

Written Direct Testimony
Mr. Clarence Kukauakahi Ching
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I am Kukauakahi (Clarence Ching) and I'm a cultural practitioner on Mauna Kea. My cultural practice extends to many other places around the island and across the archipelago. Sometimes I'm referred to as "ku - the old man of the mountain." While I don't confess to be an "old" man, I'm probably older than many others who are involved in Mauna Kea and/or its cultural practices. I have a background in science (i.e. B.S. in chemistry (major), zoology (minor)), I've been trained on Wall Street as a stock broker, I have a law (J.D.) degree and I'm a former Office of Hawaiian Affairs (OHA) trustee. I take my cultural activities very seriously.

Part of my specialized cultural practice on Mauna Kea - and on the rest of the island - is to be able to walk in the footsteps of the ancestors. By stepping into their footsteps - one can almost literally connect to one's genealogical and cultural roots. To be able to do so is an amazing experience.

In 2002 and 2003 - I led a group of hikers from coast to coast on Hawai'i island touching three different shores by way of the summits of our two big mauna, starting at sea level on the Hamakua coast, at Koholalele Landing at Kukaiau to the summit of Mauna Kea then returning to sea level at Luahinewai at Kiholo Bay on the Kona coast and from the summit of Mauna Kea to the summit of Mauna Loa then down around Kilauea to sea level at Ke'auhou Landing in the so-called national park. I utilized both traditional and modern ala hele or trails.

Since that time, we have also connected na pu'u to the kai at numerous other locations - via Saddle Road to Hilo and Kawaihae and through Ahu A "Umi to Ke'auhou on the Kona coast. Although my practice encompasses the entire island, its center and nucleus is Mauna Kea. There are probably less than a handful of people on this island who have ever been able to share this wonderful experience, and that is why protection of our cultural and traditional things, such as trails and other cultural and natural resources) need to be protected for future generations. It is my hope that we may inspire our young people so they too can follow in our footsteps and experience the greatness of our ancestors.

We have also connected all points on Highway 19 from Hilo, through Waimea, to Kailua. We have also hiked from Keahole down the South Kona coast past South Point to Ka'alu'alu. We will have circumnavigated the island when and if we ever complete our objectives - which is to have a comprehensive and intimate connection with the entire island.

The Views Planes of Mauna Kea. The views (including a view of at least 240 degrees of arc viewed from the summit of Pu'uPoliahu and the loss of the same view from Pu'uKukahau'ula (now totally restricted by the observatories on the mountain) is an undidiable impact to Native Hawaiians and the general public. If the TMT is built, these views will be lost for perhaps as long as the next 50 years (although the general lease

ends in 2033, at which time all telescopes are to be de-commissioned, the TMT Project is projecting it proposal beyond the terms of the master lease) this is unacceptable. It is unacceptable for me individually, since it will probably be the last opportunity for me, in my lifetime, to be able to ascend the pu'u and enjoy this view plane on my own power. I may not be able to do so in 2033 - at age 97 especially after TMT (if it's ever built); but it is equally unacceptable for other practitioners and the general public. What the TMT is proposing is a taking really is an unreasonable taking of the rights and resources of us all. That is our rights to fully enjoy these resources including our open space resources, not to mention the natural beauty of Mauna Kea. In 2033, if I'm still alive, it seems that the only possibility for me to experience this would be by vehicle, which will probably be totally out of the question - as the present roadway will be long gone (according to present indications). So - Where am I, where are others, and how are our rights being protected?

Today I am go up the mountain and the remaining views and to enjoy the spiritual events but if the TMT is built my that my grandchildren will not have this experience, until they are middle or old-aged. This is not right.

Having to use an alternative view of the northern and western parts of the island - from where we are not really sure - is evidence that the astronomy observatories have restricted such views from more traditional locations on the summit. Of course, TMTOC says that it will only incrementally add to the hewa, but, of course, not enough to stop construction. After all according to UH/TMT and BLNR everything will be mitigated, but this is not in evidence.

However, as my practice takes me to many locations on the summit - and in fact over the entire mountain and island - even being able to assess the great spiritual mana from sea level - the TMT is going to force me to modify my practices. For example, I will have to use secondary and tertiary locations to enjoy views that I would otherwise not necessarily, in a primary sense, need to use. Our practices are being forcibly modified and in some case eliminated all together.

