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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

**TMT INTERNATIONAL
OBSERVATORY, LLC'S
OPPOSITION TO MEHANA KIHOI'S
MOTION TO DENY THE
INTERVENTION OF PERPETUATING
UNIQUE EDUCATIONAL
OPPORTUNITIES AS A PARTY TO THE
CONTESTED CASE HEARING DATED
JULY 18, 2016 [DOC. 98];
CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S
OPPOSITION TO MEHANA KIHOI'S MOTION TO
DENY THE INTERVENTION OF PERPETUATING
UNIQUE EDUCATIONAL OPPORTUNITIES AS A PARTY
TO THE CONTESTED CASE HEARING DATED JULY 18, 2016 [DOC. 98]**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Opposition to Mehana Kihoi's Motion to Deny the Intervention of Perpetuating Unique Educational Opportunities as a Party in the Contested Case Hearing dated July 18, 2016 [Doc. 98] (the "Motion") on the basis that the Motion is untimely. The Hearing Officer may deny the Motion on this basis alone.

I. DISCUSSION

1. The Motion Should be Denied as Untimely.

On May 11, 2016, Mehana Kihoi submitted her letter request to intervene [Doc. 23] in the contested case proceeding. On May 16, 2016, a pre-hearing conference was held during which time the Hearing Officer noted that there were several applications, motions, or requests to intervene as a party in the matter, and set the following schedule with respect to applications, motions, or requests to intervene as a party:

- Deadline for intervention applications, motions or requests is May 31, 2016.
- Parties' responses to such applications, motions or requests are due by June 13, 2016.
- Hearings on the applications, motions or requests will be in Hilo on June 17, 2016.
- Time and location of the hearings will be announced in a subsequent Minute Order.

In addition to being announced at the May 16, 2016 pre-hearing conference, this schedule was also set forth in Minute Order No. 7 [Doc. 44].

On May 16, 2016, Perpetuating Unique Educational Opportunities, Inc. (“PUEO”) filed its Motion to Intervene [Doc. 33], setting forth the basis for its right to mandatory intervention under HAR § 13-1-31(b)(2) or, alternatively, for permissive intervention under HAR § 13-1-31(c). Under the briefing schedule set forth in Minute Order No. 7 [Doc. 44], the deadline for responses to PUEO’s Motion to Intervene was June 13, 2016.

Ms. Kihoi failed to submit her timely response to PUEO’s Motion to Intervene by June 13, 2016. It cannot be disputed that **Ms. Kihoi’s response to PUEO’s Motion to Intervene was not filed until July 18, 2016, more than one month after the June 13, 2016 deadline.** Consequently, the Motion is an untimely response to PUEO’s Motion to Intervene, and should be denied on this basis alone.

To the extent the Motion is construed as a motion for reconsideration of the Hearing Officer’s June 17, 2016 decision granting PUEO’s Motion to Intervene, the Motion is still untimely. Under HAR § 13-1-39(b), a motion for reconsideration “shall be made not later than five business days after the decision or not less than fourteen days prior to any deadline established by law for the disposition of the subject matter, whichever is earlier.”

On June 17, 2016, PUEO’s Motion to Intervene was granted. Under HAR § 13-1-39(b), the deadline to file a motion for reconsideration of the Hearing Officer’s ruling granting PUEO’s Motion to Intervene was Friday, June 24, 2016. Ms. Kihoi’s response was not filed until July 18, 2016. The Motion is untimely even as a motion for reconsideration of the Hearing Officer’s June 17, 2016 decision granting PUEO’s Motion to Intervene.

2. The Motion Should be Denied because PUEO is a Proper Party.

Even assuming *arguendo*, the Motion was not time-barred as untimely under the applicable administrative rules, it should still be rejected on the basis that the arguments set forth in the Motion fail to establish that PUEO is not a proper party entitled to intervention. The Motion belatedly argues that PUEO should be denied intervention for the following reasons:

- a. PUEO is not entitled to mandatory intervention under HAR § 13-1-31(b)(2) because it cannot demonstrate an injury in fact, and that their interest in “enhancing educational opportunities” by the construction of the TMT is not a constitutionally protected right and is not clearly distinguishable from that of the interest of the University of Hawaii at Hilo or the general public;
- b. PUEO is not entitled to permissive intervention under HAR §13-1-31(c) because it does not have a substantial interest in the case and, if it did, such interest is adequately represented in the contested case by the University of Hawaii at Hilo; and
- c. PUEO should not be allowed intervention because (1) its board members Patrick Leo Kahawaiola’a (“Kahawaiola’a”)¹ and Richard Ha, Jr. (“Ha”) participated in and supported community outreach efforts for the TMT Project, (2) its board member Shadd Keahi Warfield (“Warfield”) is also the President of Keaukaha One Youth Development (“KYOD”), a non-profit organization, and (i) KYOD received a \$15,000 STEM grant administered by the Hawaii Community Foundation, and funded by nine organizations, one of which is TIO, and (ii) Board Member Stanley Roehrig (“Member Roehrig”) was a *former* director of KYOD.

i. PUEO is entitled to mandatory intervention.

