

BOARD OF NATURAL RESOURCES

STATE OF Hawai'i

In Re Petitions requesting) DLNR NO. HA-11-05
a Contested Case Hearing Re)
Conservation District Use)
Permit (CDUP) HA-3568 for the)
Thirty Meter Telescope at the)
Mauna Kea District, Island of)
Hawai'i, TMK (3) 4-4-015:009)

ORAL ARGUMENT

Taken on February 12, 2013 at the Hilo County
Chambers, 25 Aupuni, Hilo, Hawaii, commencing at
11:00 a.m.

BEFORE: Jean Marie McManus, CSR #156

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NATURAL RESOURCES
STATE OF HAWAII

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1 CHAIRMAN AILA: Aloha. Welcome to the Board
2 of Land and Natural Resources oral arguments held in
3 Hilo, Hawaii. It is February 12th. Here we are in
4 the Hilo County Boardroom.

5 First of all, I want to thank the kupuna
6 who came and pi kai'd the room at the beginning. I'm
7 sure that the intent really was for the cleansing of
8 everyone in the room, so I appreciate that.

9 Mahalo to the Hawaii Island County offices
10 for allowing us to have this hearing in this room. I
11 want to remind people in the audience that this is
12 oral arguments, and it is not a public hearing, so we
13 won't be taking public testimony.

14 It is the Petitioners in the contested case
15 hearing for the Conservation District Use Permit that
16 are to be heard today. So I just wanted to make that
17 very, very clear.

18 The order is University of Hawaii will
19 present. If they wish, they can reserve some time
20 for rebuttal. And then the Petitioners will present,
21 and then we will close -- if there is rebuttal, we'll
22 hear rebuttal, and then close the hearing with
23 decision-making to be done at a later time.

24 So with that, aloha. We will start with
25 Tim Lui-Kwan.

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1 ORAL ARGUMENT

2 MR. LUI-KWAN: Aloha, Chairman Aila,
3 Members of the Land Board. May I sit?

4 CHAIRMAN AILA: Sure.

5 MR. LUI-KWAN: My name is Tim Lui-Kwan and
6 I'll be presenting the final arguments for the
7 Applicant, University of Hawaii at Hilo. With me
8 today are members of our legal team. I have Ian
9 Sandison on my left and Jay Handlin on my right.

10 CHAIRMAN AILA: Excuse me. One other piece
11 of information that's important is that each side
12 will be given 30 minutes to present. Do you want to
13 reserve time for rebuttal at this time?

14 MR. LUI-KWAN: Yes. I would like to
15 reserve at least ten minutes of my 30 minutes for
16 rebuttal. If the timekeeper can actually prompt me
17 in 15 minutes, I'd appreciate it.

18 CHAIRMAN AILA: Your time begins now.

19 MR. LUI-KWAN: Also with me today is
20 University of Hawaii at Hilo Chancellor Straney, and
21 Ms. Stephanie Nagata, who is Director of the Office
22 of Mauna Kea Management, OMKM.

23 We would like to thank the Board and the
24 Department's staff for coming to Hilo today and
25 holding the oral arguments for the Contested Case

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1 Hearing on this Application for the construction of
2 the Thirty Meter Telescope. It's been more easily
3 referred to as the TMT.

4 It has been nearly two years to the day, or
5 just a fortnight shy, since this Board issued its
6 preliminary ruling on the TMT Application ordering
7 the holding of this Contested Case, proceedings in
8 which the parties were put to their proof by
9 providing credible evidence supporting their claims
10 and ultimately their position on whether a
11 Conservation District Use Permit should be issued.

12 However, the evidentiary proceedings before
13 the Hearing Officer is done and the parties are here
14 today to provide you with a summary of the legal
15 reasons why they should prevail, a summation of the
16 evidence, and the legal authority.

17 While an important part of due process,
18 oral argument is not evidence; it is only argument.
19 It's important to keep in mind that scientific and
20 educational purpose of this project, which is
21 considered when completed, along with the large
22 Hadron Collider constructed at the Cern Project in
23 Switzerland, to be one of the two greatest scientific
24 achievements of this century.

25 As noted by Professor Michael Bolte in his
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1 testimony, the study and observation of the universe
2 is the oldest of the exact sciences that stretches
3 far back into man's prehistory. Astronomy is one of
4 the first subjects recorded in historical accounts by
5 the planet's earliest literate civilizations. In
6 ancient Egypt the date for the annual flooding of the
7 Nile was predicted by the helical rising of a star:
8 Their observations of the heavens also told the Mayan
9 Kingdoms of Central America when to go to war, and
10 the Chinese when to start their New Year - Kung Hee
11 Fat Choy.

12 Our earliest unaided observations allowed
13 us to measure time - when and what to hunt, gather
14 and plant. Later, the study of the stars and planets
15 took us to far places on countless journeys over
16 trackless expanses and made it possible for us to
17 navigate the way home. It has seen the rise and fall
18 of every great civilization and witnessed the
19 creation of all of the world's religions - often
20 providing the foundations for their religious beliefs
21 and cultural practices, and its believers with proof
22 that a universe so large and complex could only be
23 the work of a God or Gods.

24 So intertwined in our history was the study
25 of religion and the science of astronomy, that it was

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1 not separated in the west until the time of Galileo
2 and Newton.

3 In the present, we find evidence of our
4 origins and that of the universe, which is the
5 totality of all space, time, matter and energy.

6 As described in the Application and
7 confirmed by the evidence submitted by the Applicant
8 during the hearings, the TMT is not just another
9 telescope. Its segmented primary mirror spanning
10 nearly one hundred feet will be ten times more
11 powerful and far more advanced than the largest
12 telescopes in operation today - the twin Keck
13 Telescopes on Mauna Kea - allowing us to see farther
14 and with more detail than anything in operation.

15 Once the TMT is operational, it will be the
16 first in the next generation of giant telescopes that
17 will seek the answers for questions on the nature,
18 origin and composition of the universe and whether
19 there is life elsewhere out there.

20 The selection of Mauna Kea at the site for
21 construction of the TMT is essential if Mauna Kea
22 will continue to be the world's best ground-based
23 viewing platform for astronomy. After considering
24 six possible locations in Chile, Mexico and Hawaii,
25 it was determined that Mauna Kea's viewing

1 conditions, its high altitude, atmospheric clarity
2 and relative darkness - together with the
3 accessibility of the Mauna Kea Science Reserve, and
4 its outstanding support facilities and
5 infrastructure, in neighboring observatories and a
6 supportive local community made the selection an easy
7 choice.

8 Its location on the mountain's northwestern
9 plateau was identified in the 2000 Master Plan as
10 best suited for this type of observatory, at a lower
11 elevation and less visible than the other telescopes
12 within the precinct, while avoiding the most
13 sensitive areas in terms of Mauna Kea's natural and
14 cultural resources. The location selected provides
15 additional mitigation while providing access to the
16 spectacular night sky - another precious resource of
17 Mauna Kea - allowing the TMT, in the words of
18 Professor Bolte, a wonderful union to the universe.

19 Current investment in astronomy of Mauna
20 Kea is close to \$1 billion, however, the investment
21 in the TMT project and other supporting services is
22 expected to more than double that by the time the
23 facility is completed.

24 The project will be an enormous benefit to
25 the public welfare and bring significant moneys to

1 the local economy as well as contribute new programs
2 and funds to Big Island schools.

3 Moreover, these benefits have been vetted
4 and discussed with the community at all of the public
5 meetings during the planning process. As described
6 in the record, the TMT project will provide
7 employment and educational opportunities for Hawaii
8 in a clean, high-tech endeavor that will be a source
9 of pride for the community while advancing our
10 understanding of the universe.

11 Petitioners here have been involved in the
12 planning process long before the submission of this
13 Application in September of 2010. However, they now
14 claim that they have been denied due process in these
15 proceedings. The truth is that most of these same
16 Petitioners have been involved in the planning
17 process from the beginning - even bringing a
18 challenge to the Board's adoption of the Mauna Kea
19 Comprehensive Management Plan, the CMP, and the
20 sub-plans though resulting instead in the
21 Intermediate Court of Appeals' affirmation of the
22 Board's action and process in approving the CMP.

23 Petitioners have had an abundance of due
24 process. They have had more than ample opportunity
25 to prove their claims that the Board's criteria for

1 issuance of a CDUP for the construction and operation
2 of the TMT has not been met.

3 They submitted testimony at the public
4 hearing on the Application. They fully participated
5 in the Contested Case Hearings held over a six-month
6 period in 2011.

7 As reflected in the Proposed Findings of
8 Fact and Conclusions of Law what the Petitioners
9 experienced was not a denial of due process, it was a
10 failure of proof to support their claims, claims they
11 argued vigorously and repeatedly.

12 In truth, they would oppose any further
13 telescope development no matter where placed within
14 the astronomy precinct and no matter what manner of
15 construction.

16 The Board delegated to the Hearing Officer
17 the responsibility to hear, review and consider
18 evidence offered by the parties in support of their
19 respective positions. His Proposed Findings and
20 Conclusions should be afforded considerable
21 deference, as he was able to assess the credibility
22 and demeanor of the witness during their testimony
23 and weigh the evidence submitted in proving their
24 claims.

25 The Applicant supports the Findings and

1 Conclusions proposed by the Hearing Officer subject
2 to a few suggested additions and changes as set out
3 in our January 9, 2013 exceptions.

4 As noted in the exceptions, it is the
5 University's position that the Findings and
6 Conclusions proposed by the Hearing Officer on
7 November 30, 2012, are overwhelmingly correct, but
8 feels that several areas require clarification to
9 more fully and clearly reflect the proceedings.

10 The proposed exceptions seek more a
11 clarification rather than substantially modifying the
12 Hearing Officer's Proposed Determinations. While
13 these suggestions are detailed in our submitted
14 exceptions, I did want to outline several, including
15 clarification of the scope of this Board's action on
16 February 25, 2011, which was not the Board's Final
17 Action on the Application in light of your
18 simultaneous ordering of a Contested Case Hearing on
19 your own motion, and the Board's imposition of
20 Condition 21 prohibiting any construction, unless and
21 until, a Final Decision is rendered in favor of the
22 Applicant at the conclusion of the Contested Case.

23 The Applicant further suggests that the
24 proposed conclusions also reflect the Hawaii Supreme
25 Court's intervening decision in State v. Pratt that
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1 was handed down and decided in 2012. The holding in
2 Pratt is relevant to the issues in this Contested
3 Case as the Pratt court confirmed, that even if all
4 three elements of Hanapi test are met, the privilege
5 for Native Hawaiian customary and traditional
6 practices are not absolute and may be subject to
7 reasonable state regulations.

8 The Pratt court directed that claim of
9 right must be considered in the "totality of
10 circumstances" where there must be a balancing of the
11 state's interest in the subject regulation to the
12 right of the individual in the exercise of a
13 particular practice.

14 The other significant suggestion is an
15 exception to the Proposed Findings and Conclusions
16 that accurately reflects the Petitioners' failure of
17 proof of the first prong of the Hanapi test, as
18 Petitioners did not submit direct testimony or
19 specific evidence that they are "Descendants of
20 Native Hawaiians who inhabited the Hawaiian Islands
21 prior to 1778".

22 This is a specific evidentiary requirement
23 set out in HANAPI, PASH and PRATT, all three cases
24 talk about this requirement. While several of the
25 Petitioners testified that in fact they were Native
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1 Hawaiians, none submitted testimony of evidence
2 demonstrating descent from "Native Hawaiians who
3 inhabited the Hawaiian Islands prior to 1778."

4 The Hearing Officer correctly found and
5 concluded that the TMT project satisfies the eight
6 criteria of HAR, Hawaii Administrative Rules Section
7 13-5-30, subsection (c). While Petitioners claim
8 that all eight criteria must be satisfied in issuing
9 the CDUP, the argument is pointless as the Hearing
10 Officer correctly concluded that all the criteria of
11 subsection (c) are actually satisfied.

12 The Hearing Officer concluded correctly
13 that the project was consistent with the purpose of
14 the Conservation District as one of the specific
15 objectives of the District is to conserve and protect
16 important resources through appropriate management.

17 This is exactly what has been accomplished
18 with this project with the adoption of the TMT
19 project management plan that is consistent with the
20 state's CMP for Mauna Kea. The management plan
21 specifically and thoughtfully addresses mauna Kea's
22 natural and cultural resources including the
23 environmental factors that make Mauna Kea arguably
24 the best place on earth to put telescopes. The
25 express purpose of the District rules is to regulate
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1 land use, not to prohibit land use as claimed by
2 Petitioners.

3 The Hearing Officer also correctly
4 concluded that the project is consistent with the
5 objectives of the Resource Sub-zone as astronomy
6 facilities are expressly permitted use in the subzone
7 under an approved management plan.

8 Again, under subsection (c) of the
9 criteria, the Hearing Officer correctly found that
10 the project complies with guidelines and provisions
11 set out in HRS Chapter 205A of the CZMA.

12 This is the only CZMA objective of the
13 project which concerns the protection of the water
14 quality. The Applicant's witnesses provided
15 testimony that the project has been designed so that
16 wastewater and pollutants will not be released into
17 the surrounding environment. Petitioners' assertions
18 that the TMT would undermine important viewplanes,
19 destroy areas of historic importance and increase the
20 risk of water pollution were considered and rejected
21 by the Hearing Officer. The Hearing Officer was
22 responsible for weighing the evidence and assessing
23 the credibility of the witnesses.

24 The Hearing Officer also concluded that the
25 project will not cause substantial adverse impacts to
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1 existing natural resources within the surrounding
2 area, community, or region. And we detailed several
3 reasons why he correctly found that.

4 He also correctly concluded that the
5 proposed land use is compatible with the locality and
6 surrounding areas. While Petitioners admit there are
7 numerous observatories visible from the project and
8 its surrounding areas, they wrongly contend that the
9 project must reduce the cumulative impacts created by
10 existing facilities to less than substantial,
11 significant and adverse. This was rejected by the
12 Hearing Officer who concluded that the project had
13 satisfied this criteria.

14 The Hearing Officer correctly found that
15 the project preserves and improves upon the existing
16 physical and environmental aspects of the land.
17 Petitioners interpret this to prohibit adding any
18 structure where none currently exists in the subzone
19 even where the regulations expressly permit astronomy
20 facilities or other structures under the appropriate
21 management plan. To conclude that this criterion
22 must be interpreted to literally mean that nothing
23 can be built in any part of the district would lead
24 to an absurd or unjust result. This was rejected by
25 the Hearing Officer who concluded that this criterion

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1 was also met.

2 Hearing Officer also found that there would
3 be no subdivision of land utilized to increase the
4 intensity of land uses in the Conservation District.
5 The reason for this is the Applicant is not seeking a
6 subdivision of land, nor is one being granted by the
7 Board.

8 Even if we were seeking, government
9 agencies and agencies of the state or counties are
10 not subject to that provision for reason of HRS cited
11 by Petitioners. Legally and factually there has been
12 and will be no subdivision.

13 MR. CAIN: 15 minutes.

14 MR. LUI-KWAN: Petitioners also presented
15 no credible evidence of any detriment to the public
16 health, safety and welfare in Mauna Kea.

17 He found the University's experts and
18 evidence were more credible and in rejecting
19 Petitioners' claims.

20 I would like to thank the Board again for
21 the opportunity for the summation of the Applicant's
22 position that the Proposed Findings of Fact and
23 Conclusions of Law are correct if the exceptions
24 suggested by the Applicant in our January 9th, 2013
25 submission are also adopted by the Board.

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1 I wanted to recognize the patience and
2 effort of the Hearing Officer in conducting the
3 Contested Case proceedings.

4 I would also like to note the conduct and
5 performance of the Petitioners in what has been a
6 long and sometimes tedious process. The parties have
7 all acted professionally and respectfully towards the
8 Hearing Officer, the Applicant and each other, and I
9 commend them again for this.

10 Again, I would like to reserve again the
11 remaining time that I have for rebuttal. Thank you
12 very much.

13 MR. CAIN: 14 minutes.

14 CHAIRMAN AILA: Thank you, Mr. Lui-Kwan.
15 Next Petitioner up is Kinohi Neves for Paul Neves.

16 Let's have some order here.

17 MR. ABLE: No, I'm going say my peace.

18 CHAIRMAN AILA: Able, are --

19 MR. ABLE: So are you, so am I. Treat
20 these guys right when you guys come over here. We're
21 not just something that you guys going to wash under
22 the ground.

23 CHAIRMAN AILA: Able, I'm going to --

24 MR. ABLE: You can do whatever you like,
25 you run this. But you don't run my life. I swear to

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1 God, I don't know about you.

2 CHAIRMAN AILA: We're going to move on.
3 You're cutting in the Petitioners' timetable. We're
4 going to start, your 30 minutes starts now.

5 ORAL ARGUMENT

6 MR. NEVES: Aloha, my name is Kinohi Neves
7 and I'm speaking on behalf of my father, Paul K.
8 Neves.

9 Aloha to the god whose name is so sacred it
10 is not spoken in the open, but in the reverent
11 silence of the believer. Aloha e na Kini Akua, the
12 four gods of state, Ku, Kane, Lono and Kanaloa, the
13 40 gods, the 400 gods, the 4,0000 gods, the 40,000
14 gods, the 400,000 gods, and all the manifestations of
15 the one god whose sacred name is in the whisper.

