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DEPT. OF LAND &  
 NATURAL RESOURCES  
 STATE OF HAWAII

Attorney for 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

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' MEMORANDUM IN
Conservation District Use Permit	)	OPPOSITION TO TMT'S MOTION
(CDUP) HA-3568 for the Thirty Meter	)	TO HAVE TMT INTERNATIONAL
Telescope at the Mauna Kea Science	)	OBSERVATORY, LLC ADMITTED AS
Reserve, Kahohe Mauka, Hamakua	)	A PARTY IN THE CONTESTED CASE
District, Island of Hawaii,	)	HEARING; DECLARATION OF COUNSEL;
TMK (3) 4-4-015:009	)	EXHIBITS "A" – "D"; and CERTIFICATE
	)	OF SERVICE
	)	
	)	

PETITIONERS' MEMORANDUM IN OPPOSITION TO TMT'S MOTION TO  
 HAVE TMT INTERNATIONAL OBSERVATORY, LLC ADMITTED AS  
 A PARTY IN THE CONTESTED CASE HEARING

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 (also referred to herein collectively as "Mauna Kea Anaina Hou" or "Petitioners"), by and through their counsel undersigned, and hereby submit their

opposition to TMT's Motion to have TMT International Observatory, LLC Admitted as a Party in the Contested Case Hearing, filed on April 8, 2016, in the above-entitled matter.

I. BACKGROUND.

According to State of Hawaii Department of Commerce and Consumer ("DCCA") records, the TMT Observatory Corporation, which is a foreign non-profit corporation, was registered with the DCCA on November 9, 2009, with a stated purpose in the DCCA documents as being, "TMT will develop, build and operate a 30 meter class telescope, these facilities will be used to foster (1) scientific interaction among educational and research institutions and (2) college and university educational programs." Please see Exhibit "A" attached hereto which are true and correct copies of records from the DCCA website. In the Conservation District Use Permit Application ("CDUA") for the Thirty Meter Telescope, Island of Hawai'i, dated September 2, 2010, the Legal Name of the Applicant was listed as the "University of Hawai'i c/o of University of Hawaii at Hilo" and the contact person and the contact person's title was listed as Dr. Donald Straney, Chancellor [of the University of Hawaii at Hilo]." Please see Exhibit "B" attached hereto which is a true and correct copy of some of the pertinent pages of the CDUP Application, dated September 2, 2010. Under the Overview of the Proposed Use, Section 1.2 of the CDUA, it provides, in pertinent part (with footnote 4 omitted), as follows:

On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a conservation District Use Permit (CDUP) from the State of Hawai'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory within an area below the summit of Mauna Kea known as "Area E." The Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology (Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project.

(Emphasis added).

On December 2 and 3, 2010, BLNR held public hearings on the CDUA in Hilo and Kailua-Kona, respectively. Approximately 200 individuals attended the hearings, 84 of whom testified, and a number of individuals and groups provided written comments before and after the hearings. A range of opinions were expressed in support of and against the CDUA, and at least 6 individuals or groups requested a contested case hearing verbally, in writing, or both. In the weeks that followed, Samuel Lemmo, Administrator of the Office of Conservation and Coastal Lands, and Michael Cain, Staff Planner for the Office of Conservation and Coastal Lands, completed a staff report for the BLNR that summarized the CDUA and public comments, including the requests for a contested case hearing, and recommended that BLNR approve the CDUA and issue a Conservation District Use Permit (CDUP), along with twenty-one conditions for the permit.

On February 25, 2011, at the regularly-scheduled BLNR public board meeting, Samuel Lemmo gave a presentation to the Board and forty-one individuals testified either for or against the application, which included several more requests for a contested case hearing and objections to the BLNR issuing a permit before holding a contested case hearing. Despite the public testimony and the objections to the BLNR's issuance of a permit before the contested case hearing was held, the BLNR voted unanimously to approve the application and issued a permit. The BLNR adopted the recommendations and the conditions in the staff report. Subsequently, at the same Board meeting, BLNR voted unanimously to hold a contested case hearing and written requests were also subsequently made by the Petitioners. The Petitioners made timely requests for a contested case hearing as required by Hawaii Administrative Rules ("HAR") §§13-1-28, 13-1-29, 13-1-30 and 13-1-31. Commencing in August of 2011, a hearing officer approved by BLNR's Chair presided over a lengthy contested case hearing process, during which voluminous written direct testimony was admitted, and twenty-six witnesses, under oath, testified and were cross-examined.

On April 12, 2013, and following the conclusion of the contested case hearing, the BLNR issued its 126-page findings of fact, conclusions of law and decision and order ("BLNR's decision and order"). A timely agency appeal was taken by the Petitioners to the Circuit Court of the Third Circuit and after briefs were submitted by the

parties and oral arguments made before the court, the court issued its decision and order affirming the BLNR's decision and order and entered final judgment on May 5, 2014. The Petitioners then timely filed a notice of appeal.

In that same month, May of 2014, and according to TMT's instant Motion, TMT moved forward with the establishment of the TMT International Observatory, LLC. Please see page 3 of the Memorandum in Support of Motion, which is attached to TMT's instant Motion ("TIO's Memorandum in Support"); please see also Exhibit "C" attached hereto which is a true and correct copy of records from the DCCA website. According to TIO's Memorandum in Support, TMT International Observatory, LLC's members include the Regents of the University of California, the California Institute of Technology, the National Institutes of Natural Sciences Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the National Research Council of Canada. The Association of Universities in Astronomy is characterized as a TIO associate.

On July 28, 2014, and according to TIO's Memorandum in Support, the University of Hawaii and the TMT International Observatory, LLC. entered into a sublease agreement and non-exclusive easement agreement ("Sublease") in which a portion of the Mauna Kea Science Reserve was subleased by the University of Hawaii to TMT International Observatory, LLC. to construct and operate the TMT Project on Mauna Kea.<sup>1</sup> Please see Page 4 of TIO's Memorandum in Support.

Prior to the execution of the Sublease, the matter went before the Board of Land and Natural Resources for the required consent of the BLNR at a meeting on June 27, 2014, at which point the BLNR granted the consent to the Sublease, but "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded. At the BLNR's meeting on July 25, 2014, the Board denied requests for a contested case hearing, including a request made by E. Kalani Flores.

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<sup>1</sup> It is important to note that the CDUA, dated September 2, 2010, that was submitted by UH, has never been amended or resubmitted and it is still being brought on behalf of a different entity from the instant movants, TMT Observatory Corporation, that is still an active corporation according to DCCA records, and the CDUA is not being brought on behalf of the movants, TMT International Observatory, LLC.

(E. Kalani Flores is part of the Flores-Case 'Ohana in the instant case and a petitioner).  
E. Kalani Flores filed a timely agency appeal on that matter.

