October 3, 2016, the Temple again raised the issue of an absence of reasoned explanations for not including Temple identified issues, which was precluding the filing of motions for reconsideration. Tr. 10/3/16 39:4 – 20.

159. The absence of such explanations denied the Temple the opportunity to file motions for reconsideration regarding the excluded issues, including the character issue.

160. The Hearing Officer never took up the motion for reasoned explanations.

161. On October 6, 2016, the Temple filed its Motion to Schedule Pending Motions. DOC-324 (Temple of Lono motion to schedule pending motions). This motion

sought to have thirteen pending pre-hearing matters, raised by the Temple and not taken up by the Hearing Officer, scheduled for resolution, including two motions to recuse the Hearing Officer; two motions for summary judgment that would be dispositive of the entire case, if successful; and the motion mentioned above seeking reasoned explanations for excluding issues, including the character issue. *Id.*

162. The Hearing Officer never took up the Temple's motion to schedule pending motions.

163. On October 5, pursuant to an order from the Hearing Officer, the Applicant filed a proposed order denying the Temple's motion to file a motion out of time. DOC-318 [University of Hawaii at Hilo proposed Minute Order No. \_\_\_ denying Temple of Lono motion to dismiss out of time (Doc. 179)].

164. On October 7, 2016, the Temple filed its response to the Applicant's proposed order. DOC-336 [Temple of Lono response to University of Hawai'i at Hilo (proposed) Minute Order No. \_\_\_ denying Temple of Lono motion to dismiss out of time (Doc-179)].

165. On October 11, 2016, the Hearing Officer issued a written Order denying the Temple's motion to file motion out of time. DOC-356 [Minute Order No. 33, Order denying Temple of Lono's motion to dismiss out of time (Doc. 179)]. The only basis for the denial was that the Temple had not provided good cause for allowing a motion to be filed out of time. *Id.*

166. The Hearing Officer did not identify any cause that she did consider or otherwise explain the ruling on the absence of good cause. *Id. passim.*

167. The ruling made no mention of the Applicant's attack filed in response to the Temple's motion for partial summary judgment. *Id. passim.*

168. On October 14, 2016, the Temple filed its Temple of Lono; Unresolved Matters identifying 13 pre-hearing matters on which the Hearing Officer had yet to take action on the eve of the Contested Case Hearing beginning, including the Motion for Summary Judgment (Disqualification) and the motion to recuse. DOC-371 (Temple of Lono: Unresolved matters).

169. On {date} at a pre-hearing conference, the Temple representative brought the unresolved matters to the attention of the Hearing Officer again. Tr. Vol. \*, P. \*, L.\*.

170. The Hearing Officer offered no response as to when, if ever, those items would be addressed. Tr. Vol. \*, P. \*, L.\*.

171. The Contested Case Hearing began without the Hearing Officer taking up the Temple's unresolved matters.

172. On October 28, 2016, the Board of Land and Natural Resources issued Minute Order No. 39 (Order Denying Renewed Motion to Disqualify Hearing Officer). DOC-406.

173. As reflected in Minute Order No. 39:

2. Temple of Lono (“Lono”) filed a Substantive Joinder and Supplement to Petitioners Mauna Kea Anaina Hou et al.’s Renewed Motion to Disqualify Hearing Officer on October 10, 2016. DOC. 343. Lono also filed a Second Supplement and a Third Supplement, both on October 11, 2016. Docs. 360, 361.

DOC-406 at 1; see also DOC-343 (Temple of Lono substantive joinder and supplement to petitioners Mauna Kea Anaina Hou, et al.'s renewed motion to disqualify hearing officer); DOC-360 (Temple of Lono second supplement to petitioners Mauna Kea Anaina Hou et al.'s renewed motion to disqualify Hearing Officer); DOC-361 (Temple of Lono third supplement to petitioners Mauna Kea Anaina et al.'s renewed motion to disqualify Hearing Officer).

174. In Minute Order No. 39, the Board attempted to characterize DOC-262 – the Temple’s motion to recuse the Hearing Officer – as a decided matter being given reconsideration. In fact, no decision had ever been made on that motion.

175. The treatment of DOC-242 as already decided comes on page 4 of the Minute Order:

Lono argues that the Hearing Officer violated its right to due process when she denied its request to file a late motion [DOCs. 179, 356], when she set the issues in the contested case hearing that it did not agree with [DOC. 281], and because she did not recuse herself from these proceedings upon Lono's request [DOC. 262].

DOC-406 at 4-5 (emphasis added).

176. The first two items in that paragraph refer to actual rulings. The Temple did not, however, object to the Hearing Officer “when she set the issues in the contested case hearing that it did not agree with.” The Temple sought a reasoned explanation for why the Hearing Officer excluded some issues, DOC-286, so that the Temple could exercise its due process right to seek reconsideration of issues it wished to have included that were excluded. HAR §13-1-39.

177. The third item listed in the Minute Order does not refer to an actual ruling, i.e. the Hearing Officer had not ruled by that time on the Temple’s motion requesting that she recuse herself. DOC-262.

178. Seven and a half months after the filing of the motion to recuse, the Hearing Officer issued a ruling denying the motion. Minute Order 46: Order related to



Temple of Lono motion to recuse Hearing Officer (Doc. Nos. 262, 434, 436, 536, 544). DOC-595.

179. The Temple moved to reconsider the decision on the motion to recuse. DOC-610 (Temple of Lono motion to reconsider Minute Order No. 46).

180. In its motion to reconsider, the Temple argued as follows:

The Hearing Officer cannot possibly be objective about a motion to recuse filed last September. Since the filing of that motion, there has been an extensive proceeding, including 44 days of hearings. For the Hearing Officer to now rule that she should have disqualified herself more than seven months ago would irrevocably taint the proceeding since that time and be a basis for vacating this proceeding.

The denial of the Temple's motion was pre-ordained when the Hearing Officer chose to wait more than seven months before ruling while the proceeding continued.

Ibid. at 3.

181. As noted above, the Temple participated directly in the litigation leading up to the issuance of Minute Order No. 39 by filing a joinder and three supplements. DOCs-343, 360, and 361.

