

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, Hawai'i 96721  
(808) 936-4428  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
A Contested Case Hearing Re Conservation ) **TEMPLE OF LONO MOTION TO**  
District Use Application (CDUA) ) **BOARD OF LAND AND NATURAL**  
(HA-3568) for The Thirty Meter Telescope ) **RESOURCES TO DISMISS HA-3568;**  
at the Maun Kea Science Reserve, ) **MEMORANDUM IN SUPPORT; COS**  
Kaohe Mauka, Hamakua District, )  
Island of Hawai'i, TMK (3) 4-4-015:009 )

**TEMPLE OF LONO MOTION TO BOARD OF LAND AND NATURAL RESOURCES  
TO DISMISS HA-3568**

NOW COMES Intervener Temple of Lono to bring to the attention of the Board a very serious matter that seems to have been overlooked throughout the application process for the permit in this proceeding and that calls for the dismissal or denial of the permit application.

In the Final Environmental Impact Statement (EIS) for the Thirty Meter Telescope, the Applicant lists the statutes, rules, regulations, and requirements that the Applicant considered applicable to this project. Document A-3 (Final Environmental Impact Statement, Volume 1 in Section 3.1 at pages 3-4 and 3-5.)

While the Applicant's list purports to identify all relevant statutes, there is one glaring omission – **HRS §711-1107 Desecration.**

Nowhere in the CDUA or related documents does the Applicant ever discuss whether this statute is applicable to the proposed Thirty Meter Telescope.

Received  
Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
2017 March 19 11:06 am

The statute would be applicable if:

- (1) Mauna Kea is a place of worship, Section (1)(b), **OR**
- (2) Mauna Kea is a place of burial, Section (1)(b), **OR**
- (3) Mauna Kea is an object of veneration, Section (1)(c), **AND**
- (4) The proposed Thirty Meter Telescope would damage the place of worship **OR** the burial ground **OR** the object of veneration, Section (2), **AND**
- (5) The defendant knows that the damage to the place of worship, **or** burial ground, **or** object of veneration will produce public outrage. Section (2).

Intervener Temple of Lono argues in the accompanying memorandum that the proposal to build the Thirty Meter Telescope satisfies all the legal tests in the statute for the prohibition on desecration to apply.

No State agency can consider, let alone grant, an application for a permit to engage in an activity that will, or is likely to, violate the law.

The Temple of Lono argues that a reasoned application of the statutory provisions in HRS §711-1107 to the proposed project compels a conclusion that the project will or is likely to violate the statute.

Because the Board lacks the authority to grant a permit to violate the law, the Board has no options other than to dismiss or deny the application immediately.

The Temple of Lono, moves the Board to dismiss or deny the application.

Dated: March 18, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Sinkin  
Lay Representative for the Temple of Lono

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, Hawai'i 96721  
(808) 936-4428  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
) )  
A Contested Case Hearing Re Conservation)  
District Use Application (CDUA) )  
(HA-3568) for ) **TEMPLE OF LONO**  
The Thirty Meter Telescope at the Mauna ) **MEMORANDUM IN SUPPORT**  
Kea Science Reserve, Kaohe Mauka, ) **OF MOTION TO BOARD TO DISMISS**  
Hamakua District, Island of Hawai'i, ) **HA-3568**  
TMK (3) 4-4-015:009 )  
\_\_\_\_\_ )

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS HA-3568**

**TABLE OF CONTENTS**

I. PREFACE: CONTEXT ..... 2

    A. The brutal history of foreigners doing everything  
in their power to destroy the traditional Hawaiian  
civilization is part of the context for this proceeding. .... 2

    B. The trust relationship supposedly established  
between Native Hawaiians and the State of Hawai'i  
is another important context for this proceeding. .... 3

    C. The relative importance of Mauna Kea to  
Native Hawaiians and the Astronomers is another  
context for this proceeding. .... 6

II. INTRODUCTION ..... 7

III. ARGUMENT ..... 9

    A. The Board of Land and Natural Resources  
does not have the authority to grant an application

for a permit to break the law. ....	9
B. The Board is competent to determine whether to dismiss or deny the application. ....	9
1. The Board is competent to determine whether the Applicant is seeking a permit for an undertaking that would violate criminal law and to respond appropriately. ....	9
2. Mauna Kea is a place of worship. ....	15
a. Justices on the Hawai'i Supreme Court acknowledged Mauna Kea as a place of worship. ....	15
b. The Applicant documents some of the numerous spiritual and cultural practices on Mauna Kea. ....	17
c. The Applicant seeks to limit the definition of a sacred space to fit a non-Hawaiian model and invalidate a Native Hawaiian definition of a sacred space. ....	20
3. Mauna Kea is a place of burials. ....	24
4. Mauna Kea is an object of veneration. ....	28
5. The construction of the Thirty Meter Telescope will damage the sacred sit. ....	29
6. The Applicant seeks to make a factual question into a constitutional question. ....	30
7. Hawaiian spiritual rights are protected in the broader context of culture, tradition, heritage, identity, and value system. ....	32
8. The Applicant knew that the proposal to construct the Thirty Meter Telescope would cause outrage. ....	37
a. Before selecting Mauna a Wākea as the site for the Thirty Meter Telescope, the Applicant knew that selection was	

likely to produce outrage. ....	37
b. After the decision to pursue the project on Mauna Kea, still further evidence of potential outrage surfaced. ....	39
c. Whatever measures the TMT proponents took to prevent the predicted outrage, those measures failed. ....	40
9. The application seeks to give a private corporation the right to break the law. ....	41
10. The Board’s consideration of this issue is <i>de novo</i> . . . . .	43
11. The application to build the Thirty Meter Telescope on Mauna Kea seeks permission to violate the desecration statute. ....	44
IV. CONCLUSION . . . . .	46

## TABLE OF AUTHORITIES

### Constitutional Provisions

First Amendment, United States Constitution .....	31, 32, 33, 34
Article XII, § 7, Hawai'i Constitution .....	5, 33, 34, 36

### Cases

<i>Cty. of Yakima v. Confederated Tribes &amp; Bands of the Yakima Indian Nation</i> , 502 U.S. 251 (1992) .....	5, 28
<i>Hernandez v. Commissioner of Internal Revenue</i> , 490 U.S. 680 (1989) .....	25
<i>Ka Pa'akai O Ka 'āina v. Land Use Comm'n</i> , 94 Haw. 31 (2000) .....	34, 36
<i>Kay v. Bemis</i> , 500 F.3d 1214 (10 <sup>th</sup> Cir. 2007) .....	25
<i>Lower Brule Sioux Tribe v. South Dakota</i> , 711 F.2d 809 (8th Cir. 1983) .....	5, 28
<i>Lyng v. Northwest Indian Cemetery Protective Association</i> , 485 U.S. 439 (1988) .....	31, 32
<i>Mauna Kea Anaina Hou v. Board of Land and Natural Resources</i> , 363 P.3d 224, (2015) .....	16
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985) .....	5, 28
<i>Morgan v. Planning Dep't, Cnty. of Kauai</i> , 104 Hawai'i 173, 86 P.3d 982 (2004) .....	9
<i>Moussazadeh v. Tex. Dep't of Criminal Justice</i> , 703 F.3d 781 (5 <sup>th</sup> Cir. 2012) .....	25
<i>No Oilport! v. Carter</i> , 520 F.Supp. 334 (W.D. Wash 1981) .....	5, 28
<i>PASH</i> , 79 Hawai'i 246 (1993) .....	33
<i>White Earth Band of Chippewa Indians v. County of Mahnomn</i> , 605 F. Supp. 2d 1034 (D. Minn. 2009) .....	4, 27

