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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation) **TEMPLE OF LONO**
Contested Case Hearing Re Conservation) **SUPPLEMENT B TO PROPOSED**
District Use Permit (CDUP) (HA-3568) for) **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 SUPPLEMENT B TO
PROPOSED DECISIONS AND ORDERS INCLUDING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. INTRODUCTION

On April 18, 2017, the Hearing Officer filed Minute Order 43 setting a deadline of May 30, 2017 for the filing of proposed decisions and orders, including findings of fact and conclusions of law. DOC-552.

The same Minute Order set June 13, 2017 as the deadline for the filing of any responses to the proposed decisions and orders. *Id.*

On May 23, 2017, the Temple of Lono filed its proposed decisions and orders, including findings of fact and conclusions of law. DOC-651.

On May 29, 2017, the Temple of Lono filed its Supplement A to Proposed Decisions and Orders Including Findings of Fact and Conclusions of Law. DOC-655.

Subsequent to the deadline for filing proposed decisions and orders, the Hearing officer issued numerous rulings on pending motions.

The Temple of Lono herein further supplements its findings of fact and conclusions of law to address those orders.¹

¹ The Temple has addressed some of these orders in motions to reconsider. See DOC-675 (Temple of Lono motion for reconsideration of Minute Order 53); DOC-694 (Temple of Lono motion to reconsider Minute Order 57)

II. SUPPLEMENTAL FINDINGS OF FACT

A. Subsequent to the close of the period for filing proposed decisions and orders, including findings of fact and conclusions of law, the Hearing Officer filed a plethora of orders.

1. Since the May 30, 2017 close of the period for filing proposed decisions and orders, including findings of fact and conclusions of law, the Hearing Officer has filed 18 Minute Orders:

- a. DOC-674 (Minute Order No. 57, Order denying Temple of Lono motion to schedule pending motions (Doc. 324))
- b. DOC-681 (Minute Order No. 58, Order denying Temple of Lono motion to strike for failure to serve or extension of time and rescheduling of hearing (Doc. 364))
- c. DOC-682 (Minute Order No. 59, Order denying Kamahana Kealoha motion of reconsideration on decision to motion of quo warranto (Doc. 379))
- d. DOC-683 (Minute Order No. 60, Order denying Mehana Kihoi's motion for reconsideration to deny the intervention of Perpetuating Unique Educational Opportunities as a party in the contested case hearing (Doc. 380))
- e. DOC-684 (Minute Order No. 61, Order granting J. Leinaala Sleightholm's motion to accept pre-hearing statement, witness testimony, witness and exhibit list (Doc. 381))
- f. DOC-685 (Minute Order No. 62, Order denying Cindy Freitas' motion to dismiss contested case hearing re: Conservation District Use Application HA-3568 (Doc. 391) (Non-hearing motion))
- g. DOC-686 (Minute Order No. 63, Order denying Temple of Lono motion to restore cross-examination rights (Doc. 410))
- h. DOC-687 (Minute Order No. 64, Order denying motion to be a party to TMT case by Shelley Stephens (Mahi-Hanai) (Doc. 420))
- i. DOC-688 (Minute Order No. 65, Order denying the Temple of Lono motion to dismiss TIO as intervenor or alternatively, stay this proceeding (Doc. 427) and Harry Fergerstrom's motion to remove TMT/TIO as a party, for lack of standing including any and all submissions into the evidentiary library (Doc 429))

j. DOC-689 (Minute Order No. 66, Order denying the Temple of Lono request for witness subpoena for David Lassner, President of the University of Hawaii system (Doc. 438))

k. DOC-690 (Minute Order No. 67, Order 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 Mauana Kea (Doc. 439))

l. DOC-692 (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))

m. DOC-693 (Minute Order No. 69, Order granting J. Leinaala Sleightholm's motion to appear by phone (Doc. 449))

n. DOC-696 (Minute Order No. 70, Order granting Brannon Kealoha motion of clarification reserving rights to participate (Doc. 450))

o. DOC-697 (Minute Order No. 71, Order granting Joseph K. L. Camara's motion to allow witness testimony (Doc. 453))

p. DOC-698 (Minute Order No. 72, Order granting Kahea: The Environmental Alliance's motion to permit live testimony of rebuttal witness Brian Cruz (Doc. 459))

q. DOC-699 (Minute Order No. 73, Order granting in part applicant University of Hawaii at Hilo's motion for leave to present rebuttal testimony (Doc. 461)).

