

CARLSMITH BALL LLP

IAN L. SANDISON 5597  
JOHN P. MANAUT 3989  
LINDSAY N. MCANEELEY 8810  
ASB Tower, Suite 2100  
1001 Bishop Street  
Honolulu, HI 96813  
Tel No. 808.523.2500  
Fax No. 808.523.0842  
[isandison@carlsmith.com](mailto:isandison@carlsmith.com)  
[JPM@carlsmith.com](mailto:JPM@carlsmith.com)  
[lmcaneley@carlsmith.com](mailto:lmcaneley@carlsmith.com)

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED  
OFFICE OF CONSERVATION  
AND COASTAL LANDS

2017 JUN 30 P 3 13

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT  
HILO'S OPPOSITION TO FLORES-CASE  
'OHANA'S MOTION FOR  
RECONSIDERATION OF MINUTE  
ORDER NO. 85 [DOC. 752];  
CERTIFICATE OF SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO  
FLORES-CASE 'OHANA'S MOTION FOR RECONSIDERATION OF  
MINUTE ORDER NO. 85 [DOC. 752]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") submits its opposition  
to the *Motion for Reconsideration of Minute Order No. 85*, filed by Flores-Case 'Ohana on June  
24, 2017 [Doc. 752] (the "Motion").

**I. INTRODUCTION**

The Motion makes clear that the sole basis for reconsideration is the Flores-Case  
'Ohana's dissatisfaction with the Hearing Officer's denial of the relief sought in the Flores-Case  
'Ohana's *Motion for Disclosure Re Spoliation of Evidence* [Doc. 676] ("Underlying Motion").

Disagreement with the Hearing Officer’s ruling is an insufficient and specious basis for reconsideration. The Motion does not identify any newly-discovered evidence or legal arguments that could not have been raised previously. The Motion simply block-quotes its prior briefing and poses inflammatory questions with no citations to legal authority. Rather than address the evidentiary failings of its Underlying Motion, the Flores-Case ‘Ohana resorts to unfounded accusations that the Hearing Officer failed to fully consider that Underlying Motion, which was denied because it failed to meet the elements of a spoliation claim. The Flores-Case ‘Ohana’s effort to cast the blame for its lack of proof on the Hearing Officer is improper and should be rejected.

Lastly, the Flores-Case ‘Ohana appears to misunderstand that simply demanding relief is not the same as requesting leave to file an otherwise procedurally improper motion. Nonetheless, the Underlying Motion was denied on *both* procedural and substantive grounds. Therefore, the Flores-Case ‘Ohana’s argument that it sought leave to file its untimely Underlying Motion is irrelevant and does not serve as a basis for reconsideration.

## II. ARGUMENT

### A. THE HEARING OFFICER PROPERLY DENIED THE UNDERLYING MOTION AS AN ATTEMPT TO SEEK FURTHER RECONSIDERATION

The Flores-Case ‘Ohana’s assertion that the Hearing Officer “mistakenly characterized the [Underlying Motion] as being a ‘thinly veiled request to reconsider Minute Order No. 44’” is contradicted by the clear language of the motion itself. The Flores-Case ‘Ohana does not dispute that, among other demands for relief, its *Motion to Reconsider Minute Order No. 44 and Notice of Spoliation of Evidence* [Doc. 577] asserted claims of spoliation and “demand[ed] a full disclosure and listing of exhibits such as Doc. R-7 and R-8 that were switched after the initial documents were filed in the Evidentiary Hearing Submittals.” *Id.* at 7. Minute Order No. 51

[Doc. 647] rejected the Flores-Case ‘Ohana’s spoliation claims, and the resulting Amended Minute Order No. 44 [Doc. 649] barred further reconsideration. Nonetheless, the Underlying Motion alleged the spoliation claims and contained—nearly verbatim—the same demand for relief: “The FLORES-CASE ‘OHANA demands a full disclosure and listing of exhibits such as Doc. R-7 and others that were switched after the initial documents were filed in the Evidentiary Hearing Submittals.” Doc. 676 at 5. The Flores-Case ‘Ohana cannot sidestep Amended Minute Order No. 44’s prohibition on attempts to seek further reconsideration simply by dressing up its Underlying Motion as a “Motion for Full Disclosure Re Spoliation of Evidence.” The Underlying Motion unquestionably seeks to relitigate issues ruled upon in Minute Order No. 51 and violates Amended Minute Order No. 44. Therefore, the Hearing Officer properly denied the Underlying Motion as improper.