On December 2, 2015, the Hawaii Supreme Court entered its decision in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015) in which it vacated the Third Circuit Court's May 5, 2014 Decision and Order and Final Judgment thereon and remanded to the circuit court to further remand to the BLNR for proceedings consistent with the Supreme Court's opinion, so that "a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion." On February 22, 2016, the Third Circuit Court, the Honorable Greg K. Nakamura, presiding, entered its order of remand to the BLNR.

On April 5, 2016, and in the agency appeal dealing with the consent of the Sublease by the BLNR, in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civ. No. 14-1-324 (Third Circuit-Hilo), the Third Circuit Court, again, the Honorable Greg K. Nakamura, presiding, issued its Order for Remand. Please see Exhibit "D" attached hereto which is a true and correct copy of the said Order. The court concluded, *inter alia*, that the fact that the TMT CDUP had been vacated as a result of the Hawaii Supreme Court's decision in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, *supra*, is material because the Sublease and Consent was premised upon the existence of the TMT CDUP and the Hawaii Supreme Court's subsequent decision was not a fact existing for the BLNR when it considered the application for the consent of the Sublease. *Id.* The Third Circuit Court **ordered** the BLNR to take appropriate action on remand and the court set forth a series of questions in its Order, for the BLNR when considering the new evidence, that the Board may consider:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?

- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

Id.

To date, the BLNR has inexplicably refused to comply with the Third Circuit's Order for Remand, filed April 5, 2016, an Order and determinations in compliance of which completely undermine TMT's instant request in being admitted as a party in these proceedings because of a so-called "property interest." This disregard of the Honorable Judge Greg K. Nakamura's Order amounts to contempt of court by the BLNR and such contemptuous actions by the Board should not and cannot be tolerated in these proceedings.

## II. ARGUMENT.

### A. TMT'S REQUEST TO BE ADMITTED AS A PARTY IS NOT TIMELY.

TMT's instant Motion to be admitted as a party is based on HAR § 13-1-31(b)(2). HAR § 13-1-31, provides, in pertinent part, as follows:

**Parties.** (a) ...[P]arties to a contested case **shall be determined within a reasonable time following the ten-day period following the board meeting,** the presiding officer shall notify all persons and agencies, including the applicant...., who timely petitioned for the contested case hearing of the date and time for a hearing to be determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case...

(b) The following persons or agencies shall be admitted as parties:

...(2) All persons who have some property interest in the land,...or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public **shall be admitted as parties upon timely application.**

(Emphasis added).

While the Petitioners argued in their Objections filed on April 15, 2016 (as well as correspondence to Board Counsel prior to April 15, 2016) and their subsequent Motion filed on May 13, 2016 in the above-entitled matter that the Board was required to conduct a public hearing pursuant to Sunshine Law, the Board found in three (3) different Minute Orders, Minute Order No. 2, dated April 8, 2016; Minute Order No. 4, filed on May 6, 2016; and Minute Order No. 9, filed on June 3, 2016, that such a meeting, pursuant to Sunshine Law, does not apply as the Board claimed that it was exercising its adjudicatory functions, pursuant to H.R.S. Section 91-9. As a result, and without the Petitioners waiving their objections and challenges, the BLNR has already determined that the process in determining parties, pursuant to HAR § 13-1-31, is not applicable and has already passed in the proceedings. In fact, and again without the Petitioners' waiving their objections, the Board has already determined, with its findings that it was exercising its adjudicatory functions, pursuant to HRS Section 91-9, that the proceedings are now at the stage of HAR § 13-1-32(c) in the process, with the party determination, under HAR § 13-1-31, no longer being at issue as the proceedings are already in the adjudicatory process, as found by the BLNR.<sup>2</sup> UH Hilo did not object to the Board's failure and its treatment of the process as already being in the adjudicatory process and neither did TMT International Observatory, LLC, when it filed its Supplemental Memorandum in Support of its Motion to Have TMT International

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<sup>2</sup> The Board's refusal to conduct a public hearing pursuant to Sunshine Law also calls into question the Board's failure to follow the concurring opinion of Justice Pollack in Mauna Kea Anaina Hou, with which Justice Wilson joined, and Justice McKenna joined, in part, that the administrative agency is not merely a passive actor or neutral umpire. The BLNR has an affirmative duty to fulfill the State's constitutional obligations, and there are now over thirty (30) additional movants and petitioners who are requesting to be admitted as parties in the contested case hearings and who are asserting that their constitutionally protected rights regarding customary and traditional practices and/or rights under the public trust doctrine will be adversely impacted by the proposed TMT observatory project. It appears that the Board has already, *sua sponte*, violated these obligations and has, as the Petitioners respectfully submit once again, already grossly and systematically violated due process in these proceedings on numerous occasions. (As for the claims of P.U.E.O., Inc., its claims are not applicable as further discussed in the separate Memorandum in Opposition to its Motion to be admitted as a party and P.Uu.E.O., Inc.'s Motion should be denied).

Observatory, LLC Admitted as a Party in the Contested Case Hearing, Filed April 8, 2016, filed on May 26, 2016, in which the only concern and issue that TMT International Observatory, LLC raised was that this Honorable Hearing Officer should be replaced, and it did not raise any other issues or objections. UH Hilo and TMT International Observatory, LLC, have, thus, also waived any positions that the proceedings are in a pre-HAR § 13-1-32(c), party determination process.

In addition, at no time did TMT Observatory Corporation make a timely request to be part of the contested case process on February 25, 2011, almost four-and-one-half years ago, with a number of the entity members of the current TMT International Observatory, LLC, having every opportunity to make a timely request at that time. The fact that TMT may have wanted to minimize its exposure and liability by waiting until May of 2014 to form a separate limited liability corporation with the remainder of its collaborators and potential partners being included, does not excuse the fact that TMT Observatory Corporation had every opportunity to request to be a party in February of 2011. In addition, and since the entering into a Sublease with the University of Hawaii on July 28, 2014, at no time did TMT International Observatory, LLC, move to intervene in the appellate process. TMT has clearly slept on any of its claims and alleged rights and it should not benefit from its conscious decisions in allowing UH to litigate the CDUP application, to date, on its behalf for the past several years, and now, all of a sudden, try to become a party at this point in the process. The fact that TMT International Observatory, LLC, may have become dissatisfied with UH Hilo litigating in these proceedings on its behalf, following the Hawaii Supreme Court's decision in Mauna Kea Anaina Hou, *supra*, is certainly not a justification for TMT International Observatory, LLC, to be admitted as a party, at this late date, either, and that seems to be TMT International Observatory, LLC's real motivation at this point. TMT International Observatory, LLC's Motion should be denied as untimely.

