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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 TEMPLE OF LONO  
MOTION TO VACATE RULING AND  
SUPPLEMENT RESPONSE TIME  
[DOC. 127]; CERTIFICATE OF  
SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S  
OPPOSITION TO TEMPLE OF LONO MOTION TO VACATE  
RULING AND SUPPLEMENT RESPONSE TIME [DOC. 127]**

TMT International Observatory, LLC (“TIO”), by and through its undersigned counsel, hereby submits its Opposition to the Temple of Lono Motion to Vacate Ruling and Supplement Response Time dated July 23, 2016 [Doc. 127] (the “Motion”). For the reasons stated herein, the Motion and the relief sought therein should be denied.<sup>1</sup>

**I. DISCUSSION**

**1. The Motion Should be Denied Because it is Untimely.**

As an initial matter, the Motion is untimely. The Motion admits that at the second pre-hearing conference on June 17, 2016, the Hearing Officer established a pretrial motions deadline of July 18, 2016. The Motion was filed on July 23, 2016, *i.e.*, after the pretrial motions deadline. Consequently, the Motion is untimely, and should be denied on that basis alone.

**2. The Motion Should be Denied Because it Fails to Establish that Reconsideration of the Board’s Minute Order No. 14 is Warranted Under HAR § 13-1-39.**

Assuming *arguendo*, the Motion seeks reconsideration of the Board’s Minute Order No. 14, denying Dwight J. Vicente’s Motion to Disqualify Judge Riki Mae Amano (Ret.); State of Hawaii Lack Jurisdiction to Hear This Contested Case Hearing [Doc. 80] (“Vicente’s Motion”),

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<sup>1</sup> On July 30, 2016, Dwight Vicente submitted a “Motion in support of the Temple of Lono’s motion to vacate the Board’s July 22, 2016, Minute Order No. 14” (“Vicente Joinder”). On July 31, 2016, Kalikolehua Kanaele filed a “Motion to Exclude/Remove PUEO, TMT, UH Manoa/Hilo, and All Petitioners Seeking for Permit for TMT by circumvention of Religious Protections of the Hawaii Constitution Article XII and HRS 7-11-1107 Committing Desecration” (the “Kanaele Motion”). The Vicente Joinder and the Kanaele Motion seek to join in the relief sought by the Motion. However, neither the Vicente Joinder nor the Kanaele Motion provides any independent basis or bases warranting the requested relief sought in the Motion. Consequently, the Vicente Joinder and the Kanaele Motion should be denied for the same reasons that the Motion should be denied.

HAR § 13-1-39 governs. Under HAR § 13-1-39, the “[B]oard may reconsider a decision made on the merits only if the party can show” the following:

- [1] New information not previously available would affect the result; or
- [2] A substantial injustice would occur.

HAR § 13-1-39. As the Hawaii Supreme Court has explained:

[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.

Sousaris v. Miller, 92 Hawaii 505, 513, 993 P.2d 539, 547 (2000) (internal brackets and citations omitted) (emphasis added). The Motion is completely devoid of any new information not previously available which would affect the result, *i.e.*, the denial of Vicente’s Motion, or that a substantial injustice would occur absent reconsideration of the Board’s Minute Order No. 14 for the following reasons.

Vicente’s Motion alleges and argues that (1) the overthrow of the Kingdom of Hawaii and subsequent annexation of the Hawaiian Islands by the United States violated the United States Constitution and international law and, therefore, Hawaii is *currently* not a state of the United States; and (2) the State of Hawaii and the Hearing Officer lack subject matter jurisdiction over the Contested Case proceeding because Hawaii is *currently* not a state of the United States and, therefore, the Hearing Officer should be disqualified.

- a. **The Motion does not and cannot establish new information not previously available would affect the result or that substantial injustice would occur absent reconsideration of Vicente's Motion because Hawaii was admitted as a state to the United States in 1959.**

The relief sought by Vicente's Motion is premised upon Hawaii's current status as a state of the United States. As the Hawaii Intermediate Court of Appeal has explained that "[w]hatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawaii in 1894, and the Territory of Hawaii in 1898, the State of Hawaii . . . is now, a lawful government." State v. Fergerstrom, 106 Hawaii 43, 55, 101 P.3d 652, 664 (Haw. App. 2004). Consequently, to the extent Vicente's Motion argued that Hawaii is not a state, this allegation is factually inaccurate.

