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STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED
CONSERVATION
DISTRICTAL LANDS

2011 MAR -7 P 4: 24

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
 Administrative Proceedings Office
 1151 Punchbowl Street, Room 130
 Honolulu, Hawaii 96813
 Phone: (808) 587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name KAHEA: The Hawaiian-Environmental Alliance	2. Contact Person Marti Townsend	
3. Address 1149 Bethel Street, #415	4. City Honolulu	5. State and ZIP 96813
6. Email KAHEA-Alliance@hawaii.rr.com	7. Phone 808-524-8220	8. Fax 808-524-8220

B. ATTORNEY (if represented)		
9. Attorney Name none	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

SUBJECT MATTER

17. Board Action Being Contested

Approval of CDUA-3568, the Conservation District Use Permit for the Thirty Meter Telescope (TMT), the TMT Management Plan and the Mauna Kea Comprehensive Management Plan.

18. Board Action Date

February 25, 2011

19. Item No.

K-1

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

As a long-standing advocate for the protection of the natural and cultural resources of Mauna Kea lands, KAHEA has an interest distinct from the general public that warrants standing in this contested case proceeding.

The Hawai'i Administrative Rules identify three groups that "shall be admitted as a party": the petitioner, relevant government agencies, and "other persons who can show a substantial interest in the matter..." (HAR §13-1-31(a)(4)). KAHEA has a substantial interest in the CDUA-3568 and implementation of the Mauna Kea Comprehensive Management Plan.

Since 2001, KAHEA has supported the community's effort to uphold the laws that protect the sacred summit of Mauna Kea. KAHEA's Board and constituents include Native Hawaiian cultural practitioners, conservationists, scientists, and outdoor enthusiasts, all of whom are deeply invested in the effort to protect this public trust resource and uphold the laws that protect this important area. The well-being of the natural and cultural resources of Mauna Kea is essential to the ability of our members to engage in constitutionally protected, traditional cultural and religious practices, as well as statutorily protected recreational activities, such as gathering, hiking and star-gazing.

KAHEA asserts the rights of Native Hawaiians to ensure Hawai'i's natural resources and the cultural beliefs and traditional practices associated with them are fully protected. KAHEA is led by and works on behalf of Native Hawaiians with constitutionally recognized rights to access and protect Mauna Kea. See, Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5. KAHEA's members engage in these traditional and customary practices in the conservation district of Mauna Kea, including religious ceremonies, huaka'i, gathering of snow, plants, and other materials, view plains/scapes, and other activities. In this contested case proceeding, KAHEA will present its genuine concerns for the protections of these legitimate interests, which are not shared by the general public as a whole.

The Supreme Court of Hawai'i has stated:

"With regard to Native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." Our fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court."

See, *Ka Pa'akai o Ka'aina et al. v. Land Use Commission et al*, 94 Haw. 31, 42, 7 P.3d 1068, 1079 (2000) (internal quotations and citations omitted).

In the same case, the Supreme Court of Hawai'i also noted:

"where the interests at stake are in the realm of environmental concerns[,] we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements."

KAHEA continues to advocate for greater protections of the cultural and natural resources of Mauna Kea. We have a continued interest in protecting the ecosystem and sacred landscape as apart of the traditional and customary cultural and religious practices of our members. Approval of CDUA-3568 for the TMT means a new 18-story, 60,000-square-foot structure -- a structure significantly larger than any structure in the area, can be built on an undisturbed plateau in the conservation district of Mauna Kea. This structure is significantly larger than structure currently in the area and would interfere with a viewplane that is one of the last uninterrupted viewplanes from the summit. Although astronomy facilities are a permissible sub-use in the Mauna Kea conservation district, this permission does not mean astronomy facilities can be allowed to take precedence over the natural beauty and cultural significance of Mauna Kea. Astronomy facilities should only be allowed if they comply with the criteria for issuing conservation district use permits. The TMT does not come close to compliance with these criteria.

Moreover, the Land Board, who holds the responsibility of protecting the Mauna Kea Conservation District, improperly delegated its responsibility to the University of Hawaii, the primary developer of astronomy facilities in the conservation district. Serious inconsistencies and unknowns remain regarding how and to what extent Native Hawaiian traditional and customary practices will be protected in the future on Mauna Kea.

As a representative and advocate on behalf of the Native Hawaiian community, including current Native Hawaiian cultural practitioners, KAHEA's interests are distinct from the general public. Because of KAHEA's on-going advocacy for the protection of the Mauna Kea conservation district from uncontrolled construction, KAHEA should be admitted as a party to this contested case hearing.

21. Any Disagreement Petitioner May Have with an Application before the Board

The BLNR erred by:

Approving the CDUA-3568 for the TMT without complying with the eight criteria in HAR § 13-5-30(c).

Approving the CDUA-3568 for the TMT in violation of the University of Hawaii's general lease S-4191.

Approving the CDUA-3568 for the TMT under the authority of the University of Hawaii's Mauna Kea Comprehensive Management Plan (CMP), which fails to actually provide comprehensive management of the natural and cultural resources in the Mauna Kea conservation district.

Delegating its authority to the University of Hawaii by approving the Mauna Kea (CMP) despite the lack of essential information, adequate consultation, and procedural due process related to constitutionally protected rights, duties, and privileges of those affected by this decision.

Approving the CDUA-3568 for the TMT before holding a contested case hearing requested pursuant to HAR § 13-1.

Approving the CDUA-3568 for the TMT without following the proper procedures and apply proper standards for the protection of species facing possible extinction.

Approving the CDUA-3568 for the TMT without first ensuring that Traditional, Cultural

Properties are fully assessed and included in all consultations and impact assessments required pursuant to the National Environmental Policy Act, the National Historic Preservation Act, and Hawaii's state environmental and historic site protections.

Approving the CDUA-3568 for the TMT without first properly appraising the fair market value of these public lands and establishing a market-based rent amount, in violation of their fiduciary duties under to Section 5(f) of the Hawai'i Admission Act and their statutory duty under to HRS § 171-33(5).

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

Invalidate CDUA-3568 for the TMT approved on February 25, 2010.

Invalidate the CMP approved on April 9, 2009 and March 25, 2010.

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

On February 25, 2011, DLNR have acknowledged that it was the advocacy of those concerned with the protection of Mauna Kea, such as KAHEA, that helped to expose the years of mismanagement of this unique conservation district. The contested case hearing requested today is a continuation of that effort to reveal the problems inherent to the development on Mauna Kea and hopefully improve protections for this important natural and cultural resource. Revealing mismanagement and improving future management of Mauna Kea is always in the public's best interest.

As a longstanding and independent advocate for the proper protection of Hawai'i's public trust resources on the sacred summit of Mauna Kea, KAHEA is the proper party to raise the distinct issues outlined in this petition in the public's interest.

