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J. DOUGLAS ING #1538-0
ROSS T. SHINYAMA #8830-0
SUMMER H. KAIawe #9599-0
First Hawaiian Center
999 Bishop Street, 23rd Floor
Honolulu, Hawaii 96813
Telephone No.: (808) 544-8300
Facsimile No.: (808) 544-8399
E-mails: rshinyama@wik.com

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attorneys for
TMT INTERNATIONAL OBSERVATORY, LLC

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 KAMAHANA
KEALOHA: MOTION INVOKING QUO
WARRANTO, RESPECTFULLY, A
DEMAND OF JURISDICTION;
DECLARATORY JUDGMENT ON A
CONSTITUTIONAL ISSUE/VIOLATION
RESUBMITTED 8/8/2016;
CERTIFICATE OF SERVICE**

**TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION TO KAMAHANA
KEALOHA: MOTION INVOKING QUO WARRANTO, RESPECTFULLY, A DEMAND OF
JURISDICTION; DECLARATORY JUDGMENT ON A CONSTITUTIONAL
ISSUE/VIOLATION RESUBMITTED 8/8/2016**

TMT International Observatory, LLC ("TIO"), by and through
its undersigned counsel, hereby submits its Opposition to
Kamahana Kealoaha: Motion Invoking Quo Warranto, respectfully, a

demand of Jurisdiction; Declaratory Judgment on a Constitutional Issue/Violation RESUBMITTED 8/8/2016 ("Motion").

I. DISCUSSION

1. The Motion is not properly before the Hearings Officer.

The remedy of quo warranto was codified in Hawai'i Revised Statutes ("HRS") Chapter 659. HRS § 659-1 defines quo warranto as "an order issuing in the name of the State by a circuit court and directed to a person who claims or usurps an office of the State or of any subdivision thereof . . . inquiring by what authority the person claims the office." Id. (emphasis added). The "order is obtained by petition addressed to a circuit court, setting out facts sufficient to show a right to the order, and sworn to if the application is made by a private individual, or is made by the attorney general as provided by section 659-6." Haw. Rev. Stat. § 659-4 (emphasis added).

Based on the foregoing, Mr. Kealoha's petition or request for quo warranto is not properly before the Hearings Officer. It must be "addressed to a circuit court." Id. On this basis alone, the Motion should be denied.

2. The Hearings Officer clearly has the authority to preside over this contested case hearing.

The State of Hawai'i is the lawful government of the Hawaiian Islands. See State v. Kaulia, 128 Hawai'i 479, 487, 291 P.3d 377, 385 (2013) ("Whatever may be said regarding the

lawfulness of its origins, the State of Hawai'i . . . is now, a lawful government."). Consequently, the State owns the lands atop Mauna Kea. The United States Supreme Court has already rejected the argument that the alleged unlawfulness of the State's origins clouds or leaves unresolved the State's title to the lands on Mauna Kea. See Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 175-76 (2009). In Hawaii, 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 ceded lands. The United State 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).

It is clear that the State owns the lands atop Mauna Kea. The Department of Land and Natural Resources ("DLNR") and the Board of Land and Natural Resources ("BLNR") are authorized by the State to, inter alia, "regulate land-use [of State lands] in the conservation district." Hawai'i Administrative Rules ("HAR") §13-5-1. In doing so, BLNR is authorized under the Rules of Practice and Procedure, HAR Title 13, Chapter 1, to conduct a contested case hearing. See HAR § 13-1-28. The contested case hearing may be conducted by BLNR or a hearings officer. See HAR § 13-1-32(b). Consequently, pursuant to HAR § 13-1-32(b), BLNR had the authority to and properly delegated the conduct of this contested case hearing to the Hearings Officer. See Minute Order No. 1 [Doc-1] (selection of this Hearings Officer); Minute Order No. 2 [Doc-3] (delegating the conduct of the contested case hearing to a hearings officer); Minute Order No. 4 [Doc-14] (submitting matter to this Hearings Officer to conduct the contested case hearing); see also Minute Order No. 9 [Doc-62] (denying motion for reconsideration of Minute Order No. 4).

Based on the foregoing, it is clear that the Hearings Officer has the authority to preside over this contested case

hearing. Mr. Kealoha's claims to the contrary are meritless. The Motion should be denied.

3. **The Motion raises non-justiciable political questions that are outside of the subject matter jurisdiction of the Hearings Officer.**

Mr. Kealoha raises issues in the Motion that present non-justiciable political questions that are outside of the Hearings Officer's subject matter jurisdiction. For example, Mr. Kealoha argues in the Motion that the Kingdom of Hawai'i is the rightful owner of the lands atop Mauna Kea. In order to determine that the Kingdom of Hawai'i has a claim to the lands on Mauna Kea, this Hearings Officer would not only have to reach a result contrary to 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., 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) (noting 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."); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the

legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.") (italics in original).

Simply stated, the Motion should be denied because it raises non-justiciable political questions that are outside of the subject matter jurisdiction of the Hearings Officer.

II. CONCLUSION

Based on the foregoing, and upon further argument to be presented at the hearing of the Motion, TIO respectfully submits that the Motion be denied.

DATED: Honolulu, Hawaii, August 9, 2016.



J. DOUGLAS ING
ROSS T. SHINYAMA
SUMMER H. KAIWE
Attorneys for TMT INTERNATIONAL
OBSERVATORY, LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē 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 above referenced document was served upon the following parties by the means indicated:

Michael Cain
Office of Conservation and Coastal
Lands
1151 Punchbowl, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
*Custodian of the Records
(original + digital copy)*

Carlsmith Ball LLP
isandison@carlsmith.com
*Counsel for the applicant
University of Hawai'i at Hilo*

Richard N. Wurdeman
RNWurdeman@RNWLAW.com
*Counsel for the petitioners Mauna
Kea Anaina Hou, Clarence
Kukauakahi Ching, Flores-Case
'Ohana, Deborah J. Ward, Paul K.
Neves, and Kahea: The
Environmental Alliance*

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

Mehana Kihoi
uhiwai@live.com

C. M. Kaho'okahi Kanuha
kahookahi@gmail.com

Joseph Kualii Lindsey Camara
kualiic@hotmail.com

Torkildson, Katz, Moore,
Hetherington & Harris
lisa@torkildson.com
njc@torkildson.com
*Counsel for Perpetuating Unique
Educational Opportunities (PUEO)*

J. Leina'ala Sleightholm
leina.ala.s808@gmail.com

Maelani Lee
maelanilce@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
*Representative for The Temple of
Lono*

Kalikolehua Kanaele
akulele@yahoo.com

Stephanie-Malia:Tabbada
s.tabbada@hawaiiantel.net

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Cindy Freitas
hanahanai@hawaii.rr.com

William Freitas
pohaku7@yahoo.com

Richard L. DeLeon
kekaukike@msn.com

DATED: Honolulu, Hawaii, August 9, 2016.



J. DOUGLAS ING
ROSS T. SHINYAMA

Attorneys for TMT International Observatory LLC