

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
tluikwan@carlsmith.com
JPM@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2016 AUG 22 A 11: 08

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO'S SUPPLEMENTAL
COMMENTS ON PERPETUATING
UNIQUE EDUCATIONAL
OPPORTUNITIES, INC.'S MOTION
TO SET THE ISSUES [DOC. 99];
DECLARATION OF COUNSEL;
EXHIBIT "1"; CERTIFICATE OF
SERVICE

**THE UNIVERSITY OF HAWAI'I AT HILO'S SUPPLEMENTAL COMMENTS
ON PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S
MOTION TO SET THE ISSUES [DOC. 99]**

The University of Hawai'i at Hilo ("University") submits these Supplemental Comments on Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set the Issues [Doc. 99] ("Motion") to respond to the arguments raised by Fergerstrom's Opposition to PUEO's Motion

to Set Issues [Doc. 186] and the joinders thereto [Docs. 195 & 210].¹

As set forth in PUEO's motion, HAR §§ 13-1-32 and 13-1-36 give the Hearings Officer the authority to formulate and simplify the issues to be adjudicated in the contested case hearing and to limit evidence on any particular issue. [Doc. 99 at 3-4.] Moreover, the Hearings Officer has the power to exclude evidence that is immaterial, irrelevant, or unduly repetitious. HAR § 13-1-35(a). As discussed in the University's joinder in that motion [Doc. 140], the legal standard for evaluating the Conservation District Use Application ("CDUA") is whether the proposed land use comports with the eight criteria set forth in Hawai'i Administrative Rules ("HAR") § 13-5-30(c) (the "Eight Criteria"). Therefore, given that the issue is whether the CDUA should be approved, the Hearings Officer should limit the issues in the contested case hearing to the Eight Criteria governing the approval of the application. The Opposing Parties² argue that they should not be precluded from raising other issues for the Hearings Officer to consider, including Hawaiian sovereignty rights and the legal status of the State of Hawai'i.

The precise nature and number of issues that the Opposing Parties wish to inject into these proceedings are unknown, making it impossible for the parties to prepare evidence and testimony to adequately address those issues. Moreover, at least some of the issues raised by the Opposing Parties are political questions that are beyond the jurisdiction of the Hearings Officer and the Board of Land and Natural Resources. For instance, Fergerstrom's opposition to the Motion alleges that the issue of whether the annexation of Hawai'i was legal should be resolved

¹ The University does not waive any of its prior arguments concerning the untimeliness of Fergerstrom's opposition or the joinders thereto. *See* Doc. 196.

² The term "Opposing Parties" refers collectively to the parties who have submitted written objections to the Motion—*i.e.*, Mauna Kea Hou, Clarence Kukauakahi Ching, Flores-Case Ohana, Deborah J. Ward, Paul K. Neves, and Kahea: The Environmental Alliance (collectively, "Petitioners"), Temple of Lono, Harry Fergerstrom, Mehana Kihoi, and J. Leina'ala Sleightholm.

at the contested case hearing. However, the Hearings Officer has already ruled that “the issue of the status of the State of Hawai‘i will not be an issue in this contested case hearing.” Exhibit 1, Aug. 5, 2016 Hr’g Tr. at 78:7-9. Fergerstrom’s attempt to litigate the status of Hawai‘i statehood and the existence of the Kingdom of Hawai‘i in the contested case hearing is not the purpose of this case nor is it relevant to the issues to be decided and the Hearings Officer’s order. Thus, there is a clear need to identify the issues to be heard at these proceedings and to limit those issues those that are: (1) relevant to the approval of the CDUA; and (2) within the scope of the Hearings Officer’s authority and jurisdiction.

The University’s position remains that PUEO’s Motion should be granted because identifying the relevant issues and limiting evidence and testimony to those issues for the contested case hearing is not only supported, but required, under the rules. If a concern arises that by granting the Motion, such an order would exclude issues before they are ever raised, the University proposes that the Hearings Officer set a deadline of August 29, 2016 for the parties to submit prehearing conference statements articulating the issues and legal issues to be adjudicated in the hearing. Under HAR § 13-1-36, the Hearings Officer “may request briefs setting forth the issues, facts and legal arguments upon which the parties intend to rely. . . .” By ordering the submittal of prehearing conference statements under HAR § 13-1-36, the parties will have an opportunity to set forth the legal issues and arguments they intend to raise at the hearing. The Hearings Officer may then exclude issues that are irrelevant, immaterial, or unduly duplicative and formulate the issues to be addressed at the hearing based on the parties’ submissions to ensure the hearing is conducted in an efficient and orderly manner. *See* HAR §§ 13-1-36, 13-1-35(a). This proposal would also avoid undue prejudice and unfair surprise by putting all parties on notice of the issues to be addressed at the hearing and giving them ample time to prepare

testimony and evidence.

DATED: Honolulu, Hawai'i, August 22, 2016.

A handwritten signature in black ink, appearing to read "Ian L. Sandison", written over a horizontal line.

IAN L. SANDISON

TIM LUI-KWAN

JOHN P. MANAUT

Attorneys for Applicant

UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, TIM LUI-KWAN, declare:

1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant University of Hawai'i at Hilo ("**University**") in the above-captioned matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.
3. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts from the transcript of the August 5, 2016 Motions Hearing held in this matter, *In the Matter of 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, Hāmākua, Hawai'i, TMK (3) 4-4-015:009*, Case No. BLNR-CC-16-002.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, August 22, 2016.


