

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
 CLARENCE KUKAUAKAHI CHING; FLORES-CASE ‘OHANA;
 DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE
 HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation;
 Petitioners.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of:	)	Case No. BLNR-CC-16-002
)	
A Contested Case Hearing Re	)	PETITIONERS’ COLLECTIVE
Conservation District Use Permit	)	PREHEARING STATEMENT;
(COUP) HA-3568 for the Thirty Meter	)	APPENDIX “A”; COLLECTIVE
Telescope at the Mauna Kea Science	)	EXHIBIT LIST; CERTIFICATE OF
Reserve, Kaohe Mauka, Hamakua	)	SERVICE
District, Island of Hawai‘i, TMK (3) 4-4-015:009)	
)	
	)	Hearing Officer: Riki J. Amano.
)	
)	

PETITIONERS’ COLLECTIVE PREHEARING STATEMENT

Petitioners MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE KUKAUAKAHI CHING; FLORES-CASE ‘OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation (“Petitioners”), proceeding in the absence of their chosen legal counsel for this portion of the contested case, respectfully submit their prehearing statement pursuant to oral orders issued at the Prehearing Conference on October 3, 2016.

I. ISSUES TO BE DECIDED AT THE HEARING.

The central issue in this contested case hearing is whether the applicant the University of Hawai‘i at Hilo (“UHH”) has met its burden of demonstrating that its proposed land use is consistent with each of the eight criteria detailed in HAR § 13-5-30(c), Chapter 183C of the Hawaii Revised Statutes (HRS), other applicable rules in HAR, Title 13, Chapter 5, Conservation District, article XII, section 7 of the Hawai‘i State Constitution and *Ka Pa’akai o Ka ‘Āina v. Land Use Comm’n, State of Hawai‘i*, 94 Hawai‘i 31, 7 P.3d 1068 (2000), and Article XI, Section 1 of the Hawai‘i State

Constitution and the public trust doctrine. BLNR cannot grant a conservation district use permit (CDUP) where these requirements have not been met.¹

II. PETITIONERS' POSITION ON ISSUES RAISED BY THIS CDUA.

UHH has not and cannot demonstrate the proposed Thirty-Meter Telescope (TMT) project has met the requirements outlined above. Therefore, its application for a Conservation District Use Permit (CDUP) to construct the Thirty Meter Telescope in the Mauna Kea Conservation District (CDUP HA-3568) must be denied. Petitioners' distinct interests and issues are aligned on this position. Our position is based on authorities and information that includes, but is not limited to, the following:

A. The proposed project does not meet the eight criteria required for compliance with HAR §13-5-30(c).

Regulations governing conservation districts, HAR chapter 13-5, outline eight criteria that must be met before a CDUP can be granted. Pursuant to HAR § 13-5-30(c), BLNR could approve the TMT CDUA only if it met the following criteria:

- (1) The proposed land use is consistent with the purpose of the conservation district;
- (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
- (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;
- (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;
- (5) The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
- (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;
- (7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; **and**
- (8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

¹ Minute Order No. 19 granted Intervenor-Party PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S ("Perpetuating Inc.") motion to set issues, filed September 9, 2016. Petitioners filed their Response to Perpetuating Inc.'s motion on September 19, 2016 (Document No. 270) and re-incorporate by reference their oppositions to the overly narrow scope of issues set. *See* Appendix "A".

(Emphasis added). All proposed actions in the resource subzone, including permitted “astronomy facilities” must comply with the overall purpose of the conservation district. The TMT CDUA does not meet any of the eight criteria established to uphold the purpose of the conservation district.

1. The TMT project clearly did not meet CDUP Criterion No. 4 (“The project shall not cause substantial, significant, and adverse impacts on existing natural resources”).

As documented in the TMT project final environmental impact statement (TMT FEIS), CDUP application, staff recommendation on the CDUA, and other documents and testimony, the TMT will have a substantial, significant, and adverse, and therefore unauthorized, impact on the natural and cultural resources of the Mauna Kea Conservation District.

- a. Addition of the TMT "increment" of adverse impact to substantially impacted resources of Mauna Kea is a prohibited “substantial adverse impact.”*

It is undisputed that even without the TMT Project, the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have previously resulted in impacts that are significant and adverse. The TMT FEIS included findings of existing "substantial, significant and adverse" impacts of observatory construction on the archaeological and historic resources, geologic resources, alpine shrublands and grasslands and mamane subalpine woodlands of Mauna Kea. TMT FEIS at S-8 to S-9. The TMT FEIS concluded:

[T]he Project will add a limited increment to the current level of cumulative impact. Therefore, those resources that have been substantially, significantly, and adversely impacted by past and present actions would continue to have a substantial, significant, and adverse impact with the addition of the project.

TMT FEIS at S-9. The addition of the TMT’s adverse impacts to existing significant and adverse impacts would result in greater, significant and adverse impacts.

- b. The TMT project would substantially impact historic, cultural, and natural resources.*

The proposed massive size and height of the TMT observatory would substantially impact Mauna Kea's historic, cultural, and natural resources due to its placement in a pristine area amongst the hundreds of historic properties and cultural resources on the northern plateau. In addition, the CDUA did not discuss adequately the area of potential effect (APE) of the TMT and its impact upon these resources. APE is most clearly defined in federal regulations as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist” (36 C.F.R §800.16[b]).

- a. *Mitigation measures proposed in the FEIS did not address adverse environmental impacts of the TMT project and cannot be considered to do so in the context of the assessment of UHH's CDUA.*

The TMT FEIS relied on mitigation measures for its conclusion that the TMT's substantial adverse impacts could be considered insignificant in comparison with existing impacts. This conclusion was faulty and cannot be adopted as compliance with HAR §13-5-30(c)(4). First, a conclusion of relative insignificance based on unlawful existing significant impacts invites violations of conservation district rules and is contrary to the purpose of its regulation.

Second, the proposed "mitigation" did not address environmental impacts, but was rather based on a "pay to degrade" economic logic that runs contrary to BLNR's obligation to protect conservation districts. *Economic* benefits would not compensate for TMT's substantial *environmental and cultural* impacts because, amongst other reasons, proposed "community" uses of these potential incomes do not include environmental or cultural resource remediation.

Finally, review of the TMT's proposed mitigation measures discloses such actions as repainting the dome of the observatory, facilities decoration, informational exhibits, and payment into funds for astronomy research. These proposals amount to a mere listing of measures that have no direct remedying impacts on the imposition of the TMT itself. "Mitigation" is undefined in Hawai'i rules and statutes, but in the context of federal environmental protection claims, concerns the "adverse environmental impacts" of a proposed action. 40 C.P.R. Sec. 1502.16(h); *see Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985) (holding mitigation measures that significantly, even if not completely, compensate for a proposed action's adverse environmental impacts, may uphold a finding of no significant impact (FONSI)). "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 697 (9th Cir. 1986), *rev'd on other grounds*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, (1988); *see also Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998); *Oregon Natural Desert Ass'n v. Singleton*, 47 F.Supp.2d 1182 (D. Or. 1998).