## Statutes

Public Law 103-150 (The Apology Resolution) .....	2
Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) .....	3, 4, 5, 27
HRS § 1-1 .....	33, 35
HRS § 7-1 .....	33, 35
HRS § 171-6-(15) .....	35
HRS § 183(D)-5 Penalties .....	12
HRS § 342D-9 Enforcement .....	12
HRS § 343-2 .....	35
HRS § 711-1107 Desecration .....	<i>passim</i>

## Other Authorities

Hawaii Administrative Rules, Chapter 10 .....	36
HAR § 13-1-34(2)(a) .....	8
HAR § 13-5-30(c) .....	2, 4, 12
HAR §13-123-25 Penalty .....	11, 12
HAR § 13-261-1 .....	23, 36
HAR § 13-261-3 .....	23
Memorandum, United States Department of Interior, Office of the Solicitor, December 4, 2016 “Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline” M-37038 .....	7
Office of Hawaiian Affairs Native Hawaiian Health Fact Sheet 2015 .....	2

Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978 .....	34
Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978 (1980) .....	34
United Nations Declaration of Rights of Indigenous People .....	34



BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
 )  
A Contested Case Hearing Re Conservation )  
District Use Application (CDUA )  
(HA-3568) for ) **TEMPLE OF LONO**  
The Thirty Meter Telescope at the Mauna ) **MEMORANDUM IN SUPPORT**  
Kea Science Reserve, Kaohe Mauka, ) **OF MOTION TO BOARD TO DISMISS**  
Hamakua District, Island of Hawaii, ) **HA-3568**  
TMK (3) 4-4-015:009 )  
 )

**TEMPLE OF LONO MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS HA-3568**

The question posed in this proceeding is: Should the State of Hawaii's Board of Land and Natural Resources (BLNR) ("Board") approve the University of Hawaii at Hilo's ("UHH") application for a permit to be used by the TMT Observatory Corporation/TMT International Observatory LLC ("TIO")<sup>1</sup> to build a thirty meter telescope on Mauna Kea?<sup>2</sup>

<sup>1</sup> The application identifies the TMT Observatory Corporation as the third party beneficiary of the permit sought by UHH. DOC-R-1 (CDUA) at 1.

The TMT Observatory Corporation has been at least partially replaced by TIO. Whether that replacement required an amended application, which was not filed, has been an issue raised in this proceeding that is not addressed in this memorandum. The Temple reserves its right to deny that TIO is the legitimate applicant for the permit.

Note: All references to documents in the record, e.g. "DOC," refer to the Documents Library for this proceeding maintained by the BLNR Office of Conservation and Coastal Lands (OCCL). <http://dlnr.hawaii.gov/mk/documents-library/>

All references to "Exhibit" refer to the Evidentiary Hearing Submittals, also maintained by the OCCL. The letter preceding the exhibit number is assigned to one of the parties to the proceeding, e.g. exhibits identification beginning with "L" are Temple of Lono exhibits found in the Temple of Lono section of the evidentiary hearing submittals. <http://dlnr.hawaii.gov/mk/evidentiary-hearing-submittals/>

The Temple of Lono argues that the application in question is a request for a permit to violate the law and must, therefore be dismissed by the Board.

## **I. PREFACE: CONTEXT**

### **A. The brutal history of foreigners doing everything in their power to destroy the traditional Hawaiian civilization is part of the context for this proceeding.**

The discussion of the Thirty Meter Telescope takes place in the larger context of Hawaiian history. That history is replete with evidence of an attempted genocide of the Hawaiian civilization. Exhibits L10, J1, Public Law 103-150 (The Apology Resolution). In “giving weight” to evidence, keeping that history in mind is important.

The colonization history is particularly relevant to this proceeding because one of the determinations to be made is whether the proposed project is in compliance with the eight criteria for conservation district land use found in HAR § 13-5-30(c). Criterion 8 requires that the “proposed land use will not be materially detrimental to the public health, safety, and welfare.”

To the extent the proposed Thirty Meter Telescope would cause detrimental effects to Native Hawaiian health and welfare, the proposal does not comply with Criterion 8.

If such effects have already been significant in the period of colonization, see e.g. Office of Hawaiian Affairs Native Hawaiian Health Fact Sheet 2015,

<http://19of32x2yl33s8o4xza0gf14.wpengine.netdna-cdn.com/wp-content/uploads/Volume-I-Chronic-Diseases-FINAL.pdf>

---

<sup>2</sup> All parties in the contested case have now rested their case.

the incremental impacts attributed to the telescope could amplify such effects and seriously affect the health and welfare of Native Hawaiians going forward, bringing the proposed land use even further out of compliance with Criterion 8.

**B. The trust relationship supposedly established between Native Hawaiians and the State of Hawai'i is another important context for this proceeding.**

There is a special relationship between the State of Hawai'i and its agencies and the Native Hawaiian population. One element of that relationship arises from the State's responsibility as the trustee of lands in which the Native Hawaiians have a beneficial interest.

The Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), Section 5(b) states in part that "the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property ...."<sup>3</sup>

Section 5(g) states:

[T]he term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

Section 5(f) states:

**The lands granted to the State of Hawaii** by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d)

---

<sup>3</sup> While people in ever increasing numbers are coming to understand that the "ceding" of lands and the "annexation" never legally took place, see Exhibit D-2, State agencies remain wedded to the false narrative of the past. In that narrative, the United States had title to Hawaiian lands and could pass that title on to the State of Hawai'i. The CDUA states that the State of Hawai'i is the "owner" of the land in question. DOC-R-1 at 2.

and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, **shall be held by said State as a public trust** for the support of the public schools and other public educational institutions, **for the betterment of the conditions of native Hawaiians**, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.<sup>4</sup>

This trust relationship argues for any ambiguity regarding the rights of Native Hawaiians in relation to a private corporation being resolved in favor of the trust beneficiaries. *See e.g. White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F. Supp. 2d 1034, 1046 (D. Minn. 2009) (citations omitted) (where there is a trust relationship and an ambiguity in the application of a statute, the ambiguity should be resolved in favor of the trust beneficiaries); *see also, e.g., Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251,

---

<sup>4</sup> With the CDUA claim that the State of Hawai'i owns the lands at Mauna Kea, the University is unwilling to even acknowledge that the State is the trustee and Native Hawaiians are among the beneficiaries of the trust.

By that sleight of hand denial, the University seeks to avoid the State's fiduciary obligations to Native Hawaiians and, instead, treat Native Hawaiians as equivalent to the Astronomers, when it comes to uses to be made of the trust lands.

Even though land use is one of the central issues in this proceeding, HAR §13-5-30(c), rulings by the Hearing Officer limited the ability of parties to develop a record on the issue of land ownership. DOC-281 ("The following issues **will not** be addressed in this contested case hearing ... The sovereignty of the Kingdom of Hawai'i or any other issues relating to the purported existence of the Kingdom of Hawai'i; Challenges to the legal status of the State of Hawai'i; and Challenges to the State's ownership of and title to the lands related to this contested case hearing.")

269 (1992) ("When we are faced with ... two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' *Montana v. Blackfeet Tribe*, 471 U.S. at 766."). See also *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 815-16 (8th Cir. 1983).

While Native Hawaiians are not Native Americans, the interpretation of trust law is similarly applied. BLNR is the most direct trustee over the 5(f) lands in question and has an obligation to protect the beneficiaries. That includes protecting the spiritual practices and sacred sites of the Native Hawaiian beneficiaries.