2. Six of the eighteen untimely rulings involved motions by the Temple of Lono. DOCs-674, 681, 686, 688, 689, 690.

B. The plethora of late-filed orders gives the appearance of an attempt to clean up a disorderly and incomplete record created by the Hearing Officer's conduct of the contested case proceeding.

3. An examination of the procedural posture of the matters identified in herein, reveals that these matters constituted motions by parties for which the Hearing Officer had failed to issue timely minute orders. FoF herein 1.

4. There is no excuse in the record for the inordinate number of motions without timely responsive rulings.

5. Many of the minute orders ruled on matters that had long been moot. See DOC-686 (denying Temple of Lono motion to restore cross examination rights after all witnesses had appeared); 689 (denying Temple of Lono motion to subpoena witness Lassiter after the close of the testimonial phase of the proceeding); 690 (denying Temple of Lono motion to subpoena DLNR employee after the close of the testimonial phase of this proceeding); 692 (denying Flores-Case 'Ohana request for subpoena for "John Doe" after the close of the testimonial phase of this proceeding); 693 (granting Leina'ala Sleightholm motion to appear by telephone at hearing that had already been concluded); 697 (granting Joseph K. I. Camara's motion to allow witness testimony after the close of the testimonial phase of this proceeding); 698 (granting KAHEA motion to call rebuttal witness after the close of the testimonial phase of this proceeding); 699 (granting Applicant's motion to call rebuttal witness after the close of the testimonial phase of this proceeding).

6. The practice of issuing minute orders for matters already mooted by the passage of time began earlier than the post-hearing minute orders identified in FoF herein 1. See DOC-590 (ruling on request for pre-hearing status conference after hearing process completed).

C. The minute orders filed after May 30, 2017 are untimely.

DOC Number	Date Filed	Date of Minute Order	Time between filing and ruling
324	October 5, 2016	May 31, 2017	7+ months
364	October 12, 2016	June 2, 2017	7+ months
379	October 15, 2016	June 2, 2017	7+ months
380	October 15, 2016	June 2, 2017	7+ months
381	October 15, 2016	June 2, 2017	7+ months
391	October 18, 2016	June 4, 2017	7+ months
410	November 7, 2016	June 4, 2017	7 months
420	December 7, 2016	June 4, 2017	6 months
427	December 15, 2016	June 5, 2017	5+ months
429	December 16, 2016	June 5, 2017	5+ months
438	January 8, 2017	June 5, 2017	5 months
439	January 8, 2017	June 5, 2017	5 months
447	January 25, 2017	June 5, 2017	4+ months
449	January 26, 2017	June 5, 2017	4+ months
450	January 26, 2017	June 6, 2017	4+ months
453	January 28, 2017	June 6, 2017	4+ months
459	February 13, 2017	June 7, 2017	3+ months
461	February 13, 2017	June 9, 2017	3+ months

7. The plethora of late filed orders confirms that the record was not complete before the Hearing Officer set the May 30, 2017 deadline for the filing of facts and conclusions of law.

**D. The failure of the Hearing Officer to rule in a timely manner
foreclosed objective and impartial rulings**

8. Many of the late-filed orders could not be objectively considered by the Hearing Officer because to grant the motions would require invalidating substantial parts of the proceeding already conducted.
9. Granting DOC-324 would have meant considering DOCs-262, 263, 264 , and 286. DOC 324.
10. DOC-262 was filed on September 17, 2016.
11. Granting DOC-262 now would mean disqualifying the Hearing Officer as of the date the motion was filed.
12. Recusal of the Hearing Officer as of September 17, 2016 would mean that the entire hearing process conducted between October 20 and continuing to this day would be vacated.
13. DOC-263 was filed on September 17, 2016.
14. DOC-263 was a dispositive motion seeking a summary judgment denying the application.
15. Granting DOC-263 now would mean that the entire contested case since that motion was filed would be vacated.
16. DOC-264 was filed on September 17, 2016.
17. DOC-264 was a dispositive motion seeking summary judgment denying the application.
18. Granting DOC-264 now would mean that the entire contested case since that motion was filed would be vacated.
19. DOC-286 was filed on September 26, 2016.
20. DOC-286 sought reasoned explanations for the Hearing Officer's decisions excluding numerous issues the Temple sought to litigate in this contested case.
21. Granting DOC-286 and providing reasoned explanations for the exclusions now would open up the opportunity for the Temple of Lono to file a motion requesting reconsideration of the decisions excluding issues.
22. Reconsideration of the decisions excluding issues could lead to expanding the issues to be heard.