**B. THE LEGALITY OF TMT'S ALLEGED PROPERTY RIGHTS HAVE NOT BEEN RESOLVED AND DETERMINED AND ITS CLAIM OF HAVING AN ALLEGED PROPERTY INTEREST IS PREMATURE AND TMT'S ALTERNATIVE ARGUMENTS FAIL, AS WELL.**

HAR § 13-1-31(b) provides, in pertinent part, as follows:

(b) The following persons or agencies shall be admitted as parties:

...(2) All persons who have some property interest in the land,...or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.

Without waiving the timeliness issues asserted above, TMT's Motion should also be denied as it does not meet the requirements under HAR § 13-1-31(b)(2), the only provision under which TMT International Observatory, LLC is asserting it should be admitted as a party.

In its Motion, TMT International Observatory, LLC first requests admission into the proceedings based on an alleged "property interest," i.e. as a sublessee under the Sublease with the University of Hawaii, dated July 28, 2014. However, as set forth in the Background section above, that alleged property right is still at issue and has not yet been properly determined.

On April 5, 2016, and in the agency appeal dealing with the consent of the Sublease by the BLNR, in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civ. No. 14-1-324 (Third Circuit-Hilo), the Third Circuit Court, again, the Honorable Greg K. Nakamura, presiding, issued its Order for Remand. Please see Exhibit "D" attached hereto which is a true and correct copy of the said Order. The court concluded, *inter alia*, that the fact that the TMT CDUP had been vacated as a result of the Hawaii Supreme Court's decision in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, *supra*, is material because the Sublease and Consent was premised upon the existence of the TMT CDUP and the Hawaii Supreme Court's subsequent decision was not a fact existing for the BLNR when it considered the application for the consent of the Sublease. Id. The Third Circuit Court ordered the

BLNR to take appropriate action on remand and the court set forth a series of questions in its Order, for the BLNR when considering the new evidence, that the Board may consider:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?
- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

Id.

To date, the BLNR has inexplicably refused to comply with the Third Circuit's Order for Remand, filed April 5, 2016, an Order and determinations in compliance of which completely undermine TMT's instant request in being admitted as a party in these proceedings because of a so-called "property interest." This disregard of the Honorable Judge Greg K. Nakamura's Order amounts to contempt of court by the BLNR and such contemptuous actions by the Board should not and cannot be tolerated in these proceedings. Without these issues being first resolved, the legality of the Sublease is still at issue and must be determined as ordered by the Third Circuit Court. The alleged claim of a property interest is premature and undetermined and it lacks a legal basis

Next, and as for TMT International Observatory, LLC's alternative argument about it allegedly being so directly and immediately affected by the requested action and that its interest is clearly distinguishable from the general public, and again without

waiving the timeliness issues raised in Part II.A above, the current CDUA application, dated September 2, 2010, as described in the Background section above and in footnote 1, is being brought on behalf of the TMT Observatory Corporation and not on behalf of the movants, TMT International Observatory, LLC. While TMT International Observatory, LLC may include some of the members involved in and in partnership with the TMT Observatory Corporation, it is a different entity, and UH has never amended, nor resubmitted a CDUP application on behalf of the movants, TMT International Observatory, LLC. Thus, TMT International Observatory, LLC's claims are irrelevant and without a basis. In addition, unless a legal sublease has been entered into between UH and TMT and a CDUP properly obtained by the appropriate party, TMT International, LLC's simple desire, proposed plans, and dreams to build an observatory on Mauna Kea does not equate to it being so directly and immediately affected by the requested action that its interest in the proceeding is clearly distinguishable from that of the general public.

In addition, TMT International Observatory, LLC does not state how its interests are not already being represented by and consistent with the University of Hawaii's interest and positions in the instant proceedings, when the University of Hawaii, c/o UH Hilo, submitted and brought the CDUA on behalf of TMT Observatory Corporation. It is cumulative. And the fact that TMT International Observatory, LLC. may have become dissatisfied with UH Hilo litigating in these proceedings on its behalf, following the Hawaii Supreme Court's decision in Mauna Kea Anaina Hou, supra, is certainly not a justification for TMT International Observatory, LLC. to be admitted as a party, at this late date, either, and that seems to be TMT International Observatory, LLC.'s real motivation at this point.<sup>3</sup>

Finally, TMT International Observatory, LLC's additional claims in its instant Motion that it should be admitted to "ensur[e] that the contested case hearing is conducted in an efficient manner" is quite presumptuous. See page 6 of TIO's

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<sup>3</sup> One potential consideration is TMT's refiling of a new application for a CDUP on its own, after the University of Hawaii, c/o UH Hilo, withdraws the instant application, with updated environmental studies and proper comprehensive management plans being submitted, as well.

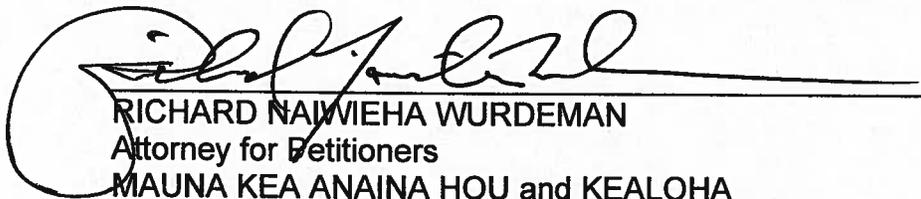
Memorandum in Support. That role, and in balancing the rights of all of the parties, is the role of the Hearing Officer and not the role of TMT International Observatory, LLC.

III. CONCLUSION.

For all of the foregoing authorities, arguments, and evidence, TMT's Motion to Have TMT International Observatory, LLC Admitted as a Party in the Contested Case Hearing, filed on April 8, 2016, should be DENIED.

Respectfully submitted.

DATED: Honolulu, Hawaii, June 13, 2016.



A handwritten signature in black ink, appearing to read 'Richard Naimieha Wurdehan', is written over a horizontal line. The signature is stylized and cursive.

RICHARD NAIMIEHA WURDEMAN

Attorney for 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

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
) DECLARATION OF COUNSEL  
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 )  
\_\_\_\_\_ )  
)

DECLARATION OF COUNSEL

I, RICHARD NAIWIEHA WURDEMAN, do declare as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and I represent the 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, in the above-entitled matter.

2. I am competent to testify to the matters set forth herein and do so on personal knowledge, unless otherwise indicated.

3. Attached hereto as Exhibit "A" is a true and correct copy of State of Hawaii Department of Commerce and Consumer Affairs ("DCCA") records from the DCCA website (under hbe.ehawaii.gov) relating to TMT Observatory Corporation.

4. Attached hereto as Exhibit "B" are true and correct copies of pertinent pages of the CDUP Application, dated September 2, 2010, that was submitted by the University of Hawaii (c/o University of Hawaii at Hilo).

5. Attached hereto as Exhibit "C" is a true and correct copy of State of Hawaii Department of Commerce and Consumer Affairs ("DCCA") records from the DCCA website (under hbe.ehawaii.gov) relating to TMT International Observatory, LLC.