That fiduciary duty may require a level of consideration beyond what would normally be required. Court have ruled that even if an agency complies with the National Environmental Policy Act, a permitting action may still be impermissible, if it unduly burdens tribal treaty rights in violation of the trust responsibility. *No Oilport! v. Carter*, 520 F.Supp. 334, 371 (W.D. Wash 1981).

Here the analogy to "tribal treaty rights" are the Native Hawaiian rights protected under Article XII, § 7 of the Hawai'i Constitution and the beneficial interest the Native Hawaiians have in the lands where the Thirty Meter Telescope proposes to build.

For purposes of this motion, if there is any ambiguity regarding whether the Thirty Meter Telescope proposal would violate the desecration statute, that ambiguity should be resolved in favor of the Native Hawaiians, in part because

Native Hawaiians have a beneficial interest in the lands where the desecration will take place that the Astronomers do not.<sup>5</sup>

**C. The relative importance of Mauna Kea to Native Hawaiians and the Astronomers is another context for this proceeding.**

The Hawaiian Islands are the “permanent and irreplaceable homelands” for the Native Hawaiians.

As will be discussed below, Mauna Kea is considered to be the most sacred of sites. Many spiritual practices on Mauna Kea cannot be practiced anywhere else because they are site specific.

As will also be discussed below, Mauna Kea is part of many Native Hawaiians core identity.

While Maunakea may be the best site for the Thirty Meter Telescope to be built in terms of astronomical production, Mauna a Wākea is not the only site where the Thirty Meter Telescope can be built. The Thirty Meter Telescope International Observatory, LLC has already approved the Canary Islands as an acceptable alternative site for the Thirty Meter Telescope.

<https://www.nytimes.com/2016/11/01/science/thirty-meter-telescope-mauna-kea.html? r=0>

Given that the Thirty Meter Telescope has alternative sites available and Native Hawaiian practitioners on Mauna Kea do not, any balance of harms approach

---

<sup>5</sup> With the invalidation of the sublease, the Astronomers have no interest in the lands at all. With the invalidation of the sublease and the permit, the Scientific Cooperation Agreement, DOC 75, Exhibit “C” has no effect since it presupposes that there is a valid sublease and permit.

weighs heavily in favor of Native Hawaiians.<sup>6</sup>

## II. INTRODUCTION

In the Final Environmental Impact Statement (FEIS), the Applicant lists the statutes, rules, regulations, and requirements that the Applicant considered applicable to this project. Exhibit R-3 (Final Environmental Impact Statement, Volume 1 in Section 3.1 at pages 3-4 and 3-5.)

While the Applicant's list purports to identify all relevant statutes, there is one glaring omission – HRS §711-1107 Desecration<sup>7</sup>

---

<sup>6</sup> The Board can take judicial notice of the ongoing controversy at the Standing Rock Sioux Reservation in which an attempt is being made to put an oil pipeline in the round underneath waters held sacred by Native Americans. In that controversy, the Department of Interior, Office of the Solicitor issued a lengthy memorandum that included the following observations relevant to this proceeding:

The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes. Their core identity and livelihood depend upon their relationship to the land and environment - unlike a resident of Bismarck, who could simply relocate if the DAPL pipeline fouled the municipal water supply, Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory. This underscores the far-reaching effects of a DAPL spill's potential environmental impacts on the Tribes' historic, cultural, social, and economic interests.

Memorandum, United States Department of Interior, Office of the Solicitor, December 4, 2016 "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline" M-37038; <https://solicitor.doi.gov/opinions/M-37038.pdf>

<sup>7</sup> On September 17, 2016, the Temple of Lono filed a motion seeking summary judgment on the issue of desecration. DOC-264 [Temple of Lono Motion for Summary Judgment (Desecration) filed September 17, 2016]

The Applicant and the third party beneficiary of the permit, TIO, filed oppositions to the Temple's motion. DOC-473 {University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration), filed September 17, 2016 [COS-264] filed February 22, 2016}; DOC-484 {TMT International Observatory, LLC's Joinder to the University of Hawai'i at Hilo's Opposition to Temple of Lono's Motion for Summary Judgment (Desecration) filed September 17, 2017 [DOC-264] filed February 28, 2017}

### **HRS §711-1107 Desecration.**

(1) A person commits the offense of desecration if the person intentionally desecrates:

(a) Any public monument or structure; or

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) “Desecrate” means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant’s action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both.

---

The Temple responded to these filings by the University and TIO with motions to strike the pleadings as filed without authorization of the Hearing Officer’s required setting of a schedule for the filing of such a pleading. HAR § 13-1-34 (2)(a) (The presiding officer shall set the time for filing all motions **and opposing memorandum**) (emphasis added); DOC-474; DOC-490.

The Temple notes that the record related to the elements of the desecration statute developed since the initial filing of the Temple’s motion last September is voluminous after forty-four days of hearings in the contested case.

The Hearing Officer has not ruled on the motions to strike. The oppositions are, therefore, in limbo as to their status in the contested case hearing.

More importantly, the questions of whether and how the desecration statute applies to this proceeding, even though raised, were never litigated.

As the filed oppositions present the legal argument of the Applicant and the third party beneficiary on the subject of desecration, the Temple herein addresses those arguments in a discussion of the desecration issue without waiving its position that the filing of both oppositions should be struck.

The Temple acknowledges footnote 1 in the Applicant’s pleading that states: The University presently addresses those issues raised in the [Temple’s] Motion; it does so without waiver of its right to address additional issues or arguments that may be appropriate at a future time, which right is hereby expressly reserved.

DOC-473 at 4.



The application of the desecration statute to the proposed Thirty Meter Telescope proves that the project, if constructed, would violate the desecration law.

### III. ARGUMENT

#### **A. The Board of Land and Natural Resources does not have the authority to grant an application for a permit to break the law.**

As the Applicant argues:

it is well established that the authority of an administrative agency is limited by the powers expressly granted to it by the Legislature.

DOC-473 at 3 *citing Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004).

The Legislature has never given the Board of Land and Natural Resources authority to issue permits for an activity that would violate the law.

If the Thirty Meter Telescope proposal would, if implemented, violate the law, the Board is foreclosed from considering, let alone granting, the application at issue in this proceeding.

#### **B. The Board is competent to determine whether to dismiss or deny the application.**

##### **1. The Board is competent to determine whether the Applicant is seeking a permit for an undertaking that would violate criminal law and to respond appropriately.**

The Applicant argues that:

Even if HRS § 711-1107 were applicable to the University – which as discussed below, it is not – this contested case hearing is not the proper forum to adjudicate a *criminal* statute.

DOC-473 at 3 (emphasis in the original).

The Temple responds that the Temple is not seeking to turn this contested case into a forum to adjudicate a criminal statute. The only action sought by the

Temple is to have the Board examine what the Applicant requests to do and determine whether the actions proposed by the Applicant meet the legal tests for desecration as defined by the Hawaii Revised Statutes.

If that examination determines that the Applicant is asking for a permit to pursue actions that satisfy the tests for application of a criminal statute, the Board is compelled to either dismiss or deny the application.

That determination is not an adjudication. There is no finding of guilt or imposition of criminal sanctions involved. The Board is simply making a jurisdictional determination. If the action proposed by the Applicant fits the test for finding a criminal act is being proposed, the Board lacks jurisdiction over such an application and the application must be dismissed or denied.

For the Board to make that determination does not “transform this contested case proceeding, related to the permit application, into a criminal court or otherwise authorize the Hearing Officer to rule on alleged *criminal* violations under HRS § 711-1107, prospective or otherwise.” Id. (emphasis in original).