16 All you spirits of the departed who have
17 been cared for with love, I welcome you here. Aloha
18 e na aumakua, you personal and family guardians,
19 advise and guide us and do what you must to
20 strengthen our relationships with each other and the
21 land.

22 Aloha na Ali'i, fellow activists, customary
23 leadership, whose kuleana is to continue the flow of
24 mana. Blessings for all our people, your fellow
25 countrymen, by being generous and productive resource

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1 managers.

2 You have been an eye witness to all that
3 akua has provided from time immemorial to our people
4 and our land. You have also been an eye witness to
5 an on-going crime scene of unspeakable proportion
6 upon those same people and those same lands.

7 You ali'i men and ali'i women, fellow
8 activists, we are all called to serve our people with
9 our very lives. These days and times require that we
10 give our very life for our country, the Hawaiian
11 Kingdom.

12 This nation will require a new age of
13 heroes who have integrity and honor, morals, ethics,
14 compassion, self-sacrifice, and a desire to fight and
15 serve their own country. No foreign entity,
16 occupational authority or an agency of any state can
17 ever erase the crime scene.

18 Only generous and competent leaders who
19 serve with integrity can begin to heal our people and
20 our land, and rediscover our destiny as a free and
21 independent people.

22 From Mauna Kea comes the snow and ice,
23 solitude and quiet to nurture the hearts and minds of
24 the people. Do not sell out, and the people will
25 remember your name with honor. Give in to today's

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1 desires of money, power and personal gratification,
2 and your name will be spoken in shame and without
3 honor, maybe not even at all.

4 Aloha Na Kupuna, Na Makua, our elders and
5 fellow parents and workers. We have searched in the
6 last 40 years the truth of what happened to our
7 people and our nationhood. The State of Hawaii
8 didn't help us in our search, neither did the United
9 States of America. We the kanaka maoli people and
10 our friends did the searching ourselves. Out of our
11 own despair and empty pockets, at work and after
12 work, from a secretary's desk or from a tent in some
13 remote beach.

14 We did it ourselves, with our copy
15 machines, our note pads and fliers, and in our
16 protests and marches, our arrests and sit-ins, our
17 voices, and our burning desire for justice.

18 Yes, many kupuna and makua have died giving
19 rebirth to a nation reborn. A patriotic duty to a
20 good and decent cause. Stand up we did, and
21 encouraged our children and grandchildren and great
22 grandchildren to do the same. For the truth does
23 matter, doesn't it?

24 The lies that we were taught or forced to
25 listen to since 1893 were educational indoctrination.

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1 Genocide of the worst sort. A living death sentence
2 for the people of this land and our fellow Hawaiian
3 nationals.

4 There is no going back to a time when the
5 occupation did all it could to erase our spiritual
6 will to live, our cultural knowledge to survive, and
7 our political nationality to be free.

8 Aloha 'opio, keiki and kamali'i, our young
9 people, children and babies. Know you are loved.
10 Know that what we are doing is to ensure that your
11 land, this land, your inheritance, our aina will be
12 here for you to live upon and for you to pass on to
13 your descendants.

14 It is what we must do and what you will
15 have to do when our nation calls. So learn to watch
16 and listen carefully.

17 Never fear to speak out for this land and
18 your people. Call the lawyer out to task, and a
19 senator to service. They are no better than you, in
20 fact, they may be far behind.

21 Your culture extends thousands of years.
22 What has been their experience on the world stage?
23 235 years. Know that your ancestors were warriors
24 and healers, planners and builders, navigators and
25 farmers, philosophers and poets, dancers and

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1 fishermen, priests and astrologers, leaders and team
2 players, scientists and sportsmen, clean and hard
3 working, deeply religious and spiritually active. Be
4 proud and follow in their path as we do. Know that
5 they and we are always with you

6 "O keia ka manawa", now is the time. It
7 has taken me 45 years to find myself as a spirit-led
8 being, culturally a kanaka maoli (native person), and
9 politically a Hawaiian National. I can recall my
10 journey beginning with the simple stories from my
11 mother. Her memories of the pain of
12 disenfranchisement, ridicule and survival under the
13 yoke of a foreign master, the United States.

14 These stories were my mother's love for a
15 confused young man of 13 years old. They were told
16 in a style that at times made me cry and laugh, but
17 most of all set me on a path to save myself. They
18 were inspirational and clear, deeply spiritual,
19 culturally beautiful and bitterly political. I was
20 broken, angry like many of my brothers and sisters.

21 Mauna a Wakea is that wahi pana, that
22 sacred place that has made me a whole person. No
23 longer do I need to seek refuge somewhere in a
24 godless world that follows a godless path.

25 The spiritual worship on and with the

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1 spiritual life of Mauna Kea completes my life long
2 search for who I am as a kanaka, a free Hawaiian man.

3 To this Mauna Kea, I owe my life's story,
4 my mother's prayers, my wife's love, and my
5 children's future.

6 Mauna Kea is that natural environment that
7 breathes life into me and causes me to reflect on the
8 creative spirit within me. The shadow of Mauna Kea
9 holds my heart close in the early evening, and renews
10 my daily walk each and every new day.

11 Over the past 15 years I have become a more
12 creative and tolerant person because of my
13 relationship to the mountain. I hold my people in a
14 more hopeful light with less doubt and with a greater
15 anticipation of a brighter future.

16 Mauna Kea has restored my family beyond my
17 greatest aspirations. As I have witnessed this
18 transformation, so also have I witnessed the
19 transformation of many others as they sought answers
20 to questions deep in their hearts.

21 Time and time again Mauna Kea has spoken to
22 the many, many people who truly seek out the creative
23 force of Mauna Kea that emanates in this most sacred
24 place. Every morning I look to Mauna Kea and
25 acknowledge what ke Akua has done for me, for my

1 family and for my people. Mauna Kea is the creator's
2 home, the piko, the center force, the greatest temple
3 on earth.

4 As an ali'i I am honored and humbled by
5 Mauna Kea and will continue to encourage the
6 spiritual enlightenment that Mauna Kea brings to the
7 human community.

8 As a Kumu Hula I am inspired by Mauna Kea
9 each and every day. I will continue to do all I can
10 to keep Mauna Kea accessible to all who seek
11 spiritual refreshment and renewal.

12 As a husband and father I have an
13 obligation for the welfare of my 'ohana to live the
14 breath of Mauna Kea within me and in all that I do
15 and say. If I need to be a warrior, so be it, but it
16 will be a warrior armed with aloha.

17 The Thirty Millimeter Telescope, TMT
18 telescope development, in this my sacred temple of
19 religious practice, will seriously interfere with my
20 ability to adore Mauna Kea. How can we put our
21 shattered lives back together again if these foreign
22 objects are allowed to alter the natural landscape
23 and natural temple, Mauna Kea.

24 As our kupuna have said, when is enough
25 enough? How can we be in solitude and beauty with

1 these foreign objects in our viewplanes, viewplanes
2 that have existed since these islands were created by
3 ke Akua?

4 I recognize the natural viewplanes created
5 by akua. What church of these foreigners would allow
6 such a desecration before their alter? What would
7 they allow it to be? Would a camouflage be
8 acceptable? A paint job? Would they tell their
9 congregation to just look the other way? Would they
10 take money to look the other way?

11 Would the interests outside of their church
12 be allowed to dictate the process? Wouldn't that
13 church consider this sacrilegious? Why is Mauna Kea
14 allowed to be desecrated but not St. Peters? Could
15 it be that the godless are worshipping a golden calf?

16 Why are the laws that are in place to
17 protect the trust lands of the Native Hawaiians and
18 the general public being broken without objection?
19 What are regulations like the eight criteria for a
20 Conservation District Use Permit for?

21 HAR 13-5-30(c), Criteria No. 1: The
22 proposed land use is consistent with the purpose of a
23 Conservation District. How can this 18-story
24 building be consistent with conservation? That's
25 impossible.

1 A Conservation District is to conserve land
2 deemed very important. By developing that land, you
3 devalue its purpose. To contemplate developing
4 conservation land, you bring injury upon us who
5 worship there and are practicing our customs.

6 Are not the laws in place to protect the
7 land and the people's interests? They clearly are
8 written to be followed, are they not?

9 Does the developer pick and choose which
10 ones he wishes to adhere to? Why do we have
11 regulators who are failing miserably in their
12 oversight?

13 Is mitigation part of the eight criteria?
14 Where is that found in the statutes? Why do we have
15 regulators who are failing miserably in their
16 oversight? Is mitigation part of the eight criteria?
17 Where is that found in the statutes? Why do the
18 elected officials show no backbone when these laws
19 and regulations are being broken? Where are the
20 cops? Why is someone not being arrested? Is this
21 not a crime scene?

22 Criteria No. 4: The proposed land will not
23 cause substantial adverse impacts to existing natural
24 resources within the surrounding area, community or
25 region.

1 It is quite obvious that this TMT proposal
2 will impact the natural resources, the surrounding
3 area, the community, in fact, the whole island. You
4 can't hide a huge thing like the TMT proposal by air,
5 land or sea.

6 How that would hurt us, who need a
7 spiritual place in this natural setting to keep our
8 lives together.

9 Criteria No. 6: The existing physical and
10 environmental aspects of land, such as natural beauty
11 and open space characteristics will be preserved or
12 improved upon, whichever is applicable.

13 Natural as defined by Webster's Dictionary
14 means: Produced or existing by nature; not
15 artificial. Natural in Hawaiian Dictionary, among
16 other things, means honest, decent, proper,
17 appropriate, satisfactory, rightful, reliable, right,
18 just, fair, qualified, suitable, advisable, seemly,
19 fit, natural, applicable, nearby, worth and merit.

20 This TMT proposal does not fit Criteria No.
21 6, nor does it preserve or improve upon the open
22 space that exists there at this very moment. And
23 this is why I'm absolutely against this TMT proposal
24 and any other proposals on sacred Mauna Kea, our
25 place of worship and religious practice.

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1 How can we practice our customs and grow
2 spiritually when our spiritual place and natural
3 setting is used for 18-story buildings, parking lots,
4 pull stations and roads? It would be another slap in
5 the face and stab in the back to build this monster
6 in our temple of prayer.

7 I have lived long enough to hear and see my
8 people cry, and still the State of Hawaii gives the
9 rubber stamp to development, after development, after
10 development.

11 Many have given up on justice. I don't
12 blame them because no one was arrested on the USS
13 Boston for January 16, 1893 either. No one was court
14 marshalled. No one was arrested on the U.S. Minister
15 Stevens. No one could be arrested for breaking the
16 laws of the Hawaiian Kingdom and properly tried for
17 high treason as they should have been. Rather the
18 queen was arrested for treason in her own country and
19 imprisoned in her own palace. No one was arrested
20 for looting the treasury and paying themselves for
21 their work.

22 Who is liable for monetary damages for
23 destruction of the land in the Conservation District?
24 Who is liable for past destruction on the
25 Conservation District?

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1 Myself and my family have had to use our
2 own financial resources for 15 years to fight for
3 mauna a Wakea, even though the protections are
4 already in the law. Why was the BLNR not advocating
5 to protect these public trust lands?

6 No one was arrested for banning the
7 Hawaiian national language and forcing the kanaka to
8 obey or else. No one was arrested for putting the
9 American flag, a foreign flag, over our islands. No
10 one was ever arrested for teaching lies in the public
11 schools. No one was arrested for terrorizing and
12 intimidating our Hawaiian nationals with statehood or
13 the Hawaiian Homes Department scandals.

14 These and other crimes were committed
15 against a free and friendly nation under treaty with
16 the United States of America. No one has done or did
17 anything about the crime scene.

18 My survival and the survival of my family
19 is threatened by the TMT proposal. The natural
20 viewplanes from Mauna Kea to Haleakala I have spoken
21 of before in a previous contested case. From Pu'u
22 Kea to Haleakala there is a connection of my family
23 all the way from Poli'ahu Heiau on Kaua'i. We are
24 the Kea family.

25 My children were named for this natural

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1 viewplane so that they can never forget where they
2 come from and how we are connected.

3 This TMT proposal puts another stress upon
4 my freedom to worship at Mauna a Wakea, my freedom to
5 practice my culture as a Kumu Hula and an ali'i in my
6 homeland in and around mauna a Wakea.

7 Most importantly, my freedom to be free
8 from the occupation of the United States of America.

9 MR. CAIN: Twenty minutes.

10 MR. NEVES: Deny the TMT proposal. It
11 injures my spirit, my well-being, and the future of
12 my children. I cannot relinquish my spiritual
13 practice or spiritual space to anyone. In the end,
14 that's all that I really have is my freedom.

15 Mahalo, thank you.

16 CHAIRMAN AILA: Any questions? I have one
17 question, maybe two.

18 At what age did you come to this
19 realization that you speak of?

20 MR. NEVES: I was about 15.

21 CHAIRMAN AILA: You were able to experience
22 Mauna Kea and receive this ike with the existing
23 telescopes on Mauna Kea?

24 MR. NEVES: Yes.

25 CHAIRMAN AILA: Simple question, no hidden

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1 agenda, just simple question. The answer is yes?
 2 MR. NEVES: Yes.
 3 CHAIRMAN AILA: Thank you.
 Kalani and Pua FLOres.
 MR. FLORES: Can I have a minute to set up
 6 before we start the clock?
 7 CHAIRMAN AILA: Sure, one minute.
 8 (Short recess.)

9 ORAL ARGUMENT

10 MR. FLORES: E ala e me ke aloha. Awaken
 11 with aloha to all.
 12 We are the Flores-Case 'ohana. My name is
 13 E. Kalani Flores. My wife B. Pualani Case, my
 14 daughters Hawane Rios and Kapulei Flores. We come
 15 before the Board humbly just to present as a result
 16 of this whole endeavor of this contested case, to
 17 give you a sense of why we first got into this case
 18 and what was discovered as a result of this contested
 19 case.

20 MS. CASE: (Hawaiian chant).

21 That chant says, amongst many things, Mauna
 22 a Wakea is the sealant that brings us altogether. I
 23 am here in my five minutes that I have to just speak
 24 truth. I speak truth because there are kupuna to
 25 opio here today. And they have concerns, and they

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1 expect me to speak truth. I speak truth because when
 2 I say out loud the names of my ancestors, and yes,
 3 they are Hawaiian, I must speak truth, because they
 4 will be in this room with us.

5 But most importantly, I speak truth because
 6 my daughters, my children, demand that. My ohana
 7 come from Awini. My grandfather generations ago was
 8 Umihulumakaokalanika' ImaunaoAwini, the guardian, the
 9 protector. When a little child was brought there
 10 generations ago to behave and safeguard it, my
 11 grandfather was there, guarding the path.

12 In my genealogy is an ancestor named Mo'o,
 13 and I always wondered why that was, Mo'o. Kind of an
 14 unusual name, I'd say. I wondered it until my
 15 grandmother, Mabel Ke'alahana'eo Mana Hussey from
 16 Kohala, we were camping at 'Anaeho'omalua, as we did
 17 often. My family is a Parker Ranch family. My
 18 grandmother said one day, hurry up, we have to pack
 19 up and leave quickly. And my mother said, why do we
 20 have to do that? She said big wave coming. We have
 21 to get out of here. And my mom said, how do you
 22 know? And my grandmother said, the Mo'o told me. We
 23 never doubted my grandmother. I was a young child
 24 then. We all got out of there and a big wave came
 25 took our whole camp site that day. We never doubted

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1 that guidance.
 2 Years later, 1980, '81 there was a huge
 3 drought in Waimea. My father was the head of water
 4 for Parker Ranch. We uncovered Manaua, the rain
 5 rock, where the Mo'owahine sunbathes. And I became a
 6 guardian of Manaua from that day forward when she
 7 brought rain to Waimea when we took food and leis
 8 there. And we have been there ever since.

9 My story really begins there. Because do
 10 you think that I ever would have woken up and said, I
 11 really want to be in a contested case today? You
 12 know, anybody ever did that, like woke up in the
 13 morning and said, today I think I'm going to become
 14 involved in a contested case and let it throw my
 15 whole life upside down and get my kids involved and
 16 what about my job and what will people say?

17 I don't think we ever do that, do we? But
 18 one day at Manaua, my daughter who is here today,
 19 Kapolei, said, mom, she's here, you know. And I
 20 said, who's here? And she said Manaua, mom, Manaua,
 21 the Mo'o wahine, the lady of the rock is here.

22 And I knew that my grandmother and
 23 generations before her, my daughter had inherited the
 24 same gift as they. One day my daughter said, mom,
 25 there is another one here today. And I said who is

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1 it? She said, mom, you know the one, the lady from
 2 on top of the lake. I said what does she look like
 3 Kapolei? She said, mom, that's what she looks like
 4 (indicating), and that's what the design on her
 5 kekapa means, mom, and she is talking to me.

6 As we were leaving, my daughter said, mom,
 7 can you stop? Stop, mom. And I turned around, and
 8 so did she. She looked at me and she said Mo'oinanea
 9 said can you try one more time, mom. And, you know
 10 you guys, for the life of me I didn't know what she
 11 meant. I said try what? That's how asleep I was at
 12 that moment in time in Waimea. I was asleep.

13 She said, mom, she said can you try one
 14 more time to stop that telescope that's going up on
 15 the mountain. She told me that. And, you know, my
 16 heart went to my toes that day. I know you
 17 understand that, my heart went to my toes that day
 18 because I didn't want to do that, because I knew what
 19 that would mean, that would mean that I would be
 20 standing here today. Right? And she said to me, my
 21 daughter, Mo'oinanea told her, tell your mother, that
 22 if she cannot, it's all right. Because she read me
 23 like a book.