6. Attached hereto as Exhibit "D" is a true and correct copy of the Order for Remand, in E. Kalani Flores v. Board of Land and Natural Resources, et al., Civ. No. 14-1-324 (Third Circuit Court-Hilo), filed on April 5, 2016.

7. I, RICHARD NAIWIEHA WURDEMAN, do declare under penalty of law do declare that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, June 13, 2016.

  
RICHARD NAIWIEHA WURDEMAN

**EXHIBIT "A"**

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# TMT OBSERVATORY CORPORATION

## FOREIGN NONPROFIT CORPORATION

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### General Info

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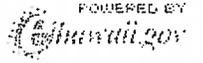


<b>MASTER NAME</b>	TMT OBSERVATORY CORPORATION
<b>BUSINESS TYPE</b>	Foreign Nonprofit Corporation
<b>FILE NUMBER</b>	41198 F2
<b>STATUS</b>	Active
<b>PURPOSE</b>	TMT WILL DEVELOP, BUILD AND OPERATE A 30 METER CLASS TELESCOPE. THESE FACILITIES WILL BE USED TO FOSTER (1) SCIENTIFIC INTERACTION AMONG EDUCATIONAL AND RESEARCH INSTITUTIONS AND (2) COLLEGE AND UNIVERSITY EDUCATIONAL PROGRAMS IN ASTRONOMY.
<b>PLACE INCORPORATED</b>	California UNITED STATES
<b>REGISTRATION DATE</b>	Nov 9, 2009
<b>MAILING ADDRESS</b>	1111 S ARROYO PARKWAY #200 PASADENA, California 91105 UNITED STATES
<b>AGENT NAME</b>	THE CORPORATION COMPANY, INC.
<b>AGENT ADDRESS</b>	1136 UNION MALL STE 301 HONOLULU, Hawaii 96813 UNITED STATES

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# TMT OBSERVATORY CORPORATION

## FOREIGN NONPROFIT CORPORATION

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### Officers

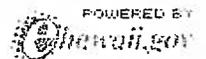
NAME	OFFICE	DATE
YANG, HENRY DR	C/D	Oct 1, 2015
ADKISON,LARRY	S/D	Oct 1, 2015
CURRIE,DEAN	T/D	Oct 1, 2015
BOLTE, MICHAEL DR	BM/D	Oct 1, 2015
HARRISON,FIONA	BM/D	Oct 1, 2015
KULKARNI,SHRINIVAS	BM/D	Oct 1, 2015
KIRSHNER,ROBERT	D	Oct 1, 2015



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**EXHIBIT "B"**

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**CONSERVATION DISTRICT USE  
PERMIT APPLICATION**

**Thirty Meter Telescope Project**

**Island of Hawai'i**

**Applicant:  
University of Hawai'i at Hilo**

---

## Conservation District Use Application (CDUA)

For DLNR Use	
File #	_____
Reviewed by	_____
Date	_____
Accepted by	_____
Date	_____
180-Day Exp. EA/EIS Required	_____
PH Required	_____
Decision	_____
Date	_____

Project Location/Address: Mauna Kea Loop Road

District/County: Hāmākua District Island: Hawai'i

Subzone: Resource Tax Map Key(s): 4-4-15:9 – Mauna Kea Science Reserve

Subzone: \_\_\_\_\_ Tax Map Key(s): \_\_\_\_\_

Total Area of Parcel in sq. ft. or acres: 11,288 acres Area of Proposed Use in sq. ft. or acres: 8.7 acres

Indicate which of the following approvals are being sought, as specified in the Hawaii Administrative Rules (HAR), Chapter 13-5.

- Board Permit
- Departmental Permit
- Emergency Permit
- Temporary Permit
- Site Plan Approval

**APPLICANT**

Legal Name: University of Hawai'i c/o of University of Hawaii at Hilo

Street Address: 200 West Kawili Street

City, State and Zip+4 Code: Hilo, HI 96720

Contact Person & Title: Dr. Donald Straney, Chancellor

Phone No.: 808-974-7444 Fax No.: 808-933-3304

Email: dstraney@hawaii.edu

Interest in Property: General Lease No. S-4191 covering TMK 4-4-15:9

\*Signature: *Donald D. Straney* Date: SEP 2 2010

\*If for a Corporation, Partnership, Agency or Organization, must be signed by an authorized officer.

**PROPERTY OWNER(S)**

(if other than the applicant)

Name: State of Hawai'i

Street Address: 1151 Punchbowl Street, Room 130

City, State and Zip+4 Code: Honolulu, HI 96813

Contact Person & Title: Laura Thielen, Chairperson, Board of Land and Natural Resources

Phone No.: (808) 587-0400 Fax No.: (808) 587-0390

Email: \_\_\_\_\_

\*Signature: \_\_\_\_\_ Date: \_\_\_\_\_

\*For private lands with multiple landowners, landowners whose property interests constitute or exceed 85% of the fee ownership of the subject parcel(s) shall sign the application.

**AGENT**

Name: None

Street Address: \_\_\_\_\_

City, State and Zip+4 Code: \_\_\_\_\_

Contact Person & Title: \_\_\_\_\_

Phone No.: \_\_\_\_\_ Fax No.: \_\_\_\_\_

Email: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**Emergency Contact Information**

Contact Person and Title: \_\_\_\_\_ Phone No.: \_\_\_\_\_

Please specify all prior CDUPs received for the subject parcel.

