BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF	) Case No. BLNR-CC-16-002
	)
Contested Case Hearing re Conservation	) Statement of Harry Fergerstrom
District Use Application HA-3568 for	) CONTESTED CASE HEARING
the Thirty Meter Telescope at the Mauna	)
Kea Science Reserve Ka'oha Mauka	) HEARING OFFICER: Hon. Riki May
Hamakua, Hawai'i TMK (3) 4-4-15:009	) Amano (ret.)
	)

STATEMENT OF HARRY FERGERSTROM

The failure of this Court to take mandatory Judicial Notice[1] of Federal Statutes such as Section 2 of the Act of Admission, "An Act to Provide for the Admission of the State of Hawaii

[1] Rule 202. Judicial notice of law

(a) Scope of rule. This rule governs only judicial notice of law.

(b) Mandatory judicial notice of law. The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Hawaii Supreme Court, and (4) all duly enacted ordinances of cities or counties of this State.

(c) Optional judicial notice of law. 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fall within the scope of this subsection or subsection (b) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) the laws of foreign countries, international law, and maritime law.

(d) Determination by court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury, and the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under these rules.

Credits

Laws 1980, ch. 164, § 1.

Editors' Notes

RULE 202 COMMENTARY

This rule, which has no counterpart in Fed. R. Evid., generally restates statutory law, Hawaii Rev. Stat. ch. 623 (1976) (repealed 1980) (originally enacted as L 1941, c 110, § § 1, 2, 3, 4, 5), and Hawaii Rev. Stat. § 622-13(c) (1976) (repealed 1980) (originally enacted as L 1921, c 232, § 1; am L 1927, c 165, § 1; am L 1945, c 195, § 1; am L 1972, c 104, § 2(h)). These superseded provisions mandated judicial notice "of the common law and statutes of every state, territory, and other jurisdiction of the United States" and of county ordinances, and provided for judicial determination of foreign and other laws.

Subsection (b): This adds to the mandatory category U.S. Supreme Court and local court rules and is consistent with Schoening v. Miner, 22 H. 196, 202 (1914), where the court said: "[R]ules made by a judge of a circuit court, and approved by this court, should be judicially noticed by this court."

Subsection (c): The early Hawaii case law considered foreign law an issue of fact that required pleading and proof and was subject to determination by the trier of fact. In Board of Immigration v. Estrella, 5 H. 211, 214 (1884), for example, the court said, "A foreign law, relied upon as a defense, must be proved, like any other fact in the case." Hawaii Rev. Stat. § 623-3 (1976) (repealed 1980) provided simply that "the law of a [foreign country] shall be an issue for the court, but shall not be subject to ... judicial notice." This rule includes foreign law among those items that may be judicially noticed.

Subsection (d): This provision is based upon the last two sentences of HRCP 44.1, which provides:

The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as ruling on a question of law.

The subsection extends the provisions of this court rule to every category of law subject to judicial notice under Rule 202.

Notes of Decisions (28)

H R S § 626-1, Rule 202, HI ST § 626-1, Rule 202

Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes.

into the Union," Act of March 18, 1959, Pub. L. 86-3, 73 stat 4,[2] would constitute a clear violation of the hearings, officer, a former circuit judge, and now a mediator as well, of a clear

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[2] Organic Act § 2 An Act to Provide a Government for the Territory of Hawaii

(Act of April 30, 1900, ch. 339, 31 Stat. 141)

§ 2. Territory of Hawaii

Currentness

That the islands acquired by the United States of America under an Act of Congress entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii.

Credits

April 30, 1900, ch. 339, 31 Stat. 141.

Notes of Decisions (3)

Organic Act § 2, HI ORGANIC ACT § 2

Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes. See . (Speed schedules for city streets were "ordinances," within meaning of statute requiring state courts to take judicial notice of municipal ordinances, though the speed schedules were not codified or enacted by the city council, where the speed schedules were incorporated by reference in the city's traffic code, the traffic code specified that speed limit signs, which were based on the speed schedules, were to be treated as enacted by ordinance, and the city council had delegated to the county director of transportation services the authority to sign the speed schedules. State v. West, 2001, 18 P.3d 884, 95 Hawai'i 22

(The Supreme Court would take judicial notice of statute prohibiting use of evidence from juvenile proceedings in any adult criminal case for any purpose, in determining whether trial court erred in manslaughter case by ruling that state would be allowed to introduce certain testimony from defendant's prior juvenile proceeding if defendant testified on cross-examination that he did not know a single punch could cause death, though the statute was not raised by the parties or noticed by trial court or Intermediate Court of Appeals; statute was directly and obviously applicable and plainly controlling. Judicial notice has nothing to do with whether an issue is properly preserved or properly addressed on appeal, or with notice arguments raised for the first time on appeal.) State v. Schnabel, 2012, 279 P.3d 1237, 127 Hawai'i 432.

