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DEPT. OF LAND &  
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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation  
District Use Application (CDUP) HA-3568 For  
the Thirty Meter Telescope at the Mauna Kea  
Science Reserve, Ka'ohē Mauka, Hamakua,  
Hawai'i, TMK (3) 4-4-015:009

CASE NO. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT  
HILO'S **RESPONSE TO THE  
REQUESTS TO INTERVENE AS A  
PARTY PURSUANT TO MINUTE  
ORDER NO. 7; DECLARATION OF  
COUNSEL; EXHIBIT A; CERTIFICATE  
OF SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO'S RESPONSE TO THE REQUESTS TO  
INTERVENE AS A PARTY PURSUANT TO MINUTE ORDER NO. 7**

Applicant THE UNIVERSITY OF HAWAI'I AT HILO (the "University"), through its  
counsel, submits its *Response to the Requests to Intervene as a Party Pursuant to Minute Order  
No. 7* ("**Response**"), as follows.

**I. BACKGROUND**

On May 16, 2016, the Hearings Officer in this proceeding held a pre-hearing conference  
to discuss, among other things, the handling of applications by non-parties who seek to be  
admitted as parties to this proceeding. At the conference, which was heavily publicized and  
attended by the public and media, the Hearings Officer set the deadline for intervention for May

31, 2016; the deadline for parties to respond to these requests for June 13, 2016; and the hearing on the applications for June 17, 2016. These deadlines were confirmed in Minute Order No. 7, filed on May 26, 2016, with the Department of Land and Natural Resources.

At the close of the intervention period on May 31, 2016, thirty-two (32) individuals and/or organizations had submitted requests to intervene in this proceeding.<sup>1</sup> None of these individuals and/or organizations had previously requested and/or perfected a request for a contested case hearing in this matter under the requirements of Hawai'i Administrative Rules ("HAR") § 13-1-29(a).<sup>2</sup> The recently filed requests, however, seek to join these proceedings as a party under HAR § 13-1-31.

## **II. STANDARDS**

HAR§ 13-1-31 provides that, upon making the necessary showing, certain categories of persons<sup>3</sup> or agencies are entitled to mandatory admission into a contested case proceeding, while others are subject to discretionary or permissive admission, but only if certain criteria are met.

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<sup>1</sup> Two additional applications were received *after* the March 31, 2016 deadline had passed. See DOC-59 (Email request of Brannon Kamahana Kealoha, submitted on June 1, 2016 at 12:02 AM) and DOC-64 (Email request of Cindy Freitas, submitted on June 3, 2016 at 7:25 PM). Having failed to meet the ordered deadline for intervention applications, the University submits that these applications are untimely. If these applications are not found to be untimely, the University submits that they are subject to the objections set forth in Section III(B), *infra*. See, generally, *Maui Paving, LLC v. Maui Master Builders*, 2015 WL 5084920 (Second Circuit Court appeal affirming the hearing officer's decision in DCCA PDH 2014-014, decided 12/9/2014, where a procurement code bid was rejected as untimely since it was submitted one minute late).

<sup>2</sup> With the exception of TMT International Observatory, Inc. and Perpetuating Unique Educational Opportunities, Inc., which were not in existence at the time of the board meeting at which the conservation district use application at issue in this proceeding was scheduled for board disposition, it is unclear from the submissions why the challenging parties now seeking to join this proceeding did not timely do so under 13-1-29(a).

<sup>3</sup> HAR § 13-1-2 defines "[p]erson" for purposes of these rules to mean, as appropriate, "individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

A. MANDATORY ADMISSION

HAR § 13-1-31(b) sets forth the requirements for “mandatory admission” to a contested case proceeding, as follows:

The following persons or agencies *shall be admitted* as parties:

(1) All government agencies whose jurisdiction includes the land in question shall be admitted as parties upon timely application.

(2) All persons who have some *property interest in the land*, who lawfully *reside on the land*, who are *adjacent property owners*, 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 upon timely application.

HAR § 13-1-31(b)(1) & (2) (emphases added).

