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LAND USE COMMISSION  
STATE OF HAWAII

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Attorney for PETITIONERS

BEFORE THE LAND USE COMMISSION  
THE STATE OF HAWAII

In the Matter of the Petition of ) Docket No. DR19-67  
)  
KU'ULEI HIGASHI KANAHELE and ) SUPPLEMENTAL MEMORANDUM IN  
AHIENA KANAHELE, individuals, for a ) SUPPORT OF PETITION FOR  
Declaratory Order Concerning the invalid ) DECLARATORY ORDERS; CERTIFICATE  
classification of the de facto and improper ) OF SERVICE  
industrial use precinct on approximately 525 )  
acres of State Land Use Conservation District )  
lands located in Mauna Kea and Hilo, County of )  
Hawai'i, Tax Map Key No.: 4-4-015:009 (por.) )

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR  
DECLARATORY ORDERS

Petitioners KU'ULEI HIGASHI KANAHELE and AHIENA KANAHELE, individuals, (Petitioners) hereby respectfully submit their Supplemental Memorandum in Support of the Petition, filed September 3, 2019 (petition). The petition requests the LAND USE COMMISSION of the State of Hawai'i (Commission) to issue declaratory orders concerning the improper use of approximately 525 acres of State Land Use Conservation District lands located in Mauna Kea and Hilo, County of Hawai'i, Tax Map Key No.: 4-4-015:009 (por.) ("de facto industrial use precinct"). The following discussions of applicable law supplement and support the petition.

**I. Argument**

A. The Commission's constitutional obligations counsel granting the Petition.

The Petition implicates the Commission's duties to enforce at least four constitutional provisions.

1. *Mauna Kea summit lands are public trust resources.*

Article XI, §1 of the Hawai'i Constitution provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

The Commission's affirmative obligation to conserve and protect Mauna Kea conservation lands are not limited to those of a "good business manager" and rather extend to "tak[ing] the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process." *In re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 456 (2000) quoted by *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006). This constitutional mandate requires the Commission to do more than merely review whether previously issued permits appear compliant, and rather to affirmatively assess impacts on public trust resources.

2. *Petitioners have a right to a clean and healthful environment.*

Article XI, §1 of the Hawai'i Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

This provision protects Petitioners' rights to a clean and healthful environment as defined by Hawaii Revised Statutes (HRS) § 205-2. Petitioners declared interests in open space, native Hawaiian traditional and customary practices, watershed lands, and the conservation district. *See* Declaration of Ku'ulei Higashi Kanahale ¶¶22-26; Declaration of Ahiena Kanahale ¶¶15-21. Conservation districts are defined to include areas for open space, watershed protection, and other uses not detrimental to a multiple use concept. HRS §205-2(e). "[HRS] Chapter 205 is a law[ ] relating to environmental quality' within the meaning of article XI, section 9" and thereby defines Petitioners' constitutional rights. *Cnty. of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 408, 235 P.3d 1103, 1121 (2010)

3. *Petitioners are beneficiaries of public trust lands.*



Article XII, §4 of the Hawai'i Constitution provides:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

This provision imposes trustee responsibilities for lands designated under section 5(b) of the Admission Act as a public trust for native Hawaiians and the general public pursuant to article XII, §4. Mauna Kea lands are part of the section 5(b) public trust land corpus designated under the Admission Act.<sup>1</sup> This provision is relevant to the Commission's assessment of Petitioners as "interested persons" because they are part of the explicitly named class of beneficiaries of Mauna Kea public trust lands.

*4. Petitioners' rights as native Hawaiian cultural practitioners are reaffirmed and protected.*

Article XII, §7 of the Hawai'i Constitution provides:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Petitioners specifically attested to the ways Mauna Kea summit areas are part of a learned, traditional practice of respecting, protecting, and honoring a sacred space. Declaration of Ku'ulei Higashi Kanahale ¶¶18-26; Declaration of Ahiena Kanahale, ¶¶14-22. This Commission would appropriately find native Hawaiian traditional and customary practices include the honoring of Mauna Kea as a sacred space and that this practice is evident in the non-use of certain of the summit areas. In so doing, the Commission would further, appropriately, address the ways that granting the petition is consistent with its obligations to protect native Hawaiian traditional and customary rights and public trust resources.

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<sup>1</sup> See University of Hawai'i, Comprehensive Management Plan, Public Access Plan for the UH Managed Areas on Mauna Kea, at 1-5 (Jan. 2010) available at: [http://www.malamamaunakea.org/uploads/management/plans/CMP\\_PublicAccessPlan\\_2010.pdf](http://www.malamamaunakea.org/uploads/management/plans/CMP_PublicAccessPlan_2010.pdf).

B. Case law interpreting land uses and conservation districts support the Petition.

1. *Curtis v. Land Use Commission*, 90 Hawai'i 384, 978 P.2d 822 (1999)

*Curtis* instructs interpretations of HRS chapter 205. Land use statutes are to be “strictly construed . . . and accorded their natural and most obvious meaning when there is no manifest legislative intent contrarywise.” *Id.*, 90 Hawai'i at 395, 978 P.2d at 833 (holding a cell phone tower did not constitute a utility line or communications equipment building within the meaning of HRS §205-4.5(a)(7) and therefore required a special use permit) quoting *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 87 Hawai'i 217, 232, 953 P.2d 1315, 1330 (1998). Where intent is ambiguous, *Curtis* looked to the overarching purpose of HRS chapter 205, which is to “protect and conserve” natural resources and foster “intelligent,” “effective,” and “orderly” land allocation and development. *Curtis*, 90 Hawai'i at 396, 978 P.2d at 834. *Curtis* observed, “conservation lands must be reserved if practicable, agricultural lands should be protected, and urban lands should be developed in orderly fashion.” *Id.*

Here, the petition asks this Commission to apply HRS §205-2 provisions for urban districting to the successive construction of thirteen telescopes and permitting of fourteen observatories. Hawai'i Land Use law clearly restricts conservation district uses to those that are not detrimental to other permitted uses and defines observatories as urban district uses as provided under all county zoning laws.<sup>2</sup>

Even if the meaning of HRS §205-2 was deemed unclear, tenets of statutory interpretation instruct reference to the legislature's intent to “conserve forests, water resources and land, particularly to preserve the prime agricultural land from unnecessary

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<sup>2</sup> As noted in the petition, in Hawai'i county, laboratories and research are permitted in general commercial districts (Hawai'i County Code (HCC) § 25-5-112(a)(36)), in village commercial districts (§25-5-122(a)(28)), in commercial mixed districts (§25-5-132(a)(28)), in limited industrial districts (§25-5-142(a)(29)) and in general industrial districts (§25-5-152(a)(38)). The Hawai'i county zoning scheme for science research facilities is in accord with that of other counties. In Maui, laboratories are allowed in zone M-1 for light industrial use (Maui County Code (MCC) §19.24.020) and laboratories and biotechnology are included in “knowledge industries” and “light industrial and manufacturing” in the Kīhei Research and Technology Park District. MCC §19.38.020. In Kaua'i, scientific research is zoned for the general commercial district (Kaua'i County Code (KCC) §8-2.4(j)(18)), limited industrial district (§8-2.4(m)(12)), and in the general industrial district (§8-2.4(n)(17) without a permit. In the City and County of Honolulu, research laboratories are a permitted use in B-2 business districts (Revised Ordinance of Honolulu (ROH) § 21-3.110-1), business mixed use districts (ROH § 21-3.120-2) I-1 and I-2 industrial districts (ROH § 21-3.130-I), and industrial-commercial mixed use district (ROH § 21-3.140-I).



urbanization.” H. Stand. Comm. Rep. No. 395, 1961 House Journal 855. Legislators realized there was a “special need” to “protect the unique natural assets of the state.” S. Stand Comm Rep. No. 937, 1961 Senate Journal 883.

We note the explicit, sole addition of geothermal resource areas to HRS § 205-2(e) description of conservation district areas. *See* Act 97 §6, 2012 Haw. Sess. Laws (codified at HRS §205-2(e) (“Conservation districts shall also include areas for geothermal resources exploration and geothermal resources development, as defined under section 182-1”). The specific addition of geothermal resource areas as a separate, standalone conservation district area indicates that other such areas, including astronomy facility areas, are excluded from HRS §205-2(e). *See* Black’s Law Dictionary 581 (6th ed. 1990) (defining “expressio unius est exclusio alterius” as “[w]hen certain ... things are specified in a law, . . . an intention to exclude all others from its operation may be inferred”).

2. *Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission*, 64 Haw. 265, 639 P.2d 1097 (1982)

*Neighborhood Board* held: (1) issuance of a special use permit for an amusement park may not be used to circumvent district boundary amendment procedures to allow ad hoc infusion of major urban uses into agricultural districts; (2) use of a special permit to effectuate what amounts to a district boundary amendment frustrates the effectiveness and objectives of Hawaii’s land use scheme.

Special use permits allow “certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. . . only when the use would promote the effectiveness and objectives of [HRS chapter 205].” HRS § 205-6. Unlike a district boundary amendment, which is analogous to a rezoning in its effect of reclassifying land, and unlike a variance, which permits a landowner to use his property in a manner forbidden by ordinance or statute, a special permit allows the owner to put his land to a use expressly permitted by ordinance or statute on proof that certain facts and conditions exist, without altering the underlying zoning classification.

*Neighborhood Board* examined the relatively simpler process for obtaining special use permits in support of the conclusion “unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.” *Id.*, 64 Haw. at 270-71, 639 P.2d

at 1102-03 citing *Kotrich v. County of Du Page*, 166 N.E.2d 601 (Ill. 1960); *Harte v. Zoning Board of Review*, 91 A.2d 33 (R.I. 1952); *Board of Adjustment v. Stovall*, 218 S.W.2d 286 (Tex.Civ. App. 1949); cf. *Topanga Ass'n v. County of Los Angeles*, 522 P.2d 12 (Cal. 3d 1974) (variance); *Bryant v. Lake County Trust Co.*, 284 N.E.2d 537 (Ind. App. 1972) (variance). The site-specific conservation district use permit does not afford the same safeguards for ordered land use planning as does the district boundary amendment process. Table 1, *infra* compares statutory procedural requirements for conservation district use permits and district boundary amendments.

**Table 1.**

<b>HRS §183C-6 Permits and site plan approvals.</b>	<b>HRS §205-4 Amendments to district boundaries for more than fifteen acres.</b>
(b) DLNR action req'd w/in 180 days of filing;  (b) automatic approval if no action (c) public hearing for uses of the protective subzone, commercial uses, and if the chair requires one in the public interest (c) public notice in county/ state.	(b) commission action req'd 60-180 days after filing; [no automatic approval] (b) contested case hearing req'd (c) public notice in county/ state (c) service to county and all persons w/ property interests (c) mailed notice to all persons requesting notice (d) commission and staff may view and inspect any land which is the subject of the petition. (e) agencies and persons may intervene in the proceedings. (e)(1) the petitioner, the office of planning, and the county planning department are required parties; (f) commission may call witnesses and citizen/ community group representatives; (g) commission decision required within 365 days (g) findings of fact and conclusions of law, (g) determine whether to issue orders to show cause absent substantial commencement of use of the land; (h) six affirmative votes required

*Neighborhood Board* instructs that other permits, particularly those that afford fewer safeguards for the public's interest in orderly land use planning, may not be enlarged so as to evade Commission review through the district boundary amendment process. Here, the instant petition seeks a declaration that the successive issuance of fourteen conservation district use permits in the same area effectively bypassed the Commission's district boundary amendment process.

3. *In re CDUP HA-3568 for the Thirty Meter Telescope, \_ Hawai'i \_*, 431 P.3d 752 (2018) (*In re TMT*)

*In re TMT* held the BLNR did not abuse its discretion by granting the Thirty Meter Telescope International Observatory Corporation a conservation district use permit to



construct the TMT on the north slope of Mauna Kea, access roads, and associated construction.<sup>3</sup> Whereas *In re TMT* is restricted to BLNR's interpretations of HRS chapter 183C and conservation district rules as it applied to a single industrial use of Mauna Kea summit lands, the petition operates squarely within this Commission's constitutional obligations and HRS chapter 205.

HRS §205-2(b) requires urban districts to "include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated[.]" Industrial research facilities such as the observatories located in the de facto industrial use precinct are urban activities and uses under Hawai'i county zoning as well as in other counties across the state. These industrial research facilities do not belong in the agricultural, rural, or conservation district.

Conversely, HRS §205-2(e) defines the conservation district to include areas to support conservation values and "other permitted uses not detrimental to a multiple use conservation concept." The substantial adverse impacts sustained by Mauna Kea conservation district, as recognized by multiple documents and *In re TMT*, do not comply with this Commission's laws on the districting and classification of lands. HRS §205-2. Industrial uses of Mauna Kea's summit are detrimental to multiple other uses of the conservation district and are unfit for the conservation district under HRS §205-2(e).

4. *Kilakila 'O Haleakala v. Board of Land & Natural Resources*, 138 Hawai'i 383, 382 P.3d 195 (2016) (*Kilakila III*)

*Kilakila III* concluded BLNR did not plainly err by finding an industrial solar telescope proposed to be sited within a highly developed 18.166 acre area set aside for astronomy uses, amidst a much larger conservation district, met a conservation district criterion for uses "compatible with the locality and surrounding areas . . ." *Id.*, 138 Hawai'i at 405-07, 382 P.3d at 215-19. Relying on *Kilakila III*, the *In re TMT* majority affirmed findings that the TMT, though a half-mile from the greater concentration of observatories in an approximately 40.6 mile area, was also compliant with BLNR rules. *Id.*, 431 P.3d at 778 quoting HAR § 13-5-30(c)(5).

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<sup>3</sup> The TMT is proposed to be developed in Area "E" of the de facto industrial use precinct. This Area "E" is one of six telescope siting areas, comprising 150 acres, outlined in the Mauna Kea Science Reserve Master Plan, adopted by the University of Hawai'i Board of Regents on June 16, 2000 (2000 Master Plan). This 2000 plan updated a 1983 plan from 1983, which allowed for 160 acres of telescope siting areas. See Appendix A.

The Commission is not bound by findings based on other agency's rules regarding conservation districts. HRS §205-2(e) does not provide for subdivision of conservation district uses and plainly requires that multiple uses operate simultaneously and not to the detriment of each other. *Id.*

5. *Kuleana Ku'ikahi*, No. 29250 (Haw. App. Dec. 21, 1999) (mem.)

In the unpublished memorandum opinion *Kuleana Ku'ikahi*, No. 29250 (Haw. App. Dec. 21, 1999) (mem.), the petitioner sought a declaration from the Commission that Maui county violated county zoning requirements and that native Hawaiian traditional and customary rights were being adversely affected by the use of subdivisions at issue in that case pursuant to HRS §205-17 (requiring the Commission to take preservation or maintenance of cultural historical or natural resources into account in its boundary amendment proceedings). The ICA affirmed the Commission's decision that it lacked jurisdiction to review the county's zoning decisions where "counties were clearly granted the power to enforce and regulate zoning" and petition "cite[d] to no authority that would give LUC the power to oversee county zoning and regulations." *Id.*, at \*4 citing *TIG Ins. Co. v. Kaubane*, 101 Hawai'i 311, 328, 67 P.3d 810, 827 (App. 2003) ("An administrative agency can only wield powers expressly or implicitly granted to it by statute. Implied powers are limited to those reasonably necessary to make an express power effective.").

*Ku'ikahi*, which is not anyway binding law, is wholly distinguished from the instant proceedings. Whereas *Ku'ikahi* petitioners sought enforcement of county laws, the Kanahelles seek a declaration from this Commission that industrial observatory uses violate the state district boundaries law administered by this Commission. HRS §205-2(3). That is, the Kanahelles do not contend BLNR violated conservation district rules. BLNR's interpretations of its governing statutes and rules are wholly outside of the instant petition.

Here, the Kanahelles specifically seek the Commission's application of HRS chapter 205 and does not seek a declaration as to the propriety of BLNR's actions under conservation district statutes, HRS chapter 183C or BLNR rules, HAR chapter 13-5.

## II. Conclusion

For the foregoing reasons, Petitioner respectfully requests this Commission grant the petition, filed September 3, 2019.



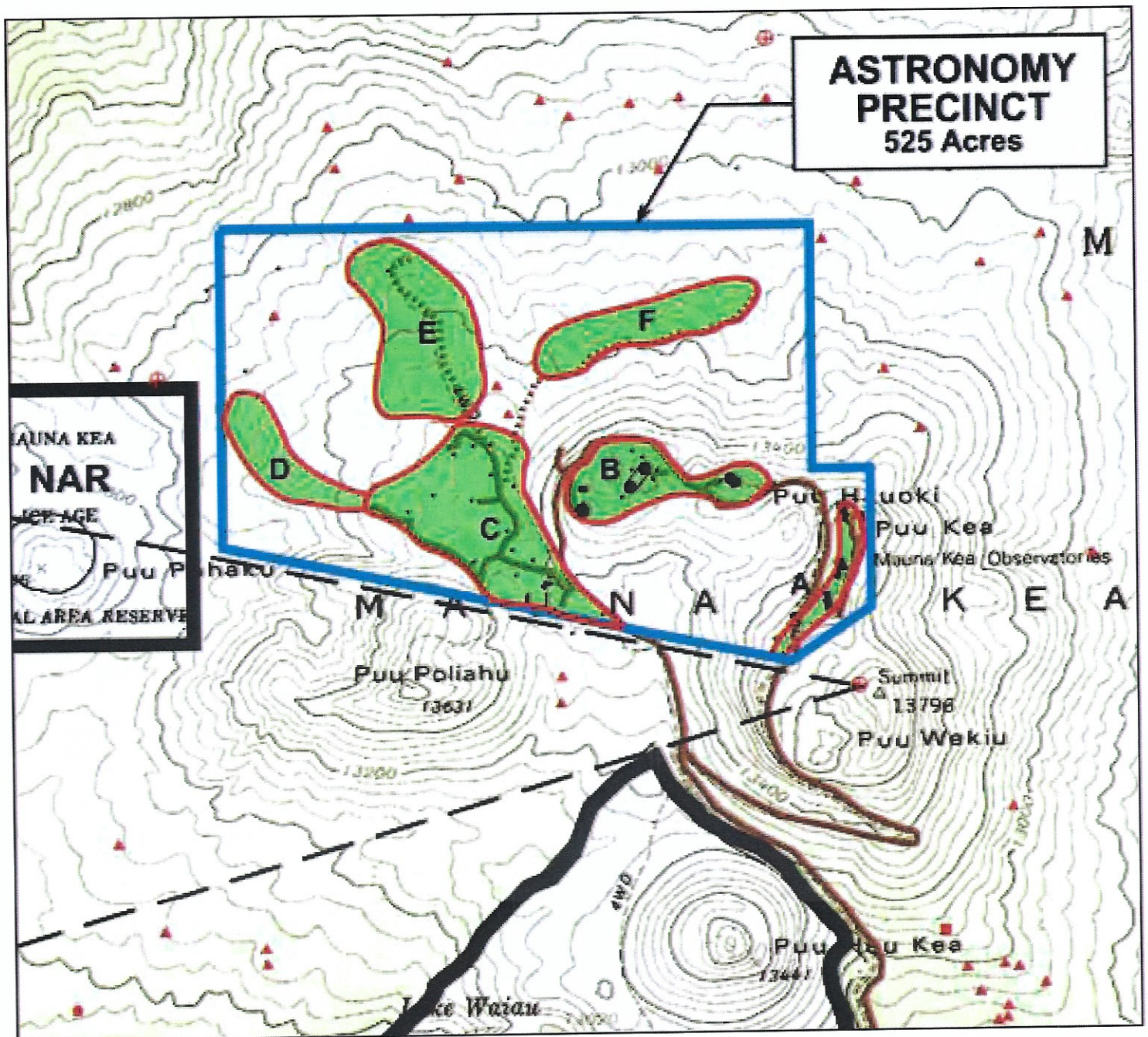
DATED: Honolulu, Hawai'i

October 15, 2019

A handwritten signature in cursive script, appearing to read "Bianca Isaki".

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Attorney for Petitioners



Telescope Siting Areas (2000-2020)  
Mauna Kea Science Reserve  
Master Plan

Figure IX - 15  
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APPENDIX "A"



BEFORE THE LAND USE COMMISSION

THE STATE OF HAWAII

In the Matter of the Petition of )  
 ) CERTIFICATE OF SERVICE  
 )  
KU'ULEI HIGASHI KANAHELE and )  
 )  
AHIENA KANAHELE, individuals )

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the above was duly served upon the following parties by U.S. Mail, postage pre-paid certified mail or hand delivered on this date as follows:

Riley K. Hakoda  
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Chief Clerk,  
LAND USE COMMISSION, STATE OF HAWAII

DATED: Honolulu, Hawai'i

October 15, 2019



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