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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 MEMORANDUM IN  
OPPOSITION TO BRANNON  
KAMAHANA KEALOHA'S  
KAMAHANA KEALOHA: INVOKING  
AMERICAN LAW; MOTION  
DEMANDING INVENTORY OF THE  
SO-CALLED CEDED LANDS  
CONTAINING THE SPECIFIC LAND  
AND PARCEL THE TIO PLANS TO BE  
SUB-LEASED BY UH WHO LEASES  
SAID LANDS FROM THE BLNR, A  
SURVEY OF THESE LANDS ALSO,  
FILED AUGUST 10, 2016 [DOC. 191];  
CERTIFICATE OF SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO'S MEMORANDUM IN OPPOSITION TO  
BRANNON KAMAHANA KEALOHA'S KAMAHANA KEALOHA: INVOKING  
AMERICAN LAW; MOTION DEMANDING INVENTORY OF THE SO-CALLED  
CEDED LANDS CONTAINING THE SPECIFIC LAND AND PARCEL THE TIO  
PLANS TO BE SUB-LEASED BY UH WHO LEASES SAID LANDS FROM THE BLNR,  
A SURVEY OF THESE LANDS ALSO, FILED AUGUST 10, 2016 [DOC. 191]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("University") submits this

Opposition to Brannon Kamahana Kealoha’s document entitled *Kamahana Kealoha: Invoking American law; Motion demanding inventory of the so-called ceded lands containing the specific land and parcel the TIO plans to be sub-leased by UH who leases said lands from the BLNR, a survey of these lands also*, filed August 10, 2016 [Doc. 191] (“**Motion**”).

## **I. INTRODUCTION**

On August 10, 2016, Mr. Kealoha filed his Motion, which appears to argue that the proceedings in the above-captioned matter are invalid because the Board of Land and Natural Resources (“**Board**”) purportedly does not have jurisdiction over the land that is the subject of the conservation district use application (“**Application**”). According to Mr. Kealoha, the Board lacks jurisdiction because: (1) “no inventory or survey is available delineating exactly the said lands;” and (2) “the Island of Hawaii is not within the so-called State of Hawaii” since there is no evidence that the Island of Hawai‘i was included in the Territory of Hawai‘i at the time that the Territory was ceded to the United States. Motion (unpaginated) at 1. Mr. Kealoha also demands (in the title of his Motion only) an inventory of the ceded lands containing the land that is the subject of the Application—*i.e.* the proposed site for the Thirty Meter Telescope on Mauna Kea (“**Proposed TMT Site**”). *Id.*

As discussed in various other filings by the University,<sup>1</sup> as well as the Board’s own

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<sup>1</sup> See, e.g., *University of Hawai‘i at Hilo’s Memorandum in Opposition to Maelani Lee’s Motion to Intervene filed July 13, 2016 [Doc. 84]*, filed August 1, 2016 [Doc. 136]; *University of Hawai‘i at Hilo’s Opposition to Living Heir/Proper Party/Petitioner Stephanie-Malia Tabbada’s Motion to Vacate Entire Process for Violation of BLNR and University of Hawai‘i Fiduciary Trust, Rights, Responsibilities, Breach of Contract, Etc. Mandated by the Law of the Land [Doc. 97]*, filed August 1, 2016 [Doc. 139]; *University of Hawai‘i at Hilo’s Substantive Joinder in Support of Perpetuating Unique Educational Opportunities’ Motion to Set the Issues filed July 18, 2016 [Doc. 99]*, filed August 1, 2016 [Doc. 140], which arguments are incorporated herein by reference as applicable.

rulings,<sup>2</sup> Mr. Kealoha’s arguments are wrong on the law and otherwise involve adjudication of issues that are not within the Board’s jurisdiction. For these reasons, the Motion should be denied.

## II. ARGUMENT

Although Mr. Kealoha entitles his Motion as a demand for an inventory of ceded lands, in form and substance the Motion is another challenge to the State of Hawai‘i’s ownership and control of ceded lands. However, it is well-settled that the State of Hawai‘i has good title to ceded lands conveyed to it by the United States and that the State of Hawai‘i holds such title in “absolute fee.” *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 174 (2009).

