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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 the
Thirty Meter Telescope at the Mauna Kea
Science Reserve, Kaohe Mauka, Hamakua
District, Island of Hawaii, TMK (3) 4-4-
015:009

**TMT INTERNATIONAL
OBSERVATORY, LLC’S OPPOSITION
TO MOTION TO DISQUALIFY BLNR’S
AND HEARING OFFICER’S COUNSEL;
CERTIFICATE OF SERVICE**

**TMT International Observatory, LLC’s Opposition to
Motion to Disqualify BLNR’s and Hearing Officer’s Counsel**

COMES NOW, TMT International Observatory, LLC (“TIO”), by and through its
counsel, Watanabe Ing LLP, and hereby submits its Opposition to the Motion to Disqualify
BLNR’s and Hearing Officer’s Counsel (“Motion”) filed by Petitioners Mauna Kea Anaina Hou
and Kealoha Pisciotta; Clarence Kukauakahi Ching; Flores-Case Ohana; Deborah J. Ward; Paul
K. Neves; and Kahea: the Hawaiian Environmental Alliance (collectively, “Petitioners”) seeking
an order disqualifying Attorney General Douglas Chin (“Attorney General”) and Deputies

Attorney General William J. Wynhoff and Julie H. China (collectively, “Named Deputies”) from any further participation in the above-entitled contested case proceedings. Petitioners’ Motion is untimely, and Petitioners do not present any evidence that the Attorney General or the Named Deputies have violated any rules regarding the representation of the Board of Land and Natural Resources (“BLNR”) or the Department of Land and Natural Resources (“DLNR”). Petitioners’ Motion is speculative and contains no evidence that these officers of the legal system will carry out their duties improperly. Accordingly, the Motion should be denied.

I. ARGUMENT

A. Petitioners’ Motion is untimely.

“A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known.” In re Water Use Permit Applications, 94 Hawaii 97, 122, 9 P.3d 409, 434 (2000).

Petitioners’ Motion to disqualify the Attorney General and the Named Deputies from participating in this proceeding comes almost six years after the initial Conservation District Use Permit (“CDUP”) application was filed on September 2, 2010 and more than three years after the initial CDUP for the Thirty Meter Telescope (“TMT”) Project was approved by BLNR on April 12, 2013. Petitioners’ Motion also comes eight (8) months after the issuance of the Hawaii Supreme Court opinion, vacating the CDUP approved by BLNR on April 12, 2013, and more than six months after the issuance of the Order for Remand, filed on February 22, 2016.

This proceeding has undisputedly been ongoing for a number of years, and the involvement of the Attorney General and Deputies Wynhoff and China in the lengthy and complicated proceedings is not new. It is clear that Petitioners are seeking to disqualify these

individuals, not because of any alleged potential bias, but because Petitioners disagree with the previous advice that these deputies provided to BLNR and/or DLNR. Petitioners mistakenly claim that these deputies “advocated in favor and in support of the University of Hawaii at Hilo,” when instead, these deputies were doing what their job entailed them to do – providing advice and guidance to BLNR and/or DLNR on the proper issuance of the CDUP. Once BLNR took action on the CDUP, these deputies again were doing what they are required by law to do – advocating that their clients, BLNR and DLNR, and did not commit wrongdoing.

Based upon the poor timing of their Motion, it is clear that Petitioners would seek to disqualify ANY acting deputy who had previously provided advice to BLNR and/or DLNR in issuing the CDUP for the TMT Project. Petitioners should not be allowed to pick and choose counsel to BLNR and/or DLNR in this manner. Removing these individuals at this point in the proceedings would be extremely prejudicial to BLNR and DLNR. Requiring another team of deputies to acquaint themselves with this long and complicated proceeding will cause unnecessary delays and provide unfair disadvantages to Petitioners who have retained the same counsel throughout these proceedings. Accordingly, Petitioners’ Motion should be denied.

B. Petitioners’ Motion is speculative and contains no evidence that the Attorney General or the Named Deputies have committed any violations of law in their representation of BLNR and/or DLNR.

Petitioners do not cite any rules, and fail to meet their burden, to support their claims that the Attorney General and Named Deputies should be disqualified. Petitioners’ citations on page 2 of their Motion relate to ensuring that decision-makers and adjudicators are impartial – in other words, the individuals and entities with the power and authority to take action and approve or disapprove a project. Petitioners’ cited cases are inapplicable. Petitioners are not seeking disqualification of any individual members of BLNR, the decision-making body.

Instead, Petitioners are seeking removal of counsel, who do not have authority to approve or disapprove any CDUP. Accordingly, Petitioners' argument is unsupported by case law and based solely on speculation that the Attorney General and Named Deputies will not fulfill their duties to provide appropriate advice to BLNR and/or DLNR.

