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UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

The Petition of Mauna Kea Hui for a  
Declaratory Order Filed May 24, 2021.

Case No. HA-22-02

**UNIVERSITY OF HAWAI'I AT HILO'S  
SUBSTANTIVE JOINDER TO TMT  
INTERNATIONAL OBSERVATORY LLC'S  
MEMORANDUM IN OPPOSITION TO  
MAUNA KEA HUI'S MOTION TO REOPEN  
HEARING TO HEAR MOTION TO  
CONFIRM NON-COMPLIANCE WITH  
CONDITION NO. 4, OR, ALTERNATIVELY,  
PETITION FOR DECLARATORY ORDERS  
CONCERNING THE SAME; CERTIFICATE OF  
SERVICE**

**UNIVERSITY OF HAWAI'I AT HILO'S SUBSTANTIVE JOINDER TO  
TMT INTERNATIONAL OBSERVATORY LLC'S MEMORANDUM IN OPPOSITION TO  
MAUNA KEA HUI'S MOTION TO REOPEN HEARING TO HEAR MOTION TO  
CONFIRM NON-COMPLIANCE WITH CONDITION NO. 4, OR,  
ALTERNATIVELY, PETITION FOR DECLARATORY ORDERS CONCERNING THE SAME**

The University of Hawai'i at Hilo ("**University**"), by and through its attorneys, hereby  
substantively joins in TMT International Observatory LLC's ("**TIO**") "Memorandum in Opposition  
to Mauna Kea Hui's Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance

with Condition No. 4, or, Alternatively, Petition for Declaratory Orders Concerning the Same” (“**TIO Memo**”), filed on November 4, 2021.

On May 24, 2021, Petitioners Mauna Kea Anaina Hou, Kealoha Pisciotta, Clarence Kukauakahi Ching, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian-Environmental Alliance (collectively, “**Petitioners**”) filed their “Motion to Reopen Hearing to Hear Motion to Confirm Non-Compliance With Condition No. 4, or Alternatively, Petition for Declaratory Orders Concerning the Same” (“**Petition**”) with the Board of Land and Natural Resources (“**Board**”). In response to the Petition, the Board determined that the Petition does not seek reconsideration of the Decision and Order for Conservation District Use Permit (“**CDUP**”) HA-3568 for the Thirty Meter Telescope on Maunakea (“**TMT Project**”), and does not comply with the requirements of Hawai‘i Administrative Rules (“**HAR**”) § 13-1-39, which governs the reconsideration of a Board’s decision on the merits. Instead, the Board deemed the Petition a petition for a declaratory ruling pursuant to Hawai‘i Revised Statutes § 91-8 and HAR § 13-1-27. Minute Order No. 1 at 1.

The Petition is part of an ongoing strategy of attempting to relitigate CDUP HA-3568, which was lawfully approved by the Board on September 17, 2017, as confirmed by the Hawai‘i Supreme Court in 2018, to allow construction of the TMT Project. For example, here is a list of some of the litigation and challenges brought by one or combinations of the Petitioners to date:

- (1) Appeal of the first TMT Project CDUP; the CDUP was overturned by the Hawai‘i Supreme Court. *See Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 363 P.3d 224 (2015) (includes all Petitioners as named parties except for Kealoha Pisciotta).

- (2) Appeal of CDUP HA-3568; the CDUP was affirmed by the Hawai'i Supreme Court. *See Matter of Conservation Dist. Use Application HA-3568*, 143 Hawai'i 379, 431 P.3d 752 (2018) (includes all Petitioners as parties).
- (3) Lawsuit filed in the Hawai'i Circuit Court of the Third Circuit in July 2019, unsuccessfully arguing that TIO failed to post security for construction of the TMT Project; appeal to the Hawai'i Intermediate Court of Appeals pending. *See Mauna Kea Anaina Hou v. David Ige*, Civ. No. 19-1-0177 (includes all Petitioners as parties except for Deborah J. Ward and KAHEA).

The instant challenge filed by Petitioners is perhaps the most vexing as it attempts to read ambiguity into permit language where there is none.

The University substantively joins and supports the arguments for denying the Petition in its entirety as argued in the TIO Memo. First, Petitioners' request for a declaratory order is procedurally defective, because under established law, the declaratory ruling procedure cannot be used to review previously-made agency decisions. Second, even assuming the Board considers the substance of the Petitioners' allegations, as set out in the TIO Memo and approved by the Chair of the Board on May 4, 2021, Condition 4 has been satisfied: the removal of the unpermitted ahu; on-site testing and survey work; kick-off meeting with contractor and others to discuss construction procedures, safety and other requirements; and inspection, certification, and mobilization of the construction equipment constituted "[a]ny work done" or construction to be done on the land as required by Condition 4 of CDUP HA-3568, especially viewed in their entirety. And finally, since Petitioners (individually or as members of various organizations) actively participated in or supported the protests to actually block the heavy

construction equipment and vehicles from accessing the TMT Project site, the Petition should be denied outright based on equity and fairness. It would be an improper remedy for the Board to provide relief of any kind to Petitioners in such circumstances.

For the above reasons, the University substantively joins the TIO Memo and respectfully requests that the Board deny the Petition in its entirety.

DATED: Honolulu, Hawai'i, November 4, 2021.

/s/ Jesse K. Souki

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STATE OF HAWAI'I

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the following document:

UNIVERSITY OF HAWAI'I AT HILO'S SUBSTANTIVE JOINDER TO TMT  
INTERNATIONAL OBSERVATORY LLC'S MEMORANDUM IN OPPOSITION TO  
MAUNA KEA HUI'S MOTION TO REOPEN HEARING TO HEAR MOTION TO  
CONFIRM NON-COMPLIANCE WITH CONDITION NO. 4, OR, ALTERNATIVELY,  
PETITION FOR DECLARATORY ORDERS CONCERNING THE SAME

Was duly served upon the following parties, by email, on November 4, 2021:

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DATED: Honolulu, Hawai'i, November 4, 2021.

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