2. The TMT project clearly did not meet CDUP Criterion No. 1, which required consistency with the purpose of the conservation district.

Conservation districts are so designated because they "contain important natural resources essential to the State's fragile natural ecosystems and the sustainability of the State's water supply[.]" HRS §183C-1. The purpose of the conservation district is to "conserve, protect, and preserve the

important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.” HAR §13-5-1 (1994). Building a metallic 18-story, eight and a half acre industrial complex on the untouched, undeveloped summit area of the northern slope cannot preserve or improve Mauna Kea’s natural resources. Construction of huge concrete industrial centers on a conservation land and UHH’s piecemeal management plans did not demonstrate that the TMT project is consistent with the purpose of the conservation district.

3. The TMT would not preserve or improve existing physical and environmental aspects of the land, such as natural beauty and open space under Criterion No. 6.

The TMT project would destroy 8 acres of a sacred landscape to construct an 18-story metallic structure in a pristine, undeveloped area of the summit. The northern plateau is a vast landscape, important for its unique geology, culturally significant snow and shrines, and natural silence. These are the resources for which the conservation district was established and there are no activities described in the TMT CDUA that would improve on the natural beauty or open space of the northern plateau. Our interpretation of criterion number six accords with the plain language of the rule and would not meet with absurd results. Under criterion number six, permissible proposed actions in conservation districts could include invasive species removal, replanting of native species, protective fencing, or erecting culturally appropriate ahu or lele. Such actions could, in specific conservation districts, preserve or improve upon the existing physical and environmental aspects of lands that are, in the case of all conservation districts, public and Hawaiian lands.

4. The TMT, including its buildings, structures, and facilities, would not be compatible with the locality and surrounding areas, nor would they be appropriate to the physical conditions and capabilities of the northern plateau, and therefore could not comply with Criterion No. 5.

There are no current developments in this main part of the northern plateau, which exists as pristine open space. The northern plateau is a half-mile from the concentration of telescopes and associated industrial buildings on Mauna Kea. This plateau is a unique natural space, treasured for its unencumbered view of Haleakalā, the opportunity to experience breathtaking silence and the inspiring interplay of light, shadow, snow and mist, its geology, and cultural and religious significance. If built, the TMT would be the largest structure on Mauna Kea and the tallest on the island of Hawai‘i. It would be the dominant feature on the landscape looking north from Kūkahau‘ula and looking towards the summit from the hundreds of shrines on this plateau. Also, it would be a new visual element and would be physically imposing for the communities of Waimea,

Honoka‘a, Waikoloa, Kawaihae as well as the residents and visitors in the districts of Kona, Kohala, and Hamakua.

UHH cannot define the “locality and surrounding areas” by presumptively nominating the summit an “astronomy precinct.” Kūkahau‘ula has been, and continues to be, sacred to Native Hawaiian cultural practitioners and part of a unique alpine desert ecosystem. The proposed 18-story, 8-acre industrial project is incompatible with the natural, cultural, and historical character of the Mauna Kea summit landscape and the northern plateau.

5. The TMT project would entail a subdivision of land that intensifies land uses in the conservation district that is contrary to Criterion No. 7.

HAR § 13-5-30(c)(7) forbids subdivision of conservation district lands undertaken to "intensify land uses." Under conservation district rules, a "subdivision" is "the division of a parcel of land into more than one parcel. HAR § 13-5-2. UHH divided "UH Managed Lands" which resulted in the concentration and intensification of astronomy development in the 525-acre Astronomy Precinct. At least eleven separate subleases for observatories further separated areas of land use within UH's Astronomy Precinct resulting in the illegal subdivision of these lands. The TMT project would be part of UHH's de facto illegal subdivision scheme. The subdivision is illegal because the State Land Use Commission, which has the sole power to establish conservation district boundaries, did not create an "Astronomy Precinct" or separate project parcels (HRS §205-2). The TMT project constitutes a subdivision that intensifies land uses because it requires: (1) the laying out of the Access Way road on 6.2 acres of undisturbed land; (2) installation of new electrical power lines and conduits on the pristine northern plateau; (3) a new wastewater storage and transport system to accommodate 2,080 gallons per day of TMT observatory wastewater; and (4) a survey of the premises and easement areas through maps and legal descriptions.

6. The TMT would be materially detrimental to the public health, safety, and welfare and therefore noncompliant with Criterion No. 8.

OCCL staff wrongly interpreted HAR §13-5-30(c)(8) in presuming this criterion could be met through direct economic benefits through construction contracts, new jobs, and incoming research grants; and educational benefits.

- a. Economic benefits cannot constitute “public welfare” within the context of compliance with conservation district rules.*

Interpreting “welfare” under Criterion No. 8 to mean capital investment would mean any revenue-generating enterprise, no matter how environmentally destructive, could meet criterion

number eight while directly undermining the purpose of the conservation district. BLNR's rules do not authorize the agency to destroy conservation district resources in exchange for economic benefits. *See* HAR § 13-5-30(c)(8). The relevant inquiry is not whether hoped-for "economic benefits" would affirm public health, safety, or welfare, but rather how the project may affect significant public resources - Mauna Kea is a wilderness cherished by the public for its reprieve and rejuvenation. Interpreting "public welfare" to mean economic benefits rendered HAR §13-5-30(c)(8) an absurdity. *C.f. Kewalo Ocean Activities v. Ching*, 124 Hawai'i 313, 324, 243 P.3d 273, 284 (App. 2010) ("The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality."). DLNR's "Conservation District Review Project" discussion draft (Nov. 1993) stated "[t]he concept of welfare was added [to the conservation district mission] to include the notion of aesthetics – preserving Hawaii's unique natural beauty." The drafters of conservation district rules intended the public welfare to be served through supporting an aesthetic appreciation of nature.

a. "Educational benefits" of the TMT have not been established and contrary evidence establishes the TMT would be materially detrimental.

OCCL staff wrongly relied on "educational benefits" to UHH's astronomy programs as a means of complying with Criterion No. 8. Keeping UHH, which has not established itself as a "Hawaiian institution," at the forefront of astronomical research may be beneficial to the welfare of a few subdivisions of UHH, but such benefits did not overcome detrimental aspects of locating the TMT on Mauna Kea. On the contrary, educators, including those within the UH system, explained that locating the TMT on Mauna Kea would actually be detrimental to educational practices of aloha 'āina and mālama 'āina.

b. The TMT would be materially detrimental to the health of many Native Hawaiians.

