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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

APPLICANT UNIVERSITY OF HAWAI'I
AT HILO'S **EXCEPTIONS** TO THE
HEARING OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER,
FILED JULY 26, 2017; CERTIFICATE OF
SERVICE

**APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S
EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED JULY 26, 2017**

Pursuant to Hawai'i Administrative Rules ("HAR") § 13-1-42 and Minute Order No. 103 [Doc. 784], Applicant University of Hawai'i at Hilo ("**University**") submits the following exceptions ("**Exceptions**") to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision and Order dated July 26, 2017 ("**Proposed Order**"). The University supports the Proposed Order and requests that the Board of Land and Natural Resources ("**Board**") adopt the Proposed Order, subject to the Exceptions set forth herein, which are intended to supplement and clarify the Hearing Officer's determinations and to correct a few typographical and

grammatical errors. These Exceptions are not intended to substantially or substantively modify or reverse any of the Hearing Officer's determinations, only to clarify and more fully and accurately reflect certain findings and conclusions from the proceedings.

References to specific findings of fact ("FOF") or conclusions of law ("COL") are denoted by the applicable FOF or COL number (*e.g.*, FOF 1, COL 4). The FOF or COL that are the subject of the proposed Exceptions are quoted in full or in pertinent part, followed by a narrative explaining the University's reasons for the Exception. References to exhibits refer to the exhibits admitted as part of the record, as set forth in Amended Minute Order No. 44 [Doc. 649]. *See* FOF 120-21. Proposed revisions to language are indicated in Ramsayer format.

I. EXCEPTIONS TO THE PROPOSED ORDER

The University proposes the following Exceptions to the Proposed Order:

A. Typographical and Grammatical Corrections

FOF 128(f). The James Clark Maxwell Telescope ("JCMT"), which became operational in 1986.

This proposed FOF is correct, except that "Clark" should be corrected to "Clerk". *See* Ex. A-1 at v.

FOF 362 and **FOF 364** mistakenly refer to "Ex. 8.11a". These references should be changed to "Ex. B.11a" so that the record is accurately reflected.

COL 306. Even assuming *arguendo* that the public trust doctrine applies to the use of the summit area of Mauna Kea for the TMT Project is consistent with the public trust doctrine.

This COL is substantively correct, but should be revised for grammatical clarity to:

Even assuming *arguendo* that the public trust doctrine applies to the use of the summit area of Mauna Kea, ~~for~~ the TMT Project is consistent with the public trust doctrine.

B. Update Regarding UKIRT Operations

FOF 170. The University is responsible for funding and executing decommissioning of its own facilities. The University owns four telescopes on Mauna Kea: UKIRT, JCMT, Hoku Ke‘a, and the University 2.2-meter Telescope. The University operates the University 2.2-meter Telescope and Hoku Ke‘a; UKIRT and JCMT are operated by other organizations. Tr. 11/15/16 at 112:11-114:16.

This proposed FOF is correct based on the record at the close of the contested case hearing. However, the University notes for the Board’s information that, as of June 1, 2017, the University began operating UKIRT. If needed, FOF 170 can be revised as follows: “The University owns four telescopes on Mauna Kea: UKIRT, JCMT, Hoku Ke‘a, and the University 2.2-meter Telescope. The University operates the University 2.2-meter Telescope, and Hoku Ke‘a, and UKIRT; UKIRT and JCMT are is operated by another organization.

C. Supplementation of Proposed COLs

COL 183. In the context of existing summit area cumulative impacts—and under the assumption that such cumulative impacts will continue—the TMT Project does not create or cause substantial adverse impacts to existing natural resources in the applicable area. The existing uses and resources are already committed to astronomical uses and objectives, and otherwise based upon commitments of the CDUA and University proposals, several facilities will be removed thereby significantly reducing substantial existing adverse impacts on the more sensitive and visible summit ridge areas within the Astronomy Precinct.