**Prior Conservation District Use Permits, Mauna Kea Science Reserve & Mid-Level Facilities**

<b>Telescope Facilities</b>	
UH 0.6-M, Planetary Patrol (removed 1994)	HA-954, 1977 (post facto)
UH 0.6-M Air Force (removed 2008)	HA-954, 1977 (post facto)
UH 2.2-M	HA-954, 1977 (post facto)
Canada-France-Hawaii Telescope	HA-527, 1974
Fiber Optic Cables from Gemini to CFHT	SPA-HA-06-49, 2006
United Kingdom Infrared Telescope	HA-653, 1975
NASA Infrared Telescope Facility	HA-653, 1975
Caltech Submillimeter Observatory	HA-1492, 1982
James Clerk Maxwell Telescope	HA-1515, 1983
<b>W. M. Keck Observatory</b>	
Keck I	HA-1646, 1984
Keck II	HA-2509, 1991
-Carport	Site Plan Approval, 1997
-Temporary Optical Test Sites	HA-SPA-21, 1998
Very Long Baseline Array Antenna	HA-2174, 1988
Japan National Large Telescope (Subaru)	HA-2462, 1991
-Subaru Concrete Walkway	Site Plan Approval, 1997
-Subaru Seepage Pit Collar	SPA-HA-05-08, 2004 (post facto)
Gemini Northern 8-M Telescope	HA-2691, 1993
Smithsonian Submillimeter Array	HA-2728, 1994
UH Hilo 0.9M Telescope	HA-3406, 2007
<b>Mid-Level Facilities</b>	
Subdivision & Construction of Hale Pōhaku Mid-Level Facilities	HA-1430, 1982
- Removal of Solar Hot Water Heating System	SPA-HA-03-34, 2002
- Installation of Five Septic Tanks	SPA-HA-05-18, 2005
- Minor Renovations to Visitor Information Station	SPA-HA-06-17, 2005
Subdivision to Create ~21-acre Site for Permanent Mid-Level Facilities	HA 1819, 1986
<b>Other Permits and Approvals</b>	
Site Testing	HA-1314, 1981
Road, Power, Conceptual Management Plan	HA-1573, 1983
-Management Plan	HA-1573, 1985
-Revised Management Plan	HA-1573A, 1995 (DLNR co-applicant)
-Upgrade of Summit Power & Communications Distribution System	Site Plan Approval, 1995
-Fiber-Optics from Pōhakuloa to Hale Pōhaku	SPA-HA-96-05, 1996
Wākiu Bug Habitat Restoration	OA-SPA-01-03, 2000
Temporary Site Testing within Northwest Plateau	HA-3225D, 2005
Restoration of Jeep Road up to Poli'ahu	SPA-HA-10-04, 2009

---

# 1 Detailed Description of Proposed Use

## 1.1 BACKGROUND

The proposed observatory and other facilities covered by this application are located in the 11,288-acre Mauna Kea Science Reserve (MKSR) (TMK 4-4-15:9) on the upper slopes of Hawai'i Island's Mauna Kea Volcano. First leased by the State of Hawai'i Department of Land and Natural Resources (DLNR) to the University of Hawai'i (UH or University) in 1968, the current lease on the MKSR expires in 2033.

Figure 1.1 shows the mountain's position on the island relative to major towns and roadways. Figure 1.2 shows the MKSR boundaries and the location of other important features and their boundaries on the upper slopes of Mauna Kea. Figure 1.3 focuses on the summit region of the mountain, showing the names of the pu'u, the major existing facilities, and important natural features such as Lake Waiau.

The Mauna Kea summit region is designated as part of the State of Hawai'i Conservation District Resource subzone and as such, uses on the land are subject to the Conservation District rules (HAR 13-5) and permit conditions. In addition, uses on the land are subject to the *Mauna Kea Science Reserve Master Plan* (UH 2000) and *Mauna Kea Comprehensive Management Plan* (CMP) and subplans (UH 2009a). As State land it is administered by the State of Hawai'i Department of Land and Natural Resources (DLNR) as directed by the Board of Land and Natural Resources (BLNR). Effective January 1, 1968, the BLNR leased the land (General Lease S-4191) to the University of Hawai'i; the lease terminates on December 31, 2033.

As shown in Table 1.1, thirteen astronomical facilities are operational in mid-2010. Nine of these are optical and/or infrared observatories<sup>1</sup>; these use mirrors to collect and focus visible and infrared light. The MKSR also hosts three submillimeter observatories and a radio antenna (the VLBA) that is part of a larger system.<sup>2</sup> All except the VLBA Antenna are located within the 525-acre area at the summit that the University of Hawai'i's *Mauna Kea Science Reserve Master Plan* refers to as the "Astronomy Precinct".

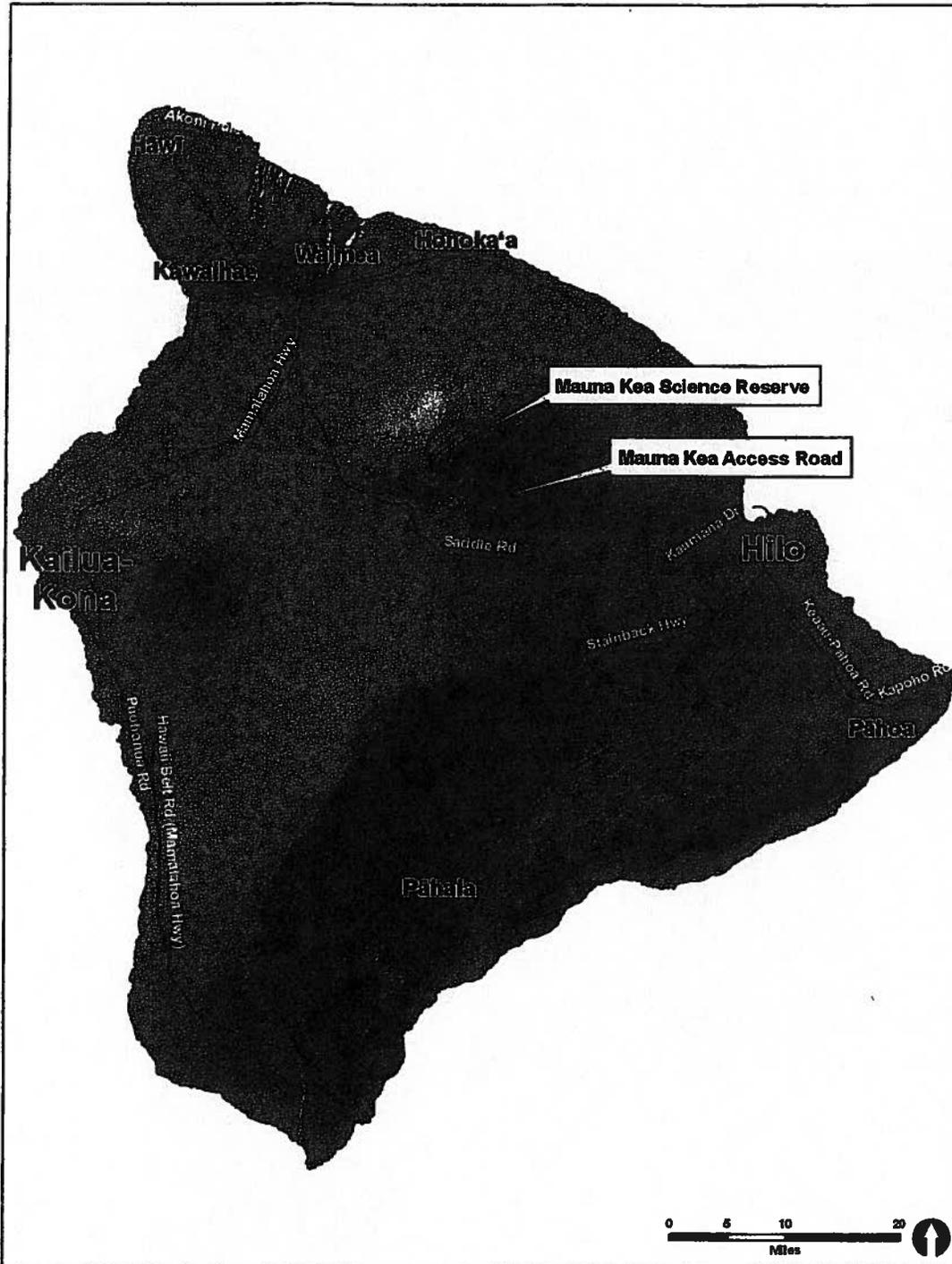
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<sup>1</sup> This counts Keck I and Keck II separately.

