

Testimony in Opposition
To the TMT Project and EA/EIS Process

2008 OCT 24 PM 3:00

UH-HILO
CHANCELLOR'S OFFICE

Submitted by
Mauna Kea Anaina Hou, The Royal Order of Kamehameha I,
and Clarence Kukauakahi Ching

Aloha

Mauna Kea Anaina Hou represented by Ms. Kealoha Pisciotto, The Royal Order of Kamehameha I, Moku o Mamalahoa, Heiau Mamalahoa Helu Elua represented by Ali'i Aimoku Ali'i Sir Paul K. Neves, and individual Hawaiian Practitioner Clarence Kukauakahi Ching, are dedicated to preserving and protecting Native Hawaiian Traditional and Customary cultural and religious rights and resources relating to Mauna Kea.

Mauna Kea Anaina Hou, The Royal Order of Kamehameha I, Sierra Club and individual practitioner Clarence Kukauakahi Ching 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 State and University. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We also participated in successful litigation in both federal and state courts against the University (UH) and State of Hawai'i (BLNR), The University of California (UC), CalTech, and NASA.

We are opposed to the TMT project and the ongoing environmental review process. There is no legal justification for more development on Mauna Kea, therefore there is no justification for doing an environmental review document for this project. Doing this EA/EIS before a Comprehensive Management Plan is prepared and approved by the BLNR, burdens and prejudices the public and the parties defending their case in the Intermediate Court of Appeals.

St Augustine, who pondered questions of ethics, morality and justice once said: An Unjust law is No law at all—here in the case of Mauna Kea we are not faced with unjust laws—only that the developers like the UH and TMT continue to violate and ignore the laws.

We submit for the record the following objections to this project and EA/EIS process:

I. GENERAL OBJECTIONS

1. The TMT will in fact, desecrate Mauna Kea

We object and take exception to the recent public assertion made by the TMT staff and Board members claiming the TMT project will not desecrate Mauna Kea. The TMT staff do not have the expertise to make such claims. Uneducated claims prior to a

comprehensive review are foregone conclusions that courts have repeatedly rejected.

Furthermore, Mauna Kea's cultural and religious significance is well documented in oral and written historical archives, as well as in legislative and court records. Since "time immemorial," Mauna Kea has been and continues to be held in reverence by the Hawaiian people as a Wahi Pana and Wahi Kapu. Mauna Kea is revered in the same way that other religions revere their churches, temples, synagogues, and mosques.

The upper regions of Mauna Kea reside in Wao Akua, the realm of the Akua-Creator. It is the burial ground of the most sacred of our ancestors. It is considered the Temple of the Supreme Being and is acknowledged as such in many oral and written histories throughout Polynesia. It is home of Na Akua (the Divine Deities), Na 'Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (Sky Father) who are considered to be the progenitors of the Hawaiian People. It is where the Sky and Earth separated to form the Great-Expanse-of-Space and the Heavenly Realms. Lake Waiau is considered (among other things) to be the doorway into the Po (i.e. the mystical realm of the ancestors). Mauna Kea in every respect represents the zenith of the Native Hawaiian people's ancestral ties to the process of creation itself.

The ceremonies and practices on Mauna Kea form the basis of the navigational knowledge that allowed Hawaiians to navigate over ten million square miles of the Pacific Ocean, millennia before modern science and before Captain Cook ever set eyes on Hawai'i Nei. Hawaiian navigation is both a cultural and scientific contribution, not only to Hawai'i but also to the world and the global knowledge base.

Because of the unique elevation and conditions at the summit of Mauna Kea, there are a number of traditional and customary cultural and religious practices conducted on Mauna Kea that are conducted nowhere else in on earth. Mauna Kea is also home to some of the most unique, rare and fragile plant and animal species in the world. These include the U'au (dark rump petrel), Palila bird, Wekiu bug, and Silverword. Many of the species found on Mauna Kea are considered threatened and/or endangered. They are also found only on Mauna Kea and nowhere else on earth.

The summit lands are designated conservation lands not only because of their unique cultural, historic, geological, and climatic features, but also because they are watershed lands. Mauna Kea is the principle aquifer for the island of Hawai'i. If these waters are contaminated, they can no longer be used for ceremonies, healing, and/or for drinking.

Mauna Kea's highly protected status as a National Landmark, a National Historic District, and a State Conservation District is because of these unique, rare and fragile features. These natural resources are part of the public trust recognized in Hawaii's Admission Act, the Hawai'i State Constitution, and in the judicially recognized public trust duties and responsibilities of the State. By comparison, the development of astronomy facilities, however valuable it may be in its own right, is not a public trust activity.

