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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

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MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
CLARENCE KUKAUAKAHI CHING; FLORES-CASE 'OHANA;
DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE
HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of:	)	Case No. BLNR-CC-16-002
)	
A Contested Case Hearing Re	)	PETITIONERS' RESPONSE TO
Conservation District Use Permit	)	PERPETUATING UNIQUE
(COUP) HA-3568 for the Thirty Meter	)	EDUCATIONAL OPPORTUNITIES,
Telescope at the Mauna Kea Science	)	INC.'S PROPOSED MINUTE ORDER
Reserve, Kaohe Mauka, Hamakua	)	GRANTING PERPETUATING UNIQUE
District, Island of Hawai'i, TMK (3) 4-4-	)	EDUCATIONAL OPPORTUNITIES,
015:009	)	INC.'S MOTION TO SET ISSUES,
	)	FILED ON SEPTEMBER 9, 2016; and
	)	CERTIFICATE OF SERVICE
)	
)	
	)	Hearing Officer: Hon. Riki May Amano,
	)	Judge (ret.)

**PETITIONERS' RESPONSE TO PERPETUATING UNIQUE EDUCATIONAL
OPPORTUNITIES, INC.'S PROPOSED MINUTE ORDER GRANTING
PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S MOTION TO
SET ISSUES, FILED ON SEPTEMBER 9, 2016**

Petitioners' MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
CLARENCE KUKAUAKAHI CHING; FLORES-CASE 'OHANA; DEBORAH J. WARD;
PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a

domestic non-profit Corporation ("Petitioners"), by and through their undersigned counsel, respectfully submits their response to Intervenor Party PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S ("P.U.E.O., Inc.") proposed minute order granting its motion to set issues, filed September 9, 2016, and pursuant to its Motion filed on July 18, 2016.

I. **INTRODUCTION.**

Pursuant to the Hearing Officer's instructions during the hearing held on August 29, 2016, P.U.E.O., Inc. submitted its proposed Minute Order Granting Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set Issues [Doc-99] on September 9, 2016. During the August 29, 2016 hearing, the Mauna Kea Anaina Hou, et al. Petitioners articulated on the record a number of issues to be addressed in the contested case hearing.¹ While some of these issues are included in P.U.E.O., Inc.'s proposed order, P.U.E.O., Inc.'s proposed order fails to include a number of important issues in this case and the proposed order is also simply overly narrow and inappropriate in assuring due process for all parties and the Board of Land and Natural Resources' fulfillment of its own duties to public trust resources as well as to customary and traditional practices.

Furthermore, the Mauna Kea Anaina Hou et al. Petitioners raise once again their objections set forth in their Memorandum in Opposition to Perpetuating Unique Educational Opportunities, Inc.'s Motion to Intervene, Dated May 16, 2016, Filed on June 13, 2016, and the further arguments made during the hearing on the motion and during subsequent hearings held before this Hearing Officer. P.U.E.O., Inc. simply

¹ Please also note Petitioners Mauna Kea Anaina Hou, Et Al.'s' Request for Further Status Conference and/or Consideration of Proposed Scheduling, Filed on September 8, 2016. Other petitioners in the instant matter appeared to subsequently file pleadings as well.

lacks standing in the instant case and no evidence or testimony intended to be adduced by P.U.E.O., Inc. is relevant to the determination of the issues in the instant case.

Some of the central issues in this contested case hearing include whether the applicant, the University of Hawai'i at Hilo ("UHH"), can meet its burden of demonstrating that its proposed land use complies with and is consistent with all of the eight criteria set forth in HAR § 13-5-30(c), the permit requirements of HAR § 13-5-24, and other requirements as set forth in HAR, Title 13, Chapter 5; whether the planned use is consistent with the requirements and provisions of Chapter 183C and 205 of the Hawaii Revised Statutes; whether the proposed land use would be in violation of the public trust doctrine, Hawai'i State Constitution Articles XI § 1 and § 9, and XII § 4 and § 7, the State's obligations under section 5(f) of the Admissions Act, and HRS Chapters 7 and 205A; whether the proposed land use would violate the customary and traditional practices of the Petitioners as well as their cultural and religious freedoms and protections; whether the proposed land use would be consistent with the requirements under *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000); and the other issues set forth below. BLNR cannot grant a conservation district use permit where these requirements have not been met.

