

**BOARD OF LAND AND NATURAL RESOURCES**

**STATE OF HAWAII**

IN THE MATTER OF	)	CASE NO. BLNR-CC-16-002
	)	
Contested Case Hearing Re Conservation District	)	Minute Order No. <u>68</u>
Use Application (CDUA) HA-3568 For the	)	(Order Denying Flores-Case
Thirty Meter Telescope at the Mauna Kea Science	)	`Ohana's Request for Witness
Reserve, Ka`ohe Mauka, Hamakua, Hawai`i	)	Subpoena for 'John Doe' and for a
TMK (3) 4-4-015:009	)	Subpoena Duces Tecum to Disclose
	)	Unidentified Maunakea (sic)
	)	Observatories Support Services
	)	Employee Involved with the
	)	Destruction of Ahu (Shrine) on
	)	Mauna Kea in August of 2015
	)	(Doc. 447))
	)	
	)	<b>Certificate of Service</b>

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**MINUTE ORDER NO. 68**

**(Order Denying Flores-Case `Ohana's Request for Witness Subpoena for 'John Doe' and for a Subpoena Duces Tecum to Disclose Unidentified Maunakea (sic) Observatories Support Services Employee Involved with the Destruction of Ahu (Shrine) on Mauna Kea in August of 2015 (Doc. 447))**

On January 25, 2017, a hearing on the Flores-Case `Ohana's Request for Witness Subpoena for 'John Doe' and for a Subpoena Duces Tecum to Disclose Unidentified Maunakea (sic) Observatories Support Services Employee Involved with the Destruction of Ahu (Shrine) on Mauna Kea in August of 2015 (Doc. 447), received by the Office of Conservation and Coastal Lands on January 25, 2017 (listed as being filed on January 12, 2017 in the Documents Library Index) ("Request"), was held in Hilo, Hawai`i at the Grand Naniloa Hotel, 93 Banyan Drive.

The following persons were present:

Received  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
2017 June 5 9:12 pm

Kealoha Pisciotta in her individual capacity and for Mauna Kea Anaina Hou (“MKAH”)  
 Paul Neves  
 Clarence K. Ching  
 Deborah Ward  
 E. Kalani Flores and B. Pualani Case for the Flores-Case Ohana  
 John Manaut, Esq. and Ian Sandison, Esq., Attorneys for the University of Hawaii-Hilo (“UHH”)  
 Ross Shinyama, Esq. A and Brian Kang, Esq., Attorneys for TMT International Observatory, LLC. (“TIO”)  
 Lincoln Ashida, Esq., Attorney for Perpetuating Unique Educational Opportunities Inc. (“PUEO”) with Keahi Warfield  
 Lanny Sinkin for Temple of Lono  
 Dexter Kaiama, Esq., for the Hawaiian –Environmental Alliance (“KAHEA”)  
 Harry Fergerstrom  
 Mehana Kihoi in her individual capacity and for Leina`ala Sleightholm  
 Cindy Freitas  
 William Freitas  
 Wilma Holi (Witness)

In addition to the Request, the following submissions were considered:

<b>Doc. #</b>	<b>Filed</b>	<b>Party</b>	<b>Title</b>
443	1/19/2017	UHH	The University of Hawai‘i at Hilo’s Motion to Quash Flores-Case ‘Ohana’s Request for Subpoena for “John Doe” and for a Subpoena Duces Tecum to Disclose Unidentified Maunakea Observatories Support Services Employee Involved with the Destruction of Ahu (Shrine) in Mauna Kea in August of 2015, Filed January 12, 2017; Memorandum in Support of Motion; Declaration of Counsel; Exhibit 1
458	01-Feb-17	UHH	Proposed] Minute Order No. __ Denying Temple of Lono Request for Witness Subpoena for DLNR Employee to Testify on Whether DLNR has a Form to Fill Out Requesting Permission to Build an Altar on Mauna Kea [Doc. 439]

By this Request, the Flores-Case `Ohana seeks two things: (1) a subpoena duces tecum for information, and (2) a subpoena for the presence of “John Doe” based upon the information produced. Tr. Vol. 30 1/25/17, 218:16-19. The subject of the Request involves “the removal of the ahu (shrine), formerly along the roadway leading to the summit between mile markers 3 and

3.5.” Doc. 447 at page 1. At the hearing on the motion on January 25, 2017, when asked why the information sought is material or relevant to the case, here are E. Kalani Flores’ answers:

HEARINGS OFFICER AMANO: All right. I want you to address the other one, duces tecum and John Doe that follows. Why is that material or relevant.

MR. FLORES: So first of all, in this particular motion by the University counsel regarding this particular request, I believe they mischaracterized the intent of our request. They present this request as being, trying to interrogate the individual, quoting what they say, they say that –

HEARINGS OFFICER AMANO: You don’t need to quote, I just need you to tell me why you think it’s material and relevant.

MR. FLORES: Okay. So this particular individual works on behalf of the Applicant in the management of Mauna Kea. He works for the Mauna Kea Observatory Support Services, which also works in conjunction with the Office of Mauna Kea Management as previously discussed.

The question before us, Your Honor, is the Applicant University of Hawai’i, who is responsible for managing these lands and also responsible for protecting our Native Hawaiian customary traditional and cultural practices. It appears that at this point in time that they’re not in compliance with their comprehensive management plans, they’re not in compliance having policies in place to protect such practices, protect such cultural resources. From the previous testimony offered by – not offered but previous witness presented by Mr. Ishibashi, we have a direct admittance that he was involved with disturbing a site associated with cultural practices.