(State courts are duty-bound to take judicial notice of municipal ordinances. Rules of Evid., Rule 202(b). On appeal from judgment entered in suit challenging proposed development of parcel of real property, Supreme Court would take judicial notice of all interim development control ordinances enacted by city council, since certified copies of those ordinances were on file

duty under Hawaii law. If this tribunal does not take mandatory judicial notice, that failure is clear an error on appeal. Moreover, the appellate courts of this state themselves are obligated to take such notice. Such notice can be raised any time, by any party, and the Court itself is obligated to take judicial notice on its own. Indeed, there is no reason why a tribunal would ignore federal law, and section one of the State Constitution, Article XV. Does that Constitution not apply in this proceeding? If so, what is the validity of a state Constitution. The mandatory rule requiring this Court to take judicial notice of federal statutes and the Hawaii State Constitution here, as to Section two of the Organic Act,[3] Section Two of the Admission Act,[4]

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in the office of the chief clerk of the trial court, and thus trial could have taken judicial notice of the ordinances and their contents. HRS § 622-13(b).) Life of the Land, Inc. v. City Council of City and County of Honolulu, 1980, 61 Haw. 390, 606 P.2d 866.

Decisions Prior to the Amendment of the Law .

(Supreme Court would take judicial notice of laws of Hawaii prior to its annexation as part of domestic laws of United States.) U.S. v. Fullard-Leo, 1947, 67 S.Ct. 1287, 331 U.S. 256, 91 L.Ed. 1474.

(The courts of the Territory should take judicial notice of laws of Hawaii which were enacted at any time prior to annexation of the Islands by the United States, and of principal facts of Hawaiian history.) In re Title of Pa Pelekane, 1912, 21 Haw. 175, (1912)

Court took judicial notice of preamble to statute in which testator's relation with Hawaiian race was stated. O'Brien v. Walker, 1939, 35 Haw. 104, 1939.

(The Supreme Court would take judicial notice of the act authorizing a street railway in Honolulu. Acts of 1898) . Fuller v. Honolulu Rapid Transit & Land Co., 1904, 16 Haw. 1, 1904.

[3] § 2. [Territory] An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub L 86-3, 73 Stat. 4)

The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

Credits

Pub.L. 86-3 (1959).

and Section One of the Hawaii State Constitution,[5] represents the intent of the legislature as that Rule of Evidence was changed[6], where such judicial notice was not mandatory, and now is. Is

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Admission Act § 2, HI ADMISSION ACT § 2
Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes.

[44] § 2. [Territory] An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub L 86-3, 73 Stat. 4)

The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.
Credits
Pub.L. 86-3 (1959).
Admission Act § 2, HI ADMISSION ACT § 2
Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes.

[5]Const. Art. 15, § 1
Section 1
Currentness
The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial and archipelagic waters, included in the Territory of Hawaii on the date of enactment of the Admission Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters; but this State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island) or Kingman Reef, together with their appurtenant reefs and territorial waters.
Credits
Added by 73 Stat. 4, ratified June 27, 1959; 1978 Const. Con., ratified Nov. 7, 1978.
Const. Art. 15, § 1, HI CONST Art. 15, § 1
Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes

[6]**Editors' Notes**

RULE 202 COMMENTARY

This rule, which has no counterpart in Fed. R. Evid., generally restates statutory law, Hawaii Rev. Stat. ch. 623 (1976) (repealed 1980) (originally enacted as L 1941, c 110, § § 1, 2, 3, 4, 5), and Hawaii Rev. Stat. § 622-13(c) (1976) (repealed 1980) (originally enacted as L 1921, c 232, § 1; am L 1927, c 165, § 1; am L 1945, c 195, § 1; am L 1972, c 104, § 2(h)). These superseded provisions mandated judicial notice "of the common law and statutes of every state, territory, and

this tribunal is taking the that it deliberately intends to defy the will of the State legislature. All officers of the court, judges, including administrative law judges, are also held to certain canons and standards[7] of Professional Ethics[8]. Such also applies to counsel, who are officers of the

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other jurisdiction of the United States" and of county ordinances, and provided for judicial determination of foreign and other laws.

Subsection (b): This adds to the mandatory category U.S. Supreme Court and local court rules and is consistent with Schoening v. Miner, 22 H. 196, 202 (1914), where the court said: "[R]ules made by a judge of a circuit court, and approved by this court, should be judicially noticed by this court."