182. On November 4, 2016, the Temple filed its Motion to Vacate Minute Order No. 39 or, Alternatively, to Partially Reconsider Minute Order No. 39. DOC-409 (Temple of Lono motion to vacate Minute Order No. 39 or, alternatively to partially reconsider Minute Order No. 39). That motion contains a direct challenge to the veracity of the Minute Order's treatment of DOC-262. DOC-409, Exhibit "AA" at 10-11.

183. The Board never ruled on the Temple's motion to vacate Minute Order No. 39.

184. On January 8, 2016, the Temple filed a request for a witness subpoena to require President David Lassner of the University of Hawai'i System to appear. DOC-438.

185. The Temple requested a subpoena for President Lassner to determine the basis for the University's attack on the Temple in DOC-135 and the University's response to the characterizations of the Temple found in DOC-135. DOC-438 at 5. ("The subpoena of President Lassner requested by the Temple will finally provide an opportunity for the Temple to hear from the Applicant on the bases for the attack and any response by the President of the University or any other University official once placed on notice of the attack.")

186. The Hearing Officer orally denied the Temple's request for the subpoena. Tr. Vol. \*, P. \*, L.\*.

187. The Hearing Officer found the evidence that the Temple sought to produce through the witness was not relevant or material to the proceeding. Tr. Vol. \*, P. \*, L.\*.

188. The Hearing Officer directed the University to draft an order denying the subpoena. Tr. Vol. \*, P. \*, L.\*.

189. The University did draft an order. DOC-457.

190. The Hearing Officer never issued a final order, which precluded the Temple filing a motion for reconsideration.

191. The Hearing Officer ruled that motions for reconsideration were only appropriate once a written order was issued, not in response to an oral ruling. See DOC-211 (Temple of Lono withdrawal of motion for reconsideration [Doc-178] without prejudice). In the absence of a written order, no motion for reconsideration could be filed. See also Tr 8/5/16 128:17 – 129:2; 8/12/16 63:8 – 12; 64:7 - 17; 65 1 - 23; 67:21 – 68:3; 81:15 – 20; 8/29/16 9:24 – 10:12

192. The failure of the Hearing Officer to file a final order denied the Temple an opportunity to file a motion for reconsideration of the ruling on the subpoena request. HAR §13-1-39.

**B. There were numerous other violations  
of the Temple's due process rights.**

**1. The Hearing Officer repeatedly failed to take up motions filed by the  
Temple or to make timely rulings.**

193. The Hearing Officer refused to take up numerous motions and related filings by the Temple or addressed them so long after they were filed that an objective consideration of the merits was impossible.

194. Those pleadings included:

a. DOC-324 (Temple of Lono motion to schedule pending motions), filed October 6, 2016. This motion identified four separate motions not taken up by the Hearing Officer at the time the Temple filed the motion to schedule: DOC-262 (Motion to Recuse Hearing Officer; DOC-263 [Motion for Summary Judgment (Disqualification)]; DOC-264 [Motion for Summary Judgment (Desecration)] and DOC-286 (Motion for Reasoned Explanations and Extension of Time). The Hearing Officer never took up this motion.

b. DOC-262: Motion to Recuse Hearing Officer,<sup>8</sup> filed September 17, 2016.

(1). On May 2, 2017, the Hearing Officer filed Minute Order No. 46 (Related to Temple of Lono Motion to Recuse Hearing Officer (Doc. Nos. 262, 434, 436, 536, 544). DOC-595.

(2) On May 4, 2017, the Temple filed a motion to reconsider Minute Order 46. DOC-610.

(3) The Temple response argued that the Hearing Officer could not possibly be objective in ruling on this motion because to grant the motion would be to rule that the Hearing Officer should have recused herself more than seven months before, so the hearings held were essentially a waste of time. *Ibid.* at 2-3.

(4) The Hearing Officer, therefore, had no choice other than to deny the motion.

(5) The failure to rule in a timely manner denied the Temple an opportunity to be heard at a meaningful time and in a meaningful manner.

c. DOC-263: Motion for Summary Judgment (Disqualification), filed September 17, 2016.

(1) On May 4, 2017, the Hearing Officer filed Minute Order No. 47 (Related to Temple of Lono Motion for Summary Judgment (Disqualification) (Doc. 263)). DOC-609

(2) On May 5, 2017, the Temple filed a motion to reconsider Minute Order 47. DOC-619 (Temple of Lono motion to reconsider Minute Order No. 47).

(3) The Temple response argued that the Hearing Officer could not possibly be objective in ruling on this motion because to grant the motion would be to rule that the Hearing Officer should have recused herself more than seven months before, so the hearings held were essentially a waste of time. *Ibid.* at 2.

(4) The Hearing Officer, therefore, had no choice other than to deny the motion.

(5) The failure to rule in a timely manner denied the Temple an opportunity to be heard at a meaningful time and in a meaningful manner.

d. DOC-264: Motion for Summary Judgment (Desecration), filed September 17, 2016.

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<sup>8</sup> There was considerable confusion in the proceeding about which motions regarding the Hearing Officer continuing to preside went to the Hearing Officer and which went to the Board.

The third motion to remove me, the Attorney General, ... I don't make the decision on the petition itself, somebody else has got to look at that.

So I have to refer the matter to the BLNR. As I indicated, all challenges to my sitting as Hearing Officer have been decided by them."

Tr 8/5/16 103:20 – 104:20.

The issues related to challenges to my qualifications are being decide [sic] by the Board, but everything else is coming to me through this process.

Tr 8/29/16 15:7 – 17.

In this instance, the Hearing Officer ruled on a motion seeking to recuse her.

(1) While filing a late ruling on two of the four motions identified in the Temple's motion to schedule pending motions, DOC-324, the Hearing Officer never ruled on this third motion.

e. DOC-286: Motion for Reasoned Explanations and Extension of Time, filed September 17, 2016.

(1) The Hearing Officer never ruled on this fourth motion identified in the Temple's motion to schedule pending motions. DOC-324.