The Applicant’s inclusion of the term “prospective” highlights the true nature of the determination. If the Board makes a legal determination that the Applicant is asking for a permit to commit an act that would be criminal, if committed, the Board has a legal obligation to dismiss the application or deny the permit.

For example, if an applicant applied for a permit for an action that would intentionally inflict emotional distress on a group impacted by the action, the agency would be required to deny the permit to prevent the tort.

Or if a hunter sought a permit to shoot a deer out of season, the agency would be required to dismiss the application seeking a permit to commit a violation of the agency's rules.

In circumstances where an agency is requested to authorize a violation of law, the agency lacks discretion to grant such a request and is foreclosed from even considering such a request, other than to take action dismissing or denying the request.<sup>8</sup>

The Board is perfectly capable of determining whether the provisions of HRS § 711-1107 defining desecration are met by the application.

---

<sup>8</sup> Were the Applicant to pursue the project without Board approval, the Board in this case, has a law enforcement division with police powers. If the hypothetical hunter just mentioned proceeded to kill a deer out of season, the Department of Land and Natural Resources, the Forestry and Wildlife Division regulates hunting on lands under the jurisdiction of the Board of Land and Natural Resources. The administrative rules governing that regulation are found in Title 13, Subtitle 5, Part 2, Chapter 123.

Within those rules are provisions governing the penalties to be imposed for violations.

Any person violating any of the provisions of this subchapter shall be subject to **criminal** and or administrative penalties as provided in section 183D-5, 171-.6.4, or 171-31.6, Hawaii Revised Statutes HAR §13-123-25 Penalty (emphasis added).

The rules are enforced by the Division of Conservation and Resources Enforcement (DOCARE).

The **Hawaii Division of Conservation and Resource Enforcement**(DOCARE) and also known as the **Hawaii DLNR Police**, is the **law enforcement agency** for the Hawaii Department of Land and Natural Resources. It is tasked **with full state police powers to enforces all State laws and Department rules ....**  
[https://en.wikipedia.org/wiki/Hawaii\\_Division\\_of\\_Conservation\\_and\\_Resource\\_Enforcement](https://en.wikipedia.org/wiki/Hawaii_Division_of_Conservation_and_Resource_Enforcement) (emphasis added).

If the Thirty Meter Telescope chose to proceed without a permit, similar DOCARE enforcement should take place.

Just as the Board is perfectly capable of determining whether the Applicant meets all eight criteria required to be met in order to receive a Conservation District Permit. HAR §13-5-30(c).

An agency is perfectly capable of determining whether a statute is violated. See e.g. HAR § 13-123-25 Penalty; HRS § 342D-9 Enforcement; HRS § 183(D)-5 Penalties.

While the penalties may differ, the analysis regarding whether a statute, rule, or regulation has been violated is the same inquiry applying the law to the facts and well within the purview of the Board in this proceeding.

If the Applicant is arguing that the Board is not competent to determine whether a proposed action would violate a criminal statute, then that incapacity on the part of the Board would be the same regarding compliance with an administrative rule. The Board would then be legally incompetent to decide any application for a permit. The Applicant's argument is frivolous.

Nor is the Temple arguing for "a private right of action" allowing the Temple to enforce the law. DOC-473 at 3. The Temple is bringing a matter to the attention of the Board with the intent of providing the Board with sufficient information to make an informed decision about what action is required. A person who calls the police to report a burglary is not exercising some private right of action to enforce the law.

The Applicant characterizes the Temple's argument as asserting the following:

that by submitting the CDUA, the University improperly seeks to engage in criminal actions; and that, if the requested permit is granted, the Board would be complicit in a conspiracy to violate the law.

DOC-473 at 5 *citing* DOC-264 at 4-5.

The Temple is not arguing that the submission of the CDUA constituted the Applicant seeking “to engage in criminal actions.” An application for a permit to violate the law is obviously distinct from engaging in an actual violation of the law.

There is no evidence that the Applicant ever considered whether the proposal would violate the desecration statute prior to submission of the CDUA.<sup>9</sup> The absence of the desecration statute from the list of legal requirements that the Applicant considered; Exhibit R-3 (Final Environmental Impact Statement, Volume 1 in Section 3.1) at pages 3-4 and 3-5; would support a conclusion that the Applicant, at best, did not realize the proposal was illegal at the time the application was submitted. If that is true, then filing an application proposing to violate that statute may have been inadvertent.<sup>10</sup>

---

<sup>9</sup> To the contrary, the Applicant tried to argue that issues related to the traditional Hawaiian faith had no place in this proceeding. DOC-135 at 15 (“The Temple will try to use this proceeding to galvanize a religious movement. Indeed, the Temple states that religion will be an essential part of this proceeding: ‘[I]ssues related to the Traditional Hawaiian Faith are going to be ***an essential part of the contested case*** ...’ [DOC-078 at 2]. The Hearing Officer should not allow such diversions from the stated criteria to obtain a permit.”) (emphasis in original).

To the Applicant, issues of faith were a diversion and irrelevant to this proceeding. In their intent to exclude issues of faith, the Applicant avoided addressing the desecration statute.

<sup>10</sup> In the worst case scenario, the Applicant was fully aware of the desecration statute, its potential to disqualify the Thirty Meter Telescope proposal from being considered, and the extraordinary difficulty the Applicant would have to disprove that the elements of the desecration statute are present in the Thirty Meter Telescope proposal, so the Applicant deliberately omitted that statute from the list of applicable laws as an exercise in misdirection or obfuscation.

The Applicant may well have complied with the “processes and requirements for lawfully obtaining the conservation use permit necessary for construction of the TMT Project.” DOC-473 at 6.

Similarly, the Board, “in administering the processes provided for and making the decisions expressly contemplated under its rules,” may have had no “intent to commit the offense of desecration.” Id.

Following lawful process does not mean the act proposed is lawful.

The Temple does argue that once the criminal nature of the proposal was brought to the attention of the Applicant, DOC-264, the Applicant should have withdrawn the application. At this point, the Applicant has been on notice for months about the desecration disqualification. The Applicant’s failure to withdraw the application is now evidence of criminal intent.

Also once on notice of the proposed violation of law, the Hearing Officer became obligated to respond appropriately by making a ruling on the issue and/or referring the question to the Board. The Hearing Officer did neither.

To the contrary, the Hearing Officer refused to even take up the Temple’s motion calling attention to the Applicant’s failure to address the desecration statute.

---

In whatever scenario the truth may be found, “[t]he Final EIS and all ancillary documents were prepared under the University of Hawai’i at Hilo’s (University’s) direction or supervision ....” DOC-R-3 at 7. The Applicant is responsible for the omission and failure to consider a relevant statute that precluded granting the application at issue in this proceeding.

That motion argued that the Applicant's failure and the Hearing Officer's refusal provided a basis for the Temple seeking to remove the Hearing Officer. DOC-262.<sup>11</sup>

As the Board is now placed on notice as to the potentially criminal nature of the proposal and the evidence presented herein that supports a determination that the permit is sought to violate the law, granting the permit would make the Board of Land and Natural Resources Board complicit in violating the law.

## **2. Mauna Kea is a place of worship.**

### **a. Justices on the Hawai'i Supreme Court acknowledged Mauna Kea as a place of worship.**

With the Applicant having the burden of proof generally in this proceeding, that same burden applies to their compliance with relevant constitutional provisions, statutes, regulations, and rules.

If there is any evidence that Mauna Kea is a place of worship, the Applicant then has the burden to prove that Mauna Kea is not a place of worship to avoid initiating the desecration evaluation.