B. THE MOTION FAILS TO ALLEGE ANY NEW EVIDENCE OR ARGUMENTS THAT WARRANT RECONSIDERATION

A motion for reconsideration is not a vehicle for a dissatisfied litigant to re-litigate old matters or to raise arguments or evidence that could have been raised during the earlier adjudicated motion. *See Cho v. State*, 115 Hawai‘i 373, 384, 168 P.3d 17, 28 (2007); *State v. Oughterson*, 99 Hawai‘i 244, 255, 54 P.3d 415, 426 (2002). Mere disagreement with an adverse ruling is an insufficient basis for reconsideration. *See White v. Sabatino*, 424 F.Supp.2d 1271, 1274 (D. Haw. 2006). Yet mere disagreement is the sole argument set forth in the Motion. The Motion offers no new evidence or argument that could not have been raised previously. Indeed, a substantial portion of the Motion is devoted to block-quotes taken from the Underlying Motion. *See Motion* at 3. The Motion then assumes that because the Hearing Officer found that the Flores-Case ‘Ohana “fail[ed] to provide evidentiary support for [its] allegations of spoliation,” she must have “failed to examine the[] exhibits, declaration and memorandum in support” of the

Underlying Motion. *Id.* That accusation is baseless and devoid of merit.

Minute Order No. 85 clearly states that the Hearing Officer considered the Underlying Motion and “all related submissions from counsels and/or parties, all applicable law, [and] the entire record.” Doc. 748 at 5. Based on that record, the Hearing Officer found that the Flores-Case ‘Ohana failed to adduce credible and sufficient evidence to support its spoliation claims. Contrary to the Flores-Case ‘Ohana’s assertion, a rejection of the Underlying Motion’s arguments and evidence does not support a conclusion that the Hearing Officer failed to consider the evidence and arguments presented in that motion. Rather, the denial of the Underlying Motion is simply the result of the Flores-Case ‘Ohana’s own failure to carry its evidentiary burden. Therefore, the Flores-Case ‘Ohana’s claim that the Hearing Officer failed to consider the evidence and arguments in the Underlying Motion is without basis and contradicts the plain language of Minute Order No. 85.

Indeed, the Motion cites no legal authority and provides no credible rationale that shows the Hearing Officer’s denial of the Underlying Motion was improper. As explained in the University’s Opposition to the Underlying Motion [Doc. 700]—which the University hereby incorporates by reference—the Underlying Motion failed to provide any evidence of intent to destroy or manipulate evidence and also failed to demonstrate any prejudice to the Flores-Case ‘Ohana’s ability to prove its case. Doc. 700 at 6-8. The current Motion does not mention the standards for proving spoliation, much less attempt to remedy the evidentiary deficiencies that were fatal to the Underlying Motion. Mr. Ching’s joinder [Doc. 755], which discusses purported differences in R-7, similarly does not allege or show any malicious intent to destroy or manipulate evidence, or address how such differences prejudice his or any other party’s ability to

prove their claims.<sup>1</sup> *See generally* Doc. 755. Therefore, the Hearing Officer properly denied the Underlying Motion, and neither Mr. Ching nor the Flores-Case ‘Ohana have articulated any legitimate basis that would warrant reconsideration of that denial.

C. THE FLORES-CASE ‘OHANA DID NOT SEEK LEAVE TO FILE ITS UNDERLYING MOTION

In its Motion, the Flores-Case ‘Ohana states that it “clearly articulated leave sought from the Hearing Officer in this matter as noted in section 7 of the *Motion for Full Disclosure* [Doc. No. 676].” Motion at 4. To the extent that the Flores-Case ‘Ohana is arguing that it was entitled to file its Underlying Motion simply because it had requested leave, that argument is fundamentally flawed for multiple reasons.