<sup>2</sup> Submillimeter wave astronomy is a relatively new branch of astronomy that studies celestial objects using the submillimeter band of the electromagnetic spectrum (300 GHz to 3,000 GHz). Most of the radiation in this band is blocked by the earth's atmosphere, and it is only with the development of high-altitude facilities such as those on Mauna Kea that scientists have been able to acquire the valuable information it contains.

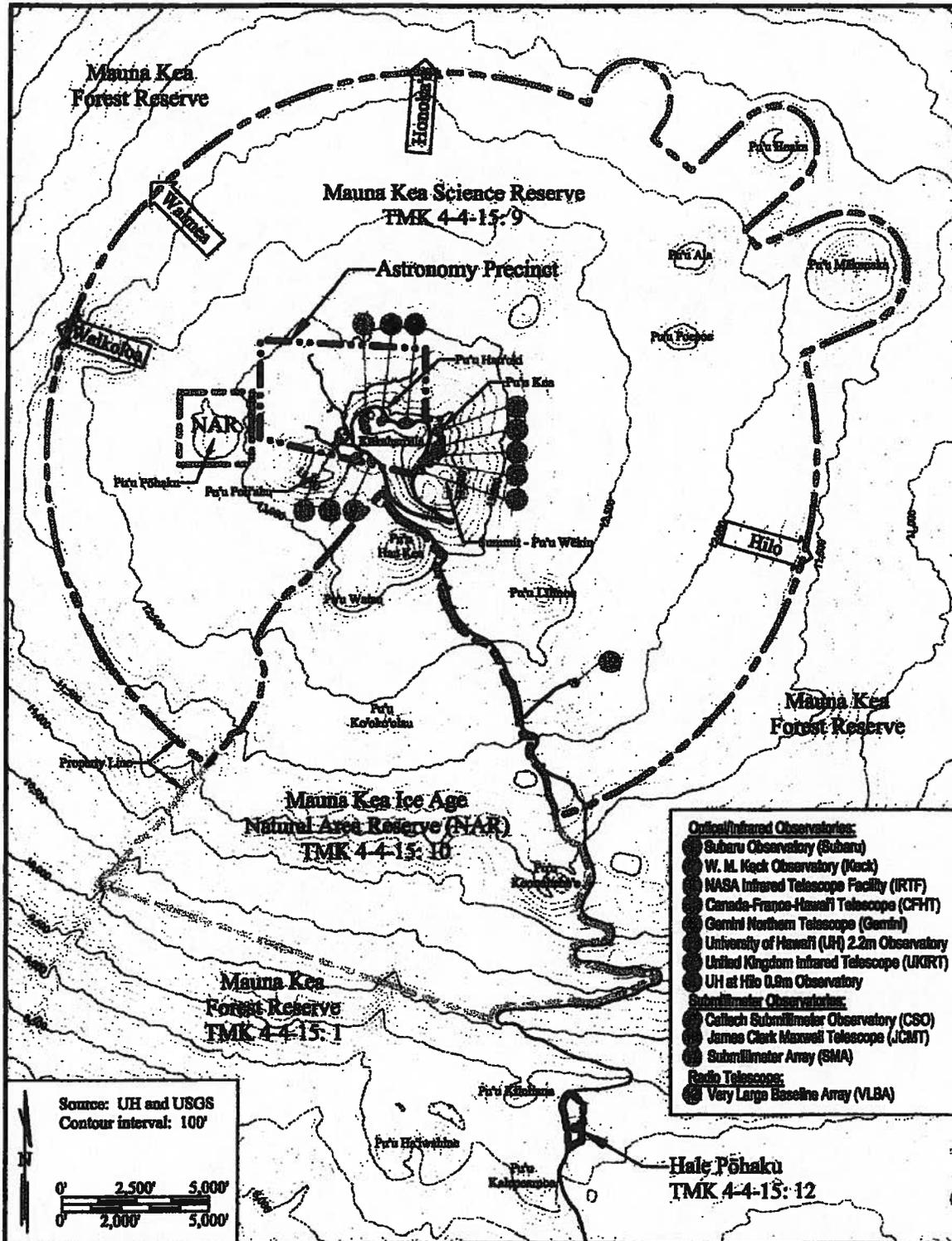
The Very Long Baseline Array (VLBA) radio antenna is a telescope but does not individually meet the definition of an observatory because it is only one part of a larger array, which stretches from the U.S. Virgin Islands to Mauna Kea.

**Figure 1.1 Project Location**



Source: Planning Solutions, Inc.

Figure 1.2: Overview of Mauna Kea



Source: Figure 2-2, Final EIS: TMT Observatory



**Table 1.1. Mauna Kea Telescopes (as of 2010)**

	Facility Name	Mirror Size (in meters)	Owner/Operator	Year Built
<b>Optical/Infrared</b>				
UH 2.2m	UH 2.2-m Telescope	2.2m	University of Hawai'i	1970
IRTF	NASA Infrared Telescope Facility	3.0m	NASA	1979
CFHT	Canada-France-Hawai'i Telescope	3.6m	Canada/France/UH	1979
UKIRT	United Kingdom Infrared Telescope	3.8m	United Kingdom	1979
Keck I	W. M. Keck Observatory	10m	Caltech/University of California	1992
Keck II	W. M. Keck Observatory	10m	Caltech/University of California	1996
Subaru	Subaru Telescope	8.3m	Japan	1999
Gemini	Gemini North Telescope	8.1m	USA/UK/Canada/Argentina/Australia/Brazil/Chile	1999
UHH 0.9m <sup>3</sup>	UHH 0.9-m Telescope	0.9m	University of Hawai'i, Hilo	2008
<b>Radio</b>				
CSO	Caltech Submillimeter Observatory	10.4m	Caltech/NSF	1987
JCMT	James Clerk Maxwell Telescope	15m	UK/Canada/Netherlands	1987
SMA	Submillimeter Array	8x6m	Smithsonian Astrophysical Observatory/Taiwan	2002
VLBA	Very Long Baseline Array	25m	NRAO/AUI/NSF	1992

Note: The California Institute of Technology (Caltech) has announced that it will begin decommissioning the Submillimeter Observatory (CSO) in 2016 with the return of the site to its natural state, consistent with the terms of the CSO sublease by 2018.

