

In Support of Joseph Kualii Lindsey Camara

I. Scope of Expert Testimony:

Affiant is an indigenous Hawaiian attorney licensed to practice in the State of Hawaii and a United Nations Expert in the field of international indigenous human rights. I served as the first indigenous expert of the Pacific Region to the United Nations Permanent Forum on Indigenous Issues and am widely recognized as an initial drafter of the United Nations Declaration on the Rights of Indigenous Peoples. Affiant states under penalty of perjury that the information contained herein is accurate & truthful and submitted in support of Joseph Kualii Lindsey Camara, a Petitioner in this contested case.

II. Maunakea: A Sacred Landscape:

A. The University of Hawaii, State DLNR, TMT and OMKM have been aware for years that Maunakea is a sacred landscape to and for Hawaii's indigenous peoples, and a place that has been utilized by Hawaiian cultural and religious practitioners from time immemorial. The following excerpts from the Maunakea Comprehensive Management plan (CMP-April 2009) by Ho'akea/Ku'iwalu clearly demonstrate that the parties developing the Mauna were aware of this fact and the cultural uses of the Mauna during the entire course of time relevant to this contested case.

"Mauna Kea kuahiwi ku ha'o i ka mālie" (Mauna Kea is the astonishing mountain that stands in the calm) (Pukui 1983), is an old saying that expresses the sentiment among the Hawaiian people that Mauna Kea is a source of awe and inspiration. Kepā Maly, a respected researcher and cultural historian, relates, "the mountain is a respected elder, a spiritual connection to one's gods" (Maly 1999).

It is clear that to many Hawaiians, Mauna Kea is more than a mountain; it is the embodiment of the Hawaiian people. of the cultural significance Mauna Kea holds for many Hawaiian people

Many traditional practices are associated with physical places, places that are today considered traditional cultural properties. These can be either archaeological sites or natural geographic features of the landscape. Such properties are afforded additional protection under both state and federal laws – protection that in most instances would limit the use of these places to activities that do not result in physical alterations of the property.

As has been documented, some traditional practices associated with Mauna Kea have continued into the present and thus, while undertaken in modern times these practices are nonetheless considered traditional and not contemporary. The contemporary practices undertaken by Hawaiians in modern times may or may not have a basis in traditional practice, but none exhibit an unbroken continuity with past practices. The revival of an ancient practice, without established continuity to the past, can only be considered a modern interpretation of what once was and thus must be considered a contemporary practice.

...Hawaiian cultural practices associated with Mauna Kea can be considered aspects of the cultural concept related to the segregation and use of sacred space. Specifically, it is the recognition that the summit region of Mauna Kea, the area of the UH Management Areas, exists both geographically and metaphysically at the apex of a religious perhaps equated with the uppermost tier (*kahua*) of a *lananu'u mamao* (sacred tower) on top of a *heiau* (temple), space that is considered to be within the domain of the gods.

As a result of his exhaustive studies, Kepā Maly identified many traditional cultural properties on Mauna Kea. He documented ongoing traditional cultural practices associated with several of these. It is a sacred landscape that provides a connection, genealogically, physically, and spiritually to ancestral realms. The mythical creation of Mauna Kea is part of a Hawaiian cosmology that establishes a relationship between all things animate and inanimate.

According to Kanahale and Kanahale (1997), Mauna Kea represents the *piko* (the umbilicus) of the island of Hawai'i, which is the first-born (*hiapo*) island child of Wākea and Papahānaumoku, a product of the union of the sky and the earth. This is the ancestral part of a traditional genealogy that later includes the birth of humans, with Wākea as father and his daughter, Ho'ohōkūkālani, as mother. Ho'ohōkūkālani's name means "Creator of the stars," and in union with her father she provides the celestial womb from which the native population ensues. Thus, in a Hawaiian context, Mauna Kea can be viewed as the *kuahu* (shrine) to this union and considered an ancestor to the Hawaiian people. This lineage carries a birthright and responsibilities commensurate with Mauna Kea's status as first-born, whose resources need to be protected for the growth and well being of all.

