

RICHARD NAIWIEHA WURDEMAN 6015-0
Attorney at Law, A Law Corporation
Pauahi Tower, Suite 720
1003 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 536-0633
Facsimile: (808) 536-0634
e-mail: RNWurdeman@RNWLaw.com

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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
)
)
) PETITIONERS MAUNA KEA ANAINA
A Contested Case Hearing Re) HOU, ET AL.'S RENEWED MOTION
Conservation District Use Permit) TO DISQUALIFY HEARING OFFICER;
(CDUP) HA-3568 for the Thirty Meter) DECLARATION OF COUNSEL;
Telescope at the Mauna Kea Science) EXHIBIT "A"; and CERTIFICATE OF
Reserve, Kaohe Mauka, Hamakua) SERVICE
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
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PETITIONERS MAUNA KEA ANAINA HOU, ET AL.'S RENEWED MOTION
TO DISQUALIFY HEARING OFFICER

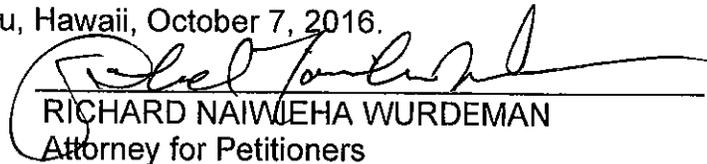
COMES NOW Petitioners MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA, CLARENCE KUKAUAKAHI CHING, FLORES-CASE OHANA, DEBORAH J. WARD, PAUL K. NEVES, and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation (also referred to herein collectively as "Petitioners"), by and through their counsel undersigned, and hereby moves once again to disqualify the Hearing Officer Riki May Amano in the above-entitled case. This Motion is a renewed motion to disqualify the Hearing Officer. The initial grounds for disqualification, which were previously raised by the Petitioners, are raised again, and

ongoing and/or continuing events as discussed in the Memorandum in Support, shows and supports a showing of bias and/or appearance of bias. In addition, each and every point discussed in the attached Memorandum in Support is also an independent ground for recusal and/or disqualification. Collectively and cumulatively, the paid membership with a party, UH Hilo as raised earlier as well as the untimely disclosure, along with the further evidence and further issues discussed and set forth in the Memorandum in Support, clearly establishes grounds for disqualification as further discussed in the attached memorandum.

In that the evidentiary hearing, as set forth in the Amended Notice of Contested Case Hearing, dated October 6, 2016, commences on October 18, 2016, the Petitioners respectfully request that an expedited Order be issued. In light of the discussion in *Kilakila 'O Haleakala v. Board of Land and Natural Resources*, SCWC-13-0003065, filed on October 6, 2016, the Board of Land and Natural Resources also is required to remedy the situation as it did, according to the Court with the removal of the first hearing officer in Kilakila.

This Motion is brought pursuant to Hawaii Administrative Rules ("HAR") §§ 13-1-12, 13-1-34 and 13-1-39. This Motion is also based on the Memorandum in Support of Motion and the authorities and arguments set forth therein and pleadings incorporated therein, Declaration of Counsel and exhibits attached hereto; the records and files in the instant case; and any further evidence that may be adduced and arguments that may be presented at a hearing on the said Motion.

DATED: Honolulu, Hawaii, October 7, 2016.


RICHARD NAIWIEHA 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
)
) MEMORANDUM IN SUPPORT
A Contested Case Hearing Re) OF MOTION
Conservation District Use Permit)
(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)
_____)

MEMORANDUM IN SUPPORT OF MOTION

As this Board is certainly aware, the Hawaii Supreme Court found that the Board of Land and Natural Resources had previously acted improperly when the BLNR issued the Conservation District Use Permit to the University of Hawaii at Hilo prior to holding a contested case hearing and that “[n]o case or argument put forth by the UHH or BLNR persuade[d] [the Hawaii Supreme Court] otherwise.” Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai’i 376, 363 P.3d 224, 247 (2015). As the Hawaii Supreme Court also heavily emphasized in its decision and had raised with UHH and BLNR Counsel during oral arguments in Mauna Kea Anaina Hou, *supra*, “...the manner in which the justice system operates must be fair and must also appear to be fair.” Mauna Kea Anaina Hou, *supra*, 363 P.3d at 237 (Emphasis added); Sifagaloa v. Bd. of Trs. of Emps.’ Ret. Sys., 74 Haw. 181, 190, 840 P.2d 367, 371 (1992)(“[J]ustice must not only be done but must manifestly be seen to be done[.]”).