*First*, the Flores-Case ‘Ohana misrepresents section 7 of its Underlying Motion. Section 7 of the Underlying Motion simply states the Flores-Case ‘Ohana’s “demands [for] full disclosure and listing of exhibits” and “demand[] for other corrective actions.” Underlying Motion at 5. A demand for relief is not the same as a request for leave to file an otherwise improper motion. Nowhere in section 7 or anywhere else in the Underlying Motion does the Flores-Case ‘Ohana request leave from the Hearing Officer to file its motion. Therefore, the Flores-Case ‘Ohana’s assertion that it properly sought leave to file the Underlying Motion is unsupported.

*Second*, even if the Flores-Case ‘Ohana’s demands for relief could be construed as a request for leave to file an otherwise improper motion, merely asking for leave to file does not mean Flores-Case ‘Ohana is entitled to it. Under Hawai‘i Administrative Rule § 13-1-32, the Hearing Officer has the power to, *inter alia*, “fix times for submitting documents, briefs, and

---

<sup>1</sup> The University also notes that the Hawai‘i Court Record Rules cited in Mr. Ching’s joinder are inapplicable to an administrative proceeding. Furthermore, Mr. Ching’s attempt to assert a new legal argument that could have been raised earlier is an improper use of a motion for reconsideration.

dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.” In other words, the Hearing Officer has broad discretion to not only set limitations on the filing of motions—including filing deadlines and limits on attempts to seek further reconsideration—but she has broad authority as to how to dispose of motions that do not comply with those limits. Therefore, the Hearing Officer acted within her enumerated authority when she rejected the Underlying Motion as untimely.

*Third*, the Hearing Officer fully considered the Underlying Motion and denied it on *both* procedural and substantive grounds. In Minute Order No. 85, the Hearing Officer found that, in addition to the procedural defects of the Underlying Motion, it also “fails as a matter of law because movant fails to provide evidentiary support for [its] allegations of spoliation.” Doc. 748 at 5. Indeed, the Flores-Case ‘Ohana emphasizes the Hearing Officer’s substantive ruling in its present Motion. Motion at 2-3. Thus, whether the Flores-Case ‘Ohana sought leave in the Underlying Motion is irrelevant because the Hearing Officer already ruled on the merits.

### **III. CONCLUSION**

For these reasons, the University respectfully submits that the Motion has failed to establish any grounds for reconsideration of Minute Order No. 85 and therefore requests that the Motion be denied.

DATED: Honolulu, Hawai‘i, June 30, 2017.



IAN L. SANDISON  
JOHN P. MANAUT  
LINDSAY N. MCANEELEY

Attorneys for Applicant  
UNIVERSITY OF HAWAI‘I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal  
Lands ("OCCL")  
[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)

MICHAEL CAIN  
Office of Conservation and Coastal Lands  
1151 Punchbowl Street, Room 131  
Honolulu, HI 96813  
[michael.cain@hawaii.gov](mailto:michael.cain@hawaii.gov)  
*Custodian of the Records*  
*(original + digital copy)*

DAVE M. LOUIE, ESQ.  
CLIFFORD K. HIGA, ESQ.  
NICHOLAS R. MONLUX, ESQ.  
Kobayashi Sugita & Goda, LLP  
[dml@ksglaw.com](mailto:dml@ksglaw.com)  
[ckh@ksglaw.com](mailto:ckh@ksglaw.com)  
[nrm@ksglaw.com](mailto:nrm@ksglaw.com)  
*Special Deputy Attorneys General for*  
*ATTORNEY GENERAL DOUGLAS S. CHIN,*  
*THE DEPARTMENT OF THE ATTORNEY*  
*GENERAL, and DEPUTY ATTORNEYS*  
*GENERAL IN THEIR CAPACITY AS*  
*COUNSEL FOR THE BOARD OF LAND AND*  
*NATURAL RESOURCES and HEARING*  
*OFFICER*

WILLIAM J. WYNHOFF, ESQ.  
Deputy Attorney General  
[bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
*Counsel for the BOARD OF LAND AND*  
*NATURAL RESOURCES*

J. DOUGLAS ING, ESQ.  
[douging@wik.com](mailto:douging@wik.com)  
ROSS T. SHINYAMA, ESQ.  
[rshinyama@wik.com](mailto:rshinyama@wik.com)  
SUMMER H. KAIAWE, ESQ.  
[skaiawe@wik.com](mailto:skaiawe@wik.com)  
Watanabe Ing LLP  
*Counsel for TMT INTERNATIONAL  
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA  
[kualiic@hotmail.com](mailto:kualiic@hotmail.com)