Any attempt to prove that proposition would fail.

While the Applicant minimizes the importance of a concurring opinion from the Hawai'i Supreme Court, DOC-473 at 6, the fact remains that the concurring opinion did state the following:

Rising to a majestic 13,796 feet above sea level, Mauna Kea, the highest mountain peak in the Hawaiian Islands, is of profound importance in Hawaiian culture. **The summit region is sacred to Native Hawaiians, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area.**

---

<sup>11</sup> A Hearing Officer refusing to even take up a motion to recuse, let alone address the merits of the motion, is not fair and impartial.

*Mauna Kea Anaina Hou v. Board of Land and Natural Resources* (hereinafter “*Anaina Hou*”), 363 P.3d 224, 248 (2015) (Justice Pollack concurring) (emphasis added).

Thus, the Board was informed of multiple traditional Hawaiian cultural practices exercised **in the project area** and was aware of the project’s **potential adverse impact on the “spiritual nature of Mauna Kea” and the “cultural beliefs and practices of many.”**

*Ibid* at 251 (2015) (emphasis added).

The Applicant’s argument that the Supreme Court opinion does not “refer to HRS § 711-1107 or otherwise state that Mauna Kea is a ‘place of worship,’” DOC-473 at 6, reads the opinion too narrowly.

Even if the Court did not refer to the desecration statute, the Court’s observations should have meaning to the Applicant and the Board in considering whether they are in jeopardy of violating the statute.

As to directly referencing a place of worship, the Court’s statement that “because of [Mauna Kea’s] spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area” describes a place of worship. The Court’s reference to the “cultural beliefs and practices of many” is certainly meant to include spiritual practices, such as worship.

From the burden of proof perspective, the Supreme Court observations are sufficient to shift the burden to the Applicant to disprove those observation, i.e. to prove that Mauna Kea is not a place of worship.

At the same time, there is ample evidence apart from the Supreme Court’s findings to conclude that Mauna Kea is a place of worship and to increase the burden on the Applicant to prove otherwise.



**b. The Applicant documents some of the numerous spiritual and cultural practices on Mauna Kea.**

To determine whether the desecration statute applies to the Thirty Meter Telescope proposal, the nature and uses of Mauna Kea are important. In its FEIS, the Applicant states:

‘Āina mauna, or mountain lands, reflects a term used affectionately by elder Hawaiians to describe the upper regions of all mountain lands surrounding, and including, Maunakea. The area was frequented by native practitioners and contained a native and cultural landscape that provided among other things:

- Places to worship
- Places to gather stones
- Kanu iwi (places to bury human remains)
- Kanu piko (places to bury umbilical cords)
- Places to traverse, i.e. for those who were crossing from one region to another
- Places to gather food, and catch birds
- Sacred and safe area

Exhibit R-3 at 3-10.

This extensive list of uses supports a finding that Mauna Kea is a place of worship. HRS §711-1107(1)(b).<sup>12</sup>

These extensive uses undoubtedly contributed significantly to the recommendation in the Cultural Impact Assessment (CIA), submitted by the

Applicant, that:

Project proponents strongly consider no further development, including the TMT Observatory Project, and the TMT Mid-Level Facility at Hale Pōhaku, take place on Maunakea.

Exhibit R-5 (CIA) at xiv.

---

<sup>12</sup> The list also identifies uses that support a finding that Mauna Kea is a place of burial, HRS §711-1107(1)(b), and an object of veneration, *ibid.* (1)(c).

More detailed evidence presented by the Applicant only strengthens such a finding.

For example, the FEIS states:

Maunakea bears much significance because it is believed that the points of highest altitude are sacred and open the gateways to Heaven. Six main zones can be found on the slopes of Maunakea; Kuahiwi, the core summit area, is the highest and most sacred. Tradition tells us that access to the summit was limited to high chiefs and priests.

Exhibit R-3 at P-1.

The burial of the piko or umbilical cord on the Mauna is part of the practice of ancestor worship.

Other cultural<sup>13</sup> practices on Maunakea include the deposition of a baby's piko, or umbilical cord. In an account by Puanani Kanaka'ole Kanahela, the symbolism of this practice was described as:

... the part of the child that connected the child back to the past. Connected the child back to the mama. And the mama's piko is connected back to her mama and so on. So its takes it back, not only to the wā kahiko [ancient times], but all the way back to the Kumulipo ... So it's not only the piko, but it is the extension of the whole family that is taken and put up in a particular place, that again connects to the whole family line. And it not only gives mana or life to that piko and that child, but life again to the whole family.

Ibid. at P-2.

Mauna Kea itself is "known as 'ka piko o ka moku' meaning 'the navel of the island.'" Ibid. at P-1; see also ibid. at S-3 ["Maunakea is understood to be symbolic of the piko (umbilical cord) of the island-child Hawai'i that connects the land to the heavens; Mauna Kea is known as 'ka piko o ka moku' meaning the navel of the island."]

---

<sup>13</sup> As is often the case, an expression of the traditional Hawaiian faith is treated as a cultural expression, rather than a spiritual expression. The burial of the piko is a highly important expression of the ancestor worship aspect of the faith, linking the baby to all the past generations, not a cultural practice, like eating musubi.

The origins of Maunakea and its central place in Hawaiian genealogy and cultural geography are told in mele (poems, chants) and mo'olelo (stories, traditions). Native Hawaiian traditions state that ancestral akua (gods, goddesses, deities) reside within the mountain summit area. Several natural features in the summit region are named for, or associated with, Hawaiian akua; these associations indicate **the importance of Maunakea as a sacred landscape. Each part of the mountain contributes to the integrity of the overall cultural, historical, and spiritual setting.**

Ibid. at 3-11 (emphasis added).

This passage makes a particularly important point worth repeating. While the Applicant constantly seeks to segment the Mauna into smaller and smaller pieces and then tries to limit the impact analyses to only the impacts on each small piece, the FEIS makes clear that “[e]ach part of the mountain contributes to the integrity of the overall cultural, historical, and spiritual setting.” Id.

The CIA gives an overview of Mauna Kea as follows:

Maunakea is a sacred cultural landscape; symbolic of Wākea (the “Sky Father” to all Hawaiians), home of Poli’ahu, the goddess of snow and foe of Pele (the fire goddess), and of many other resident deities and supernatural deities (e.g. Līlīnoe, Kūkahau’ula, and Mo’oinanea), and the *piko* (umbilical cord) of the island-child Hawai’i which connects the lands to the heavens (Maly and Maly 2005:v); home of Waiau, the highest permanent lake in the Hawaiian Islands; location of the highest and most extensive basalt quarry in all of Polynesia and perhaps the entire world; and numerous trails, *ahu* (stone markers), *heiau* (temple, place of worship) and cinder cone *pu’u* (hills).

Exhibit R-5, CIA for the TMT Observatory and TMT Mid-Level Facility Project at iii.

The Office of Hawaiian Affairs

acknowledges the different perspectives on Maunkea as a spiritual, sacred space, home to “wau akua” (dwelling, place of the gods) and the place where the presence of numerous *ahu* and *iwi kūpuna* provide silent testimony that **generations of Hawaiians have worshipped and buried loved ones at “the highest point possible to rest in peace.”**

Ibid. at x.

Interviews in the community confirmed these characterizations of the sacred Mauna.