This proposed COL is substantively correct. However, the University proposes supplementing this COL as follows to more accurately reflect the record and the University’s commitments to decommissioning as set forth in Ex. A-39 (Nov. 17, 2015 Letter from D. Lassner to BLNR) and Ex. A-13 (Decommissioning Plan):

COL 183. In the context of existing summit area cumulative impacts—and under the assumption that such cumulative impacts will continue—the TMT Project does not create or cause substantial adverse impacts to existing natural resources in the applicable area. The existing uses and resources are already committed to astronomical uses and objectives, and otherwise ~~based upon commitments of the CDUA, if the TMT Project is~~

approved and built, and upon the University's commitments in its Decommissioning Plan, proposals, several facilities will be removed thereby significantly reducing substantial existing adverse impacts on the more sensitive and visible summit ridge areas within the Astronomy Precinct.

In essence, the removal of three telescopes through the University's decommissioning commitments will mitigate and reduce adverse impacts if the TMT Project is approved and built, within the Astronomy Precinct and overall summit area. See Ex. A-39; Ex. A-3 at 3-224; Ex. A-1, Ex. B (TMT Management Plan) at 4-41; FOF 171-73, 345, 940-41.

D. Corrections to Proposed Conditions

The University submits that the proposed conditions set forth on pages 260 through 263 of the Proposed Order should be revised as follows to clarify which entities are responsible for implementing each action:

Preamble to additional conditions [page 261]. The following additional conditions shall be implemented by UHH, OMKM and TIO:

For clarity, the preamble to additional conditions should be changed to: "The following additional conditions shall be implemented by UHH, OMKM or TIO, as applicable."

Condition No. 12 [page 261]. The University will ensure that the survey of power line corridor easement complies with DLNR standards and is in accordance with the conditions contained in the grant of easement (including the Mauna Kea Ice Age Natural Area Reserve) that was approved by the BLNR in August 1985. The University will provide copies of the survey to DOFAW;

For clarity, "The University" should be changed to "UH Hilo".

Condition No. 19 [page 262]. UH Hilo will notify OCCL of the date of the twice-annual inspections of the project site and allow Department staff to attend if available;

"/OMKM" should be added after "UH Hilo" to read "UH Hilo/OMKM" as OMKM will be primarily responsible for this action.

Condition No. 20 [page 262]. UH Hilo will provide OCCL and BLNR a

copy of their annual report to OMKM;

For clarity, Condition No. 20 should be revised to read: “UH Hilo/OMKM will provide OCCL and BLNR a copy of ~~their~~ TIO’s annual report to OMKM, as required by Section 5.3 of the TMT Management Plan;”.

E. Proposed Additional Conditions

The following are proposed additional conditions of the Conservation District Use Permit (“CDUP”) to further explain and clarify the University’s decommissioning commitments:

Proposed New Conditions Nos. 10 through 13.¹ The University shall meet its decommissioning commitments, as set forth in the letter from University President David Lassner to BLNR Chair Suzanne Case dated November 7, 2015, and in the Decommissioning Plan for the Mauna Kea Observatories, in accordance with the following conditions. Condition Nos. 10 through 13 shall be applicable only upon approval and development of the TMT Project.

10. The TMT Project site will be the last new area on Mauna Kea where a telescope project will be contemplated or sought by the University;

11. The University will decommission three telescopes permanently, as soon as possible and before TMT can go into operation, and no new observatories will be constructed on those sites;

12. These commitments will be legally binding on the University and may be regarded as a condition of the University’s current leases, and of any lease renewal or extension proposed by the University, for Mauna Kea; and

13. Notwithstanding any lease renewal or extension, consistent with the Decommissioning Plan, at least two additional facilities will be permanently decommissioned by

¹ Proposed Condition Nos. 10 through 13 are intended to be added after Condition No. 9, which begins on page 260 and ends on page 261 of the Proposed Order.

December 31, 2033, to include the Very Long Baseline Array antenna and at least one additional observatory.

II. CONCLUSION

The University respectfully requests that the Hearing Officer's Proposed Order be adopted, subject to the Exceptions set forth herein.

DATED: Honolulu, Hawai'i, August 21, 2017.



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CERTIFICATE OF SERVICE

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The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

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