24 I told my daughter, why do we have to do
 25 that? And tell me what to do. Mo'oinanea told my

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1 daughter that day, and I have no doubt, and I stand
2 here to say it because we have fulfilled that promise
3 to Mo'oinanea. We have tried one more time, and
4 we've spent a lot of time doing that.

5 And we have felt privileged and gifted to
6 have been chosen to deliver the message that
7 Mo'oinanea said, one more is too much, you folks, one
8 more is not just one more, it's too big.

9 They of the mauna have co-existed. They
10 have tried their best. They have stood on the mauna
11 with all of that which has been built on a shaved
12 down mountain.

13 But this time they cannot do that, because
14 the mauna is not just sacred, it is connected to all
15 parts of the world in sacred ceremony, practices,
16 traditions, knowledge.

17 I stand here to say that my daughters are
18 seers. Yeah, just like in the old days, you guys.
19 All you kanakas in the room, yeah, my daughters are
20 seers. They see things. They are related. Those
21 are not just our ancestors, those are our family
22 members up there.

23 I don't know about you folks, but I spend
24 much time on the mauna. That's what I'm most
25 thankful for, for being in this contested case

1 hearing. You know what happened? I spend once a
2 month up there on the mauna. What about you guys?
3 You are going to make a tremendous decision here
4 that's going to affect me, my children, children to
5 come.

6 I don't know how often you are on my mauna.
7 I don't know how often you go up there and pray up
8 there. Or ceremony up there, or heal things from up
9 there. Or connect places from up there, or expand
10 yourself from up there; but let me tell you, I am
11 there.

12 I am there all the time following deep
13 ceremony that is taught to me by my daughter Hawane,
14 who is learning from them. And they might have to
15 leave the top. And if they do, they take the
16 elemental forces with them. They might have to leave
17 the top because they say it won't be the same up
18 there. The weather, the environment.

19 To connect 18 stories to the top of a
20 mauna, you got to go down deep. And if you think
21 that that doesn't hurt me, it does. It hurts me to
22 the heart and the core.

23 Now, I know my time's up. And when we
24 leave here, we take the chance that we will be
25 ridiculed here today, because we are saying that we

1 not only are relatives, but we have a message from
2 those that are still here, even though you can't see
3 them, but we take that chance, my daughters and I.

4 We were asked once on the mauna just to ask
5 one simple question, and I'm going to end with this.

6 The kupuna on the mountain asked us to ask
7 one question. Who here or outside of here is going
8 to take responsibility if you approve this? Who of
9 you will take responsibility for what's coming. Who
10 of you, when our grandchildren look up there and
11 their heart is sore and they say, mom, how did you
12 ever let that get built up there? I got to look at
13 that every day just like these kids in here. Their
14 school is right next to the mauna. They going to be
15 looking up at that every day, me in Waimea, for
16 eternity.

17 And I have to say no to that. No, don't do
18 that, not for jobs. Not for money. Not even for
19 education, because I tell you the education that I
20 get from my children I never could find that.

21 So I'm ending. But I'm just asking the
22 question, who is going to be responsible for that up
23 there? Because they have asked us. Is it the
24 University? Is it you? Is it China, Japan, India,
25 whoever? Somebody is responsible, and I'm just

1 asking who is that going to be. Because you know
2 what, it's not going to be us, because we have
3 answered Mo'oinanea. We have delivered the message.
4 We are free of responsibility, and we speak truth.
5 Eo.

6 ORAL ARGUMENT

7 MR. FLORES: Prior to this, the legal
8 counsel talked about searching for life out there.
9 There's life still on the mauna, you know. Legal
10 counsel mentioned about searching for life out there.
11 There is life still on the mauna. We have
12 experienced it in many ways.

13 Our children, not just our children, others
14 have seen the life on the mauna. So before I
15 continue, I just want to lay to rest that we are
16 kanaka maoli also referred to as native Hawaiian. If
17 you guys need a DNA blood sample, we can give it to
18 you afterward, but we are kanaka. Beyond that,
19 there's no other ways to prove it.

20 So move on beyond that. So, you know, the
21 legal counsel wants to say that on February 25th,
22 2011, you guys approved the permit. And CDUP
23 HA-3568. Now they're saying it wasn't approved, but
24 that's not what the record says. But I want to say
25 today, I can't go through everything in the time we

1 have. And I don't expect you folks to read through
2 hundreds of pages of Findings of Fact, because I went
3 through that. How do you tell what is true or not?
The information is misinterpreted and woe weavened
and manipulated.

6 So as a board member, I used to sit on a
7 board, for seven years I sat on Kauai's Historic
8 Preservation Council. For ten years on OHA's Native
9 Hawaiian Historic Preservation Council. Five years
10 Hawaii Council's Public Access, Open Space and
11 National Resources Preservation Resources Commission,
12 I know what it is to sit on a board. I know what it
13 is to go through all these documents. I'm not sure
14 that you were able to get through the documents.

15 As Petitioners, there were hundreds of
16 pages we have to go through and even after we went
17 through it, how do you know what is right or wrong?
18 It's very difficult when you read whether Applicant
19 or Petitioner, what is the truth?

20 So I'm not going to go through everything,
21 I'm just going to go through certain parts to show
22 that as a result of our involvement in this, that
23 there's significant information that was provided in
24 the CDUA that was false, incomplete and inaccurate,
25 and which would warrant the BLNR to revoke this
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1 permit.

2 Now, when the permit was issued in February
3 25th, 2011, there was conditions applied to it. One
4 of the conditions is Condition No. 16. Issuing this
5 permit, department and board have relied on the
6 information and data that the Applicant has provided
7 in connection with this permit application. If
8 subsequent to the issuance of this permit, such
9 information and data prove to be false, incomplete or
10 inaccurate, this permit may be modified, suspended or
11 revoked in whole or part, and the department may in
12 addition institute appropriate legal proceedings.

13 I'm going to show you why that should
14 occur. Why the information is inaccurate. So the
15 handouts I gave to you is relevant.

16 Let's go to cultural resources. So this is
17 what is in a CDU. This map, this diagram in the
18 CDUA, in this particular figure, it has been
19 falsified information on it, and information has been
20 omitted from it. And the information has been
21 manipulated to downplay the impact of the natural
22 resources.

23 So if you look at this map, this diagram,
24 Figure 4.1, and you actually look at the other
25 figure -- this is from the archeologist's report.

1 This is what should have been in the CDUA. Look at
2 all the sites there, all the numbers. I mean, my
3 middle school seven grade daughter, I just showed her
4 these two figures, said what's the difference between
5 the two. And, well, there is a lot missing from
6 this. A seventh grader could tell me that. I just
7 said tell me the difference. This is what should
8 have been in the CDUA.

9 So what they did instead, they put a
10 telescope into this so you only could see what the
11 Applicant wanted you to see. In addition to that,
12 how they falsified the information, if you see it on
13 the right-hand side of the figure, there is these
14 triangles. These triangles represent historic sites.

15 Someone deleted all the numbers off these
16 sites. If you look at these numbers, there is no
17 reasons why the numbers should have been deleted.
18 The only reason why someone would delete the numbers
19 is so that it would downplay, or seem like there
20 weren't historical and cultural sites in the area.
21 It's not like they accidently shook the paper and
22 numbers fell off, because other numbers are there.
23 Somebody deliberately removed that and the legal
24 counsel is going to say there's no evidence. The
25 evidence is in the record itself. The evidence is in

1 the archaeological reports. It's been manipulated.

2 So expand beyond that. If you read through
3 the CDUA, they left out certain information, so the
4 CDUA only talks about four sites. They left out
5 descriptions about 21, 447, 61, 69 even though it's
6 on the map. What they also left out in this whole
7 report of the CDUA, I should say it's all in the
8 archeologist's report. What they also left out was
9 significant information as such.

10 So when you look through the page 4.1 in
11 the CDUA, they even omitted information what's even
12 on the diagram with the numbers.

13 I've sat on the Commission before. I've
14 reviewed reports. Actually wrote reports. I know
15 when somebody is trying to manipulate the information
16 so that you only see a certain aspect of it.

17 But in reality this whole Mauna Kea Science
18 Reserve is part of the mauna -- excuse me a second
19 here -- so the Mauna Kea Science Reserve is in the
20 Mauna Kea Summit Region Historic District. What does
21 that mean?

22 This whole part here is part of the
23 Historic District. As part of the Historic District,
24 historic reservation rules says that you have to look
25 at everything collectively. You cannot look at

1 individual sites next to the project.
 2 None of the reports have done that. I've
 3 been through all the archeology reports, numbers of
 4 them back and forth, none of them mention what is the
 5 impact of this project upon the collective sites
 6 within that area. The sites, referring to the sites
 7 we are talking about, are these shrines. These
 8 shrines that are there on the summit there in the
 9 area where this TMT is going to be proposed to be
 10 built.

11 These are shrines that have connections
 12 with ancestors and kupunas, and even with us today.
 13 These are where our kupunas used to pray. And you
 14 know what's so remarkable about all these reports, no
 15 one ever asked Hawaiians or kanaka maoli what these
 16 shrines were. We have been up to the shrines, and
 17 our daughters, they shared what those shrines were.
 18 They're places where they did pilgrimages up to the
 19 mauna. They connected with those up to the heavens
 20 and the earth. There were prayers done at these
 21 shrines.

22 However, no information is talked about how
 23 it's going to impact these shrines, even though the
 24 TMT is going to be built amongst these shrines.

25 Another thing, they left out all these
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1 other things they call find spots. The find spots,
 2 the legal counsel are going to argue that the find
 3 spots are modern. They're not modern.

4 The problem is a full analysis has never
 5 been done of it. Look at archeology report. They
 6 never determined what they are or not. So if there
 7 is a stone there, they don't know what the stone is,
 8 or how long it's been there unless there's some
 9 cultural matter or materials near there. Some of
 10 these sites they calling find spots, because they
 11 cannot figure what they are, are left in limbo.
 12 They're not given a historic preservation number.
 13 But there might be a handful that are modern in
 14 context if somebody went there, but most of them are
 15 not modern as has been implied.

16 MR. CAIN: Twenty minutes.

17 MR. FLORES: So let's go on. So there's
 18 significant information that's been falsified, that's
 19 inaccurate or incomplete in the cultural resource and
 20 historic preservation, has to do with cultural
 21 resources and historic properties on this mountain,
 22 as part of the CDUA, significant things that were
 23 left out of it or downplayed.

24 Let's go to the natural beauty. Part of
 25 one criteria is, how do you improve upon the

1 existing -- or how do you preserve the existing
 2 characteristics of the land? Its natural beauty and
 3 open space? This project will not. Right now
 4 there's nothing there. If you go on the plateau
 5 where it's proposed to build the TMT, nothing there
 6 on this plateau.

7 And when you go to what they call
 8 mitigation for this, this type of mitigation, they
 9 refer to one of the mitigations for this project, it
 10 says, well, we're not going to build on the summit.

11 That's inaccurate, because there is no
 12 space on the summit to build anything more, so how
 13 can there be a mitigative measure? If you cannot
 14 build on the summit because there's no room and no
 15 space, look -- look in the master plan, the Mauna Kea
 16 Master Plan. They will tell you, for the size of
 17 this proposed telescope, there is no more space on
 18 the mountain, on the summit there, to put any more
 19 telescopes there. So that's why they're moving down
 20 to the northern plateau. They have occupied the top.
 21 You can't put any more up there. And neither are any
 22 of those up there wishing to give up their real
 23 estate. Nobody is saying, okay, I'll give up my
 24 space for the TMT. Nobody is. So that cannot be a
 25 mitigation for this.

1 Another mitigation that they talk about in
 2 the CDUA, which is inaccurate, is that they say the
 3 coating of the dome with a reflective aluminum-like
 4 coating is going to reflect the sky and earth. That
 5 is so inaccurate. Like whoever checked this?
 6 Anybody ever check that? I know those who have been
 7 on the mountain, they can tell you that's not so,
 8 because the dome shape of the proposed telescope does
 9 not reflect the sky and it does not reflect the
 10 ground. It's a science thing. What it does is it
 11 reflects light back into your eyes.

12 And so when you look in the CDUA, they're
 13 making comparisons. They're trying to compare the
 14 TMT observatories aluminum-like finish to the Subaru
 15 Observatory. The Subaru is a cylinder-shaped
 16 observatory. They should have been comparing this
 17 with the Gemini, which is dome-shaped. There's a
 18 difference. Because when you look at Subaru it
 19 doesn't reflect the light back into you, and does
 20 reflect sky because it's cylinder. TMT is a dome
 21 shape, it reflects light right back into your eyes.
 22 So aluminum light covering is not going to reflect
 23 the sky and the ground as it's being implied
 24 inaccurately in the TMT.

25 It says this in the Mauna Kea Master Plan.

1 It says that, both the master plan, as much as
2 possible, surfaces should not be -- surfaces should
3 be non-reflective in the visible spectrum to minimize
4 glare and visibility from distant areas. Reflective
5 materials are to be avoided. That's from the Master
6 Plan 2000. And yet now they're saying, no, it is
7 good, you know. So it has changed.

8 One report to the next, it's changed, but
9 whoever looked in the master plan to verify whether
10 the information is correct or not?

11 The height of the building. This is a
12 reference, since you guys have Kalanimoku Building,
13 the height of the state capital. You look at the
14 state capital at your next meeting, state capital is
15 100 feet high. The TMT is almost twice as high as
16 that. That's how big it is. That's the reference
17 point.

18 Here's the TMT. Next to the state capital,
19 it's almost twice as high, close to 190 feet. And
20 it's 200 something feet wide. Don't tell me that's
21 not significant.

22 Every time you go to your meeting, you step
23 outside, take a break and look at the state capital.
24 For those here saying it's not significant, when you
25 leave this room, walk out to the parking lot, look at

1 the state building. The state building you can put
2 four-and-a-half height on the state building, that's
3 how high the TMT. Walk outside. Put four-and-a-half
4 buildings on the state building right outside here,
5 that's how high the TMT observatory is. And the
6 width is the width of the state building, in fact
7 it's wider than the state building. That's how
8 significant it is. It is so significant we can't
9 even say how it is.

10 MR. CAIN: Five minutes.

11 MR. FLORES: So where are we at? This is
12 from their own documents. Here is the observatories
13 now. Here they want to put the TMT. There's nothing
14 there now, nothing. Is this the board at this point
15 in time who will be the ones to say yes to this.
16 Where the previous boards, how did we get to a point
17 where all the records and documents says impacts are
18 already substantial and significant on the mauna.

19 It's already stated that. So is this the
20 board in time in the history books to read that this
21 is the board that approved this? Or in the book of
22 the universe at some time, at this point in time say
23 this is not significant. It is.

24 There's nothing there on the northern
25 plateau. The mauna is still sacred. And there's

1 those guardians of the mountain have shared with us,
2 life forces and energies come to the mountain and
3 energies also leave the top of the mauna. It's a
4 piko just like the piko on top of your head.

5 Already significant disturbances have
6 occurred on top to of the mountain. But they say
7 this is one too much. Due to size and the scale,
8 it's one too much. It's going to push everything off
9 balance, out of harmony.

10 And the only thing that nature can do and
11 the guardians can do is protect themselves.

12 And whether it's shaking of the mountain,
13 or whether Tutu Pele coming down here, they're not
14 there -- those are in the mountains are there to
15 protect and keep things in balance, but this is going
16 to push things way off balance more than it has done
17 already.

18 So in concluding, I'll give my written
19 testimony afterwards as a copy, but also like to
20 mention that the Office of Hawaiian Affairs in
21 regards to this contested case, Office of Hawaiian
22 Board of Trustees passed the following resolution on
23 January 3rd, 2013 that states:

24 Resolution urging the Board of Land and
25 Natural Resources to exercise the highest possible

1 level of stewardship and to afford the strongest
2 consideration to the rights and practices of Native
3 Hawaiians and sacred sites affected by proposed
4 developments, including those on Mauna Kea, in the
5 Conservation District use Application process.

6 In closing, there's so much to go through
7 in this time, I can only point out a few of it, but
8 if you want to see the rest of it, read the
9 Petitioners' responses, read the Petitioners'
10 Findings of Facts. If you want to find out more what
11 the mountain has said to us, read our testimony, it's
12 in our testimony.

13 And I'm not sure as a board member you had
14 a chance to read through everything, but if you want
15 to more what they say on the mountain and who's on
16 the mountain, read our testimony that was previously
17 submitted.

18 Other than that we just want to say, we say
19 our Mauna Wakea is our piko, our piko is still
20 sacred. Have we as humanity -- sacredness of the
21 land, our connection to the land, sacredness of all
22 things. There is sacredness within each of us, that
23 is what the mauna told us and shared with us,
24 sacredness within each of us.

25 Now, this project is so huge, it's so big,

1 18 stories, the University couldn't even put this
2 building up on the campus, it's so huge. They
3 couldn't even build it on Kauai. Coconut height
level wouldn't even allow them to build, couldn't
build it in the County of Maui.

6 Our county has a code where 90 feet in a
7 commercial and resort areas is a height limit, except
8 for Hilo, there's few places got 120 feet.