The results of cultural consultations indicate that there are major concerns (and several ancillary ones) regarding potential adverse impacts on cultural and natural resources and associated beliefs and practices as a result of the proposed development of the Thirty Meter Telescope, construction of the staging area for the TMT Observatory Project and the HELCO electrical transformer needed to supply electrical power to the TMT Observatory Project:

1. **All of the community members interviewed for this study stress that Maunakea is a sacred landscape** and that any future development activities on the mountain proceed with greater awareness of, and the utmost respect for Hawaiian culture, Hawaiians' spiritual connection to the mountain, and the sanctity of Maunakea.

...

3. Ten of the community members interviewed, and three of the respondents who provided brief commentary, explicitly stated their opposition to the proposed actions on Maunakea which is traditionally, and continues to be, **one of the most sacred locations in all of Polynesia, not to mention Hawai'i**. These participants voiced sadness, frustration, and negative feelings about the cumulative impacts of past and present developments on Maunakea. In the words of one participant, referring to the telescopes on the summit of Maunakea, "When is enough, enough?"

R-5 at vi-vii (emphasis added).

The FEIS and related documents offered in support of the CDUA contain ample proof that the summit of Mauna Kea is a place of worship satisfying that part of the desecration test found in HRS §711-1107(1)(b).

**c. The Applicant seeks to limit the definition of a sacred space to fit a non-Hawaiian model and invalidate a Native Hawaiian definition of a sacred space.**

The Applicant responds to the Temple's argument that Mauna Kea is a place of worship or burial by attempting to define Mauna Kea as outside the boundaries of what can be considered a place of worship.

The Temple cited to statements regarding the sacred nature of Mauna Kea, and particularly the summit, found on the website that is part of the Applicant's Imiloa Astronomy Center. DOC-264 at 3.<sup>14</sup> The Temple argued that this presentation represents an admission by the University regarding the sacredness of Mauna Kea.<sup>15</sup>

The Applicant seeks to change the subject by stating that “the Temple’s argument is that *anything* considered sacred to some, including expansive natural or environmental features, necessarily fall within the scope of HRS § 711-1107(1)(b) and cannot be built upon, even if such construction would otherwise be lawful.” DOC-473 at 6-7 (emphasis in the original).

This proceeding is not about “*anything* considered sacred to some.” This proceeding is about Mauna Kea being sacred to Native Hawaiians. The Applicant

---

<sup>14</sup> The original name of Maunakea is *Mauna a Wakea*, or ‘Mountain of Wakea.’ In Hawaiian tradition *Wakea* (sometimes translated in English as ‘Sky Father’) is the progenitor of many of the Hawaiian Islands, and of the Hawaiian people. This mountain is his piko, or the place of connection where earth and sky meet and where the Hawaiian people connect to their origins in the cosmos.

### **‘Realm of the gods’**

As a sacred site, many of the physical features and environmental conditions of the mountain are associated with Hawaiian gods and goddesses. *Lilinoe*, *Poliahu*, and *Waiiau* are just a few of the deities associated with this place.

The summit of Maunakea was considered a *wao akua*, or ‘realm of the gods’ and was therefore visited only rarely by humans.”

<http://www.imiloahawaii.org/60/cultural-significance> (emphasis added).

<sup>15</sup> The Temple also filed the partial summary judgment motion to establish that the traditional Hawaiian faith is still practiced and to counter the erroneous impression left by the Imiloa Astronomy Center presentation characterization that Mauna Kea “was considered” a sacred site, as opposed to being still considered a sacred site. DOC-264 at 3.

tries to make the subject generic to eliminate the compelling nature of the Native Hawaiian claims in relation to Mauna Kea.

The Applicant's phrase "would otherwise be lawful" is a *non sequitur*. The desecration statute defines whether the construction would be lawful or not. If the construction would violate the statutory provisions, i.e. satisfy the statutory test for desecration, then it would be unlawful to build it.

The Applicant then tries to redefine what a sacred space can be.

Contrary to the Temple's contention, the term "place of worship" is commonly used to refer to a specific structure, delineated space or otherwise designated locale, not an entire geographical feature."

DOC 473 at 7.

The Temple does not contend that the term "place of worship" means only "an entire geographical feature." The Temple does contend that an entire geographical feature can be a place of worship.

The Applicant offers no explanation as to how to distinguish a "delineated space" or a "designated locale" from "an entire geographical feature." The distinction is arbitrary and without legal significance.

In the statute itself, Section (1)(a) refers to "[a]ny public monument **or structure**" while (1)(b) refers to a "place of worship." The statute, therefore, specifically identifies a "place of worship" as not limited to a "structure."<sup>16</sup>

---

<sup>16</sup> All the examples offered by Applicant are structures or facilities, including a *heiau*. DOC-473 at 7. Apparently the attempt is to limit Hawaiian practice to only *heiaus*, so that the false argument for structures being necessary can be made.

Setting aside Mauna Kea as a sacred space for use as determined by Native Hawaiians has a precedent. The Legislature created the Kaho'olawe Island Reserve, which is defined as

**the entire island of Kaho'olawe** and those waters and submerged lands seaward of the shoreline of Kaho'olawe island to a distance of approximately two miles.

HAR § 13-261-3 (emphasis added).

The legislation says that the Reserve

is to be used **solely and exclusively** for the preservation and practice of all rights customarily and traditionally exercised **by native Hawaiians** for cultural, **spiritual**, and subsistence purposes.

HAR Rules § 13-261-1 (emphasis added).

The “specific structure” statement by the Applicant is an attempt to confine “place of worship” to a non-indigenous, western definition. Indigenous people all over the world hold “entire geographical features” to be sacred.

For example, the Lakota, Cheyenne, Omaha, Arapaho, Kiowa and Kiowa-Apache indigenous peoples consider the Black Hills of North Dakota to be sacred.

<http://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/the-black-hills-the-stories-of-the-sacred/>

For the Apache, Mount Graham in Arizona is similarly a Native American sacred site. <http://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/vatican-observatory-vs-san-carlos-apache-sacred-land/>

To the Apache the ecology of the area is what makes the land sacred and it is not related to the western idea of a physical shrine.

Id.<sup>17</sup>

There is no definitional or legal barrier to accepting Mauna Kea as a “place of worship.”

There is strong evidence supporting a finding that Mauna Kea is a “place of worship.”

### **3. Mauna Kea is a place of burials.**

The FEIS states:

The subject of the presence of burials in the Maunakea summit region is a topic of considerable differences between the scientific, archaeological perspective, on the one hand, and the Native Hawaiian perspective on the other hand.

R-3 at P 3-15.

Western scientists grant at least 29 burials or possible burial sites. Ibid. at 3-16.

Native Hawaiians, based in part on documentary evidence, believe that there are or were many more sites. Id. See also ibid. at P-2.

There is also the concern that if burials have been going on for hundreds of years, there is every likelihood that the bones will have deteriorated and be undetectable. That means that relying only on identified sites in making the determination of whether Mauna Kea is a burial ground is highly problematic.

The known presence of burials in the area shifts the burden of proof to the

---

<sup>17</sup> Considering an entire geographical feature as sacred is not limited to indigenous religions. Mount Sinai, where Moses received the Ten Commandments, is considered a holy mountain by Christians, Jews, and Muslims. Exhibit T-2 at 2.

The Holy See, with its spiritual jurisdiction over Vatican City, presides over one of the larger sacred sites – 109 acres – defined by geographic boundaries, not “facilities.” DOC-437 at 7.



Applicant to demonstrate that the Thirty Meter Telescope and its associated infrastructure will not be within or adversely impact a burial ground.

Give the general secrecy that surrounds burials and the difficulty in identifying burial sites, there is simply no way that the Applicant can prove Mauna Kea or any particular part of the high lands of Mauna Kea are not a burial ground.