2. The Intermediate Court of Appeals is reviewing the Mauna Kea case

The Mauna Kea case is currently in the Intermediate Court Appeals – which means that the merits of the case, apart of the cross appeal, are under review, and therefore the TMT project should not be moving forward while the ICA is reviewing the case, this prejudices the parties such as Mauna Kea Anaina Hou.

3. BLNR has not fulfilled the court order issued by Judge Hara

Judge Hara's decision and order found the following:

- (1) Pursuant to 183C of Hawaii Revised Statutes, the purpose of the State's Conservation Districts is conservation;
- (2) The resource that needs to be conserved is the entire summit area of Mauna Kea and not just the development area;
- (3) The UH 2000 Master Plan is NOT, (A), an approved plan pursuant to BLNR rules and regulations and (B), is Not a comprehensive plan as contemplated by the rules and regulations.
- (4) BLNR erred in issuing a permit to the NASA Outrigger Telescope Project, allowing piecemeal development proposals without having completed a Comprehensive Management Plan for the entire summit of Mauna Kea.

Unless and until Judge Hara's ruling is overturned, it is a matter of law that must be followed. Judge Hara ordered the BLNR to prepare and approve a Comprehensive Management Plan. The BLNR has not done a Comprehensive Management Plan for the conservation of Mauna Kea. The TMT should not be moving forward in contravention of the law.

We incorporate by reference the state case Mauna Kea et al., v. BLNR, Civil No. 04-1-397, to be fully integrated into any and all TMT environmental review documents.

4. UH and its agent Ku`iwalu may not fulfill Judge Hara's order on behalf of BLNR

The TMT Notice documents claim the TMT will be incorporated into the UH-Ku`iwalu's "Comprehensive Management Plan." But the Court ordered BLNR and NOT the UH or its agent Ku`iwalu to do the Comprehensive Management Plan. The TMT should not be moving forward in contravention of court orders.

5. BLNR must comply with Hawai`i Supreme Court orders and instructions

BLNR has a non-transferable fiduciary duty to protect Native Hawaiian rights and resources. The Supreme Court of Hawai`i has provided all state agencies with instructions to fulfill their duty. Expressly barring delegation of their duties to a sub-entity like the UH or a third party like Ku`iwalu. Recently the Supreme Court specifically barred the sale, transfer or encumbrance of the 5(f) trust lands—a case currently on appeal before the U.S. Supreme Court. **The TMT should not be moving in contravention of the State Supreme Court orders and instructions.**

We incorporate by reference the Hawai'i Supreme Court case *Kapa`akai O Ka Aina v. Land Use Commission*, 94 Hawaii 1, 7 P. 3rd 1068 (2000), to be fully integrated into any and all TMT environmental review documents.¹ (see also relevant section in foot note)

6. The TMT will have significant, adverse and substantial impact on the cultural and natural resources of Mauna Kea

In 2003, a federal lawsuit involving UC-Caltech and NASA compelled NASA to complete the first EIS ever conducted on Mauna Kea since 1968; and found "the cumulative impact of 30 years of astronomy development has resulted in significant, adverse and substantial impact to the cultural and natural resources of Mauna Kea."

We incorporated by reference the entire NASA Federal Environmental Impact Statement (EIS) and accompanying court records *OHA v. Sean O'Keefe*, Civil. No. 02-00227 SOM/BMK filed July 15, 2003 to be integrated into any and all TMT environmental review documents

Furthermore, BLNR may not issue permits to projects that have adverse and significant impact to the natural and cultural resources. BLNR rules and regulations prohibit the approval of development projects in Conservation Districts that have "adverse and significant" impacts to the cultural and natural resources. BLNR rules under HAR §13-5-30(c)(4) clearly state:

The proposed land use will not cause substantial adverse impacts to existing natural resources within the surrounding area, community or region etc.

The TMT should not be moving forward if the State cannot give it a permit to be built.

We incorporate by reference the relevant section of BLNR rules and regulations, including HAR §13-5-30, to be integrated into any and all TMT environmental review

¹ In *Kapa`akai O Ka Aina v. Land Use Commission*, 94 Hawaii 1, 7 P. 3rd 1068 (2000), the court made two critical rulings. In *Kapa`akai*, the Land Use Commission (LUC) failed to meet its duty to protect native Hawaiian traditional and customary practices when the LUC reclassified land from Conservation to Urban without independently assessing: (1) identity and scope of the 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist (*Kapa`akai v. LUC*, 94 Haw. 1, 15). Second, the Supreme Court expressly rejected the claim by the private Ka`upulehu Development Company ("KD") that the LUC's duties had been fulfilled by the private developer's Resources Management Plan which attempted to address native Hawaiian cultural and religious practices. The Court rejected the LUC's purported "delegation" authority:

[T]his wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity, however, was improper and missed the point... We hold that, insofar as the LUC allowed KD to direct the manner in which customary and traditional native Hawaiian practices would be preserved and protected by the proposed development—the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority. (*Kapa`akai v. LUC*, 94 Haw. 1, 19)

documents.² (See relevant section in foot note)

7. The University and International observatories are in material breach of the General Lease

First, because the \$1.00 per year lease rent, the international observatories and corporations pay, if they pay at all, is unlawful. The entire summit of Mauna Kea is section 5(f) public trust lands which is held "in trust" by the state for the Native Hawaiians and the general public. Hawai'i Admissions Act, section 5(f), Haw. Rev. Stats §§171-17 and -18 require the state to collect fair market value lease rent and to deposit the funds from the use of section 5(f) lands in the public lands trust fund.

