

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF	)	Case No. HA-22-02
	)	
	)	Temple of Lono
The Petition of Mauna Kea Hui for Declaratory	)	Brief in Response to
Order Filed May 24, 2021	)	Petitioners' Motion
	)	
	)	CERTIFICATE OF SERVICE

TMT offers the following actions that TMT considers sufficient to demonstrate that construction of TMT has begun.

1. Testing of GPS equipment
2. Partial survey of an access road
3. Survey of underground fiber optic and electrical lines
4. Inspection for invasive species
5. A “kickoff meeting” between TMT staff and contractors to discuss construction
6. Removal of an ahu.

The determination of whether the TMT has begun construction should rely on common sense and be guided by a reasonable person standard.

Common sense says that merely testing GPS equipment is hardly an activity that can be considered to fall within the boundaries of “construction.”

Similarly, surveying an access road is a non-invasive action that in no way changes the nature or characteristics of the property, i.e. demonstrates no evidence of construction.

Surveying fiber optic and electrical lines that are already in place would more appropriately be termed “taking inventory” than initiating construction.

A walk about to see whether any invasive species are found is similarly a “taking inventory” type of action.

While the meeting between TMT staff and the contractors is termed a “kick off” meeting, kick offs are normally followed by the initiation of the game. The game of constructing the TMT was not begun at that meeting or subsequently.

There was no follow on activity subsequent to the very limited activity argued by the TMT as beginning construction. The actions proffered as a basis for finding construction has begun did

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not initiate a continuing construction process. Those actions are isolated visits to the construction site.

For TMT to use the desecration of an ahu as proof construction of TMT was begun only reinforces the nature of the TMT's complete insensitivity to Native Hawaiian objections to the project. The destruction of the ahu is evidence of racism or religious bigotry, not construction.

TMT applied for an extension of the permit after some of the actions at issue now had already been taken. Now TMT is arguing that those same acts are evidence that construction has begun. TMT cannot have it both ways. Either those acts did not demonstrate that construction had begun, so the first extension was necessary, or they did demonstrate construction had begun, so the application for the first extension was unnecessary.

Common sense (and the law) preclude DLNR using the activities they earlier found to be a basis for extending the permit expiration date to also be used to argue that construction already began.

The TMT argument is that these activities taken as a whole provide sufficient evidence to conclude that construction has begun. The more any of the six arguments are found to be insufficient to be considered as supporting the premise that construction has begun, the weaker the TMT position becomes.

A reasonable person evaluating the proffered actions would find each of them to be a de minimis activity not satisfying the requirements of a State-granted permit.

Indeed an examination of each proffered action finds them to be insufficient individually and cumulatively.

Construction has not begun and any further extension is unwarranted.

Dated: October 31, 2021

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Lanny Sinkin  
Representing the Temple of Lono

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the following documents:

1. Temple of Lono Brief in Response to Petitioner's Motion

was duly served upon the following parties, by email, on October 31, 2021

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