Source: [http://www.ifa.hawaii.edu/mko/telescope\\_table.htm](http://www.ifa.hawaii.edu/mko/telescope_table.htm) as reported in the *Decommissioning Plan for Mauna Kea Observatories*, dated January 2010.

These observatories have been attracted to the summit region of Mauna Kea principally because of the superb viewing conditions that its high-altitude/mid-oceanic location provides. The intellectual and physical support infrastructure that has been developed around the complex complements these natural assets. Combined, they have helped Hawai'i become one of the most important centers for astronomical research in the world.

## 1.2 OVERVIEW OF THE PROPOSED USE

On behalf of the TMT Observatory Corporation, the University of Hawai'i is seeking a Conservation District Use Permit (CDUP) from the State of Hawai'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory<sup>4</sup> within an area below the summit of Mauna Kea that is known as "Area E". The TMT Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology

<sup>3</sup> In 2008 the UH 0.6-m telescope (built in 1968) was replaced by the UHH 0.9-m telescope.

<sup>4</sup> An observatory includes the telescope(s), the dome(s) that contain the telescope(s), and the instrumentation and support facilities for the telescope(s) that fall under a common ownership.

---

(Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project.

Management Action FLU-1 in the recently adopted CMP states that future facility planning should follow the guidelines presented in the University of Hawai'i *Mauna Kea Science Reserve Master Plan*, referred to as the *2000 Master Plan* (University of Hawai'i, 2000). The *2000 Master Plan* limits future development to the Astronomy Precinct and identifies Areas A through F within it as preferred sites (Figure 1.3). It also lists criteria to assist in the selection of an appropriate site for a ground-based telescope with a primary mirror of 25 to 50 meters in diameter (generically referred to as a "Next Generation Large Telescope", or NGLT in the *2000 Master Plan*). The *2000 Master Plan* identifies Area E as the preferred location for an NGLT.<sup>5</sup> Area E is located approximately 1/2-mile northwest of the nine existing optical/infrared observatories located near the summit.

The TMT Observatory is proposed for a roughly 5-acre site within Area E, near the end of an existing 4-wheel drive road. Road access to the site will be provided by improving the existing four-wheel drive road from the point where it diverges from the existing Mauna Kea Loop Road. This includes one segment across the base of Pu'u Hau'oki and another that extends through the existing Submillimeter Array (SMA) complex and Area E. Leasehold title and ongoing maintenance of the roadway will remain the responsibility of the University as part of the common areas under its jurisdiction.

### 1.3 DETAILED DESCRIPTION OF TMT FACILITIES

The following subsections describe the various components that make up the proposed TMT project that are within the Conservation District:

- Section 1.3.1 covers the proposed TMT Observatory, which consists of the 30-meter telescope itself, the instruments that are attached to it to record data, the enclosing dome, the attached building housing support and maintenance facilities, and parking. The Observatory is located on what is generally referred to as the 13-North (13N) site within the Astronomy Precinct of the MKSR.
- Section 1.3.2 describes the proposed TMT Access Way, which consists of an improved road and underground utilities (power and telecommunications) improvements that will be constructed to connect the TMT Observatory with existing roads and utilities.
- Section 1.3.3 briefly discusses the proposed use of the existing Batch Plant Staging Area during construction of the TMT Observatory and Access Way. Approximately 4 acres in size, this area is located at the top of the Mauna Kea Access Road, and its use as a construction staging area has been authorized as a temporary accessory use in several previous CDUPs (e.g., those for the Subaru, Keck II, and SMA telescope facilities).

---

<sup>5</sup> It should be noted that the 2000 Master Plan limits future development to Areas A, B, C, D, E, and F within the Astronomy Precinct. By doing this, the Master Plan removed the possibility of developing an observatory on an undeveloped pu'u within the MKSR.

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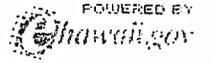
<b>MASTER NAME</b>	TMT INTERNATIONAL OBSERVATORY LLC
<b>BUSINESS TYPE</b>	Foreign Limited Liability Company (LLC)
<b>FILE NUMBER</b>	116689 C6
<b>STATUS</b>	Active
<b>PLACE INCORPORATED</b>	Delaware UNITED STATES
<b>REGISTRATION DATE</b>	May 6, 2014
<b>MAILING ADDRESS</b>	1111 S ARROYO PKWY STE 200 PASADENA, California 91105 UNITED STATES
<b>PARTNER TERM</b>	AT-WILL
<b>MANAGED BY</b>	MANAGER(S)
<b>AGENT NAME</b>	THE CORPORATION COMPANY, INC.
<b>AGENT ADDRESS</b>	1136 UNION MALL STE 301 HONOLULU, Hawaii 96813 UNITED STATES

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# TMT INTERNATIONAL OBSERVATORY LLC

FOREIGN LIMITED LIABILITY COMPANY (LLC)

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## Member/MGR

NAME	OFFICE	DATE
STONE, EDWARD C DR	MGR	May 6, 2014

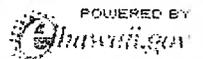


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**EXHIBIT "D"**

E. Kalani Flores  
P.O. Box 6918  
Kamuela, Hawaii 96743  
Tel: 808- 885-5383  
Email: [ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

FILED

2016 APR -5 AM 9:09

Appellant Pro Se

S. MURAKAWA, CLERK  
THIRD CIRCUIT COURT  
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT<sup>1\*</sup>  
STATE OF HAWAII

E. KALANI FLORES,	) CIVIL NO. 14-1-324 (Hilo)
	) (Agency Appeal)
Appellant pro se,	)
	)
vs.	) <b>ORDER FOR REMAND</b>
	)
BOARD OF LAND AND NATURAL	)
RESOURCES; DEPARTMENT OF LAND	)
AND NATURAL RESOURCES; SUZANNE	)
D. CASE, in her official capacity as	) <u>Hearing on Oral Argument:</u>
Chairperson of the Board of Land and Natural	) Date: March 11, 2016
Resources and the Director of the Department of	) Time: 10:00 a.m.
Land and Natural Resources; STATE OF	) Judge: Honorable Greg K. Nakamura
HAWAII; and UNIVERSITY OF HAWAII,	)
	)
Appellees.	)
	)

**ORDER FOR REMAND**

The matter of this agency appeal, notice of which was filed herein pursuant to Section 91-14, Hawai'i Revised Statutes, on August 25, 2014, having come on for oral argument before the Environmental Court of the Third Circuit (hereinafter "Court"), the Honorable Greg K. Nakamura presiding, on March 11, 2016 and E. KALANI FLORES, Appellant, having appeared *pro se* together with Deputy Attorney General Julie H. China, counsel for Appellees BOARD OF LAND AND LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES and SUZANNE D. CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, STATE OF HAWAI'I and Arsima A. Muller and Tim Lui-Kwan appearing as counsel for Appellee UNIVERSITY OF HAWAI'I. No other appearances were made.