It is unfortunate that typical western thought and philosophy dwells mainly on the physical aspects of things. For instance, in the documents that mandate the elements necessary to be considered on whether a proposed development should be allowable or not - it is mostly the physical that is considered - only things that can be seen or touched. There is nothing mentioned about intangibles. This is completely wrong. Practice include both tangible and intangible aspects.

In Hawaiian cosmology - intangibles, as it applies to cultural beliefs and practices, are a major, major consideration. Surely, intangibles are difficult to quantify. But - Who said it would be easy? The most fundamental and basic beliefs that are instilled into Hawaiians from infancy on has everything to do with intangibles. This is a major fault of statutory law or the rules and regulations of DLNR. While federal law is trending towards the importance of intangibles, the State of Hawaii remains in the dark ages. Is this why TMTOC has resisted the facts of it having receipts and use of federal funds? It

is even in denial that it is looking for future dollars of such funds. Yet - the entire world knows that TMTOC is hoping that NSF will appoint it with a quarter billion dollars of its budget. This brings up another important question - If TMT is having such difficulty in raising the funds necessary for construction, where and from whom will it obtain the funds necessary for operations?

Switching the subject a bit. We were camped at the 10,000 foot level on the Umikoa Trail the night before our almost final ascent of the mountain. We were clearly within the allowances of the "Law of the Splintered Paddle." It was an awesome sight, as, after our tents were put up, and we were about to have dinner - that Lilinoe's fog came meandering through the campground to see what was going on. In a bit, she must have been satisfied - and her mists left us and then moved further on down the mountain. After hiking 5,000 feet from the Keanakolu 4-wheel drive road to this level of the mountain (10,000 feet) - we were tired - and looking forward to the next day's hike to the 13,000 foot level at Pu'uLilinoe.

The hike - up the slopes of Pu'uMakanaka, between Pu'uAla and Pu'uPoepoe and across the plateau was extremely vigorous. In fact, I hit the wall at Pu'uLilinoe and I was forced to catch my breath for at least 5 minutes after every incremental 25 paces or so. I reached the Access Road at the very moment of sunset. Negotiating the 13,000 foot level of Mauna Kea is not child's play. The point is that neither my feeling about Lilinoe and her many blessings, or that feeling of awe from the sunset on the plateau are necessarily measurable (hence intangible), but they are still protected in the way of that the laws protect our open spaces and our right to access areas in order to enjoy these kinds of experiences.

It is hoped that the Hearings Officer will take into his purview those elements of federal law having to do with intangibles during the site visit (although the site visit will already have taken place by the time this testimony is given).

Funds To Desecrate And TMT Being Under Funded Is Problematic

On the one hand the UH/TMT is suggesting using money to attempt "mitigate" the important aspects of the Mauna Kea, which is problematic in and of itself, since practitioners are not concerned with money. But another problem is that the UH/TMT Corporation (TMT) admits that the Project has not been fully funded and therefore, it does not have the funds to actually build or complete the project, yet BLNR is entertaining approving their CDUA. How is that acceptable? If sufficient funds for operations don't show up - What is TMT's alternative plans? What happens if the TMT starts building and irreparably damaging the sacred landscape and other resources, but then is unable to complete its plans—who will be responsible for its removal—and if there really are bad economic times, making legally responsible a moot point. Would not that constitute an irrevocable commitment to the loss or damage of protected resources.

While the current requirements of the laws and rules may not obviously take budgetary considerations such as construction and operational costs into effect - in the realm of billion dollar budgets and the threat of national financial debacles - yes - even as it might affect the United States - that such considerations may be most important if not mandatory. These consideration become obviously important in the CDUA process when the sublease (based on the CDUA) requires then to comply with all applicable laws, including the promise to retore the landscape to its original state—this will not be able to occure if there is no funding to build or to demolish the TMTC, if budgetary problems arise—so the state taxpayers will be saddled with the burden—this is unacceptable.