While public lands are often set aside to public agencies for their own use at no cost, any subsequent transfer of an interest to third parties outside the Hawaii government is subject to the fiduciary obligation to obtain fair market rent. The one dollar (\$1.00) per year lease rent currently paid to the State by the foreign governments and corporations operating on Mauna Kea therefore, are unlawful. State law requires "fair market" lease rent for the use of 5(f) Trust Lands.

We incorporate by reference Haw. Rev. Statutes 171-17 and -18 and related public trust documents cited above to be incorporated into any and all TMT environmental review documents.

Secondly, the legal limits on the number and size of the observatories have already been exceeded. In the 1980's BLNR prepared and approved the 1983-85 management plan which limited the number of telescope allowed in Mauna Kea's Conservation District to thirteen (13), that is eleven (11) major and two (2) minor telescope facilities. There is no new plan that extends the telescope limits beyond the 13 established that has been adopted by BLNR.

The 1983-85 BLNR plan limited not just the number of facilities but the size of each facility. No telescope could exceed 125 feet in height and diameter. The telescope limits were established based on the science collected at the time relating to the protection of the natural and cultural resources. The BLNR has categorically allowed UH to violate the telescope limits with the construction of the Gemini North Telescope, Very Large

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

Array (VLBA) and the Smithsonian Telescope Array (consisting of over 24 telescope pads and support buildings spread over a half mile area). The TMT will also violate these limits. The TMT should not be moving forward if it will exceed legal limits on the telescopes allowed on Mauna Kea.

We incorporate by reference **the 1983-85 Mauna Kea Science Reserve Complex Development Plan, to be integrated into any and all TMT environmental review documents.**

9. Scholarships will not mitigate negative impact on the natural and cultural resources of Mauna Kea

Providing scholarships including Hawaiian scholarships will not offset the actual impacts the TMT will have on the cultural and natural resources on Mauna Kea. Federal law requires that mitigation measures reduce significant impacts to less than significant. Off-site mitigation such as scholarships will not suffice for getting a Conservation District Use Permit. The TMT should not be moving forward to further negatively impact the cultural and natural resources of Mauna Kea.

II. SPECIFIC OBJECTIONS

1. TMT EIS Public Hearings And Notice

A. At the TMT Public EA/EIS Scoping meeting held in Keaukaha on Hawai'i Island Mauna Kea Anaina Hou asked if these hearings were being conducted pursuant to Chapter 91 and 92. TMT representatives answered in the negative, that the hearings were not in compliance to Chapter 91 and 92. HRS Chapter 343 requires EA/EIS review processes to be in compliance with Chapter 91 and 92. Please see HRS 343.

B. At the TMT Public EA/EIS Scoping meetings held in Keaukaha, on Hawai'i Island, TMT representatives expressly stated that the TMT would only be conducting a state level EA/EIS pursuant to HRS Chapter 343. The reasons offered for this where that the TMT project had no public funds associated with the project. The TMT claims are not true. The TMT project has in fact received substantial federal funds from the National Science Foundation; constituting a major federal undertaking pursuant to National Environmental Policy Act (NEPA) and the National Historic Preservation Act. Please see NSF website. The TMT therefore must complete a federal EIS and Section 106 for the TMT project.

Please see <http://www.bigislandvideonews.com/maunakea/20081020dawson.htm>, for TMT representative comments cited above.

The University of Hawai'i (UH) , has also recently received substantial federal funds for the astronomy under the University Affiliated Research Center (UARC), constituting a major federal undertaking. The University therefore is acting in a federal capacity and must comply with all federal law, including NEPA and NHPA.

Therefore we also must request that the TMT conduct this EA/EIS pursuant to both NEPA and the NHPA. We request formal compliance with Section 106 of the National Historic Preservations Act as amended 1969. We request consultation pursuant to Section 106 of NHPA.

C. Beginning on the front page of the EIS notice published by The Office of Environmental Quality Control (OEQC Bulletin), reads:
"This Environmental Document is Prepared Pursuant to Hawai'i Revised Statutes, Chapter 343, Environmental Impact State Law and Chapter 200 of Title 11, Hawai'i Administrative Rules, Department of Health, Environmental Impact Statement Rules."