TIM LUI-KWAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BOARD OF LAND AND NATURAL RESOURCES

STATE OF Hawai'i

IN THE MATTER OF) CASE NO. BLNR-CC-002
)
 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, Hamakua, Hawai'i)
 TMK (3)4-4-015:009)
 -----)

MOTIONS HEARING

Held on August 5, 2016, commencing at 10:05 a.m. at
the YMCA Building, 300 West Lanikaula Street, Hilo,
Hawai'i 96720.

BEFORE: Jean Marie McManus, CSR #156

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

JUDGE RIKI MAY AMANO, Hearing Officer

JULIE CHINA, Deputy Attorney General
WILLIAM WYNHOFF, Deputy Attorney General

STEPHEN MICHAEL CAIN, Staff Planner

TIM LUI-KWON, ESQ.
JOHN P. MANAUT, ESQ.
IAN L. SANDISON, ESQ.
Attorneys for University of Hawai'i

RICHARD N. WURDEMAN, ESQ.
Attorney for Mauna Kea Anaina Hou, et al

DOUGLAS ING, ESQ.
ROSS SHINYAMA, ESQ.
Attorneys For TMT International Observatory

LINCOLN S.T. ASHIDA, ESQ.
NEWTON CHU, ESQ.
For PUEO

LANNY SINKIN
Temple of Lono

HARRY FERGERSTROM
RICHARD DeLEON
MEHANA KIHAI
C.M. KAHOKAHI KANUHA
JOSEPH KUALII LINDSEY CAMARA
JENNIFER LEINA'ALA SLEIGHTHOLM
MAELANI LEE
STEPHANIE-MALIA TABBADA
TIFFNIE KAKALIA
GLEN KILA
DWIGHT J. VICENTE
BRANNON KAMAHANA KEALOHA
CINDY FREITAS
WILLIAM K. FREITAS

1 So, Judge, the ruling should be consistent
2 with Hawai'i and the law of the United States. Thank
3 you.

4 HEARING OFFICER AMANO: After consideration
5 of the motion, the oppositions, and the arguments
6 presented, I'm denying the motion.

7 The issue of the status of the State of
8 Hawai'i will not be an issue in this contested case
9 hearing.

10 If you have filed a memorandum in relation
11 to that motion, you may speak. Otherwise, no.

12 MR. KEALOHA: I believe I did.

13 HEARING OFFICER AMANO: What document
14 number is that?

15 Mr. Kealoha, I'm going to get to quo
16 warranto. I have no idea what that means.

17 MR. KEALOHA: It has everything to do with
18 that.

19 HEARING OFFICER AMANO: I'll deal with it.
20 I've already ruled.

21 MR. KEALOHA: I don't believe you answered
22 the question.

23 HEARING OFFICER AMANO: Mr. Fergerstrom,
24 did you file something?

25 MR. FERGERSTROM: Yes. My --

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

JUDGE RIKI MAY AMANO (Ret.)
rma3cc@yahoo.com
Hearing Officer

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

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for
ATTORNEY GENERAL DOUGLAS S. CHIN,
THE DEPARTMENT OF THE ATTORNEY
GENERAL, and DEPUTY ATTORNEYS
GENERAL IN THEIR CAPACITY AS
COUNSEL FOR THE BOARD OF LAND AND
NATURAL RESOURCES and HEARING
OFFICER

JULIE H. CHINA, ESQ., Deputy Attorney
General
julie.h.china@hawaii.gov
WILLIAM J. WYNHOFF, ESQ., Deputy
Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND
NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
Watanabe Ing LLP
*Counsel for TMT INTERNATIONAL
OBSERVATORY, LLC*

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington &
Harris
*Counsel for PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES (PUEO)*

RICHARD NAIWIEHA WURDEMAN, ESQ.
rnwurdeman@rnwlaw.com
*Counsel for Petitioners MAUNA KEA ANAINA
HOU; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J.
WARD; PAUL K. NEVES; and KAHEA: THE
HAWAIIAN ENVIRONMENTAL ALLIANCE*

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(no email; mailing address only)

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

RICHARD L. DELEON
kekaukike@msn.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96750
hankhawaiian@yahoo.com
(via email & U.S. mail)

CINDY FREITAS
hanahanai@hawaii.rr.com

WILLIAM FREITAS
pohaku7@yahoo.com

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

MEHANA KIHUI
uhiwai@live.com

GLEN KILA
makakila@gmail.com

MAELANI LEE
maelanilee@yahoo.com

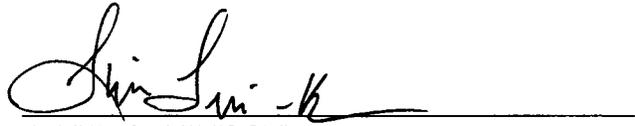
JENNIFER LEINA 'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

STEPHANIE-MALIA: TABBADA
s.tabbada@hawaiiantel.net

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

HARVEY E. HENDERSON, JR., ESQ.,
Deputy Attorney General
harvey.e.hendersonjr@hawaii.gov
*Counsel for the Honorable DAVID Y. IGE, and
BLNR Members SUZANNE CASE and
STANLEY ROEHRIG*

DATED: Honolulu, Hawai'i, August 22, 2016.

A handwritten signature in black ink, appearing to read "Ian L. Sandison", is written over a horizontal line.

IAN L. SANDISON

TIM LUI-KWAN

JOHN P. MANAUT

Attorneys for Applicant

UNIVERSITY OF HAWAI'I AT HILO