Subsection (c): The early Hawaii case law considered foreign law an issue of fact that required pleading and proof and was subject to determination by the trier of fact. In Board of Immigration v. Estrella, 5 H. 211, 214 (1884), for example, the court said, "A foreign law, relied upon as a defense, must be proved, like any other fact in the case." Hawaii Rev. Stat. § 623-3 (1976) (repealed 1980) provided simply that "the law of a [foreign country] shall be an issue for the court, but shall not be subject to ... judicial notice." This rule includes foreign law among those items that may be judicially noticed.

Subsection (d): This provision is based upon the last two sentences of HRCP 44.1, which provides:

The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as ruling on a question of law.

The subsection extends the provisions of this court rule to every category of law subject to judicial notice under Rule 202.

Notes of Decisions (28)

H R S § 626-1, Rule 202, HI ST § 626-1, Rule 202

Current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes.

HAWAI'I REVISED CODE OF JUDICIAL CONDUCT
Appended by Order of August 29, 2008 and December 17, 2008
Replacing Former Exhibit B Which Was Appended by Order of
September 9, 1992 With Further Amendments as Noted

[7]Rule 1.2. Promoting Confidence in the Judiciary

A **judge** shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary and shall avoid impropriety* and the appearance of impropriety.*

Court.[9] These obligations apply to all conduct, whether in court or in an administrative tribunal.

The moving party must prove the summit of Mauna Kea is thus within the territorial boundaries

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Editors' Notes

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the ***professional*** *and personal conduct of a* ***judge****.*
[2] A ***judge*** *should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.*

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a ***judge*** *undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.*

[4] ***Judges*** *should participate in activities that promote ethical conduct among* ***judges*** *and lawyers, support* ***professionalism*** *within the judiciary and the legal* ***profession****, and promote access to justice for all.*

[5] Actual improprieties include violations of law, court rules, or provisions of this Code.

[6] A ***judge*** *should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the* ***judge*** *must act in a manner consistent with this Code.*

Code of Jud. Conduct, Rule 1.2, HI R S CT EX B CJC Rule 1.2

State court rules and jury instructions are current with amendments received through July 1, 2016.

[8] **Rule 1.1. COMPLIANCE WITH THE LAW**
A judge shall comply with the law,* including the Hawai'i Revised Code of Judicial Conduct

[9] **Rule 3.3. CANDOR TOWARD THE TRIBUNAL.**
(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

as set forth in the Admission Act and the Hawaii State Constitution.[10] This court has the responsibility of properly interpreting, Haw. Rules. of Civ. Procedure Rule 12(b)(1) which as to

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(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.

(b) The duties stated in paragraphs (a) and (d) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6(a) of these Rules.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, except grand jury proceedings and applications for search warrants, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse, disclosure of which is not otherwise prohibited by law.

COMMENTS:

[1]The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2]An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1 of these Rules. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation, prescribed in Rule 1.2(d) of these Rules, not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also Comment [2] to Rule 8.4(b) of these Rules.

Misleading Legal Argument

[3]Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[10] Durfee v. Duke, 84 Sc.D. 242 (1964); City Bank v. Abad, 106 Haw. 406 2005); Garrido v. National Union Fire Insurance Life Company of Pittsburg, 891 So. 2d. 1091 (2005); Burns v. Department of Legal Affairs, 147 So. 3d 95) Dist. Court of Appeal Florida Fifth District 2014);

territorial subject matter jurisdiction, as is everywhere the case in the United States[11] can be raised at any time.[12] Such burden of proving territorial subject matter jurisdiction is on the

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Serion v. Thornton, 104 Haw. 79 (Intermediate Court of Appeals 2004); Bove v. Bove, 77 Conn. App. 355, 823 A,2d 383 (2003); Coastland Corp. v. North Carolina Wildlife Resources Comm., 134 N.C. App. 343 (1999); Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994); Rodrigues v. Rodrigues, 7 Haw. App. 102 (1987 In the Matter of the Estate of Kekuewa, Deceased 37 Haw. 394 (1946) and Keliipelapela v. Pamano et. al., 1 Haw. 280 (1856);
[11]

Jurisdiction Based on Property—In General

4A Fed. Prac. & Proc. Civ. § 1070 (4th ed.) April 2016 Update

The Late Charles Alan Wright[a36], Arthur R. Miller[a37], Mary Kay Kane[a38], Richard L. Marcus[a39], A. Benjamin Spencer[a40], Adam N. Steinman[a41]
Adam N. Steinman[a435]