\*Environmental Court

I hereby certify that this is a full, true and correct copy of the original on file in this office.



Clerk, Third Circuit Court, State of Hawaii

The Court, having considered the record, memoranda, declarations, briefs and arguments presented or submitted herein, and good cause appearing therefor, hereby issues the following findings of fact, conclusions of law and order:

**I. FINDINGS OF FACT**

The Court makes the following findings of fact, however, to the extent that these findings of fact contain conclusions of law, they shall be considered as such.

1. This appeal relates to Appellee Board of Land and Natural Resources' (the "**Board**") consent to the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii (the "**Sublease**").

2. At a meeting held on June 27, 2014, the Board granted consent to the Sublease, but "stayed the effectiveness of the consent until administrative proceedings on any contested case requests" were concluded.

3. At a meeting held on July 25, 2014, the Board denied Appellant E. Kalani Flores' request for a contested case hearing.

4. The Sublease is part of the record. Paragraph 4 of the Sublease relates to the "Use of the Subleased Premises". It states in part:

The construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of Conservation District Use Permit HA-3568 approved by the Lessor [the "**Board**"] on April 12, 2013 (the "**TMT CDUP**"), including performance of all mitigation conditions set forth therein, and any amended or subsequent Conservation District Use.

5. The Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii Under General Lease No. S-4191 (the "**Consent**") is part of the record. Paragraph 2 of the Consent states:

Sublessee [the TMT International Observatory LLC] shall comply with all the conditions of Conservation District Use Permit No. HA-3568, as approved by the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, and Decision and Order issued on April 12, 2013.

## II. CONCLUSIONS OF LAW

The Court, based on the finding of fact above, makes the following conclusions of law. To the extent that these conclusions of law contain findings of fact, they should be considered as such.

1. The Court takes judicial notice of the Supreme Court of Hawai'i's opinion entered on December 2, 2015 in *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.*, 136 Hawai'i 376 (2015).

2. Consistent with *Mauna Kea Anaina Hou* opinion, the Board's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit HA-3568 (the "TMT CDUP") has been vacated.

3. Appellant has asked that this Court take judicial notice of the opinion in *Mauna Kea Anaina Hou* and vacate the Board's action in consenting to the Sublease. This is not appropriate because it requires consideration of an adjudicative fact, the vacating of the TMT CDUP, which the Board has not addressed.

4. However, Section 91-14(e) of the Hawai'i Revised Statutes ("HRS") provides the following:

[i]f, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision

5. Appellant's request that the Court take judicial notice of the *Mauna Kea Anaina Hou* opinion is the functional equivalent of a request that the fact that the TMT CDUP has been vacated be presented to the Board.

6. This fact is material because the Sublease and Consent are premised upon the existence of the TMT CDUP.

7. This fact could not have been presented to the Board when it considered the application for the consent to the Sublease because the fact did not exist at that time.

8. Therefore, the *Mauna Kea Anaina Hou* opinion and the Order for Remand, filed on February 22, 2016 in Civil No. 13-1-349, *Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, State of Hawai'i, et al.*, Third Circuit Court, State of Hawai'i (the "**Order of Remand**"), should be presented to the Board for appropriate action.

9. Therefore, an order of remand should be entered in this case to accomplish this purpose.

10. When reviewing the new evidence, the Board may consider the following questions:

- a) Since the TMT CDUP does not exist and its existence was a premise for the Board's grant of the consent to the Sublease, should the consent be withdrawn pending further proceedings in regard to the TMT CDUP application process?
- b) If the Board takes the position that the consent to the Sublease should remain in place because of the assumption that the Board will grant the TMT CDUP in the future, would this not run afoul of the "cart before the horse" due process concern established in the *Mauna Kea Anaina Hou* opinion?
- c) Since the existence of the TMT CDUP is such an integral part of the Board's consent to the Sublease, should parties who have standing in the TMT CDUP application process similarly have standing in regard to the consent to Sublease application process?
- d) In *Mauna Kea Anaina Hou*, Justices Pollack, Wilson and McKenna concurred in the following proposition: An agency is not merely a passive actor or neutral umpire. It has an affirmative duty to fulfill the State's constitutional obligations. How is the Board going to fulfill this affirmative duty in the absence of a contested case hearing and the grant of standing to an individual who seeks to have the State fulfill its constitutional obligations?

III. **ORDER**

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED:

1. That the *Mauna Kea Anaina Hou* opinion and the Order for Remand be presented to the Board as additional evidence;
2. And that the Court further orders that this matter be remanded back to the Board for appropriate action in accordance with HRS § 91-14(e).

DATED: Hilo, Hawai'i APR - 5 2016.

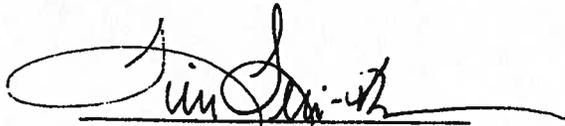
GREG K. NAKAMURA (Seal)

\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

  
\_\_\_\_\_  
JULIE H. CHINA  
Deputy Attorney General

Attorneys for Appellees  
BOARD OF LAND AND NATURAL  
RESOURCES; DEPARTMENT OF LAND AND  
NATURAL RESOURCES; SUZANNE D. CASE,  
in her official capacity as Chairperson of the Board  
of Land and Natural Resources and the Director of  
the Department of Land and Natural Resources;  
STATE OF HAWAI'I

  
\_\_\_\_\_  
TIM LUI-KWAN  
ARSIMA A. MULLER

Attorneys for Appellee  
UNIVERSITY OF HAWAI'I

\_\_\_\_\_  
*E. Kalani Flores vs. Board of Land and Natural Resources, et al.*, Civil No. 14-1-324; ORDER  
FOR REMAND

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
) CERTIFICATE OF SERVICE  
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 )  
\_\_\_\_\_ )

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 party(ies) by depositing the same in the U.S. mail, postage prepaid and addressed as follows, unless otherwise indicated:

Judge Riki May Amano (Ret.)  
c/o DPR Hawaii, Inc.  
1003 Bishop Street, Suite 1155  
Honolulu, HI 96813  
(VIA Hand-Delivery)

Hearing Officer

Ian L. Sandison, Esq.  
Timothy Lui-Kwan, Esq.  
Carlsmith Ball, LLP  
1001 Bishop Street  
American Savings Bank Tower, Suite 2100  
Honolulu, HI 96813  
(VIA Hand-Delivery)

Attorneys for Applicant University of Hawaii at Hilo

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Julie H. China, Esq.  
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State of Hawaii  
465 South King Street, Room 300

Honolulu, HI 96813  
(VIA Hand-Delivery)

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