In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decision-makers from being biased, and more specifically, prohibits decision-makers from prejudging matters and the appearance of having prejudged matters. Mauna Kea Anaina Hou, *supra*, 363 P.3d at 237-238; *citing Sussell* 71 Haw. at 109, 784 P.2d at 871 (concluding that where an adjudicator’s actions while presiding over a matter gave rise to an appearance of impropriety, the circuit court erred in not enjoining the adjudicator from deciding the case)(emphasis added); Winthrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)(“Not only is a biased

decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.'")(*quoting* Murchison, 349 U.S. at 136, 75 S.Ct. 623); see also Cinderella v. Career & Finishing Schs., Inc. v. F.T.C., 425 F.2d 583, 591 (D.C.Cir.1970)(holding that the standard for evaluating the existence of improper prejudgment in an adjudicative context is whether "a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."). "Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice." Mauna Kea Anaina Hou, *supra*, 363 P.3d at 238, *quoting* Sussell, 71 Haw. at 108, 784 P.2d at 870)(*quoting* *M. Redish & L. Marshall, Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 483-84 (1986)); see Sifagaloa 74 Haw. at 190, 840 P.2d at 371 (same); see also Cinderella, 425 F.2d at 590 (disapproving of circumstances "which give the appearance that [a decisionmaker] has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves"). It is abundantly clear that "[f]ew situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance" due to "some identifiable potential bias." Mauna Kea Anaina Hou, *supra*; Redish & Marshall, *Adjudicatory Independence*, 95 Yale L.J. at 483 (emphasis in original); see Williams-Yulee v. Florida Bar, - U.S. -, 135 S.Ct.1656, 16666, 191 L.Ed.2d 570 (2015)(stating that "public perception of judicial integrity" is a governmental interest of "the highest order")(quotations omitted).

The Petitioners once again move to disqualify the Hearing Officer in the above-captioned case and they incorporate herein and reassert their Objections to the Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on April 15, 2016 ("Petitioners' April 15, 2016 Objections")-Doc 5, as well as the Petitioners' Responsive and Supplemental Objections to Selection Process and to Appointment of Hearing Officer Made Pursuant to Minute Order No. 1, Dated March 31, 2016, filed on May 2, 2016 ("Petitioners' May 2, 2016 Objections")-Doc 13; Motion for Reconsideration of Minute Order No. 4, Filed on May 6, 2016 and/or Motion to Strike Selection Process and to Disqualify Various

Members and Hearing Officer, Filed on May 13, 2016 ("Petitioners' May 13, 2016 Motion for Reconsideration")—Doc 31; and the Petitioners' Mauna Kea Anaina Hou, Et Al.'s: (1) Renewal of Objections to Hearing Officer Selection Process and Hearing Officer Appointment, and (2) Supplemental Arguments on Motion to Disqualify BLNR's and Hearing Officer's Counsel, Filed on July 18, 2016, filed on July 26, 2016 ("Petitioners' July 26, 2016 Renewal of Objections")—Doc 130.

In addition, and while the Petitioners believe that the authorities, arguments, and evidence previously submitted in all of the above-referenced filings in the instant case, including the Hearing Officer's paid membership with the UH Hilo Astronomy Center, when UH Hilo is a party in these proceedings on an issue involving astronomy (with which the center promotes and has also had corporate membership/sponsorship with TMT as discussed), as well as the failure to make timely disclosures, were all independent bases for disqualification (and also reassert these arguments once again), as well as subsequent evidence and arguments set forth in the other filings referenced above, the Petitioners' also believe that the cumulative effect of all of the evidence as well as the further evidence and indicia of bias and/or appearance of bias, requires disqualification of the Hearing Officer.

