

**Written Direct Testimony for Clarence Kukauakahi Ching**  
**October 9, 2016**

I am Kukauakahi, aka Clarence Kukauakahi Ching, one of the parties of this contested case hearing - and a cultural, spiritual and religious practitioner on Mauna Kea.

I - #1 - am 5/16 of Kanaka Maoli blood, and was born in Honolulu, O'ahu, on June 27, 1936. I am using numbers in place of actual names to indicate the ascending generations from me as #1 - at the present and to the past - as I intend to maintain confidentiality of major portions of this genealogical line. My mother - #2 - of 5/8 Kanaka Maoli blood was born at Waimea, Kaua'i, on December 10, 1907. My mother's father - #3 - is of 1/2 Kanaka Maoli blood and was born at Koloa, Kaua'i, in 1884. My grandfather's mother - #4 - (and all following generations) is of 100% Kanaka Maoli blood, and was born at Huleia, Kaua'i, on April 24, 1858. My greatgreatgrandmother - #5 - was born on Kaua'i, in approximately 1846. My greatgreatgreatfather - #6 - was born on Kaua'i, approximately 1826. Then came #7 (kane) - born at Wailua, Kaua'i, approximately 1798. #8 (wahine) - born on Kaua'i, #9 (kane) - born on Kaua'i, #10 (kane, born on Kaua'i, who is interred at Pohukaina, the mausoleum at 'Iolani Palace, and is an ancestor of Queen Ka'ahumanu, King Kamehameha IV and V, King Lunalilo, King Kalakaua and Queen Lili'uokalani) - and #11 (wahine) - assumably born on Kaua'i, follows. #12 is Kaina-aila (kane) - who is a direct descendant of pre-Cook Hawai'i island paramount chiefs - Lonoikamakahiki, his father, Keawe-a-'Umi, 'Umi a Liloa ( c. 1525–50) and Liloa - who are listed in the classic - "Ruling Chiefs," by Kamakau - and in the writings of Fornander.

From ancient days, Mauna Kea became important to the people, probably because, among other things, it was the tallest mountain in all of Hawai'i and the known Pacific region. And in Hawaiian mythology - in the Kumulipo, the story of Hawaiian origins - Mauna Kea took its place as Papa's and Wakea's - Earth Mother's and Sky Father's - first mountain child, and it's highest elevated levels became the "realm of the gods."

Mauna Kea, from ancient days was accessed by roads and trails by the inhabitants of Hawai'i island.. Kepa Maly writes: "Historical accounts and oral history interviews record that these trails provided travelers access to various sites, including areas where rituals and practices were observed, and that the trails converged at Waiau." ["Mauna Kea: Ka Piko Kaulana o ka 'Aina" - p. 16] Mauna Kea became so important to the inhabitants that it also became one of the most sacred places in Hawaiian cosmology.

That travelers, for instance, from Waimea (Hawai'i island) to Hilo would take the "mountain" roads and trails, by way of Lake Waiau, is an example of Mauna Kea's significance. It is significant, for instance, that Kauikeaouli - Kamehameha III - in his genealogy chant - singles out Mauna Kea as part of his genealogy. Or that Queen Emma made a special trip to the highlands of Mauna Kea.

Of Queen Emma's trip - a poem at the time mentioned -

The Royal One is at Maunakea  
To see the lake, Waiiau  
The amazing body of water  
At the very peak of the mountain  
The Royal One turned to come back  
Along that unwieldy path  
And it is a narrow, treacherous trail  
To reach Kemole  
And the Royal One offered encouragement  
“Be lively, all of you”  
“It will be a very long descent”  
“To reach *Wahinekea*”  
For Emmalani indeed, a name song  
For the chiefess who traverses the  
mountains,

Queen Emma's behavior on Mauna Kea provides a blueprint for our present-day behavior on the mountain. And thusly, my cultural hiking group - Huaka'i I Na 'Aina Mauna" (Traveling through the high Mountain area - a name given to us by author Kepa Maly) follows the blueprints set by Kauikeaouli, Queen Emma and others who have come before. Queen Emma traversed the trails on the mountain and saw Lake Waiiau (and other places). We traverse the trails (and non-trails) on the mountain, Mauna Kea, visiting Lake Waiiau (and other places) and engage in rituals and ceremonies.

I am an individual Hawaiian cultural practitioner. Being a descendent of 'Umi A Liloa, I have family and genealogical ties to Mauna Kea. I am also a graduate of Kamehameha Schools (Class of 1954). I was an Office of Hawaiian Affairs Trustee from 1986 to 1990 - a time when voters and trustees were "certified" to be Hawaiian by blood.

I am a Hawaiian subject - and I participate in this administrative hearing under duress. I have been involved in traditional cultural, religious and spiritual practice on Mauna Kea since the mid-1980s. I have traversed the trails and roads leading to, over and around Mauna Kea. I am a member of the kalai wa'a (canoe building) community (having been a member of the crew that built the voyaging canoe, Hawai'i Loa from 1990 to 1993, with special ties to Keanakako'i (the adze quarry) situated not far from the summit of Mauna Kea. I work with and gather traditional wood, fiber and stone materials, as related to canoe building and other cultural works. I also collect sacred waters from various locations on Mauna Kea, including Lake Waiiau and the springs at Houpo O Kane for spiritual and medicinal purposes. I have spent years in the protection and propagation of endemic and other plant species.