195. These motions are substantive.

196. In the case of DOCs-263 and 264, the motions were potentially dispositive of this case.

f. October 14, 2016 – DOC-371 (Temple of Lono: Unresolved matters) Just prior to the first hearing, the Temple brought unresolved pre-hearing matters to the attention of the Hearing Officer. In addition to the four motions identified in DOC-324 and DOC-324 itself, DOC-371 identified eight additional motions not yet ruled upon:

(1) DOC-329: Temple of Lono Motion for Extension of Time for Filing of Final Witness List and Pre-filed Testimony, Exhibit List and Exhibits, Prehearing Statements, and Motions

Filed: October 7, 2016

Status: Never scheduled for briefing; mooted by inaction

(2) DOC-337: Temple of Lono Supplement to Motion for Extension of Time

Filed: October 7, 2016

Status: Never scheduled for briefing; mooted by inaction

(3) DOC-343: Temple of Lono substantive joinder and supplement to petitioners Mauna Kea Anaina Hou, et al.'s renewed motion to disqualify hearing officer

Filed: October 10, 2016

Status: Later ruled upon; see Minute Order 39 (Order Denying Renewed Motions to Disqualify Hearing Officer (DOC-340)) filed October 28 (one week after the close of the pre-hearing phase and the beginning of the hearing phase See Tr Vol. 1.

(4) DOC-360: Temple of Lono second supplement to petitioners Mauna Kea Anaina Hou et al.'s renewed motion to disqualify Hearing Officer

Filed: October 11, 2016

Status: Ruled upon after hearings began. See Minute Order 39, supra

(5) DOC-361: Temple of Lono third supplement to petitioners Mauna Kea Anaina Hou et al.'s renewed motion to disqualify Hearing Officer

Filed: October 11, 2016

Status: Ruled upon after hearings began. See Minute Order 39, supra

- (6) DOC-364: Temple of Lono motion to strike for failure to serve or extension of time and rescheduling of hearing  
Filed: October 12, 2016  
Status: Never ruled upon
- (7) DOC-367: Temple of Lono Supplement to motion to strike [DOC-364]  
Filed: October 13, 2016  
Status: Never ruled upon
- (8) DOC-368: Temple of Lono Second Supplement to motion to strike [DOC-364]  
Filed: October 13, 2016  
Status: Never ruled upon
- g. DOC-474 (Temple of Lono motion to strike UHH opposition)  
Filed: February 22, 2017  
Status: Never ruled upon
- d. DOC-490 (Temple of Lono motion to strike TIO opposition)  
Filed: March 3, 2017  
Status: Never ruled upon

197. In addition to the pleadings identified in FoFs {\*, \*, ...}, the Hearing Officer never took up that following Temple pleadings or ruled upon them in an untimely fashion:

- a. DOC-293 (Motion for reconsideration)  
Filed: September 29, 2016  
Status: Never ruled upon
- b. DOC-329 (Motion for extension of time)  
Filed: October 7, 2016  
Status: Never ruled upon
- c. DOC 337 (Supplement to motion for extension of time)  
Filed: October 7, 2016  
Status: Never ruled upon
- d. DOC-410 (Motion to restore full cross-examination rights)  
Filed: November 7, 2016  
Status: Never ruled upon
- e. DOC-427 (Motion to dismiss TIO as intervener)  
Filed: December 15, 2016  
Status: Never ruled upon
- f. DOC-435 (Temple of Lono motion to strike University of Hawai'i at Hilo's opposition to Temple of Lono motion for summary judgment, filed September 17, 2016 (Disqualification) [DOC-263])  
Filed: December 31, 2016  
Status: Ruled upon in Minute Order 47, DOC-609 filed May 4, 2017.  
Reconsideration still pending as of May 21, 2017.

- g. DOC-436 (Temple of Lono motion to strike University of Hawai'i at Hilo's opposition to Temple of Lono motion to recuse Hearing Officer, filed September 17, 2016 [DOC-262])  
Filed: December 31, 2016  
Status: Ruled upon in Minute Order 46, DOC-595 filed May 2, 2017.  
Reconsideration still pending as of May 21, 2017.

198. There were two Temple motions that the Board did not take up:
- a. November 6, 2016 – DOC-409 (Temple of Lono motion to vacate Minute Order No. 39).
  - b. March 19, 2017 – DOC-516 (Temple of Lono motion to Board of Land and Natural Resources to dismiss HA-3568)

## **2. The Hearing Officer repeatedly failed to issue minute orders.**

199. In addition to failing to rule or making untimely rulings, the Hearing Officer made oral rulings that were never followed up by a minute order. Such orders included:

- a. January 8, 2017 – DOC-438 – Temple of Lono request for a witness subpoena for President David Lassner
- b. February 1, 2017 – DOC 457 {[Proposed] Minute Order No. \_\_ Denying Temple of Lono Requesting for Witness Subpoena for David Lassner, President of the University of Hawai'i System [Doc. 438] and Granting the University of Hawai'i at Hilo's Motion to Quash Temple of Lono Request for Witness Subpoena for David Lassner, President of the University of Hawai'i System, Filed January 8, 2017 [Doc. 445]} – Draft Order submitted to Hearing Officer and never filed, thereby denying Temple an opportunity to seek reconsideration.

## **3. The Hearing Officer adopted procedures that prejudiced the Temple and other parties.**

200. The Hearing Officer ruled that there would be no discovery. Tr. V.\*, P.\*, L.\*

201. The Hearing Officer ordered all parties to present their cases at the same time, rather than the Applicant with the burden of proof being required to put on its case first. Tr 10/3/17 41:13-24; 78:19-21;

202. The Temple repeatedly brought the issue of procedural matters violating due process rights to the attention of the Hearing Officer. See e.g. DOC-296, DOC-329, DOC-337, DOC-343, DOC-360 at 4-5.

203. The Hearing Officer denied the Temple's motion to file motion out of time, which would have allowed the Temple to file a motion to dismiss the application based on the Applicant's unwarranted and bigoted attack on the Temple. DOC-179; Tr. 8/29/16 19:10 – 28:2; ibid. 28:9 – 12; DOC 356.

204. The Hearing Officer rejected almost all of the issues identified by the Temple as relevant to the Temple's case. *Compare* DOC-265 (Temple of Lono proposed issues) and DOC-281 (Minute Order 19: Order granting Peperuating Unique Educational Opportunities, Inc.'s motion to set issues).

205. The Hearing Officer's repeated failures to issue orders led one party to propose that the prevailing party assume responsibility for writing orders for the Hearing Officer to sign, which would, in turn, presumably provide a reasoned explanation that the non-prevailing party could use to prepare a motion for reconsideration. Tr. 10/3/16 47:4 – 48:7.