II. ARGUMENT.

A. P.U.E.O., Inc.'s Proposed Issues are Overly Narrow.

P.U.E.O., Inc.'s proposed minute order was restricted to the following issues:

- (1) Is the proposed land use, including the plans incorporated in the application, consistent with the eight criteria in HAR § 13-5-30(c) and other applicable rules in HAR, Title 13, Chapter 5, Conservation District?
- (2) Is the proposed land use consistent with article XII, section 7 of the Hawai'i State Constitution?

- (3) Is the proposed land use consistent with *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000)?
- (4) Is the proposed land use consistent with applicable provisions of Chapter 183C of the Hawai'i Revised Statutes?
- (5) Does the public trust doctrine apply to the proposed land use and, if it does, is the proposed land use consistent with the public trust doctrine?

This framing of the issues does not encompass relevant, necessary considerations concerning the parties proposing the land use, the authorities and obligations concerning the conservation use and public lands in question, the violations of Petitioners' cultural and traditional practices and desecration of sacred land, and a number of other issues, including but not limited to, environmental studies, comprehensive management plans, and other issues. Whether these issues are determined through evidentiary hearings prior to the contested case hearings or during the hearings themselves, parties should have a right to present and be afforded a fair opportunity to be heard on what may be relevant or not relevant, material or not material, to the instant proceedings throughout the process.

In addition to the due process issues, the issues raised in moving this Hearing Officer to Strike the Conservation District Use Application, HA-3568, Dated September 2, 2010, and/or Motion for Summary Judgment, filed on July 18, 2016, and the further arguments and objections raised in hearings held on August 5th and 12th, 2016, the Motion to Disqualify BLNR's and this Hearing Officer's Counsel, filed on July 18, 2016, and as further argued at the hearings held on August 5th and August 12th, 2016, and other issues raised by the Petitioners to date, the Petitioners additionally raise the following issues for consideration:

- (1) Whether an evidentiary hearing shall be held prior to the commencement of the hearings, based on the alleged delegation (as articulated by the Hearing Officer

at various hearings) of authority to the Hearing Officer by the BLNR of all issues in the contested case hearing process other than motions to disqualify or recuse the Hearing Officer, on whether BLNR Board member Stanly Roehrig has a conflict or appearance of conflict and/or bias and/or appearance of bias in ruling on various matters to date and hereinafter regarding the CDUA, sublease, the proposed development of the Thirty Meter Telescope, and other matters involving the instant contested case, especially in light of P.U.E.O., Inc.'s and its officers' participation in the instant proceedings.

(2) Whether the application should be dismissed, additionally, for failure to include indispensable parties in the instant contested case proceedings, including, but not limited to, the University of Hawaii, the Office of Hawaiian Affairs, and TMT Observatory Corporation (the separate entity for which the University of Hilo is purportedly applying in its instant application for a conservation district use permit).

(3) Whether the proposed land use is consistent with and meets all of the eight criteria set forth in HAR § 13-5-30(c), the permit requirements of HAR § 13-5-24, and other requirements as set forth in HAR, Title 13, Chapter 5.

(4) Whether the proposed land use is consistent with and complies with the provisions and requirements of Chapters 183C and 205 of the Hawaii Revised Statutes.

(5) Whether the proposed land use and the Board's approval of the CDUA would be consistent with the requirements under *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

(6) Whether the proposed land use violates the constitutional and statutorily protected customary and traditional practices of the Petitioners, under article XII, Section 7 of the State of Hawaii Constitution, H.R.S. Sections 1-1 and 7-1, and other

pertinent authorities and, also, whether the granting of the CDUA would be consistent with international legal authorities, including the United Nations Declaration of the Rights of Indigenous Peoples, IUCN Resolution No. 26,² and other international law and legal principles.

(7) Whether the applicant has met and whether the proposed land use complies with all main and management plan, comprehensive management plan, and environmental impact statement and environmental assessments requirements as required under state and federal law and under administrative rules and regulations.