Since the filing of the Petitioners' July 26, 2016 Renewal of Objections, the following has occurred: (1) following the hearings held on August 5, 2016 and August 12, 2016 on the very critical Motion to Disqualify BLNR's and Hearing Officer's Counsel, filed on July 18, 2016 ("Petitioners' July 18, 2016 Motion to Disqualify Counsel")—Doc 95, the Hearing Officer took the matter under advisement and still has not ruled on the Motion and continues to seek advice and confer with her counsel, as does the Board with its counsel); (2) following the hearing held on August 5, 2016 and August 12, 2016, with further arguments made at a status conference on October 3, 2016 about the matter, the Hearing Officer has still not ruled on a critical dispositive motion—Petitioners' Motion to Strike Conservation District Use Application, HA-3568, Dated September 2, 2010, and/or Motion for Summary Judgment, filed on July 18, 2016 (even while canons for judges, for example, require diligence and fairness in decisionmaking); (3) despite the Petitioners Mauna Kea Anaina Hou, Et Al.'s Site Visit Recommendations, filed on August 17, 2016—Doc 218, the Hearing Officer issued

Minute Order No. 18 that disregarded cultural protocol in accessing the Mauna for the Petitioners and for other objectionable matters and issues raised in Petitioner Mauna Kea Anaina Hou, Et Al.'s Objections to Site Visit, filed on September 26, 2016 ("Petitioners' September 26, 2016 Objections to Site Visit" —Doc 288 (please see Exhibit "A" attached hereto); (4) as raised in the Petitioners' September 26, 2016 Objections to Site Visit and as raised once again, at least sometimes a few and generally more often several armed and uniformed DLNR Enforcement (DOCARE) officers stand guard at the hearings in the room and outside the hearing room at the various hearings—at the last status conference, held on October 3, 2016, the hearing officer, at one point during the proceedings, was escorted at the Naniloa Hotel, the venue of the last status conference by two armed and uniformed DOCARE officers—one in front of her and one behind her as the Hearing Officer walked to the restroom during a recess; (5) during the status conference held on October 3, 2016, upon inquiries made by the Petitioners' counsel, the Hearing Officer stated that she rode in a vehicle with a Mr. Paiva, an employee of UH Hilo with the OMKM, and followed a vehicle guided for the visit and directed by UH Hilo employees and Office of Mauna Kea Management officials, Stephanie Nagata and Wallace Ishibashi, with Ms. Nagata and Mr. Ishibashi also being witnesses at the contested case hearing for UH Hilo, with Mr. Ishibashi also being a strong and well known community proponent of the TMT Observatory Project. The Hearing Officer also disclosed on October 3, 2016 that she rode in the same vehicle as her counsel, who is still the subject of a Motion to Disqualify, during the September 26, 2016 site visit; (6) that when also inquired about the Hearing Officer's connection, if any, with Deputy Attorney General Harvey Henderson, whose official representation and scope of representation in the instant UH and CDUP matters and issues related to the TMT project and Mauna Kea are still unclear, because of the decisionmaking by the Board not ever involving a hearing, and who also appeared in an advocacy role at hearings before the Hearing Officer on August 29, 2016, the Hearing Officer stated that she would issue another disclosure, which she submitted on October 4, 2016—DOC 307, after the hearings regarding Mr. Henderson (and the Petitioners object also hereto), which is now the 6th disclosure in the instant proceedings (with Board Member Stanley Roehrig also making an