I'm wondering ethically and lawfully whether the University is playing multiple roles in this process that are in major conflict. Can the University ethically and legally comply with state law in negotiating a fair rent for a sublease and support protection of Hawaiian culture and practice, while on the other hand, advocating to for a foreign corporation with no track record and no financial rating to obtain a permit for the building of a multi-billion astronomy project on the mountain? It would seem that there would be legal liability, among other things, as the Applicant and trying to straddle two conflicting opposites (wearing 2 conflicting hats) - and, in addition, squandering the public's money to put up a legal defense (such as this contested case hearing and any appeal that may follow) to advance the fortunes of a foreign corporation.

I use the term multi billion because that is what the trend is. My earliest recollection of TMT's cost was \$900 Million. Then it became \$1 Billion - and now \$1.1 Billion. At the moment, the most extreme estimated cost for the TMT that is being bandied about is \$1.4 Billion. I don't think I'll have to stick my neck out too much to predict a \$2 Billion price tag in less than 10 years - a fairly reasonable time frame in order to build this machine. Considering the state of international, U.S. and State of California economics, will TMT be able to meet this swiftly moving budgetary target? I think not, and if not BLNR should not be entertaining approving such a project, even if it could meet the requirements for approval in the conservation district.

While it is U.S. policy to keep interest rates very low at present, higher interest rates cannot be avoided - with dire results for the U.S. economy to come on reasonably soon that will usher in extreme increments of inflation. On the other hand, I see nothing in the CDUP that instructs TMT to keep up the condition and appearance of the external parts of the observatory. I was abhorred to notice the external bad shape of the Gemini observatory on my last visit to the summit in June, is this indication of the extent of budgetary problems?

Considering the Hawai'i Tribune-Herald's June 4, 2011, article "Biggest telescope carries big cost" of TMT's joint project with HIEDB (Hawaii Island Economic Development Board), in the amount of \$200,757 in expenses to, among other things, do public outreach and educational presentation to K-12 and college classes on a Workforce Development Program Roundtable over two years, and the annual \$1 M proposed "Community Benefits Package" that is to be administered by The Hawai'i Island New Knowledge (THINK) Fund, the question needs to be asked, and I'm sure that it has been and should

have been already considered - When does TMT project that the first candidate that may be produced through these programs gets hired for a 6-figured income like the 7 employees that are currently on its staff?

As for the suggestion (and recommendation) that the Batch Plant Staging Area application not be approved - Why should an area of the mountain (although claims are that the area has had prior use for similar purposes) that is roughly equal to the proposed TMT site (4 acres compared to 5 acres) be sacrificed and forever desecrated when the activities that are planned for that location can take place at the proposed TMT site? This position is more than relevant if bulldozing and filling to make the site usable are part of the plans. Just because a site has had prior use doesn't mean that the prior use was correct and/or legal. It's about time that DLNR recognizes that its charge to primarily protect cultural and environmental uses of the mountain (due to its Conservation District status) has top priority as compared to all other possible decisions that it might make.

If DLNR decides to allow use of the Batch Plant Staging Area, including dozing and filling, then it must then answer the question of where the necessary fill will come from and whether or not the fill will be required to be removed post project or not. To not require a return to its original condition will be a travesty. If anything, such modification could easily constitute "waste" as it should be delineated in the general lease. Whether or not such a position was addressed to prior users is a question of direct importance. Will DLNR again fail to follow its primary statutory mandate?

More On the Applicant--Who's the Real Applicant?

The University is the general lessor of the Mauna Kea summit lands - which lands devolved (illegally according to international law) to the State of Hawaii - by Section 5(f) of the Hawaii State Admissions Act.

At some point in time, TMT Observatory Corporation (TMTOC) must negotiate a sub-lease with the University - supposedly in an arm's length transaction. Such sub-lease transaction terms could have/should have been included in the CDUA -to be reviewed as to adequacy, compliance with conditions of the general lease and in compliance with all pertinent law (federal, state, county, etc.). The sub-lease should have also been available for review by the public, environmental and cultural practitioners, etc., for adequacy and lawfulness.

As a state agency and the general lessor, the University is also charged with fiduciary responsibility - and to comply with all laws respecting its status - federal, state, county, DLNR's rules and regulations, etc. While DLNR is primarily charged with such fiduciary responsibility, by conditions of the general lease and its agency status with the State of Hawaii, the University, is also charged to comply with such conditions - and also cause its sub-lessees to also be in compliance.