206. The Hearing Officer began the hearing process prior to taking up and resolving any of the motions or matters identified above as unscheduled, unheard, or otherwise not dealt with completely.

207. The Hearing Officer set a deadline for the filing of findings of fact and conclusions of law prior to the record being complete. *See* Minute Order 43 (Order setting post-hearing deadlines) filed on April 18, 2017 *citing* HAR §13-1-38. DOCs-552 through 642.

208. Numerous parties requested the Hearing Officer reconsider that scheduling because the cited rule said that the preparation of findings of fact should begin when the record is complete and the record was not complete. *See e.g.* DOC-559 (Temple of Lono motion for reconsideration of Minute Order 43) filed April 18, 2017.

209. Parties were also required to prepare the findings and conclusions while litigating unfinished matters. As the record reflects, after the filing of Minute Order 43, parties filed almost 80 pleadings litigating issues potentially affecting the record. DOCs-552 through 631.

210. This continuing litigation included determining which exhibits would be admitted into evidence. *See* Minute Order 44 (Order regarding documentary evidence).

211. The Hearing Officer continued to issue rulings on matters not previously resolved. *See e.g.* Minute Order 44 (Order regarding documentary evidence) filed on April 20, 2017, DOC-553; Minute Order 46 (Order related to Temple of Lono motion to recuse Hearing Officer (Doc. Nos. 262, 434, 436, 536, 544)) filed May 2, 2017; Minute Order 47 (Order related to Temple of Lono motion for summary judgment (disqualification)) filed May 4, 2017, DOC-595.

212. All such orders were subject to motions for reconsideration, which prolonged the completion of the record still further. *See e.g.* DOCs-569 (Temple of Lono Motion for Reconsideration of Minute Order 44), 610 (Temple of Lono Motion for Reconsideration of Minute Order 46), 619 (Temple of Lono Motion for Reconsideration of Minute Order 47).

213. As of May 21, 2017, with one week left to prepare findings of fact, the Hearing Officer had still not filed orders resolving the challenges to hundreds of exhibits whose exclusion led to motions for reconsideration. See DOCs-575, 576, 577, 579, 580, 581, 586, 587, 592, 603, 610, 611, 613, 614, 615, 616, 617, 620, 621, 625, 628, 634, 640.

214. When the Hearing Officer set the deadline for the filing of decisions and orders, including findings of fact and conclusions of law, Minute Order 43 also included the following:

**FILING/SUBMISSION PROCEDURE.** An original of the filing/submission **must be received** by the DLNR Office of Conservation and Coastal Lands, 1151 Punchbowl Street, Room 131, Honolulu, Hawai'i 96813: **no later than 4:00 p.m. on the deadline set forth.** (emphasis added). A digital copy in pdf form should be sent to [dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov), or delivered to the above office on the same deadline.

MO 43 at 3. (emphasis in original).

215. Throughout this proceeding, the filing of an electronic copy within the deadline satisfied the deadline. See DOC-629 [Protector / parties' petition to Board for declaratory judgment and motion to vacate Minute Order 43; Exhibit 1 (Declaration of Kealoha Pisciotta) at ¶¶ 4-8.]

216. This sudden change in the procedure took place with no notice and no consultation. Cf. HRS § 91-9(d) (“Any procedure in a contested case may be modified or waived by stipulation of the parties ....”).

217. Under this new rule, those parties who are not represented by lawyers on Oahu or do not reside on Oahu, are required to complete their documents and put them in the hands of a delivery service in time to have the original delivered to Oahu by the deadline.

218. Essentially, the new filing rule reduces the time available to parties not on Oahu for preparing a pleading by at least a day and a half.

219. The findings and conclusions are due in Oahu on May 30, 2017. DOC-552 (Minute Order 43).

220. Monday, May 29 is a holiday. That means that pleadings from outer islands must be given to the delivery service two or three before the deadline.

221. This new procedure gives the lawyers for the Applicant on Oahu four more days that the parties on other islands in which to complete their filings.



222. The Hearing Officer repeatedly expressed her “inclination” to take in all the proffered exhibits with very few exceptions.

223. The Protector Interveners believed that would be the process, much to their detriment.

224. The process for admission of exhibits set forth by the Hearing Officer called for the parties to submit motions seeking such admission.

225. The parties did file such motions. DOCs 480, 481, 482, 483, 485, 486, 487, 488, 489, 491, 492, 493, 494, 495, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 517, 519. The Temple filed one such motion. DOC-491.

226. The Hearing Officer enunciated many times that she expected few objections because she intended to simply grant all such motions and then decide what weight to give to the exhibits admitted into evidence. V27 252:9 – 253.3.

227. The process as defined by the Hearing Officer meant that parties did not spend time establishing the admissibility of an exhibit while the witness associated with the exhibit was testifying. There was, therefore, no record that could be cited to later argue for admissibility of the exhibit.

228. Moving to admit exhibits was specifically not a part of the witness phase of the proceeding. The Hearing Officer rejected any attempt to admit an exhibit into evidence during the testimony phase based on the “all in at the end” nature of the proceeding as defined by the Hearing Officer. \*\* Nagata – LAS cross.

229. A second impact was that the sponsor of an exhibit had no reason to make an admissibility argument when moving, at the end of the hearing, to admit exhibits. Not having developed a record to support admissibility, such an argument would have been difficult, if not impossible, to make.

230. The result of this process was that the parties made motions for the admission of exhibits in a *pro forma* fashion without arguing the admissibility of the individual documents. See e.g. DOC-491 (Temple of Lono motion to admit opening statement, pre-filed testimony, and exhibits into evidence citing applicable rules without making argument for admissibility of each document moved into evidence); see also DOC-506 (The University of Hawai'i at Hilo's supplemental motion to admit exhibits and written direct testimony into evidence and objection to admission of certain exhibits and written direct testimony moving exhibits into evidence based on generally applicable rules without providing exhibit-specific support for motion); DOC-451 (TMT International Observatory's motion to admit exhibits and written direct testimony into evidence citing generally the applicable statutes and rules without making any argument for the admissibility of each specific document); DOC-485 (Perpetual Unique Education Opportunities, Inc.'s Motion to Admit Written Direct Testimony and Exhibit making generic statement that all exhibits are

admissible with references to applicable rules without making argument for the admissibility of each specific exhibit based on a record); DOC-502 (Mehana Kihoi's motion to admit exhibits and written direct testimony into evidence making generic reference to the relevant statute without making an argument for the admissibility of each specific exhibit).