unexplained disclosure all of a sudden on September 30, 2016 that also included certain references to the Hearing Officer as being a mediator in a 2015 settlement, presumably paid in that matter by counsel including Mr. Roehrig); and (7) refusing to require disclosure of witness statements, exhibits, and position statements from the UH Hilo that has the burden of proof under the administrative rules, prior to the deadlines for such material from the Petitioners, and also in not requiring for disclosure and filing of witness statements, exhibits and position statements from the applicant until only the Tuesday, immediately preceding the commencement of the evidentiary portion of the contested case hearing, and simultaneously at the time that the same production is made by the Petitioners that places the Petitioners. The issues deal with very complex matters and a very substantial \$1.4 billion project on an issue involving such tremendous public importance, and the timing and magnitude of the disclosures place the Petitioners at a tremendous disadvantage (The Petitioners further submit, yet once again, that they have been deprived of due process and notice and an opportunity to be heard at a meaningful time and in a meaningful manner. See Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224, 237 (2015) *citing* Sandy Beach Def. Fund. v. City and Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)).

Additionally, in added points 1 and 2 in the paragraph immediately above, the Hearing Officer has not acted diligently on these matters, which also reflects bias and/or an appearance of bias, and the Hearing Officer has also pushed the commencement of the evidentiary portion of the contested case hearing, while still not ruling on such critical motions. Any rulings in denying either of the motions, based on the evidence, authorities, and the arguments made in the motions and arguments made on August 5, 2016, August 12, 2016, and again on October 3, 2016, would also clearly show bias or an appearance of bias by the Hearing Officer, as well.

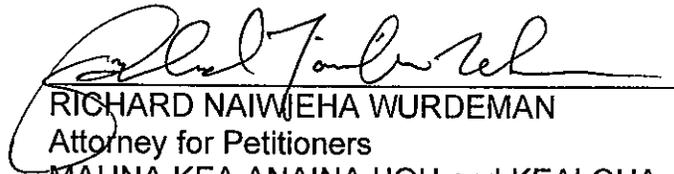
As for the issue of armed and uniformed officers, as discussed above, no good cause has been showed or established for such armed and uniformed enforcement and the fact that the Hearing Officer believes that armed guard escorts is required in also going to the restroom, the Petitioners submit, also shows bias and/or an appearance of bias against the Petitioners and those similarly situated as well, including an apparent

fear of the parties that also rises to the level of the Hearing Officer not being able to be fair and impartial at this point.

The Petitioners submit that the other issues and/or occurrences set forth above are also clear as well.

For all of the foregoing reasons, including the issues raised previously on disqualification, which are also renewed once again, each and every bases rises to the level of disqualification, independently of each other. Cumulatively, the bases and factors and issues considered collectively, without question require disqualification of the Hearing Officer under the authorities cited herein. Based on the commencement of the evidentiary portion of the contested case hearing in the above-entitled case, as set forth in the Amended Notice of Contested Case, dated October 6, 2016, being scheduled for October 18, 2016, the Petitioners also respectfully request an expedited order and prior to the commencement of the Hearings.

DATED: Honolulu, Hawaii, October 7, 2016.



RICHARD NAIWEHA 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
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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
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) 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:

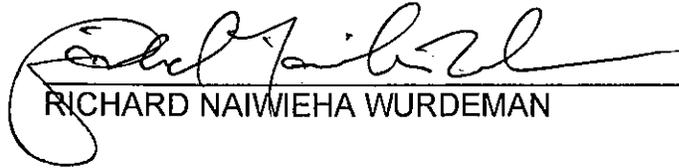
1. I am an attorney licensed to practice law in the State of Hawaii and I represent the Mauna Kea Anaina, et al. Petitioners in the above-referenced case.

2. On October 3, 2016, and in many of the previous hearings and/or status conferences before the Hearing Officer in this case, there has been a presence in the hearing rooms of armed and uniformed DOCARE DLNR enforcement officers. On October 3, 2016, during the hearing, several armed and uniformed officers were positioned in the hearing room as well as outside of the hearing room at the Naniloa Hotel in Hilo for a simple status conference. During the recess, counsel observed the Hearing Officer being escorted by two armed and uniformed DLNR DOCARE enforcement officers, one walking immediately in front of the Hearing Officer and one officer walking immediately behind the Hearing Officer. One of Counsel's clients remarked to counsel that he observed the exact same thing.