Furthermore, it is interesting that Attorney Douglas Ing, on application of TIO as a party,

characterized TIO as to be that party, if the CDUA were to be denied in this CCH process, with the most to lose. I believe that Mr. Ing mis-represented the fact. The CDUA, filed at DLNR in 2010, states that TMT is the Third Party Beneficiary. How can TIO be that Third Party Beneficiary when it wasn't around in 2010 when the CDUA was filed, having been incorporated in 2014. It is totally impossible that TIO could be that Third Party Beneficiary (and having the most to lose) when it didn't exist in 2010 when the CDUA was filed. Unless there is an Amended CDUA or other paperwork resulting in legal substitutions, it is impossible for TIO to be the Third Party Beneficiary with the most to lose..

Re: TMT

The legal evolution of TMT, relative to the Conservation District Use Application (hereinafter as "CDUA"), is very interesting and somehow a bit complicated. In my observations of the Hearings Officer (hereinafter as "HO") in some of the communications taking place in the Pre-Hearing segments of this Contested Case Hearing (hereinafter as "CCH") - I believe I've observed a significant degree of confusion. The HO seemed to be confused about the characterization of these 2 corporations, being 1) TMT Observatory Corporation (hereinafter as "TMT"), and 2) TMT International Observatory, LLC (hereinafter as "TIO"), as separate and unique as 2 individual persons. The fact that the names of the 2 corporations here initially begin with the term "TMT" - the 2 corporations are as separate and unique corporate entities as Tom Jones and Tom Smith are separate and unique persons - although both their first names are "Tom."

Furthermore, it is interesting that Attorney Douglas Ing, on application of TIO as a party, characterized TIO as the party, if the CDUA were to be denied in this CCH process, with the most to lose. I believe that Mr. Ing mis-represented the fact. The CDUA, filed at DLNR in 2010, states that TMT is the Third Party Beneficiary. How can TIO be that Third Party Beneficiary when it wasn't around in 2010 when the CDUA was filed, having been incorporated in 2014. It is totally impossible that TIO could be that Third Party Beneficiary (and having the most to lose) when it didn't exist in 2010 when the CDUA was filed. Unless there is an Amended CDUA or other paperwork resulting in legal substitutions, it is impossible for TIO to be the Third Party Beneficiary with the most to lose.

The following are self-descriptions of TMT and TIO - as stated in their Financial Statements.

TMT Observatory Corporation (TMT) is a non-profit public benefit corporation whose purpose is to conduct fundamental research and development and foster scientific interaction between educational and research institutions and to further college and university educational research in astronomy. TMT was founded by The Regents of the University of California (UC) and the California Institute of Technology (Caltech), hereinafter collectively called "founding members" for the initial purpose of developing the design of a giant segmented mirror telescope, the Thirty Meter Telescope, with the

goal of constructing, commissioning and operating an observatory. [TMT Observatory Corporation, Financial Statements, September 30, 2014 and 2013]

\* \* \*

Liability of the Members under the Company agreement is limited so that no Member shall be individually obligated to any third party for any debt, obligations or liabilities of TIO. Each Member's liability for the debts, obligations or liabilities of TIO is limited to the maximum extent of the Members' Contribution. "Contribution" means any money (excluding loans), property provided, services rendered, or any commitment or agreement to provide money, property or to render services to TIO by a Member that is reflected in the various agreements which have been made between TIO and its Members. [From TMT International Observatory, LLC Notes to Financial Statements December 31, 2014]

TMT International Observatory, LLC ("TIO"), a Limited Liability Company, was formed in the state of Delaware in 2014 by the California Institute of Technology ("Caltech"), the University of California ("UC"), the National Institute of Natural Sciences ("NINS") and the National Astronomical Observatories of China, Chinese Academy of Sciences ("NAOC"), hereinafter collectively called "the Members" for the purpose of providing for the observation and collection of images and information from deep space to advance human knowledge of astronomy and the origins of the universe by and through the execution of the Thirty Meter Telescope Project hereinafter called the "TIO Project". TIO is responsible for the execution of the TIO Project through the construction, commissioning and operation of an observatory. Each of the Member (sic) has signed the Limited Liability Company Agreement of TIO ("Company Agreement") and a Contribution Agreement with TIO. Prior to establishment of TIO in May 2014, the pre-construction activities were managed by TMT Observatory Corporation ("TMT Corp"), a not for profit public benefit corporation, formed by Caltech and UC. Since May 2014, TMT Corp managed the in-kind construction contributions of Caltech and UC. In 2014, TIO also entered into a Personnel Administrative Agreement with TMT Corp under which TMT Corp provides labor and support services to TIO. [From TMT International Observatory, LLC Notes to Financial Statements December 31, 2014]

Until May 2014, TMT was responsible for managing the execution of the TMT Project including the preconstruction contributions by Caltech and UC. During this time, TMT received contributions solely from both institutions and revenue from NAOJ for some contracted effort. Since May 2014, TMT has managed the in-kind construction contributions of Caltech and UC to TIO and has continued to manage a multi-year cooperative agreement with the National Science Foundation (NSF). In 2014, TMT also entered into a Personnel Administrative Agreement with TIO under which TMT provides labor and support services. [TMT Observatory Corporation, Financial Statements, September 30, 2014 and 2013]

Why the TMT folks decided to operate as 2 corporations - one a 501(c)3, the other an LLC - may be complex. On the other hand, there are multiple times one, such as TMT, acts as an "agent" for the other - TIO. For example, member funds are paid to TIO, then TIO gets TMT to perform an action for which it (TMT) gets paid by TIO. In many ways, these corporations act as separate entities, at times they act in an over-lapping manner,

and yet at other times they act as one. It's like when Mr. Ing says, for instance, at the hearing that addressed the addition of parties, that the entity he represents has the most to lose. As I have argued, it is TMT that has the most to lose. However, in their (both TMT and TIO) sometimes separate roles, sometimes over-lapping roles and sometimes identical roles, one can't be sure what entity (or both) he meant when he made the statement he made (assumably for TIO, as it was TIO's participation he was arguing for at the time). The important question to ask is: What did the HO think that he meant? I would venture to guess that the HO had no idea.