231. The Hearing Officer, in almost all cases, therefore, had no initial exhibit-specific argument for admissibility from the exhibit sponsor to consider when deciding whether to receive a particular exhibit into evidence.

232. The parties facing objections had a rude awakening when the Hearing Officer decided to grant objections to exhibits before providing the parties any time to respond to objections by presenting arguments for admissibility. Order 44.

233. Even if the Hearing Officer had provided time to respond to objections, that allowance could not cure the problem created by the fact that admissibility of an exhibit could well depend on the testimony of the witness with whom the exhibit was associated. There was no reason or permission to seek such testimony when the witness was testifying and no opportunity to recall the witness once it became clear that the process was not going to be as portrayed repeatedly by the Hearing Officer.

234. Given that the process as described by the Hearing Officer meant that there was no reason for the parties to present arguments for admissibility of each document at the time motions to admit exhibits were filed, the proper procedure would have been (a) filing of motion to admit exhibit, (b) filing of objection to admission, (c) filing a response to the objection,<sup>9</sup> (d) ruling by the Hearing Officer on each objection in an order that provided reasonable explanation for each ruling, (e) motions for reconsideration, (f) response to motion for reconsideration, and (g) final ruling.

235. As documented in Order 44, the Hearing Officer erroneously failed to provide time in the schedule for responses to objections to be filed. Order 44 at 1.

236. The process enunciated by the Hearing Officer might have worked had all parties fulfilled the Hearing Officer's expectations of few objections, if any.

237. Instead, the Applicant filed multiple objections to 237 exhibits, DOC-514, and TIO filed additional objections to 76 exhibits. DOC-511.

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<sup>9</sup> Again noting that there was no reason for the sponsor of an exhibit to establish its admissibility at the time the associated witness was testifying. Any response to an objection later would be incurably handicapped by that absence of a reason or permission to create a record.

238. Once the reality of hundreds of objections emerged, Intervener Mauna Kea Anaina Hou filed its motion requesting time to respond to exhibit objections and related matters. DOC-522. Other interveners joined that motion. DOCs 524, 526, 527, 528, 530, 532, 535, 538, 539, 540, 541, 545.

239. The Hearing Officer never ruled on that motion.

240. The Temple filed a motion seeking a protective order “clarifying that there is no obligation on the part of parties whose testimony and exhibits have been subject to objections to file responses at this time.” DOC-546. Other interveners joined in that motion. DOCs-547, 548.

241. The Hearing Officer never ruled on that motion.

242. When parties attempted to respond to the objections anyway, the Hearing Officer refused to review or consider such responses because they were “late.” Order at 6 *citing* DOCs-515, 520, 521, and 525.

243. Responses to objections could not be “late” when there was no schedule for them to be filed in the first place.

244. As a result of all these factors, the Hearing Officer made all decisions on admissibility of exhibits subject to objections without the sponsor of the exhibit having an opportunity to present an initial argument for admissibility of the specific exhibit objected to or to be heard in response to the objection. The Hearing Officer essentially ruled on objections without hearing from the sponsor of the exhibit objected to – the classic “cart before the horse” problem so familiar to this proceeding. *See Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 363 P.3d 224, (2015).

245. Misleading parties into not establishing the admissibility of documents when the related witness was testifying was a due process violation.

## V. CONCLUSIONS OF LAW

### A. The proceeding lacked objectivity from the beginning.

246. In light of FoF 10-17, the due process violation that led to the Hawai'i Supreme Court vacating the first BLNR approval of HA 3568 unalterably tainted the second contested case because the Hearing Officer in the second case also knew "BLNR's position on the permit before the first witness[was] sworn in." *Mauna Kea Anaina Hou*, supra. at 239.

247. In a situation where the appearance of bias may be incurable, even by "the most elaborate procedural safeguards," *Mauna Kea Anaina Hou*, supra. at 238 quoting *Sussel v. City & Cnty. of Honolulu Civil Serv. Comm'n*, 71 Haw. at 108, 784 P.2d at 870 (quoting M. Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84 (1986), the minimum burden on the agency is to demonstrate objectivity and fairness at a level that can withstand the strictest scrutiny.

248. The Hearing Officer's decision not to disqualify the legal counsel participating in the initial contested case, whose advice led to the due process violation found by the Supreme Court and who subsequently defended that violation, FoF 19-20, brings the neutrality of the Hearing Officer and the proceeding itself into question.

249. When both the proponents and the opponents agreed that that the selected Hearing Officer should be removed based on potential bias and the BLNR refused to remove the Hearing Officer, the appearance of impropriety arose and the standard of strict scrutiny that should be applied in this proceeding to any rulings implicating due process makes the BLNR ruling a violation of due process.

250. In a proceeding already tainted by a major prejudicial ruling, any ambiguity regarding whether a given action, such as the selection of the Hearing Officer, gave the appearance of bias should have been resolved towards not taking the action. Such a standard was not met in this proceeding.

251. Based on the refusal of BLNR to select an alternative Hearing Officer in the context of a case calling for heightened adherence to due process requirements, the entire proceeding must be invalidated.

252. Legally, there simply was no cure for the taint created by the initial BLNR due process violation of approving the permit prior to holding the contested case.

### B. The consideration of HA 3568 at this time is further evidence of a compromised proceeding.

253. For the BLNR to be considering both the question of whether to grant the Applicant's request for a permit to build the TMT and whether to adopt a new

Master Lease, FoF 23-30, creates innumerable conflict of interest issues that compromise the integrity of the proceeding and raise serious due process issues.

254. The BLNR should have decided whether to approve a new Master Lease before taking up a new permit application for the TMT project, which is intended to operate long after the current Master Lease expires.

255. The BLNR decision on whether to approve a new Master Lease will be influenced by a prior approval of the TMT application because TMT may rely on an approved application to initiate construction, an attempt TMT made before the Supreme Court invalidated the first permit.

256. The more TMT does pursuant to the premature permit, the greater the pressure on the BLNR to approve the new Master Lease.