This contested case proceeding addresses many of the long-standing issues surrounding the University's use of the summit of Mauna Kea for astronomy. The outcome of this case will likely have significant effect on the future interpretation and implementation of state laws and regulations regarding land use in conservation districts, leases for the use of state land, and the state's obligation to protect constitutionally recognized Native Hawaiian traditional and customary practices. The questions of law and fact presented in this case speak to the core purpose and proper implementation of Hawaii's conservation district protections. As such, this contested case directly affects KAHEA's interests as a longstanding advocate for the protection of this public trust resource and as a Native Hawaiian-led organization committed to protecting traditional and cultural rights.

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

KAHEA's participation in this contested case hearing will aid the Land Board in making an informed decision. KAHEA has consistently provided critical information to the Land Board to assist Board members in making the best possible decisions about the management of the Mauna Kea. Over the years, KAHEA has developed its role in the community as an advocate and leader for the protection of Mauna Kea's public trust natural and cultural resources. As such, KAHEA has access to independent, expert analysis related to these issues. Relevant and impartial information, such as this, is essential to an effective and efficient decision-making process.

KAHEA's interests are not substantially similar to other parties in this proceeding. However, to ensure this contested case hearing is conducted in an efficient manner, KAHEA commits to working with other parties to the greatest possible. Where appropriate, KAHEA will file documentation jointly with other participants concerned for the protection of the Mauna Kea conservation district.

- Check this box if Petitioner is submitting supporting documents with this form.
- Check this box if Petitioner will submit additional supporting documents after filing this form.

Marti Townsend M. Townsend March 7, 2011
Petitioner or Representative (Print Name) Signature Date

check for \$400.00 filing fee enclosed.

Hand Delivered
- [Signature]

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

RECEIVED
CONSERVATION
DISTRICT LANDS

2011 MAR -7 P 4: 24

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

- 1. **Name:** Mauna Kea Anaina Hou
- 2. **Contact:** Kealoha Pisciotta
- 3. **Address:** Mauna Kea Anaina Hou
P.O. Box 5864
- 4. **City:** Hilo
- 5. **State/Zip:** Hawai'i, 96720
- 6. **Email:** keomaivg@gmail.com
- 7. **Phone:** (808) 968 - 7660
- 8. **Fax:** None
- 9 -16. **Attorney:** Pro Se

17. Board Action Being Contested:

Conservation District Use Application (CDUA – HA - 3568) and Conservation District Use Permit (CDUP – HA – 3568), site management plan and Mauna Kea Comprehensive Management Plan for the University of Hawai'i and the Thirty Meter Telescope Corporation's Telescope Project, Mauna Kea Science Reserve, Ka' ohe, Hamakua District Hawai'i Island.

18. **Board Action Date:** February 25, 2011

19. **Item No.:** K-1

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

Mauna Kea Anaina Hou (MKAH) is an unincorporated association of individuals (Hawaiian and non-Hawaiian) throughout the island of Hawaii. MKAH is dedicated to protecting, preserving and perpetuating Native Hawaiian traditional and customary cultural, historic and religious practices, access and site (landscape) protection.

MKAH Members have been actively involved in protecting Mauna Kea's natural and cultural resources since the late 1980s. Kealoha Pisciotta, President of Mauna Kea Anaina Hou, continues to exercise her traditional and customary Hawaiian cultural and religious practices on Mauna Kea. Ms. Pisciotta and other MKAH members have family and genealogical ties to Mauna Kea.

BLNR granted MKAH standing in the previous Contested Case Hearing on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. MKAH was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).

MKAH Members exercise and will continue to exercise their traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. Many MKAH members are native Hawaiian, as defined in the Hawaii Admission Act, Section 4. These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in 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. MKAH members enjoy constitutionally protected traditional and customary native Hawaiian rights.

MKAH has an interest in the Mauna Kea lands under review by the BLNR relating to the approval of the UH/TMT Corporation's CDUA/CDUP, separate from those of the general public. MKAH can and will provide information to assist decision-making on the UH/TMT Corporation's CDUA/CDUP. To manage and expedite the Contested Case Hearing, MKAH will work jointly with other parties who share common interests to organize and make a single presentation addressing:

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

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

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

- the gathering of ice, snow, water, raw materials for adz making;
- depositing of the "piko" or umbilical cord in Lake Waiau;
- traditional astronomy, cosmology, and navigation;
- continued burial practices;
- solstice and equinox ceremonies;
- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- the exercise of other rights for religious, cultural, and subsistence purposes.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to the observatory projects. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

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

Ceded Lands Trust Revenues. Petitioners are also beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust,

Petitioners have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As beneficiaries of this trust, they have a right to reasonable revenues from the lease of public lands subject to the provisions of the trust.

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

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

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT corporation is required to consult with native groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

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

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b)(10).

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

The BLNR made many errors in approving the UH/TMT Corporation's request for a CDUA on February 25, 2011 prior to holding the requested contested case hearings, violating the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS

§ 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine:

- 1) Whether BLNR erred by approving the UH/TMT Corporation CDUA prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
- 2) Whether the BLNR should accept this application to construct the large TMT Corporations facility on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
- 3) Whether the BLNR erred in approving the UH/TMT Corporation CDUA in violation of the requirements for the issuance of CDUAs.
- 4) Whether the BLNR erred by approving the UH/TMT Corporation CDUA with a management plan insufficient to meet the requirements of HAR 13-5-24.
- 5) Whether the BLNR erred by approving the UH/TMT Corporation CDUA prior to the courts review of the UH Comprehensive Management Plan that is under review in the Intermediate Court of Appeals.
- 6) Whether the members of the Board of Land and Natural Resources will violate their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- 7) Whether the BLNR is violating state and national laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
- 8) Whether the BLNR should approve the CDUA for the UH/TMT Corporations Project proposed for the Mauna Kea Conservation District when the UH has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites.
- 9) Whether the Board of Land and Natural Resources must comply with the requirements of Hawaii Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT Corporation to prepare and circulate for public review and comment a Federal Environmental Impact Statement, including a cumulative impact assessment, prior to any approval of CDUA for the Mauna Kea Conservation District.

- 10) Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals.

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

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

Desecration and Destruction of Cultural Sites. In addition, members of the Petitioners Mauna Kea Anaina Hou, and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a family shrine of Mauna Kea Anaina Hou on at least three separate occasions. In total the family shrine has been desecrated and removed on at least seven separate occasions—the original stone and second stone (from the family of Auntie Iolani Luahine) has been removed and is still missing.

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

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope. Petitioners have members who are eligible beneficiaries of the Hawaiian homestead program and are users of the Mauna Kea State Park.