As stated in the Board's Minute Order No. 14, "[i]n 1959, Congress admitted Hawaii to the Union" by way of the Admission Act. Minute Order No. 14 (citing Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009)). As a matter of law, Hawaii is a current state of the United States. Pursuant to HAR § 13-1-35(i), the Board may take official notice of Hawaii's admission as a state of the United States in 1959 by way of Pub. L. 86-3, 73 Stat. 4, commonly referred to as the "Admission Act," under HRE Rule 202 made applicable here through HAR § 13-1-35(i), as explained below.

Under HAR § 13-1-35(i):

Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the specialized knowledge of the board when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

HAR § 13-1-35(i).

With regard to such matters as may be judicially noticed by the courts of the State of Hawaii, Rule 201 of the Hawaii Rules of Evidence (“HRE”) governs judicial notice of *adjudicative facts*, and HRE Rule 202 governs judicial notice of *law*. Under HRE Rule 202(c), upon reasonable notice to adverse parties, a party may request that the court take, and the court may take judicial notice of:

- (1) all duly adopted federal and state rules of court,
- (2) all duly published regulations of federal and state agencies,
- (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states,
- (4) any matter of law which would fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and
- (5) the laws of foreign countries, international law, and maritime law.

See State v. West, 95 Hawaii 22, 26-28, 18 P.3d 884, 888-890 (2001) (30 mph limit on Lunalilo Home Road); see also State v. Marley, 54 Haw. 450, 467-468, 509 P.2d 1095, 1107 (1973) (affirming trial court’s denial of draft instructions, including, for example that “international law” takes precedence over Hawaii state statutes, and that treaties ratified by the United States are binding on the State of Hawaii).

Courts of the State of Hawaii may take judicial notice that in 1959 Congress admitted Hawaii to the Union through Pub. L. 86–3, 73 Stat. 4, commonly referred to as the Admission Act pursuant to HRE Rule 202, governing requests for judicial notice of law. HAR § 13-1-35(i) allows the Board to take judicial notice of such matters as may be judicially noticed by the courts of the State of Hawaii. Consequently, the Board may take official notice that in 1959 Congress admitted Hawaii to the Union through Pub. L. 86–3, 73 Stat. 4, commonly referred to as the Admission Act pursuant to HAR § 13-1-35(i).

Based on the ability of the Board to take official notice of Hawaii’s admission as a state of the United States in 1959 by way of the Admission Act, the Motion fails to establish new

information not previously available which would affect the result or that a substantial injustice would occur. As a result, the Motion should be denied.

- b. **The Motion does not and cannot establish new information not previously available would affect the result or that substantial injustice would occur absent reconsideration of Vicente's Motion because the Board and Hearing Officer could not have granted Vicente declaratory relief overturning Hawaii's admission as a state to the United States in 1959.**

In addition, even assuming *arguendo*, Vicente's Motion sought declaratory relief overturning Hawaii's current status as a state of the United States based on the overthrow and annexation, Vicente's Motion would have been denied on the basis that it presented a nonjusticiable question over which the Board and Hearing Officer lacked subject matter jurisdiction.

The political question doctrine is "the result of the balance courts must strike in preserving separation of powers yet providing a check upon the other two branches of government." Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 194, 277 P.3d 279, 288 (2012). Determining whether a case involves a nonjusticiable political question depends on the facts of the case. The Hawai'i Supreme Court has adopted the six-part test in Baker v. Carr, 369 U.S. 186 (1962) to determine if a claim presents a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found: [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170, 737 P.2d 446, 455 (1987) (quoting Baker, 369 U.S. at 217).

As discussed previously, the threshold issue presented by the Motion is whether the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States was wrongful such that Hawaii is not a valid state of the United States. Courts addressing claims based on this same issue have concluded that several of the Baker factors squarely apply, and have held that the issue raises a nonjusticiable political question reserved for the executive and legislative branches.