PUEO established that is entitled to mandatory intervention under HAR § 13-1-31(b)(2), which provides that “[a]ll persons [who] . . . 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 action.” HAR § 13-1-31(b)(2).

¹ Not Patrick Leo “Kawaiola’a” as incorrectly stated in the Motion.

Relying on the Hawaii Intermediate Court of Appeals (“ICA”) decision in Public Access Shoreline Hawaii (PASH) v. Hawaii County Planning Commission, 79 Hawaii 246, 900 P.2d 1313 (App. 1993), the Motion argues that PUEO’s interest in “enhancing educational opportunities” by the construction of the TMT is not a constitutionally protected right and is not distinguishable from the University of Hawaii at Hilo or the general public.² Contrary to the arguments in the Motion, the PASH decision supports the determination that PUEO is entitled to mandatory intervention.

In PASH, the ICA considered the Hawaii County Planning Commission’s (the “Commission”) denial of PASH’s request for a contested case on an application for a Special Management Area Use Permit (the “SMAP”). PASH, an association to preserve and protect public accesses to beach and shoreline areas, submitted evidence that some of its native Hawaiian members exercised their customary and traditional rights in the area. Id. at 253, 900 P.2d at 1320. The ICA determined that such evidence established that PASH’s interest was clearly distinguishable from the general public, and that PASH was entitled to intervene and request a contested case. Id.

PUEO’s Motion to Intervene is supported by the declarations of several of its native Hawaiian members attesting to their exercise of customary and traditional rights on Mauna Kea. By way of example, Warfield attests that he is a native Hawaiian cultural practitioner from the lineage of ali’i and maka’ainana who once oversaw the leadership and stewardship in caring for the people and places of this land. Warfield and his family have accessed Mauna Kea to visit

² The Motion also argues that PUEO’s interest in enhancing educational opportunities is similar to the general public because “the general public generally supports enhanced educational opportunities.” This argument is entirely conclusory and disingenuous in light of Ms. Kihoi’s concerted effort to obstruct PUEO from rightfully participating in the contested case proceeding through this untimely and unfounded Motion.

their heritage sites and to exercise customary and traditional native Hawaiian rights, *e.g.*, hunting for subsistence purposes, and praying and worshipping.

In addition, Kahawaiola'a attests that he is a native Hawaiian cultural practitioner who, along with his family, has accessed the lands on Mauna Kea for the purpose of exercising customary and traditional native Hawaiian rights, *e.g.*, hunting, gathering ohelo, ieie vines, tree ferns, and orchards crops for subsistence purposes, and gathering water from Lake Waiau for medicinal purposes. The declarations of PUEO's members are given under penalty of perjury, and their testimony therein has not been refuted by the Motion.

Like PASH's request for a contested case, supported by evidence that some of its native Hawaiian members exercised their customary and traditional rights in the area, PUEO's Motion to Intervene provided sufficient evidence that several of its board members and their families exercise their customary and traditional rights in the area. Consequently, PUEO has established that it is entitled to mandatory intervention under HAR § 13-1-31(b)(2).³

In contrast to the detailed statements by PUEO's board members, submitted under oath, Ms. Kihoi's letter request to intervene [Doc. 23] in the contested case proceeding appears to be a form document consisting of entirely conclusory statements without any factual support.

Ms. Kihoi's letter request to intervene states in conclusory fashion:

This request should be granted because: (1) Requestor has a property interest in the lands of Mauna Kea through [sic] the exercise of Native Hawaiian traditional and customary practices; (2) Requestor will be affected by the proposed Thirty Meter Telescope project and has a substantial interest in the proceedings; (4) Requestor's participation will substantially assist the board in

³ To the extent the Motion argues that PUEO's interest in "enhancing educational opportunities" by the construction of the TMT is not a constitutionally protected right, this argument is simply a red herring. As discussed previously, under PASH, PUEO need only provide evidence that it's certain of its members exercise customary and traditional rights in the area.

its decision making; (5) Requestor's position is not substantially the same as any existing parties to the proceedings; and (6) Requestor's participation will add substantially new relevant information and will not make the proceedings inefficient and unmanageable.⁴

Ms. Kihoi's letter fails to provide any factual support for these wholly conclusory statements. There is no information regarding the specific traditional and customary practices Ms. Kihoi claims to practice; how Ms. Kihoi will be affected by the proposed TMT Project if she is not granted leave to intervene; how her participation will substantially assist the Board; how her position is not substantially the same as any existing parties to the proceedings (despite her use of a form document used by numerous other persons who have been admitted as parties to the proceeding); or what substantially new relevant information she intends to provide.

Notwithstanding the significant deficiencies in her own letter request to intervene, Ms. Kihoi has been admitted as a party. While TIO does not seek reconsideration of the Hearing Officer's decision granting Ms. Kihoi admission as a party at this time, Ms. Kihoi should be reminded that all parties must follow the applicable rules and authorities and the orders of the Hearing Officer and Board, including, in relevant part, complying with filing deadlines.

ii. PUEO is entitled to permissive intervention.

PUEO established that is entitled to permissive intervention under HAR §13-1-31(c) because it does have a substantial interest in the case and, if it were not granted leave to intervene as a party, such interest would not be adequately represented in the contested case by the University of Hawaii at Hilo or any other party. PUEO's board members exercise their

⁴ Failing to follow the rules and deadlines set by the Hearing Officer by filing an untimely, frivolous Motion is contrary to Ms. Kihoi's representation that her participation will not make the proceedings inefficient and unmanageable.

customary and traditional native Hawaiian rights on Mauna Kea. PUEO's participation in the case will substantially assist the Board and Hearing Officer in its decision making.

PUEO's specific purpose is not the same position as the University of Hawaii at Hilo, which is the applicant under the CDUA. The Motion portrays PUEO's purpose as broadly supporting education, but PUEO's specific purpose is to share the interaction of Hawaiian culture and science, and to inspire exploration. No other party to the contested case shares this same, specific purpose, including the University of Hawaii at Hilo. The Motion fails to establish that PUEO is not entitled to permissive intervention under HAR §13-1-31(c).

iii. There is no conflict of interest that should bar PUEO's admission as a party.

The Motion argues that a conflict exists or that PUEO should not be admitted as a party because its position is substantially the same as TIO's or the University of Hawaii at Hilo's because PUEO's board members Kahawaiola'a and Ha participated in and supported community outreach efforts for the TMT Project. This is absurd. Under such faulty logic, anyone who protested or spoke against the TMT Project would likewise have a conflict or should not be admitted as a party because its position is substantially the same as the Petitioners who oppose the TMT Project. There is no Hawaii authority supporting the proposition that a conflict of interest arises or that admission of a party should be barred under the circumstances.

In addition, the Motion argues that a conflict exists because PUEO's board member Warfield is also the President of KYOD, which received a STEM grant administered by the Hawaii Community Foundation, and funded by nine organizations, one of which is TIO. This argument is yet another futile attempt to manufacture a conflict of interest where none exists. KYOD's receipt of a STEM grant does not impute a conflict of interest to PUEO.

The Motion concedes that the STEM grant is administered by the Hawaii Community Foundation (not TIO or the University of Hawaii at Hilo). In other words, neither TIO nor the University of Hawaii at Hilo select the awardees of the STEM grants. Moreover, TIO is merely one of nine contributors to the STEM grants. TIO contributes \$1 million annually in STEM education through The Hawaii Island New Knowledge (“THINK”) Fund, which is administered through the THINK Fund Board of Advisors comprised of local Hawaii Island community representatives – not TIO itself. Consequently, TIO does not directly select the awardees of the STEM grants.

Lastly, the Motion argues that a conflict of interest exists because Member Roehrig was a *former* director of KYOD. The Motion fails to explain how Member Roehrig’s service as a *former* director of KYOD, who is not a party to the contested case proceeding, creates a conflict of interest. There is no basis to conclude that Member Roehrig should be disqualified, and the Motion should be denied in this regard.

II. CONCLUSION

Based on the foregoing, and upon further argument to be presented at the hearing of the Motion, the Motion should be denied.

DATED: Honolulu, Hawaii, August 1, 2016.



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STATE OF HAWAII

Contested Case Hearing Re Conservation
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BLNR Contested Case HA-16-02

CERTIFICATE OF SERVICE

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The undersigned hereby certifies that the foregoing document was served upon the following parties by the means indicated:

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