Ceded Lands Trust Revenue. The Board of Land and Natural Resource's disposition of public lands are subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a proper appraisal and for less than fair-market value is a breach of trust and statutory duties owed to native Hawaiian beneficiaries of the trusts

created by this Act, the BLNR and the UH have foregone substantial revenues that the observatories could have generated for the trust. All members are beneficiaries of the trust. Some of the members of Mauna Kea Anaina Hou, are Native Hawaiian beneficiaries of the trust.

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals are found on the slopes of Mauna Kea and in some cases only there on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this specie would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. Petitioners have an interest in this protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT Corporation has not complied with the Hawai'i and National Environmental Policy Acts. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT Corporation to submit only a state environmental impact statement, when federal funding has already been received and additional federal funding is anticipated by the project proponents. In order to give the Board all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT Corporation needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts on the Mauna Kea Conservation District.

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

We believe that the Board violated petitioner due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioners, and are therefore unsure of the specific remedy in this instant case, however, we seek the BLNR to invalidate, deny or revoke (as this case may require) the UH/TMT Corporations CDUA/CDUP, or in the alternative approval with conditions that will be developed during the course of the Contested Case Hearing to address the above mentioned issues.

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

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioners access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

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

The BLNR failed to adequately assess the affect that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

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

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

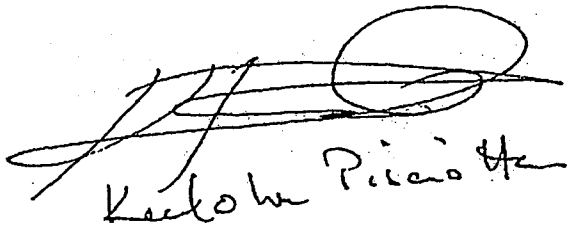
Mauna Kea Anaina Hou, has been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We were granted standing by BLNR allowing us to participate in previous contested case hearings relating to observatory expansion. We were also granted standing by the Third Circuit Court, in our appeal of the BLNR's approval of the KECK-NASA Outrigger Telescopes Project. We prevailed over the DLNR and UH at the Third Circuit Court, reversing the BLNR's approval of the KECK/NASA CDUA. We participated and prevailed in a federal court where the court found KECK/NASA in breach of the National Environmental Policy Act.

We have participated in every phase of formal decision-making regarding the UH/TMT Corporation's CDUA. On November 22, 2010, MKAH submitted written testimony highlighting the significant flaws in the TMT CDUA. We requested a contested case hearing at that time.

On December 2 and 3, 2010 the Department of Land and Natural Resources Office of Conservation and Coastal Lands (DLNR-OCCL) Administrator, Mr. Samuel J. Lemmo, conducted public hearings (in Hilo and Kona, Hawai'i island where the lands in question are located) regarding the Thirty Meter Telescope Corporation's Telescope (TMT) Conservation District Use Application (CDUA) for the purpose of preparing the DLNR staff recommendations to the Board of Land of Natural Resources (BLNR) to accept, amend or adopt with conditions the TMT's CDUA. At that hearing the President and other members of Mauna Kea Anaina Hou presented testimony and provided collective written requests, requesting that BLNR hold a contested case hearing (CCH) on the TMT Conservation District Use Application (CDUA).

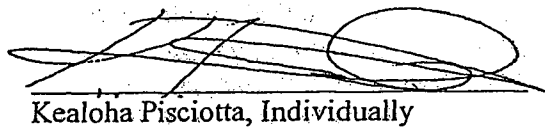
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DATED: Hilo, Hawai'i, March 6, 2011

A handwritten signature in black ink, appearing to read "Kealoha Pisciotta". The signature is stylized with a large loop at the end and is written over a horizontal line.

Kealoha Pisciotta, President
Mauna Kea Anaina Hou

DATED: Hilo, Hawai'i, March 6, 2011

A handwritten signature in black ink, appearing to read "Kealoha Pisciotta". The signature is stylized with a large loop at the end and is written over a horizontal line.

Kealoha Pisciotta, Individually

Hand Delivered
~K

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

1. **Name:** The Royal Order of Kamehameha I, Moku o Mamalahoa, Mauna Kea Committee
2. **Contact:** Ali'i Sir Paul K. Neves K.G.C.K.
3. **Address:** 380 Nahale-a Avenue
4. **City:** Hilo
5. **State/Zip:** Hawai'i, 96720
6. **Email:** kealiikea@yahoo.com
7. **Phone:** (808) 935-9656
8. **Fax:** None
- 9-16. **Attorney:** Pro Se
17. **Board Action Being Contested:**

Conservation District Use Application (CDUA – HA - 3568) and Conservation District Use Permit (CDUP – HA – 3568), site management plan and Mauna Kea Comprehensive Management Plan for the University of Hawai'i and the Thirty Meter Telescope Corporation's Telescope Project, Mauna Kea Science Reserve, Ka'ohe, Hamakua District Hawai'i Island.

18. **Board Action Date:** February 25, 2011
19. **Item No.:** K-1

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

The Royal Order of Kamehameha I, Moku o Mamalahoa (ROOK I), is an unincorporated association of Hawaiian individuals. The Royal Order of Kamehameha I of which Paul Neves is a part, was created well over 130 years ago. Its charter dates back to the 1860's. The ROOK I was formed to instill loyalty and patriotism to the Hawaiian Kingdom and to uphold the protocols of the traditional and customary Hawaiian leadership. Members of ROOK I have been actively exercising traditional and customary Native Hawaiian cultural and religious practice and ceremony and have consistently worked for greater natural and cultural resources protection of Mauna Kea since the 1990's.

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STATE OF HAWAII

I, Paul K. Neves, am the Chairman of the Mauna Kea Committee for the ROOK I and I continue to exercise traditional and customary Hawaiian cultural and religious practice. I also have family and genealogical ties to Mauna Kea and Haleakala.

I and ROOK I were granted standing by BLNR in a previous Contested Case Hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. ROOK I was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the 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).

Members of ROOK I participate in many traditional and customary native Hawaiian practices within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas. ROOK I members have maintained temple ceremonies within the land areas, including Pu'u Wekiu of Mauna Kea. ROOK I under my leadership erected a ceremonial platform (lele) on the Pu'u Wekiu many years ago, which has been desecrated and destroyed on at least two separate occasions.

Many ROOK I members are native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. 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, depositing of the "piko" or umbilical cord in 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 and members of ROOK I enjoy constitutionally protected traditional and customary native Hawaiian rights.