23. Expanding the issues to be heard would require reopening the hearing to take additional evidence.
24. To take additional evidence would require giving the parties an opportunity to put on their case regarding each issue.
25. Addressing issues in this proceeding includes identification of witnesses and exhibits, submission of written direct testimony for each witness, cross-examining each witness by all parties other than the party offering the witness, additional proposed decisions and orders including findings of fact and conclusions of law, and responding to proposed decisions and orders.

III. SUPPLEMENTAL CONCLUSIONS OF LAW

1. The inordinate number of motions which had not been ruled upon prior to the deadline for the filing of proposed findings and conclusions is demonstrative of a lack of competence and/or failure to perform on behalf of the presiding officer.
2. The numerous rulings addressed herein appear to be little more than an attempt to clean up the record to eliminate the evidence of non-performance.
3. The numerous rulings are confirmation that the record was not complete at the time the Hearing Officer set a deadline for the filing of findings of fact and conclusions of law.
4. Setting a deadline for the filing of findings of fact and conclusions of law prior to the record being complete violated HAR §13-1-38(a)
5. The Hearing Officer embraces and perpetuates the ludicrous argument by the telescope proponents that HAR §13-1-38(a) does not mean what it plainly states, i.e. that the scheduling of findings and conclusions is determined by when the record is complete, not by how much time the parties have had to prepare such a filing. See e.g. DOC-646 at 12-13.
6. The assertion by the Hearing Officer that the record does not have to be complete before the parties are compelled to file their findings of fact and conclusions of law prejudices the parties by forcing them to prepare their findings and conclusions without knowing what documents have been received into evidence and/or what the ruling will be on pending motions.
7. The forced filing of findings and conclusions on an incomplete record violated the due process rights of the parties.
8. The Hearing Officer could not impartially decide DOC-262 because granting the motion would invalidate much of the contested case to date. See FOF herein 10-12.

9. Because the Hearing Officer could not decide DOC-262 impartially, the ruling denying the motion was a violation of the Temple's due process rights.
10. The Hearing Officer could not impartially decide DOC-263 because granting the motion would invalidate much of the contested case to date. See FOF herein 13-15.
11. Because the Hearing Officer could not decide DOC-263 impartially, the ruling denying the motion was a violation of the Temple's due process rights.
12. The Hearing Officer could not impartially decide DOC 264 because granting the motion would invalidate much of the contested case to date. See FOF herein 16-18.
13. Because the Hearing Officer could not decide DOC-264 impartially, the ruling denying the motion was a violation of the Temple's due process rights.
14. The Hearing Officer could not impartially decide DOC-286 because granting the motion would require reopening the hearing to address any issues excluded that the Hearing Officer decided, upon reconsideration, should be included. See FoF herein 19-25.
15. To have to reopen the completed hearing process would be a major embarrassment for the Hearing Officer.
16. Because the Hearing Officer could not decide DOC-286 impartially, the ruling denying the motion was a violation of the Temple's due process rights.
17. The fact that one third of the untimely post-hearing minutes orders, see FoF herein 2, addressed motions filed by the Temple of Lono is evidence of bias against the Temple on the part of the Hearing Officer.
18. Not providing meaningful opportunity to seek reconsideration of minute orders at issue herein because the orders addressed moot motions, see FoF herein 5, or could not be decided objectively and impartially, see FoF herein 8-25, violated the Temple's due process rights.
19. Requiring the Temple of Lono to evaluate whether to seek reconsideration of six minute orders, see FoF herein 2, and to prepare such motions within the same time frame, see DOC-552 setting deadlines, available to respond to the extensive findings and conclusions filed by the Applicant/TIO, DOC-671, violated the due process rights of the Temple of Lono.

Dated: June 10, 2017

_____/s/_____
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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 SUPPLEMENT B TO PROPOSED DECISIONS AND ORDERS INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served on the following parties by email on June 10, 2017.

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Dated: June 10, 2017

_____/s/_____
Lanny Alan Sinkin