257. That pressure, particularly in this case where objectivity was an issue even before the contested case began, FoF 10-35, threatens to undermine the objectivity and credibility of any decision on whether to approve a new Master Lease.

258. The BLNR committed a legal error by taking up the TMT application prior to deciding on whether to approve a new Master Lease.

259. That error violated the due process rights of those opposed to the TMT by forcing them into a contested case before the BLNR had decided on whether to approve a new Master Lease because a decision not to approve a new Master Lease would have led to TMT terminating their application and obviated the need for a contested case.

260. By taking up the TMT application before approving the new Master Lease, the BLNR signaled to TMT and the Hearing Officer that the BLNR has already decided to approve a new Master Lease to accommodate TMT.

261. This latest “cart before the horse” violated the due process rights of TMT opponents because the BLNR created pressure upon itself to approve the new Master Lease, compromising an objective decision on the new Master Lease.

262. Consideration of the TMT application should be suspended until such time as the BLNR decides whether to approve a new Master Lease or not.

**C. This initiation of this proceeding violated and/or inappropriately applied the rules.**

263. By treating the second contested case hearing process as both a resumption of the initial contested case and a new proceeding, FoF 36-56, the BLNR and the Hearing Officer admitted parties based on two separate criteria – those requesting a contested case the first (and only) time that option was offered and those seeking to intervene in an existing case.

264. The rules do not permit both avenues to become a party.

265. This proceeding has, therefore, been a hybrid that is nowhere supported by the rules.

266. The conflation of a resumed contested case and a new contested case invalidates the proceeding.

**D. The Board and the Hearing Officer violated the Temple's due process rights by failing to rule on the Temple's motions related to desecration.**

267. The procedural history of the Temple's efforts to have the merits of the Temple's argument regarding the application of the desecration statute to this proceeding, FoF 1-9; 57-72, constituted a violation of the Temple's due process rights.

268. The refusal of the Hearing Officer to rule on the Temple's motion for summary judgment based on the desecration law, DOC-264, denied the Temple's due process right to be heard at "a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou*, *supra*. at 228 quoting *Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

269. The refusal of the BLNR to rule on the Temple's motion to dismiss based on the desecration law, DOC-516, denied the Temple's due process right to be heard at "a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou*, *supra*. at 228 quoting *Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

**E. The proposal to build the TMT satisfies all the tests for desecration found in the state law.**

**1. Mauna Kea is a place of worship.**

270. The evidence is overwhelming that Mauna Kea is a place of worship. *See e.g.* FoF 73-93.

**2. Mauna Kea is a place of burials.**

271. The uncontested evidence demonstrates that Mauna Kea is a place of burials. *See e.g.* FoF 94-107.

**3. Mauna Kea is an object of veneration.**

272. The uncontested evidence demonstrates that Mauna Kea is an object of veneration. See e.g. FoF 108-111.

**4. The construction of the Thirty Meter Telescope will damage the sacred site.**

273. The uncontested evidence is that the construction of the Thirty Meter Telescope will damage the pristine site where construction is proposed. See e.g. FoF 116-114.

**5. The project was predicted to cause outrage.**

274. The evidence demonstrates that the Applicant knew the project would cause outrage. See e.g. FoF 117-119.

**6. The project did cause outrage.**

275. The evidence demonstrates that the project did cause significant public outrage. See e.g. FoF 120-123.

**F. State law requires the dismissal of this case.**

276. Because the application at issue in this proceeding is requesting permission to violate State law, FoF 73-123, the application must be dismissed or denied.

**G. The Hearing Officer denied every effort by the Temple to be heard on the disqualification issue.**

277. Hawai'i State Constitution, Article I, § 5:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

278. As a general proposition, this constitutional provision requires due process in contested case proceedings because those proceedings determine rights.

279. Due process includes the right to be heard at "a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou*, supra. at 228 *quoting Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

280. The equal protection of the laws also applies to guarantee each party to the contested case the same rights as any other party in terms of participating in the proceeding.

281. The ban on discrimination in this proceeding means that the Temple is guaranteed that the proceeding will not discriminate based on faith.
282. The episode of the Applicant's attack on the Temple and the subsequent Hearing Officer's actions protecting the Applicant from the legal consequences of that attack defy any requirements for due process.
283. This one episode includes multiple violations of the Temple's due process rights.
284. As this proceeding deals with a Conservation District Use Application, the Applicant bears the burden of proof, including on any challenge to the Applicant's character. HAR § 13-5-30.
285. In *N.M. Ranchers Ass'n v. ICC*, 702 F.2d 227 (D.C. Cir. 1983) (per curiam), the court remanded an Interstate Commerce Commission (ICC) decision to grant a permit for a railroad line. The court found that the ICC erred in failing to consider evidence of bad faith tending to show that the rail line developer would not fulfill its promises to preserve sacred and historical Native American sites along the right-of-way. *Id.* at 232-33.
286. In this case, the Applicant made character an issue by its attack on the Temple's character. DOC-135 at 14-15.
287. The Temple of Lono is not the party seeking a permit. The Temple's character is totally irrelevant to the issues in the contested case. The testimony and exhibits presented in the case by the Temple will be judged on their merits, not by who submitted them.
288. The Applicant's decision to impugn the Temple's character was, therefore, gratuitous.
289. Even assuming that the attack would somehow be relevant, the Applicant offered no supporting evidence for the attack.
290. The *ad hominem* attack, however, did raise a serious question about the Applicant's qualifications to receive a permit from the State of Hawai'i.
291. Actions on the part of the Applicant demonstrating disrespect for constitutional obligations towards Native Hawaiians that would accompany any grant of a permit are relevant to the question of whether the application should be granted.
292. The issue of Native Hawaiian rights is specifically an issue in this proceeding. DOC-281 at 4.



293. The Temple's claim that the attack by the Applicant disqualified the Applicant from receiving a permit never had the opportunity to have a ruling on the merits of that claim.

294. The absence of a ruling on the merits of the Temple's disqualification claim meant that the Temple never had an opportunity to file a motion for reconsideration of an adverse ruling, had that been the outcome.

295. The facts presented document that the Board and the Hearing Officer have engaged in a systematic effort to prevent the Temple of Lono from having an opportunity to argue that the attack on the Temple disqualifies the Applicant from receiving the permit at issue in this proceeding.