If the Board has doubts one way or the other, the Temple argues that the benefit of the doubt has to go to the Native Hawaiians, who have used the site for hundreds of years and know far better what is present on the Mauna than the recently arrived and culturally ignorant Astronomers.<sup>18</sup>

Intervener Fergerstrom filed the Written Direct Testimony of Michael Lee that contained the following:

Our family has clocked into record on August 02, 2016 at SHPD [State Historic Preservation Division] a Burial Registration Form showing the exact location of my 13th great uncles a [Mō'i] of Maui's burial location of his

---

<sup>18</sup> The Board can take note of the fact that the information about burials that would normally be kept as a close family knowledge is being forced into the open to defeat the Astronomers claims that the burial grounds are not what the Native Hawaiians know them to be. The question of when enough is enough is raised by this process as well.

The Board should be very sensitive about its role in determining the sincerity of religious beliefs. Courts normally take an approach that is a "light touch." *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 792 (5<sup>th</sup> Cir. 2012); *see also Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigant's interpretation of those creeds."); *Kay v. Bemis*, 500 F.3d 1214, 1219 (10<sup>th</sup> Cir. 2007) ("The inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment.")

There is no basis for the Board to question the sincerity or credibility of Native Hawaiians, who share their spiritual knowledge to provide guidance on such questions as whether Mauna Kea is a place of worship, a burial ground, or an object of veneration.

[kā'ai] and **another burial site on the proposed access road to the TMT site.**

I was taught our 'Ohana's Mo'olelo of my Keawe and Piilani bloodlines and how my 13th great uncle was taken to this isolated site and why.

This genealogy and the site location of my family's information is restricted from the public access [pursuant to HRS Chapter 6E-43.5 (e)] confidential only to be seen by SHPD Burial experts and the Hawaii Island Burial Council.

Exhibit D-1 at 3 (emphasis added).<sup>19</sup>

The FEIS discussion on the subject of burials does not reach any definitive conclusions. Ibid. at P 3-15-16.

In the Hawaiian civilization, wisdom resided in the Kupuna (the Elders). If the Kupuna say "Our family is up there," id., that should settle the matter.<sup>20</sup>

From the non-Hawaiian perspective, i.e. for those who refuse to take the word of Hawaiian Kupuna regarding the burial ground, there is sufficient evidence to conclude that Mauna Kea has been used as and continues to be a burial ground.

Of particular importance is the location of one burial through the testimony of Mr. Michael Lee as being on the access road to the proposed site for the Thirty Meter Telescope. Exhibit D-1 at 3. That close proximity raises the broader issue

---

<sup>19</sup> Mr. Lee refers to his 13<sup>th</sup> grand uncle as a Mō'i of Maui. The term Mō'i referred to a ruling chief.

<sup>20</sup> In an article published in 1892, documenting an ascent of Mauna Kea by Mr. E. D. Preston, an astronomer, and others on June 25, 1892, the following appeared:

The same afternoon the surveyors occupied the summit of Lilinoe, a high rocky crater, a mile southeast of the central hills and a little over 13,000 feet in elevation. Here, as at other places on the plateau, ancient graves are to be found. In the olden time, it was a **common practice** of the Natives in the surrounding region to carry up the bones of their deceased relatives to the summit plateau for burial.

"The Ascent of Mauna Kea, Hawaii," The Pacific Commercial Advertiser, Vol. XVI, No. 3175, Wednesday, September 14, 1892 at page 1 (emphasis added).

that there are no metes and bounds defining a “cemetery” on Mauna Kea that would allow a determination of which areas are part of the burial grounds and which are not.

The Applicant would have the Board treat the physical location of the proposed telescope as an isolated island on the summit. The issue of burials is a case in point.

The Applicant acts like there could be hundreds of burials, altars, and other evidence of religious practices surrounding the TMT Observatory site and that would not matter, if there were none within or in close proximity to any of the lands the Thirty Meter Telescope intends to use.

The fallacy in this narrative is illustrated by the example of a cemetery with some plots still vacant. The vacant plots are still part of the cemetery. The treatment of the land area as a cemetery and the fact that other burials have taken place in a nearby section of the cemetery extends any protections offered to a cemetery to the vacant plots as well.

Even if no burials had been identified in Area E, that did not mean Area E would not be used at some future time for burials. Certainly the Applicant is not qualified to make that determination. If there is any ambiguity as to whether Area E might later be used for burials, that ambiguity should be resolved in favor of the traditional faith practitioners.<sup>21</sup>

---

<sup>21</sup> The trust relationship created by Section 5(f) of the Admissions Act, discussed earlier, *supra* at 3-6, argues for any ambiguity regarding the rights of Native Hawaiians in relation to a private corporation being resolved in favor of the trust beneficiaries. See e.g. *White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F. Supp. 2d 1034, 1046 (D. Minn. 2009) (citations omitted) (where there is a

On the record, there is at least one burial identified on the access road to the Thirty Meter Telescope proposed site. The fact that others have not been detected does not mean that they are not present. Given the proximity of an identified burial to the proposed Thirty Meter Telescope site, the potential expansion of burials into the area of or within the site is a reasonable expectation, absent the construction of the telescope.

The evidence in the record is that Mauna Kea has been and continues to be a burial ground. That designation satisfies Section (1)(b) (place of burials) of the desecration statute.

#### **4. Mauna Kea is an object of veneration.**

The desecration statute also refers to “[i]n a public place, any other **object of veneration** by a substantial segment of the public.” HRS § 711-1107(1)(c)

---

trust relationship and an ambiguity in the application of a statute, the ambiguity should be resolved in favor of the trust beneficiaries); *see also, e.g., Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (“When we are faced with ... two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court’s Indian jurisprudence: ‘Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.’ *Montana v. Blackfeet Tribe*, 471 U.S. at 766.”). *See also Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 815-16 (8th Cir. 1983).

While Native Hawaiians are not Native Americans, the interpretation of trust law is similarly applied. BLNR is the most direct trustee over the lands in question and has an obligation to protect the beneficiaries. That includes protecting the spiritual practices and sacred sites of the beneficiaries.

That fiduciary duty may require a level of consideration beyond what would normally be required. Court have ruled that even if an agency complies with the National Environmental Policy Act, a permitting action may still be impermissible, if it unduly burdens tribal treaty rights in violation of the trust responsibility. *No Oilport! v. Carter*, 520 F.Supp. 334, 371 (W.D. Wash 1981).

If there is any ambiguity regarding whether the Thirty Meter Telescope proposal would violate the desecration statute, that ambiguity should be resolved in favor of the Native Hawaiians.

(emphasis added).<sup>22</sup>

The FEIS states:

Some Native Hawaiian spiritual practitioners continue to view Maunakea as the first-born of the Wākea and Papa union and, thus, revered as a connection to all Native Hawaiian people and gods.

Exhibit R-3 at 3-13.

Numerous comments were received regarding cultural resources, and while the comments expressed a wide range of sentiments, **all** made it clear that Maunakea is **a sacred place revered by many**.

Exhibit R-5 at B-01 (emphasis added).

When there is substantive evidence, particularly from admissions within the Applicant's own documents, that Maunakea is a revered site, the Applicant's have an impossible burden to prove that Maunakea is not a revered site. HRS § 711-1107(c) (an object of veneration). There is no way the Applicant can prove the absence of veneration in the face of testimonies and practices by those who relate to Mauna Kea as an object of veneration.<sup>23</sup>

##### **5. The construction of the Thirty Meter Telescope will damage the sacred site.**

The construction of the Thirty Meter Telescope will involve both short-term adverse construction impacts on Mauna Kea and long term irreparable impacts.