DLNR staff based their recommendation to approve the TMT CDUA on the conclusion that they "heard no credible testimony that the project would be a threat to the public health, safety, or welfare." Contrary to the staff's assertion, many members of the public attested to stress, grief, and constraints on cultural practices – all of which entail health impacts. When desecration occurs, native people are impacted and are often not able to continue their cultural practices. This in turns affects their cultural identity, and causes the connection between the sacred space and the people to become disrupted. When this link is strained or broken, health is affected. By not being able to fulfill stewardship/covenant it breaks or harms that connection/relationship. Telescope development on Mauna Kea has come at a significant cost to the cultural and religious heritage and practices of the

Hawaiian people. The 'TMT' would be materially detrimental to the public's health, safety, and welfare and did not comply with Criterion No. 8.

B. The TMT CDUA did not have a sufficient management plan in compliance with HAR §13-5-24.

UHH's TMT Management Plan and Mauna Kea Comprehensive Management Plan (CMP) did not satisfy the requirements of HAR § 13-5-24(c). Management of the 'TMT' project does not meet the minimum requirements of the regulations. In 2012, the Hawai'i State Intermediate Court of Appeals held the Mauna Kea CMP outlined "management actions [that] are nothing more than considerations for the future" and that "many of these suggested actions cannot be implemented without [UH] rule-making authority." *Mauna Kea Anaina Hou v. Univ. of Hawai'i*, No. 30397 (App. Jan. 25, 2012) (mem.) (internal quotes omitted). BLNR cannot simultaneously contend: (1) the CMP authorizes no action warranting a contested case hearing; and (2) the CMP authorizes all actions necessary to reduce the significant impacts on Mauna Kea's natural resources caused by existing and future construction. A comprehensive management plan, as discussed by Third Circuit Court, has not been approved for the management of the Mauna Kea Conservation District. *See Mauna Kea Anaina Hou v. BLNR*, Civ. No. 04-1-397 (Haw. 3d Cir. Ct, Jan. 19, 2007) J. Hara. To be clear, two documents have been submitted-- the TMT Management Plan and UH's "Comprehensive Management Plan." For these reasons amongst others, neither of these documents satisfy this prerequisite for a comprehensive management plan.

Furthermore, the CMP, dated January 2009, was required to be updated every five years. It is now 2015 and no update has been proffered. Therefore, UHH is out of compliance with this requirement as well as other management actions stipulated in the CMP.

C. Improper Delegation of Authority per *Ka Pa'akai v. Land Use Comm'n*

The Hawai'i Supreme Court "has made clear that the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible." *Ka Pa 'akai o Ka 'Aina v. Land Use Comm 'n*, 94 Hawai'i 31, 35, 7 P.3d 1068, 1072 (2000), *as amended* (Jan. 18, 2001). Specifically, BLNR is required to investigate:

- (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action;
- and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084. BLNR has improperly delegated its responsibility to manage the conservation district to UHH, who has become the primary developer of the Mauna Kea conservation district. BLNR has not identified or investigated traditional and customary practices that may be impacted as a consequence of its approval of the CDUA, nor has it formulated feasible protections. Instead, BLNR has impermissibly delegated these decision to UHH. Prior to BLNR approving any further CDUPs within the public lands of Mauna Kea, the Board is required to first complete an independent *Ka Pa'akai* analysis.

D. Violation of Protected Native Hawaiian Traditional and Customary Practices and Rights and the public trust.

The Hawai'i State Constitution and subsequent court rulings hold the State to a high standard when it comes to protecting the public trust and traditional and customary practices and rights of Native Hawaiian cultural practitioners. The BLNR has not met this obligation, and in fact has authorized, tacitly and implicitly, the improper infringement of constitutionally protected rights reasonably exercised in the Mauna Kea Conservation District, including but not limited to access to trails, viewplanes, subsistence gathering, and spiritual, religious, and cultural practices connected to Mauna Kea. Likewise, UHH also violated these protected rights and the public trust doctrine in these past several decades with its mismanagement and overdevelopment of the culturally and environmentally significant public lands of Mauna Kea. If built, the TMT project would further contribute to the ongoing violations of the public trust doctrine and Native Hawaiian traditional and customary practices and rights.

E. Violation of Protected Religious Freedoms.

Mauna Kea is recognized by many as a religious temple and sacred site. State and federal law protect the reasonable practice of religious beliefs from infringement. The TMT proposal represents a significant interference with religious practices historically and currently practiced in the temple of Mauna Kea. Construction of the TMT on pristine land in the Mauna Kea Conservation District will create a physical and spiritual disturbance, which threatens to sever the connection between mankind and akua, and between humanity and the environment.

F. Basic Contractual and Lease Requirements Not Satisfied by the TMT and UHH is not the appropriate applicant for the CDUP.

The TMT proposal raises basic issues of contract law, including compliance with the general lease and all of its conditions, the terms and requirements of the proposed CDUP, and all associated state, federal, and local laws. For example, the current record does not demonstrate that:

- (1) all of the necessary parties to this decision are appropriately represented in this process and therefore accountable for commitments made on their behalf;
- (2) the terms of the TMT lease are sufficient to meet the commitments that have been made and comply with the State's fiduciary duties as a public trustee and HRS chapter 171;
- (3) the TMT is financially able to follow through with the commitments that have been made (e.g. funding of appropriate TMT decommissioning); and,
- (4) UHH is the appropriate applicant for the CDUP in light of allocated responsibilities and commitments.

These are some of the issues that the seven petitioners will present to demonstrate that UHH has failed to meet its burden in this application. Further, under the specific circumstances presented by the proposed TMT project, the potential invalidation of the sublease of public trust lands to the TMT International Observatory LLC and the overarching general lease from BLNR to UH should also be explicitly considered during contested case proceedings. On April 5, 2016, the The Environmental Court of the Third Circuit issued an order for remand concerning the BLNR's consent to the Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and UHH ("TMT sublease"). *See E. Kalani Flores v. Bd. of Land and Natural Resources, et al.* Civ. No. 14-1-324 (Order for Remand). This court ordered the 2015 Hawai'i Supreme Court opinion in *Mauna Kea Anaina Hou* and the Order for Remand be provided to BLNR as additional evidence in their reconsideration of their previous consent to the TMT sublease. The consequences of this remand of the TMT sublease itself, should fall within the scope of the instant contested case hearings. Amongst other things, the TMT sublease and the TMT decommissioning plan presumed a certain duration of the leased period. Reasonable precautions occasioned by issues concerning the proposed approval and non-approval of new general leases to UH for Mauna Kea lands must also be considered in these proceedings.

III. LIST OF EXPECTED WITNESSES

(*See* PETITIONERS' COLLECTIVE WITNESS LIST)

All witnesses identified by the Applicant and other parties.

Additional witnesses to be identified after all witnesses are identified by the Applicant and other parties.

IV. BURDEN OF PROOF

A. The Applicant's Heavy Burden.

UHH, as applicant, has a heavy burden to show that its proposal (1) meets the criteria in the conservation district rules; (2) does not adversely affect public trust resources; and (3) does not adversely affect native Hawaiian rights. “The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria [in HAR § 13-5-30(c)].” HAR 13-5-30(c). *See also, In re CDUA for Hawaiian Electric Company, Inc. to Construct a 138-kV Transmission Line at Wa`abila Ridge*, Findings of Fact, Conclusions of Law, Decision and Order, DLNR File No. OA-2801 (2002), at 63.