(8) Whether the proposed land use violates the public trust doctrine, Article XI, Section 1, Article XI, Section 9, and other related authority, and whether the granting of a CDUA would be consistent with the obligations and duties under the public trust doctrine, including the fiduciary obligations of public trustees.

(9) Whether the granting of the CDUA in the instant matter would be in compliance with section 5(f) of the Admissions Act and Article XII, Section 4 of the Hawaii State Constitution.

(10) Would the granting of the CDUA be in violation of provisions of the general lease to the University of Hawaii for the Mauna Kea Science Reserve.

(11) Whether the provisions and requirements of H.R.S. Section 171-17 and other provisions of Chapter 171 of the Hawaii Revised Statutes have been and will be met.

² During its recent World Conservation Congress in Honolulu, the International Union for the Conservation of Nature (IUCN) passed Motion No. 26, titled "Protected areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development." See IUCN, Motion No. 26, (Sep. 9, 2016) available at: <https://portals.iucn.org/congress/motion/026>.

(12) Whether the proposed land use violates the religious freedoms and protections of the Petitioners under the state and federal constitution as well as under International law and legal principles.

(13) Whether the proposed lands use complies with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of HAR, Title 13, Chapter 5.

(14) Based on the Order of Remand in E. Kalani Flores v. Bd. of Land and Natural Resources, Civ. No. 14-1-324 (Third Circuit Court-Hilo), whether the sublease between TMT International Observatory, LLC and the University of Hawaii should be vacated prior to the commencement of the instant contested case proceedings as it would otherwise be running afoul of the “cart before the horse” due process concerns established in the Hawaii Supreme Court’s decision in *Mauna Kea Anaina Hou*, as raised as an issue for consideration in the Third Circuit Court’s Order of Remand.

B. P.U.E.O. Inc. lacks any interest in its proposed issues and should be excluded from the proceedings.

The Articles of Incorporation of P.U.E.O., Inc. included such corporate purposes and powers as (a), to share the interaction of Hawaiian culture and science, (b) to research and educate the public on the interaction of Hawaiian culture and science and to inspire exploration, and (c) to further educational opportunities for the children of Hawai’i in the fields of science, technology, engineering and mathematics. None of these purposes and powers are by the issues set under P.U.E.O., Inc.’s proposed minute order.

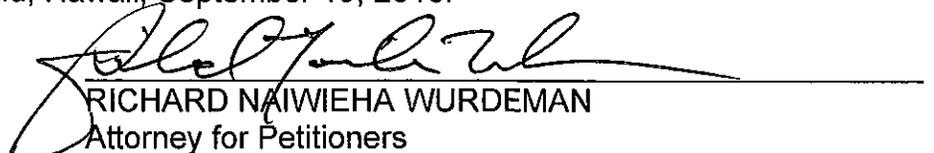
Petitioners also raise and incorporate their earlier objections regarding the participation of P.U.E.O., Inc. because the latter is aligned with the applicant the

University of Hawai'i at Hilo (UHH). Further, and relevant to the setting of issues, Petitioners again raise and reassert their objections filed through their Position Statement on Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set the Issues, filed August 1, 2016; Memorandum in Opposition to Perpetuating Unique Educational Opportunities, Inc.'s Motion to Intervene, dated May 16, 2016, filed on June 13, 2016; and the arguments made by the Petitioners on the hearing date, and object to such testimony as to relevancy and materiality in these proceedings. P.U.E.O., Inc. and its agents and representatives and any evidence and arguments to be presented at the contested case hearings are neither relevant, nor material to these proceedings. P.U.E.O., Inc. and its representatives have no injury in fact with respect to the proposed development, they have no standing, and their proposed testimony and evidence is neither relevant, nor material to any of the issues they have proposed to set in these proceedings. Accordingly, P.U.E.O., Inc. should be disqualified as a "party" within the meaning of HAR §13-1-31.

III. CONCLUSION.

For the foregoing reasons, Petitioners respectfully request P.U.E.O., Inc.'s Proposed Minute Order Granting its Motion to Set Issues be denied and Petitioners' above-identified issues be set for discussion in these proceedings.

Dated: Honolulu, Hawaii, September 19, 2016.


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(CDUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kahohe Mauka, Hamakua)
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following parties by the means indicated:

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