B. DISCRETIONARY ADMISSION.

HAR § 13-1-31(c) sets forth the requirements for “discretionary admission” into a contested case proceeding, as follows:

Other persons who can show a *substantial interest* in the matter *may be admitted* as parties. The board *may approve* such requests *if it finds* that the requestor’s *participation will substantially assist* the board in its decision making. The board *may deny* any request to be a party when it appears that:

(1) The position of the requestor is *substantially the same* as the position of a party already admitted to the proceedings; and

(2) The admission of additional parties *will not add substantially new relevant information or* the addition will make the proceedings *inefficient and unmanageable*.

HAR § 13-1-31(c)(1) & (2) (emphases added).

C. HEARING ON REQUESTS TO INTERVENE

The Hearings Officer scheduled the June 17, 2016 hearing to “determine whether any or all of the persons and agencies seeking to participate in the contested case are entitled to be parties in the contested case.” HAR § 13-1-31(a). “At such a hearing, evidence and argument

shall be limited to matters necessary to determine whether the requestor shall be admitted as a party.” HAR § 13-1-31(f).

### **III. THE UNIVERSITY’S POSITION ON THE REQUESTS**

#### **A. THE REQUESTS OF TIO AND PUEO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THEIR REQUESTS FOR ADMISSION AS A PARTY**

Both the requests of TMT International Observatory, Inc. (“TIO”) (DOC-2) and Perpetuating Unique Educational Opportunities, Inc. (“PUEO”) (DOC-33) contain sufficient information to warrant admission as parties in this proceeding under HAR § 13-1-31.

Accordingly, the University does not object to, and affirmatively supports, the requests of TIO and PUEO, as further set forth below.

##### **1. TIO’s Request**

TIO meets the standard for mandatory inclusion under HAR § 13-1-31(b), as it has a property interest in land at issue in these proceedings as a result of its Sublease for that land, and its Scientific Cooperation Agreement with the University. TIO Mem. in Supp. at 1, 3-5. Moreover, as the developer of the Thirty-Meter Telescope Project, (“Project”) TIO will be directly and immediately affected by the outcome of this proceeding in a manner that is clearly distinguishable from the public. *Id.* at 1, 6. Accordingly, TIO satisfies the requirements for mandatory admission to this proceeding as a party.

Alternatively, TIO also meets the standard for discretionary or permissive admission under HAR § 13-1-31(c) because: (1) as the developer of the Project and the sublessee of that portion of land upon which the Project is proposed to be constructed, TIO has a substantial interest in the outcome of the contested case proceeding; (2) TIO’s position is unique and not substantially the same as the position of a party already admitted to the proceedings because TIO is the sole developer of the Project; (3) TIO’s unique position in these proceedings will add

substantially new and relevant information; and (4) TIO's participation, through counsel and as the only party representing its specific interests, will not make the proceedings inefficient or unmanageable.

2. PUEO's Request

PUEO also meets the standard discretionary admission. PUEO is a Hilo-based organization whose mission explores and supports the relationship between the exercise of native Hawaiian traditional and customary practices and the exploration of science. *See* Mem. in Supp. at 9. As a native Hawaiian organization that supports the Project and that believes that native Hawaiian practices and science can co-exist, PUEO stands in a unique position and will offer new perspectives to this contested case hearing that are not already represented by other parties.

*Id.* The University supports PUEO's request because: (1) there are no parties currently admitted that are native Hawaiian organizations supporting the Project; (2) PUEO's unique position in these proceedings will add substantially new and relevant information; and (3) PUEO's participation as the only organization representing these interests will not make the proceedings inefficient or unmanageable.

B. THE REMAINDER OF THE REQUESTERS DO NOT PROVIDE SUFFICIENT INFORMATION TO WARRANT ADMISSION BASED ON THEIR WRITTEN REQUESTS

With respect to the remaining requests to intervene, identified in Exhibit A attached hereto ("**Requests**"), the University notes that most of the Requests utilized the same, or substantially the same, form request. The Requests have not provided sufficient information for the University to respond to the substance of the Requests because the Requests do not adequately describe how the requestor meets the criteria to be joined as a party under the standards set forth in HAR § 13-1-31. The Requests identified in Exhibit A, while stating that they meet the criteria set forth in HAR § 13-1-31, either do not, or fail to provide enough

information factually or legally. However, based on the critical time concerns and to promote streamlining and efficiency of the hearings process, the University will not object to the joinder of those who have timely submitted a request, subject to a reservation of its right to examine further their alleged interests, as necessary, at the June 17, 2016 hearing.