9 Now, why does the county have these
10 protections to protect the open space and natural
11 beauty cut off at 120 feet, and actually 90 the rest
12 of the island? How can we allow three times more on
13 the mauna, 18 stories. Can't even build this here
14 down below that. How can that justify putting it on
15 top of the mountain? Couldn't build even it on
16 Kauai, couldn't even build it on Maui, County of
17 Maui. Why this time we saying, okay, it's all right,
18 you can build it on top of the mountain, the most
19 sacred point. But we don't want to put it on Mt.
20 Fuji, because there is a connection to Mt. Fuji, and
21 those whose ancestors who came here from Japan, if
22 you were to take this project to Japan, they will be
23 deeply offended. Those from California, if we were
24 to take this project to build on Mt. Shasta, the
25 native people there, all the people will be deeply

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1 offended to bring such a project. But why are we at
2 this point?

3 CHAIRMAN AILA: Ask you to summarize.

4 MR. FLORES: So at this point in time we
5 just want to say that we want to conclude by saying
6 everything we touch is sacred. We are all sacredness
7 within us. And no matter if you're for the project
8 or not for the project, we all connected. And we
9 want to say aloha to all of those no matter what
10 position you take. And at this time we would just
11 conclude by saying that we would like to have those
12 things submitted today, whether it's oral arguments
13 or anything else, to be included as part of the
14 contested case hearing process as part of our
15 exceptions. And we would open it up if there's any
16 questions from the board.

17 CHAIRMAN AILA: Thank you. Any questions?

18 I have a question, but if you will allow me
19 to ask the question, a question of Pua. Aloha, Pua.

20 MS. CASE: Aloha.

21 CHAIRMAN AILA: My question is: Should
22 this be allowed to go forward, would you stop going
23 to the mountain?

24 MS. CASE: I will never -- that's a fair
25 question.

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1 CHAIRMAN AILA: I'm doing my job.

2 MS. CASE: That's a fair question.

3 (Interruption.)

4 CHAIRMAN AILA: It's her turn. You're
5 taking time away from them.

6 MR. ABLE: I'm sorry.

7 CHAIRMAN AILA: I think you should
8 apologize to her. Don't apologize to me. Not me.

9 MS. CASE: I will never stop going to the
10 mountain, but that is different from saying what I
11 will have to do when I go up to the mountain. I
12 cannot just chant those chants of reverence when I
13 get up there.

14 I'm going to have to be bowing down to ask
15 forgiveness every single time I get to the top. I'm
16 going to be eha that every time because I failed,
17 because I failed Mo'oinanea and I failed Poli'ahu and
18 all the rest, but I would never allow anyone or
19 anything to stop me from doing what I need to do to
20 pass onto my girls, which is our traditions, which is
21 our language, which is everything about sacredness.
22 But would it change everything? You better believe
23 it.

24 I'm going to have to make my peace, mihi,
25 my forgiveness, not one time, every time. And more

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1 than that, I'm going to have to look at all these
2 kids in here who's going to be looking at that
3 building from their campus every day. And when I'm
4 teaching them oli and hula and saying Mauna a Wakea,
5 how we going to do that knowing that in our time at
6 this time in our awareness and consciousness that
7 somehow we didn't say enough. Somehow we didn't
8 touch your heart enough. Somehow, because I know the
9 facts here, I know we present that, but somehow we
10 didn't reach you.

11 And I don't want you to have to answer for
12 it either. I don't want you to go down in the books
13 or not at all. As you are the ones who said yes, go
14 build that monstrosity up there. I don't wish that
15 for you, so my heart is full of compassion more for
16 you today than for me, because I know it's difficult.
17 I know it is.

18 Thank you for asking me the question and I
19 hope I've answered it.

20 CHAIRMAN AILA: Thank you.

21 MEMBER EDLAO: When you go up to the
22 mountain, you say you go up every month?

23 MS. CASE: Yes.

24 MEMBER EDLAO: When you go up there, do you
25 go as family or as a group of people?

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1 MS. CASE: It all depends. Sometimes my
2 own family needs to go up because we are there to
3 strengthen. We are there to connect personally as a
4 family.

5 Sometimes we receive a message in the pule
6 that we must go up there because there is something
7 happening and we must make a connection. And we must
8 pray maybe to Japan that day or maybe all the way
9 around the world.

10 MEMBER EDLAO: So it could be more than
11 once a month that you go up there?

12 MS. CASE: It could be every day, or it
13 could be once a month, but it's never less.

14 MEMBER EDLAO: Thank you.

15 MS. RIOS: Ask me what I see. Please ask
16 me what I see.

17 CHAIRMAN AILA: What do you see?

18 MS. RIOS: I have come into this earth as a
19 seer. I see the spirit world and I hear them, and
20 they speak to me. And I don't care if you think that
21 I'm crazy, I'm kanaka maoli, that is in our history,
22 that is in our chants, our dances. I see them. I
23 see the star beings up there that reside in this
24 space, the space of the proposed TMT. They are the
25 star beings of the highest council.

1 Petitioners and probably the Applicant as well, and I
2 really want the BLNR in a broader way to take back
3 and take to heart how hard this process is on people.
4 All of the Petitioners are volunteers. All of them
5 have personally put up their own money to participate
6 in this contested case hearing, and for this process
7 to take two years, even more from the February
8 hearing in 2010 is unacceptable.

9 Because it's taken so long, I feel it's
10 important to remind you why we're here. We are here
11 today because the University has failed to fulfill
12 its obligation to protect the Conservation District
13 of Mauna Kea for many decades. The eight criteria of
14 the Conservation District rules direct the board to
15 put the natural resources of the Conservation
16 District at the center of its decision-making. When
17 we focus on the resources, and when we make decisions
18 in their best interest, then the intent of the
19 Conservation District rules will be satisfied and our
20 natural resources will actually thrive.

21 As it is, the University and past boards
22 have put the interest of the developers at the center
23 of their decision-making, not the resources. And it
24 shows. The summit is 38 feet shorter than it was
25 before telescopes found it. Invasive species are

1 Those pohaku aren't just rocks, they aren't
2 just rocks. They point the voyagers in the right
3 direction. From mountain to sea, it's all connected,
4 we are all one. And they're coming out, and more
5 people are seeing and hearing. And that's something
6 that has to be put into this space, here, now. I
7 hope that you hear me, because they say that if it's
8 put up there, they will leave and all that ike, that
9 knowledge won't be passed down to us. It's in our
10 Kumulipo. I've seen that, and I hope that you can
11 see it too.

12 CHAIRMAN AILA: Thank you. Mahalo. Marti.

13 ORAL ARGUMENT

14 MS. TOWNSEND: Aloha, Chairman Aila,
15 Members of the Board of Natural Resources.

16 My name is Marti Townsend. I'm here on
17 behalf of Kahea, the Hawaiian Alliance.

18 It's been a long time since we saw each
19 other last. By my count it's two years since we met.
20 I can't imagine why it's taken so long, it took the
21 Hearings Officer's report a year to be released, even
22 though it's basically a copy and paste of the
23 university's proposed findings of fact. I object to
24 how long this process has taken.

25 It has really taken a toll on everyone, the

1 advancing up the mountain. And it is by focusing on
2 developer interests that the University now attempts
3 to justify expanding the industrial footprint of
4 telescopes on Mauna Kea.

5 Their argument continue to focus on the
6 seeing conditions of the mountain rather than the
7 natural resources that are identified for protection
8 in the Conservation District rules. The fact that
9 Mauna Kea has good seeing conditions for astronomy,
10 for modern astronomy, does not mandate another
11 telescope be built there. Beaches are ideal place to
12 put hotels from a developers' perspective, but that
13 does not make it a good idea.

14 The University seeks to disavow itself from
15 its history of mismanagement on Mauna Kea, the many
16 mercury spills, the harassment of Native Hawaiian
17 cultural practitioners. But the fact is, this is the
18 existing environmental aspects of the land that
19 criteria No. 5 requires to be improved upon. The
20 existing conditions of the resources on Mauna Kea are
21 the direct result of the industrialization caused by
22 telescopes on the mountain. And the telescopes on
23 the mountain are the direct result of the
24 university's advocacy, the facilitation of
25 development of Mauna Kea Conservation District.

1 The University is the primary advocate for
 2 every single telescope on Mauna Kea. It cannot now
 3 stand before the board and say they will not be
 4 responsible for the harm caused by their past
 5 actions. The University has an obligation to improve
 6 upon the existing resources of Mauna Kea because it
 7 facilitated the current damage that is suffered by
 8 the resources, and because the rules mandate
 9 applicants improve upon the natural environment in
 10 which they are building it.

11 Now, the University would have you believe
 12 that that's an absurd interpretation, can never build
 13 in the Conservation District. That's not true. In
 14 this situation to comply with Criteria No. 5 would
 15 mean fully restoring two current telescope sites
 16 before considering the proposal before a new one.

17 As it is, the University makes empty
 18 promises to decommission telescopes in the future.
 19 Not only does the decommissioning plan not guarantee
 20 that a site will be fully restored to its natural
 21 condition, it's not part of this permit application.
 22 There's no way for you to actually enforce that and
 23 make sure it happens.

24 The University is promising to you now,
 25 please, give us this permit to build, and some day in
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1 the distant future we will consider decommissioning,
 2 we promise
 3 You have to ask yourself what is inside the
 4 current application. What did they actually apply
 5 for when they applied to build? They did not apply
 6 to decommission, to restore anything on the mountain.

7 Instead of improving upon the natural
 8 environment and ensuring that the project would not
 9 have additional substantial adverse impact on the
 10 mountain, the University relies heavily on it's
 11 Comprehensive Management Plan. It's a great title,
 12 Comprehensive Management Plan, but what you know what
 13 they say about covers. Shall looking deeper into the
 14 CMP reviews they actually -- it is more accurately
 15 described as an assessment plan, a plan for
 16 conducting future studies.

17 For example, the Comprehensive Management
 18 Plan has 103 action items, of those 36 were deemed
 19 directly applicable to the TMT. Of those 36, 14 are
 20 planning and monitoring, along the lines of study
 21 methods of the invasive species as opposed to
 22 actually stopping the spread of invasive species.

23 Educate people about the historic cultural
 24 and natural resources as opposed to actually
 25 protecting them. Encourage observatories to

1 investigate options to reduce the use of hazardous
 2 materials in telescope operations as opposed to
 3 actually stopping the use of hazardous materials on
 4 Mauna Kea.

5 The only real actions that were identified
 6 in the TMT Management Plan were things like prevent
 7 light pollution which serves the TMT's interest.
 8 Follow the law -- interesting they can't even do
 9 that. These are nice first steps. I don't want to
 10 put down the fact that we are going to educate people
 11 about the resources of Mauna Kea or that we're going
 12 to try and figure out, think about how we cannot use
 13 hazardous materials, but these are first steps. This
 14 falls far short from offsetting the harm currently
 15 suffered on Mauna Kea. And it definitely does not
 16 justify building another telescope, expanding the
 17 industrial footprint on Mauna Kea.

18 Even after the University consulted with
 19 Native Hawaiian practitioners over many years,
 20 including many of the Petitioners before you today,
 21 the University did not adopt any of their substantial
 22 recommendations. The comments in Management Plan
 23 sets no limits on the number of telescopes that could
 24 be built on Mauna Kea.

25 What's worse, is the University, instead of
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1 focusing on restoring natural environment, is focused
 2 in this hearing on disqualifying some of the
 3 Petitioners as Native Hawaiian cultural
 4 practitioners. The University actually contends that
 5 the practitioners before you today did not prove that
 6 they were Native Hawaiian. How can the University
 7 contend that Uncle Ku or Auntie Pua, Kumu Paul Neves
 8 or any of the other Native Hawaiian practitioners,
 9 are not worthy of the Board's attention. These are
 10 the very practitioners cited by the DLNR in their
 11 staff recommendation and cited by the University in
 12 their own reference materials. Please do not be
 13 distracted by slippery lawyering.

14 These petitioners are Native Hawaiian.
 15 They do engage in traditional and customary
 16 practices, and should be granted the protection
 17 guaranteed to them by the state constitution.

18 I realize that all of the slippery
 19 lawyering and the long time it's taken to get to this
 20 point has really muddied the case in some ways, made
 21 it complicated, so I'm going to take a moment to try
 22 and simplify it.

23 Kahea and the university's attorneys
 24 actually agree on quite a bit. We agree that the
 25 natural resources on Mauna Kea have suffered as

1 result of telescope construction.
 2 We agree that the University has been and
 3 continues to be the primary advocate for telescope
 4 construction on Mauna Kea. We agree that the TMT
 5 would contribute to some degree to the harm to
 6 existing resources on Mauna Kea. The difference is
 7 the University contends that it should be rewarded
 8 for this and granted a permit to build a new
 9 telescope and expand that harm, while we think enough
 10 is enough already.

11 The general lease for the university's
 12 managed lands will come to an end soon. The TMT
 13 would be a significant new and permanent eyesore on
 14 the northern plateau of Mauna Kea. It is foolish to
 15 build such a massive industrial structure in an
 16 imperiled conservation area when the whole
 17 undertaking could come to an end before the TMT
 18 becomes obsolete.

19 This is substantial first impact to anyone
 20 who enjoys the view from Mauna Kea to Haleakala.
 21 Enough is enough already. Please deny the permit
 22 application for the TMT. Thank you.

23 CHAIRMAN AILA: Any questions? Thank you.

24 Next petitioner is Deborah Ward.

25 ORAL ARGUMENT

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1 MS. WARD: Aloha. For the record, my name
 2 is Deborah J. Ward. I'm a Petitioner.

3 I would like to begin by acknowledging and
 4 thanking everyone here who takes personal
 5 responsibility to preserve, protect and care for our
 6 mountain, Mauna Kea.

7 I've worked for the University for many
 8 years. I have a great deal of aloha for the
 9 University. However, my involvement in issues
 10 regarding the management of Mauna Kea began in the
 11 1970's.

12 As a recreational hiker, I've visited Mauna
 13 Kea with my father, who was a physicist and an
 14 astronomer, when one telescope, smaller than the size
 15 of a garage, stood at the summit. The vast
 16 wilderness vistas from the highest peak in the
 17 Pacific were awe-inspiring, breathtaking and serene.
 18 The sound of silence remains with me today.

19 I returned to Mauna Kea as hike leader with
 20 Lorin Gill, while working at the Honolulu Botanical
 21 Gardens. I chaired the program committee of the
 22 Conservation Council in 1983, when I invited
 23 astronomers to present their plans for discussion at
 24 a public meeting. At that point I was excited about
 25 what was going on on Mauna Kea, and I followed the

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1 development of the Mauna Kea Science Reserve Complex
 2 Development Plan in 1983 to '85 and remember the
 3 assurances regarding future compliance with
 4 administrative rules and limits on development.

5 Expanded development on Mauna Kea was a
 6 very controversial topic in the community in the
 7 1980s, and one of my kupuna was very instrumental in
 8 raising some of the issues that remain with us today,
 9 30 years later. Under pressure from Governor
 10 Ariyoshi and Mayor Kimura, the University promised
 11 the limit on the number of telescopes, a promise that
 12 it no longer honors.

13 I continue to use the trails and visit the
 14 summit of Mauna Kea during the '70s through the
 15 present for recreation, for wilderness experience,
 16 for the unfettered vistas, and the silence and the
 17 spiritual peace and the natural beauty and the
 18 cultural significance.

19 The cumulative impact of intensified
 20 industrial land use at the summit has really impacted
 21 my recreational enjoyment and spiritual practice.
 22 The cumulative impact of the destruction of habitat,
 23 the widespread waste accumulation, the obstruction of
 24 the viewplanes, the constant sound and alteration of
 25 the geology, the negative impact to the cultural

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1 practice of my colleagues is a source of personal
 2 grief.

3 The summit would be silent if there were no
 4 development, but it's not silent. The noise of the
 5 observatory, air-conditioning and blowers,
 6 generators, associated vehicles and industrial
 7 activity is present and disturbing to many
 8 recreational users who hoped for the pristine silence
 9 of wilderness.

10 The view of Mauna Kea at summit from any
 11 vantage point at my residence and from the beach at
 12 Hilo Bay and from my hiking trails on Mauna Loa are
 13 all fettered by the present of multi domes on the
 14 skyline. It's almost impossible to find a location
 15 on the Island of Hawaii where one cannot see the
 16 telescopes in ones view of Mauna Kea.

17 I believe I'm not alone in finding these
 18 visual obstructions a significant annoyance and
 19 adverse impact. I remember Mayor Kimura saying the
 20 same thing.