Other than Rule 1.10 of the Hawaii Rules of Professional Conduct (which relates to imputation of conflict within firms),¹ Petitioners do not cite any other rule of professional conduct allegedly being violated by the Attorney General and the Named Deputies in their representation of BLNR and/or DLNR. That is because there is no violation of any ethical duties here. In reviewing the brief submitted by Petitioners as Exhibit B of their Motion (and in the oral arguments before the Hawaii Supreme Court), the Attorney General and Named Deputies argued that BLNR's actions were not clearly erroneous because BLNR considered the necessary factors and properly came to its own conclusions based upon the conservation district rules. This is exactly what was required of counsel under the Hawaii Rules of Professional Conduct.²

Regarding the representation of BLNR and DLNR, Hawaii Administrative Rules ("HAR") §13-1-18 provides that,

¹ Rule 1.10 applies to a "firm" defined as "a lawyer or lawyers in a professional business organization...or lawyers employed in a legal services organizations or the legal department of a corporation or other organization." Whether to apply the principle of Rule 1.10 to government offices is determined on a case-by-case basis. See State v. Mark, 120 Hawaii 499, 210 P.3d 22 (2009). Applying Rule 1.10 to the Department of the Attorney General in this instance would have the absurd effect of disqualifying any deputy from BLNR representation, per Petitioners' logic. This is not to say that the Department of the Attorney General is boundless; however, other rules may address the procedures to ensure proper representation and the absence of conflict within the Department of the Attorney General. See In re Water Use Permit Applications, 94 Hawaii 97, 125-26, 9 P.3d 409, 437-38 (2000) (acknowledging that there are necessarily circumstances where separate units of the attorney general's office may undertake concurrent representation of conflicting matters, "so long as no prejudice is suffered" and so long as it "can be assigned in such as manner as to afford independent legal counsel).

² The preamble to the Hawaii Rules of Professional Conduct provides that it is an attorney's responsibility to perform various functions including to "zealously assert the client's position."

A deputy attorney general, as assigned by the department of the attorney general, will serve as counsel to the board during its proceedings. In contested cases concerning alleged violations of law, there will be at least two deputy attorneys general assigned by and from different divisions of the department of the attorney general, one to represent the department of land and natural resources in enforcement of the law and one to serve as counsel for the board.

Presumably, the intent of the foregoing rule was to prevent conflicts that might arise when the same deputy attorney general acts as counsel to the BLNR and appears as an advocate for DLNR. Petitioners, however, do not allege any violations of the foregoing rule, and there is no evidence of any violations of the foregoing rule.

Furthermore, none of the emails attached as exhibits to Petitioners' Motion evidence any kind of rule violation or unethical conduct. In the first set of emails Petitioners attached as Exhibit D to their Motion, counsel are discussing deadlines to file briefs and exchanging copies of briefs. Nothing in these emails indicates improper communication or collusion between counsel. Even if these emails were viewed as some type of coordination between parties, which they emphatically are not, the coordination would be with respect to the timing of filing briefs, and nothing else. There is no evidence that the parties conspired on the content of the briefs, but rather, the briefs were exchanged near or at completion, as a courtesy and nothing more.

In the second set of emails Petitioners attached as Exhibit E to their Motion, counsel are coordinating meeting times, exchanging pictures of the protestors who blocked TMT vehicles and who may have committed trespass violations, and exchanging information regarding jurisdictional issues related to the protests. All parties to these emails were relevant, including the prosecuting attorney handling the criminal violations, the UH attorneys whose project was being halted by the violators, and the TIO attorneys upon whose leased land the

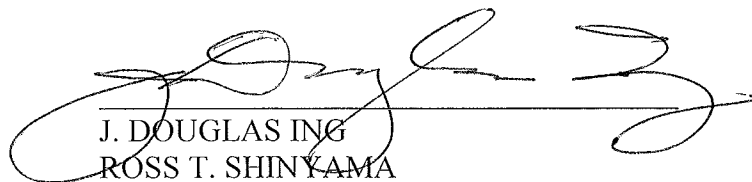
violators were trespassing. It is unclear what Petitioners are trying to prove by submission of these emails, which illustrate nothing but appropriate communication between counsel regarding investigations of violations or crimes committed by others.

Nothing in the emails or the actions of the Attorney General or the Named Deputies indicates any attempt to undermine due process or to prevent BLNR from making an impartial decision with respect to the TMT Project. Moreover, Petitioners have simply been unable to point to any rule violation or unethical conduct that would require disqualification of the Attorney General or the Named Deputies. Petitioners' allegations are based solely on speculation, and these allegations are part of Petitioners' continuing pattern to delay and disrupt an orderly and efficient contested case proceeding.

II. CONCLUSION

For the foregoing reasons, and all reasons appearing of record, TIO respectfully requests that Petitioners' Motion be denied with prejudice.

DATED: Honolulu, Hawaii, AUG - 1 2016.



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BOARD OF LAND AND NATURAL RESOURCES

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Hāmākua, Hawai'i, TMK (3) 4-4-015:009

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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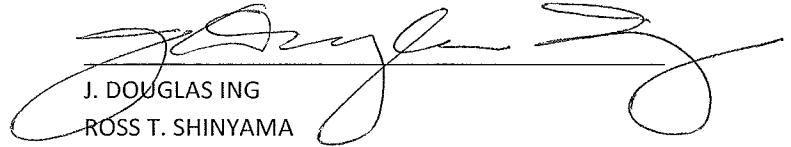
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DATED: Honolulu, Hawaii, August 1, 2016.

A handwritten signature in black ink, appearing to read 'J. Douglas Ing', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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