This burden is compounded by the duties imposed by the public trust doctrine. The public trust doctrine effectively prescribes a burden on those seeking uses which impact public trust resources to justify them in light of the purposes protected by the trust. *In Re Water Use Permit Applications*, 94 Hawai`i 97, 142 and 160, 9 P.3d 409, 454 and 472 (2000) (“*Wai`ahole*”); *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui*, 116 Hawai`i 481, 508, 174 P.3d 320, 347 (2007).

The scope of Hawai`i's Public Trust Doctrine is set forth in Article XI, section 1 of the Hawai`i Constitution and provides: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai`i'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.

Morgan v. Planning Dept., County of Kaua`i, 104 Hawai`i 173, 184 n. 12, 86 P.3d 982, 993 n.12 (2004). “Hawai`i constitutionally recognizes the significance of conserving and protecting Hawai`i's natural beauty and all natural resources for present and future generations. . .” *Morgan*, 104 Hawai`i at 181, 6 P.3d at 990; *see also Wai`ahole*, 94 Hawai`i at 132, 9 P.3d at 444. Natural beauty is a public trust resource. *Wai`ahole*, 94 Hawai`i at 136-137, 9 P.3d at 448-449; Hawai`i State Constitution, Article XI § 1. *Cf. National Audubon Soc’y v. Superior Ct. of Alpine Cty.*, 658 P.2d 709, 719 (Calif. 1983); *Muench v. Public Service Commission*, 53 N.W. 2d 514, 520 (Wisconsin 1952), affirmed on rehearing 55 N.W. 2d 40 (1952). The public trust doctrine therefore requires that permit applicants justify their action in light of the public trust purposes. A developer has no right to use *public* land to impair public trust resources. *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899).

Finally, an applicant for a permit is obligated to demonstrate *affirmatively* that the proposed use will not affect native Hawaiians’ rights. *Kukui*, 116 Hawai`i at 509, 174 P.3d at 348. These are

the burdens an applicant must satisfy prior to BLNR approving its conservation district use application.

B. BLNR's Heavy Burden

BLNR also shoulders a heavy burden when deciding to grant a conservation district use permit for this project. The BLNR has a duty to analyze traditional and customary native Hawaiian practices and the public trust obligations emanating from the Hawai'i Constitution and case decisions construing it. *Maui Tomorrow v. State*, 110 Hawai'i 234, 243, 131 P.3d 517, 526 (2006); *Ka Pa'akai O Ka'aina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000); also HRS § 205A-4(a), § 205A-5(b); § 205A-2(b)(2).

BLNR is “required under the Hawai'i Constitution to preserve and protect customary and traditional practices of native Hawaiians.” *Ka Pa'akai*, 94 Hawai'i at 45, 7 P.3d at 1082. BLNR is under “an affirmative duty” to “protect these rights and to prevent any interference with the exercise of these rights.” *Id.* In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, BLNR must make specific findings and determinations discussed *supra* Part II.C.; *Ka Pa'akai*, 94 Hawai'i at 47, 7 P.3d at 1084. See also HRS § 205A-4(a), § 205A-5(b); § 205A-2(b)(2).

Similarly, the exercise of BLNR's “discretionary authority is circumscribed by the public trust doctrine.” *Kelly v. 1250 Oceanside Ptnrs*, 111 Hawai'i 205, 230, 140 P.3d 985, 1010 (2006). The Hawai'i Supreme Court has recognized that the public trust doctrine protects resources for their own sake as well as for native Hawaiian traditional and customary rights. *Waiāhole*, 94 Hawai'i at 136-7, 9 P.3d at 448-49. “The state also bears an affirmative duty . . . to protect public trust uses whenever feasible.” *Waiāhole*, 94 Hawai'i at 141, 9 P.3d at 453; *State v. Central Vt. Ry.*, 571 A.2d 1128, 1132 (Vermont 1989) (“[T]he state's power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.”). This duty requires that the state affirmatively act to ensure that public trust resources are not impaired. *Waiāhole* at 139, 9 P.3d at 451; *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987). Under the public trust, the state has both the authority and the duty to preserve the rights of present and future generations in the public trust resources of the state. *Waiāhole*, 94 Hawai'i at 141, 9 P.3d at 453.

The public trust doctrine requires BLNR to actively consider and protect the public trust natural resources that may be affected by its decisions. *Waiāhole*, 94 Hawai'i at 141 and 143, 9 P.3d at 453 and 455. The public trust doctrine requires that the BLNR “take the initiative in considering, protecting and advancing public rights in the resource at every stage of the planning and

decisionmaking process.” *Id.* at 143, 9 P.3d at 455. These duties are re-enforced by the mandates of HRS Chapter 205A: HRS §§ 205A-4(a), 4(b), 5(b) and 6(a). *See also*, HRS §§ 205A-2(b)(1)(A), -2(b)(2)(A), -2(b)(3)(A), 2(b)(4)(A), -2(b)(6)(A), -2(b)(10)(A), -2(c)(1)(B)(i), -2(c)(1)(B)(v), -2(c)(3)(B), -2(c)(3)(C), -2(c)(4)(A), -2(c)(4)(C), -2(c)(4)(E).

Standard conditions for all land uses permitted in the conservation district include: “The permittee shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of this chapter[.]” HAR §13-5-42(a)(1). During its recent World Conservation Congress in Honolulu, the International Union for the Conservation of Nature (IUCN) passed Motion No. 26, titled “Protected areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development.” (IUCN, Motion No. 26, (Sep. 9, 2016)). IUCN Motion No. 26 provides a persuasive authority that should be considered in regard to BLNR’s public trust obligations.

These are the burdens BLNR must satisfy prior to approving an applicant’s conservation district use application.

VI. CONCLUSION.

Because UHH will be unable to meet its burden, its conservation district use application must be denied.