21 The legislative auditor in 1998, and I
 22 quote, said: DLNR has failed to define its
 23 relationship with the University, allowing the
 24 institution to oversee its own activities and not
 25 provide a mechanism to ensure compliance with lease

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1 and permit requirements.
 2 The auditor also reported that without
 3 permit conditions or controls to ensure
 4 implementation of management plans, the University
 5 was allowed to continue development without
 6 completing prior tasks outlined in management plans.
 7 In 2003 my concerns led me to join a hui of
 8 petitioners, including Sierra Club, who took part in
 9 contested case hearing and successful litigation to
 10 overturn the DLNR permit for the Keck Outrigger
 11 Telescope development due to the absence of a current
 12 comprehensive management plan to address multiple
 13 uses on Mauna Kea. We were forced to intervene in
 14 the DLNR's management of the Mauna Kea because BLNR
 15 abdicated its duty and its responsibility under the
 16 law to preserve and protect the summit.
 17 DLNR failed to comply with its own
 18 administrative rules requiring that it manage the
 19 natural resources of the conservation district
 20 pursuant to a comprehensive management plan. It
 21 actively opposed the appellants' efforts to bring
 22 DLNR into compliance with its own rules. DLNR
 23 administrative rules explicitly state that Astronomy
 24 facilities are among the uses requiring approved
 25 management plans to address cumulative land

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1 proposals. Cumulative.
 2 The DLNR staff members have claimed that
 3 the infrastructure on Mauna Kea is crumbling, and
 4 that active management of resources is constrained by
 5 lack of funds. This bolsters the argument that the
 6 petitioners have been making for years of fair market
 7 rent for use needs to be paid for use of the world's
 8 premier astronomical location to pay for adequate
 9 resource management, infrastructure upkeep, and
 10 public safety. DLNR staff's position is that the
 11 only way to fund good management is to degrade the
 12 resource in order to collect rent from the new
 13 development to pay for the management's mistake of
 14 the past. This is akin to a Ponzi Scheme; the
 15 additive insult to the resource will not reduce the
 16 cumulative impact.

17 This contested case has been conducted in
 18 order to provide information, examine the record, and
 19 demonstrate the harm this project will cause. We
 20 intend to provide the Board with a better opportunity
 21 to make an informed decision regarding the Thirty
 22 Meter Telescope application.

23 I brought my concerns to this case because,
 24 as a long-time recreational user, I have felt it was
 25 my citizen's responsibility during these years to

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1 participate in dozens of hearings and meetings to
 2 help review, plan and propose appropriate management
 3 of the natural resources associated with Mauna Kea.
 4 I have contributed hundreds, if not thousands of
 5 hours as a volunteer to this effort. Not one hour
 6 has been compensated, nor have I received any benefit
 7 from this effort, other than the knowledge that Mauna
 8 Kea deserves the care and respect, and this has been
 9 affirmed by the tremendous community support the
 10 effort has generated. The same time the University
 11 has expended millions of taxpayer funds to pay
 12 outside attorneys to represent the interests of the
 13 California-based TMT corporation and its partners.

14 If I believed that my efforts had led to
 15 appropriate management, I wouldn't be sitting here.
 16 Instead I have suffered as I have observed the
 17 cumulative industrialization of the wild panorama of
 18 the summit. My best efforts have not remedied the
 19 habitat loss, the repeated pollution accidents, the
 20 introduction of multiple alien predators and weeds,
 21 the permanent and irreversible alteration of the
 22 geologic terrain. The summit landscape, which once
 23 breathtakingly beautiful, has become more akin to a
 24 city scape, in my eyes.

25 I hike to experience the wilderness, the

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1 ecosystems and habitats for native species, the
 2 constantly changing weather, the play of light on the
 3 landscape, the serenity of silence and the revelation
 4 of the ancestral and spiritual wisdom. The steady
 5 deterioration of the natural landscape, including the
 6 intrusion of visual distractions, noise, trash,
 7 traffic, and access limitation as really had a
 8 shattering impact on my recreational experience.

9 To escape the sadness I feel when I am
 10 surrounded by the buildings and the roads, I walk
 11 long distances to find landscapes free of the visual
 12 and psychic clutter. These places include the
 13 northern plateau, and Pu'u Poli'ahu, where I can gaze
 14 at Haleakala or Pu'u Mankanaka without the industrial
 15 distractions. For this reason I maintain that the
 16 proposal to build the Thirty Meter Telescope, on the
 17 northern plateau of Mauna Kea's summit region, would
 18 further degrade, despoil and irrevocably harm my
 19 rights to a clean and healthful environment.

20 The proposition that an 18-story, five-acre
 21 industrial structure proposed to be built in a
 22 National Natural Landmark, would have no significant
 23 impact boggles the imagination. The claim that the
 24 proposal is consistent with the purpose of the
 25 conservation district simply ignores the purpose set

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1 out in the law. Conservations districts were formed
2 for the purpose of conserving, protecting and
3 preserving the important natural resources of the
4 state through appropriate management to promote their
5 long-term sustainability for the public health,
6 safety and welfare.

7 The Applicant contends that virtually any
8 telescope development they propose would be allowed
9 because the comprehensive management plan and it's
10 sub-plans provide a framework of comprehensiveness
11 and strength for managing development within the MKSR
12 - I'm quoting.

13 I strongly challenge that proposition. The
14 CMP framework describes a functional management
15 strategy, but it lacks actions to carry it out, and I
16 assert that the criteria set forth in the law have
17 not been met. Good intentions are empty promises if
18 no action is taken to carry them out. A plan must
19 actually be established, with funding for managers
20 with expertise in natural and cultural resources
21 secured. An effective plan has timelines
22 established, it has benchmarks to evaluate
23 effectiveness of outcomes. It has effective DLNR
24 oversight and consultation, and enforcement for
25 failure to act.

1 The University of Hawaii is an educational
2 institution. It's not a land management agency. The
3 University claims to have a management framework, but
4 during the 12 years that I have served on the
5 Environment Committee for UH OMKM, no natural or
6 cultural resource staff was employed to implement or
7 manage these resources. In spite of the conditions
8 set by DLNR in 1985, the plans, permits, monitoring,
9 control, and remediation efforts that should have
10 been in place for over a quarter of a century do not
11 even exist, and the UH/OMKM lacks the staff and funds
12 to carry them out. While some recommendations made
13 by citizens, scientists, and practitioners over the
14 years can be found in the CMP framework, the action
15 to implement them is absent.

16 So some of the issues that I bring to you
17 are:

18 1) Limits to development.

19 While the number of telescopes and
20 observatories already exceeds the upper limit named
21 by the University in yearly management strategies,
22 under the current management, the University has
23 proposed 12 additional telescopes during the last ten
24 years. Only one has been implemented. The Master
25 Plan 2000 and SMP do not offer a rationale for the

1 carrying capacity for the mountain, nor do they
2 provide an accurate estimate of future development
3 proposals anticipated.

4 The University would have you believe that
5 if the existing significant substantial adverse
6 impact of 20 telescopes were 20, then the addition of
7 one more telescope would be an additional increment
8 of one, thus adding only one on the impact scale, and
9 to quote from their document that "demonstrably does
10 not cause adverse impacts." By the University's
11 absurd logic, if each and every new telescope were
12 ten times larger than the one that preceded it, and
13 it were to construct 21 telescopes, the impact of the
14 last, even though one million billion times larger
15 than the first, would only be one on the impact
16 scale.

17 I show you this graph. I'm sorry I
18 constructed this last night about 11:00, but it's the
19 only way I know to show you that this is one and this
20 is 100 million billion, and this is ten times -- each
21 of these telescopes is ten times larger than the next
22 one. If that were the case, there would be more than
23 one increment of impact.

24 And the absurdity of this logic is played
25 out when one considers the scale of impact of the UH

1 Hilo 24-inch telescope, which none of the petitioners
2 objected to when it was rebuilt and reconditioned and
3 recycled. I would like to point that out because the
4 UH says we oppose all telescopes and that's not true.

5 Anyway, the absurdity of this logic is
6 played out when one considers the scale of impact of
7 the UH Hilo 24-inch telescope compared to this
8 proposed 30 meter - 1181 inch - telescope; without a
9 doubt, the compared to this proposed 30 meter - 1181
10 inch - telescope; without a doubt, the impact of a
11 telescope more than 49 times larger than the first
12 one.

13 The impact to the habitat, the geologic
14 resources, the viewplanes, recreational and
15 restorative environment is impacted to a far greater
16 extent by the addition of a massive new element in an
17 area never before irrevocably altered by human
18 forces.

19 The University's postulate that the
20 construction of a telescope larger than the footprint
21 of all the others combined would not be significant
22 in this context because the existing impact, caused
23 by its own management with DLNR oversight, was
24 negligent, is patently self-serving. It's
25 unbelievable.

1 Anyway, the destruction of habitat
2 continues with no restoration.

3 Since the University built its first
4 telescope on Mauna Kea, 92 acres of Wekiu habitat in
5 the summit area have been destroyed by telescope
6 development, but no habitat restoration has been
7 initiated, nor is restoration a condition of this
8 current proposal.

9 In spite of the Master Plan 2000 EIS
10 statements that no habitat disturbance would be
11 proposed -- no new habitat disturbance would be
12 proposed, the University's TMT EIS states that the
13 project would disturb or destroy an additional 5.6
14 acres of habitat. The mitigation efforts recommended
15 by experts hired by UH OMKM to address the habitat
16 destruction are for the most part absent from the
17 mitigation proposed by the TMT CMP. And you can read
18 them all in the draft EIS, they were not incorporated
19 into the final and they were not incorporated into
20 the CMP for the TMT.

21 So you have to wonder, why was it so
22 inconvenient that they listen to their own experts.

23 Next, there is no invasive species
24 management plan. During the 12 years since OMKM was
25 established several invasive species of plant and

1 animals have been introduced. In spite of good
2 intentions monitoring for invasive species has been
3 haphazard and the control hasn't been considered or
4 initiated. The CMP calls for development of an
5 invasive species rapid response plan in conjunction
6 with invasive species monitoring plan for specific
7 species considered the highest risks. But even these
8 plans remain on the drawing board. Just as invasive
9 species control and eradication permits for the
10 Science Reserve are not yet in place 12 years later
11 nor are they in place for the TMT.

12 During the decades of waiting for a plan,
13 several new invasive and predatory insects have been
14 established. But during the contested case OMKM
15 interim director Nagata admitted that OMKM had no
16 natural resource management staff. She said funds
17 for this purpose were not provided by the state
18 legislature. Dependence on funds to be provided by
19 our legislature during these catastrophic times
20 demonstrates the failure of DLNR to follow the law
21 requiring fair market rent for these lands. These
22 funds should be used in part through appropriate
23 management.

24 Next inadequate hazardous waste plan. Our
25 aquifer is at risk.

1 Under the current management, accidental of
2 hazardous materials and sewage continue to occur. In
3 spite of good intentions, the materials continue to
4 seep into the substrate and the aquifer. The
5 Applicant anticipates no accidents will befall the
6 TMT, and therefore assumes that protective measures
7 in place ensure there will be no significant impact.
8 These protective measures outlined in the EIS
9 actually don't currently exist, nor do they exist in
10 the Science Reserve as a whole.

11 The CMP calls for guidelines and protocols
12 calls for management of spills of hazardous waste
13 including mirror washing fluids, wastewater and fuel
14 accidents. But testimony from director Nagata
15 indicated that accidental releases within facilities
16 are managed by each observatory's individual
17 protocols. Outside the facilities, leaks from
18 vehicles might be handled by rangers overseen by the
19 Mauna Kea Support Services, but no plan was
20 identified for a larger spill, such as a truck
21 carrying barrels of fuel.

22 In its recommendations to the Board, DLNR
23 staff noted in recent experience with a toxic
24 material spill in 2009, when a hydraulic line broke,
25 releasing seven to 12 gallons of fluid onto the

1 concrete floor, leaking through a six-inch drain pipe
2 into the ground.

3 When DLNR claimed the event was handled
4 perfectly, it begs the question, why, after numerous
5 incidents of spills that have entered the ground
6 through unsealed pipes in the past, was this drain
7 pipe sealed only after the spill? Sealing the drain
8 after the spill is akin to closing the barn door
9 after the horse has left. With appropriate
10 management, drains leading to the ground would have
11 been closed years ago.

12 The next is decommissioning.

13 The University claims there will be fewer
14 telescopes when the lease expires, but planners and
15 the public are left in the dark about the details.
16 The CMP decommissioning plan leaves specifics
17 regarding the extent of site restoration undefined.
18 As a result, the costs and risks associated with
19 decommissioning are difficult to gauge.

20 The DLNR's 1977 Mauna Kea Management Plan
21 required that full funding be set aside for both
22 construction and decommissioning of permitted
23 telescopes, but no such requirement has been put in
24 place for the TMT. We learned this at the hearing
25 that funding is in place only through 2012 and that

1 amount to be set aside for decommissioning is yet to
2 be determined.

3 MR. CAIN: Twenty minutes.

4 MS. WARD: Finally, the recreational
5 resources are impacted by cumulative development.
6 The expanded industrial development of telescope
7 facilities, roads, visitor amenities, and commercial
8 tourism adds a jarring element of distraction to the
9 wilderness.

10 The northern plateau of Mauna Kea is not
11 entirely pristine, but the vast landscape, the
12 geologic terrain, the circle of shrines, and the
13 silent interaction of light and shadow, the interplay
14 of mist and snow on the plateau are still a
15 conservation resource treasured by the world. The
16 loss of this resource would be irrevocable, and is
17 counter to the laws that protect this district.

18 While the TMT project claims it will make
19 optimum use of the environmental factors associated
20 with Mauna Kea, such as the altitude, atmospheric
21 clarity, and distance from light sources,
22 unfortunately the natural resources on the earth's
23 surface are placed at risk.

24 Mitigation proposed does not address the
25 impact of the TMT.

1 The fourth criterion prohibits land uses
2 that cause substantial adverse impact. Because the
3 BLNR and University have failed to address or
4 mitigation the existing substantial adverse impact on
5 the mountain's resource, it is improper to consider
6 any new projects that would contribute more impact in
7 any way. The additive effect of additional
8 development on the significant cumulative impact is
9 not mitigated by aluminizing the dome, adding
10 cultural furnishings to the inside of the building or
11 camouflage paint on the pull boxes. Nor is offsite
12 remediation. Funding of scholarships, while
13 laudable, is not mitigation for resource destruction.

14 It is important to note that the Applicant
15 has the burden of proving that mitigation measures
16 offered would actually reduce the significant impact
17 of the TMT project proposal to a level that is less
18 than significant. The University's mitigation
19 measures fail to do this. The TMT FEIS concedes that
20 the cumulative impact of past, present and reasonably
21 foreseeable development activities are already
22 significant, substantial, and adverse impact. But
23 the TMT would contribute to this existing state of
24 impact, and there are no exceptions to the fourth
25 criterion. The fourth criterion says that this must

1 not take place.

2 The threshold of significance has already
3 been surpassed on Mauna Kea. The successive
4 recommendations by DLNR staff, and successive
5 approvals by BLNR under the deceptive assurances by
6 the University that they can be good managers have
7 led to this sorry state. The TMT project would
8 contribute to that existing impact and it cannot be
9 granted a construction permit.

10 Conservation Districts were formed for the
11 purpose of conserving, protecting, and preserving the
12 important natural resources of the state to promote
13 their long-term sustainability. While purporting to
14 do this through appropriate management, the record
15 established through this hearing demonstrates that
16 the management appropriate for this purpose is not in
17 place.

18 As Board members, it is your duty and your
19 responsibility to protect the people's resources for
20 the future. The eight criteria for permits in a
21 Conservation District are clear, and all of them must
22 be addressed. The proposal fails in this regard.
23 Please exercise your duty and deny this permit.

24 CHAIRMAN AILA: Questions? I have one
25 question. Should this permit go forward, will you

1 stop going to the mountain?

2 MS. WARD: I would not. I will tell you
3 when you asked that question of Pua, it occurred to
4 me that when the additional hotel was built on Hapuna
5 Beach and the place that I always took my children to
6 go was overlaid by a very large hotel that dominated
7 the landscape that was once a fairly beautiful place
8 at Hapuna, I don't go there any more. I've never
9 gone there again. Yes, I would go to Mauna Kea.

10 CHAIRMAN AILA: We're going to take a quick
11 break to give our reporter some rest and
12 opportunities for people to do what they need to do.

13 (Recess taken.)

14 CHAIRMAN AILA: Aloha, Clarence.

15 ORAL ARGUMENT

16 MR. CHING: Aloha. I am Kukauakahi, also
17 known as Clarence Ching.

18 To start off with, I would like to dedicate
19 the things I'm going to say today to one of our
20 lately departed brothers, Soli (phonetic). He has
21 been very supportive of all of our conduct and
22 actions on the mountain. And in fact -- maybe I
23 don't know if you guys are lucky or not that he has
24 left us, because he may really be doing more damage
25 after than was when he was here.

1 Additionally speaking, I would like to
2 publicly thank you, Bill, for some of the kokua you
3 gave to the family, and I guess -- I don't know --
4 try to keep the family out of trouble, as Soli's 's
5 usual MO would have dictated otherwise.

6 Anyway, I'm one of the petitioners here;
7 nationality - Hawaiian subject; racially and by U.S.
8 definitions, a native Hawaiian; and by conduct,
9 cultural identity and for this Contested Case Hearing
10 CCH - a native Hawaiian cultural practitioner. All
11 petitioners here, including those who claimed to be
12 Hawaiian cultural practitioners, were held to be
13 admitted as parties, having qualified for standing,
14 by Minute Order No. 6, Order Regarding Standing, on
15 May 27, 2011.

16 Furthermore, according to his Findings of
17 Facts, it seems that the Hearings Officer used some
18 kind of qualified standing, regular standing plus an
19 additional standing qualification in regards to
20 constitutionally protected native Hawaiian cultural
21 practice.