To resume the argument - if I may - the TMT "entity" seems to be some kind of morphed Frankenstein monster. Although for most purposes, there appears to be a single entity, one has to concentrate on the "arms" - as the "entity" operates with one arm, being TMT, and the other arm, being TIO. Sometimes the arms work separately - as unrelated corporation usually do (at arms length), at other times they work together. It may be very frequently difficult to discern which arm one must consider regarding the TMT "entity!"

This is further complicated when just the term "TMT" is considered, and because, among other things, for instance, both of these corporations are represented by the same attorney, Mr. Douglas Ing and/or operated by the same board of directors.

Because of the HO's self-proclaimed edict to NOT allow "discovery" and "no cross-examination" outside the scope of written and oral testimonies - to even discover the very material fact of which individuals are on the board of directors of each corporation - and the possibility that they may be over-lapping or even identical. The possibility then exists that the monster I brought up earlier is more akin to a Siamese Twin entity that share a common brain of board of directors and legal counsel. Will the real TMT please stand up?

Interestingly, the possible operation of these 2 corporations suggest that neither of them are intended to be tax paying entities.

But the best angle of analysis strongly suggests that the corporate structures as designed is to protect the "members" from all debt, obligations or liabilities owed to third parties.

Such third parties include, among others, the Hawai'i university system and the so-called "State of Hawaii!" For corporations with few assets and questionable credit ratings - AND no liability to its members - such a situation indeed raises red flags.

This all boils down to the question of - How does the so-called "State of Hawaii" and the Hawaii university system protect themselves (actually - the taxpayers) from liabilities that may arise if things don't work out as planned - in other words - if construction moneys run out and the project is abandoned. The situation is compounded - when the CDUA is signed by the university and NO TMT factions - with the sole beneficiary, TMT, being a total stranger to the document. There is little or no information in the CDUA on the finances of TMT, its members, or its key personnel. This is incredible!

But, let's switch tacks a bit.

Because TMT is the party that the Applicant of the CDUA is requesting a CDUP for, to build the gigantic 18-story telescope, one would expect it to also be the party to submit the CDUA, right? Wrong. The Applicant is UH-Hilo. The CDUA does not contain a single signature of any TMT person. As an additional point of interest, while one would expect TMT to be the party opposing the Peitioners in the CCH, as you already know, again, it is not TMT, but UH-Hilo.

Of course, with UH-Hilo as the Applicant, one would then naturally assume that a legal relationship exists between it and TMT, right? Wrong again. There is no Operating Agreement between UH-Hilo and TMT. So how can UH-Hilo legally submit a CDUA for a third-party performer that it has no legal relationship with, such party being responsible for completing the proposed project?

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

At this time, with no valid Sub-Lease in hand, it seems that the involvement of UH-Hilo in the application process seems to be as a volunteer, facilitator or Initiator, with no legal relationship with the party that would be obligated to perform all the obligations that would be included in the granting of the CDUP, if indeed, one if finalized. Additionally, UH-Hilo, being an entity holding the General Lease of the involved lands may have a conflict of interest in these negotiations.

Why is it that nobody is or has questions about TMT's history (which is none) and creditability? The CDUA seems to have ignored all discussion on these material questions.

With expenses for permitting the construction of the TMT rising, the legal expenses being over a \$Million and rising - the Third Party Beneficiary is picking up the tab? Right? Wrong again. It's the university system (and the Hawaii taxpayer) who is footing the bill.

Furthermore, one would expect that TMT would produce the necessary EIS, right? Well, not so. It was UH-Hilo's attorneys who hired the firm doing the EIS, and I suppose that whomever does the hiring also pays the bill. The Hawaii taxpayer is again stuck with the bill. Credit must be given to TMT personnel who creatively engineered this business plan - to acquire million-dollar benefits - and have the Hawaii taxpayer paying for them.

So, if TMT and/or TIO have not certified that it has the funds to complete the project in hand - What should the UH system and the so-called "state" (through BLNR/DLNR) do?

The Mauna Kea Plan, May 1977, states, in II(C):

"No application for any proposed facility shall have final approval without the applicant having first filed with the Board, adequate security equal to the amount of the contract to

construct the telescope facilities, support facilities and to cover any other direct or indirect costs attributed to the project, ...."

Some may argue that this "rule" has been superseded by newer managing documents such as the Comprehensive Management Plan. I don't think so. The Plan, for instance, does NOT state that it rescinds any older rules, processes or plans that are on the books. It has to say so if that is indeed what it intends to do.

I strongly suggest that this "rule" be implemented in this CDUP - if indeed a CDUP is to be granted. Failing to do so will short-change the taxpayers of Hawai'i! Another strong suggestion because of difficulties that may arise with having to deal with the 2 distinctly different corporations and hoping to eliminate the problems of identifying which one is being dealt with - is to require that both (TMT AND TIO) be parties to any and all subsequent contracts or agreements regarding the TMT Project that the "state" or university enters into, with signatures of responsible parties of both entities included.

