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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF 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	Case No. BLNR-CC-16-002 **TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION TO MAELANI LEE'S MOTION TO INTERVENE [DOC-84]; CERTIFICATE OF SERVICE**

TMT INTERNATIONAL OBSERVATORY, LLC'S
OPPOSITION TO MAELANI LEE'S MOTION TO INTERVENE [DOC-84]

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its Opposition to Maelani Lee's Motion to Intervene dated July 12, 2016, and filed July 13, 2016 [Doc-84] (the "Motion"). Although it is unclear, the Motion appears to seek leave to intervene on behalf of Ms. Lee, and requests that the Hearing Officer take official notice of two allegations in the Motion. That portion of the Motion seeking leave to intervene on behalf of Ms. Lee should be denied as moot insofar as Ms. Lee has already been admitted as a party to the contested case proceeding. To the extent the Motion requests that the Board or Hearing Officer take official notice of two allegations, these requests should be denied because the allegations are not appropriate for official notice under HAR § 13-1-35(i).

I. LEGAL STANDARD FOR OFFICIAL NOTICE

Hawaii Administrative Rule ("HAR") § 13-1-35(i) governs requests for "official notice," and provides as follows:

> Official notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawaii. Official notice may also be taken of generally recognized technical or scientific facts within the specialized knowledge of the board when parties are given notice either before or during the hearing of the material so noticed and afforded the opportunity to contest the facts so noticed.

HAR § 13-1-35(i).

With regard to such matters as may be judicially noticed by the courts of the State of Hawaii, Rule 201 of the Hawaii Rules of Evidence ("HRE") governs judicial notice of *adjudicative facts*, and HRE Rule 202 governs judicial notice of *law*. It is well-established that a court should take judicial notice "only in very limited circumstances." In re Water Use Permit

Applications, 105 Hawaii 1, 17 n.15, 93 P.3d 643, 659 n.15 (2004) (declining to take judicial notice of alleged facts "either unnecessary to our decision or inappropriate for judicial notice").

Under HRE Rule 201(b), a judicially noticed fact "must be one that is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." The commentary to HRE Rule 201 explains that such facts lie "outside the area of reasonable controversy" and require a "high degree of indisputability."

Cases meeting the strict standard under HRE Rule 201(b) include, for example State v. Stocker, 90 Hawaii 85, 88 N.4, 976 P.2d 399, 402 n.4 (1998) (June 20, 1997, was a Friday); State v. Arena, 46 Haw. 315, 379 P.2d 594 (1963) (the exact time of sunrise on a particular day); State v. Lorenzo, 77 Hawaii 219, 221, 883 P.2d 641, 643 (App. 1994) (more than one Native Hawaiian group has declared independence of the United States or has purported to establish its own constitution).

Under HRE Rule 202(c), upon reasonable notice to adverse parties, a party may request that the court take, and the court may take judicial notice of:

> (1) all duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies, (3) all duly enacted ordinances of municipalities or other governmental subdivisions of other states, (4) any matter of law which would fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

See State v. West, 95 Hawaii 22, 26-28, 18 P.3d 884, 888-890 (2001) (30 mph limit on Lunalilo Home Road); see also State v. Marley, 54 Haw. 450, 467-468, 509 P.2d 1095, 1107 (1973) (affirming trial court's denial of draft instructions, including, for example that "international

law" takes precedence over Hawaii state statutes, and that treaties ratified by the United States are binding on the State of Hawaii).

II. DISCUSSION

1. The Motion Should be Denied as Moot to the Extent That it Seeks Leave to Intervene as a Party on Behalf of Ms. Lee.

Although the Motion is titled "Motion to Intervene," the Motion does not actually request that Ms. Lee be granted leave to intervene as a party in the contested case proceeding, much less provide any factual allegations warranting intervention (even if it had been actually requested). In any event, at the second pre-hearing conference on June 17, 2016, Ms. Lee's request to be admitted as a party dated May 21, 2016 [Doc-39], was granted. As a result, to the extent the Motion is construed as a request that Ms. Lee be granted leave to intervene as a party in the contested case proceeding, that portion of the Motion should be denied as moot.

2. The Request for Official Notice Should be Denied Because the Allegations Are Not Relevant to the Board's Evaluation of the CDUA and Are Not Appropriate for Official Notice.

