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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 RESPONSE TO THE PURPORTED KINGDOM OF HAWAI'I'S NOTICE OF ABSENCE OF NECESSARY AND INDISPENSABLE PARTIES [DOC. 79]; CERTIFICATE OF SERVICE**

TMT INTERNATIONAL OBSERVATORY, LLC'S RESPONSE TO THE PURPORTED KINGDOM OF HAWAI'I'S NOTICE OF ABSENCE OF NECESSARY AND INDISPENSABLE PARTIES [DOC. 79]

TMT International Observatory, LLC ("TIO"), by and through its undersigned counsel, hereby submits its response to the Kingdom of Hawai'i's Notice of Absence of Necessary and Indispensable Parties [Doc. 79] ("Notice"). The purported Kingdom of Hawai'i and its claimed

King (collectively, the "Kingdom")[1] is not a necessary and indispensable party to this contested case because it does not exist. It is also not a necessary and indispensable party because complete relief can be afforded among the existing parties and because the Kingdom does not have an interest in the contested case.

I. DISCUSSION

1. The Kingdom is not a necessary and indispensable party to this contested case because it does not exist.

The Kingdom is not a necessary and indispensable party to this contested case because it does not exist. Indeed, as the Kingdom concedes in the Notice, the "official position [of the United States] . . . is that **the Kingdom does not exist**." Notice at 7 (emphasis added).[2] Because it does not exist, the Kingdom is not and cannot be a necessary and indispensable party to this contested case.

[1] The Kingdom is purportedly represented by Lanny Alan Sinkin, who this Hearings Officer allowed to represent the Temple of Lono only after its Tahuna orally appointed Mr. Sinkin as an officer of the Temple of Lono at the June 17, 2016 hearing on the motions to intervene as parties. Hawai‘i Administrative Rules ("HAR") § 13-1-10(a) provides that "[a] person may appear in the person's own behalf, a partner may represent the partnership, an officer, trustee, or authorized employee of a corporation or trust or association may represent the corporation, trust or association, and an officer or employee of an agency may represent the agency in any proceeding before the board." In the alternative, "[a] person may be represented by counsel." HAR § 13-1-10(b). "A person shall not be represented in any proceeding before the board or a hearing officer except as stated in subsections (a) or (b)." HAR § 13-1-10(c). Mr. Sinkin is not a licensed Hawaii lawyer and therefore cannot represent the Kingdom under HAR § 13-1-10(b). Moreover, neither the Kingdom nor Mr. Sinkin provide any evidence that Mr. Sinkin is properly representing the Kingdom under HAR § 13-1-10(a). Mr. Sinkin's appearance before this Hearings Officer on purported behalf of the Kingdom is therefore in violation of HAR § 13-1-10. Mr. Sinkin's cavalier attitude towards the applicable administrative rules should not be tolerated by this Hearings Officer and the Notice should be dismissed on this basis alone.

[2] The State of Hawai‘i, not the Kingdom, is the lawful government of the Hawaiian Islands. See State v. Kaulia, 128 Hawai‘i 479, 487, 291 P.3d 377, 385 (2013) (stating that "[w]hatever may be said regarding the lawfulness of its origins, the State of Hawai‘i . . . is now, a lawful government") (internal quotation marks omitted).

The Kingdom argues that, if it were a party (which it refuses to be), it would present evidence of its alleged existence. Even if the Kingdom could present evidence of its alleged existence, this Hearings Officer is prohibited from inquiring, let alone determining, the alleged existence of the Kingdom. The question of whether the Kingdom exists presents a non-justiciable political question that this Hearings Officer lacks subject matter jurisdiction over.

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). 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 non-justiciable 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).

In Sai, David Keanu Sai, the purported acting regent of the Kingdom of Hawaiʻi[3], filed a complaint against the then Secretary of State Hillary Clinton and others claiming, inter alia, that the annexation of the Hawaiian Islands by the United States was illegal and unconstitutional and that the United States was required to return control of the Hawaiian Islands to the Kingdom of Hawaiʻi. The Sai court declined to address Sai's claims based on the political question doctrine. It explained:

> 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).

This same conclusion has been reached by Hawaiʻi federal district courts. See Yellen v. United States, 2014 WL 2532460 at *1 (D. Haw. June 5, 2014) (holding that "the court lacks

[3] The Kingdom that filed the Notice is different than the Kingdom of Hawaiʻi that Mr. Sai claimed to be the regent of in Sai. Indeed, a quick Google search reveals at least 4 different websites claiming to be the Kingdom of Hawaiʻi. See e.g., http://www.hawaiiankingdom.org/ (Sai); http://kingdomofhawaii.info/ (Sinkin); http://www.sun-nation.org/sun-hawaiian-sovereign-kingdom-hawaii.html; and http://www.hawaiiankingdom.net/HawaiianKingdom.net/Home.html.

subject matter jurisdiction because the Complaint raises the nonjusticiable political question as to the validity of Hawaii as a state of the United States"); Williams v. United States, 2008 WL 5225870 at *3 (D. Haw. December 5, 2008) (noting that it "lack[ed] jurisdiction to decide any issue regarding the legality of Hawaii's statehood including the lawfulness of events leading to statehood").