296. Denying the Temple an opportunity to be heard on the disqualification issue amounted to a ruling denying the Temple's disqualification motion without a written or oral order, which in turn precluded the Temple from exercising its right to request reconsideration.

297. Denying the Temple's right to be heard violated the Temple's due process rights as a party to this proceeding.

298. A separate violation of the Temple's due process rights was the Hearing Officer's refusal to even take up Temple motions or other filings related to the University attack.

299. The Hearing Officer's refusal to take up Temple motions also denied the Temple an opportunity to avail itself of the protections offered by the rules on filing motions for reconsideration. HAR §13-1-39. Denial of that opportunity is a further violation of the Temple's due process rights.

300. A separate violation of the Temple's due process rights is the Hearing Officer's refusing to allow the Temple to call a witness capable of testifying to the University's policy and attitudes toward the traditional Hawaiian faith.

301. A related due process violation is the failure of the Hearing Officer to ever issue an order denying the request for a subpoena. The absence of such an order denied the Temple an opportunity to file a motion for reconsideration. Denial of that opportunity is a further violation of the Temple's due process rights.

302. The Hearing Officers ruling that the testimony of the witness was not relevant and material constituted a ruling that the Applicant's character is not a relevant issue to a permit application. That position is legally incorrect.

303. If there was evidence that the Applicant tolerated acts of desecration without taking, or initiating through others, any enforcement action, that evidence would be relevant and material as further proof of bad character.

304. Animosity towards the traditional Hawaiian faith is evidence of a propensity toward acts damaging to that faith. Whether the evidence of that animosity constituted a general policy of the Applicant is a matter that should have been litigated, either by allowing the issue to be briefed and decided and/or allowing the Temple to call witnesses competent to illuminate University policy.

305. The compilation of errors and constitutional violations in this proceeding leaves no option other than vacating the proceeding.

306. The combination of denying the Temple's right to be heard on the material and significant issue of disqualification; the refusal to take up motions filed by the Temple, including a motion to recuse the Hearing Officer; the failure to provide final orders enabling the Temple to file motions for reconsideration; the failure to provide reasoned explanations for orders that were issued, again denying the Temple's right to file motions for reconsideration; and the repeated refusal to respond to the Temple's efforts to bring these matters to the attention of the Hearing Officer, support finding that the Hearing Officer demonstrated a bias against the Temple and in favor of the Applicant and erred in not recusing herself.

307. The fact that the permit comes with conditions that the Applicant must obey, there is an implicit requirement that the Applicant be considered likely to obey those conditions.

308. The applicable laws, rules, regulations, and related constraints involved in the permit require the Applicant to comply with those constraints. To the extent that the Applicant demonstrates disrespect for those constraints, the Applicant is disqualified from receiving the permit. Here the protections afforded to Native Hawaiians, including their spiritual practices, are a requirement that accompanies the permit. As such, the granting agency must have confidence that the Applicant will observe and respect those protections. The unsupported and bigoted attack on the Temple is evidence demonstrating that the Applicant is unlikely to comply with those requirements. As the court found in *N.M. Ranchers Ass'n*, *supra.* evidence of bad behavior is relevant and should have been considered.

309. As found by the Hawai'i Supreme Court:

Under such facts, the role of an agency is not merely to be a passive actor or a neutral umpire, and its duties are not fulfilled simply by providing a level playing field for the parties. *See Save Ourselves, Inc.*, 452 So.2d at 1157 ("[T]he commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it."). Rather, an agency of the State, **must perform its statutory function in a manner that fulfills the State's**

**affirmative constitutional obligations.** *See, e.g., Ka Pa`akai O Ka`Aina*, 94 Hawai`i at 45, 7 P.3d at 1082 (placing "an **affirmative duty on the State and its agencies to preserve and protect traditional and, customary native Hawaiian rights**"); *In re Water Use Permit Applications (Waiahole I)*, [94 Haw. 97](#), 143, [9 P.3d 409](#), 456 (2000) (describing the state agency's affirmative duty of "considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process"). In particular, an agency must fashion procedures that are commensurate to the constitutional stature of the rights involved, *see, e.g., Waiahole I*, 94 Hawai`i at 143, 9 P.3d at 455 (decisions involving public rights to a public-trust resource must be "made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state"), and procedures that would provide a framework for the agency to discover the full implications of an action or decision before approving or denying it, *see, e.g., Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, [133 Haw. 141](#), 174-75, [324 P.3d 951](#), 984-85 (2014) (crafting an assistive framework that can guide agencies when considering the application of the public trust doctrine to water resources).

*Mauna Kea Anaina Hou*, *supra.* at 262.

310. The Supreme Court also ruled:

In light of the unique position that an agency occupies, the agency may be at the frontline of deciding issues that involve various interests that implicate constitutional rights. **Especially in instances where an agency acts or decides matters over which it has exclusive original jurisdiction, that agency is the primary entity that can and, therefore, should consider and honor state constitutional rights in the course of fulfilling its duties. Furthermore, to the extent possible, an agency must execute its statutory duties in a manner that fulfills the State's affirmative obligations under the Hawai`i Constitution. An agency is not at liberty to abdicate its duty to uphold and enforce rights guaranteed by the Hawai`i Constitution when such rights are implicated by an agency action or decision.**

*Ibid.* at 262-263 (emphasis added).

311. Furthermore, the Court ruled:

the agency must not only avoid infringing upon protected rights to the extent feasible, but it also must **execute its statutory duties in a manner that fulfills the State's affirmative constitutional obligations.**

*Ibid.* at 261.

312. The Supreme Court stressed the importance of the agency fulfilling its constitutional duties.

In other words, the authority and obligations of an agency are necessarily circumscribed and regulated by the Hawaii Constitution. *See Czerkies v. U.S. Dep't of Labor*, [73 F.3d 1435](#), 1441-42 (7th Cir.1996) (stating that "an

administrative agency [may not] claim to receive from Congress by sheer inadvertence a license to ignore the Constitution"); *Hennessey v. Indep. Sch. Dist. No. 4*, [552 P.2d 1141](#), 1145 (Okla.1976) ("All governmental bodies must remain within bounds of the Constitution."); *City of Modesto v. Modesto Irrigation Dist.*, [34 Cal.App.3d 504](#), [110 Cal.Rptr. 111](#), 114 (1973) (holding that state agencies "must submit to a constitutional mandate"). **Hence, an agency may not fulfill its statutory duties without reference to and application of the rights and values embodied in the constitution.**

Id.