Federal Rules of Civil Procedure

As is pointed out in the discussion of in personam jurisdiction in the preceding sections, jurisdiction during the eighteenth and nineteenth centuries both in England and the United States was based upon a **territorial** concept.[1] To exercise in personam jurisdiction, the court had to have "power" over the defendant and this power was predicated on the physical presence of the defendant within the court's **territory**. Even during the long period in which the **territoriality** principle held sway, however, jurisdiction also could be asserted **in rem** or quasi-**in-rem** by predicating the court's ability to proceed on the basis of its power over the defendant's local property or status relationships, rather than on the basis of the presence of the defendant himself. In keeping with the **territorial** concept of jurisdiction, however, the property or status that provided the power to assert jurisdiction had to be present within the borders of the court's geographic domain, which, of course, meant within the state or some subdivision thereof.[2] This aspect of the doctrine reflected the strong influence of sovereignty notions that pervaded the **territorial** principle.

Ordinarily, the question whether or not there is property within the court's **territorial** reach that will provide a jurisdictional base is a simple one since the situs of realty or tangible personalty is not difficult to determine. But when the property used as the **in rem** or quasi-**in-rem** base is an intangible, the question is more difficult since property of that character only has a legal situs; it does not have an actual or physical situs. The rules that have evolved to determine the situs of intangibles and some of the difficulties raised by their application are discussed in the next section.

5 Florida Practice: Florida Civil Practice § 2:2 (2011-2012 ed.)

The "local action rule" is not a venue concept; rather, it pertains to a court's **subject matter jurisdiction** to decide disputes related to real property located outside the court's **territorial**

moving party. The moving party here must prove title to lands by which a permit was granted.[13] Plaintiff need not have perfect title, but must prove a substantial interest in the property and title superior to that of defendants."[14]

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boundary.[1] In other words, the local action rule governs **subject matter jurisdiction**, not venue.[2]Under the local action rule, a court may not exercise **in rem** jurisdiction over property located outside its geographical **territory**.[3] A court cannot take possession of property beyond its **territorial** limits.[4] The rule requires an **in rem** proceeding involving real property (i.e., where real property is in controversy) to be brought in the county in which the property is located.[5] Whether the rule applies in a particular suit depends upon the underlying major question in the case.[6]

Illustration:

The local action rule did not apply where a power company's title to easements was not the underlying major question in a class action brought by landowners alleging that the power company exceeded the scope of power line easements by adding fiber optic telecommunications capacity; landowners did not seek transfer of title to the easements, and final judgment did not cause one of the parties to gain or lose an interest in real estate.[7]
Thus, an action directly related to the legal status of real property, such as an action to quiet title or to foreclose a mortgage or lien, must be brought in the circuit in which the property is located.[8] Similarly, proceedings brought for the sale of property under a mortgage foreclosure suit are regarded as local, so that jurisdiction is restricted to the local court of the county where the land lies,[9] even though other relief, such as a deficiency judgment, may be granted.[10] The rule does not preclude an action where the parties seek an equitable remedy not directly affecting title to real property.[11]

[12](Lack of subject matter jurisdiction can never be waived by any party at any time; accordingly, when Supreme Court perceives a jurisdictional defect in an appeal, court must, sua sponte, dismiss that appeal). Housing Finance and Development Corp. v. Castle Foundation 898 P.2d 576, 79 Hawai'i 64 (1995).

[13] The party claiming dominion or sovereignty has the burden of proof. See Case Concerning Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge ((Malaysia/Singapore) General list No. 130, International Court of Justice Slip Opinion page 13 12 May 2008:

"Malaysia appears to forget that 'the burden of proof in respect of [the facts and contentions on which the respective claims of the Parties are based] will of course lie on the Party asserting or putting them forward. (Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962, p. 16); it is thus for Malaysia to show that Johor could demonstrate some title to Pedra Branca, yet it has done no such thing." See also C.A.B. v. Islands Airlines, 235 F. Supp. 990 (D.C. Dist Hawaii, 1964) and, New Jersey v. New York, 523 U.S. 767 (1998) [burden of proof in cases claiming dominion by prescription]

DATED: October 18, 2016. Hilo, Hawaii.

Respectfully yours,

Hanalei Ferguson

[14] Shayefar v. Kaleleiki Civ. No. 14-00322 HG-KSC, 2016 WL 1449566 (U.S. Dist. Ct. 2016) (Based on the foregoing chain of title, there is a good and complete chain for the Subject Property as a portion of Land Commission Award Number 7779 issued to Kaleleiki from 1853 to Plaintiffs and title to the Subject Property is vested in Plaintiffs.)

Board of Land and Natural Resources
State of Hawaii

IN THE MATTER OF	) CASE NO. BLNR CC-16-002
	)
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, Hamakua, Hawaii, TMK (3) 4-4-013;009	) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email or by US Mail on Nov 9, 2016

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