ROOK I has interest in the Mauna Kea lands under review by the BLNR relating to the approval of the UH/TMT Corporations CDUA, separate and distinct from those interests held by the general public and can provide relevant information to help decision-making regarding the requested CDUA/CDUP. In order to help expedite the contested case hearing process, ROOK I is willing to work with any other parties so that where common and shared interests between parties exist we will to work to file jointly to make a single presentation addressing:

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

Traditional and Customary Practices. More specifically, Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by

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

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

- the gathering of ice, snow, water, raw materials for adz making;
- depositing of the "piko" or umbilical cord in Lake Waiau;
- traditional astronomy, cosmology, and navigation;
- continued burial practices;
- solstice and equinox ceremonies;
- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- the exercise of other rights for religious, cultural, and subsistence purposes.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater

contamination emanating from sources traceable to the observatory projects. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

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

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

Hawai'i Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawaii and the TMT Corporation filed an FEIS, which fails to fully assess cumulative impacts to the region from the combine effects of the proposed TMT expansion and the Pohakuloa training expansions (up the slopes of the Mauna Kea Conservation District). The TMT Corporation has received substantial federal funding for this project, and anticipates receiving more federal funding in the future, constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). State law requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

The *Wekiu*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. *Sierra Club v United States Fish & Wildlife Serv.* 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range."

HRS § 195D-4(b). While the *Wekiu* insect is neither an endangered nor threatened specie under the Endangered Species Act, this board has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit.

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT corporation is required to consult with native groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

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

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);

- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b)(10).

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

The BLNR made many errors in approving the UH/TMT Corporation's request for a CDUA on February 25, 2011 prior to holding the requested contested case hearings, violating the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS § 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine:

1. Whether BLNR erred by approving the UH/TMT Corporation CDUA prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
2. Whether the BLNR should accept this application to construct the large TMT Corporations facility on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
3. Whether the BLNR erred in approving the UH/TMT Corporation CDUA in violation of the requirements for the issuance of CDUAs.
4. Whether the BLNR erred by approving the UH/TMT Corporation CDUA without a management plan that meets the standards required by HAR 13-5-24.

5. Whether the BLNR erred by approving the UH/TMT Corporation CDUA prior to the courts review of the UH Comprehensive Management Plan that is under review in the Intermediate Court of Appeals.
6. Whether the members of the Board of Land and Natural Resources will violate their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
7. Whether the BLNR is violating state and national laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
8. Whether the BLNR should approve the CDUA for the UH/TMT Corporations Project proposed for the Mauna Kea Conservation District when the UH has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites.
9. Whether the Board of Land and Natural Resources must comply with the requirements of Hawaii Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT Corporation to prepare and circulate for public review and comment a Federal Environmental Impact Statement, including a cumulative impact assessment, prior to any approval of CDUA for the Mauna Kea Conservation District.
10. Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals.

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

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

area. These blockades on public roads prevented Petitioners access to the lake or upper regions of the summit area.

Desecration and Destruction of Cultural Sites. In addition, members of the Petitioners ROOK I, and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a family shrine of Mauna Kea Anaina Hou on at least three separate occasions. I, Paul K. Neves, have participated in helping to rebuild this ahu on at least two separate occasions. The ahu I helped build is still destroyed and the pohaku are missing.

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

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope. Petitioners have members who are eligible beneficiaries of the Hawaiian homestead program and are users of the Mauna Kea State Park.

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

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals are found on the slopes of Mauna Kea and in some cases only there on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this specie would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. Petitioners have an interest in this protection, based on their

members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT Corporation has not complied with the National Environmental Policy Act. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT Corporation to submit only a state environmental impact statement without considering the cumulative impacts of other proposals expected to have a significant affect on the same area (e.g. Pohakuloa Training Area expansion) and without completing a federal environmental impact statement at the same time. In order to give the Board all the information it needs to adequately evaluate the potential harm to the unique resources of Mauna Kea, the UH/TMT Corporation needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts in the area of the Mauna Kea Conservation District at both state and federal levels.

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

We believe that the Board violated my due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioners, and are therefore unsure of the specific remedy in this instant case, however, I seek to have the BLNR invalidate, deny or revoke (as this case may require) the UH/TMT Corporation's CDUA/CDUP, or in the alternative approval with conditions that will be developed during the course of the Contested Case Hearing to address the above mentioned issues.

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

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioners access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

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

The BLNR failed to adequately assess the affect that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and

those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

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

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

Members ROOK I and Paul K. Neves exercise, have exercised, or desire to exercise their traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve areas. Most members of the Petitioner are native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. These rights include the exercise of traditional and customary practices related to the use of Lake Waiau and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in 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, members of ROOK I and Paul K. Neves enjoy constitutionally protected traditional and customary native Hawaiian rights.

The Royal Order of Kamehameha I and Mr. Neves have been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We were granted standing by BLNR allowing us to participate in previous CCH's relating to observatory expansion. We were also granted standing by the Third Circuit appealing BLNR's final approval of the KECK-NASA Outrigger Telescopes Project, where we prevailed with the court finally reversing the KECK/NASA CDUA.

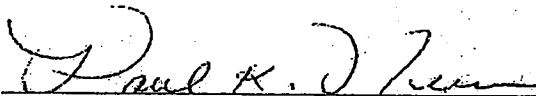
We have participated in every phase of formal decision-making regarding the UH/TMT Corporation's CDUA. On November 22, 2010, ROOK I and Mr. Neves submitted written testimony highlighting the significant flaws in the TMT CDUA. We requested a contested case hearing at that time.

On December 2 and 3, 2010 the Department of Land and Natural Resources Office of Conservation and Coastal Lands (DLNR-OCCL) Administrator, Mr. Samuel J. Lemmo, conducted public hearings (in Hilo and Kona, Hawai'i island where the lands in question are located) regarding the Thirty Meter Telescope Corporation's Telescope (TMT) Conservation District Use Application (CDUA) for the purpose of preparing the DLNR staff recommendations to the Board of Land and Natural Resources (BLNR) to accept,

amend or adopt with conditions the TMT's CDUA.. At that hearing the President and other members of Mauna Kea Anaina Hou presented testimony and provided collective written requests, requesting that BLNR hold a contested case hearing (CCH) on the TMT Conservation District Use Application (CDUA).

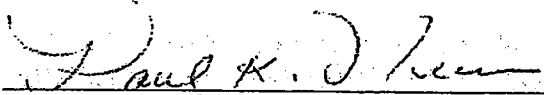
On February 25, 2011, the BLNR held a public hearing on the island of O'ahu where the Board (1) approved the TMT CDUA (HA 3568) and (2) subsequently approved our CCH request, and delegated to the Chairman the authority to select a hearings officer to conduct all hearings with respect to conservation district use application (CDUA HA - 3568).

DATED: Hilo, Hawaii, March 6, 2011



Ali'i Sir Paul K. Neves, K.G.C.K., Chairman of the Mauna Kea Committee
Royal Order of Kamehameha I, Moku o Mamalahoa.

