

This is the Supplemental WDT of Clarence Kukauakahi Ching.

This, in no way, deletes or supplants my earlier WDT, but is an addition to my earlier views.

In the opening lines of his book "Inconvenient Indian: A Curious Account of Native People in North America," Thomas King, in speaking about the Indians of North America, as it parallels Hawaiians of Hawai'i island of the Hawaiian Kingdom, declares the following:

"Land. if you understand nothing else about the history of Indians in North America, you need to understand that the question that really matters is the question of land.

Land has always been a defining element of Aboriginal culture. Land contains the languages, the stories, and the histories of a people. It provides water, air, shelter, and food. Land participates in the ceremonies and the songs. And land is home. Not in an abstract way. The Blackfoot in Alberta live in the shadow of Ninastiko or Chief Mountain. The mountain is a special place for the Blackfoot, and friends on the reserve at Standoff have told me more than once that, as long as they can see the mountain, know they are home.

For non-Natives, land is primarily a commodity, something that has value for what you can take from it or what you can get for it."

So, yes, When one can see the Mountain, or be up there experiencing its lofty ridges and distant slopes, Mauna Kea is our Mountain, the Mountain that is DNA- and blood-related to us according to principles of Hawaiian cosmology - our elder, mountain brother. Its status to us is as elevated as that of our other elder brother - the kalo. The Mountain is also the place where the bones of many of our ancient ancestors have deteriorated to become, with the rocks, stones, and gravels, the actual substance of what is the Mountain.

Like its brother mountains scattered over the Earth that are respected and acknowledged, and possibly worshiped, Mauna Kea's status is indeed as important to many Hawaiians.

According to Catie Leary, who writes about science, travel, animals and the arts, mountains are indeed sacred. She writes -

"Religions around the world have long attributed divine qualities to the mountains that tower over their civilizations, and it makes a lot of sense. After all, these looming peaks are often the objects that are most closely positioned next to the heavens, the celestial bodies and the unknown.

However, that's not the only reason why mountains are often imbued with religious significance.

Many of Earth's peaks are considered sacred because of their connections to famous events — when Noah's ark came to rest upon Mount Ararat — or because the mountain demonstrates a god-like strength for destruction — consider Mount Shasta or Mauna Kea.

Regardless of whether you believe the legends that surround them, it's hard to deny the sublime power that mountains represent."

And these are some of the reasons why I place so much significance on the sacredness of Mauna Kea. The tsunami of persons - Hawaiian and non-Hawaiian who feel similarly, make

Mauna Kea the globally-regarded sacred Mountain that it is, just as Kailash, Fuji, Shasta, Kilimanjaro, Aconcagua or Denali are.

### **TMT Observatory Corporation is the Third Party Beneficiary of the CDUA**

The following Declaration is found starting at Page 1-5 of Exhibit A-1 The Conservation District Use Application, at 1.2 OVERVIEW OF THE PROPOSED USE:

**"On behalf of the TMT Observatory Corporation**, the University of Hawaii, is seeking a Conservation District Use Permit (CDUP) from the State of Hawaii, Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory<sup>4</sup> within an area below the summit of Mauna Kea that is known as "Area E". The TMT Observatory Corporation is a private non-profit corporation that will be responsible for constructing the TMT project and for managing its operations. The TMT project is currently a partnership among the TMT Observatory Corporation (TMT), the University of California (UC), the California Institute of Technology (Caltech) and the Association of Canadian Universities for Research in Astronomy (ACURA). The National Astronomical Observatory of Japan (NAOJ) is a collaborator and potential partner, and the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC) and India's Department of Science and Technology (DST) are observers and potential partners in the TMT project." (Emphasis added)

There is no doubt that the Third Party Beneficiary in the Conservation District Use Permit is TMT Observatory Corporation (TMT) that will be responsible for constructing the TMT Project, a project involving TMT, UC, Caltech, ACURA, NAOJ, NAOC and DST.

However, let me note here that there has been a major effort made by pro-TMT parties to this contested case hearing, namely the University of Hawaii, the superior agency of the Applicant University of Hawai'i-Hilo, University of Hawaii - Hilo ("u.h.-Hilo"), and the TMT International Observatory LLC ("TIO"), with the cooperation of the Office of Mauna Kea Management ("OMKM"), Board of Land and Natural Resources (BLNR) and Department of Land and Natural Resources (DLNR) of the so-called "State of Hawaii" - the Decision Maker - to substitute TIO for TMT in this process. As a matter of fact, both TMT and TIO are individual corporations, although they each have similar corporate objectives and each is represented by a singular legal representative (Watanabe Ing LLP) and are co-existing. The fact of their co-existence was put in evidence by TIO Witness Robert Rechtman, archaeologist, who testified that he performed contract work for both entities at the same distinct time.