313. In this case, the agency's action will directly affect the rights of the Temple and other spiritual practitioners and, therefore, must act in a manner that protects those rights.

Consequently, an agency bears a significant responsibility of assuring that its actions and decisions honor the constitutional rights of those directly affected by its decisions.

Ibid. at 262:

314. The agency has failed to live up to its responsibilities.

315. The multiple due process violations just related to the Temple's efforts to be heard on the disqualification issue cannot be cured and require vacating this proceeding.

## **H. Post-Hearing due process violations.**

### **1. Setting deadline for findings and conclusions prior to the record being complete violated due process.**

316. Setting a deadline for the submission of proposed decisions and orders, including findings of fact and conclusions of law before the record was complete violated HAR §13-1-38(a).

317. The violation of HAR §13-1-38(a) violated the parties' due process rights by requiring the completion of the findings and conclusions based on an incomplete record.

### **2. The procedure for admission of exhibits into evidence violated due process.**

318. The Hearing Officer set up a process for admitting exhibits into evidence that violated the due process rights of the parties.

319. The Hearing Officer repeatedly expressed her intent to allow all exhibits to be entered into evidence with the expectation that there would be few objections.

320. Based on this intent, the Hearing Officer foreclosed any attempt by parties to have exhibits admitted into evidence while the witness associated with the exhibits was testifying.

321. As a result, the parties did not make a record on the admissibility of their exhibits while the associated witness was testifying.

322. Also as a result, the parties filed motions to admit their exhibits into evidence that were *pro forma* in nature, rather than arguing for the admissibility of specific exhibits.

323. When the Applicant and TIO then filed hundreds of objections, the Hearing Officer erroneously decided those objections without allowing the sponsor of a challenged exhibit an opportunity to respond to the objection.

324. Misleading parties into not establishing the admissibility of documents when the related witness was testifying was a due process violation.

325. Not providing the exhibit sponsors time to respond to objections prior to the Hearing Officer ruling on the objections was another due process violation.

326. Relegating all objection responses to objections to the reconsideration process denied those now responding the opportunity to present arguments for reconsideration of an initial order based on a process in which all parties participated. That denial is another due process violation.

327. Relegating all objection responses to the reconsideration process meant that the sponsors of challenged exhibits had to defend the admissibility of their exhibits without having an opportunity to develop a record supporting admissibility in the first place and without having an opportunity to respond to objections prior to an initial ruling. This combination of due process violations constituted a separate due process violation.

### **3. Untimely rulings violated due process.**

328. Entering a post-hearing ruling denying the Temple of Lono's motion to recuse the Hearing Officer, filed more than seven months previously, violated the Temple's due process right to a timely ruling. Minute Order 46; see DOC-610 (Temple of Lono motion to reconsider Minute Order 46).

329. Entering a post-hearing ruling denying the Temple of Lono's motion to recuse the Hearing Officer denied the Temple's due process right to a fair and objective proceeding because the Hearing Officer could not objectively choose between granting the motion, meaning she should have ceased to preside over the contested case seven months before, or denying the motion to prevent the vacating of the proceeding since the time the motion was filed. Id.

330. Entering a post-hearing ruling denying the Temple of Lono's motion for a summary judgment on the issue of whether the Applicant was disqualified from receiving the permit, filed more than seven months previously, violated the Temple's due process right to a timely ruling. Minute Order 47; see DOC-619 (Temple of Lono motion for reconsideration of Minute Order 47).

331. Entering a post-hearing ruling denying the Temple of Lono's motion for a summary judgment on the issue of whether the Applicant was disqualified from receiving the permit denied the Temple's due process right to a fair and objective proceeding because the Hearing Officer could not objectively choose between granting the motion, meaning the proceeding should have been terminated seven months prior, or denying the motion to prevent the vacating of the proceeding. Id.

332. Choosing to enter orders on two motions filed more than seven months ago, Minute Orders 46 and 47, while not entering orders on two other motions filed at the same time or shortly thereafter is capricious and arbitrary. See DOC-264 (Temple of Lono motion for summary judgment (desecration), filed September 17, 2016; DOC-286 (Temple of Lono motion for reasoned explanations and extension of time) filed September 26, 2016).

#### **I. The plethora of due process violations invalidates this proceeding.**

333. The innumerable violations of the Temple's (and other parties') due process rights, see e.g. FoF 193-244, constitutionally require invalidating this proceeding.

### **VI. Proposed Decision**

334. Given that the objectivity of this proceeding was compromised from the beginning and that there was really nothing the BLNR could do to correct that taint, the Hearing Officer finds that the process initiated by the BLNR in response to the Supreme Court ruling in this case did not meet the constitutional tests for due process.

335. Given that the proposed project would violate the state law on desecration, the Hearing Officer recommends that the BLNR deny or dismiss the CDUA (HA 3568).

336. Given that the BLNR initiated this proceeding because BLNR violated the due process rights of those opposed to the application and given that the conduct of this proceeding including numerous similar violations of due process rights of the application opponents, the Hearing Officer recommends to the BLNR that this proceeding be vacated as defective based on the conduct of the proceeding.

## VII. PROPOSED ORDER

337. Based on the entire record,<sup>10</sup> the Hearing Officer recommends that BLNR order the CDUA in this proceeding be dismissed or denied.

DATED: May 23, 2017

Respectfully submitted,

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Lanny Alan Sinkin  
Lay Representative for the Temple of Lono

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<sup>10</sup> §91-9 Contested cases; notice; hearing; records.

- (e) For the purpose of agency decisions, the record shall include:
- (1) All pleadings, motions, intermediate rulings;
  - (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
  - (3) Offers of proof and rulings thereon;
  - (4) Proposed findings and exceptions;
  - (5) Report of the officer who presided at the hearing;
  - (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

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Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this day a copy of the **TEMPLE OF LONO PROPOSED DECISIONS AND ORDERS INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served on the following parties by email on May 23, 2017.

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



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and by first class mail on May 23, 2017 to:

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Dated: May 23, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin