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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

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, Kaahe Mauka, Hamakua
District, Island of Hawai'i, TMK (3) 4-4-
015:009

**PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES,
INC.'S MOTION TO SET THE ISSUES;
CERTIFICATE OF SERVICE**

**PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S
MOTION TO SET THE ISSUES**

COMES NOW PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.
("PUEO"), by and through its undersigned counsel, and hereby respectfully moves the Board of
Land and Natural Resources ("Board"), through its Hearings Officer, for an order setting the
issues for the contested case hearing in the above-captioned matter. The Motion should be
granted pursuant to Hawai'i Administrative Rules ("HAR") §§ 13-1-34 and 13-1-29.1 because
the Board may limit the issues or deny a contested case hearing on matters "not within the

adjudicatory jurisdiction of the board[.]" HAR § 13-1-29.1. Given the recent admission of a number of intervenors, it may assist all parties involved if there is clear understanding of what issues the Hearing Officer believes are relevant so the parties may appropriately focus their evidence and arguments thereon.

This Motion is made pursuant to HAR §§ 13-1-34 and 13-1-29.1 and all other applicable rules of practice and procedure, and is based upon the attached Memorandum in Support of Motion and the entire record and files herein.

DATED: Hilo, Hawai'i, July 18, 2016.



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PERPETUATING UNIQUE EDUCATIONAL
OPPORTUNITIES

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

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

Case No. BLNR-CC-16-002

MEMORANDUM IN SUPPORT OF MOTION

MEMORANDUM IN SUPPORT OF MOTION

PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC. ("PUEO"), by and through its counsel, hereby submits its Memorandum in Support of Motion to Set the Issues in the above-captioned matter. This Motion should be granted pursuant to Hawai'i Administrative Rules ("HAR") § 13-1-34 and 13-1-29.1 because the Board may limit the issues or deny a contested case hearing on matters "not within the adjudicatory jurisdiction of the board[.]" HAR § 13-1-29.1. Given the large number of intervenors recently admitted into this case, it may assist all parties to understand what issues the Hearing Officer believes are relevant, and focus their evidence and arguments thereon.

I. BACKGROUND

On June 17, 2016, the Hearings Officer in this proceeding held a hearing on the applications by persons or organizations seeking admission as parties to this proceeding. At the hearing, nineteen requests to participate as parties in the contested case hearing were granted, bringing the number of parties to this proceeding to twenty-five (25). At the hearing, the Hearings Officer orally set out the following filing deadlines:

1. July 18, 2016: Pre-hearing motions and parties' witness lists;
2. August 1, 2016: Responses to pre-hearing motions and witness lists;
3. August 5, 2016: Hearing on the motions; and
4. August 5, 2016: Third pre-hearing conference.

The parties to the contested case, all of whom were either represented or present at the June 17, 2016 hearing, acknowledged the setting of the above deadlines by the Hearing Officer. The issue that must be addressed at the evidentiary hearing on this matter is whether or not the Conservation District Use Application ("CDUA"), which is the subject of this contested case, meets the eight criteria set forth in HAR § 13-5-30(c). *See infra*. PUEO respectfully requests that the issues be further defined and confirmed. Additionally, the Board or any party may request that the Third Circuit Court appoint a master or monitor, where the case is remanded to the Board to hold a contested case, to ensure compliance with the Court's Order pursuant to a recent amendment to State Administrative Procedures Act ("HAPA") Haw. Rev. Stat. § 91-14.¹ If appointed by the Third Circuit Court, a master or monitor, could also assist the Board and/or the Hearing Officer in assuring the Court that the issues formulated or simplified during the prehearing conferences were correctly made and within the adjudicatory jurisdiction of the Board.

II. STANDARDS

A. MOTIONS.

Pursuant to HAR § 13-1-34(a):

All motions other than those made during a hearing shall be made

¹ The State Legislature, in a recent amendment to HAPA, adopted Act 48, (Sess. Laws of Hawaii, 2016) which in relevant part added the following subsection to Haw. Rev. Stat. § 91-14:

"(i) Where a court remands a matter to an agency for the purpose of conducting a contested case hearing, the court may reserve jurisdiction and appoint a master or monitor to ensure compliance with its orders."

in writing, shall state the relief sought, and shall be accompanied by an affidavit, or declaration, or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for filing all motions and opposing memoranda, if any.

B. SUBJECT MATTER OF CONTESTED CASE HEARING.

In determining whether a party is entitled to a contested case hearing, the Board:

may deny a request or petition or both for a contested case *when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board* or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.

HAR § 13-1-29.1 (emphasis added). It follows that the Board may limit the issues to be heard in a contested case hearing pursuant to this rule as the Board cannot rule or provide relief on matters for which it does not have jurisdiction.

C. PREHEARING CONFERENCE; EXCHANGE OF EXHIBITS; BRIEFS.

Under HAR § 13-1-36, the Hearings Officer may also:

hold or cause to be held pre-hearing conferences with the parties *for the purpose of formulating or simplifying the issues*, written testimony, setting of schedules, exchanging names or witnesses, limitation of number of witnesses, *and such other matters as may expedite the orderly conduct and disposition of the proceeding* as permitted by law.

HAR § 13-1-36(a) (emphasis added).

D. CONDUCT OF HEARING; EVIDENCE.

Under HAR § 13-1-32(h), the Hearings Officer "may limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue" to avoid repetitive or unnecessary evidence. Furthermore under HAR § 13-1-35(a), the Hearings Officer has discretion "in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial

justice."

III. THE ISSUES IN THIS CONTESTED CASE SHOULD BE LIMITED TO THE EIGHT CRITERIA SET FORTH IN HAR § 13-5-30(C).

The sole issue for resolution in a contested case on a CDUA is whether or not the applicant's proposed land use is consistent with the criteria for approval of a CDUA as set forth in HAR § 13-5-30(c), which provides:

(c) In evaluating the merits of a proposed land use, the department or board shall apply the following criteria:

- (1) The proposed land use is consistent with the purpose of the conservation district;
- (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
- (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management," where applicable;
- (4) The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding area, community or region;
- (5) The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
- (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;
- (7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
- (8) The proposed land use will not be materially detrimental to the public health, safety and welfare.

PUEO acknowledges that other issues related to the public trust doctrine and *Ka Pa 'akai 'O Ka 'Āina v. Land Use Comm'n*, native Hawaiian traditional and customary practices, and the

TMT sublease, may be raised in this proceeding. To the extent that any additional related issues are raised, PUEO respectfully requests that such issues and the evidence and testimony presented thereon be considered only to the extent that they are relevant to the CDUA criteria and within the jurisdiction of the Board.

PUEO further acknowledges that the proposed Project for which the CDUA seeks approval is a highly politicized due to other issues not related to the CDUA. In the last contested case hearing and in various requests for intervention in this proceeding, claims related to ceded lands and sovereignty, among other things, have been asserted. To the extent that other parties may seek to introduce such issues or evidence supporting *solely* those unrelated issues or irrelevant evidence in this proceeding, PUEO respectfully requests that the Hearings Officer rule that such issues will not be heard and no evidence taken in this contested case hearing.

As discussed above, the Board's jurisdiction in this matter is limited to whether or not the CDUA meets the criteria set forth in HAR § 13-5-30(c). While issues like ceded lands and sovereignty may be of great public importance, such issues are nonjusticiable political questions² reserved to the executive branch. Consequently, the Board does not have the ability to provide relief on matters that are political questions, for which the Board does not have jurisdiction.³

With many parties in this case, many of whom may not be knowledgeable of the law or the purpose of the contested case hearing, it may be productive to have the issues established and to

² See, e.g., *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."); *Wang v. Masaitis*, 416 F.3d 992 (9th Cir. 2005) (recognizing that discerning a nation's sovereignty is a nonjusticiable political question).

³ See Haw. Rev. Stat. § 183C-3 (Powers and duties of the board and department); HAR § 13-1-29.1 (providing that the Board may deny a request for a contested case when it the subject is a matter that is not within the adjudicatory jurisdiction of the Board); see also HAR § 13-1-27(f)(4) (providing that the Board may refuse to issue a declaratory order where the matter is not within the Board's jurisdiction).

notify all parties ahead of time the extent to which the Hearing Officer will permit evidence or argument on what may be deemed matters outside the jurisdiction of the Board. Hence the present request by PUEO to have the Hearing Officer set the issues ahead of time.

The bottom line is PUEO's concern is that the contested case hearing be conducted efficiently and expediently and that the dispositive issues be thoroughly examined without allocating precious time and resources to matters that are irrelevant or inapposite to the matter at hand. With twenty-five parties to this action, this task may prove to be difficult. However, the Board and the Hearings Officer have within their authority the tools to ensure that the proceeding is conducted in a fair and efficient manner, one such tool being setting the issues to be determined by the proceeding. *See* HAR § 13-1-35(a) (providing that the Board and the Hearings Officer have the discretion to limit the issues and admission of evidence in a contested case where such issues and/or evidence is "immaterial, irrelevant, or unduly repetitious").

PUEO notes that recent legislative amendments to Haw. Rev. Stat. Chapter 91, while providing priority for appeals of contested cases having significant statewide importance directly to the Hawai'i Supreme Court, also provides for an appointment of a master or monitor to assure compliance where the dispute has been remanded by a court to an agency to hold a contested case as was done in the instant proceedings. As the Hearing Officer knows, a master or monitor appointed by the Third Circuit Court could assist the Board and/or the Hearing Officer in assuring that the issues to be determined in this contested case are correctly formulated and and the process for that determination is fairly conducted. Haw. Rev. Stat. § 91-14 (i); *see also* HAR§ 13-1-36 (a).

IV. CONCLUSION

Based on the foregoing, PUEO respectfully moves that the issues in the above-captioned matter be limited as set forth herein. PUEO requests that due consideration be given to the

streamlining of further proceedings and the hearing on the merits, pursuant to HAR § 13-1-32, which provides the hearings officer with inherent authority and discretion to avoid unnecessary and/or duplicative evidence and to organize the parties' positions for an efficient and practicable presentation.

DATED: Hilo, Hawai'i, July 18, 2016.



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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing was served on the following via the manner

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