...As it may have been in ancient times, the Mauna Kea landscape is today considered by many in the Hawaiian community to be the most sacred and culturally significant location on the island of Hawai'i, if not in the whole of Hawai'i. While as Maly (1999:12) relates, "[t]his attachment to the mountain landscape is rooted in antiquity and remains important in the lives of Native Hawaiians today, who attribute spiritual and cultural values to Mauna Kea." The practices identified here as contemporary are either not part of a documented longstanding family tradition, are modern adaptations of ancient practices, or are new activities not traditionally practiced. Nonetheless, these contemporary cultural practices are significant to the practitioners and their families and may ultimately be the foundation for future traditional cultural practices.

Chief among the contemporary practices is the use of the whole of Mauna Kea as a spiritual and religious site of prayer and contemplation, which includes the building of family *ahus* or altars and the placement of offerings to honor families or as a form of personal spiritual worship. Other practices include the collection of basalt from Keanakāko'i; the scattering of ashes of cremated remains of families and friends; and subsistence and recreational hunting. See CMP, April 2009, prepared by Ku'iwalu/Ho'akea, at pages 1-1 to 1-3.

III. History of State Mismanagement in Relation to State Law:

A. Applicable State Constitutional, Statutory and Case Law:

Hawaiian Cultural Rights are specifically addressed in Article XII Section 7 of the State Constitution. Hawaii Revised Statutes section 171-6-15 which imposes penalties and fines for illegal uses of the Mauna specifically exempts Hawaiians engaging in cultural practices. It states

“ No person shall be sanctioned pursuant to this section for the exercise of native Hawaiian gathering rights and traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii state constitution” . In addition, Act 132 passed by the Legislature in 2009 that gave the University ‘Autonomy’ in its management of the Mauna specifically provides ... “Access for traditional and customary native Hawaiian cultural and religious purposes shall be accommodated.” The University, DLNR and the Science Community have ignored and violated these mandates and consequently have violated Hawaiian Constitutional and Human rights. (UN Declaration on the Rights of Indigenous Peoples, provisions 11, 12 & 25).

(HRS. Chapter 171) requires that State lands be leased at fair market value as determined by appraisal. It provides that lease rental cannot be waived for any commercial venture for longer than 1 year. Section 171- 6 (15) sets fines for violations of the law, rules or illegal public use but it also states... “No person shall be sanctioned pursuant to this section for the exercise of native Hawaiian gathering rights and traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii state constitution.”

In 2015 the State Supreme Court reviewed the Petition of the Maunakea Anaina Hou and several other “Protector” groups. The Court ruled in their favor, finding that the DLNR Board had violated due process. The Supreme Court required the matter be sent back for a contested case. The majority and minority opinions recognized the sacredness and profound importance of Maunakea to Hawaiian practitioners, and recognized that traditional and customary practices are exercised throughout the summit area. The Court ruled that the State and DLNR had an “affirmative obligation” to protect Hawaiian rights recognized in Article XII Section 7 of the Constitution, this argument was expanded in the Minority opinion which also affirmed that this obligation was part of the protection of the public trust. See Maunakea Anaina Hou vs., DLNR/State of Hawaii. SCAP-14-0000873, December 2, 2015.

B. State Mismanagement as verified by The State Auditor:

State auditors reports on the Mauna for the years 1998, 2005, 2009 and 2014 document numerous violations of State law and verify that although the University and private Telescope Operators created several studies & plans for the Development (Native Cultural Report, Public Access Report, Decommissioning Report and Comprehensive Management Plan) none of these plans have been implemented and no plan actually provided for Hawaiian rights to worship or for other cultural practices. For example, the Public Access Plan prepared for the TMT Project and the OMKM in 2010 by the Sustainable Resources Group International, delineated public access rights in a number of areas including hunting and recreational uses but specifically omitted any protections for Hawaiians and instead put Hawaiian rights in a section entitled “Unresolved Issues”. This is a clear example of racism that pervades the history of the States mismanagement of Maunakea.

In 2014, the State Auditor (citing Act 132 , 2009) noted, “Administrative rules governing public and commercial activities on Mauna Kea lands are necessary to provide effective protection of cultural and natural resources from certain public activities, and to help ensure public health and safety. Examples of public and commercial activities to be governed by administrative rules include general access to sensitive resource areas, such as specific and off-road vehicle

management and control; alcohol consumption; recreational activities; and commercial tour activities.”