And these are recent offenses. And we have another incidence that occurred in August 2015 by another employee of the University. There seems to be, what the question is really being asked, are there actually rules in how to protect these sites, and if there are these rules, how come no one knows them – whether they know about them or not, why are these procedures and policies in place. First question, are there procedures and policies in place, which we believe they aren’t.

HEARINGS OFFICER AMANO: Why do you need the name of the individual?

MR. FLORES: So we can identify the individual to be here. Because what we’re getting is very varied reports of what happened in this incident. So it’s not so much here to interrogate that specific individual, but we want to get from his own mouth as to what exactly happened and what were the circumstances that an

`ahu that was built, associated with cultural practice. I'm talking about an `ahu – the `ahu is bigger than this podium. It wasn't like a small rock or stone that could have been mistakenly just bulldozed away. We have one account from Ms. Nagata in her testimony that it was accidental. And we have another account presented by the UH and spokesperson Mr. – sorry, I'm going to mispronounce his name, but spelled N-E-I-D-E-N-T-H-A-L, saying that it was cleared away to retrieve materials.

Just on clarity, and it's not so much we're looking at the individual, we're looking at what are the policies, or are there actually policies in place for employees of the University in dealing with these cultural resources, because if you can't even protect these cultural resources or protect native Hawaiian customary, traditional rights from your own employees, how can you protect them from a project such as TMT with 100-something other people involved?

HEARINGS OFFICER AMANO: Okay, thank you, Mr. Flores.

MR. FLORES: We're not here to – or implied, we are not here to try to impeach Ms. Nagata, we're not here to harass or intimidate the employee, we just want to get it straight from his mouth exactly what happened.

And if Office of Mauna Kea Management had a written report, we would have went to get the report, but as we noticed in the testimony, the information just exchanged verbally, so we couldn't get a straight or clear report of what exactly happened. That's our intent.

We're not looking towards attacking or intimidating any witness, we're just trying to get what happened to, on that particular incident, and that's why we're asking for that particular – and then lastly, so when it gets into the legal standard there, it does also state that in calling for a witness subpoena, that an address also needs to be provided, as well as the mileage.

TR. Vol 30, 1-25-17, 224:3 – 227:18.

UHH has moved to quash the subpoenas asserting that the Request fails to show good cause, relevance, or materiality. UHH argues that the Request does not comport with the Hawaii

Administrative Rules (“HAR”):

§13-1-33 Procedure for witnesses. (a) Witnesses may be subpoenaed as set forth below:

(1) Requests for the issuance of subpoenas, requiring the attendance of a witness for the purpose of taking oral testimony before the board **shall be in writing, and shall state the reasons why the testimony of the witness is believed to be material and relevant to the issues involved.** Only parties or a board member may request the issuance of a subpoena.

\* \* \*

(emphasis added)

After taking the Request and UHH Motion to Quash under advisement overnight, the Hearing Officer issued a verbal ruling on January 26, 2017:

HEARINGS OFFICER AMANO:

\* \* \*

And Mr. Flores requested ...a subpoena duces tecum for documents relative to the individual who is – who was – who knocked down the `ahu on the mountain. And thereafter, a subpoena for that individual.

I’m going to find that there is no materiality or relevance to our current issues as to the information. The information on the record is sufficient.

Tr. Vol. 31, 1-26-17, 13:2-10.

On February 1, 2017, the University of Hawai`i at Hilo filed a Proposed Minute Order No. \_\_ Denying Flores-Case ‘Ohana Request for Subpoena for “John Doe” and for a Subpoena Duces Tecum to Disclose Unidentified Maunakea Observatories Support Services Employee Involved with the Destruction of Ahu (Shrine) on Mauna Kea in August of 2015 [Doc. 447] and Granting the University of Hawai`i at Hilo’s Motion to Quash Flores-Case ‘Ohana Request for Witness Subpoena for “John Doe” and for a Subpoena Duces Tecum to Disclose Unidentified Maunakea Observatories Support Services Employee Involved with the Destruction of Ahu (Shrine) on Mauna Kea in August of 2015, Filed January 12, 2017 [Doc. 443] (“Proposed Minute Order”). (Doc. 458) There were no responses to the Proposed Minute Order.

Based upon the Request, all related and oral submissions from counsels and/or parties, the Proposed Minute Order and all submissions related thereto, all applicable law, the entire record having been considered by the Hearing Officer,

IT IS HEREBY ORDERED that the Request is DENIED.

**Motion to Reconsider.** A party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein. Any Motion for Reconsideration shall not be used to reargue the motion or set out positions of a purely repetitious nature or to present factual or legal grounds that could or should have been presented at the original hearing. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 (1992).

The deadline for submission of any **motion** to reconsider this minute order is no later than **5 business days** after the date this Minute Order is filed in the Documents Library. Any **responses to motions to reconsider**, shall be submitted no later than **10 business days** after this order is filed in the Documents Library; essentially 5 business days after the deadline for motions to reconsider.

Any Motion to Reconsider shall be considered a non-hearing motion unless otherwise designated by the Hearing Officer.

DATED: Honolulu, Hawai`i, June 5, 2017.



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Judge Riki May Amano (Ret.)  
Hearing Officer

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-02  
Document title: **Minute Orders 68-69**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on June 6, 2017 and by regular mail on June 6, 2017:

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