

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, Hawai'i 96721  
(808) 936-4428  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
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 Application (CDUA) (HA- ) **TEMPLE OF LONO RESPONSES TO**  
3568) The Thirty Meter Telescope at the ) **APPLICANT AND TIO PROPOSED**  
Mauna Kea Science Reserve, Kaohe Mauka,) **FINDINGS OF FACT AND**  
Hamakua District, Island of Hawai'i, ) **CONCLUSIONS OF LAW; COS**  
TMK (3) 4-4-015:009 )  
\_\_\_\_\_ )

**TEMPLE OF LONO RESPONSES TO APPLICANT AND TIO  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. INTRODUCTION**

The Applicant and TIO have filed their joint proposed findings of fact and conclusions of law. DOC-671 (The University of Hawaii at Hilo and TMT International Observatory, LLC's joint [proposed] Findings of Fact, Conclusions of Law, and Decision and Order).<sup>1</sup>

The Applicant/TIO filed 1,014 separate findings of fact and 482 separate conclusions of law. *Id.*

The Hearing Officer provided two weeks in which to file responses. Minute Order 43 (Order setting post-hearing deadlines). DOC-552.

The Temple of Lono herein files its responses to the Applicant/TIO joint filing. All references to findings of fact or conclusions of law are to DOC-671.

<sup>1</sup> The Applicant and TIO filed joint proposed findings and conclusions. DOC-671. That fusion supports the original challenge by various parties to the inclusion of TIO as a party in this proceeding. The University clearly represented the interests of TIO and TIO had no basis for independent standing.

**II. THE PROPER CONTEXT FOR EVALUATING THE APPLICATION AT ISSUE  
INCLUDES THE EIGHT CRITERIA REQUIRED FOR PROJECTS IN A  
CONSERVATION DISTRICT.**

**A. The proposed astronomical facility cannot meet Criterion 6.**

1. The sixth criterion in HAR § 13-5-30(c)(6), states: “The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable[.]”
2. The Applicant/TIO find:  
869. The evidence presented demonstrates that the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon by the TMT Project.
3. The Applicant/TIO find:  
882. The size, dimensions and dome structure were conceived to minimize [sic] and enhance the natural beauty of the surrounding areas to the extent practicable. (emphasis added)
4. The Applicant/TIO go where the truth would never go to proclaim the 18-story high Thirty Meter Telescope will preserve or improve the natural beauty and open space characteristics of the sacred Mauna.
5. Common sense dictates that Applicant/TIO finding 869 is nonsense. Adding a large building to an area that is now open space cannot preserve or improve upon the open space characteristics of that area.
6. Also the Thirty Meter Telescope is not a natural object and therefore cannot and will not preserve or improve upon the natural beauty of the site.
7. The idea that an 18-story industrial building can enhance the natural beauty is an oxymoron.
8. The Applicant/TIO find:  
886. Petitioners and Opposing Intervenors, however, propose to read this criterion to literally require that the TMT Project “improve on the natural beauty or open space of the Northern Plateau.”
9. The Applicant/TIO find:  
887. Such an absolute and restrictive reading would mean no structure could be constructed in the Astronomy Precinct, which would be inconsistent with the subzone use designation.
10. The Applicant/TIO find:

888. Based on Petitioner’s and Opposing Intervenor’s interpretation of HAR 13-5-30(c)(6), no telescope could ever have been built on Mauna Kea, and nothing could be permissibly built on Conservation District land in the State of Hawai‘i.

11. The Applicant/TIO find:

889. Such a reading would render “Astronomy facilities” in the Resource subzone meaningless.

12. The inclusion of astronomy facilities within the potential uses of a resource subzone does not mean that such a facility must be allowed within the Conservation District.

13. The inclusion of astronomical facilities as a potential use of a resource subzone did not exempt such a proposed facility from meeting the requirements of the Conservation district.

14. The consideration of an astronomical facility within a Conservation District certainly does not require the Hearing Officer to be a contortionist trying to get an astronomical facility to fit within the Conservation District requirements, as the Applicant/TIO insist.

15. The Applicant/TIO is arguing that the plain wording of the criterion – “natural beauty and open space characteristics ... **will** be preserved or improved upon, whichever is applicable[.]” (emphasis added) – is to be ignored and amended to read “unless this requirement would prevent the construction of a telescope within the Conservation District.”