22 The HO failed to provide prior notice of
23 his intentions and failed to include such standards
24 for qualification in Minute Order No. 1, the Notice
25 of Standing and Prehearing Conference, dated April
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1 10, 2011, or anywhere else. Such error cannot be
2 tolerated in retrospect, there is no discussion
3 anywhere in the record or HO's Finding of Facts,
4 Conclusions of Law, or Decision that outlines the
5 specific standards that the HO would use to evaluate
6 a cultural practitioner's qualifications under the
7 umbrella of Constitutionally-guaranteed protections.
8 The HO further erred by modifying the standards of
9 proof for civil cases by using Hanapi criminal
10 standards for qualification.

11 To be held to standards that don't exist or
12 noticed but must, in the least, be in violation of
13 petitioners' due process. Additionally, Petitioners
14 Anaina Hou and Clarence Kukauakahi Ching were
15 Petitioners in the contested case hearing on the
16 Conservation District Use Application for the
17 construction and operation of six 1.8-Meter Outrigger
18 Telescopes.

19 In that CCH, whether or not these
20 Petitioners were qualified as native Hawaiian
21 cultural practitioners was at issue. The HO, in the
22 CCH, after a hearing, found and concluded that these
23 Petitioners were qualified for standing with
24 constitutionally-guaranteed protections as native
25 Hawaiian cultural practitioners. This Board

1 confirmed that these Petitioners qualified for
2 standing, and so did the Third Circuit Court that
3 heard the Appeal.

4 Based on the qualification of said
5 Petitioners in that CCH and Appeal, it is res
6 judicata and the HO is estopped to re-challenge said
7 Petitioners for standing in this CCH. It is
8 especially absurd when the finding and conclusion
9 here is 180 degrees out of kilter, a denial of such
10 protection. The law does not favor such
11 inconsistency and uncertainty, and the HO erred.

12 Mary Pukui, in Nana I Ke Kumu - Look to the
13 Source Vol. 1, Page 94, says that in Hawai'i's early
14 days, one's name was one of one's most precious
15 possessions. And one's inoa (name) was both owned
16 property and a kind of force in its own right. Once
17 spoken, an inoa took on an existence, invisible,
18 intangible, a kapu (taboo) becoming attached to the
19 name.

20 An example of this phenomenon in real time
21 occurred when Applicant's witness, Wallace Ishibashi,
22 in his cross-examination 9.17.11 transcript on Page
23 105, was on the stand. He was asked a question about
24 his family's 'aumakua relative to Mauna Kea. His
25 response was: Well, we take it as, again, every

1 family has their own secret in how they do their
2 thing, but yeah, on Poli'ahu, which we recognize as
3 the location of where we have an 'aumakua. But I
4 reserve the right to keep that in the family.

5 As for me, in addition to my hesitancy in
6 revealing the actual names of my familial relations
7 that would/could meet the Hanapi Prong 2 test
8 reveals, at its very foundations, a deep-rooted
9 conflict between the courts of the so-called State of
10 Hawai'i and the long-standing practice and conduct of
11 Hawaiian practitioners in legal settings than to
12 unreasonably discriminate against their cultural
13 philosophies and conduct, and that is they don't talk
14 about their genealogies, to refuse to remedy the
15 situation by insisting on the use of Hanapi Prong 2,
16 among other things, may constitute a violation of due
17 process and civil rights of native Hawaiian cultural
18 practitioners on mauna Kea.

19 The native Hawaiian cultural practitioners
20 here, addition to verbal and written statements
21 they've made or referred to, have, in addition, upon
22 oath, stated that they as individuals are native
23 Hawaiian cultural practitioners. How redundant must
24 BLNR and the HO be then, in the face of a cultural
25 and/or familial kapu to not reveal such personal and

1 sensitive information, to insist on requiring
2 additional, specific information? To insist on more
3 specific genealogical information would be to
4 improperly discriminate against Hawaiians as cultural
5 practitioners. Do Christians have to swear their
6 genealogies upon oath in order to practice their
7 religion? This illogical conclusion, among other
8 things, seems to be a violation of the Equal
9 Protection Clause of Constitutions.

10 Let me state on the record for yet another
11 time, that I qualify as the Hanapi Prong 2 standard.
12 This (indicating) is one of my genealogical lines.
13 Interestingly, some of the names on here, that I
14 choose not to reveal on this record, are names that
15 are also on Chairman Aila's genealogy.

16 This really turns out to be one of the more
17 gravid issues in this CCH, and I would exhort you to
18 pay serious attention to its resolution, as it will
19 be referred to later in this presentation. After
20 all, the question should really be whether
21 Petitioners are native Hawaiian cultural
22 practitioners and not necessarily who their specific
23 ancestors are, or when they lived. It should be
24 sufficient to simply state under oath that one is a
25 qualified native Hawaiian cultural practitioner.

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1 Facetiously, should the State start issuing licenses
2 to those who may qualify as native Hawaiian cultural
3 practitioners? I don't think so.

4 For the HO and BLNR to insist on such a
5 rigid requirement as Hanapi Prong 2 and try to coerce
6 native Hawaiian cultural practitioners here into
7 violation their family kapu with such requirements is
8 preposterous.

9 But getting back to the CDUA.

10 Because TMT Observatory Corporation is the
11 party that requires a permit to build the gigantic
12 18-story telescope, one would expect it to also be
13 the party to submit the CDUA to BLNR, right? Wrong.
14 The Applicant is UH Hilo. The CDUA does not contain
15 a single signature of any authorized TMT person. As
16 an additional point of interest, while one would
17 expect the TMT Corp to be the party opposing the
18 Petitioners in the Contested Case Hearing, as you
19 already know, again, it is not TMT Corp, but UH Hilo.

20 Of course, with UH Hilo as the Applicant,
21 one would then naturally assume that a legal
22 relationship exists between it and TMT Observatory
23 Corporation, right? Wrong again.

24 There is no Operating Agreement between the
25 two. So how can UH Hilo legally submit an

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1 application for a third-party performer that it has
2 no legal relationship with, such party being
3 responsible for completing the proposed project?

4 In a sane, logical and legal world, the
5 existence of such an agreement would be fundamental,
6 expected and required, if only to delineate the
7 rights and obligations of the parties involved.

8 The involvement of UH Hilo in the
9 application process seems to be as a volunteer,
10 facilitator or initiator, with no legal relationship
11 with the party that's supposed to perform all the
12 obligations that would be included with the granting
13 of a permit, if indeed, one is finalized.

14 Additionally, UH Hilo, as an entity of the University
15 of Hawai'i, holder of the General Lease for Mauna
16 Kea, may have a conflict of interest in all of these
17 dealings.

18 Furthermore, that the actual party in the
19 interest, the hopefully responsible party that will
20 raised the funds, submit the designs, comply with all
21 the laws, rules and regulations, and build the
22 building and its instrumental contents, is a
23 corporation without a corporate history, corporate
24 success, corporate assets, et cetera, should raise an
25 entire battery of questions.

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1 What is the TMT Observatory Corporation's
2 corporate credibility and creditability. Not one
3 single iota of this necessary information is in
4 evidence. No one of consequence, including BLNR, is
5 asking questions about them. So while there is a
6 privity, a legal relationship between BLNR and UH
7 Hilo, because of the CDUA, there is no privity
8 between UH Hilo and TMT. Therefore, there is no
9 legal relationship between BLNR and TMT, and except
10 for the granting of the CDUP with its conditions, no
11 conduit through which legal communications and
12 relations can take place.

13 It continues to be interesting that so far
14 the legal and other expenses for the TMT are over one
15 million dollars and rising. Of course, the
16 beneficiary of whatever benefits should accrue, TMT
17 is picking up the tab, right? Wrong again. It's the
18 University of Hawaii and you the taxpayer who are
19 footing the bill.

20 Furthermore, one would expect the TMT Corp,
21 the performer, would be responsible to produce a
22 necessary EIS. Well, not so. It was UH Hilo's
23 attorneys who hired the firm during the EIS, and I
24 suppose that whoever does the hiring also pays for
25 the service. But remember, there is no Operating

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1 Agreement, so how could there be an arrangement?
 2 I'm afraid that again the taxpayer is
 3 footing the bill. Credit must be given to the TMT
 4 Corp personnel who creatively engineered this
 5 business plan, to get these multi-million dollar
 6 benefits and not have to pay for them. There doesn't
 7 seem to be any provision for a subsequent payback
 8 either, as there is no agreement that specifies the
 9 situation.

10 Heck, further examination reveals that TMT
 11 doesn't even have a sublease upon which it could
 12 build the telescope that UH Hilo is applying for it
 13 to build. And as a consequence of this situation,
 14 the rent that BLNR should be evaluating for adequacy
 15 and compliance is nowhere in sight. Will the amount
 16 of rent, when it eventually appears, satisfy the
 17 recommendations of BLNR relative to the CDUA that
 18 states that TMT remains committed to paying a
 19 substantial amount for sublease rent?

20 More so, we also need to be reminded that
 21 the individual shareholders, members, or whatever the
 22 constituents of this TMT Corporation are normally, by
 23 law, not liable for the liabilities of the
 24 corporation. In other words, not even the sovereign
 25 nation states involved are liable for payment.

1 Benefits with no liabilities. Who said there is no
 2 free lunch?

3 While it is a common, if not a necessary,
 4 practice that corporations without a history of
 5 success and inadequate credit rating usually require
 6 personal guarantees in its commercial transactions to
 7 guarantee full performance for its undertakings in
 8 case of unexpected contingencies. None has been
 9 provided for or required in this situation. Is this
 10 reasonable and prudent on BLNR's part?

11 With little or no practical experience,
 12 defective decision-making becomes a real possibility.
 13 How does BLNR protect the so-called state and its
 14 beneficiaries from such contingencies? So whether it
 15 is the Applicant in this case, UH Hilo, or the
 16 builder-operator, TMT Observatory Corp., BLNR should
 17 require that one or both of them provide
 18 guarantee/surety of such proportion to secure and/or
 19 insure that, once started, this project will go to
 20 full completion.

21 20% of the fees collected by the Mauna Kea
 22 Lands Special Fund, HRS 304A-2170, are being set
 23 aside for payment to the Office of Hawaiian Affairs.
 24 Precedent has been set. It is suggested that this
 25 arrangement be further documented in any CDUP that

1 may be granted.

2 While existing telescopes provide viewing
 3 time to UH, in lieu of rent, no proportion of
 4 equivalent value have ever been shared with the
 5 Office of Hawaiian Affairs for its 20% share of all
 6 rental proceeds as far as I know.

7 The proposed CDUP, among other things, does
 8 not mention viewing time in any of its discussions.
 9 Not only should the subject of viewing time be
 10 included in the CDUP, but that 20% of equivalent
 11 value for viewing time to be shared with OHA should
 12 be mandated.

13 Curiously, TMT will color the pavement of
 14 the accessway roadway, the roadway to the
 15 observatory, to blend with the surroundings. Yet it
 16 insists, and the HO has gone along with the
 17 suggestion, that the coating of the dome will be a
 18 reflective aluminum-like coating which will reflect
 19 the sky during the day, reducing visibility.

20 To claim that a reflective aluminum-like
 21 coating reflects the blue colors of the sky seems to
 22 be a figment of somebody's PR myth, surely not
 23 reality.

24 In my observation, other aluminized domes
 25 presently on Mauna Kea have always reflected the

1 glare of the sun, but never a blue sky. If the
 2 roadway and supporting buildings are colored to blend
 3 with the surroundings, then I would suggest, even
 4 require, to maintain consistency of argument that the
 5 dome be colored likewise. After all, my view of an
 6 eventual TMT observatory, if should be built, will be
 7 from Waimea, and the dome, colored like its
 8 surroundings, will be more tolerable if blended
 9 rather than glaring.

10 Relative to spatial relationships on Mauna
 11 Kea, the University moves its different physical
 12 orientations, either from being close to the other
 13 observatories of the summit area, or at a great
 14 distance from them, depending on the advantages or
 15 disadvantages of the issue it is addressing.

16 For example, regarding Section
 17 13-5-30(c)(5) Hawaii Administrative Rules that
 18 states: The proposed land use shall be compatible
 19 with the locality and surrounding areas, appropriate
 20 to the physical conditions and capabilities of the
 21 specific parcel or parcels. It is so understandable
 22 that the University would take a close-in perspective
 23 for this one, that the proposed TMT observatory would
 24 be compatible with the locality and surrounding areas
 25 of the other observatories, although the actual

1 proposed TMT observatory location is over a quarter
2 mile away, except for the Submillimeter Array, from
3 the nearest other observatory. A quick glance at a
4 map clearly shows how remote the proposed TMT
5 observatory is from the cluster of summit
6 observatories.

7 On the other hand, it is undisputed,
8 Paragraph 91 of HO's Conclusions of Law, that
9 cumulative effects of astronomical development and
10 other uses in the summit area of Mauna Kea have
11 previously resulted in significant and adverse
12 impacts. The trick here is to locate the TMT
13 observatory as far away from the summit area as
14 possible so as to argue that TMT observatory impacts
15 will be minimally cumulative to the significant and
16 adverse impacts undisputedly having already tainted
17 the summit area. Either the TMT observatory is near
18 the summit cluster of observatories or isn't. It
19 cannot be close for some arguments and far for
20 others. After all, one of the laws of physics is
21 that a thing cannot be in two different places at the
22 same time.

23 Pu'u Poli'ahu is the major physical feature
24 on the west side of the Mauna Kea summit area. I can
25 attest to the height of the pu'u because it is a

1 challenging height to the top of its summit. Well,
2 the sheer size of the proposed TMT, for a man-made
3 object, being approximately 1/3 Pu'u Poli'ahu's
4 height, is monstrous.

5 Moreover, how can the addition of the
6 proposed TMT observatory, with spatial dimensions,
7 width, length and height, practically dwarfing the
8 total of other observatories on Mauna Kea, already
9 declared to constitute significant and adverse
10 impacts, not cumulatively add additional significant
11 and adverse impacts, and not violate the threshold of
12 being significant and adverse, as the HO suggests?
13 While mental hocus-pocus, along with alchemy and
14 witchcraft, might have attained credibility in the
15 Dark Ages my modern mind tells me that one cannot
16 subtract or mitigate by adding.

17 The summit area of Mauna Kea is
18 substantially developed. That it occurs in the
19 Conservation Zone is as mythical as the existence of
20 unicorns. The Conservation Zone in the summit area
21 has been totally decharacterized by observatories.

22 It is so totally developed that there is no room on
23 it to build a gargantuan facility such as the 30
24 Meter Telescope. The character of the summit of
25 Mauna Kea would not be further developed even if the

1 heart of Waikiki were to be transported to the
2 mountain, but such development is, is not, allowed in
3 a Conservation District and therefore is not allowed
4 atop mauna Kea.

5 That there are no guidelines regarding
6 development limits on the mountain is a travesty. It
7 was a major oversight to not have been included in
8 the Comprehensive Management Plan. Moreover, that
9 the negative impact on the mountain is characterized
10 by the number of telescopes on the mountain and not
11 by their sizes and heights, the actual impact of
12 their existence seems to be a fallacy. After all, 10
13 TMT-sized observatories would have a mega impact on
14 the mountain when compared to ten 12-inch sized
15 telescopes. In each case, there being ten of them.
16 But the actual impact of a telescope is, I would
17 guess, more proportional to the cube of its primary
18 lens radius than by its unitized number.

19 To shift gears a bit, let me suggest that
20 CDUP process does not comply with the United Nations
21 Declaration on the Rights of Indigenous Peoples,
22 UNDRIP. Although President Obama and the United
23 States had initially opposed signing the Declaration.
24 On December 16, 2010, at his second Tribal Nations
25 Conference, the president reversed his earlier

1 decision and stated that he would sign.

2 Indeed, a query to the White House about
3 how the declaration would be implemented was referred
4 to the State Department Spokeswoman Tiffany Miller
5 responded by e-mail that there is no simple answer:
6 As you know, the declaration has implications for
7 many agencies across the U.S> government, she said.
8 However, I can tell you that the Obama administration
9 is committed to making U.S. support of the
10 declaration meaningful. Citing Article 32 of UNDRIP,
11 I conclude that this CDUA process is non-compliant
12 with the article, Article 32.

13 1. Indigenous peoples have the right to
14 determine and develop priorities and strategies for
15 the development or use of their lands and territories
16 and other resources.

17 2. States shall consult and cooperate in
18 good faith with the indigenous peoples concerned
19 through their own representative institutions in
20 order to obtain their free and informed consent prior
21 to the approval of any project affecting their lands
22 or territories and other resources, particularly in
23 connection with the development, utilization or
24 exploitation of mineral, water or other resources.

25 3. States shall provide effective

1 mechanisms for just and fair redress for any such
2 activities, and appropriate measures shall be taken
3 to mitigate adverse environmental, economic, social,
4 cultural or spiritual impact.

5 While I have no knowledge if UNDRIP has
6 been an issue of any appeal in the so-called State of
7 Hawai'i yet, I suggest that this Board start thinking
8 about the day that it will. In fact, I'll even
9 suggest that the Board start paying attention
10 starting with this contested case hearing. The day
11 of reckoning is here.

12 Amy K. Lehr, in an article entitled
13 "Looking Ahead: Indigenous Peoples and Free, Prior,
14 and Informed Consent" stated: The UNDRIP sets forth
15 the responsibility of governments to gain free,
16 prior, and informed consent from indigenous peoples
17 for development projects. It has already been cited
18 in national court cases, particularly in Latin
19 America, as support for the requirement that
20 governments seek free, prior, informed consent from
21 indigenous peoples and cease giving concessions to
22 companies until consent is obtained. Thus, although
23 the UNDRIP addresses governments, it will directly
24 impact companies and the University in this case.