If by "pursuant" you also mean in "compliance" with the law—you are not correct. As outlined above both TMT and the UH are receiving federal funds and therefore they must comply with NEPA and NHPA.

State law under HRS §343-5(2) (f) clearly states;
Whenever an action is subject to both the National Environmental Policy Act of 1969(Public Law 91-190) and the requirements of this chapter...agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

TMT-UH must do a Federal EIS and may NOT do separate state and federal EIS's. Doing separate documents will burden the public by forcing it to attend and submit testimony in separate hearings.

We incorporate by reference the above statutes to be integrated into any and all TMT environmental review documents.

2. The EIS Notice Relies On Incorrect Information.

Throughout the EIS notice documentation you reference the UH 2000 Master Plan, the Office of Mauna Kea Management, and the astronomy precinct. TMT uses the information contained in the UH 2000 Master Plan document to identify the land area for the TMT project. The UH Master Plan has no force or effect of law. Judge Hara confirmed it was not a plan created by BLNR or in contemplation under the State rules and regulation governing Mauna Kea's conservation district. This document (UH 2000 Master Plan) is not a document that can be cited legally because it is not a legal document. Additionally, it also means the Office Of Mauna Kea Management is not a legal entity that can make land use decisions for BLNR, and UH certainly may not reclassify or recharacterize any land on Mauna Kea. There is no astronomy precinct—and even if there were an astronomy precinct, the TMT would exceed the legal limits on telescopes allowed in the Science Reserve and Mauna Kea Conservation District.

We object to the TMT's reliance on a document (the UH 2000 Master Plan) that has no force or effect of law for determining land use in the Mauna Kea Conservation District.

3. The Life Of The TMT Extends 23 Years Beyond The General Lease

The TMT notice information claims the TMT will begin seven years of construction in 2010 and will have an expected design life of 50 years at which time it will be decommissioned. The General Lease issued by the State to the University in 1968 ends in the year 2033. If the life of the TMT is 50 years, it means the TMT is requesting the use of Mauna Kea 23 years beyond the term of the lease. The General Lease requires that in the year 2033 all facilities must be decommissioned and the land must be returned to its original state.

We object to any telescope to continue its existence beyond the 2033 lease termination.

We incorporate by reference the Mauna Kea Science Reserve General Lease No. S-4191, to be integrated into any and all TMT environmental review documents.

4. There is a comparable site in Chile that does not involve significant impacts on the cultural or natural resources that the TMT will have on Mauna Kea.

The TMT will be able to achieve good science if it is NOT built on Mauna Kea. The TMT should be built where there is the least impact to the cultural and natural resources.

III. CONCLUSION

The people of Hawai'i have been actively opposing more development and destruction on Mauna Kea since the lease was first issued in 1968. People marched at the State Capitol in the 70's and 80's to show they did not want astronomy to take over the mountain. We are only the latest people that have been engaged in the struggle. We have been engaged in legal battles since the UC-Caltech announced that they would be building the four (4) – six (6) Outrigger Telescopes in 1995. To be clear, while you may want to appear to be "new people" to the issue, UC and CalTech are same institutions we have spent the last 13 years fighting.

We have spent all of those years turning out to testify, bringing our Kupuna out to the hearings, that were too frail to come out--one hearing after another. We did this because our Kupuna told us it was the aloha thing to do, since they believed, if the scientist understood how important Mauna Kea was to the people they would understand why no more development is the better thing to do. Eventually we were forced to file lawsuits in federal and state courts—which the people won (our Kupuna won). But our Kupuna also told us that litigation is the path to be taken when dialog fails.

We spent over 3 hours explaining what I have outlined here tonight to both Mr. Chameau, President of Caltech and Mr. Yang, Chairman of the TMT Board. We have spent this time in the spirit of our Kupuna, hoping they would see the problems and would want to not further aggravate these problems. As soon as the TMT EIS hearings were announced it was clear that our good faith dialog had failed again.

We will continue to stand firm in our work to protect the sacred things of Mauna Kea.

We will honor our Kupuna who kept these things so that we might live. The sacred things are what blesses us and give us life today. We will stand by our Kupuna who have always raised the standard of Aloha. Aloha Mauna Kea and Aloha Ke 'Akua, Na 'Akua, Na 'Aumakua!

In Aloha we remain,

Ms. Kealoha Pisciotta
President, Mauna Kea Anaina Hou

Mr. Clarence Kukauakahi Ching, individual Hawaiian Practitioner

Ali'i Sir Paul K. Neves, Ali'i Aimoku, The Royal Order of Kamehameha I, Moku o Mamalahoa
Heiau Mamalahoa Helu Elua.