The Applicant - UH- Hilo

One of the conditions of the General Lease - and also of any resulting CDUP - is that all laws must be complied with.

UH-Hilo, through its subordinate, Office of Mauna Kea Management (hereinafter as "OMKM"), continues to be non-compliant with the law. It has also been unsuccessful in promulgating rules that have been challenged and dis-allowed by the courts. And, while the university's compliance with lease conditions and recommendations by the State Auditor have been improving, an acceptable level of compliance has not been attained. For these reasons, the CDUA is defective and should be stricken.

Mis-management and mis-behavior by OMKM are significant problems and should be one of the key factors in determining whether this CDUA is granted.

In early August 2015, OMKM adopted an emergency rule without complying with administrative rule-making procedure. Not only was this new rule immoral - it was unconstitutional.

The illegally promulgated rule was to limit cultural, spiritual and religious practitioners to ascend the mountain only at 1 p.m. daily, as long as there weren't more than 10 in the group and that they were required to be accompanied both up and down the mountain by one of OMKM's rangers, with the total visit not exceeding 1 hour. While practitioners were able to be accommodated on most of the days during the life of the rule, there were days when there were no accommodation - and no ascents took place on those days.

There was at least one letter from an attorney, Mr. Na'iwi Wurdeman, representing affected practitioners that complained about the irregular attempt at managing the mountain, and threatened suit, and a federal lawsuit was filed by another attorney (Mr. Lanny Sinkin) - before this irregular, unlawful and un-constitutional rule was dis-

continued, and the lawsuit rendered moot.

While this kind of illegal rule-making was not only contemplated and intended, but actually put into action, is despicable and in substantial violation of the General Lease.

A second "Emergency Rule" was suggested by OMKM, I'm sure, in consultation with other "state" agencies and an attempt to follow required administrative rule-making took place. This rule was promulgated under the "Hunters' Rules" of DLNR. The rule was obviously defective - as most "Protectors" could not even remotely be legally-defined as hunters. Anyway, this rule was promulgated to be effective only on Mauna Kea and generally restricted any person from riding in a motor vehicle one mile on each side of the Mauna Kea Access Road (except it did not specify "Mauna Kea Access Road" or John A. Burns Way (the legal names of the road, the name used being a non-existent and fictitious name) at night from 10 p.m. to 4 a.m. It also outlawed possession of tents, sleeping bags, cooking utensils, and, I believe, propane stoves. The "Emergency Rule" was thrown out in a Circuit Court challenge. I have brought up this "Emergency Rule" only as it implicates OMKM - that supported its promulgation and defense actively and provided many of the pro-rule witnesses, including Stephanie Nagata, Director, and Scotty Paiva, Chief Ranger. This "rule" was, among other things, generally focused on curtailing the long-standing night-time practices of spiritual, cultural and religious practitioners - the practices of which is actually mandated by the Hawai'i State Constitution (and precedent court cases) for governmental agencies to support and advocate for.

At some time during the same period, OMKM decided to close the Visitors' Center and all restrooms in the area. This ploy was supposedly designed to get the "Protectors" off the mountain. Visitors that the Hawaiian Visitors Bureau encourage to come to the islands - and the mountain - were seemingly discouraged from visiting the mountain because of the intentional termination of restroom facilities. However, visitors kept coming to visit the mountain. The "Protectors" brought up a couple of portable toilets and invited visitors to use them. Before long, warning letters instructing the "Protectors" of their un-authorized toilets were delivered - and fines threatened. In compliance, the un-authorized toilets were taken down. "Protectors" were forced to use the "dirty" toilets at Pu'uHuluhulu at the bottom of the Access Road, or the "clean" toilets at Mauna Kea State Park (more than 10 miles away). As can be expected, the entire area became a common bathroom for many - becoming a health, visual and odoriferous hazard - and a crime against humanity and the sacred mountain. Such criminal behavior cannot be ignored - and responsibility and integrity can only be restored by dis-regarding the Applicant in the CDUA by its (the CDUA's) denial.

Presently, Mauna Kea Management is attempting to promulgate extensive rules on cultural, spiritual and religious practices on Mauna Kea - a clear violation of First Amendment constitutional protections. Such outrageous behavior, under the guise of good management and good administrative practices, and the guidelines of the (defective) Comprehensive Management Plan - cannot be rewarded and such irregular behavior must be condemned.



## The EIS

The EIS that was approved by the then Hawaii State Governor in 2010 and that has become an integral part of the CDUA under consideration in this contested case hearing, ought to be outmoded (obsolete) by now when considered in the fast-paced scientific world of astronomy. Therefore, the Applicant must at the least update the EIS, if not, replace it with a timely EIS that reflects the current, state of the art situation in the science. Failure to mandate such an action would be to base all deliberations on this contested case hearing on outmoded and obsolete information (that fails to reflect the present situation in astronomy science).

For example, there have been great strides made in the area of interferometry - a part of astronomy that cannot be overlooked when considering alternatives to giant, segmented mirror telescopes like the Thirty Meter Telescope. When equivalent baselines that would exceed the actual resolution of the Thirty Meter Telescope by factors of hundreds if not thousands, such a discussion must be included in order to be timely and significantly considered at this time.

Another factor that must be part of the EIS process are the present alternative sites that are presently undergoing consideration in Baja California, La Palma Island in the Canary Islands, China and Ladakh, India. There may be other potential sites that are being considered that are unknown to the general public - and the HO - at this time. The failure to file an Amended EIS or Supplemental EIS signifies a failure of any viability that the CDUA might have once accommodated and mandates a denial of the CDUA.