The Motion requests that the Board or Hearing Officer take "judicial notice"[1] of the following allegations:

> **Take Judicial Notice:** A Joint Resolution is a United States Domestic Law, confined only to the boundaries within the United States, not outside the United States like the Islands of Hawai'i. **This is a Congressional Fact.**
>
> **Take Judicial Notice: The Joint Resolution & The Admissions Act have no Hawaiian Islands or metes and bounds to make the Kingdom of Hawai'i part of the United States of American Inc. [sic] This is a Congressional Fact!**

Motion, at 1-2 (emphasis in original).

[1] Ostensibly, the Motion intends to seek "official notice" rather than "judicial notice."

HAR § 13-1-35(i) governs requests for "official notice." The Motion does not explain how taking official notice would be necessary to the Board's evaluation of the CDUA under the criteria set forth in HAR § 13-5-30(c) or establish that the allegations are appropriate for official notice. Indeed, the Motion fails to establish that either of the above allegations are relevant or necessary to the Board's evaluation of the CDUA or that the allegations are even appropriate for official notice, for the following reasons.

First, the following allegation is inappropriate for official notice under HAR § 13-5-35(i):

> **Take Judicial Notice:** A Joint Resolution is a United States Domestic Law, confined only to the boundaries within the United States, not outside the United States like the Islands of Hawai'i. **This is a Congressional Fact.**

Motion, at 1 (emphasis in original).

As best as can be deciphered, this allegation claims that a Joint Resolution is a United States domestic law that is unenforceable outside of the United States, including the Islands of Hawaii, *i.e.*, the inference being that Hawaii is not a valid state of the United States. This allegation is not appropriate for official notice because Hawaii was admitted as a state to the United States in 1959 by way of the Admission Act. See Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). As a result, Hawaii is currently a state of the United States, and this allegation is factually and historically inaccurate.

To the extent the Motion seeks a declaration that the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States was wrongful such that Hawaii is not a valid state of the United States, the Motion must be denied on the basis that this issue raises a nonjusticiable political question over which the Board and Hearing Officer lack subject matter jurisdiction. Courts addressing this same issue have concluded that it is a nonjusticiable political question reserved for the executive and legislative branches.

The political question doctrine is "the result of the balance courts must strike in preserving separation of powers yet providing a check upon the other two branches of government." Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 194, 277 P.3d 279, 288 (2012). Determining whether a case involves a nonjusticiable political question depends on the facts of the case. The Hawai'i Supreme Court has adopted the six-part test in Baker v. Carr, 369 U.S. 186 (1962) to determine if a claim presents a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found:[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170, 737 P.2d 446, 455 (1987) (quoting Baker, 369 U.S. at 217).

It has "long [been] recognized that the determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts." Sai v. Clinton, 778 F.Supp.2d 1, 6 (D.D.C. 2011), aff'd sub nom. Sai v. Obama, No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011). For example, in Sai, David Keanu Sai, the purported acting regent of the Kingdom of Hawai'i, sought a declaration from the court that his Hawaii theft conviction violated federal and international law because Hawaii is not a valid state. Sai v. Clinton, 778 F.Supp.2d 1, 6 (D.D.C. 2011), aff'd sub nom. Sai v. Obama, No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011).

The Sai court declined to address Sai's claims that were based on a nonjusticiable political question explaining that:

> Plaintiff's lawsuit challenges the United States's recognition of the Republic of Hawaii as a sovereign entity and the United States's exercise of authority over Hawaii following annexation. However, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments of the Government, and **the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision**. In addition, the Constitution vests Congress with the "Power to dispose of an [sic] make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Therefore, there is a textually demonstrable constitutional commitment of these issues to the political branches. Furthermore, it would be impossible for this Court to grant the relief requested by Plaintiff without disturbing a judgment of the legislative and executive branches that has remained untouched by the federal courts for over a century. **Since its annexation in 1898 and admission in the Union as a State in 1959, Hawaii has been firmly established as part of the United States. The passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a political decision already made**.

Id. at 7-8 (internal citations omitted) (emphasis added).