Dated: October 11, 2016

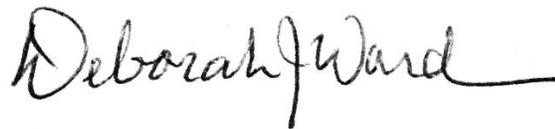
Honolulu & Hilo, Hawai'i



KEALOHA PISCIOTTA, President
MAUNA KEA ANAINA HOU, Petitioner



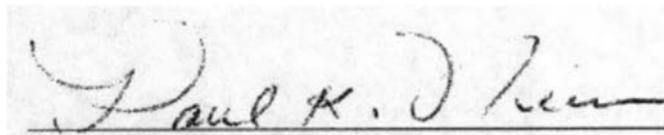
E. KALANI FLORES, Petitioner, on behalf of
FLORES-CASE 'OHANA



DEBORAH J. WARD, Petitioner



CLARENCE KŪKAUAKAHI CHING, Petitioner



PAUL NEVES, Petitioner



BIANCA ISAKI, on behalf of KAHEA: THE HAWAIIAN-
ENVIRONMENTAL ALLIANCE, Petitioner

APPENDIX “A”

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attorney for Petitioners

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
CLARENCE KUKAUAKAHI CHING; FLORES-CASE 'OHANA;
DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE
HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of:) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re)
Conservation District Use Permit) PETITIONERS' RESPONSE TO
(COUP) HA-3568 for the Thirty Meter) PERPETUATING UNIQUE
Telescope at the Mauna Kea Science) EDUCATIONAL OPPORTUNITIES,
Reserve, Kaohe Mauka, Hamakua) INC.'S PROPOSED MINUTE ORDER
District, Island of Hawai'i, TMK (3) 4-4-) GRANTING PERPETUATING UNIQUE
015:009) EDUCATIONAL OPPORTUNITIES,
) INC.'S MOTION TO SET ISSUES,
) FILED ON SEPTEMBER 9, 2016; and
) CERTIFICATE OF SERVICE
)
)
)
)
) Hearing Officer: Hon. Riki May Amano,
) Judge (ret.)
)
_____)

**PETITIONERS' RESPONSE TO PERPETUATING UNIQUE EDUCATIONAL
OPPORTUNITIES, INC.'S PROPOSED MINUTE ORDER GRANTING
PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S MOTION TO
SET ISSUES, FILED ON SEPTEMBER 9, 2016**

Petitioners' MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;
CLARENCE KUKAUAKAHI CHING; FLORES-CASE 'OHANA; DEBORAH J. WARD;
PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a

domestic non-profit Corporation ("Petitioners"), by and through their undersigned counsel, respectfully submits their response to Intervenor Party PERPETUATING UNIQUE EDUCATIONAL OPPORTUNITIES, INC.'S ("P.U.E.O., Inc.") proposed minute order granting its motion to set issues, filed September 9, 2016, and pursuant to its Motion filed on July 18, 2016.

I. **INTRODUCTION.**

Pursuant to the Hearing Officer's instructions during the hearing held on August 29, 2016, P.U.E.O., Inc. submitted its proposed Minute Order Granting Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set Issues [Doc-99] on September 9, 2016. During the August 29, 2016 hearing, the Mauna Kea Anaina Hou, et al. Petitioners articulated on the record a number of issues to be addressed in the contested case hearing.¹ While some of these issues are included in P.U.E.O., Inc.'s proposed order, P.U.E.O., Inc.'s proposed order fails to include a number of important issues in this case and the proposed order is also simply overly narrow and inappropriate in assuring due process for all parties and the Board of Land and Natural Resources' fulfillment of its own duties to public trust resources as well as to customary and traditional practices.

Furthermore, the Mauna Kea Anaina Hou et al. Petitioners raise once again their objections set forth in their Memorandum in Opposition to Perpetuating Unique Educational Opportunities, Inc.'s Motion to Intervene, Dated May 16, 2016, Filed on June 13, 2016, and the further arguments made during the hearing on the motion and during subsequent hearings held before this Hearing Officer. P.U.E.O., Inc. simply

¹ Please also note Petitioners Mauna Kea Anaina Hou, Et Al.'s' Request for Further Status Conference and/or Consideration of Proposed Scheduling, Filed on September 8, 2016. Other petitioners in the instant matter appeared to subsequently file pleadings as well.

lacks standing in the instant case and no evidence or testimony intended to be adduced by P.U.E.O., Inc. is relevant to the determination of the issues in the instant case.

Some of the central issues in this contested case hearing include whether the applicant, the University of Hawai'i at Hilo ("UHH"), can meet its burden of demonstrating that its proposed land use complies with and is consistent with all of the eight criteria set forth in HAR § 13-5-30(c), the permit requirements of HAR § 13-5-24, and other requirements as set forth in HAR, Title 13, Chapter 5; whether the planned use is consistent with the requirements and provisions of Chapter 183C and 205 of the Hawaii Revised Statutes; whether the proposed land use would be in violation of the public trust doctrine, Hawai'i State Constitution Articles XI § 1 and § 9, and XII § 4 and § 7, the State's obligations under section 5(f) of the Admissions Act, and HRS Chapters 7 and 205A; whether the proposed land use would violate the customary and traditional practices of the Petitioners as well as their cultural and religious freedoms and protections; whether the proposed land use would be consistent with the requirements under *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000); and the other issues set forth below. BLNR cannot grant a conservation district use permit where these requirements have not been met.

II. ARGUMENT.

A. P.U.E.O., Inc.'s Proposed Issues are Overly Narrow.

P.U.E.O., Inc.'s proposed minute order was restricted to the following issues:

- (1) Is the proposed land use, including the plans incorporated in the application, consistent with the eight criteria in HAR § 13-5-30(c) and other applicable rules in HAR, Title 13, Chapter 5, Conservation District?
- (2) Is the proposed land use consistent with article XII, section 7 of the Hawai'i State Constitution?

- (3) Is the proposed land use consistent with *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000)?
- (4) Is the proposed land use consistent with applicable provisions of Chapter 183C of the Hawai'i Revised Statutes?
- (5) Does the public trust doctrine apply to the proposed land use and, if it does, is the proposed land use consistent with the public trust doctrine?

This framing of the issues does not encompass relevant, necessary considerations concerning the parties proposing the land use, the authorities and obligations concerning the conservation use and public lands in question, the violations of Petitioners' cultural and traditional practices and desecration of sacred land, and a number of other issues, including but not limited to, environmental studies, comprehensive management plans, and other issues. Whether these issues are determined through evidentiary hearings prior to the contested case hearings or during the hearings themselves, parties should have a right to present and be afforded a fair opportunity to be heard on what may be relevant or not relevant, material or not material, to the instant proceedings throughout the process.

In addition to the due process issues, the issues raised in moving this Hearing Officer to Strike the Conservation District Use Application, HA-3568, Dated September 2, 2010, and/or Motion for Summary Judgment, filed on July 18, 2016, and the further arguments and objections raised in hearings held on August 5th and 12th, 2016, the Motion to Disqualify BLNR's and this Hearing Officer's Counsel, filed on July 18, 2016, and as further argued at the hearings held on August 5th and August 12th, 2016, and other issues raised by the Petitioners to date, the Petitioners additionally raise the following issues for consideration:

- (1) Whether an evidentiary hearing shall be held prior to the commencement of the hearings, based on the alleged delegation (as articulated by the Hearing Officer

at various hearings) of authority to the Hearing Officer by the BLNR of all issues in the contested case hearing process other than motions to disqualify or recuse the Hearing Officer, on whether BLNR Board member Stanly Roehrig has a conflict or appearance of conflict and/or bias and/or appearance of bias in ruling on various matters to date and hereinafter regarding the CDUA, sublease, the proposed development of the Thirty Meter Telescope, and other matters involving the instant contested case, especially in light of P.U.E.O., Inc.'s and its officers' participation in the instant proceedings.