In dismissing the plaintiff's complaint, the Yellen court explained:

> 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.

Id. at *2.

It is therefore well-settled that this Hearings Officer is prohibited from inquiring, let alone determining, the alleged existence of the Kingdom. The Kingdom, however, cites to four Hawai'i cases and argues that our state courts have been willing to address the existence of Kingdom when raised. See Notice at 8. Initially, none of the cases cited by the Kingdom found that the Kingdom of Hawai'i existed. Moreover, none of the cases held that the political question doctrine did not bar judicial inquiry on the alleged existence of the Kingdom of Hawai'i. In fact, only one case, Nishitani v. Baker, 82 Hawai'i 281, 921 P.2d 1182 (App. 1996), even discussed the political question doctrine. In Nishitani, the ICA explained that the political question doctrine would have barred judicial inquiry in that case if the relevant question had concerned, as the defendants maintained, the creation of the State of Hawai'i. However, because

the relevant question in that case did not concern the creation of the State of Hawai'i, but merely concerned the enforceability of promissory notes and mortgages, the ICA held that the political question did not apply and did not bar judicial inquiry. See id. at 291, 921 P.2d at 1192. Unlike Nishitani, the relevant question presented by the Notice squarely concerns the creation of the State of Hawai'i and the existence and sovereignty of the Kingdom of Hawai'i. Judicial inquiry into such a question is clearly barred by the political question doctrine.

In sum, the Kingdom is not a necessary and indispensable party to this contested case because it does not exist.[4] To the extent that the Kingdom argues that it does exist and has evidence of its existence, this Hearings Officer is prohibited from inquiring, let alone determining, its existence. Indeed, the question of whether the Kingdom exists presents a non-justiciable political question that this Hearings Officer lacks subject matter jurisdiction over.[5]

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[4] Notwithstanding that it does not exist, the Kingdom argues that it has a claim to the lands on Mauna Kea based on the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub.L. 103-150, 107 Stat. 1513 (the "Apology Resolution"). This argument has already been rejected by the United States Supreme Court in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). The United States Supreme Court clearly stated in Hawaii:

> The Apology Resolution reveals no indication – much less a "clear and manifest" one – that Congress intended to amend or repeal the State's rights and obligations under [the] Admission Act (or any other federal law); nor does the Apology Resolution reveal any evidence that Congress intended *sub silentio* to "cloud" the title that the United States held in 'absolute fee' and transferred to the State in 1959.

Id. at 175-76 (italics in original); see also id. at 176 ("[W]e must not read the Apology Resolution's nonsubstantive 'whereas' clauses to create a retroactive 'cloud' on the title that Congress granted to the State of Hawaii in 1959.") (citation omitted).

[5] See also HAR § 13-1-29.1 ("The board without a hearing may deny a request or petition or both for a contested case **when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board** . . . .") (emphasis added).

2. **<u>The Kingdom is not a necessary and indispensable party because complete relief can be afforded among the existing parties and because the Kingdom does not have an interest in the contested case.</u>**

This contested case is governed by HAR, Title 13, Chapter 1, which is entitled "Rules of Practice and Procedure." HAR § 13-1-1 provides that this chapter "governs practice and procedure before the board of land and natural resources of the State of Hawaii." There is no rule in the Rules of Practice and Procedure that permits a non-party like the Kingdom to file a notice of the type filed here. There is also no rule concerning necessary and indispensable parties. Indeed, HAR § 13-1-31 concerning the admission and exclusion of parties is silent on the issue of necessary and indispensable parties. The Rules of Practice and Procedure also do not incorporate the Hawai'i Rules of Civil Procedure ("HRCP"), including HRCP Rule 19, which concerns necessary and indispensable parties. Consequently, there is no basis in the Rules of Practice and Procedure for the Kingdom to file the Notice. There is also no basis in the Rules of Practice and Procedure for the Kingdom to argue that it is a necessary and indispensable party. On this basis alone, the Notice and the Kingdom's claim that it is a necessary and indispensable party to this contested case is meritless.

The Kingdom does not specifically cite to HRCP Rule 19 in its Notice. Regardless, the Kingdom is not a necessary and indispensable party under HRCP Rule 19. HRCP Rule 19 sets forth a two-part analysis. First, it must be "determine[d] if an absent party is 'necessary' to the suit; then if . . . the party cannot be joined, the court must determine whether the party is 'indispensable" so that in 'equity and good conscience' the suit should be dismissed." <u>Makah v. Indian Tribe v. Verity</u>, 910 F.2d 555, 558 (1990). Notably, "[t]he rule regarding indispensable parties is founded on equitable considerations, and is not jurisdictional." <u>Midkiff v. Kobayashi</u>, 54 Haw. 299, 324, 507 P.2d 724, 739 (1973).