The TMTC is a fairly new corporate body, with no prior success in constructing astronomy observatories and with no established credit rating. It is constituted by, among

others, a California state university - the University of California. This significance of this observation is that the state of California is on the verge, if it could, of filing for bankruptcy. Another entity of TMTC is the nation-state of Japan that has recently undergone massive tsunami and earthquake damage.

Because of the risk of massive financial liabilities due to potential lawsuits from those who have been exposed to deadly radiation from its failed nuclear reactors - Japan is in a very negative position to be able to finance its share of its TMT corporate expenses. With its massive debt to GNP ratio - which is worse than the United States - and its recent environmental problems, Japan's financial abilities are substantially curtailed.

While it is accepted fact that one of the major attractions for use the corporate entity are utilized to limit the financial liabilities of its members - Is it prudent for 1) the University to get itself involved in possible financial complexities with a corporation that has no track record or creditability? or 2) that BLNR should take on the risk of dealing with such a risky entity also? - Without exercising sufficient diligence to require additional financial assurances of creditability and/or alternative financial contingency plans? The procedure for qualifying a CDUP for such a gigantic project as the TMT that spans an entire decade is grossly inadequate - the affect, of which, is essentially that of "no review."

One of the pertinent questions here - is - Does the University have any kind of principal-agent relationship with TMTC that could/would qualify its speaking on behalf of TMTC? Or, does the University, with its fiduciary responsibilities to the citizens of the State of Hawaii and an agency of the State of Hawaii, have the legal and ethical capacity to legally represent a foreign corporation as its agent? Without such an agreement or contract - the University is nothing but a potential sub-lessor and is not qualified to be an Applicant.

This goes directly to the question of rent as well, since TMTC would and should be construed as a foreign corporation and it does not fulfill the conditions of the Admissions Act to be considered a 5(f) purpose and therefore is required to pay "fair-market" lease rent into the general fund as is provided under HRS 171-but the University fronting for the TMTC is a backhanded way give public lands away (like a carrot), and to short the state taxpayers, in violation of the law. The UH by being the applicant on the CDUA is hiding the TMTC away from the statutory requirements of the rent for the use of Public Trust Lands (so called ceded lands), this is unlawful, and the BLNR is also allowing this un-holly alliance to continue by not addressing it and by allowing for all other foreign entities operating on Mauna Kea. The BLNR does not have the right to set these laws aside, and by doing so is burdening the state taxpayers.

Additionally, the University, financed by public money, is not in a position to volunteer its free services, including legal services (such as that involved in this contested case hearing and any subsequent appeals), to a foreign corporation in advocating the granting of a CDUP for such a project as the TMT. That there may be financial arrangements that

have not been disclosed - with the public being kept in the dark - is not the way a governmental agency ought to be operating. A governmental agency that is not operating in a transparent manner should be condemned.

Because of its being the "real" party in interest, TMTC should really be the Applicant - with all pertinent facts of its operations and finances being subject to the public's purview. Or, in CDUA, Section 2.1 Ownership - If TMT is not a party, why would the sublease be subject to approval first by the TMT Board and the UH BOR followed by approval by BLNR. If TMTOC is being treated as if it were the Applicant - then it should be the Applicant.

The University, by accepting a certain degree of financial liability, to act as the Applicant here, is in a substantial position of conflict of interest. Is it representing the public's interest as a state agency, or is it representing the interests of a foreign corporation? The University can't have it both ways.

After all - because it is TMTC that will be accruing the principal benefits of a CDUP, it is the "real" party in interest. The University is only TMTC's potential landlord - and possible beneficiary of telescope viewing time (in lieu of rent) and claims to fame of potential astronomy milestones on its leased mountain. This is without question a conflict of interest and the UH and the BLNR are permitting this to occur in the disposition of public lands and funds and this is unacceptable.