(2) Whether the application should be dismissed, additionally, for failure to include indispensable parties in the instant contested case proceedings, including, but not limited to, the University of Hawaii, the Office of Hawaiian Affairs, and TMT Observatory Corporation (the separate entity for which the University of Hilo is purportedly applying in its instant application for a conservation district use permit).

(3) Whether the proposed land use is consistent with and meets all of the eight criteria set forth in HAR § 13-5-30(c), the permit requirements of HAR § 13-5-24, and other requirements as set forth in HAR, Title 13, Chapter 5.

(4) Whether the proposed land use is consistent with and complies with the provisions and requirements of Chapters 183C and 205 of the Hawaii Revised Statutes.

(5) Whether the proposed land use and the Board's approval of the CDUA would be consistent with the requirements under *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000).

(6) Whether the proposed land use violates the constitutional and statutorily protected customary and traditional practices of the Petitioners, under article XII, Section 7 of the State of Hawaii Constitution, H.R.S. Sections 1-1 and 7-1, and other

pertinent authorities and, also, whether the granting of the CDUA would be consistent with international legal authorities, including the United Nations Declaration of the Rights of Indigenous Peoples, IUCN Resolution No. 26,² and other international law and legal principles.

(7) Whether the applicant has met and whether the proposed land use complies with all main and management plan, comprehensive management plan, and environmental impact statement and environmental assessments requirements as required under state and federal law and under administrative rules and regulations.

(8) Whether the proposed land use violates the public trust doctrine, Article XI, Section 1, Article XI, Section 9, and other related authority, and whether the granting of a CDUA would be consistent with the obligations and duties under the public trust doctrine, including the fiduciary obligations of public trustees.

(9) Whether the granting of the CDUA in the instant matter would be in compliance with section 5(f) of the Admissions Act and Article XII, Section 4 of the Hawaii State Constitution.

(10) Would the granting of the CDUA be in violation of provisions of the general lease to the University of Hawaii for the Mauna Kea Science Reserve.

(11) Whether the provisions and requirements of H.R.S. Section 171-17 and other provisions of Chapter 171 of the Hawaii Revised Statutes have been and will be met.

² During its recent World Conservation Congress in Honolulu, the International Union for the Conservation of Nature (IUCN) passed Motion No. 26, titled "Protected areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development." See IUCN, Motion No. 26, (Sep. 9, 2016) available at: <https://portals.iucn.org/congress/motion/026>.

(12) Whether the proposed land use violates the religious freedoms and protections of the Petitioners under the state and federal constitution as well as under International law and legal principles.

(13) Whether the proposed lands use complies with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of HAR, Title 13, Chapter 5.

(14) Based on the Order of Remand in E. Kalani Flores v. Bd. of Land and Natural Resources, Civ. No. 14-1-324 (Third Circuit Court-Hilo), whether the sublease between TMT International Observatory, LLC and the University of Hawaii should be vacated prior to the commencement of the instant contested case proceedings as it would otherwise be running afoul of the “cart before the horse” due process concerns established in the Hawaii Supreme Court’s decision in *Mauna Kea Anaina Hou*, as raised as an issue for consideration in the Third Circuit Court’s Order of Remand.

B. P.U.E.O. Inc. lacks any interest in its proposed issues and should be excluded from the proceedings.

The Articles of Incorporation of P.U.E.O., Inc. included such corporate purposes and powers as (a), to share the interaction of Hawaiian culture and science, (b) to research and educate the public on the interaction of Hawaiian culture and science and to inspire exploration, and (c) to further educational opportunities for the children of Hawai’i in the fields of science, technology, engineering and mathematics. None of these purposes and powers are by the issues set under P.U.E.O., Inc.’s proposed minute order.

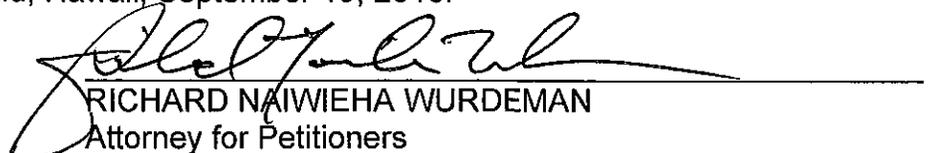
Petitioners also raise and incorporate their earlier objections regarding the participation of P.U.E.O., Inc. because the latter is aligned with the applicant the

University of Hawai'i at Hilo (UHH). Further, and relevant to the setting of issues, Petitioners again raise and reassert their objections filed through their Position Statement on Perpetuating Unique Educational Opportunities, Inc.'s Motion to Set the Issues, filed August 1, 2016; Memorandum in Opposition to Perpetuating Unique Educational Opportunities, Inc.'s Motion to Intervene, dated May 16, 2016, filed on June 13, 2016; and the arguments made by the Petitioners on the hearing date, and object to such testimony as to relevancy and materiality in these proceedings. P.U.E.O., Inc. and its agents and representatives and any evidence and arguments to be presented at the contested case hearings are neither relevant, nor material to these proceedings. P.U.E.O., Inc. and its representatives have no injury in fact with respect to the proposed development, they have no standing, and their proposed testimony and evidence is neither relevant, nor material to any of the issues they have proposed to set in these proceedings. Accordingly, P.U.E.O., Inc. should be disqualified as a "party" within the meaning of HAR §13-1-31.

III. CONCLUSION.

For the foregoing reasons, Petitioners respectfully request P.U.E.O., Inc.'s Proposed Minute Order Granting its Motion to Set Issues be denied and Petitioners' above-identified issues be set for discussion in these proceedings.

Dated: Honolulu, Hawaii, September 19, 2016.


RICHARD NAWIEHA WURDEMAN
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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
) CERTIFICATE OF SERVICE
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Conservation District Use Permit)
(CDUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kahohe Mauka, Hamakua)
District, Island of Hawaii,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following parties by the means indicated:

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

In the Matter of:)	Case No. BLNR-CC-16-002
)	
A Contested Case Hearing Re:	)	PETITIONERS’ COLLECTIVE EXHIBIT
Conservation District Use Permit	)	LIST
(COUP) HA-3568 for the Thirty Meter)	
Telescope at the Mauna Kea Science)	
Reserve, Kahohe Mauka, Hamakua)	
District, Island of Hawai‘i, TMK (3) 4-4-015:009)	
)	
)	
)	
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PETITIONERS’ COLLECTIVE EXHIBIT LIST