The auditor found that the University and Office of Maunakea Management (OMKM) had not implemented any of their own studies, reports or plans because they have refused to establish rules to implement these plans. Consequently, the Mauna has not been protected these many years, nor have there been rules to facilitate Hawaiian cultural practices guaranteed by the State Constitution & Laws. During this time, development proceeded to a point that it exceeded the carrying capacity of the Mauna and its unique environment. The last Comprehensive Management Plan called for development to cease after 13 permits for telescopes had been awarded, today there are 22 structures on the Mauna!

The 2014 audit found that the OMKM had benefitted significantly by avoiding its rule making obligations and giving out unauthorized and illegal permits for public commercial uses. In the last few years, the science community has brought in 2 million dollars through illegal permitting for tourism. These funds did not go to the DLNR for management purposes, in fact the BLNR record reflects that the Board has repeatedly acknowledged that it did not have funds to meet the environmental and cultural needs of the Mauna.

Although the provisions of Chapter 171 require fair market rental be paid for the use of public lands, these laws have been violated for 48 years, ever since the University received a 65 year lease for Maunakea in 1968 for free. The University ignored these laws when it subleased lands on the summit for 22 buildings for \$1.00 per year. Data obtained by Kahea, the Hawaiian Environmental Coalition indicates that annual rent should be 45 – 55 million per year and that rental of approximately 500 million has been lost to date.

C. ACT 132 & Evidence of Desecration and Deliberate Vandalism of Sacred Sites:

In 2009, the State Legislature passed ACT 132 the purpose of which was to allow the university of Hawaii to adopt administrative rule to regulate activities within the lands managed by the UH on Maunakea. Testimony of the Maunakea Ranger Corp Program, the body whose job it was to protect cultural sites on the Mauna, presented to the Senate Ways & Means Committee on April 6, 2009. Their testimony, attached hereto as Exhibit #1 verifies that the Maunakea Corps was aware that there was a significant problem with desecration of sacred cultural sites and properties on the Mauna. Appended to their testimony were photos of destroyed lele (altars) as well as graffiti and the deliberate disturbance of cultural features going on at the summit. (see Exhibit #1, testimony of Mauna Kea Rangers to the Legislature re: Act 132, 2009 and photos of destroyed ahu.)

The State Legislature passed Act 132 in 2009, but the University, DLNR and TMT refused and continue to refuse to pass Administrative Rules to protect the cultural resources relating to Hawaiian rights to worship and engage in cultural practices guaranteed by the State Constitution Article XII Section 7.

IV. Applicable International Human Rights Law and Violations thereof:

A. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The UNDRIP (Exhibit #2) was passed in 2007, it set forth the Human Rights of Indigenous Peoples, including Hawaiians. The UNDRIP sets forth clearly the rights of Hawaiians to the lands, territories and resources they traditionally owned and used, including sacred sites and landscapes. UNDRIP incorporated by reference.

Article 11 of the Declaration states:

1. *“Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.*
2. *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”*

Article 12 of the Declaration States:

1. *“Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*
2. *States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.”*

Article 25 of the Declaration states:

“1. 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 seas and other resources and to uphold their responsibilities to future generations in this regard. ”

These provisions and the Hawaiian Human Rights they refer to, have been violated and continue to be violated by the actions of the University, TMT and DLNR. In April, 2015 over 100 Hawaiian practitioners, through their organizations, halau and ohana, submitted an Intervention to the U.N. Permanent Forum on Indigenous Issues objecting to these human rights violations requesting Consultation. (See Exhibit #3 Testimony of Hawaiian practitioners to the UN Permanent Forum on Indigenous Issues, 2015)). Their Intervention verified the sacredness of the Mauna and its cultural significance to Hawaiians and also documented the injury and expanding violations of their human rights as the direct result of the actions of the State DLNR, TMT University and numerous other foreign nations and commercial science corporations.

B. In 2015, The United Nations Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples published its *Study and advice on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*. (See EMRIP document A/HRC/EMRIP/2015/2 attached as Exhibit #4.) Incorporated herein by reference.

