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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 (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	CASE NO. BLNR-CC-16-002 THE UNIVERSITY OF HAWAI'I AT HILO'S **OPPOSITION** TO LIVING HEIR/PROPER PARTY/PETITIONER STEPHANIE-MALIA **TABBADA'S MOTION TO VACATE** ENTIRE PROCESS FOR VIOLATION OF BLNR AND UNIVERSITY OF HAWAI'I FIDUCIARY TRUST, RIGHTS, RESPONSIBILITIES, BREACH OF CONTRACT, ETC. MANDATED BY THE LAW OF THE LAND [DOC. 97]; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO LIVING HEIR/PROPER PARTY/PETITIONER STEPHANIE-MALIA TABBADA'S MOTION TO VACATE ENTIRE PROCESS FOR VIOLATION OF BLNR AND UNIVERSITY OF HAWAI'I FIDUCIARY TRUST, RIGHTS, RESPONSIBILITIES, BREACH OF CONTRACT, ETC. MANDATED BY THE LAW OF THE LAND [DOC. 97]

I. INTRODUCTION

The University of Hawai'i at Hilo ("**University**") opposes the motion to "vacate [the] entire process" filed by Stephanie-Malia Tabbada ("**Tabbada**"). The motion is mostly

indecipherable and requires some guess work to discern its meaning and relevance to this proceeding. Fundamentally, the motion is unclear about what it wants the Hearing Officer to do, other than to "vacate [the] entire proceeding," and without a rational legal justification for why the Hearing Officer should do it. For the reasons below, the motion should be denied.

II. ANALYSIS

A. WHAT THE UNIVERSITY WISHES TO DO ON MAUNA KEA AND WHAT TABBADA WISHES TO DO ARE COMPATIBLE

The University's position is that astronomy and traditional and customary native Hawaiian practices on Mauna Kea are compatible, if not mutually supportive. Tabbada reminisces about her mother gathering water from Lake Waiau for her father, to heal his wounds from World War II. Mot. at 2 [unpaginated] [Doc. 97]. While that is an emotionally touching story, the University's proposed TMT project, where it is situated on Mauna Kea, would not interfere with Tabbada's or her family's ability to gather water from Lake Waiau, or otherwise to practice traditional native Hawaiian customs on Mauna Kea. ***Science and religion can live together on the mountain.*** Indeed, they both can thrive.

B. TO "VACATE ENTIRE PROCESS" DOES NOT MAKE SENSE SEMANTICALLY

Tabbada moves to "vacate" [the] entire process. "Vacate" means to "nullify or cancel; make void; invalidate <the court vacated the judgment>." BLACK'S LAW DICTIONARY 1584 (2004). In lay terms, "vacate" means "to make legal void: annul." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1380 (11th ed. 2003). The Hearing Officer cannot do what Tabbada moves her to do: no one can "vacate [the] entire process." That is, the Hearing Officer cannot nullify, cancel, make void, or invalidate this Proceeding. The Hearing Officer might vacate an order or ruling made in this Proceeding, but it cannot "vacate [the] entire process." Tabbada

does not cite any statute, regulation, rule, or other case law to support the premise that the Hearing Officer can "vacate [the] entire process."

C. ISSUES OF HAWAIIAN SOVEREIGNTY ARE OFF-LIMITS FOR THIS PROCEEDING

Tabbada's motion assumes the existence of the "Kingdom of Hawai'i," even replacing "State of Hawai'i" with "Hawaiian Kingdom" in caption and title for this Proceeding. Tabbada invokes generally "Hawaii Kingdom laws," Mot. at 2 [unpaginated] [Doc. 97]. Those laws, if they exist, are irrelevant to the scope and purpose for this Proceeding. Tabbada states: "**I am in agreement with Dwight J. Vincente's filing, Hawaii Kingdom Exists!**" *Id.* at 1 [unpaginated] (bold in original). However, Tabbada's reliance in this Proceeding on the existence of a purported "Hawaii(an) Kingdom," or on any sovereign state other than the State of Hawai'i (or the United States of America) is not supported. Indeed, in response to Dwight J. Vicente's motion to disqualify the Hearing Officer, the Board of Land and Natural Resources ("**Board**") stated:

> On the contrary, in *Hawai'i v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), the United States Supreme Court discussed the historical background of overthrow, annexation, and admission. The Court stated the obvious: "In 1959, Congress admitted Hawai'i to the Union" by way of the Admission Act. *Id.* at 168. ...
>
> The Board accordingly rejects the notions that State of Hawai'i is not legally a State in the Union, that there is any issue with or cloud on the State's title to the land at issue in this matter, or that the Board lacks jurisdiction.

Minute Order No. 14 Denying Dwight J. Vicente's Motion to Disqualify Judge Riki Mae Amano (Ret.); State of Hawai'i Lack of Jurisdiction to Hear this Contested Case Hearing, filed July 22, 2016 [Doc. 124].

Any reliance on the sovereignty of a purported "Hawaiian Kingdom" is not justiciable. American courts have long recognized that the determination of sovereignty over a territory is

fundamentally a ***political question beyond the jurisdiction of the courts***. As the United States Supreme Court recognized in 1890:

> Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Jones v. United States, 137 U.S. 202, 212 (1890).