DATED: Hilo, Hawaii, March 6, 2011



Paul K. Neves, Individually

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

RECEIVED
CONSERVATION
DISTRICT LANDS

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

- 1. Name: Ms. Deborah Ward
- 2. Contact: as above
- 3. Address: P.O. Box 918
- 4. City: Kurtistown
- 5. State/Zip: Hawai'i, 96760
- 6. Email: dward@hawaii.edu
- 7. Phone: (808) 966-7361
- 8. Fax: None
- 9-16. Attorney: Pro Se
- 17. Board Action Being Contested:

Conservation District Use Application (CDUA – HA - 3568) and Conservation District Use Permit (CDUP – HA – 3568), site management plan and Mauna Kea Comprehensive Management Plan for the University of Hawai'i and the Thirty Meter Telescope Corporation's Telescope Project, Mauna Kea Science Reserve, Ka'ohē, Hamakua District Hawai'i Island.

18. Board Action Date: February 25, 2011

19. Item No.: K-1

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

I, Deborah Ward, representing myself, am a long-standing member of the Sierra Club, Hawaii Chapter. I served on the faculty of the University of Hawai'i at Mānoa in the Department of Natural Resources and Environmental Management. I regularly use Mauna Kea for hiking (including access and use of traditional Hawaiian trails of Mauna Kea), viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.

I have been an active member of the Office of Mauna Kea's Environment Committee since 2000, and in the past ten years I have participated in crafting recommendations regarding resource protection. As an environmental scientist and recreational user of Mauna Kea, I seek summit-wide protection, and conservation of natural and cultural resources management of Mauna Kea.

Management requires a long-range commitment of funding, and includes ongoing monitoring of the resource, prevention of damage to the habitat from a range of harm.

I represented Sierra Club (SC) in a previous contested case hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of the KECK/NASA observatory facilities on Mauna Kea. SC was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawai'i, Board of Land and Natural Resources*, Civil No. 04-1-397). When the DLNR and the University appealed Third Circuit Court Judge Glen Hara's ruling requiring a comprehensive management plan, the issue went before the Intermediate Court of Appeals, and the DLNR appeal was subsequently withdrawn, so the ruling stands. SC is currently a Plaintiff in the Intermediate Court of Appeals where the UH-Kuiwalu's "comprehensive management plan" previously approved by BLNR is currently under review.

Although many issues involve Hawaiian religious practitioners, whose interests are different from my own interests, I continue to support their rights to cultural and religious practice. I am working primarily to preserve and protect the natural (environmental) resources from degradation. This interest can overlap with the interests of the practitioners, but my recreational practices and scientific interests and longstanding history in this issue are distinct from that of the general public. I have knowledge and information that could be used by the BLNR decision makers so that they may make an informed decision regarding the protecting the Mauna Kea Conservation District.

Additional Historical background:

SC member Mae Mull worked with Hawai'i Island Mayor Herbert Matayoshi and State Governor George Ariyoshi in the 1970's and early 1980's to get the DLNR aware of the community's concerns about expanding (unpermitted) telescope development, which led to the DLNR's development of the Science Reserve Complex Development Plan and management plan, approved by the BLNR in 1985. Sierra Club member Nelson Ho, and others in the 1980's participated in communication with DLNR through letters and testimony about MK management throughout the 1980's and 1990's. He appeared before the BLNR to speak on Mauna Kea matters in 1995 when that plan was adopted. He was concerned about the urbanization and industrialization of the summit and the amount of observatory trash being blown over the landscape.

I accompanied Sierra club member Nelson Ho and scientist Dr. Fred Stone in 1996, when the destruction of a significant portion of wekiu habitat at the base of Pu'u Hau'oki was identified and brought to the attention of the BLNR. I participated in meetings with BLNR archaeologist Holly McEldowney and USFWS biologist Steve Miller, and Bishop Museum entomologist Frank Howarth, to identify resource protections absent from UH IfA and DLNR practices that lead to this violation of Mauna Kea management plan protections approved by the BLNR in 1985. I assisted in efforts to procure a Legislative Auditor's report in 1998, and participated in UH Mauna Kea Master Plan 2000 and the Keck/NASA Outrigger Environmental Assessment process.

At the request of the Legislative Auditor, Ho and Deborah Ward participated in discussions for the audits conducted in 1998 and 2005. In 1998 Ho was appointed by then UH President Kenneth Mortimer to help draft their UH Master Plan. At the request of the Office of Mauna Kea Management (OMKM), Ward has been an active member of the OMKM Environment Committee since 2000. Ward was tasked to draft the Environment Committee white paper that eventually led to the decision to hire a planning consulting firm to draft a natural resources management plan for OMKM.

I have an interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH/TMT Corporation CDUA/CDUP, separate from those of the general public. I can and will provide information to assist decision-making on the regarding the UH/TMT Corporation's CDUA/CDUP. To manage and expedite the contested case hearing, I will work jointly with other parties who share common interests to organize and make a single presentation addressing:

Public Trust. Article XI, Sections 1 and 7. Hawai'i Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR's jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawai'i's people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa (Military) Training Area, and Mauna Kea State Park.

Section 5(f) Public Trust Land Revenues. Are meant to benefit Hawaiians and the general public. Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising the private use of public trust lands, and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee. SC Member include Hawaiian and general public beneficiaries of the Public Trust Land Revenues.

Hawai'i Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The UH/TMT Corporation have failed to prepare an Federal level EIS, despite the significant cumulative effects of the proposed observatory expansion as is acknowledged in previous documents relating to the environmental protections.

The *Wekiu*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

The UH/TMT Corporation's CDUA/CDUP adopted in by BLNR reference another UH BOR document called the UH 2000 Master Plan (UH 2000 MP). This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the BOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH CMP includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The TMT) constituting a federal under taking under federal law.

National Environmental Policy Act. Actions covered by the UH/TMT Corporation will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality (federal and state level requirements) established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);

- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

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

The BLNR made many errors in approving the UH/TMT Corporation's request for a CDUP on February 25, 2011 prior to holding the requested contested case hearings, violating the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS § 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine:

- 1.) Whether BLNR erred by approving the UH/TMT Corporation CDUA prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
- 2.) Whether the BLNR should accept this application to construct the large TMT Corporations facility on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
- 3.) Whether the BLNR erred in approving the UH/TMT Corporation CDUA in violation of the requirements for the issuance of CDUAs.
- 4.) Whether the BLNR erred by approving the UH/TMT Corporation CDUA with an insufficient management plan.
- 5.) Whether the BLNR erred by approving the UH/TMT Corporation CDUA prior to the courts review of the UH Comprehensive Management Plan, which is currently before the Intermediate Court of Appeals.

The UH/TMT Corporations CDUA relies on the Comprehensive Management Plan written by UH and Kuiwahu. This plan does not adequately address, *inter alia*, the following:

- a. Carrying capacity;
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Protection of traditional and customary practices of Native Hawaiians;
- d. Decommissioning;
- e. Timelines for proposed activities;
- f. Cumulative impacts on specific natural resources;
- g. Relation of this CMP to the 2000 UH Plan (which was not adopted by the BLNR);
- h. No updated hydrological study;
- i. No energy consumption study.