16. In an attempt to have the criterion misread, the Applicant/TIO leave out the word will when quoting the criterion. FoF 886.

17. To read the inclusion of the word will as requiring what follows that word, i.e. “preserved or improved upon,” is simply applying the plain intent of the word.

19. The Criterion 6 phrase “whichever is applicable” limits the options to either preserving or improving the natural beauty and open space characteristics of the Conservation District.

20. There is no option in Criterion 6 to degrade the natural beauty or open space characteristics.

21. The Applicant/TIO find:

870. This [sixth]criteria must be analyzed in the context of the purpose and goals of the resource subzone of the conservation district.

22. The Applicant/TIO have the analysis exactly backwards. The use of the

resource subzone must be evaluated in the context of the purposes and goals of the Conservation District.

23. The Applicant/TIO filed a Conservation District Use Application (CDUA), not a resource subzone use application. By its very nature, the context for such an application is the purpose and goals of the Conservation District, not the purpose and goals of the resource subzone within the Conservation District.

24. The attempt in Applicant/TIO finding 870 is to elevate one potential use of a small part of the Conservation District into the dominant perspective from which to assess the application.

25. The Applicant/TIO attempts to shift the analysis away from the purpose and goals of the Conservation District and claim that the purpose and goals of the resource subzone trump the purpose and goals of the Conservation District.

26. There is no support in the law for such an approach to evaluating a CDUA.

27. The Applicant/TIO find:

874. Because certain resources such as a clear night time viewing sky location are available only in particular places, limited alternatives for locating properties requiring those resources would outweigh visual or other impacts, even if such impacts are “obvious.” The location for the TMT Project is dictated by the combination of natural resources that makes the Project’s site uniquely ideal for astronomical observation.

28. The Applicant/TIO find:

898. As set forth above, the decision to locate the TMT Project on Mauna Kea was the result of an extensive worldwide study to evaluate potential locations. A unique combination of environmental factors indicated the summit area of Mauna Kea as the best location for the Project.

29. Findings 874 and 898 focus on Mauna Kea as the best possible site for an astronomical facility.

30. While the Applicant/TIO tries to portray the placement of the Thirty Meter Telescope on Mauna Kea as “dictated,” FoF 874, the fact remains that there are other sites where the Thirty Meter Telescope could be built.

31. The Astronomers have signed a contract for construction of the Thirty Meter Telescope in the Canary Islands, should the Hawaiian site not work out for any reason.

32. The Hearing Officer can take judicial notice of an article just published regarding the alternative site in the Canary Islands. <http://www.space.com/37067-canadian-astronomers-consider-megatelescope-move.html#sthash.RfVoGUBT.gbpl>

33. The article states:

The researchers discuss the fact that the Mauna Kea location is strongly **preferred** scientifically to La Palma, but that La Palma could be a **valid choice** to minimize delay and be one of the first to turn eyes to the sky. (emphasis added).

34. The article also states:

The main drawbacks of ORM are that it is warm and relatively wet, which makes [mid-infrared] observations all but impossible," Michael Balogh, chairman of the CASCA/ACURA TMT Advisory Committee that authored the report, told Motherboard. "That means it takes longer to achieve the same science compared with [Mauna Kea] or Chile. **But for the most part, the same science is still achievable.**" (emphasis added)

35. Regarding coverage of the northern hemisphere, the article states:

A Northern Hemisphere location, such as Mauna Kea or La Palma, would give the new telescope the ability to see targets not visible from the other two locations and would work in coordination with other Northern Hemisphere telescopes, the researchers wrote.

36. What is missing from the analysis is the unique nature of Mauna Kea as a spiritual site for Native Hawaiians and how that uniqueness supersedes the uniqueness to the astronomical community.

37. For Native Hawaiians, there is no such option, preferred or otherwise.

38. The unique characteristics of Mauna Kea for Native Hawaiians are:

- a. Mauna Kea is the highest mountain in the world.
- b. Mauna Kea is also, therefore, the highest mountain in Polynesia.
- c. Mauna Kea is acknowledged as especially sacred throughout Polynesia.
- d. The Native Hawaiian spiritual practices on Mauna Kea are in many instances unique to that location, i.e. there is no alternative "Canary Islands" for Native Hawaiians.
- e. Mauna Kea cannot be replicated in any other location.
- f. Native Hawaiians cannot relocate to continue their practices.