It is expected that a written order by Judge Greg Nakamura of the Third Circuit Court, State of Hawaii, will be filed at a date subsequent to this writing (January 1, 2017), that will revoke the CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191. The oral decision preceding this written order was rendered at a Hearing on December 15, 2016, with said Judge presiding. The revocation of this Consent to Sublease revokes the viability of the Sublease. Without the Consent, the written and signed Sublease between TIO and the University has no more legal significance than a blank piece of paper.

And without the Sublease having any legal significance, the Sublease has been indirectly terminated. Without having any possible legal effect, there is no other conclusion that can be made other than that it is terminated. As the Scientific Cooperation Agreement (to be brought

up in the next paragraph) is conditioned on the viability of the Sublease, the termination of the Sublease, is also a termination of the Scientific Cooperation Agreement, and TIO and its Standing in this Contested Case Hearing has just evaporated. Because TIO has nothing going for it to support its Standing in this Contested Case Hearing - How can the HO justify its further involvement in the Contested Case Hearing?

However, without any supporting information and/or documentation - a Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and University of Hawaii ("Sublease"), dated July 28, 2014, and a Scientific Cooperation Agreement between TMT International Observatory LLC and University of Hawaii Concerning the Design, Construction and Operation of the Thirty Meter Telescope on Mauna Kea, Hawaii ("Scientific Cooperation Agreement"), dated July 28, 2014, were executed. Note that it is TIO that is the party to these two documents - and NOT TMT - as was contemplated by the CDUA. That there are no supporting documents to legitimate this substitution is frustratingly vexing.

### **The Conservation District Use Application (CDUA) is outdated**

The Conservation District Use Application (CDUA) was signed on September 2, 2010. More than 6 years have passed since that time occurred. Because of the events that have transpired since that initial date, the CDUA is out-dated. The Motion to Strike the CDUA filed by Attorney Richard Wurdeman should have been granted - and the entire Contested Case Hearing process should have begun anew - with the filing of an Amended CDUA.

Even if the 6 year elapsed time is ignored, major events have occurred that agree with the conclusion that the CDUA under consideration by this Contested Case Hearing is out-dated.

The mere existence of the Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and University of Hawaii ("Sublease"), dated July 28, 2014, and the Scientific Cooperation Agreement between TMT International Observatory LLC and University of Hawaii Concerning the Design, Construction and Operation of the Thirty Meter Telescope on Mauna Kea, Hawaii ("Scientific Cooperation Agreement"), dated July 28, 2014, although both are slated for early deaths, are overwhelming reasons to argue that the CDUA is outdated and should be stricken. Furthermore, the fact that TMT International Observatory LLC, although it is not the real party in interest, was inserted as if it were the "Real Party in Interest," is another overwhelming reason to strike the CDUA. On the other hand, if TIO's insertion as the "Real Party in Interest" in the Sublease and Scientific Cooperation Agreement is indeed correct, then it is impossible to not come to the elementary conclusion that the CDUA should be stricken because it is outdated. So, in either case, the CDUA should be stricken and an Amended CDUA should be filed.

It is interesting that the Applicant tried to use its Witness Perry White to legitimize TIO's substitution for TMT. When asked under cross examination of this writer, who asked him to discuss TIO in his direct written testimony, Perry White testified that it was requested of the University. Perry White also testified that he worked for Planning Solutions Inc. that is an in-house entity of Carlsmith and Ball - Applicant U.H.-Hilo's attorneys.

In his direct written testimony, Perry White states: "As discussed in the TMT CDUA, the University of Hawai'i at Hilo (the "University") and **TMT International Observatory, LLC ("TIO") (formerly, TMT Observatory Corporation) are both committed to achieving this purpose** through appropriate management and mitigation measures. Accordingly, the design of

the TMT project is consistent with the goals and objectives of the 2000 Mauna Kea Science Reserve Master Plan (Exhibit A- 48), which purpose is to protect and preserve the resources of the University's managed lands on Maunakea. The proposed project is also consistent with the provisions of the Board-approved Comprehensive Management Plan ("CMP") and sub-plans for Maunakea."

Perry White then describes many issues in which **TIO** will do a great job such as - "In this regard it is worth noting that TIO is the first astronomy development since the inception of the Master Plan to commit to contributing funds towards the management of Maunakea. **TIO** is also committed to implementing the mitigation measures described in the Final Environmental Impact Statement ("FEIS") and the CDUA, including management actions contained in the TMT-specific management plan (which was based upon and is consistent with the CMP and its sub-plans)."

To continuing to bolster TIO as the "Real Party in Interest," Applicant's Witness James T. Hays states: "In July 2008, PB was retained by the TMT Observatory Corporation (**the predecessor entity to TMT International Observatory LLC**) to prepare an Environmental Impact Statement ("EIS"). Mr. Hays, however, was in error as TMT Observatory Corporation AND TMT International Observatory LLC are both distinct corporate entities that are co-existing. TMT Observatory Corporation was NOT the predecessor entity of TMT International Observatory LLC - although its corporate existence did pre-date the existence of TMT International Observatory LLC.

It would have been simple to amend the CDUA or to submit an original CDUA with TIO as the Third Party Beneficiary, or to execute an Assignment or Transfer of Rights from TMT to TIO to accomplish their objectives, but none of the necessary steps to create such an outcome, and to establish a step-wise paper trail, was followed. The existence of such a document would have resulted in a paper trail of certainty of who the "Real Party in Interest" in this process is. At this time - TIO is NOT the "Real Party in Interest!"

Regardless of the absence of these necessary steps of corporate operations and procedures, developments outside of this contested case hearing will probably, in the meantime, remedy the situation of these multi attempts to ignore the "Real Party in Interest" in favor of an imposter corporation thlt is expected that a written order by Judge Greg Nakamura of the Third Circuit Court, State of Hawaii, will be filed at a date subsequent to this writing (January 1, 2017), that will revoke the CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191. The oral decision preceding this written order was rendered at a Hearing on December 15, 2016, with said Judge presiding. at is devoid of any supportive evidence of its being the "Real Party in Interest!"

### **The Final Environmental Impact Statement (FEIS) is outdated and should be struck**

The Final Environmental Impact Statement (FEIS), dated May 8, 2010, is outdated.

On Page S-2 of the EIS, the text reads:

"Project Purpose, Need, and Objectives

The Project's overall purpose is to provide a 30-meter ground-based telescope, which was identified in the 2001 National Academy of the Sciences Decadal Survey for Astronomy as the

most critical need for ground-based astronomy. Such a telescope would be a critical part of future astronomy facilities planned for 2015 and beyond."

Debatably, the above statement is probably the most important statement in the entire Final Environmental Impact Statement. If it were not for "the most critical need for ground-based astronomy," there would be no need to address the entire TMT Project. However, while the statement was probably true in 2001, the statement may not be true today, in 2017. If, indeed, the statement were true in 2010, the year in which this Final Environmental Impact Statement was filed, one would expect that the National Science Foundation that is the federal government's funding agency would have, upon application, funded at least a portion of this TMT Project. But, as it is general knowledge today, the federal funds that would have come to this project because of its high "critical need" did not come. So, why is that?

The 2011 National Academy of the Sciences Decadal Survey had a change of heart, making the most important statement of this Final Environmental Impact Statement, the 2001 statement untrue. The 2011 position of the Decadal Survey, although it continued to like these very large, ground-based telescopes, didn't categorize them by giving them the highest priority. In essence, the primary purpose that drove the initial movement to build the TMT Project had evaporated - and no money was produced.

.An article in Science Magazine, dated May 14, 2015, written by Jeffrey Mervis and Adrian Cho: "NSF should help build massive telescope in Hawaii, says senior appropriator" states:

"That community is already solidly behind the project, which would sit atop Mauna Kea on Hawaii's Big Island. **A 2011 decadal survey** of the field by the National Research Council of the U.S. National Academies **ranked a giant segmented-mirror telescope as one of its top three priorities for ground-based optical and infrared astronomy.** The report recommended the United States pay for 25% of construction of either TMT or its competitor, the Giant Magellan Telescope, which would sit atop Cerro Las Campanas in Chile. The panel also recommended NSF eventually spend a similar amount in equipping or operating the second telescope. (Emphasis added)

\* \* \*

**\*Correction, 15 May, 2:36 p.m.:** *The priority ranking given to a giant segmented-mirror telescope by the 2011 decadal survey has been corrected. It was given **third priority, not first, primarily because other projects were more "mature."*** (Emphasis added)

(<http://www.sciencemag.org/news/2015/05/nsf-should-help-build-massive-telescope-hawaii-says-senior-appropriator>)

Therefore, the inference of the cited statement under Project Purpose, by 2011, had become a misrepresentation, and by 2017, a lie. If the Hearing Officer ignores this section of my written testimony, she runs the risk of eventually being liable for either misrepresentation, deceit or fraud.

As of 2011, the TMT Project does not have the mistaken first priority that was seemingly announced in 2001, but had slipped to 3rd Priority by the 2011 Decadal Survey. And all of the propaganda that seemingly suggested that the TMT Project that its PR appointees continued to communicate to the world had the highest priority was plain old b.s. That b.s. cannot be allowed

to control the results of this Contested Case Hearing and the Final Environmental Impact Statement must be stricken.

**The Applicant cannot be granted a Conservation District Use Permit (CDUP)**

The Master Lease (General Lease S-4191), dated June 21, 1968, requires:

THE LESSEE, IN CONSIDERATION OF THE PREMISES, COVENANTS WITH THE LESSOR AS FOLLOWS:

\* \* \*

11. Laws, Rules and Regulations, etc. The lessee shall observe and comply with Regulation 4 of the Department of Land and Natural Resources and with all other laws, ordinances, rules and regulations of the federal, state, municipal, or county governments affecting the demised lands or improvements.

\* \* \*

On or about June 24, 2015, there occurred a major confrontation on Mauna Kea between a number of Mauna Kea Protectors and DOCARE. A number of arrests took place. In order to maintain its power on the Mountain, the Office of Mauna Kea Management (Stephanie Nagata) and/or U.H.-Hilo (Dr. Donald Straney) and/or the University of Hawai'i (Dr. David Lassner) - or all three - decided to close the Mauna Kea Access Road, except for astronomy personnel, at the point where the paved road turns into the gravel road just above HalePohaku.

As a result of their decision to close the road, the University of Hawai'i interests, in non-compliance with its legal rule-making power and authority, invoked an illegal rule on Mauna Kea that restricted Hawaiian Cultural Practitioners from ascending past the HalePohaku area except only at 1 p.m. on a daily basis in a group of no more than 10 Practitioners, and only for an hour. This group would be required to be accompanied by a Mauna Kea Ranger (if and when available) in both going up and coming down. The University folks, among other things, should have been fully aware of their rule-making powers and authority - as DLNR had embarked on its own rule-making attempt at promulgating the so-called Emergency Rule - that was eventually revoked by the Third Circuit Court - Judge Ibarra - for failing to comply with all the rules of legal rule-making.

When Applicant's Witness Stephanie Nagata was on the stand - and questioned about this situation, she testified that a representative or representatives of the Mauna Kea Rangers had reached what she characterized as "an accommodation" - that I refer to as an illegal rule - that put the above restrictions into action, as agreed to by a few of the Mauna Kea Protectors. While this accommodation/rule may have been agreed to by a few Mauna Kea Protectors - the majority of Mauna Kea Cultural Practitioners AND the general public were NOT consulted and did not agree with the accommodation/rule - but were restricted - the public totally, and Cultural Practitioners by the 1 p.m., no more than 10, and only for an hour, but accompanied by a Ranger rule.

So - while the public and Cultural Practitioners were "locked out" of the Mountain, and Protectors were restricted by the illegal rule/accommodation, the astronomy folks had unrestricted access to the Mountain at all times. When Stephanie Nagata was asked why the astronomy folks were not restricted, her answer was something like - it is part of 1) their

subleases that allows them un-restricted access, 2) they are also equipped to handle adverse safety situations, 3) they waive any and all liability, and 4) they have insurance that covers them. So when she was asked if Cultural Practitioners could waive liability, etc., she brushed the question off.

Document A-48 recites the Management Plan of the Mauna Kea Science Reserve Master Plan provides policies and strategies to integrate and balance the natural, cultural, educational/research and recreational values of Mauna Kea within a framework that provides responsible stewardship of the resources. This includes creating a structure to meet the following objectives:

- Promote community input
- Establish local management
- Establish a focal point for management responsibility
- Establish clear lines of decision-making and accountability
- Establish economic and structural feasibility
- Provide a base for future expansion beyond astronomy that includes cultural, educational and community programs

On Page 5 of the Plan, the following is recited:

#### COMMITMENTS

Management and implementation of a master plan requires firm commitments on the part of the lead authority. The University of Hawai'i. These commitments include the following:

\* \* \*

#### 4. Commitments to unrestricted religious and cultural practices in the Mauna Kea Science Reserve

\* \* \*

The promulgation of its "illegal rule" as discussed above, the University has violated its Commitment 4 of the Management Plan of the Mauna Kea Science Reserve Master Plan. The University's violation of the written commitments of its Management Plan of the Mauna Kea Science Reserve Master Plan is serious.