## The UN Declaration of the Rights of Indigenous Peoples

On September 13, 2007, the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter as "Declaration") was adopted by the UN General Assembly as Resolution 61295. At the time of adoption, the United States, Canada, New Zealand and Australia were on the losing side of the vote. However, at the Tribal Nations Consultation in Washington DC on December 6, 2010, President Obama announced United States support for the Declaration.

President Obama said -

"The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies."

"The United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human

rights recognized in international law, and that indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights."

#### Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal areas and other resources and to uphold their responsibilities to future generations in this regard.

\* \* \*

#### Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned while not legally binding or a statement of current international law through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In reference to the UN Declaration on the Right of Indigenous Peoples, I, and others of my status, haven't been consulted, asked or gotten permission of for the use of the so-called "ceded" - stolen lands of Mauna Kea - despite that the Declaration is not legally binding or a statement of current international law - as President Obama suggested - it should have both moral and political force. Such moral and political force warrants the determined and intentional considerations in a final recommendation to grant or deny the CDUA of this contested case hearing. If anything, the determinable facts that pertain to the issues of this contested case hearing should be, everything being equal, given full consideration and balance. As argued here - there are multiple factors that point to a denial of the CDUA considered here.

#### Telescope Viewing Time

"Telescope Viewing Time," although it is a commodity that has been part of the astronomical picture of Mauna Kea, as a consideration in "lieu of rent." is part of the process that seems to have no basis in law or rule. It is my understanding that rent must be expressed in dollar amounts. However, it seems to have become an "acceptable" (although unmentioned and unauthorized) ingredient of the rental scheme. Although not expressed in dollars, which would allow its tracing and accountability - the present

practice. "all" income and proceeds from that pro rata portion of the trust referred to is totally unaccounted for and possibly wrought with waste and abuse.

Why is there no accountability for telescope viewing time?

It seems that if "telescope viewing time" becomes a feature of Thirty Meter Telescope rent - that this contested case hearing should at least include it in its relevant discussions, even if its done in elementary terms. Another reason for keeping tabs on accounting for telescope viewing time is that the Office of Hawaiian Affairs is supposed to generally receive 20% of all rents of the so-called "ceded lands" (stolen lands).

The Admission Act, which was passed in 1959, transferred a portion of these lands and explicitly created the public land trust to be held by the State of Hawaii. Importantly, subsection 5(f) of the Admissions Act recognized the public trust status of this portion of the "ceded lands," stating that :

The lands granted to the State of Hawaii by subsection (b) of this section III . . . , shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, . . . . Such lands, proceeds , and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide.

Section 6 of Article XII provides that OHA shall receive any funds and proceeds for native Hawaiians and Hawaiians, and "manage and administer . . . all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians . . . ." (Emphasis added)

\* \* \*

Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter.

If indeed, that OHA will not be receiving any dollar amounts in lieu of rent from "telescope viewing time" - then it is being illegally short-changed and this contested case hearing cannot dis-regard discussions on this subject. The CDUA should be denied.

I thank you all.

I must stress my acknowledgement of the sacredness of Mauna Kea because, among other things, Mauna Kea is family. It is my/our Mountain Brother, like Taro is my/our elder brother (Story of Haloa). My ability to carry out my cultural, spiritual, and religious practices on the mountain is priceless.

Over the past 14 years (since 2002), I have led Huaka'i I Na 'Aina Mauna, a group of cultural, religious, spiritual and environmental

hikers, across Hawai'i island, from sea level to the summits of Mauna Kea, Mauna Loa, Hualalai and Kilauea and back to sea level.

We conduct traditional, customary cultural, religious, spiritual rituals and ceremonies at all locations, literally all over the 'aina where

we hike.

I have been actively involved in natural and cultural resources protection of Mauna Kea since the 1980's and I continue to exercise

traditional and customary Hawaiian cultural, spiritual and religious practices. Furthermore, I have been granted standing by BLNR in

previous contested case hearings that include but are not limited to the case regarding BLNR approval of Conservation District Use

Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. I was also a Plaintiff in the Third

Circuit Court agency appeal of the final decision made by BLNR regarding CDUP Application (HA-3065B), in 2004 (Mauna Kea

et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources, Civil No. 04-1-397).

I have exercised, presently exercising, and desire to continue to exercise traditional and customary native Hawaiian rights within the

Mauna Kea summit, Ice Age Natural Area Reserve, Mauna Kea Science Reserve and Hale Pohaku areas, in fact, over the

entirety of Mauna Kea and the entire Hawai'i island. These rights include but are not limited to the exercise of traditional and

customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for

the gathering of ice, snow, water, raw materials for adze making and other crafts, depositing of the "piko" or umbilical cord in and

around Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and

equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve,

and Science Reserve. Thus, I, along with other Hawaiian cultural practitioners enjoy constitutionally protected traditional and

customary native Hawaiian rights on Mauna Kea.

As for the "hiking" part of our cultural, spiritual and religious Mauna Kea practice, we have done a number of hikes - all over the mountain. These hikes have been accompanied by oli, pule, mele, etc., and doing ritual and ceremony.

1) In 2002, we hiked from sea level at Koholalele Landing at Kukai'au on the Hamakua coast, up the Umikoa-Kaula Trail, past Pu'uLilinoe, to the summit of Mauna Kea. We then descended past Pu'uPoliahu and past Pu'uNanahu, then past the Pu'uLa'au cabin and out Kilohana gate, across part of Pohakuloa Training Area, followed the Old Kona Highway, then to sea level to Luahinewai at Kiholo Bay.