Similarly, in Yellen, the United States District Court for the District of Hawaii dismissed plaintiff's claims that were based on the same nonjusticiable political question explaining that:

> The entire basis of Plaintiff's Complaint is that the overthrow of the Hawaiian Kingdom and Hawaii's annexation to the United States violated the United States Constitution and international law such that this Court should declare these acts void and restore the Kingdom of Hawaii. These issues are squarely nonjusticiable political questions – as in Luther, "it rests with Congress," not the judiciary, to decide the governance of Hawaii, and both the Supreme Court and the Ninth Circuit have already determined, in a number of other contexts, that issues of sovereignty and/or recognition of foreign entities are not for the judiciary to determine.

Yellen v. United States, 2014 WL 2532460 at *2, Civ. No. 14-00134 JMS-KSC (D. Haw. June 5, 2014) (concluding that plaintiff's Complaint raised the nonjusticiable political question that the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States was wrongful such that Hawaii is not a valid state of the United States).

In Williams, the United States District Court for the District of Hawaii also determined that it lacked subject matter jurisdiction over an inmate's civil rights claims challenging the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States, explaining that:

> Plaintiff's claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, "[n]ew States may be admitted by the Congress into this Union[.]" U.S. Const. Art. IV, § 3. **By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood.**

Williams v. United States, 2008 WL 5225870, at *3, Civ. No. 08-00547 SOM-KSC (D. Haw. Dec. 5, 2008); Algal Partners, L.P. v. Santos, 2014 WL 1653084, at *2-3, Civ. No. 13-00562 LEK-BMK (D. Haw. Apr. 23, 2014) (adopting Williams reasoning and declining jurisdiction over claim "Hawaiian Kingdom continues to exist and is under a prolonged and illegal occupation by the United States.").

As the foregoing cases demonstrate, it is well-established that nonjusticiable political questions are reserved for the executive and legislative branches. As a matter of law, therefore, the Hearing Officer Judge Amano and the Board lack subject matter jurisdiction to address and decide that the overthrow of the Kingdom of Hawaii and annexation of the Hawaiian Islands by the United States was wrongful such that Hawaii is not a valid state of the United States.

In addition, the second allegation for which official notice is requested, also raises the same nonjusticiable political question, that is, the validity of Hawaii's status as a state of the United States:

> **Take Judicial Notice: The Joint Resolution & The Admissions Act have no Hawaiian Islands or metes and bounds to make the Kingdom of Hawai'i part of the United States of American Inc. [sic] This is a Congressional Fact!**

Motion, at 2 (emphasis in original). Because Hawaii is a state of the United States, this allegation seeks a declaration that the annexation of the Hawaiian Islands by the United States was wrongful such that Hawaii is not a valid state of the United States. Based on the reasons and authorities discussed previously, the Hearing Officer and Board do not have subject matter jurisdiction over such nonjusticiable political questions.

Such nonjusticiable political questions have been constitutionally committed to the United States Congress. Under Article IV, Section 3 of the Constitution, "[n]ew States may be admitted by the Congress into this Union[.]" By an act of Congress, Hawaii was admitted to the Union in 1959. Algal Partners, L.P., 2014 WL 1653084, at *2 (finding that the court lacked "jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood.").[2] Consequently, neither the Board nor the Hearing Officer can take official notice of the allegations pursuant to HAR § 13-1-35(i), and the Motion must be denied.

[2] The Hawaii Intermediate Court of Appeal has explained that "[w]hatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawaii in 1894, and the Territory of Hawaii in 1898, the State of Hawaii . . . is now, a lawful government." State v. Fergerstrom, 106 Hawaii 43, 55, 101 P.3d 652, 664 (Haw. App. 2004).

III. CONCLUSION

Based on the foregoing, and upon further argument to be presented at the hearing of the Motion, the Motion should be denied.

DATED: Honolulu, Hawaii, August 1, 2016.

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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	BLNR Contested Case HA-16-02 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following parties by the means indicated:

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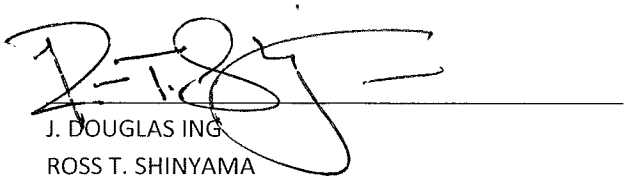

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