This CMP is currently under review in the Intermediate Court of Appeals, which means the BLNR has approved the UH/TMT Corporation's CDUA/CDUP without having a fully vetted comprehensive management plan, as the law requires.

- 6.) Whether the members of the Board of Land and Natural Resources will violate their fiduciary duties pursuant to Section 5(f) of the Hawai'i Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- 7.) Whether the BLNR is violating state and national laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
- 8.) Whether the BLNR should approve the CDUA for the UH/TMT Corporations Project proposed for the Mauna Kea Conservation District when the UH has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites.
- 9.) Whether the Board of Land and Natural Resources must comply with the requirements of Hawai'i Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT Corporation to prepare and circulate for public review and comment a Federal Environmental Impact Statement, including a cumulative impact assessment, prior to any approval of CDUA for the Mauna Kea Conservation District.
- 10.) Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals.

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

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea. I along with many others have spent years advocating for greater protections of the cultural and natural resources, and I have a continued interest in protecting the ecosystem, and I believe the laws protect the sacred landscape as apart of Hawaiian's traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water-shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Area. I have spent years advocating for greater protections of the cultural and natural resources, and have a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, the general public and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust.

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals are found on the slopes of Mauna Kea and in some cases only there on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this specie would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. I have an interest in the preservation and conservation of all the resources of the Mauna Kea summit area for future generations.

Environmental Impact Review. Applicant(s) UH/TMT Corporation has not complied with the National Environmental Policy Act. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. The TMT Corporation has received federal funding for this project proposal and expects to receive additional federal funding in the future. Because this project qualifies as a federal action and in order to give the BLNR all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT

Corporation needs to comply with all procedures for a comprehensive NEPA EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts on the Mauna Kea Conservation District.

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

We believe that the Board violated petitioner due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioners, and are therefore unsure of the specific remedy in this instant case, however, we seek the BLNR to invalidate, deny or revoke (as this case may require) the UH/TMT Corporations CDUA/CDUP.

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

The operations of the observatories on the summit have resulted in the continued physical destruction of the delicate ecosystem and sacred landscape which is used for by many people in the public, including myself, for among other things, hiking (including access and use of traditional Hawaiian trails of Mauna Kea), hunting, viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation. Agents of the University of Hawaii have denied Petitioners access to cultural sites and other areas of the summit and slopes of Mauna Kea. Observatory operations may have resulted in the pollution of the natural environment.

The construction of the TMT will result in continued desecration and destruction of the cultural and natural resources of the summit area and underlying ground water resource within the Mauna Kea Ice Age Natural Area Reserve areas and will interfere with the exercise of these traditional and customary rights.

The BLNR failed to adequately assess the affect that the destruction caused by the TMT will have my rights, duties and privileges and on the rights of other users of Mauna Kea including Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

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

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

I, representing myself and Sierra Club, have been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of

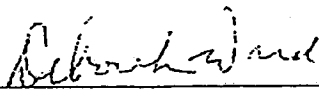
unregulated astronomy development. We were granted standing by BLNR allowing us to participate in previous contested case hearings relating to observatory expansion. We were also granted standing by the Third Circuit Court, in our appeal of the BLNR's approval of the KECK-NASA Outrigger Telescopes Project. We prevailed over the DLNR and UH at the Third Circuit Court, reversing the BLNR's approval of the KECK/NASA CDUA. We participated and prevailed in a federal court where the court found KECK/NASA in breach of the National Environmental Policy Act.

We have participated in every phase of formal decision-making regarding the UH/TMT Corporation's CDUA. On November 22, 2010, I and Sierra Club submitted written testimony highlighting the significant flaws in the TMT CDUA. I requested a contested case hearing at that time.

On December 2 and 3, 2010 the Department of Land and Natural Resources Office of Conservation and Coastal Lands (DLNR-OCCL) Administrator, Mr. Samuel J. Lemmo, conducted public hearings (in Hilo and Kona, Hawai'i island where the lands in question are located) regarding the Thirty Meter Telescope Corporation's Telescope (TMT) Conservation District Use Application (CDUA) for the purpose of preparing the DLNR staff recommendations to the Board of Land and Natural Resources (BLNR) to accept, amend or adopt with conditions the TMT's CDUA.. At that hearing I and other members of Sierra Club presented testimony and provided collective written requests, requesting that BLNR hold a contested case hearing (CCH) on the TMT Conservation District Use Application (CDUA).

On February 25, 2011, the BLNR held a public hearing on the island of O'ahu where the Board (1) approved the TMT CDUA (HA 3568) and (2) subsequently approved our CCH request, and delegated to the Chairman the authority to select a hearings officer to conduct all hearings with respect to conservation district use application (CDUA HA - 3568).

DATED: Hilo, Hawai'i, March 5, 2011



Deborah Ward

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

1. **Name:** Clarence Kukauakahi Ching
2. **Contact:** Clarence Kukauakahi Ching
3. **Address:** 64-823 Mamalahoa Highway
P.O. Box 5864
4. **City:** Kamuela
5. **State/Zip:** Hawaii, 96743
6. **Email:** kauila3339@gmail.com
7. **Phone:** (808) 769-3828
8. **Fax:** None
- 9-16. **Attorney:** Pro Se

17. Board Action Being Contested:

Conservation District Use Application (CDUA – HA – 3568) and Conservation District Use Permit (CDUP – HA – 3568), site management plan and Mauna Kea Comprehensive Management Plan for the University of Hawai'i and the Thirty Meter Telescope Corporation's Telescope Project, Mauna Kea Science Reserve, Ka'ohē, Hamakua District Hawai'i Island.

On November 22, 2010, I submitted written testimony on the TMT CDUA. I requested a contested case hearing at that time, though none was held at that time.

On December 2 and 3, 2010, the Board of Land and Natural Resources Office of Conservation and Coastal Lands (DLNR-OCCL), by its Administrator, Samuel J. Lemmo, (with no board members present) conducted public hearings (in Hilo and Kona respectively, Hawai'i island, where the lands in question are located) regarding UH-Hilo's Conservation District Use Application (CDUA) on behalf of the Thirty Meter Telescope Corporation. I presented oral and written testimony and requested that BLNR hold a contested case hearing (CCH) on the TMT Conservation District Use Application (CDUA) at both hearings. A contested case hearing was not held at this time, as well.

Then, on February 25, 2011, the BLNR held a board meeting on O'ahu island where the Board - (1) granted the TMT CDUP (HA 3568) and (2) granted the request for CCH, and delegated authority to the Chairman to select a hearings officer to conduct such hearings with respect to conservation district use application (CDUA HA - 3568).