3. Attached hereto as Exhibit "A" is a true and correct copy of Petitioner Mauna Kea Anaina Hou, Et Al.'s Objections to Site Visit and Minute Order No. 18, filed on September 26, 2016.

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

DATED: Honolulu, Hawaii, October 7, 2016.



RICHARD NAIWIEHA WURDEMAN

EXHIBIT "A"

RICHARD NAIWIEHA WURDEMAN 6015-0
Attorney at Law, A Law Corporation
Pauahi Tower, Suite 720
1003 Bishop Street
Honolulu, Hawaii 96813
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Facsimile: (808) 536-0634
e-mail: RNWurdeman@RNWLaw.com

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Attorney for Petitioners

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BOARD OF LAND AND NATURAL RESOURCES

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IN THE MATTER OF) Case No. BLNR-CC-16-002
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) PETITIONER MAUNA KEA ANAINA
A Contested Case Hearing Re) HOU, ET AL.'S OBJECTIONS
Conservation District Use Permit) TO SITE VISIT AND MINUTE
(CDUP) HA-3568 for the Thirty Meter) ORDER NO. 18; and
Telescope at the Mauna Kea Science) CERTIFICATE OF SERVICE
Reserve, Kaohe Mauka, Hamakua)
District, Island of Hawaii,)
)
)
)
)

PETITIONER MAUNA KEA ANAINA HOU, ET AL.'S OBJECTIONS
TO SITE VISIT AND MINUTE ORDER NO. 18

COMES NOW 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 "Petitioners"), by and through their counsel undersigned, and hereby respectfully submits their Objections to the Site Visit and Minute Order No. 1, filed on September 19, 2016.

On August 17, 2016, and pursuant to the Hearing Officer's orders, the Petitioners field their Site Visit Recommendations (Doc 218). In the proposed recommendations, the Petitioners requested that areas be marked off with colored tape and also that helium balloons attached to the four corners of the proposed TMT site be included. Despite the Petitioners' requests, in Minute Order No. 18, filed on September 19, 2016, over a month after the proposals were submitted and one week before the site visit, the Hearing Officer included in the Minute Order a mere request to have either TMT International Observatory or the University of Hawaii at Hilo arrange for the use of a single red helium balloon at the proposed TMT Observatory site. In that the stated purpose for the site visit in then Minute Order was for the Hearing Officer "to see first-hand the location and observable impact of the Thirty-Meter Telescope project," the essential duplication of the logistics of the site visit in the first contested case hearing (a contested case hearing that was found to have violated due process when the cart was placed before the horse and the BLNR approved a CDUP even before the contested case hearings were held), was completely inadequate for a determination and appreciation of the observable impact of the project.

At the time of the submission of their proposed recommendations, the Petitioners were also unaware and of the belief that they would be meeting the Hearing Officer at the approved locations and would be ascending the Mauna in their own vehicles. This is a critical point in that the Petitioners' inability to follow their cultural and traditional practices in accessing the sacred Mauna and observing strict protocols precluded them from any participation in the site visit. In the Minute Order No. 18, it was ordered that all parties board hired tour vans in Hilo at the Hilo Bayfront Soccer Fields and that there were no unscheduled or impromptu stops unless specifically authorized by the Hearing Officer. One party of the group of the Petitioners was going to attempt to board a van just to be present at the Hale Pohaku at the 9,000 foot level, an unauthorized boarding spot, as there was no other way to observe the site visit. In any event, the Petitioners object with their inability to follow strict and necessary protocols in accessing the Mauna that precluded them from participation.

Finally, the Petitioners object to the continued presence of armed DLNR enforcement officers at the various hearings to date and any future hearings and also

what they assume will also occur at the site visit. The Petitioners seek the fair and impartial process in contested case hearings that the Hawaii Supreme Court ordered in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*. There has not to date been any finding of good cause and the need for such armed presence of DLNR officers in contested case proceedings in which they are participating. Not only is there a feeling of intimidation from the armed presence, but the Petitioners also are of the belief that the request for an armed presence and, with all due respect, the feeling by the Hearing Officer of the need for an armed presence is once gain a violation of the Petitioners' rights of due process of law in these proceedings.