2) In 2002, we hiked from the summit of Mauna Kea to the summit area of Mauna Loa, around Kilauea Crater to sea level at Ke'auhou Landing (in Volcanoes National Park), then to the road in the area of Pu'uloa petroglyphs.

3) We have hiked from the end of the road on the south side of Mauna Kea to the sacred springs at Houpo O Kane, then descending to the area of the formerly-named Mauna Kea State Park.

4) We have hiked around Mauna Kea at the 9,000 foot elevation - on the Kaaliali Trail - to the Pu'uLa'au cabin.

5) We have hiked - starting at the Mauna Kea Access Road (around the 7,000 foot elevation), following the Lamaia Trail to Keanakolu, then to Waimea and Kawaihae.

6) We have hiked to the summits of Pu'uPoliahu, Pu'uMakanaka, Pu'uKanakaleonui and the slopes of Pu'uLilinoe.

7) We have hiked (closer to sea level) around Mauna Kea from Hilo, up the Hamakua coast past Honoka'a, to Waimea, then to Old Saddle Road (at the Upper Road that connects Kailua-Kona to Waimea), and following Old Saddle Road back to Hilo.

I have also been on numerous trips to the summit area for Equinox and Solstice ceremonies. I have also been on the mountain multi-times on non-Equinox and non-Solstice times. One of my special every-day kinds of activities is to greet Mauna Kea -

from my home or other areas in and around Waimea - regularly (on a daily basis) whenever the clouds allow me to see the mountain. All of these visitations have been accompanied by some semblance of acknowledgement and respect. My view of the mountain is contaminated by the presence of the multi-numbers of observatories near the summit area, which will be further impacted if the TMT ever gets built. The TMT's gigantic presence on the mountain will add "desecration," from my standpoint, to my regular views of the mountain (from Waimea).

As for defining "Desecration" - see the 2011 Hawaii Code (that follows) -

**2011 Hawaii Code**  
**DIVISION 5. CRIMES AND CRIMINAL PROCEEDINGS**  
**TITLE 37. HAWAII PENAL CODE**  
**711. Offenses Against Public Order**  
**§711-1107 Desecration.**

**Universal Citation:** HI Rev Stat § 711-1107 (2011 through Reg Sess)

**§711-1107 Desecration.** (1) A person commits the offense of desecration if the person intentionally desecrates:

- (a) Any public monument or structure; or
  - (b) A place of worship or burial; or
  - (c) In a public place the national flag or any other object of veneration by a substantial segment of the public.
- (2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.
- (3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both. [L 1972, c 9, pt of §1; gen ch 1993; am L 2002, c 198, §1]

Governor Ige said:

"In many ways, we have failed the mountain. Whether you see it from a cultural perspective or from a natural resource perspective, we have not done right by a very special place and we must act immediately to change that."

One of the fundamental problems of the current contested case hearing is that the physical site for building of the proposed TMT

observatory is NOT located. All documents of this contested case hearing that reference the siting mention the so-called "State of

Hawaii" - but the question is - Where is the "state" located?

I believe that I reside on Hawai'i island in the Hawaiian Kingdom. I believe that the actual location of the proposed TMT observatory

site is not in the "State of Hawaii" but in the Hawaiian Kingdom. Why do I make this claim? I make it because I have never seen any

document that states or declares where the so-called "state" is located. If such documents exist - please produce them.

§2. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters. [Admissions Act of Hawaii, 1959]

This statement is more specific and material of what is NOT in the so-called "State of Hawaii" than what is in it!

OK - I'll go along with the edict that the so-called "state" exists where "the Territory of Hawaii was (located) on the date of enactment of this Act."

So, the next question is - Where was or is the Territory of Hawaii located?

The illegal United States Admissions Act (because it is a domestic document of the United States that has no semblance of law outside the boundaries of the United States that purportedly creates the "state" of Hawaii does not help. It states - **§ 2. Territory of Hawaii.** That the islands acquired by the United States of America under an Act of Congress entitled "Joint resolution to provide for annexing the Hawaiian Islands to the United States," approved July seventh, eighteen hundred and ninety-eight, shall be known as the Territory of Hawaii. [ORGANIC ACT.: An Act to Provide a Government for the Territory of Hawaii (*Act of April 30, 1900, C 339, 31 Stat 141*)]

So, What did the United States annex and whom did it annex it from?

Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public

property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining;  
[NEWLANDS RESOLUTION: To Provide for Annexing the Hawaiian Islands to the United States.] If indeed the so-called Republic of Hawaii had no interest of the Hawaiian Kingdom in hand - It consented to cede "no interest" of the Hawaiian Kingdom to the United States - and the United States received no interest in the Hawaiian Kingdom. [NEWLANDS RESOLUTION: To Provide for Annexing the Hawaiian Islands to the United States.] If indeed the so-called Republic of Hawaii had no interest of the Hawaiian Kingdom in hand - It consented to cede "no interest" of the Hawaiian Kingdom to the United States - and the United States received no interest in the Hawaiian Kingdom.

Huh? The Republic of Hawaii transfers all interests of the Hawaiian Islands to the United States. So, by international law - the so-called "Government of the Hawaiian Islands" is the Hawaiian Kingdom - recognized by Great Britain and accepted into the International Family of Nations on November 28, 1843, followed by the United States agreeing in 1844. How did the so-called "Republic of Hawaii" acquire the interests of the Hawaiian Kingdom? Please produce such documentation. On the other hand, if the interests involved are interests of the Hawaiian Kingdom - then Why is it that the Hawaiian Kingdom is NOT the party making the transfer of cession?