Exhibit No.	Description	Rec’d. Into Evidence
B.01a	Kealoha Pisciotta WDT	
B.01b	National Science Foundation Award Abstract to the TMT Corporation #0443999	
B.01c	Amicus Brief of Abigail Kawanakoa filed in Mauna Kea Anaina Hou, et al, v. Bd. of Land and Natural Resources, et al, Civ. No. 13-1-0349 (July, 22, 2015)	
B.01d	HA-11- 05 Petitioners’ Opening Brief TMT CCH (2011)	
B.01e	HA-11- 05 Petitioners’ Findings of Fact and Conclusions of Law, Proposed Decision and Order, TMT Contested Case Hearing (2011).	
B.01f	Petitioners Combined Exceptions to Hearing Officer’s proposed Findings of Fact, Conclusions of Law, and Proposed Decision and Order (2011).	
B.01g	Petitioners’ Combined Response to Applicant’s Exceptions to Hearing	

	Officer's proposed Findings of Fact, Conclusions of Law, and proposed Decision and Order.	
B.01h	Kealoha Pisciotta's written direct testimony for and cross examination (September 26, 2011)	
B.01i	Kealoha Pisciotta's Closing Statement presented September 30, 2011.	
B.01j	Written explanation and invitation to Aloha Ceremonies Pu'u Hulu Hulu October 7, 2011	
B.01k	KAHEA newsletter, "Mauka to Makai," vol. 1, 2010.	
B.01l	Intentionally left blank	
B.01m	Testimony of Kealoha Pisciotta and Kinohi Neves, Feb. 2, 2013 oral arguments	
B.01n	Press Statement, Governor Ige's Ten Point Plan for Mauna Kea, May 26, 2015	
B.01o	Request for Section 106 consultation on TMT proposal, Pisciotta comments to the TMT DEIS, July 7, 2009	
B.02a	E. Kalani Flores WDT	
B.02b	E. Kalani Flores CV	
B.02c	UIPA request: re TMT sublease	
B.02d	Ho'ohana Aku, a Ho'ola Aku	
B.02e	Geotechnical Activities photos	
B.02f	TMT Sublease	
B.02g	Order for Remand (Civil No. 14-1-324)	

B.02h	CMP 2015 Annual Report	
B.02i	Monitoring Report	
B.02j	“Shrine Destruction Angers TMT Protestors,” Hawaii Tribune Herald, Sept. 16, 2015	
B.02k	Notice of Intent to Prepare an Environmental Impact Statement, Master Lease for Mauna Kea, University of Hawai‘i Hilo (December 14, 2014)	
B.02l	Figure 4.1 (CDUA at 4-2)	
B.02m	Figure 5.1 (AIS AP at 5-5)	
B.02n	Figure 2.9 (CRMP-CMP at 2-52)	
B.02o	Subaru & Gemini domes	
B.02p	TMT renderings (CDUA at 1-16, 1-17)	
B.02q	Figures 7.5 (CDUA at 7-10)	
B.02r	Figures 7.8 (CDUA at 7-12)	
B.02s	Hawai‘i County General Plan section 7 (re: Natural Beauty)	
B.02t	Mauna Kea Science Reserve Master Plan, Figure IX-16	
B.02u	Mauna Kea Science Reserve Master Plan, Figure IX-21	
B.02v	Image, Sacred Mounts	
B.02w	Image, Portal above Mauna Kea	
B.03a	Marti Townsend WDT	

B.03b	UH progress report on Governor's 10 point plan (May 25, 2015)	
B.03c	Final Archaeological Inventory Survey for the Mauna Kea Access Road Management Corridor, Pacific Consulting Services (McCoy, Feb. 2010)	
B.03d	"Looking at B: TMT would relocate if permit not secured soon," West Hawaii Today, February 12, 2016.	
B.03e	Operating and Development Agreement for 8-millimeter telescope (Subaru telescope sublease).	
B.03f	Agreement for Construction and Operation of a 3.8 millimeter telescope (UKIRT sublease).	
B.03g	Renegotiated Site Development and Operating Agreement concerning the W.M. Keck Observatory (Keck sublease)	
B.03h	Operating and Site Development Agreement for the Very Long Base Array (VLBA sublease)	
B.03i	Operating and Site Development Agreement for the Smithsonian Submillimeter Array (SAO sublease)	
B.03j	Operating and Site Development Agreement for the Gemini 8-meter Telescope (Gemini Sublease)	
B.03k	Operating and Site Development Agreement for the Caltech Submillimeter Telescope Facility (Caltech Sublease)	
B.03l	Operating and Site Development Agreement for the Canada-France-UH telescope (CFH sublease)	
B.03m	Operating and Site Development Agreement for the 15 Meter United Kingdom-Canada-Netherlands Telescope (UK-Canada sublease)	
B.03n	vacant	
B.03o	Image, TMT viewplane simulation with red balloon, view from the side	

B.03p	Image, TMT viewplane simulation with red balloon, view from the ground	
B.03q	Image, sunrise on the pu‘u obstructed by shadow from an existing telescope	
B.03r	Image, viewplane from proposed TMT location towards Maui	
B.03s	Image, existing telescopes on the summit from access road	
B.03t	Atwater, Gail. Conservation District Review: Preliminary Discussion Draft, November 1993.	
B.03u	Kaena Point Conceptual Plan, 1978 (excerpts provided, complete document available upon request)	
B.03v	Testimony from the Mauna Kea hui in opposition to TMT (October 24, 2008)	
B.03w	Public Testimony, proposed Comprehensive Management Plan for Mauna Kea (May 13, 2008)	
B.03x	Motion No. 26, Protected Areas and other areas important for biodiversity in relation to environmentally damaging industrial activities and infrastructure development, World Conservation Congress (September 2016)	
B.03y	Minutes of the Board of Land and Natural Resources, Comprehensive Management Plan considered (March 2010).	
B.03z	OCCL Staff Submittal, Comprehensive Management Plan (March 2010)	
B.03aa	Minutes of the Board of Land and Natural Resources, Comprehensive Management Plan approved (April 8-9, 2009)	
B.03ab	Maly, Kepa. Oral history and consultation, and archival literature study, Mauna Kea Science Reserve and Hale Pohaku Complex Development (1999)	

B.03ac	Image, trash collected at Batch Plant 1	
B.03ad	Image, trash collected at Batch Plant 2	
B.03ae	Image, trash collected at Batch Plant 3	
B.03af	Image, trash collected at Batch Plant 4	
B.03ag	Image, spools of Cable at Batch Plant	
B.03ah	Image, bulldozer at Batch Plant	
B.03ai	Image, cinder piles at Batch Plant	
B.03aj	Image, HECO “pull box” on Mauna Kea	
B.03ak	BLNR Minutes, TMT CDUA approval (February 25, 2011)	
B.03al	Letter from Sam Lemmo, OCCL to Richard Chamberlain, CSO, re: hydraulic spill, October 13, 2009	
B.03am	Image, “Leave the Landscape” sign at Hale Pohaku on Mauna Kea	
B.03an	Assessment of TMT Risks on Mauna Kea, Moore Foundation (2007)	
B.03ao	"Consideration of Cumulative Impacts in EPA Review of NEPA Documents," U.S. EPA, Office of Federal Activities, EPA 315-R-99-002/May 1999.	
B.03ap	Final Environmental Impact Statement, Outrigger Telescopes proposed for Mauna Kea, National Aeronautics and Space Administration (2005)	
B.04a	Maile Tualii WDT	
B.04b	Maile Tualii CV	