It is interesting that in the development of the February 25, 2011, writeup regarding CDUA HA-3568 - references seem to jump from the Applicant to TMT. This is very confusing. On the other hand, while TMTC is not the Applicant, and there is no privity between DLNR and TMTC, that there are so many references to the TMT, and for directives that TMT must perform, seems to suggest a significance to TMT that the CDUA doesn't address. To avoid confusion and to build a solid network of communication - privity, rights and obligations - it is imperative that TMTC be a party to the CDUA, and actually, THE Applicant.

More Uncertainty

However, there seems to be a concerted effort in the principal players to this astronomy drama - to not only conspire to intercept - but to actually intercept (fair market rents) rent income that is required by statutory law to be paid to the state's general fund. And the tentatively granted CDUP provides the framework for such indiscretions. For instance - the amount of rent that will be required by the sub-lease - when it is finally gotten around to being negotiated - is nebulous. How can such uncertainty be allowed to slip through DLNR's trust and fiscal responsibility? Intentionally?

It seems to be an audacious exercise to make the following statement in a legal document like the CDUA - 'TMT remains committed to paying a "substantial" amount for sublease rent. The rent would be deposited into the Mauna Kea Land Fund, and only used for management of Mauna Kea.' This seems to be a brazen violation of statutory

requirements that mandates that all rents, sourced from negotiations of arms' length fair market value, be placed in the State's general fund.

It appears that this "uncertain" rent requirement, along with the failure to have already negotiated a sublease - breaks all the rules of legal certainty. That a "special" fund has been created to receive the funds seems to be an intentional and substantial non-compliance of state law.

On the other hand, with a sale of viewing time by the Keck Observatory to Yale University in 1909 which, established a value of \$80,000 for one night's use of the facility, that DLNR hasn't reviewed its \$1 per year general lease rent to the University is ludicrous.

The TMT project is being treated as if it were an instant in time - with all aspects of world economics in a vacuum. In these times of financial turmoil, many substantial things could happen during the course of a 12 year expanse of time. For instance, the artificially low interest rates that is current U.S. policy must come to an end within at least a couple of years. And, with interest rates loosened, it is expected that inflation will become a necessary part of the scene. Unless protections and valid alternatives are built in - TMTC will find itself on the short end of the economic stick and will not have sufficient funds to finalize the project.

The lack of viable alternatives and possible guarantees by its sponsors - may easily leave the TMT project high and dry - with the State of Hawaii holding the proverbial bag, this is unacceptable.

Lastly, there are yet other financial leakages that are being slipped into this tentatively approved CDUP. Paragraph 9 includes a couple more - 'Funding the re-naturalization of the closed Access Road on Poli'ahu, partially re-naturalize the Batch Plant Staging Area after construction, and camouflage the utility pull boxes in certain locations to reduce the visual impact from the summit area;' and 'Providing \$1million annually, adjusted for inflation, for "Community Benefits Package" which will commence with construction and continue through the term of the sublease. The package will be administered via The Hawai'i Island New Knowledge (THINK) Fund Board of Advisors;' Unless there are listed exceptions to statutory law that requires all incomes from the so-called "ceded" lands be deposited into the State's general fund - these funds are being misappropriated.

interestingly, questions as to possible "insurance" were asked at some of the hearings, such as the requirement of a bond to cover the contingency of de-commissioning - but none was put in place by the tentatively approved CDUP. The requirement of a bond for the funds necessary to complete the project could/should also be put in place. If not, it is possible, were the dire economic forecasts that are being bandied about, actually take place. To put the possibility of the State to end up having an incomplete "white elephant" if TMTOC were to default in its construction obligations would be the utmost in public

irresponsibility, and surely a grave violation of the State's and its administrative staff's obligation of fiscal responsibility.

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On the other hand, with a sale of viewing time by the Keck Observatory to Yale University in 1909 which, established a value of \$80,000 for one night's use of the facility, that DLNR hasn't reviewed its \$1 per year general lease rent to the University is ludicrous. While the lease rent of \$1 per year, for the University's primary purpose of education, may be justified., that the ability of the University's sublessors to convert such an opportunity into a financial bonus must somehow be chalked up to somebody's short-sightedness. The TMT, having 9 times the light-gathering power of the Kecks - should justify a pretty hefty figure - something like 9 times the Keck values, or \$720,000 per night.

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Thank you and Aloha Mauna Kea