HARRY FERGERSTROM  
P.O. Box 951  
Kurtistown, HI 96760  
[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)  
*(via email & U.S. mail)*

WILLIAM FREITAS  
[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)

TIFFNIE KAKALIA  
[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)

BRANNON KAMAHANA KEALOHA  
[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)

GLEN KILA  
[makakila@gmail.com](mailto:makakila@gmail.com)

JENNIFER LEINA 'ALA SLEIGHTHOLM  
[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)  
[leina.ala.s808@gmail.com](mailto:leina.ala.s808@gmail.com)

LANNY ALAN SINKIN  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for the Temple of Lono*

MAUNA KEA ANAINA 'HOU  
c/o Kealoha Pisciotta  
[keomaivg@gmail.com](mailto:keomaivg@gmail.com)

LINCOLN S.T. ASHIDA, ESQ.  
[lsa@torkildson.com](mailto:lsa@torkildson.com)  
NEWTON J. CHU, ESQ.  
[njc@torkildson.com](mailto:njc@torkildson.com)  
Torkildson, Katz, Moore, Hetherington &  
Harris  
*Counsel for PERPETUATING UNIQUE  
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE  
2608 Ainaola Drive  
Hilo, HI 96720-3538  
[dwightjvicente@gmail.com](mailto:dwrightjvicente@gmail.com)  
*(via email & U.S. mail)*

RICHARD L. DELEON  
[kekaukike@msn.com](mailto:kekaukike@msn.com)

CINDY FREITAS  
[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)

C. M. KAHO'OKAHI KANUHA  
[kahookahi.kukiaimauna@gmail.com](mailto:kahookahi.kukiaimauna@gmail.com)

KALIKOLEHUA KANAEL  
[akulele@yahoo.com](mailto:akulele@yahoo.com)

MEHANA KIHAI  
[uhiwai@live.com](mailto:uhiwai@live.com)

STEPHANIE-MALIA: TABBADA  
[s.tabbada@hawaiiantel.net](mailto:s.tabbada@hawaiiantel.net)

DONNA H. KALAMA, ESQ.,  
Deputy Attorney General  
[donna.h.kalama@hawaii.gov](mailto:donna.h.kalama@hawaii.gov)  
*Counsel for the Honorable DAVID Y. IGE, and  
BLNR Members SUZANNE CASE and  
STANLEY ROEHRIG*



E. KALANI FLORES  
[ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

DEBORAH J. WARD  
[cordylinicolor@gmail.com](mailto:cordylinicolor@gmail.com)

YUKLIN ALULI, ESQ.  
Law Offices of Yuklin Aluli  
[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)

DEXTER KAIAMA, ESQ.  
Law Offices of Dexter K. Kaiama  
[cdexk@hotmail.com](mailto:cdexk@hotmail.com)

*Counsel for KAHEA: THE ENVIRONMENTAL  
ALLIANCE*

IVY MCINTOSH  
[3popoki@gmail.com](mailto:3popoki@gmail.com)  
*Witness for the Hearing Officer*

PATRICIA P. IKEDA  
[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)  
*Witness for the Hearing Officer*

CRYSTAL F. WEST  
[crystalinx@yahoo.com](mailto:crystalinx@yahoo.com)  
*Witness for Hearing Officer*

CLARENCE KUKAUAKAHI CHING  
[kahiwaL@cs.com](mailto:kahiwaL@cs.com)


B. PUALANI CASE  
[puacase@hawaiiantel.net](mailto:puacase@hawaiiantel.net)

PAUL K. NEVES  
[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com)

WILMA H. HOLI  
P. O. Box 368  
Hanapepe, HI 96716  
[w\\_holi@hotmail.com](mailto:w_holi@hotmail.com)  
*Witness for the Hearing Officer  
(via email & U.S. mail)*

MOSES KEALAMAKIA, JR.  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Witness for the Hearing Officer*

DATED: Honolulu, Hawai'i, June 30, 2017.

  
\_\_\_\_\_  
IAN L. SANDISON  
JOHN P. MANAUT  
LINDSAY N. MCANEELEY

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO