

From: Akulele
Sent: Tuesday, May 31, 2016 12:13 AM
To: Moses, Kuulei N
Subject: ATTENTION KU`ULEI PETITION FOR A CONTESTED CASE HEARING

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

INTRODUCTION

I, Kalikolehua Kanaele, file the following written Petition for a Contested Case Hearing pursuant to Hawaii Administrative Rule (HAR) Section 13-1-29. I did not make an oral request for a contested case hearing at a BLNR hearing prior to the close of the public hearing at which the matter was scheduled for disposition; however, it is our understanding the the appointed Hearing Officer (HO) Ms. Amano, has allowed new Petitions to be file before May 31, 2016.

In addition and for convenience this Petition (total of 10 pages including the cover) has been sent via email to Ms. Ku`ulei N. Moses the Land Board Secretary (at Kuulei.N.Moses@hawaii.gov) on May 31st 2016 and sent via US Postal Service on May 31st 2016 It was mailed to the Board of Land and Natural Resources, at 1151 Punchbowl Street, #130, Honolulu, HI 96813. I also ask that my fee be waived if any fees, for reasons of Hardship.

- 1. Name:** Kalikolehua Kanaele
- 2. Contact:** As above
- 3. Address:** [redacted]
- 4. City:** Keaau
- 5. State/Zip:** Hawai`i, 96749
- 6. Email:** [redacted]
- 7. Phone:** [redacted]
- 8. Fax:** None
- 9 -16. Attorney:** Pro Se
- 17. Board Action Being Contested:**

University of Hawai'i at Hilo/The Thriry Meter Telescope (UHH/TMT) Conservation District Use Application (CDUP) for the lands under General Lease S-4191 to the UHH/TMT in the Mauna Kea Conservation District Ka`ohe, Hamakua District Hawai`i Island, Tax May Key: (3) 4-4-015:009 por.;

18. Board Action Date: Uncertain

19. Item No.: Land Division, D-19

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action:

Mauna Kea resides on the States Conservation District of Ka`ohe, Hamakua District Hawai`i Island, and lands under question in the immediate case is under Tax May Key: (3) 4-4-015:009 por.;, Ka`ohe, Hamakua District Hawai`i Island, Tax May Key: (3) 4-4-015:009 por.;

I as a Native Hawaiian (where Native Hawaiian is used it also means Kanaka Maoli, Hawaiian Subject and National of the Kingdom of Hawai'i) do have a property interest in the lands in question and my civil and human rights as well as as my rights under state and federal statute and the state Constitution and international law and custom will be and have been violated and continue to be threatened.

I participate here in pursuit of Justice and also under duress as I as a Kanka Maoli _____do not recognize the jurisdiction of the United States of American or it alleges occupation or lording over Hawai'i or over our Kingdom.

I am a Cultural Practitioner who practices and will continue to Practice/ exercise my traditional and customary cultural and religious practices on and around the summit and slopes of Mauna Kea, Hawai'i. I as a ranking Chief of the Royal Order of Kamehameha I, Heiau Mamalahoa, Helu 'Elua and a Kanekoa, Priest of I'o Kalanainuilamamao of Mauna Kea, and a descendant of Kamehameha I, have a Kuleana and am dedicated to preserving and perpetuating Native Hawaiian traditional and customary cultural, historic and religious practices, access and site (landscape) protection.

I have a interest that is separate and distinct from that of the general public. I have been actively involved in protecting Mauna Kea's natural and cultural resources for decades. I participated in previous Contested Case Hearing (CCH) on Mauna Kea and have been a witness in the CCH re: the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea.

I exercise and will continue to exercise traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. I am a native Hawaiian, as defined in the Hawaii Admission Act, Section These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, erecting 'ahu and lele for ceremonies, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies (Polohiwa ceremonies), and conducting temple worship, and 'Ahu building and ceremonies in accordance with my rank and religious titles. These things are performed in, among, and around the Mauna Kea summit area, Ice Age Natural Area Reserve, and Science Reserve. I enjoy constitutionally protected traditional and customary native Hawaiian rights.

I can and will provide information to assist decision-making on the UHH/TMT CDUP for use of the Mauna Kea lands. To manage and expedite the Contested Case Hearing, I will work jointly with other parties who share common interests to organize and make a single presentation addressing but not limited to the following:.

Rights protected under Section 5(f) of the Hawaii Admission Act, 42 USC § 1983, 40 C.F.R. § 1508.27(b), Hawaii Const. Art. XI, secs. 1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343.

Traditional and Customary Practices. More specifically, Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. *Kapa`akai v Land Use Commission*, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai`i unaffected by the changes in government. In effect, the exercise of such rights is a public trust purpose.

The proposed disposition of lands and water within the Mauna Kea summit, Ice Age Natural Area Reserve and Science Reserve areas of Mauna Kea threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes are derived from HRS § 1-1. These rights include, but are not limited to:

- the gathering of ice, snow, water, raw materials for adz making;

- depositing of the "piko" or umbilical cord in Lake Waiau;

- traditional astronomy, cosmology, and navigation;

- continued burial practices;

- solstice and equinox (Polohiwa) ceremonies;

- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and

- the exercise of other rights for religious, cultural, and subsistence purposes.

'AHU and Ceremonies conducted in accordance to my rank, position and kuleana or responsibility handed down by my family and/or people.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation

districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. I have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to the observatory projects. I am informed and believe that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

Hawaiian Homes Commission Act. In addition, pursuant to Section 221 of the Act, these same beneficiaries have a right to sufficient water to support homesteading. I and others are beneficiaries of the trust created by the Hawaiian Homes Commission Act ("Act"). The ground water beneath the summit of Mauna Kea is both an actual source of drinking water for the Pohakuloa Military Training Ground and Mauna Kea State Park. In addition, it is a potential source of water for future homesteading for areas of Pi`ihonua and Humu`ula, in which the Department of Hawaiian Home Lands has title to over 59,000 acres of pastoral homesteading land.

Ceded Lands Trust Revenues. I am also a beneficiary of the trust established pursuant to Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, I have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As a beneficiary of this trust, I and others beneficiaries have a right to reasonable revenues from the lease and use of public lands subject to the provisions of the trust.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawaii and the TMT failed to prepare an adequate FEA/FEIS, despite the significant cumulative effects of the proposed TMT expansion and the Pohakuloa training expansions (up the slopes of the Mauna Kea Conservation District). The TMT Corporation has received substantial federal funding for this project constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). State law requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

The *Wekiu and other threatened and endangered speice of Mauna Kea*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. *Sierra Club v United States Fish & Wildlife Serv.* 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b). While the *Wekiu* insect is not listed as endangered nor threatened under the Endangered Species Act, this board nonetheless has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit.

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation

with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT is required to consult with native Hawaiian groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the “intangible aspects” of the property. National Register Bulletin 38-“Guidelines for evaluating and documenting Traditional Cultural Properties” establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

National Environmental Policy Act. Under NEPA regulations, “an agency must prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” The UH and/or the TMT International Observatory LLC (TMT) formerly known as the TMT Corporation project proposal has received significant funding and anticipates more federal funding from the National Science Foundation, but has not completed a federal environmental impact statement. The regulations promulgated by the Council on Environmental Quality (federal and state adopted) established the following nonexclusive criteria for determining when a full EIS is required:

"Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);

"Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);

"The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);

"The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);

"The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);

"Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," id. § 1508.27(b)(7);

"The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," id. § 1508.27(b)(8);

Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b)(10).

21. Any Disagreement Petitioner Seeks or Deems Itself Entitled To:

The BLNR made many errors previously as was affirmed by the Hawai'i State Supreme Court in December 2, 2015 in approving the UH/TMT request for a CDUP prior to holding the requested

contested case hearing, thus violating basic due process rights. But this CDUP also continues to challenge, frustrate and even violate the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS § 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine whether my rights and those of others Petitioners (Native Hawaiians and the General Public) can be protected and preserved with the approval of the UH/TMT CDUP.

Other issues include but are not limited too the following:

Whether BLNR used the correct procedure to granting the CCH and tue appointment of the HO etc.

Whether TMT has fulfilled all the requirements and conditions and all state and federal requirements of the law.

Whether the members of the BLNR are or have been violating their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.

Whether the BLNR is violating state and federal laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.

Whether the BLNR should approve it when the UH/TMT has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices without interference of view planes and other forms of disturbance, distraction and interference to Practitioners at these sites.

BLNR's approval of the UH/TMT CDUP will harm our rights, duties, and privileges, as protected by law. These abridgment include but are not limited to:

Traditional and Customary Rights of Hawaiians. The approval of this CDUP is an abridgment and denial of constitutionally protected rights enumerated above at paragraph 8 and held by Petitioners as native Hawaiians. In the past, the Mauna Kea Support Services (MKSS) staff at the summit has denied members of Petitioners access for exercise of religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000' level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners access to the lake or upper regions of the summit area.

Numerous people have been arrested on unlawful grounds yet no enforcement of the law against desecration has been enforced and instead the law was selectively enforced in favor of the Developers (UH/TMT). Numerous peoples have filed complaints of desecration with Hawaii county police and DOCARE already committed by TMT/UH of Hilo. This is a violation of our civil and human right.

Desecration and Destruction of Cultural Sites. In addition, to myself and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit,

slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a number sites numerous times. TMT will be a desecration also. So it should be denied.

Public Trust Doctrine. The operations of the observatory and the planned expansion threaten the current and future water quality of the dike-confined ground water beneath the Mauna Kea summit. This is a resource which I and other Petitioners have an interest in protecting. BLNR until and unless the UH/TMT completes studies on the impacts of its past operations on that water resources and makes adequate provision for its future enhancement and protection should not approve and more development on Mauna Kea.

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope.

Ceded Lands Trust Revenue. The Board of Land and Natural Resource's disposition of public lands are subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a proper appraisal and for less than fair-market value is a breach of trust and statutory duties owed to native Hawaiian beneficiaries of the trusts created by this Act, the BLNR and the UH have foregone substantial revenues that the observatories could have generated for the trust. All members are beneficiaries of the trust.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT has not complied with the National Environmental Policy Act. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT to submit a state environmental assessment without adequate review and comment by the public. In order to give the Board all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts in the area of the Mauna Kea Conservation District.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to:

Denial of the UH/TMT CDUP. Beyond that we cannot know the relief until we can know the extent of the damage so all rights are hereby reserved.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest:

The construction of the TMT will result in continued desecration of the cultural and natural resources of the summit area and underlying ground water resource. Moreover, the issuance of water permits or long term licenses that would allow the continued diversion of water from Lake Waiau within the Mauna Kea Ice Age Natural Area Reserve areas will interfere with the exercise of these traditional and customary rights.

The BLNR failed to adequately assess the effects that the desecration caused by the

Observatories and the cumulative impact the TMT will have on our constitutional rights as Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

This contested case hearing will serve the public's interest by providing the BLNR with the information it needs to fully and properly implement the conservation district protections that they are obligated to uphold.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to be A Party under section 13-1-31, HAR.

I have participated in every phase of formal decision-making regarding the UH/TMT CDUA and I have information to assist the Board member to make informed decisions.

DATED: Hilo, Hawaii, May 31st 2016

Kalikolehua Kanaele

(electronic signature)