The Hawaiian Kingdom was internationally recognized as an independent nation-state - "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations have thought it right to engage reciprocally to consider the Sandwich Islands as an independent State and never to take possession, either directly or under the title of protectorate, or under any other form, of any part of the territory of which they are composed." [DECLARATION 1843]

The United States recognized the independence of the Hawaiian Kingdom - "On July 6, 1846, U.S. Secretary of State John C. Calhoun, on behalf of President Tyler, afforded formal recognition of Hawaiian independence. "

Therefore - Mauna Kea continues to be in the Hawaiian Kingdom and not in the United States - and any reference to the United States is an attempt at misrepresentation, deceit and/or fraud. This contested case hearing, therefore, does not comply with the necessary requirements for jurisdiction - and must be dismissed.

Moving on, in referencing the General Lease of the Mauna Kea lands to the University of Hawaii - it is noted that the purpose for the lease is for "an observatory." These are 2 words of terminology that have not been authoritatively interpreted in actual use, or in any court decision to this point in time as to their actual and true meaning. First of all - the adjective "an" signifies that the intent of the lease is for "one" observatory to be built - or, at least, to exist at any particular time. There is no other meaning possible for the use of the adjective - "an." However, if it weren't for the use of the adjective "an" - one might think of possibly stretching the other term - "observatory" to mean something more



than "one observatory" However by the use of the adjective "an" - there is no other possible interpretation, the term "observatory" - without an "...ies" ending, totally restricts the number to a singular - "one." Furthermore - even if both words in the term - "an observatory" are considered - the sum of the word "an" added to the other word - "observatory" - cannot in the most creative use of the English language add up to more than "one" observatory - and, in no way, can the number be stretched to include the total amount of 13 observatories and/or telescopes (that currently exist on the mountain).

The bottom line here is that the "purpose" of the General Lease has been exceeded to great excess - which is a major violation of terms of the lease. Therefore, the CDUA should be denied and NO CDUP should be granted.

At this point - I want to move the discussion into my continuing objection to the Hearings Officer's dictatorial edict to allow "no discovery" and restricting "cross examination" to be only within the scope of witnesses' written and oral testimonies. If indeed, one of the features for having a contested case hearing is for the parties to assist - by rendering facts and truth to the process - then these restrictions put in place by the Hearings Officer are actually materially detrimental to the entire process.

For example, the Applicant (and its contractors) has resorted to misrepresentation in some of the materials it has submitted in support of its CDUA. This IS a serious charge. What am I talking about?

For example - in an October 14, 1999, letter from Kepa Maly (of Kumu Pono Associates) to Francis Oda and Jeff Overton of Group 70 International - who was contracted for certain purposeful work. Mr. Maly complains of his work being used for purposes other than for which he was contracted. [Although I have obtained a copy of his letter from the internet, Mr. Maly has confirmed by private email to this writer that his letter is indeed genuine.) Kepa Maly writes the following - under the Subject line - "Reference to and Incorporation of Mauna Kea – Historical Research and Oral History Interviews in planning documents (KPA Report HiMK21-020199)."

Mr. Maly continues -

"Below, I summarize several key points that cause me concern about your treatment of this potentially disruptive matter:

First: The primary gist of the calls is that Kepa Maly's reports support Group 70s' "master plan/development plan update proposals." If that means expanding from 50 to some 600 acres, and development of 40 or more telescope related facilities in the summit region of Mauna Kea, you are purposefully misrepresenting the work I compiled.

Second: The lack of cultural-historical information in the draft "master plan/development plan update," specifically, the cursory manner in which you have addressed the information documented in the oral historical study lacks sensitivity and integrity (I have

seen drafts 1 & 2, I understand that a third draft is out). People are desperately trying to understand the traditions and on-going cultural-spiritual significance of Mauna Kea.

Nearly every call I receive is asking me "what was actually reported," and requesting copies of the documentation that you have only minimally disclosed in the "master plan/development plan update." Such requests are costly to me. I note that I am not the consultant who received \$500,000.00 plus for compilation and distribution of the information.

Third: I understand that a third draft of the "master plan/development plan update" has been circulated. If it is substantially different (contains more than two paragraphs summarizing the nearly 800 pages of research I compiled), professional ethics/standard practice would include my receiving a copy of the revised work.

Fourth: I have learned that you prepared a "draft EIS" for Mauna Kea that incorporates the oral history program summary and portions of the research/consultation documents I prepared. Evidently the work is referenced as having been "prepared for the EIS." If that statement is made in the "draft EIS," it is untrue. You may recall that when I (in hindsight, foolishly) agreed to assist Group 70 in preparing this work, I was referencing it in association with preparation of an EIS. Francis specifically told me not to use the term EIS, as I was working on the "master plan/development plan update."

In the past, every client that I have worked with always provided me with a copy of the resulting EIS/EA – involving me in the EIS development phases to ensure that the documentation was accurately represented; and asked me to participate in any agency/public review meetings. The goal being to provide a summary of the documentation reported and answer questions that might be raised about the work I did. Instead, I only recently learned that you took the same cultural component of the "master plan/development plan update" and incorporated it into your "draft EIS." Further more, I am being called and told that you have been meeting with Hawaiians and other interested groups, presenting your version of the research I prepared.