39. The Applicant/TIO find:

873. The visual landscape in the summit area of Mauna Kea has already been substantially altered and impacted. Ex. A-1/R-1 at 7-1 to 7-2; WDT Hayes at 4-5. It will remain so with or without the TMT Project. The TMT Project, and its visual impacts, are assessed in that context. Adding the TMT to the existing physical context will not result in a substantial adverse impact. Clearly, the rules and regulations allowing the use recognize that astronomical observatories are typically large buildings that house

telescopes.

40. Here the Applicant/TIO is trying to shift the focus away from the eight Criteria to the damage already done by the Astronomers to the sacred Mauna.

41. The basis argument presented by the Astronomers is that they have trashed the sacred space so significantly that the addition of the largest telescope ever built will hardly be noticeable.

42. The more legally appropriate analysis would be that the substantial, adverse, and significant impacts on the area by previous astronomical intrusion calls for cessation of any further astronomical development.

## **II. THE APPLICANT/TIO ANALYSIS OF DESECRATION IS NOT SUPPORTED BY THE FACTS OR THE LAW.**

43. On September 17, 2016, the Temple of Lono filed its Motion for Summary Judgment (Desecration). DOC-264.

44. On March 19, 2017, the Temple of Lono filed its motion to Board of Land and Natural Resources to dismiss HA-3568. DOC-516. That motion also relied upon the desecration statute. HRS § 711-1107.

45. On May 27, 2017, the Hearing Officer denied the Temple's initial desecration-based motion. DOC-654.

46. The Board of Land and Natural Resources never responded to the Temple's desecration motion.

47. The Applicant/TIO addressed the desecration issue in various filings. See e.g. DOCs-473, 484.

48. The Applicant/TIO addressed the desecration issue in their findings of fact 392 to 407. DOC-671.

49. The Applicant/TIO find:

393. The Petitioners' and Opposing Intervenors' claims that development of the TMT Project constitutes "desecration" under HRS § 711-1107 is meritless.

50. The Applicant/TIO find:

394. The BLNR does not have jurisdiction to adjudicate violations of the Hawai'i Penal Code. Hawai'i law is very clear that administrative agencies have only those powers expressly granted by statute. *Morgan v. Planning Dep't*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004). Nothing in the Hawai'i Penal Code or the BLNR's enabling statutes provides the BLNR with

jurisdiction over criminal offenses. Instead, HRS § 603-21.5 confers upon the circuit courts of the State of Hawai'i jurisdiction over all "criminal offenses cognizable under the laws of the State," except for those offenses "otherwise expressly provided." On the basis of the foregoing, the alleged desecration claims fail.

51. That Applicant/TIO formulation of the issue presumes that some action has taken place, i.e. that the Temple is alleging a violation of the statute has occurred.

52. That formulation is deliberate misdirection.

53. The Temple is **not** seeking to have a criminal violation **adjudicated** in this proceeding.

54. The Temple is arguing that the application in this proceeding is seeking a permit to violate the law, that the Hearing Officer can make a determination on that issue, and that the Hearing Officer can find as a matter of law that the application must be denied or dismissed **before** any action can take place.

55. The Temple further argues that the Hearing Officer has an **obligation** to dismiss the application or become complicit in violating the law.

56. If someone filed an application with the BLNR seeking a conservation district use permit to excavate a burial area and remove artifacts found there to be sold later, the BLNR would have no problem finding that the request was seeking a permit to violate the law. In fact, the BLNR would be required to deny the permit or be found complicit in a conspiracy to break the law.

57. The pretense that the Hearing Officer, a retired judge, cannot recognize and respond to an application to break the law is ludicrous.

58. The Applicant/TIO find:

395. Even if the desecration claim could be considered on its merits, there is simply no evidence whatsoever of a violation, and the claim fails as a matter of law.

59. The Applicant/TIO simply refuse to acknowledge that the challenge is to an application for permission to commit a violation of law, **not** to "a violation."

60. The Applicant/TIO find:

396. HRS § 711-1107 lists the types of activities that constitute desecration as "defacing, damaging, polluting, *or otherwise physically mistreating*" a site. *Id.* (emphasis added).