25 UNDRIP, coupled with the Hawaiian Kingdom's
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1 Instrument of Accession that was filed with the
2 United Nations Secretary-General on December 10, 2012
3 in New York City that invokes the jurisdiction of the
4 International Criminal Court over Hawaiian territory
5 beginning on March 4, 3023, gives notice that a new
6 paradigm is taking place in Hawai'i.

7 The ICC prosecutes individuals and not
8 states for war crimes committed within occupied
9 territories. Only states can accede to the
10 jurisdiction of the ICC, and that Hawai'i achieved
11 the international recognition of its statehood on
12 November 28, 1843, by joint proclamation of Great
13 Britain and France and entered into extensive
14 diplomatic relations and treaties with other states.

15 The justification for the accession was
16 based on two points: First, the acting, occupying,
17 government is not able to enforce and prosecute
18 individuals for violating Hawaiian law and the law of
19 occupation taking place within Hawaiian territory;
20 and second, the U.S. Pacific Command, the Occupier,
21 has refused to hold to account individuals for
22 committing war crimes that have been reported since
23 July 6, 2012.

24 According to the United Nations War Crimes
25 Commission, war crimes, include: Usurpation of

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1 sovereignty during occupation; Denationalizing the
2 inhabitants of occupied territory; Confiscation of
3 property: Wanton devastation and destruction of
4 religious, charitable, educational and historical
5 buildings and monuments, etc.

6 So please take notice that these
7 developments may eventually apply to you. In
8 conclusion, I exhort you to examine Petitioners'
9 arguments on the merits and deny the CDUP. And while
10 you're at it, you should reverse the HO's erred
11 findings, conclusions and decision that the native
12 Hawaiian Petitioners here are denied standing for
13 constitutional protections of all rights, customarily
14 and traditionally exercised for subsistence, cultural
15 and religious purposes and possessed of ahupua'a
16 tenants who are descendants of native Hawaiians who
17 inhabited the Hawaiian Islands prior to 1778. I
18 think this (indicating) goes back further than 1778,
19 about 90 generations.

20 I thank you. About ninety generations on
21 here. I thank you.

22 CHAIRMAN AILA: Any questions? I'm going
23 to ask the question I've asked almost everyone else.

24 Should the decision stand and go forth,
25 will you stop going to Mauna Kea?

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1 MR. CHING: I think that's a very good
2 question. But the answer I believe cannot just be
3 yes or no. However, I will go as far as to say I
4 will not stop going to the mountain. However, as Pua
5 Case said earlier, every time she goes to the
6 mountain from now on, already and continuing that
7 there are compromises, spiritual, mental, these kinds
8 of things that we have to make in order to go up
9 there.

10 I mean, after all, these observatories are
11 not invisible. They're there. And we almost have to
12 sort of condition ourself to ignore them. But let me
13 tell you, it's very hard to ignore.

14 CHAIRMAN AILA: Thank you.

15 Next up is Mauna Kea Anaina Hou.

16 ORAL ARGUMENT

17 MS. PISCIOTTA: Aloha. My name is Kealoha
18 Pisciotta. I'm here on behalf of Mauna Kea Anaina
19 Hou and on behalf of myself, my kupuna, my ancestors.

20 Just for the record, I'm going to read from
21 my notes. In October I had a stroke. So I don't
22 need real accommodation, I don't think, but just so
23 you know, I have a hard time little bit with words
24 and things, so.

25 CHAIRPERSON AILA: Take your time.

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1 MS. PISCIOTTA: So I just want to say a
2 pule before I begin and I will close with one also,
3 as I will be speaking of the sacred.

4 Aloha Ke Akua Na Akua, Na Aumakua. We ask
5 you Akua to abide with us this day as we speak on
6 these sacred issues. Grant us permission to speak to
7 the sacredness of Mauna Kea. We ask blessings for
8 all, and those who have traveled far, may they be
9 returned safely to their loved ones. And we ask
10 forgiveness of any trespasses that may occur. Aloha
11 Ke Akua, Na Akua ame Aumakua Amama Ua Noa.

12 I will repeat that prayer when I'm done.

13 Mauna Kea is sacred, because in our
14 cosmology, our world view, Mauna Kea is an origins
15 place. It is where the heavens and earth come
16 together and where all life forms originated from.
17 It is a temple, but not one made by man, but rather
18 made for man so that man could learn the ways of the
19 heavens and the laws of the earth, and man could
20 learn how do we live in relationship with the earth
21 and how do we live in the relationship to the heavens
22 and each other. According to our oral history god
23 Kane was shows chosen by the Akua before him and made
24 him the one who brought down the baskets of knowledge
25 so that mankind could live rightly.

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1 In the Kumulipo, the chant of creation, we
2 learn before man was born, mostly all living things
3 were born before him, thus teaching us our place in
4 the world. The po, the infinite potential, the great
5 cause of all life is where we came from. We came
6 later and all those before us are our older siblings.
7 When they are under attack, we defend them.

8 And we ask that the unraveling of creation
9 not begin, because after all the science we have on
10 Mauna Kea, we don't have any science that teaches us
11 how to bring our species back from extinction. And
12 that is not our human right to have.

13 So this is what Mauna Kea represents. It
14 represents our zenith and our ties to creation
15 itself. And it is this basis that gives it its
16 power, and also that it is the sentinel of the
17 Pacific. There is no other like Mauna Kea.

18 So when we attend to do ceremony, we ascend
19 back through generation to which the po and the light
20 were given birth.

21 So before I get into the substance of the
22 issues involved, I have to digress a moment to
23 address the University's latest allegation which goes
24 something like they know that we're Hawaiian, but we
25 never proved it. And therefore, have no

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1 constitutional protection for our cultural and
2 religions practices that we execute on Mauna Kea or
3 native Hawaiian rights, in other words. I've tried
4 to think of ways to explain the fallacy of this
5 argument, without sounding terse, but I can't. So
6 this allegation is simply ridiculous and preposterous
7 and absurd.

8 I cannot believe that the University, which
9 is considered our center of higher learning, would
10 take this position. And I don't even know how to
11 respond, but I have to, so these are some of my
12 reasons why that is a fallacious argument and should
13 be struck.

14 First, the University misconstrues the law
15 by attempting to apply criminal standard to this
16 case, that is where Native Hawaiians used their
17 constitutional Hawaiian rights to launch affirmative
18 defense against criminal trespass charges. But we
19 are not criminals, and this case is not a criminal
20 case, but a civil case involving Native Hawaiian
21 traditional and customary cultural practitioners who
22 continue to practice their constitutionally protected
23 rights on public, ceded and undeveloped lands, which
24 is exactly what PASH case was all about. And exactly
25 what the court was seeking to protect against in that

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1 PASH case.

2 Further, because many of us, and that is at
3 least Mr. Neves, Mr. Ching, Ms. Ward, and I have all
4 been previously found to have standing not only by
5 this board, but by a state case and federal case,
6 more than one state case. And so the University is
7 consequently barred from challenging us at this
8 point.

9 You know, the courts can't flip-flop,
10 decisions make flip-flop decisions, so that's our
11 position.

12 So we have six other reasons in our briefs,
13 and I won't go into those here, but I would encourage
14 you to review at least our Native Hawaiian right
15 section for that area in our briefs.

16 Returning to the issue at hand before us
17 today, why we're here, why we're here before this
18 board. The short answer is we're here today because
19 BLNR said yes when they should have said no. The job
20 of any regulatory agency, including BLNR, is to
21 regulate. That means sometimes it needs to say no to
22 projects like the TMT that are inconsistent with the
23 purpose and mandate of the laws that govern the Mauna
24 Kea Conservation District.

25 But we have been coming and asking the same

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1 thing for a long, long time, years now, coming to
2 BLNR asking that they do their job which is to
3 conserve our natural resources, such as lands, and to
4 protect the Native Hawaiian and the public rights.

5 We began in the '90s by trying to have
6 input in the UH new development plans which planned
7 to exceed the legal limits of 13 telescopes on Mauna
8 Kea, and the plan agreed upon by, not only
9 University, but BLNR. An if my memory serves me
10 correctly, when we first began coming before the
11 BLNR, it was six chairpersons ago. We had Mike
12 Wilson, Gil Coloma Agaran, Peter Young, Timothy
13 Johns, Laura Theilen, and there was another one and I
14 can't remember his name -- oh, Alan Smith, and then
15 now you, Chairman Aila.

16 To find justice we have had to come before
17 BLNR in contested case hearings to compel them to
18 follow the rules, the statute and the constitution
19 that are already written. We're not asking for
20 anything new. And that failing, we went to the
21 court, went to Federal Court, Third Circuit Court,
22 Intermediate Court of Appeals. All the state courts
23 found in our favor.

24 I think it's safe to say that we have
25 fulfilled our civic duty, as Judge Hara affirmed our
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1 rights have been prejudiced because we have had to go
2 beyond our normal duty, as regular citizens, and
3 engage in these contested case hearings and the court
4 cases. So I just like to point that out.

5 We've had to go and endure all of this
6 because BLNR has acted in a political way rather than
7 as a trustee, which is proscribed in the Admission
8 Act and in contradiction of the law. BLNR is
9 empowered to care for the land and specifically not
10 mandated to be proponents of development such as the
11 TMT Corporation, and that's why we're here today.

12 The state recognizes the Conservation
13 District of Mauna Kea's importance as well because
14 they have created laws specifically protecting Mauna
15 Kea, under state law it is considered public lands
16 which are held in trust for only two beneficiaries,
17 Native Hawaiians and the general public. The state
18 is but a trustee, not the owner. The public and
19 Native Hawaiians are the owners; the state holds it
20 in trust only and has an affirmative duty to protect
21 it on behalf of the right holders, the owners who are
22 the Native Hawaiians and general public. This is
23 affirmed in the Admissions Act.

24 BLNR is mandated to conserve our land and
25 natural resources, period. So we're here because the
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1 constitution affirms that Native Hawaiians have a
2 right to continue their traditional and customary
3 rights on public lands and because the public has a
4 right to a clean and healthful environment. And BLNR
5 is required to protect that on their behalf.

6 This is not what is happening. What is
7 happening is BLNR has not chosen to protect those
8 rights that they're mandated to protect, but they're
9 here to protect the rights instead of the residents
10 of Pasadena, California, residents more specifically
11 of the corporate members of Pasadena. The rights of
12 citizens of other countries like Japan, France,
13 China, United Kingdom, instead of those where the
14 laws are there to protect.

15 We know for instance foreign citizens have
16 no land rights here, so the real question that needs
17 to be answered is what law is BLNR relying on to give
18 non-taxpayers, non-citizens, not only the right to
19 use our lands, but the right of destruction of our
20 lands? And what are you relying onto give foreigners
21 the right to pay only a dollar a year in lease rent?

22 What we do know that is BLNR has
23 non-transferable duty, that means they cannot be
24 given away to the University or anyone else, to
25 protect the public rights and reasonable exercise of
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1 traditional and customary Hawaiian cultural and
2 religious rights. That also means they cannot let
3 private entity like the TMT or University a
4 subdivision of the state that is not mandated the
5 University to perform these duties.

6 The BLNR has affirmative duty to protect
7 the people, as the Supreme Court of Hawaii has
8 repeatedly upheld. We believe the evidence has
9 demonstrated the evidence in this case demonstrates
10 TMT's project is inconsistent with the laws and
11 policy of the state. And to understand, we need
12 briefly to trace the origins of BLNR's responsibility
13 to the people of Hawaii, and that is identify exactly
14 why the BLNR has fiduciary duty. The Admissions Act,
15 the State of Hawaii Constitution and all of the
16 related statutes, rules and regulations governing the
17 conservation lands of mauna Kea.

18 Let us review. The Admissions Act is a
19 federal act, compact or agreement made between the
20 United States Congress and the people of Hawaii, thus
21 forming what is known as the State of Hawaii. And
22 regardless of the tenuous history that led up to
23 statehood, the Admissions Act clearly identifies
24 certain agreements made by America, and they take
25 precedence as they establish some of the fiduciary
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1 obligations that BLNR, as the state agency has to the
2 people.

3 The Admissions Act establishes the lands of
4 Hawaii are to be held in trust for purpose of
5 betterment of the condition of State of Hawaii and
6 general public. The state shall be the trustee.
7 Lands of Hawaii must be used in the a manner
8 consistent with Admissions Act, federal law.

9 I would like to take note that the law that
10 the came into existence in 1920 and '21 when Congress
11 made the 50 percent blood quantum requirement for
12 Hawaiian Home Lands. However, the Admissions Act
13 provide for the Hawaiians of less than 50 percent and
14 other actual subjects of the kingdom of all
15 ethnicities. Hawaiian is a political
16 identification not a racial one.

17 Now, the Mauna Kea Conservation District
18 lands are entirely comprised of those public trust
19 lands that are identified by the Admissions Act.
20 However, these lands have protection not only under
21 public trust laws, but under the Conservation and
22 Historic Preservation laws of State of Hawaii.

23 Therefore, in considering the TMT, BLNR
24 must consider how the project benefits the people of
25 Hawaii. Better the conditions of Native Hawaiians

1 and the general public, not the interest of the
2 international astronomy industry or foreign direct
3 investment to be subsidized by public lands by
4 taxpayers.

5 Now, the state constitution contains the
6 Admissions Act agreements as well, contains an
7 article, I think it's XII, sec. 7, affords the
8 protection of Native Hawaiian traditional and
9 customary rights, while Article, I think XI, Section
10 9 provides that all the people have a right to
11 conservation and clean and healthful environment.

12 So when the question arises, should it be
13 approved, we must consider their obligation. But did
14 BLNR consider it. Well when the TMT proposal came
15 before BLNR and UH, the DLNR staff report affirmed
16 the following:

17 From a cumulative perspective, the impact
18 of past and present actions on cultural,
19 archaeological and historic resources is substantial,
20 significant and adverse. These impacts would
21 continue to be substantial, significant and adverse
22 with the consideration of the TMT project, and other
23 reasonably foreseeable projects.

24 Further the former chair Laura Thielen
25 states, and I quote: It is our view that the effect

1 of astronomy development on cultural resources and on
2 the landscape of Mauna Kea has been significant and
3 adverse. While a project such as TMT can bring new
4 resources into play that may mitigate certain
5 cultural impacts and even benefit Native Hawaiians,
6 we believe that the project will increase the level
7 of impact on cultural resources, which remains to be
8 significant and adverse.

9 Therefore, what is undeniable is both BLNR
10 and the University admit, and the record demonstrates
11 that if built, the TMT would contribute to
12 significant and adverse and substantial harm to the
13 conservation resources of Mauna Kea, including
14 cultural and natural resources, which are public
15 trust resources meant to be protected. What BLNR
16 admit we need not prove.

17 The Conservation laws. The rules governing
18 the Conservation District, or in this case
19 development of yet another telescope allowed for this
20 contested case to happen. Generally the purpose of a
21 contested case hearing is to afford members of the
22 public with specific interests, legal rights, duties
23 or privileges an opportunity to present evidence,
24 examine the witnesses and so on, in order to help
25 BLNR make an informed decision. I have to note here

1 that in this case BLNR approved the TMT permit prior
2 to conducting a contested case hearing, which we
3 believe, potentially shifting the burden of proof,
4 and therefore by forcing us to have to change BLNR's
5 mind, rather than BLNR listening with an open mind.
6 A contested case hearing is not a motion for
7 reconsideration, and just as a court does not
8 conclude a case before hearing all the evidence, BLNR
9 has erred by approving this permit prior to hearing
10 all the evidence with an open mind.

11 Nevertheless, the University has rightly
12 affirmed that they as Applicant have the burden of
13 proof, and we are here today to provide evidence and
14 present witness testimony to help BLNR make an
15 informed decision now before they dispose of more
16 public lands and conservation lands belonging to the
17 people.

18 So according to the Rule 183C-1, the
19 purpose of a Conservation District is, and I quote:

20 The legislature finds that the lands within
21 the State Land Use Conservation District contain
22 important natural resources essential to the
23 preservation of the state's fragile natural ecosystem
24 and the sustainability of the state's water supply.
25 It is therefore the intent of the legislature to

1 conserve, protect and preserve the important natural
2 resources of the state through appropriate management
3 and use to promote their long-term sustainability and
4 the public health, safety and welfare.

5 The law is clear, the purpose of Mauna Kea
6 Conservation District, conservation, the purpose is
7 not development. Development can occur if and only
8 if the critical cultural natural resources are
9 conserved, protected and preserved. In order to
10 determine if BLNR meets its legal requirements and
11 obligations, they're supposed to apply a set of rules
12 called the eight criteria, and they all must be met.

13 Along with the eight rules, there is one
14 other condition, and that is the Applicant shall have
15 the burden of demonstrating that they have met all of
16 these conditions. Which also means it that it's not
17 our job to prove that impacts will occur. It's the
18 University's job to prove that they won't. So we
19 submit the evidence has shown they have not met their
20 burden under the law.

21 Number one, the TMT project does not meet
22 the first criteria. It does not meet the purpose of
23 a Conservation District. Again, they admit the
24 cumulative impact of cultural natural resources is
25 substantial, significant and adverse. Further, in
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1 order for the TMT to be built, the land will have to
2 be hoe rammed, dynamited, and bulldozed and other
3 heavy machinery used to carve up and destroy more
4 than eight acres. So we would submit it does not --
5 it is not consistent with the purpose of Conservation
6 District.