Closing Comments:

In closing, I think back to the MKAC meeting of December 1, 1998, in which Pua Kanahela looked directly at you and the co-chairs, and asked "Why did you ask us here? You've already made up your minds about what you are going to do." I can't help but think that she had a depth of vision that eluded me. I naively believed that you would approach this process with cultural sensitivity, integrity, and compassion. The above observations, along with the recent flack about disclosure of burial sites on Mauna Kea (via the web) have dismissed any room for sensitivity, integrity, and compassion in this process.

I also guess I should have taken the resignation of your original cultural consultant from the project as my clue as to how all of this would evolve."

If this letter of complaint is typical of any amount of the contents of the CDUA for the TMT observatory - then I believe that there is a critical need for a "discovery process" and an open "cross-examination process" to be mandated for this contested case hearing. Anything less is a sham (and do not meet the legal requirements of the "State of Hawai'i's" rules and statutes).

And what is extremely disconcerting is Mr. Maly's last remark about the "resignation of your original cultural consultant." The "reasons" for such resignation might be material to this process. Who is this consultant? Was this consultant fired for good cause? Or, why did this consultant resign? Did this consultant resign because the process involved was somehow intolerable? If indeed, all these allegations are true and typical of the process that is included in the CDUA process - then major parts of the CDUA are tainted - and the CDUP should be denied.

The Hearings Officer's self-proclaimed restrictions on "Discovery" and "Cross-Examination" to not extend beyond the scope of written and oral testimonies of witnesses and parties in this contested case hearing is responsible for the suppression of major aspects of possible conflicts of interest. If one of the major aspects for holding a contested case hearing is to assist the Board of Land and Natural Resources to reach a fair determination for consideration of a Conservation District Use Permit, and attaining due process for all parties involved, the Hearings Officers proclamation of the above restrictions has become a major and un-acceptable hindrance to properly make such considerations.

Speaking about Palmyra Island, it is very interesting that the Board of Land and Natural Resources has, or has had, multiple parties that are personnel of The Nature Conservancy (that controls the major interest in Palmyra Island). The remarks that I'm making here contains overwhelming facts that may be relevant to this contested case hearing and the hoped-for result of a fair hearing of the Conservation District Use Permit that is the subject of this contested case hearing. But I have reservations that my hope for justice will not materialize. The reason for my pessimism are the Hearings Officer's restrictions on "Discovery" and "Cross-Examination!"

The following facts can be retrieved from the internet easily.

The present Chair of BLNR, Suzanne Case, is a recent Executive Director of The Nature Conservancy of Hawaii. The former member of the BLNR, Ulalia Woodside has been a member of the board of directors of The Nature Conservancy of Hawaii, and was recently, in December 2015, named to be the Executive Director of The Nature Conservancy of Hawaii. In March 2015, after being an interim member of BLNR since 2014, Ulalia Woodside was appointed to BLNR, Sam Gon, a senior scientist and cultural advisor at the Hawai'i Nature Conservancy of Hawai'i, where he has worked for nearly 30 years, was appointed on August 9, 2016, as Ulalia Woodside had departed BLNR some unspecified time before Gon's appointment. It seems a bit uncanny, even defying the laws of probability, that such a number of The Nature Conservancy of Hawaii insiders have become appointees to BLNR.

The story get wilder. Remember Palmyra Island? Well, I'm guessing (hypothetically) that all 3 of The Nature Conservancy of Hawaii (Case, Woodside and Gon) are personal friends of Gordon and Betty Moore (principals of the Moore Foundation). The Moores, with at least one trip to Palmyra, have been wined and dined by the bigwigs of The Nature Conservancy of Hawaii, to become major donors, and I believe they now have become donors, for The Nature Conservancy's Palmyra Island project. Interestingly, the major private donor to the Thirty Meter Telescope is the Moore Foundation. The \$64,000 question is - Because of the (fiduciary) relationships of these people - Is there the slightest possibility that any of these BLNR members (including Chair Case) would vote "No" on the granting of the Conservation District use Permit that would enable construction of the Thirty Meter Telescope? These persons are conflicted. The Hearings Officer's restrictions on "Discovery" and "Cross-Examination" is a major detriment in unearthing the facts of this situation.

Another area of complaint that must be mentioned is the process involving motions for reconsideration. The procedure that the HO set up and is supposed to follow is that she makes oral decisions, granting or denying, on motions that she decides to make. These oral decisions are supposed to be followed up by written minute orders, after which, if a party decides he or she would like to appeal from, such as filing a motion for reconsideration, he or she must do so within 5 business days according to rule. But, there have been occasions when there was an oral determination, but the written minute order that triggers a reaction never came about. Such actions could never result in a motion for reconsideration because the necessary trigger never appeared.

Another twist to the violation of process that is being discussed, shows up, for instance in the Motion to Strike CDUA that was offered by Attorney Wurdeman, that was forced to sit in legal limbo because of the HO's decision to NOT make any oral or written decision followed by a minute order. With one or two such motions in pending limbo, HO's attempt to set the scope of issues to be addressed by this contested case hearing is practically impossible to be competently addressed.

An added complication that rears its ugly head in this area of context are the deadlines in which to file - once a trigger, such as a written minute order, takes place. Things started out with a 5-day filing deadline, but eventually became a 3-day deadline, and finally a 2-day deadline, all decided sua sponte by the Hearings Officer. Interestingly, these modifications were made orally - without subsequent written minute order. The rights of those parties who have opted to be noticed by hard copy have been totally violated, and so have the other parties.

These procedural errors truly taint the entire contested case hearing process and are arguably a violation of due process, and, for sure, indefensible appearances of a violation of due process.