For example, in Sai, David Keanu Sai, the purported acting regent of the Kingdom of Hawai‘i, filed a complaint against the then Secretary of State Hilary Clinton and others seeking a declaration that his Hawaii theft conviction violated federal and international law because Hawaii is not a valid state. 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). The Sai court declined to address Sai’s claims that were based on a nonjusticiable political question explaining that:

Plaintiff’s lawsuit challenges the United States’s recognition of the Republic of Hawaii as a sovereign entity and the United States’s exercise of authority over Hawaii following annexation. However, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative – ‘the political’ – Departments of the Government, and **the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.**

.....

**Since its annexation in 1898 and admission in the Union as a State in 1959, Hawaii has been firmly established as part of the United States. The passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a political decision already made.**

Id. at 7-8 (internal citations omitted) (emphasis added)

Similarly, in Yellen, the United States District Court for the District of Hawaii dismissed plaintiff's claims that were based on the same nonjusticiable political question explaining that:

The entire basis of Plaintiff's Complaint is **that the overthrow of the Hawaiian Kingdom and Hawaii's annexation to the United States violated the United States Constitution and international law such that this Court should declare these acts void and restore the Kingdom of Hawaii. These issues are squarely nonjusticiable political questions** – as in Luther, “it rests with Congress,” not the judiciary, to decide the governance of Hawaii, and both the Supreme Court and the Ninth Circuit have already determined, in a number of other contexts, that issues of sovereignty and/or recognition of foreign entities are not for the judiciary to determine.

Yellen v. United States, 2014 WL 2532460 at \*2 (D. Haw. June 5, 2014) (emphasis added).

In Williams, the United States District Court for the District of Hawaii also determined that it lacked subject matter jurisdiction over an inmate's civil rights claims challenging the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States, explaining that:

Plaintiff's claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, “[n]ew States may be admitted by the Congress into this Union[.]” U.S. Const. Art. IV, § 3. **By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood.**

Williams v. United States, 2008 WL 5225870, at \*3, Civ. No. 08-00547 SOM-KSC (D. Haw. December 5, 2008); Algal Partners, L.P. v. Santos, 2014 WL 1653084, at \*2-3 Civ. No. 13-00562 LEK-BMK (D. Haw. Apr. 23, 2014) (declining jurisdiction over claim “Hawaiian Kingdom continues to exist and is under a prolonged and illegal occupation by the United States.”).



To the extent Vicente's Motion raises a nonjusticiable question over which the Board and Hearing Officer lack jurisdiction, the Motion has not and cannot establish that new information not previously available would affect the result, or that a substantial injustice would occur, as required for reconsideration under HAR § 13-1-39. As a result, the Motion should be denied.

- c. **The Motion does not and cannot establish new information not previously available would affect the result or that or that substantial injustice would occur absent reconsideration of Vicente's Motion with regard to the disqualification of the Hearing Officer because the arguments proffered failed as a matter of law.**

The only grounds for disqualifying the Hearing Officer set forth in Vicente's Motion was that because Hawaii is not a state of the United States or that Hawaii should not be a state of the United States fail for the reasons previously discussed. No other basis to disqualify the Hearing Officer was provided in Vicente's Motion. The Motion fails to set forth any new information not previously available which would affect the result, or that a substantial injustice would occur absent reconsideration of the Board's Minute Order No. 14, with regard to the disqualification of the Hearing Officer. As a result, the Motion should be denied.

## 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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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568  
for the Thirty Meter Telescope at the Mauna  
Kea Science Reserve, Ka'ohe Mauka,  
Hāmakua, 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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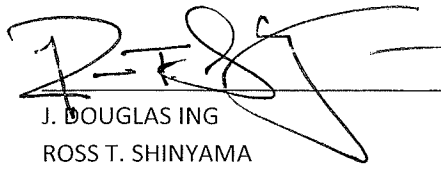
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DATED: Honolulu, Hawaii, August 1, 2016.

A handwritten signature in black ink, appearing to read 'J. Douglas Ing', is written over a horizontal line.

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