DATED: Honolulu, Hawaii, September 25, 2016.



RICHARD NAWIEHA WURDEMAN
Attorney for Petitioners
MAUNA KEA ANAINA HOU and KEALOHA
PISCIOTTA; CLARENCE KUKAUAKAHI
CHING; FLORES-CASE OHANA; DEBORAH
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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:

Michael Cain
Office of Conservation and Coastal
Lands
1151 Punchbowl, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

Ian Sandison, Esq.
Timothy Lui-Kwan, Esq.
isandison@carlsmith.com
tluikwan@carlsmith.com
Counsel for the Applicant University
Of Hawai'i at Hilo

J. Douglas Ing, Esq.
Ross T. Shinyama, Esq.
douging@wik.com
rshinyama@wik.com
Counsel for TMT International
Observatory, LLC

Lincoln S.T. Ashida, Esq.
Newton J. Chu, Esq.
isa@torkildson.com
njc@torkildson.com
Counsel for Perpetuating Unique
Educational
Opportunities (P.U.E.O)

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com

Richard L. DeLeon
kekaukike@msn.com

Mehana Kihoi
uhiwai@live.com

C.M. Kaho'okahi Kanuha
kahookahi@gmail.com

Joseph Kuali'I Lindsey Camara
kualiic@hotmail.com

J. Leina'ala Sleightholm
leina.ala.s808@gmail.com

Stephanie-Malia Tabbada
s.tabbada@hawaiiantel.net

William Freitas
pohaku7@yahoo.com

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Maelani Lee
maelanilee@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
akulele@yahoo.com

Cindy Freitas
hanahanai@hawaii.rr.com

Dwight J. Vincente
2608 Ainaloa Drive
Hilo, HI 96720-3538

Julie.H.China, Esq.
Julie.H.China@hawaii.gov
William J. Wynhoff, Esq.
Bill.J.Wynhoff@hawaii.gov
Department of the Attorney General

DATED: Honolulu, Hawaii, September 26, 2016.



RICHARD NAIWIEHA WURDEMAN
Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 10, 2016, a true and correct copy of the foregoing document will be served on the following parties by the means indicated:

Michael Cain
Office of Conservation and Coastal
Lands
1151 Punchbowl, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

Ian Sandison, Esq.
Timothy Lui-Kwan, Esq.
isandison@carlsmith.com
tluikwan@carlsmith.com
Counsel for the Applicant University
Of Hawai'i at Hilo

J. Douglas Ing, Esq.
Ross T. Shinyama, Esq.
douging@wik.com
rshinyama@wik.com
Counsel for TMT International
Observatory, LLC

Lincoln S.T. Ashida, Esq.
Newton J. Chu, Esq.
isa@torkildson.com
njc@torkildson.com
Counsel for Perpetuating Unique
Educational
Opportunities (P.U.E.O)

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com

Richard L. DeLeon
kekaukike@msn.com

Mehana Kihoi
uhiwai@live.com

C.M. Kaho'okahi Kanuha
kahookahi@gmail.com

Joseph Kualii' I Lindsey Camara
kualiic@hotmail.com

J. Leina'ala Sleightholm
leina.ala.s808@gmail.com

Stephanie-Malia Tabbada
s.tabbada@hawaiiantel.net

William Freitas
pohaku7@yahoo.com

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Maelani Lee
maelanilee@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
akulele@yahoo.com

Cindy Freitas
hanahanai@hawaii.rr.com

Dwight J. Vincente
2608 Ainaloa Drive
Hilo, HI 96720-3538

Harvey E. Henderson, Jr., Esq.
Deputy Attorney General
Harvey.e.hendersonjr@hawaii.gov

Julie.H.China, Esq.
Julie.H.China@hawaii.gov
William J. Wynhoff, Esq
Bill.J.Wynhoff@hawaii.gov
Department of the Attorney General

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RICHARD NAIWIEHA 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 ENVIRONMENTAL ALLIANCE, a domestic
non-profit Corporation