To be necessary, the absent party must establish that complete relief cannot be afforded among those already parties. See Haw. R. Civ. P. 19(a)(1). In the alternative, the absent party must have an interest relating to the subject of the action and be so situated that the disposition of the action will impair or impede the absent party's ability to protect that interest or leave the existing parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. See Haw. R. Civ. P. 19(a)(2).

In this contested case, complete relief can be afforded among the existing parties. The relevant question presented in this contested case is whether a Conservation District Use Permit ("CDUP") should be issued for the construction of the Thirty Meter Telescope on Mauna Kea. If the answer is yes, then complete relief can be afforded between the University of Hawai'i at Hilo, the applicant, and TIO, the sublessee and operator of the Thirty Meter Telescope. If the answer is no, then complete relief can be granted amongst the existing anti-TMT parties by denying the CDUP. No other potential relief is available to the Kingdom that is not available to the existing parties.

The Kingdom also does not have an interest in this case because it does not exist. The existing parties will also not be subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations if the Kingdom is not a party to this contested case. Simply stated, the non-existent Kingdom is not a necessary party.

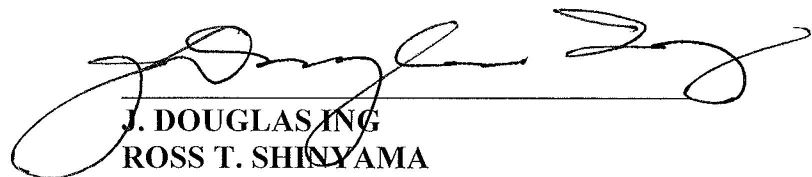
The Kingdom is not indispensable. Non-parties are indispensable if in "equity and good conscience" the contested case should be dismissed without them. The Kingdom that once existed long ago does not exist today. Equity and good conscience do not call for the dismissal of the contested case based on the claimed interests today of a non-existent Kingdom. Moreover, a party is indispensable only if it "cannot be joined." See supra. The purported Kingdom claims

that it cannot be joined in this contested case because of sovereign immunity. However, unlike Native American tribes[6], the Kingdom is not federally recognized by the United States as a sovereign entity and therefore does not enjoy sovereign immunity. Consequently, if it did exist, the purported Kingdom could be involuntary joined as a party to this contested case.[7] This self-proclaimed Kingdom is thus not indispensable.

II. CONCLUSION

In sum, and based on the foregoing, the Kingdom is not a necessary and indispensable party. The Notice is meritless and should be dismissed by this Hearings Officer.

DATED: Honolulu, Hawaii, August 1, 2016.



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[6] See Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050-51 (9th Cir. 1985) (noting that Indian tribes are protected by sovereign immunity because the United State recognizes them as a sovereign entity).

[7] The Kingdom and its purported citizens also cannot argue that this Hearings Officer lacks jurisdiction over them or that they are exempt from the laws of the State of Hawaiʻi. Indeed, Hawaiʻi appellate courts have rejected on numerous occasions jurisdictional challenges by individuals claiming to be part of the Kingdom of Hawaiʻi or some other sovereign Hawaiian nation or organization. See State v. Kaulia, 128 Hawaiʻi 479, 291 P.3d 377, (2013); Kekona v. State, 2015 WL 732519 (Haw. App. Feb. 19, 2015) (unpublished); State v. Weeks, 2015 WL 709599 (Haw. App. Feb. 18, 2015) (unpublished); State v. Smith, 134 Hawaiʻi 115, 334 P.3d 778 (Haw. App. Sept. 12, 2014) (unpublished); State v. Kanakaʻole, 132 Hawaiʻi 518, 323 P.3d 162 (Haw. App. March 31, 2014) (unpublished); State v. Kanaʻele, 132 Hawaiʻi 518, 323 P.3d 162 (Haw. App. March 31, 2014) (unpublished); State v. Rivera, 131 Hawaiʻi 300, 318 P.3d 590 (Feb. 6, 2014) (unpublished); State v. Palama, 129 Hawaiʻi 428, 301 P.3d 1269 (Haw. App. June 5, 2013) (unpublished).

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAIʻI

Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaʻohe Mauka, Hāmakua, Hawaiʻi, 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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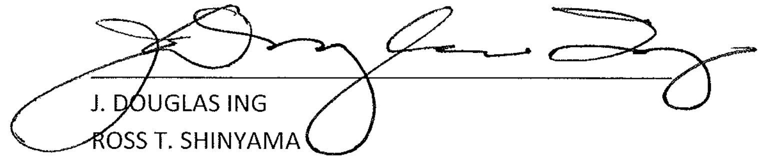

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