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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

LAND/TRANS. DIV.
DEPARTMENT OF
ATTORNEY GENERAL

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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 District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009	**MOTION TO HAVE TMT INTERNATIONAL OBSERVATORY, LLC ADMITTED AS A PARTY IN THE CONTESTED CASE HEARING; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE**

MOTION TO HAVE TMT INTERNATIONAL OBSERVATORY, LLC ADMITTED AS A PARTY IN THE CONTESTED CASE HEARING

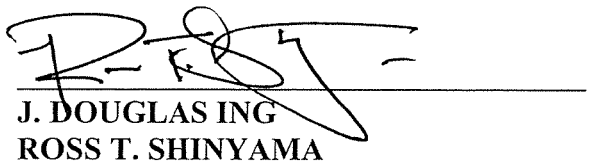
Comes Now, TMT International Observatory, LLC ("TIO), by and through its undersigned counsel, and hereby respectfully moves the Board of Land and Natural Resources or the Hearing Officer for an order admitting TIO as a party to the contested case hearing pursuant to Hawai'i Administrative Rules ("HAR") § 13-1-31(b)(2). The Motion should be granted because:

(1) TIO clearly has a property interest in the subject land as it has a contractual right under its sublease and/or Scientific Cooperation Agreement with the University of Hawai'i to construct and operate the TMT Project on Mauna Kea and/or is responsible for designing and constructing the TMT Project and fulfilling mitigation measures.

(2) TIO will be so directly and immediately affected by the contested case hearing that its interest is clearly distinguishable from the general public. The contested case hearing directly and immediately affects TIO's contractual right and/or responsibility to construct and operate the TMT Project on Mauna Kea. This contractual right or responsibility is unique to TIO and is not shared by the general public. In addition, TIO's interest is unique from the general public because no one in the general public can design or construct the TMT Project, and no one in the general public stands to lose more if the contested case hearing does not result in the issuance of a Conservation District Use Permit authorizing the construction of the TMT Project to proceed.

This Motion is made pursuant to HAR § 13-1-31(b)(2) and all other applicable rules of practice and procedure, and is based upon the attached Memorandum in Support of Motion, the attached exhibit, and the entire record and files herein.

DATED: Honolulu, Hawaii, April 8, 2016.



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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Memorandum in Support of its Motion to Have TMT International Observatory, LLC Admitted as a Party in the Contested Case Hearing. The Motion should be granted pursuant to Hawai'i Administrative Rules ("HAR") § 13-1-31(b)(2) because:

(1) TIO clearly has a property interest in the subject land as it has a contractual right under its sublease and/or Scientific Cooperation Agreement with the University of Hawai'i to construct and operate the TMT Project on Mauna Kea and/or is responsible for designing and constructing the TMT Project and fulfilling mitigation measures.

(2) TIO will be so directly and immediately affected by the contested case hearing that its interest is clearly distinguishable from the general public. The contested case hearing directly and immediately affects TIO's contractual right and/or responsibility to construct and operate the TMT Project on Mauna Kea. This contractual right or responsibility is unique to TIO and is not shared by the general public. In addition, TIO's interest is unique from the general public

because no one in the general public can design or construct the TMT Project, and no one in the general public stands to lose more if the contested case hearing does not result in the issuance of a Conservation District Use Permit authorizing the construction of the TMT Project to proceed.

I. BRIEF BACKGROUND

Procedural Background

1. Over seven days in August and September 2011, a contested case hearing regarding the construction of the Thirty-Meter Telescope Project on Mauna Kea ("TMT Project") was held before a Hearing Officer. TIO was not a party to this earlier contested case proceeding as it was not established until years later in May 2014. See infra.

2. On April 12, 2013, the Board of Land and Natural Resources ("BLNR" or "Board") entered its Findings of Fact, Conclusions of Law, and Decision and Order ("BLNR's FOFs/COLs/D&O") and issued a CDUP for the construction of the TMT Project.

3. Mauna Kea Anaina Hou, et al. (collectively, "Appellants") appealed BLNR's FOFs/COLs/D&O to the Third Circuit Court of the State of Hawai'i. On May 5, 2014, the Third Circuit Court entered its decision and order affirming BLNR's FOFs/COLs/D&O and entered final judgment in favor of BLNR, et al.

4. The Appellants appealed the Third Circuit Court's final judgment affirming BLNR's FOFs/COLs/D&O to the Supreme Court of Hawai'i. On December 2, 2015, the Hawai'i Supreme Court issued its opinion in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, SCAP-14-0000873 (December 2, 2015) vacating the Third Circuit Court's final judgment and the CDUP. The Hawai'i Supreme Court remanded the case "so that a

contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with [the Court's] opinion." Id. at 6.

5. On December 29, 2015, the Hawai'i Supreme Court entered its Judgment on Appeal remanding the case to the Third Circuit Court "to further remand to the [Board] so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with the opinion." Judgment on Appeal, dated December 29, 2015 at 2.

6. On February 22, 2016, the Third Circuit Court entered its Order for Remand vacating BLNR's FOFs/COLs/D&O and "remand[ing] this matter to the Board of Land and Natural Resources so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with the opinion." Order for Remand, dated February 22, 2016 at 2.

TIO, the TMT Project, and the Sublease

7. TIO is a non-profit organization that was established in May 2014 to construct and operate the TMT Project. TIO's members include The Regents of the University of California ("UC"), the California Institute of Technology ("Caltech"), the National Institutes of Natural Sciences of Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the National Research Council of Canada. The Association of Universities for Research in Astronomy is a TIO associate. Major funding for the TMT Project has also been provided by the Gordon & Betty Moore Foundation.

8. The TMT Project is a collaboration among UC, Caltech, and the above-identified national governmental research organizations to design, develop, construct, and operate a thirty-meter primary telescope within the Mauna Kea Science Reserve on the Mauna Kea summit in

cooperation with the University of Hawai'i ("University"). It is the only Next Generation Large Telescope or Giant Segmented Mirror Telescope planned in the northern hemisphere or in the United States. It is expected to push the frontier of technology, providing an advanced and powerful ground-based observatory capable of carrying out cutting-edge astronomical research for many years.

9. On July 28, 2014, the University and TIO entered into the Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and The University of Hawaii ("Sublease"). See Item D-8 of the June 13, 2014 Minutes for the Meeting of the Board of Land and Natural Resources; Item D-19 of the June 27, 2014 Minutes for the Meeting of the Board of Land and Natural Resources. Under the Sublease, the University subleased a portion of the Mauna Kea Science Reserve to TIO to construct and operate the TMT Project. TIO as a result has a contractual right under the Sublease to construct and operate the TMT Project on Mauna Kea. TIO has been designing and building the component parts for the TMT Project and is the only entity that can construct and operate the TMT on Mauna Kea.

10. The TMT Project is committed to the stewardship of Mauna Kea and will serve as a model of sustainable astronomy. Recognizing the natural beauty and cultural significance of Mauna Kea, the location and design of the TMT Project minimizes visual and physical impacts of the telescope and incorporates sustainable and energy efficient technologies, as the result of a decade long process involving community consultation, consensus building, design refinement and cooperative problem solving.

11. TIO's members have been working on the actual components of the TMT for at least the last two and a half years. In a truly global effort, and in reliance upon the earlier issued CDUP, work on the TMT has been performed in California, Japan, India, China, and Canada.

12. TIO's members have already made cash and in-kind contributions to the TMT Project valued at more than $304 million as of December 2015.

II. DISCUSSION

TIO should be admitted as a party in the contested case hearing as it clearly has a property interest in the subject land as it has a contractual right and responsibility to construct and operate the TMT Project on Mauna Kea. TIO should also be admitted as a party because it will be so directly and immediately affected by the contested case hearing that its interest is clearly distinguishable from the general public.

HAR § 13-1-31(b)(2) provides:

> The following persons or agencies **shall be admitted as parties** . . . [a]ll persons who have **some property interest in the land** . . . or who otherwise can demonstrate that they will be **so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application**."

Id. (emphases added).

HAR § 13-1-2 defines "Person" to "mean[] as appropriate individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies." HAR § 13-1-2.

TIO clearly has "some property interest in the land" as the Sublessee under the Sublease. Under the Sublease, the University subleased a portion of the Mauna Kea Science Reserve to TIO to construct and operate the TMT Project. TIO as a result has a contractual right under the Sublease and/or the responsibility to design, construct, and operate the TMT Project on Mauna Kea. TIO's contractual right is a "property interest in the land." On this basis alone, TIO must be admitted as a party to the contested case hearing.

TIO will also be "so directly and immediately affected by the [contested case hearing] that [its] interest in the proceeding is clearly distinguishable from that of the general public." See supra. There is no question that the contested case hearing directly and immediately affects TIO's contractual right and obligation to construct and operate the TMT Project on Mauna Kea. Indeed, the contested case hearing squarely challenges TIO's ability to exercise its contractual right and fulfill its obligations. This contractual right and/or obligation is unique to TIO and is not shared by the general public.

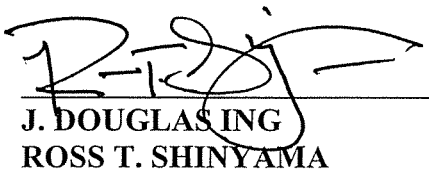
TIO's interest is also unique from the general public because no one in the general public stands to lose more if the contested case hearing does not result in the issuance of a CDUP authorizing the construction of the TMT Project to proceed. Just as an example, TIO stands to lose time and money expended for permitting, approvals and efforts to construct the TMT Project in Hawaii. TIO also stands to lose the opportunity to build the TMT Project at the best site in the northern hemisphere and to work in collaboration with other observatories at Mauna Kea. Moreover, even if the contested case hearing does ultimately result in the issuance of a CDUP, TIO has an interest unique from the general public in ensuring that the contested case hearing is conducted in an efficient manner.

In sum, TIO should be admitted as a party in the contested case hearing as it clearly has a property interest in the subject land, as well as a contractual right to construct and operate the TMT Project on Mauna Kea. TIO should also be admitted as a party because it will be so directly and immediately affected by the contested case hearing that its interest is clearly distinguishable from the general public. The Motion should be granted and TIO should be admitted as a party in the contested case hearing pursuant to HAR § 13-1-31(b)(2).

III. CONCLUSION

Based on the foregoing, TIO respectfully requests that its Motion be granted and TIO be admitted as a party in the contested case hearing pursuant to HAR § 13-1-31(b)(2).

DATED: Honolulu, Hawaii, April 8, 2016.



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CERTIFICATE OF SERVICE

I hereby certify that on this day, a copy of the foregoing was duly served on the following parties by mail, postage pre-paid to their last known address:

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