B.04c	Indigenous health pt. 1 study; M. Gracey & M. King (2009)	
B.04d	Indigenous health pt. 2 study; M. King, A. Smith, M. Gracey (2009)	
B.05a	Manulani Aluli-Meyer, Ed.D. WDT	
B.05b	Manulani Aluli-Meyer, Ed.D. CV	
B.06a	Ku Kahakalau, Ph.D. WDT	
B.06b	Ku Kahakalau, Ph.D. CV	
B.07a	Jon Osorio, Ph.D. WDT	
B.07b	Jon Osorio, Ph.D. CV	
B.08a	Kehaunani Abad, Ph.D. WDT	
B.08b	Kehaunani Abad, Ph.D. CV	
B.08c	Article: Dunnell & Dancey “Siteless Survey”	
B.08d	Article: Elbert, Distribution Archaeology	
B.08e	Hester et al, Field Methods excerpts	
B.08f	Maly Report on Mauna Kea excerpts	
B.08g	Ka Hoku I ka Pakipika	
B.08h	Nupepa Kuokoa article	
B.08i	Article Morris et al, Views from Inside and Outside	
B.08j	National Register Bulletin	

B.08k	Keck Outrigger EIS excerpts	
B.09a	David James Vicente, M.S. WDT	
B.09b	David James Vicente, M.S. CV	
B.10a	Eric Hansen, M.S. WDT	
B.10b	Eric Hansen, M.S. CV	
B.11a	Kuulei Kanahale, M.A. WDT	
B.11b	Kuulei Kanahale, M.A. CV	
B.12a	Peter Mills, Ph.D. WDT	
B.12b	Peter Mills, Ph.D. CV	
B.12c	OEQC Guidelines for Assessing Cultural Impacts	
B.13a	Candace Fujikane, Ph.D. WDT	
B.13b	Candace Fujikane, Ph.D. CV	
B.13c	CMP Map of Mauna Kea Summit Region Historic Region	
B.13d	Excerpt from FEIS for Outrigger Telescopes	
B.13e	HAR §11-200-12 on Significance Criteria	
B.13f	HAR §13-5-1 Purpose of Conservation District	
B.13g	UH Mauna Kea CMP Map of Historic Sites, Find Spots, TCPs	
B.13h	HRS §711.1107 Desecration	

B.13i	Excerpt from Maly and Maly (2005)	
B.13j	Pukui and Elbert, Hawaiian Dictionary, mo`o	
B.13k	LCA 3131 from Foreign Testimony 1850	
B.13l	Excerpts from Keaomelemele	
B.13m	Map of Ka'oho Ahupua'a	
B.13n	Mahele Book, V. Kamamalu relinquishing lands	
B.13o	Excerpt from Maly and Maly (2005)	
B.13p	Ku-Kahau-ula and Poliahu story by Ahuena	
B.14	(vacant)	
B.15a	Laulani Teale WDT	
B.15b	Laulani Teale CV	
B.15c	Kamakahukilani Van Oelhoffen on Mauna Kea	
B.16	(vacant)	
B.17a	Deborah J. Ward WDT	
B.17b	Deborah J. Ward CV	
B.17c	<i>The Office of Hawaiian Affairs v. Sean O'Keefe et al.</i> , US District Court, Civ. No. 02-00227 SOM/BMK	
B.17d	<i>Mauna Kea Anaina Hou v. State of Hawai'i et. al.</i> , Third Circuit Court, Civil No. 04-1-397	

B.17e	1998 Legislative Auditor's report	
B.17f	General Lease No. S-4191 (2011)	
B.17g	The Mauna Kea Management Plan (1997)	
B.17h	Revised Management Plan for the UH Management Areas on Mauna Kea (1995)	
B.17i	Letter, Sen. D. Inouye to D. McClain, 13 May 2008	
B.17j	Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13 (2005)	
B.17k	Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 14-07 (2014)	
B.17l	Englund et al, Results of the 2009 Alien Species and Wekiu Bug (<i>Nysius Wekincola</i>) Surveys on the Summit of Mauna Kea (2010)	
B.17m	Memorandum, L. Landgraf to T. Tagawa, 21 Feb. 1974	
B.17n	The Elepaio, Sept. 1974	
B.18a	Paul K. Neves WDT	
B.19a	Clarence Kūkauakahi Ching WDT	
B.19b	Oct. 7, 2014 Photo blockade at access road	
B.19c	Letter, Kepa Maly to Group 70 International, 14 Oct 1999	
B.20	(vacant)	
B.21a	B. Pualani Case WDT	

B.21b	Aumakua article	
B.21c	Mediums accounts	
B.21d	Manaua article	
B.21e	Ceremonies photos	
B.21f	Ho‘olokahi chant	
B.21g	Lake Waiau article	
B.22a	(vacant)	
B.23a	Kapulei Flores WDT	
B.23b	Picture of Mo`oinanea	
B.24a	Ruth Aloua, M.A. WDT	
B.24b	Ruth Aloua, M.A. CV	
B.25a	Diana LaRose WDT	
B.25b	Sites Diagram	
B.26	(vacant)	
B.27	(vacant)	
B.28	(vacant)	
B.29	(vacant)	
B.30	CDUA HA-3568	

B.31	TMT FEIS Summary Sheet	
B.32	TMT FEIS Vol. 1	
B.33	TMT FEIS Vol. 2	
B.34	TMT FEIS Vol. 3	
B.35	DLNR-OCCL Cдуа HA-3568 Report	
B.36	DLNR-OCCL Exhibits	
B.37a	MKSR Master Plan (2000)	
B.37b	MKSR Master Plan Appendix (2000)	
B.38	Mauna Kea CMP (2009)	
B.39	CRMP - CMP Sub-Plan	
B.40	NRMP - CMP Sub-Plan (2009)	
B.41	Public Access Plan - CMP Sub-Plan	
B.42	Decommissioning Plan - CMP Sub-Plan (2010)	
B.43	CMP Implementation Plan (2010)	
B.01a	Kealoha Pisciotta WDT	
B.01b	National Science Foundation Award Abstract to the TMT Corporation #0443999	

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI‘I

In the Matter of:	)	Case No. BLNR-CC-16-002
)	
A Contested Case Hearing Re:	)	CERTIFICATE OF SERVICE
Conservation District Use Permit)	
(COUP) HA-3568 for the Thirty Meter)	
Telescope at the Mauna Kea Science)	
Reserve, Kahohe Mauka, Hamakua)	
District, Island of Hawai‘i, TMK (3) 4-4-015:009)	

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was served on the following via email unless otherwise specified below:

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