At the time of the promulgation of the "illegal rule" - the University interests also decided to close the Visitors' Center at HalePohaku. I believe that this decision was to discourage the Protectors so they would leave the Mountain. In closing the Visitors' Center, its restrooms were also closed and every porta potty in the area was locked. Interestingly, the Protectors arranged to bring up their own porta potties for them and the public to use. This self-help potty situation brought DLNR into action - as it, in concert with the University's decision to close the place down, then threatened the Protectors with increasing fines if they didn't remove their porta potties. The private porta potties were removed. The result of all of this maneuvering was that the public - because it kept coming up the Mountain - converted many parts of the area around the Visitors' Center into a common bathroom. The decision to close the Visitors' Center, which closed the bathrooms and locked the porta potties, I believe, was a was a substantial violation of Covenant 11 above and commission of a crime against humanity. These are serious charges.

The violations enumerated above - cumulatively - add up to a clear violation of Covenant 11 -

that is a clear violation of the Master Lease (General Lease S-4191). Being in non-compliance of the Master Lease (General Lease S-4191) - the Applicant (the University in this case) cannot be granted the Permit as requested by this CDUA.

**The Final Environmental Impact Statement is defective and the section on lichens should be struck**

Going to Page 3-61 of Exhibit A-03 The Final Environmental Impact Statement, it says - "A recent survey of Area E detected 10 lichens species (Appendix K). All of the species encountered also occur at somewhat lower elevations and none are unique to Hawai'i."

Really?

However, going to Office of Mauna Kea Management's website - <http://www.malamamaunakea.org/environment/flora> - at the bottom of the page, the following is found - "A survey of lichens on the summit of Maunakea identified 21 species (plus five possible other species). Around half of the lichen species found on Maunakea are endemic (found only in Hawai'i), two of which (*Pseudephebe pubescens* and *Umbilicaria pacifica*) are limited to Maunakea alone. The remaining species are indigenous to the Hawaiian Islands."

Yes. It is interesting that "Around half of the lichen species found on Maunakea are endemic (found only in Hawai'i), two of which (*Pseudephebe pubescens* and *Umbilicaria pacifica*) are endemic ONLY on Mauna Kea.

In his cross examination, Dr. Clifford Smith, Applicant's expert witness on lichens, admitted that indeed *Pseudephebe pubescens* does occur on Area E - the site of the proposed TMT Observatory.

Therefore, the statement on Page 3-61 of Exhibit A-03 The Final Environmental Impact Statement that there are "none [lichens] are unique to Hawai'i" is a gross mis-statement and should be stricken from the Final Environmental Impact Statement.

**The Final Environmental Impact Statement is defective and the section on Threatened and Endangered Species should be modified**

**Threatened and Endangered Species**

On Page 3-65 of A-03 The Final Environmental Impact Statement, it says - "There are no currently-listed threatened or endangered species known to occur in the Astronomy Precinct. However, in a comment on the Draft EIS, it was reported that an 'io (Buteo solitaires), the endangered Hawaiian Hawk, has been observed circling above the summit region on occasion. 'Io are known to use a broad range of forest habitats and are not frequent visitors to elevations greater than roughly 7,000 feet, and do not reside in the summit region: however; individuals can be observed in the area occasionally."

Well, I was the person who reported an 'io circling above the Mauna Kea summit area. This wasn't a phenomenon I had observed. However, it was observed by Kealoha Pisciotta, as she attended a function at the summit one day years ago.. She reported that the 'io circled and circled the gathering many times. For one who has observed 'io every chance I get, this is typical behavior, as 'io seem to love observing humans (and other occurrences) habitually.

I must disagree with the response above however - that 'io "are not frequent visitors to elevations greater than roughly 7,000 feet ..., however, individuals can be observed in the area occasionally."and are not frequent visitors to elevations greater than roughly 7,000 feet, and do not reside in the summit region: however; individuals can be observed in the area occasionally."and are not frequent visitors to elevations greater than roughly 7,000 feet, and do not reside in the summit region: however; individuals can be observed in the area occasionally.

On August 1, 2002, I observed 2 'io flying from the direction of Hualalai and landing in some old trees as I sat at 9,800 feet on the west side of Mauna Kea. In 2013, while driving through an area at 8,900 feet on the east side of Mauna Kea, a lone 'io was perched in a tree and just watching. Or, in 2015, a lone 'io hung around the 9,200 foot area of HalePohaku of Mauna Kea for about a week, and was occasionally seen chasing little birds through the scattered mamane trees of the area. Conclusively, I'd say that the fact is that 'io spend a lot of time above 7,000 feet.

I would suggest that the phrase "and are not frequent visitors to elevations greater than roughly 7,000 feet" should be stricken.