**IV. CONCLUSION**

The University respectfully submits that: (1) TIO and PUEO have provided sufficient evidence to be admitted as parties to these contested case proceedings; and (2) while additional information and evidence from the other persons submitting the Requests is required to determine whether they meet the criteria for admission set forth in HAR § 13-1-31, the University does not otherwise object, subject to further questioning at the hearing, if any. The University 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: Honolulu, Hawai'i, June 13, 2016.



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IAN L. SANDISON  
TIM LUI-KWAN  
JOHN P. MANAUT

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO

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CASE NO. BLNR-CC-16-002

DECLARATION OF COUNSEL;  
EXHIBIT A

**DECLARATION OF COUNSEL**

I, IAN L. SANDISON, declare:

1. I am a partner at the law firm of Carlsmith Ball LLP, counsel for UNIVERSITY OF HAWAI'I AT HILO, in the above-caption matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon my personal knowledge.
3. Attached hereto as Exhibit A is a true and correct inventory of requests to intervene that the University avers should be denied or supplemented.

This declaration is made upon personal knowledge and is filed pursuant to Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai'i. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of June, 2016.

  
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IAN L. SANDISON

# **EXHIBIT A**



**EXHIBIT A**

	<b>BLNR Doc. No.</b>	<b>Party/Parties</b>
1.	DOC-18	Edward K. Akiona
2.	DOC-19	Wai'ala Ahn
3.	DOC-20	Harry Fergerstrom
4.	DOC-21	Ana Nawahine-Kaho'opi'i
5.	DOC-22	Richard L. Ma'ele DeLeon
6.	DOC-23	Mehana Kihoi
7.	DOC-24	Chase Michael Kaho'okahi Kanuha
8.	DOC-25	Joseph Kualii Lindsey Camara
9.	DOC-26	Hālonai kiopuna Mikala-Jiro Fukutomi
10.	DOC-27	Crystal F. West
11.	DOC-28	Ivy McIntosh
12.	DOC-29	Wilma H. Holi
13.	DOC-30	Moses Kealamakia Jr.
14.	DOC-32	Michael Kumukauoha Lee
15.	DOC-34	Ricky Cassiday Trustee, Mary Lucas Estate Residential Market Consultant
16.	DOC-35	Keahi Tajon
17.	DOC-36	Eric Hansen
18.	DOC-37	Patricia P. Ikeda
19.	DOC-38	Jennifer Leina'ala Sleightholm
20.	DOC-39	Maelani Lee
21.	DOC-40	Michele (Mikala) Cabalse
22.	DOC-47	Linda Namauu
23.	DOC-48	Maile Tualii PhD, MPH Danelle Cooper MPH
24.	DOC-50	Temple of Lono
25.	DOC-51	Kalikolehua Kanaele
26.	DOC-53	Stephanie-Malia:Tabbada
27.	DOC-54	Tiffnie Kakalia
28.	DOC-56	Glen Kila
29.	DOC-57	Dwight J. Vicente
30.	DOC-58	Joy K. Mills-Ferren
31.	DOC-59	Brannon Kamahana Kealoha
32.	DOC-64	Cindy Freitas

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CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that on the date of service noted below, a true and correct copy of the foregoing was duly served on the above-identified parties at their last known address, by U.S. mail, postage prepaid:

<p>RICHARD NAIWIEHA WURDEMAN, ESQ. 720 Pauahi Tower 1003 Bishop Street Honolulu, HI 96813  Attorney for Petitioners MAUKA NEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE</p>	<p>WILLIAM J. WYNHOFF, ESQ. JULIA H. CHINA, ESQ. Deputy of the Attorney General State of Hawai'i 465 South King Street, Room 300 Honolulu, HI 96813  Attorneys for the BOARD OF LAND AND NATURAL RESOURCES</p>
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DATED: Honolulu, Hawai'i, June 13, 2016.



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