It is also indisputable that the Island of Hawai‘i is part of the State of Hawai‘i. As Mr. Kealoha states in his Motion, “[t]he State of Hawaii shall consist of all the islands . . . included in the Territory of Hawaii on the date of enactment of this Act[.]” Haw. Const. art. XV, § 1. The Island of Hawai‘i, birthplace of King Kamehameha the Great—who united the Hawaiian Islands as the Kingdom of Hawai‘i—was undoubtedly included within the boundaries of the Kingdom of Hawai‘i and thus the Territory of Hawai‘i. Indeed, the first constitution of the Kingdom of Hawai‘i provided that “[t]here shall be four Governors over these Hawaiian Islands – *one for Hawaii* – one for Maui and the Islands adjacent – one for Oahu, and one for Kauai and the adjacent Islands.” 1840 Constitution of the Kingdom of Hawai‘i (Ke Kumukānāwai a me nā Kānāwai o ko Hawai‘i Pae ‘Āina, Honolulu, 1840), § 23. When the Territory of Hawai‘i was ceded to the United States, all lands within the Territory were ceded in “absolute fee.” *Id.* at 167. Thus, contrary to Mr. Kealoha’s assertions, the Island of Hawai‘i is clearly within the State of Hawai‘i’s jurisdiction.

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<sup>2</sup> *See* Minute Order No. 14, filed July 22, 2016 [Doc. 124].

The Board, by extension, has good title to the public lands within its jurisdiction, including public lands within the State Land Use Conservation District such as the Mauna Kea Science Reserve and the proposed TMT . See Hawai‘i Revised Statutes (“HRS”) § 183C-3. Additionally, the Board already has ruled that it has jurisdiction over the lands that are the subject of this proceeding, *i.e.* the Proposed TMT Site. See Minute Order No. 14 [Doc. 124], at 2; see also *Baker v. Carr*, 369 U.S. 186, 212 (1962) (“[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over a disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.”).

To the extent that Mr. Kealoha disputes the State of Hawai‘i’s authority over ceded lands within its jurisdiction, Mr. Kealoha’s argument amounts to a challenge of the State’s sovereignty, and as such involves a nonjusticiable political question which the Board does not have jurisdiction to determine.<sup>3</sup> Even if, for the sake of argument, this was somehow a justiciable political question, this is not the proper forum to adjudicate this issue, as agencies only have jurisdiction to perform the actions authorized by the agency’s enabling statute; and, it is indisputable that the Board has not been granted statutory authority to adjudicate sovereignty issues.<sup>4</sup>

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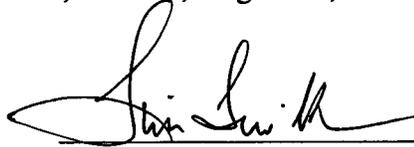
<sup>3</sup> See *Baker v. Carr*, 369 U.S. 186, 212 (1962); *Sai v. Clinton*, 778 F.Supp.2d 1 (D. D.C. 2011), *aff’d sub. nom.*, *Sai v. Obama*, 2011 WL 4917030, at \*3 (D.C. Cir. Sept. 26, 2011) (“Since its annexation in 1898 and admission to the Union as a State in 1959, Hawaii has been firmly establish 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.”).

<sup>4</sup> See Hawai‘i Revised Statutes § 183C-3 (Powers and duties of the board and department); see also *Morgan v. Planning Dep’t, Cnty. of Kauai*, 104 Hawai‘i 173, 184, 86 P.3d 982, 993 (2004) (“An administrative agency can only wield powers expressly or implicitly granted to it by statute. However, it is well established that an administrative agency’s authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.”)

**III. CONCLUSION**

For these reasons, the Motion should be denied.

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



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(citations and quotation marks omitted); *Public Util. Comm'n of Texas v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001) (“The basic rule is that a state administrative agency has only those powers that the Legislature expressly confers upon it.”); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St.3d 250, 773 N.E.2d 536, 545-46 (2002) (providing that a while an agency’s grant of power may be express or implied, “the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective”).

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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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:

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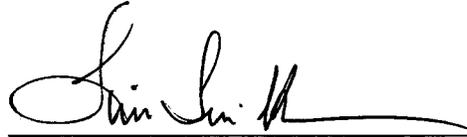
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DATED: Honolulu, Hawai'i, August 22, 2016.

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

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