18. Board Action Date: February 25, 2011

19. Item No.: K-1

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

I, Clarence Kukauakahi Ching, file this petition for contested case hearing as a Hawaiian cultural practitioner in general and, specifically, my practices on Mauna Kea. Being a descendant of some of the most noted chiefs of Hawai'i Island (Lono i ka Makahiki, Keawe a 'Umi, 'Umi a Liloa, Liloa and on up the line), I have long-standing family and genealogical ties to Hawai'i island and Mauna Kea.

I am a Hawaiian Kingdom Subject, and participate in this state administrative hearing under duress. I was an Office of Hawaiian Affairs Trustee (of the so-called "State of Hawaii") from 1986 to 1990. I am a member of the kalai wa'a (canoe building) community, with special ties to Keanakeko'i (adze quarry) located within the Ice Age Natural Area Reserve.

I have been involved in traditional and customary Native Hawaiian cultural, religious and spiritual practice on Mauna Kea for over 30 years. I have traversed the trails leading to, over and around Mauna Kea (including the Umikoa Trail, the KaUla Trail, the Humu'ula Trail, etc.). I have also been on the mountain where there are no trails.

For almost a decade (from 2002 to present), I have led Huaka'i i na 'Aina Mauna, a group of Hawaiian and non-Hawaiian hikers and cultural practitioners, across the island of Hawai'i, east-west and north-south from sea level to the summits of Mauna Kea and Mauna Loa, around the summits and back to sea level. These practices are based on being able to walk in the footsteps of our ancestors, to feel how they might have felt and to "connect" with them. On Huaka'i, we have conducted traditional and customary cultural, spiritual and religious rituals and ceremonies at many locations on Mauna Kea, including Kukahau'ula (the summit area), Lake Waiiau, the various springs and Pohakuloa gulch areas.

I work with and gather, among other things, traditional wood, fiber, and stone material related to kalai wa'a (canoe building, being part of the construction crew of the voyaging canoe, Hawai'i Loa) and other cultural and artistic works.

I also collect and use sacred waters from various sources, including the springs of Mauna Kea at Houpo o Kane and Lake Waiiau, for ritual and medicinal purposes. I have also spent multi-years working for protection of and propagation of endemic (to Hawai'i and Mauna Kea) and indigenous plant species.

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 on Mauna Kea. Furthermore, I was granted standing by BLNR in a previous contested case hearing regarding BLNR's approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea (more specifically, the Keck Observatories Outrigger Telescopes). I was also a Plaintiff in the Third Circuit Court appeal of the final decision made by the BLNR regarding the CDUP Application

(HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawai'i, Board of Land and Natural Resources*, Civil No. 04-1-397).

I exercise, have exercised, and desire to continue to exercise traditional and customary native Hawaiian rights and practices within and around Mauna Kea summit, Ice Age Natural Area Reserve, Mauna Kea Science Reserve and Hale Pohaku areas, all trails, roads, na pu'u, and in between. These rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making and other crafts, depositing of "piko" or umbilical cords in the Lake Waiau area, performing traditional astronomy, cosmology, navigation, continuing burial practices, solstice and equinox ceremonies, patriotic (including flag) ceremonies and rituals, and temple worship, in, among, and around the entireties of Mauna Kea, which, basically speaking, includes the entire island of Hawai'i. Thus, I, along with other Native Hawaiians, enjoy constitutionally protected traditional and customary native Hawaiian rights on Mauna Kea and on the remainder of the Hawai'i island and islands of Hawai'i. My Mauna Kea practice also includes areas away from Mauna Kea's summit area - from such places as Waimea, the Hamakua coast, the Saddle area, Mauna Loa, and Hilo, from all areas from which Mauna Kea can be seen and/or contemplated.

I have an interest in the Mauna Kea lands relating to the issuance of the TMT CDUP separate from those interests held by the general public and can provide relevant information to assist in decision-making regarding the subject CDUP. In order to help expedite the contested case hearing process, I am willing to work with any other parties so that where common and shared interests between parties exist we will to work to file jointly.

The BLNR's improper approval of the TMT CDUP harms my rights, duties, and privileges as outlined in the attached testimony already submitted to the BLNR and summarized here:

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

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

The TMT CDUP will impact land uses within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The TMT CDUP possibly threatens the exercise of these rights by Petitioner. Petitioner's right to exercise his traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes, including the entire island, is derived from custom, tradition and exercise which are, among other things, recognized statutorily in HRS § 1-1. These rights include, but are not limited to:

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the "piko" or umbilical cord, and water collection in and from Lake Waiau;
- Traditional astronomy, cosmology, and navigation;
- Burial practices;
- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the entireties of Mauna Kea;
- Exercise of other rights for religious, cultural, and subsistence purposes;
- Protection of mauka-makai and makai-mauka view planes;
- Protection of kinolau images;
- Native Hawaiian traditional and customary, cultural and religious uses;
- Access to and through the area, including trails and roads - their access and use; and
- The Law of the Splintered Paddle.

Burial Treatment Requirements. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The archeological studies of the summit area of Mauna Kea are not complete, and so far burial sites are the second largest historic sites found. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. Article XI, Sections 1 and 7. Hawai'i Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66 places jurisdiction over water quality in the Department of Health. BLNR's jurisdiction over the Conservation District must be exercised in conjunction with the Department of Health to preserve water quality in the aquifer underlying Mauna Kea. Petitioner has an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawai'i's people from groundwater contamination emanating from sources traceable to any observatory project on Mauna Kea. Petitioner is informed and believes that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories.

Trail System and the Highways Act of 1892. In 1892, Queen Lili'uokalani approved law that determined that the ownership of all public highways and the land, real estate and property of the same shall be in the Hawaiian Government in fee simple. The definition of public highway, includes all existing trails at the time "or hereafter opened, laid out or built by the Government, or by private parties, and dedicated or abandoned to the public as a highway, are hereby declared to be public highways. Furthermore, "All public highways once established shall continue until abandoned by due process of law". (HRS §264-Ub)

The following HRS furthers the intent of the Highways Act: All trails and other nonvehicular rights-of-way in the State declared to be public rights-of-way by the Highways Act, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at anytime hereafter, or in the future, as declared to be public trails. A public trail is under the jurisdiction of the State Board of Land and Natural Resources – unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county. All State trails once established shall continue until lawfully disposed of pursuant to Chapter 171, HRS. (see also HRS §264-1 Public highways and trails) http://www.capitol.hawaii.gov/hrscurrent/vol05_Ch0261-0319/HRS0264/HRS_0264-0001_.HTM 9/19/2006

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawai'i Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawai'i, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioner has an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to observatory projects. Petitioner is informed and believes that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

Ceded Lands Trust Revenues. Petitioner is also a beneficiary of the trust (Hawai'i state being the trustee) established pursuant to Section 5(f) of the Hawai'i Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As a beneficiary of this trust, Petitioner has a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As a beneficiary of this trust, I have a right to expect reasonable revenues from the lease of public lands subject to the provisions of the trust.

