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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

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 THE TEMPLE OF LONO MOTION
TO DISMISS FOR LACK OF
JURISDICTION BASED ON
UNRESOLVED LAND CLAIMS [DOC.
126]; CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION TO THE
TEMPLE OF LONO MOTION TO DISMISS FOR LACK OF JURISDICTION
BASED ON UNRESOLVED LAND CLAIMS [DOC. 126]**

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Opposition to the Temple of Lono Motion to Dismiss for Lack of Jurisdiction Based on Unresolved Land Claims [Doc. 126] ("Motion"). The Motion should be denied because it is untimely. The Temple of Lono ("ToL") did not e-mail the Motion until July 22, 2016, four days after the July 18, 2016 deadline to file pre-trial motions. The Motion should also

be denied because the State of Hawai‘i, not the purported Kingdom of Hawai‘i (“Kingdom”), is the lawful government of the Hawaiian Islands. ToL’s argument that the purported existence of the Kingdom clouds or leaves unresolved the State’s title to the lands on Mauna Kea has already been rejected by the United States Supreme Court in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). Moreover, the question of whether the Kingdom exists presents a non-justiciable political question that this Hearings Officer lacks subject matter jurisdiction over.

I. DISCUSSION

1. The Motion should be denied because it is untimely.

The deadline to file pre-trial motions was July 18, 2016. See Minute Order No. 13 at 6 [Doc. 115]. ToL did not e-mail the Motion until July 22, 2016. The Motion is therefore untimely and should be denied on that basis alone.

2. The Motion should be denied because the State of Hawai‘i is the lawful government of the Hawaiian Islands and has clear title to the lands on Mauna Kea.

It is undisputed that the State of Hawai‘i, not the Kingdom, is the lawful government of the Hawaiian Islands. See State v. Kaulia, 128 Hawai‘i 479, 487, 291 P.3d 377, 385 (2013) (stating that “[w]hatever may be said regarding the lawfulness of its origins, the State of Hawai‘i . . . is now, a lawful government”) (internal quotation marks omitted). Consequently, the State of Hawai‘i, not the Kingdom, owns the lands on Mauna Kea. ToL’s argument that the purported existence of the Kingdom clouds or leaves unresolved the State’s title to the lands on Mauna Kea has already been rejected by the United States Supreme Court in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). In Hawaii, the Office of Hawaiian Affairs (“OHA”) sought to enjoin the State from alienating ceded lands from the public lands trust. OHA argued that the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of

the Kingdom of Hawaii, Pub.L. 103-150, 107 Stat. 1513 (the “Apology Resolution”) clouded the State’s title to the ceded lands. The United States Supreme Court rejected OHA’s argument and explained:

The Apology Resolution reveals no indication – much less a “clear and manifest” one – that Congress intended to amend or repeal the State’s rights and obligations under [the] Admission Act (or any other federal law); nor does the Apology Resolution reveal any evidence that Congress intended *sub silentio* to “cloud” the title that the United States held in ‘absolute fee’ and transferred to the State in 1959.

Id. at 175-76 (italics in original); see also id. at 176 (“[W]e must not read the Apology Resolution’s nonsubstantive ‘whereas’ clauses to create a retroactive ‘cloud’ on the title that Congress granted to the State of Hawaii in 1959.”) (citation omitted).

Simply stated, there is no cloud or unresolved claim surrounding the State’s title to the lands on Mauna Kea. The State owns the lands on Mauna Kea and this Hearings Officer has jurisdiction over this matter. ToL’s claim to the contrary is meritless and the Motion should be denied.

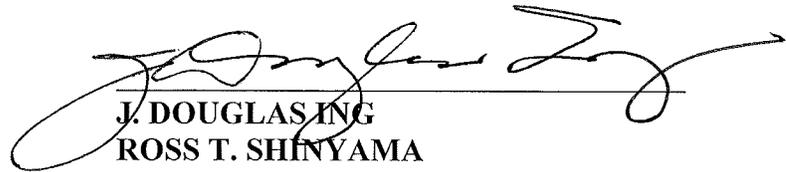
In order to determine that the Kingdom has a claim to the lands on Mauna Kea as ToL argues, this Hearings Officer would not only have to reach a result contrary to the United States Supreme Court precedent in Hawaii, but she would also have to find that the Kingdom exists. The question of whether the Kingdom exists presents a non-justiciable political question that this Hearings Officer lacks subject matter jurisdiction over. See e.g., See e.g., Sai v. Clinton, 778 F.Supp.2d 1, 6 (D.D.C. 2011), aff’d sub nom. Sai v. Obama, No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011) (holding that it has “long [been] recognized that the determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts”). On this point, TIO also hereby incorporates by this specific reference its Response to

the Purported Kingdom of Hawai'i's Notice of Absence of Necessary and Indispensable Parties, which is being filed concurrently herewith. This Motion makes the same arguments as in the Notice. The lone difference is that this Motion is brought on behalf of ToL, while the Notice is purportedly brought on behalf of the Kingdom. ToL and the Kingdom are both purportedly represented by Mr. Sinkin. Both this Motion and the Notice are meritless and should be denied by this Hearings Officer.

II. CONCLUSION

Based on the foregoing, the Motion should be denied.

DATED: Honolulu, Hawaii, August 1, 2016.

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BOARD OF LAND AND NATURAL RESOURCES

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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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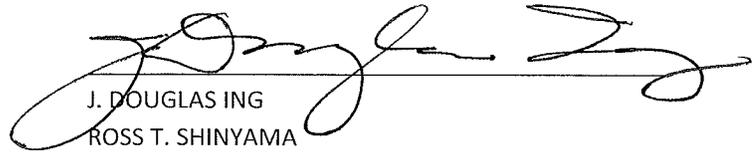
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