The study discussed the perspective of international human rights law on the cultural heritage of indigenous peoples, including Hawaiians in the following manner:

6. Indigenous peoples' cultural heritage includes tangible and intangible manifestations of their ways of life, world views, achievements and creativity, and should be considered an expression of their self-determination and their spiritual and physical relationships with their lands, territories and resources. While the notion of heritage encompasses traditional practices in a broad sense, including language, art, music, dance, song, stories, traditional games and sports, sacred sites, and ancestral human remains, for indigenous peoples the preservation of heritage is deeply embedded and linked to the protection of traditional territories. Indigenous cultural heritage is a holistic and inter-generational concept based on common material and spiritual values influenced by the environment.³ It also includes bio-cultural heritage and traditional food production systems such as rotational farming, pastoralism, artisanal fisheries and other forms of access to natural sources.

7. Taking into account the various understandings of culture and cultural heritage, the Expert Mechanism proposed the following:

Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous culture is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behavior, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovisions, laws, and activities such as hunting, fishing, trapping and gathering. Their environment, impacting on a people's common perspective of the world and underlining its connection with nature, influences indigenous cultures. Indigenous cultures shape their views of the world and life. (A/HRC/21/53, Para. 52)."

V. Resolution of the Conflict – The Need for Consultation & Protocols for accommodating cultural practice & Hawaiian Constitutional Rights.

The record reflects that the University, DLNR, BLNR and TMT have consistently refused to acknowledge Hawaiian Constitutional and Human Rights. Although a number of "Studies" have been undertaken, no administrative rules have been fashioned with the participation of Hawaiian Practitioners. The State has conducted an archaeology survey, and mapping that record environmental areas, but has never included data on the Hawaiian practices of Maunakea, their location and location specific information. Consequently, the State and TMT do not know how many practitioners need access to the Mauna during the moon cycles, when the perennial springs flow, or at other seasonal & astrological times etc. Because no consultation has occurred, the DLNR has no information on traditional practices that are applicable or to reforestation & invasive species eradication, method of renewing the earth to support growth & re-introduction of

endemic species. Cultural mapping should be undertaken in order to ensure that places of practice are accurately recorded and procedures are developed in conjunction with practitioners.

This work must be undertaken if any protocols are developed by Practitioners for their use & protection. Recently, the DLNR circulated proposed rules, these rules were prepared in a vacuum and were not based on the actual facts relating to where, how, how often and the manner in which Hawaiians practice their culture on Maunakea. Instead of working with practitioners, DLNR is proposing rules based on their authority to manage the Mauna.

Currently, the State is proposing rules in 3 areas:

- 1) CR-5 Develop and Adopt Guidelines for the Culturally Appropriate Placement and Removal of Offerings;
- 2) Action Item CR-8 Develop and Adopt a Management Policy for UH Management Areas on the Scattering of Cremated Human Remains;
- 3) Action Item CR-7 Determination of the Appropriateness of Constructing new Hawaiian Cultural Features;
- 4) Action Item CR-9 Management Policy for the Cultural Appropriateness of Building Ahu or 'Stacking of Rocks.;"

Proposing State regulation in these areas runs afoul of the Establishment Clause of the First Amendment and flies in the face of the task required by the State Constitution... that that the State accommodate Hawaiian practice. In addition, the State must abandon its current process of recognizing State designated Kahu Ku Mauna (Priest of the Mountain) and begin to work with real practitioners, State wide. Real Hawaiian Kahu and Kumu need to be included and the State appointed Kahu Ku Mauna disbanded.

Consultations need to be undertaken on all islands because it is clear that practitioners reside on all islands. Gathering data from as many practitioners as possible will facilitate the broadest understanding of the practices on the Mauna and their locations and other details (day or night, solstice, women or men or both, overnight, etc. etc.). Cultural mapping is necessary to ensure that protocols for access & use interface reasonably with what is going on culturally.

It is evident that the constitutional and Human Rights of Hawaiians are being deliberately violated and subverted. The University and DLNR must be compelled to adopt rules to facilitate & implement protections for Native Hawaiian rights. In fashioning the cultural protocols, it is the practitioners themselves who will be the sources of information and cultural knowledge. Traditional knowledge & practice dictate the appropriate manner of indigenous worship, gathering etc. and this knowledge is encoded in the culture of the Hawaiian practitioner.

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