7 Second, the TMT does not meet second
8 criteria. It does not meet the purpose of the
9 subzone, because no subzone purpose can override the
10 first purpose which is conservation. While astronomy
11 is a permitted sub-use, again, it is permitted if and
12 only if no substantial adverse impact occurs in the
13 Conservation District, but the University has already
14 admitted that it will. And that it will have adverse
15 impact.

16 The TMT project does not meet the fourth
17 criteria prohibiting substantial adverse impact. The
18 evidence has demonstrated that there is not only
19 historical injury, but continued injury, and there
20 will be additional injury if the TMT is allowed to be
21 built.

22 Further, University and BLNR have already
23 admitted it will have adverse and significant impact.
24 Again, what they admit, we need not prove. The
25 threshold has been reached. There is no condition in

1 the rules that says any project can have really,
2 really bad or super, super adverse impact. The
3 threshold is adverse and significant.

4 The TMT does not meet fifth criteria,
5 because it is not compatible with the locality and
6 surrounding area. If the TMT is built, it will sit
7 right smack dab in the middle of what's called the
8 ritual landscape, or what's called the ring of
9 shrines that surround the summit cone, also known as
10 Kukahau'ula. These features are part of the historic
11 district, which contains many cultural and
12 traditional properties, which is further affirmed in
13 the cultural impact statement.

14 In fact, while the TMT -- while it's cited
15 as a mitigation measure, putting the TMT on the
16 northern plateau is not set out to reduce the impact,
17 and the TMT is so big it can't actually fit on the
18 summit.

19 So what is really happening is astronomy
20 development is now spilling off the summit onto the
21 plateau, thus increasing the intensity of the land
22 use, which I think is the seventh criteria.

23 The TMT project does not meet the sixth
24 criteria, protecting open space or natural beauty
25 because it does not preserve or improve upon the

1 natural characteristics such as the open space or the
2 natural beauty. The operative word in natural beauty
3 is natural, not industrial beauty. The operative
4 words in open space means just that, open space.
5 There's no simple way -- there is simply no way this
6 telescope can meet this criteria no matter how much
7 the University places a spin on it, and there's no
8 way an 18-foot high building, with an 8 acre
9 footprint -- it just simply cannot preserve the open
10 space, the natural beauty or improve upon them.

11 The TMT does not meet the eighth criteria
12 regarding the public health, safety and welfare,
13 which requires the project not to be materially
14 detrimental to the public health, safety and welfare
15 of the people. We heard UH witnesses testify that
16 the complex hydrology, including groundwater flows of
17 Mauna Kea are not known. We heard also that the
18 groundwater is -- Mauna Kea's groundwater are the
19 primary source of drinking water for Hawaii Island.
20 Mauna Kea sits over five aquifers and the problem
21 that we have here today is, while someone can promise
22 that they will not hurt or damage the aquifer, if it
23 is damaged we have no way to clean it up. What
24 happens if mercury spills again, diesel fuel, jet
25 fuel or any of the other hazardous materials used by

1 the conservatory spill? Who will be responsible?
 2 The government of France? The United Kingdom? The
 3 state taxpayers? So if the BLNR can't really easily
 4 answer these questions, then they should err on the
 5 side of caution and use the cautionary principle
 6 under the Public Trust Doctrine proscribed by Supreme
 7 Court. In the absence of proof, we must rely or err
 8 on the side of caution and rule on behalf of the
 9 resource.

10 Mauna Kea houses the water that the life
 11 forms rely on in Hawaii altogether. There is
 12 uncertainty. Witnesses have testified to the
 13 cultural and religious importance of the water of
 14 Mauna Kea like the snow, ice, and clean water such as
 15 those found in the lake and other pu'u for ceremony
 16 any medicinal and other religious purposes.

17 Those practices will not be able to be
 18 conducted if the water is contaminated. But let's
 19 face, if it is contaminated, we all have a problem.

20 We also heard witnesses, Dr. Kawika Liu,
 21 and Kehaulani Kauanui who testified that the
 22 University and the TMT corporation did not even
 23 consider let alone analyze the significant impacts
 24 resulting from high destructive development upon the
 25 landscape on the health and well-being of Native

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1 Hawaiian people, especially those with high cultural
 2 affiliations, such as cultural practitioners.

3 Cultural practices will be impacted. In
 4 this case the actual injuries are cumulative,
 5 historic and immediate.

6 Cumulative impact was previously defined in
 7 our other court case which was our federal court
 8 where Judge Mollway defined it and she stated:

9 Cumulative impact is defined as the impact
 10 on the environment which results from the incremental
 11 impact of the action when added to other past,
 12 present and reasonably foreseeable future actions
 13 regardless of what agency, federal or non-federal, or
 14 person undertakes such actions. Cumulative impacts
 15 can result from other individually minor but
 16 collectively significant actions taking place over a
 17 period of time.

18 MR. CAIN: Five minutes.

19 MS. PISCIOTTA: She also stated that NASA's
 20 cumulative impacts section, which takes up only three
 21 pages in the 125-page EA, does not include an
 22 appropriate analysis, and finds further however, that
 23 not only the effects of construction of a particular
 24 project that should be taken into account, but rather
 25 the effects of any action as a whole. For instance,

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1 there is evidence in the record that the physical
 2 appearance of the Mauna Kea summit, or the view
 3 scape, is of cultural and religious significance to
 4 Native Hawaiians and that the placement of the
 5 telescopes has an adverse effect on the view scape.
 6 Therefore, the effects of development at the summit
 7 would obviously last beyond construction.

8 Now, when we practice on Mauna Kea we don't
 9 only go to the summit as the University would have
 10 everyone believe, practices are dependent on the
 11 reason for the ceremony being conducted and the
 12 hundreds of cultural and historic shrines placed
 13 around the summit region demonstrate practice is
 14 widespread.

15 Viewplanes, view scapes are public trust
 16 resources. The TMT being placed in the middle of the
 17 ring of shrines that contains hundreds of these sites
 18 will totally impact our practice. For example, from
 19 the ground level south to north, if you're standing
 20 on the ground level looking south, the TMT on the
 21 plateau from any of those ahu's or cultural sites
 22 down below, your view of Haleakala and the other
 23 viewplanes will be impacted, just by the sheer height
 24 of TMT.

25 If you're standing at ground level on the
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1 east side we will not be able to see or observe the
 2 motion of the western stars and constellations
 3 without direct interference from the height of the
 4 TMT.

5 And if you're standing on the ground level
 6 on the west side, at any of the sites, you will not
 7 be able to see or observe the motion of the eastern
 8 stars or constellations because it would be directly
 9 interfered with by the TMT.

10 And if you're standing on the ground level
 11 north of the TMT on the plateau for any of these
 12 sites, you will not able to see or observe the motion
 13 of the sun or stars or constellations without direct
 14 interference from TMT.

15 So from the pu'u level, you're going to
 16 have interference from the TMT as well.

17 So I think I'm almost done. How much time
 18 do I have?

19 MR. CAIN: Two minutes.

20 MS. PISCIOTTA: If the BLNR allows the
 21 legal limits to be exceeded, they will be in breach
 22 of trust and in excess of their authority. And in
 23 any case the TMT is not only the straw that breaks
 24 the camel's back, it's the elephant that will cause
 25 the entire system to breakdown.

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1 In conclusion, when we began standing for
2 Mauna Kea all those years ago, the kupunas told us
3 that we must make sure to tell you all of the
4 significance because our kupunas believe that if you
5 knew better, you would do better, and they certainly
6 are right. We all know that our kupunas that have
7 passed told us that we must continue to stand in
8 aloha, and we do that here today.

9 We extend our aloha to all of you. We know
10 that this is a hard decision, and we will pray that
11 you will make the one we wish to hear. However,
12 akua, the mountain belongs to akua, and akua's will
13 be done.

14 All we want to say is that we have carried
15 this inequity for a long time. We a carry it because
16 we even take it from the University, we carry it so
17 much, but we cannot do that any more. Our time has
18 changed. And we just want everyone to know that we
19 all will carry the inequity, any inequities that will
20 flow from any of our actions or decision.

21 The world the earth is calling out and
22 saying no more. And the earth papa is demanding that
23 we stand, and now is the time, and we will not give
24 up. But we are here to say that it's time, and
25 that's all we can say.

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1 So I will close my pule.
2 (Pule said.)

3 Excuse me for my tears. So sorry.
4 CHAIRMAN AILA: Just about to say, no need
5 for any excuses. Questions?

6 MEMBER GOODE: Your testimony was really
7 good, really good.

8 You spoke of certain practices within the
9 pu'u, the pu'u level from different the directions
10 and how the observatory will obscure or impact those
11 practices.

12 And since today was mostly I guess a
13 summation of what was discussed or brought force in
14 the contested case hearing itself, which we weren't a
15 part of, we only got summaries.

16 Did you discuss those items within at the
17 time of the testimony in front of the Hearings
18 Officer?

19 MS. PISCIOTTA: Yes, definitely. We also
20 listed a lot of those practices in our petition, such
21 as Soltice and equinox ceremonies which have been
22 conducted by our kupuna for thousands of years. In
23 fact, we just completed the one recently that closed
24 the 23,000 year cycle, the procession.

25 And, yeah, those will all be impacted

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1 actually severely. And I believe actually the
2 tourist view of the sunset will be majorly impacted.
3 Anything from the north, you know, north facing side
4 of the mountain is going to be impacted by that, and
5 the views of Haleakala and the star constellations
6 and all of those things.

7 MEMBER GOODE: Thank you.

8 CHAIRMAN AILA: Any other questions?
9 Mahalo for your aloha. I'm going to ask you the same
10 question I asked everyone else.

11 Should the decision standing to continue,
12 will you continue to go to Mauna Kea?

13 MS. PISCIOTTA: Well, yes, I will, nothing
14 can bar me from going there. However, that's a hard
15 question.

16 I will have to say affirmatively that our
17 practices will be hampered, will be impacted. And in
18 fact some of the practices will not be able to be
19 conducted any longer. And if that's the case, you
20 know, then we'll still -- I mean, the ceremonies we
21 do today are already adjusted for all of the other
22 telescopes, because actually the central place where
23 the kupunas used to do that practice was leveled on
24 the summit.

25 So we're actually, the lele now is already
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1 actually an adaptation. And, yes, it's good that we
2 could make that adaptation, but when we are losing
3 those pu'us, then we have nowhere else to go.

4 So to answer your question, I will continue
5 to go, but I probably won't be able to practice some
6 of the practices any longer, neither will the other
7 practitioners.

8 CHAIRMAN AILA: Mahalo.

9 MS. PISCIOTTA: Mahalo.

10 MS. CASE: I'm just asking, that question
11 you're asking us, I'm starting to feel like it's a
12 trick question. And I'm not sure if it is. I'm just
13 starting to feel that, like, well, they're going to
14 go anyway, so why not.

15 CHAIRMAN AILA: It's not. It's a question
16 that my Hawaiian processing that I need to ask.

17 MS. CASE: Okay, well, in my Hawaiian
18 processing, I need to ask too, because I'm standing
19 here with my children today, and I do not want that
20 to come back to haunt me that I said I would still
21 go. So I'm just asking.

22 CHAIRMAN AILA: Let me just explain. It's
23 not a trick question.

24 MS. CASE: That's all I need to know, in
25 good faith and trust, thank you.

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1 CHAIRMAN AILA: I think you need to hear
2 the other reason.

3 So when Clarence unveils genealogy and
4 calls to my attention that that genealogy is
5 connected, I have to ask that question, okay.

6 MS. CASE: Thank you for clarifying that.
7 I just didn't want to go home today and think that I
8 was kind of being tricked. Thank you so much.

9 CHAIRMAN AILA: You're welcome. Thank you.
10 Mahalo.

11 Mr. Lui-Kwan, before you begin your
12 rebuttal, there were two unsolicited documents that
13 were handed to me, and I'm going to give you the
14 opportunity to object.

15 So the first is from Kalani Flores, and he
16 represented that this was a summation of his
17 testimony that was given earlier. So I give you an
18 opportunity, because it's unsolicited, to place
19 objections on the record.

20 MR. LUI-KWAN: Well, Chairperson Aila, as a
21 matter of record, I would like a copy for myself.
22 The to the extent that's a summary of Mr. Flores'
23 oral argument, I would not object to it coming in.

24 However, I would actually ask the board to
25 disregard anything on this document which was not

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1 included in his oral argument. I believe that we are
2 entitled to submit summaries. In fact, I think the
3 court reporter actually asked for copies of any
4 written summaries, so I think it's proper.

5 But again I would agree to having it
6 submitted with the understanding that none of the
7 argument is evidence itself. And if there's anything
8 on this document that's not reflected in his oral
9 argument as reviewed in the transcript you'll get, we
10 ask that it not be included and disregarded.

11 CHAIRMAN AILA: The second set of documents
12 was handed to us unsolicited, described basically as
13 Hawaiian Kingdom document, the jurisdiction of the
14 international court. So have you had an opportunity.

15 MR. LUI-KWAN: I have seen that, thank you.

16 I would object to introduction of any
17 documents or presentations or any material submitted
18 by anyone that's not party to this. This is not a
19 public hearing, it's not a public meeting. It's oral
20 argument in this case and I think it would be
21 inappropriate to include that on the record as even
22 part of the oral argument.

23 It's not that I'm objecting to substance, I
24 have no judgment on the substance itself, it is
25 actually what I believe is not an appropriate

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1 inclusion on this contested case.

2 CHAIRMAN AILA: Thank you.

3 MR. FLORES: Mr. Chairman, I would like to
4 submit an objection to that.

5 CHAIRMAN AILA: Well, you're a party, so go
6 ahead.

7 MR. FLORES: So it's not relevant to that
8 one. It was initially sent and submitted as a
9 summary of our oral presentation testimony that was
10 dated February 12, 2013, and I don't believe that in
11 the case of this oral argument, that the Applicant
12 can object to what we present to the board at this
13 time.

14 CHAIRMAN AILA: He's only objecting if
15 there was anything that wasn't in your presentation.

16 MR. FLORES: Why can't I present something
17 at this point in time as part of this 30 minute that
18 I was given to petitioners, why should allow the
19 applicants to object to anything that I submit at
20 this point?

21 CHAIRMAN AILA: Because he hadn't had time
22 to review the documents like all the other evidence
23 that was put into the record.

24 MR. FLORES: Yeah, but neither does he have
25 time to review the evidence or documents that people

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1 are presenting in this time they're given.

2 CHAIRMAN AILA: Procedurally he has the
3 opportunity to object. At some point we will in our
4 deliberations rule on his objection in terms of what
5 gets put in.

6 MR. FLORES: I just want to make that
7 clarification, thank you.

8 MR. LUI-KWAN: Mr. Flores, he has made the
9 representation that this actually reflects his oral
10 argument itself. So I understand his concern.

11 CHAIRMAN AILA: So you now have your
12 rebuttal.

13 MR. CAIN: You have 14 minutes on the
14 clock. Do you want a time check?

15 MR. LUI-KWAN: No, I don't need one. Thank
16 you.

REBUTTAL ARGUMENT

17 MR. LUI-KWAN: I would have to agree with
18 Ms. Pisciotta's statement that there is nothing new
19 that's been presented by Petitioners today. As she
20 noted, that they have actually repeatedly been before
21 the board, the department on many of these -- in
22 fact, all of these claims. So you will actually see
23 that all of the issues that they've raised is
24 actually addressed, all of these things were actually

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1 reviewed, considered and considered by the hearing
2 officer in its proposed Findings of Fact and
3 Conclusions of Law that you have.

4 And, again, there's, we believe that we
5 have actually responded to them and we will rest on
6 our opening statements that we made earlier as well
7 as the documents which we have submitted in response
8 to those same claims, including our exceptions to our
9 suggested exceptions to the proposed Findings of
10 Fact, Conclusions of Law, as well as our response to
11 Petitioner's objections. Thank you.

12 If there are any questions of the Board,
13 we're available for answering.

14 CHAIRMAN AILA: Any questions? University.

15 MR. LUI-KWAN: I would have one thing. I
16 would note that the board does have the discretion to
17 deliberate now or vote now. And I understand that
18 you've already made a statement that the board will
19 deliberate subsequently on this.

20 But I'll also join with Ms. Townsend's
21 request that the board deliberate expediently and
22 come quickly back to the parties for determination on
23 this. Thank you.

24 CHAIRMAN AILA: We will take both of those
25 requests under consideration. With that, the hearing
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1 is now closed. Thank you very much.

2 (The proceedings ended at 2:30 p.m.)

3 CERTIFICATE

4 STATE OF HAWAII)
5) SS.
6 COUNTY OF HONOLULU)

7
8 I, JEAN MARIE McMANUS, do hereby certify:

9 That on February 12, 2013, at 11:00 a.m., that
10 the proceedings contained herein was taken in
11 computerized machine shorthand and was thereafter
12 reduced to print; that the foregoing represents, to
13 the best of my ability, a true and correct copy of
14 the proceedings had in the foregoing matter.

15 I further certify that I am not of counsel
16 for any of the parties hereto, nor in any way
17 interested in the outcome of the cause named in this
18 caption.

19 Dated this 12th day of February, 2013, in
20 Honolulu, Hawaii.

21 _____
22 JEAN MARIE MCMANUS, CSR 156
23
24
25

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