61. The Applicant/TIO find:

399. Thus, the general clause in HRS § 711-1107(2) that desecration requires

conduct of “otherwise physically *mistreating*” a site makes it clear that the more specific listed conduct of “defacing, damaging, [and] polluting” must be motivated by the ill-intent of “mistreatment” and/or be unauthorized.

62. The Applicant/TIO find:

400. This ill-intent of mistreatment requires “conscious object to engage in certain conduct or cause a certain result.” Commentary to HRS § 702-206(1).

63. The Applicant/TIO find:

401. Accordingly, the *mens rea* for the crime of desecration necessarily requires a specific intent to mistreat a protected site. HRS § 711-1107(2).

64. The Applicant/TIO finds and proposes:

403. There is no evidence in this matter that an entity or “person” involved in this proceeding has the specific ill-intent to mistreat Mauna Kea through defacing, damaging or polluting the mountain through the development of the TMT Project, and the Hearing Officer specifically finds that the University and TIO have no such intent.

65. While the Applicant/TIO pretends that there is no animus involved in the selection of Mauna Kea, that position is refuted by the risk assessment that informed the Applicant/TIO that the selection of Mauna Kea would be poorly received in the community. See DOC-651 (Temple of Lono Proposed Decisions and Orders including Findings of Fact and Conclusions of Law) FoF 117-119.

66. Knowing full well what the risk assessment said, the Applicant/TIO proceeded to select Mauna Kea anyway.

67. If *mens rea* was relevant to this proceeding and the desecration issue, which it is not, the risk assessment report would be sufficient to demonstrate the requisite intent.

68. There is no need for the Hearing Officer to address the *mens rea* issue in order to conclude that approval of the application would be approving a plan to violate the law.

69. The Applicant/TIO find:

407. The foregoing sufficiently addresses Petitioners’ and Opposing Intervenors’ claims of alleged desecration, without the need to make any findings or conclusions regarding any other element of the statute, including whether the summit of Mauna Kea meets any of the definitions under HRS § 711-1107(1)(a), (b) or (c). Petitioners’ and Opposing Intervenors’ alleged claims are not within BLNR’s jurisdiction, are unsupported by any evidence, and are therefore rejected.

70. Having erroneously structured their response to what they term an “allegation



of desecration” around the irrelevant issue of *mens rea*, the Applicant/TIO have defaulted on proposing findings and conclusions “regarding any other element of the statute, including whether the summit of Mauna Kea meets any of the definitions under HRS § 711-1107(1)(a), (b) or (c).” Id.

71. In doing so, the Applicant/TIO have defaulted on proposing any findings of fact or conclusion of law regarding the elements of the desecration statute.

72. As a result, the findings and conclusions submitted by the Temple on the desecration issue, DOC-561 FoF 73-110; 117-123; CoL 267-269; 270-276, stand undisputed.

73. That Mauna Kea is a place of worship is undisputed in the record.

74. That Mauna Kea is a place of burials is undisputed in the record.

75. That Mauna Kea is an object of veneration is undisputed in the record.

76. That the construction of the Thirty Meter Telescope will damage Mauna Kea is undisputed in the record.

77. That the selection of Mauna Kea as the site for the Thirty Meter Telescope would produce public outrage is undisputed in the record.

78. Given that the elements of the desecration statute would be satisfied, if the permit were granted, the permit must be denied or dismissed.

79. The Temple of Lono herein incorporates by reference all decisions and orders including findings of fact and conclusions of law filed by all parties other than the Applicant and TIO.

Dated: June 10, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin  
Lay Representative for Temple of Lono

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, Hawai'i 96721  
(808) 936-4428  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)

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 RESPONSES TO APPLICANT AND TIO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was served on the following parties by email on June 11, 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 Pisciotto-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

<[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)>, Yuklin Aluli <[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)>, Dexter Kaiama <[cdexk@hotmail.com](mailto:cdexk@hotmail.com)>

and will be served by expedited mail on June 12, 2017 to:

1. Dwight J. Vicente  
2608 Ainaola Drive  
Hilo, Hawaiian Kingdom

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

3. Michael Cain, Custodian of Records  
Conservation and Coastal Lands  
1151 Punchbowl, Room 131  
Honolulu, Hawai'i 96813

Dated: June 11, 2017

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