The only relevant sovereign entity here is the State of Hawai'i, not the purported "Hawaiian Kingdom." As the United States District Court for the District of Hawai'i has stated:

> To state the obvious, Hawai'i is a state of the United States and therefore, the [defendants'] ***position implying that Hawai'i is not a state of the United States fails as a matter of law***. . . . *See United States v. Lorenzo*, 995 F.2d 1448, 1456 (9th Cir. 1993) (holding that the Hawai'i district court has jurisdiction over Hawai'i residents claiming they are citizens of the Sovereign Kingdom of Hawai'i); *Kupihea v. United States*, 2009 WL 2025316, at *2 (D. Haw. July 10, 2009) (dismissing complaint seeking release from prison on the basis that plaintiff is a member of the Kingdom of Hawai'i); *State v. French*, 77 Hawai'i 222, 228, 883 P.2d 644, 649 (Haw. App. 1994) ("[P]resently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature.") (quotations omitted).

United States v. Lindsey, Civ. No. 11–00664 JMS–KSC, 2013 WL 3947757 at *2 n.1 (D. Haw. July 30, 2013) (emphases and bracketed material added).

The State of Hawai'i exists. In 1959, Congress passed the Admission Act,[1] conferring statehood upon Hawai'i. The question of the State of Hawai'i's sovereignty therefore has been addressed by Congress, ***conclusively***, in the Admission Act. The Board exists, as an agency of the State of Hawai'i. The Board has granted the Hearing Officer authority over this Proceeding.

[1] An Act to Provide for the Admission of the State of Hawai'i into the Union, Pub. L. No. 86-3, 5(f), 73 Stat. 4, 5-6.

There is no basis to "vacate [the] entire process" based upon an unrecognized, legally rejected, and irrelevant sovereignty issue.

D. TABBADA'S REFERENCE TO "VESTED RIGHTS" DOES NOT MAKE SENSE

Tabbada invokes certain "vested rights." If Tabbada is arguing that she has "vested rights" as a citizen of a purported "Hawaiian Kingdom," then her argument is inconsistent with the above conclusion and otherwise contradicts the historical record concerning a ***real*** Hawaiian Kingdom. There was no "inherent sovereignty" of native Hawaiian people before Hawai'i became a territory of the United States. The Supreme Court of the Hawaiian Kingdom, in a thoughtful and carefully drafted 1863 opinion (*i.e.*, decades before the purported overthrow), held that the sovereignty of the kingdom resided in the monarch, and ***not in the people***. *Rex v. Booth*, 2 Haw. 616 (1863).

> The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, ***in his own person, all the attributes of sovereignty***.

Id. (emphasis added). So, based on the law of the Hawaiian Kingdom, Tabbada has no "vested rights" based on Hawaiian sovereignty, even if a purported "Hawaiian Kingdom" still existed.

E. TABBADA'S REMAINING COMMENTS ARE IRRELEVANT FOR THIS PROCEEDING

Tabbada makes several other comments in Sections I through VI of her motion. The relevance of those comments for this Proceeding lacks merit.

Section I states she is "not a corporation," as allegedly assumed, in violation of several laws. Mot. at 2 [Doc. 97]. She then asks: "Where did the State of Hawai'i come into the picture?" As discussed above, the answer is ***1959.*** *See supra* at 4.

Section II continues with dubious notions about her status or standing in this Proceeding. *Id.* at 3. Nobody seems to be challenging her right to participate in this Proceeding.

Section III asserts that Mauna Kea is "a creation of God and not of man." *Id.* at 3. Who (or what) created Mauna Kea is irrelevant for this Proceeding. What is relevant is whether science and religion can co-exist on Mauna Kea under the U.S. and Hawai'i constitutions. The University says yes; Tabbada apparently says no.

Section IV seems to assert that the contemplated TMT project reflects some form of malfeasance, asking: "Why can't we leave Mauna Kea in it's [sic] sacredness and stop destroying it any further?" *Id.* at 3. Again, the University believes that science and religion can co-exist on Mauna Kea, and that astronomy and native Hawaiian traditional and customary practices can thrive together on the mountain. Building the TMT on Mauna Kea will not destroy Mauna Kea. Nor will it impugn in any way Mauna Kea's "sacredness," to the extent the Hearing Officer even can consider any notion of "sacredness" of Mauna Kea, given the clear precedent and restrictions of the establishment clause of both the United States and Hawai'i constitutions.

Section V seems to (a) assert that unspecified "Hawaii Kingdom laws" are relevant for this Proceeding, and (b) to question the State of Hawai'i's dominion over Mauna Kea. Both notions are irrelevant for this Proceeding. Indeed, the Hearing Officer cannot even address that irrelevance based on the non-justiciable political question doctrine. The task before the Hearing Officer is whether the University's permit meets certain requirements under certain regulations for State of Hawai'i lands. Tabbada offers nothing on that critical topic.

In Section VI, Tabbada points to General Lease No. S-4191, with no substantiation or explanation. It is unclear how those random points support her motion to "vacate [the] entire

process." The language of the lease speaks for itself. Tabbada does not ask the Hearing Officer to interpret it, nor does she explain what she wants the Hearing Officer to do concerning it.

III. CONCLUSION

For the foregoing reasons, Tabbada's motion should be denied.

DATED: Honolulu, Hawai'i, August 1, 2016.

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CERTIFICATE OF SERVICE

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