Hawai'i Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawai'i and the TMT Corporation have failed to prepare a federal EA/EIS, despite the significant cumulative effects of the proposed TMT observatory (and the Pohakuloa training expansions) on the slopes of Mauna Kea within the Conservation District. The TMT Corporation has received substantial federal funding for this project constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). While TMT Corporation has attempted to characterize its federally obtained funds in sub-projects that may, by its accounting practices, be overlooked as "federal funds," the spirit and letter of the law command that these funds should indeed mandate compliance with federal environmental laws. State law further requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

Furthermore, TMT Corporation, in denying use of federal funds or that its use of federal funds has not "triggered" a need for compliance with federal requirements, has either given notice of, or has applied for, future grants or use of federal funds. If the TMT Corporation anticipates using federal funds, as it appears it does, then compliance with federal requirements seems to be fully necessary.

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

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT corporation are required to consult with native groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

National Environmental Policy Act. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality (federal and state adopted) established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);

- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b)(10).

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

The BLNR made many errors in approving the TMT CDUP on February 25, 2011 prior to holding the requested contested case hearings. These resulted in the violation of the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, 91-2, 91-9, HRS § 171, 171-6, HRS § 183C, 183C-3, 183C-6, HRS § 205, HRS § 343, HAR § 13-1, § 13-1-28, 13-1-29, § 13-1-31, HAR § 13-5, 13-5-24, 13-5-30, and possibly other requirements. Please also refer to the attached testimony already submitted to the DLNR for clarification of these and other legal requirements not satisfied.

The contested case hearing should determine:

- 1) Whether BLNR erred by approving the TMT CDUP prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
- 2) Whether the BLNR should accept this TMT CDUA for constructing on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
- 3) Whether BLNR engaged in the "wholesale delegation" of their fiduciary duty to oversee, manage and reasonable protect the cultural and natural resources of Mauna Kea necessarily affects and negatively impacts our legal rights, duties, and privileges.
- 4) Whether the BLNR erred in approving the UH/TMT Corporation CDUA in violation of the requirements for the issuance of CDUAs.

- 5) Whether the BLNR erred by approving the UH/TMT Corporation CDUA with a management plan insufficient to meet the requirements of HAR 13-5-24.
- 6) Whether the BLNR erred by approving the UH/TMT Corporation CDUA prior to the courts review of the UH Comprehensive Management Plan that is under review in the Intermediate Court of Appeals.

Judicial Notice: On March 19, 2010, we appealed the Third Circuit Court's decision regarding BLNR's denial of our request for a contested case hearing on the UH's Comprehensive Management Plan. Our appeal is currently before the Intermediate Court of Appeals.

- 7) Whether the members of the Board of Land and Natural Resources will violate their fiduciary duties pursuant to Section 5(f) of the Hawai'i Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- 8) Whether the BLNR is violating state and national laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
- 9) Whether the BLNR could approve the TMT CDUP for the Mauna Kea Conservation District when the UH has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites.
- 10) Whether the Board of Land and Natural Resources must comply with the requirements of Hawai'i Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT Corporation to prepare and circulate for public review and comment a Federal Environmental Impact Statement, including a cumulative impact assessment, prior to any approval of CDUA for the Mauna Kea Conservation District.
- 11) Whether the UH has a conflict of interest as both CMP author/land manager and CDUA applicant. The UH, while a state agency, is in a conflict of interest, first, because they are not the state agency mandated to oversee conservation district (BLNR has this responsibility) and secondly because the UH has a specific interest in seeking more development to improve their academic credentials (see State Auditors reports regarding the BLNR and UH's failure to management of Mauna Kea). The UH also files CDUA's with foreign and non-state observatory developers for the use of Mauna Kea. The UH therefore is the primary supporter and mover of development of Mauna Kea, which has great impact on the cultural and natural resources of Mauna Kea.

- 12) Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals.

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

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

Desecration and Destruction of Cultural Sites. In addition, members of the Petitioners Mauna Kea Anaina Hou, and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a family shrine of Mauna Kea Anaina Hou on at least three separate occasions. In total the family shrine has been desecrated and removed on at least seven separate occasions—the original stone and second stone (from the family of Auntie Iolani Luahine) has been removed and is still missing.

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

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope. Petitioners have members who are eligible beneficiaries of the Hawaiian homestead program and are users of the Mauna Kea State Park.

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

members are beneficiaries of the trust. Some of the members of Mauna Kea Anaina Hou, are Native Hawaiian beneficiaries of the trust.

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals are found on the slopes of Mauna Kea and in some cases only there on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this specie would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. Petitioners have an interest in this protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT Corporation has not complied with the Hawai'i and National Environmental Policy Acts. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT Corporation to submit only a state environmental impact statement, when federal funding has already been received and additional federal funding is anticipated by the project proponents. In order to give the Board all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT Corporation needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts on the Mauna Kea Conservation District.

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

I believe that the Board violated my due process rights by approving the TMT CDUA prior to establishing the legal rights, duties and privileges of all the petitioners. I seek to have the BLNR to invalidate, deny or revoke (as this case may require) the TMT CDUP and any all management plans upon which the CDUP is based because both are inadequate to fulfill the requirements of the law.

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

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawai'i have denied Petitioners access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

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

The BLNR failed to adequately assess the affect that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

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

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

I have 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 on Mauna Kea. Furthermore, I was granted standing by BLNR in a previous contested case hearing regarding BLNR's approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea (more specifically, the Keck Observatories Outrigger Telescopes). I was also a Plaintiff in the Third Circuit Court appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawai'i, Board of Land and Natural Resources*, Civil No. 04-1-397).

DLNR Staff, Mr. Sam Lemmo, acknowledged that criticisms that I and my fellow petitioners raised regarding the mis-management of Mauna Kea by the University were accurate and have helped the staff to recognize the need for improved management of the Mauna Kea Conservation District. This has been a huge public service that we have provided without any compensation. I, and my fellow petitioners, return here again to inform the BLNR that the illegal and offensive mis-management of Mauna Kea continues today.

DATED: Honolulu, Hawai'i, March 7, 2011



Martha Townsend for Clarence Kukauakahi Ching

To Whom It May Concern,

I, Clarence Kukauakahi Ching, give my permission to Ms. Marti Townsend of KAHEA to sign my Petition to the Board of Land and Natural Resources of the State of Hawai'i concerning my participation in the Contested Case Hearing of the TMT CDUP.

It is understood that Ms. Townsend will also deliver said "signed" Petition to the Board of Land and Natural Resources on or about Monday, March 7, 2011.

DATED: Kamuela, Hawai'i, March 6, 2011.

/s/ Clarence Kukauakahi Ching

Clarence Kukauakahi Ching
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Kamuela, HI 96743
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