Project construction will require the excavation of rock from the TMT Observatory site and along the Access Way.

DOC-R-1, Appendix B at Page B-3

---

<sup>22</sup> To venerate is to adore, deify, glorify, revere, reverence, or worship.  
<https://www.merriam-webster.com/dictionary/>

<sup>23</sup> Lining up testimony or eliciting responses to cross-examination that demonstrate that some Native Hawaiians do not venerate Mauna Kea is at best irrelevant and at worst exploitation of a suppressed people forced to abandon the faith of their ancestors.

Construction Noise. Construction of the proposed facilities, particularly Observatory site and Access Way grading, will involve the use of heavy construction equipment, including that needed for excavation of relatively dense rock. It will also entail periodic operation of construction equipment on the concrete Batch Plant Staging Area site.

DOC-R-1 at Page 2-31

The foundation will extend below grade and will require considerable excavation to remove and significant material to backfill the voids.

DOC-R-1 at Page 4-43

Preliminary engineering plans indicate that the total volume of excavated material ("cut" material) will be 64,000 cubic yards.

DOC-R-1, Appendix B at Page B-3

The total dome height will be 184 feet above the finished grade, with an exterior radius of 108 feet.

DOC-R-1 at Page 3-3.

In sum, the Thirty Meter Telescope will excavate a vast amount of material in order to prepare a foundation and then build an eighteen story building on that foundation. There is no question that this huge construction project will damage the pristine site where construction is proposed, satisfying that element of the desecration test. HRS § 711-1107(2).

**6. The Applicant attempts to make a factual question into a constitutional question.**

The determination of whether the Thirty Meter Telescope proposal attempts to secure permission to violate the desecration statute is a factual inquiry. (1) Is the telescope located within a site that is a place of worship? (2) Is the telescope located within a site that is a place of burials? (3) Will the telescope adversely affect an object of veneration, i.e. Mauna Kea? (4) Did the Applicant know that pursuing the construction of the proposed telescope would produce outrage from a substantial segment of the public?

The Applicant attempts to make the issue into a legal question of whether an affirmative finding on any one of the questions about place of worship, burial, or veneration would “run afoul of the Establishment Clause of the First Amendment to the U.S. Constitution.” DOC-473 at 7.

Acknowledging a site as a place of worship, burial ground, or object of veneration does not violate the Establishment Clause. If it did, then the desecration statute is unconstitutional because the acknowledgment of a place of worship, burial, or veneration is the first step in applying that statute. Also, absent the authority to make such determinations, the State could not prohibit desecration.

What the Applicant is really arguing is that, if a determination of a site to be a place of worship, place of burials, or object of veneration would preclude the Applicant having *carte blanche* to build their telescope there anyway, then the Establishment Clause is violated. Not getting your way is not a test of whether the Establishment Clause has been violated.

The acknowledgment of Native Hawaiian spiritual rights cannot burden the First Amendment rights of the University or TIO or constitute establishment under the First Amendment.

The University is a government institution and, as such, cannot assert a right to practice religion under the First Amendment. The Amendment “is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.” *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1988) quoting *Sherbert v. Verner*, 374 U.S. 398 (1963).

For the University, as a government entity, to claim a religious right as burdened would mean that the University is establishing a particular religion to be associated with the University. That is clearly an unconstitutional assertion.

If the Board determines that land leased by the University from the Board cannot be used for a particular project because that project would violate a criminal statute that protects the rights of all religions to have their sacred sites respected, that decision is a constitutional, and mandatory, exercise of the agency's powers.

That decision could not burden the religious practice of the University or TIO because neither institution has religious practices.

Neither the University nor TIO would have standing to challenge that decision because such a decision would not "coerce[]" the University or TIO "into **violating [their] religious beliefs**" or "**penalize religious activity** by denying [the University or TIO] an equal share of rights, benefits, and privileges enjoyed by other citizens based on that religious activity." *Lyng, supra.* at 449 (emphasis added).

The Applicant being denied the right to construct its project because to do so would violate a criminal statute does not give rise to a constitutional concern.<sup>24</sup>

### **7. Hawaiian spiritual rights are protected in the broader context of culture, tradition, heritage, identity and value system.**

The Applicant has a difficult time, in part, because the Applicant fails to approach the question of Hawaiian rights and Hawaiian law from a holistic

---

<sup>24</sup> To the contrary, the Applicant tramples the Establishment Clause by objecting to the Temple of Lono seeking to be recognized as a faith entitled to all the same rights to practice without suppression as every other faith in Hawai'i enjoys. See e.g. DOC-135 at 14-15.



perspective.<sup>25</sup>

The Applicant objects to the Temple being unwilling to “share” Mauna Kea, Doc-135 at 14, as if the Astronomers have the same rights to Mauna Kea as do the Native Hawaiians.<sup>26</sup>

The Applicant tries to contain the issue to only Native Hawaiian religious rights in order to make the argument just discussed that recognizing Native Hawaiian religious rights is unconstitutional.

The protected rights of Native Hawaiian are “all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes,” not just religious purposes. This bundle of rights emanates from the prior status of the Native Hawaiians as sovereign and constitutes an attempt to protect the remnants of the Hawaiian civilization from ever expanding encroachment by the occupying civilization.

In discussing the nature and reason for the protection, the Hawai'i Supreme Court explained Article XII, §7 as follows:

This provision places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies "the power to protect these rights and to prevent any interference with the exercise of these rights." Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980). See also PASH, 79 Hawai'i at 437, 903 P.2d at 1258; HRS §§ 1-1 [citation omitted] and 7-1 [citation omitted](providing two additional sources from which gathering rights are derived). Article XII, section 7's mandate grew out of a desire to "preserve the small remaining vestiges of a

---

<sup>25</sup> A useful primer would be <https://apps.americanbar.org/buslaw/blt/2008-11-12/sproat.shtml>

<sup>26</sup> The fact that 13 telescopes and numerous other buildings have been constructed on Mauna Kea over the objections of Native Hawaiians is a measure of who is about sharing and who is not.

quickly disappearing culture [by providing] a legal means by constitutional amendment to recognize and reaffirm native Hawaiian rights." Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640. The Committee on Hawaiian Affairs, in adding what is now article XII, section 7, also recognized that "**[s]ustenance, religious and cultural practices** of native Hawaiians are an integral part of their **culture, tradition and heritage**, with such practices forming the basis of Hawaiian **identity and value systems**." Comm. Whole Rep. No. 12, in 1 Proceedings of the Constitutional Convention of 1978, at 1016.

*Ka Pa'akai O Ka 'āina v. Land Use Comm'n*, 94 Haw. 31, 45 (2000).

The Applicant refuses to acknowledge this broader context and attempts to equate the Hawaiian protections with protections provided to Astronomy or Astronomers. A small sampling of legal protections for Native Hawaiians compared to legal protections for Astronomy or Astronomers highlights the distinction.

False Equivalency

Protections for Native Hawaiians

Protections for Astronomy

United Nations Declaration of Rights of <b>Indigenous People</b>	Astronomers are <b>not an indigenous people</b> and have <b>no specifically recognized rights under international law</b>
United States Constitution, First Amendment – Freedom of Religion, Speech, Assembly, Petition for Redress of Grievances	United States Constitution, First Amendment – Freedom of Religion, Speech, Assembly, Petition for Redress of Grievances
The Constitution of the State of Hawai'i: Article XII, § 7: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are <b>descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778</b> , subject to the right of the State to regulate such rights."	The Constitution of the State of Hawai'i – <b>No mention of Astronomy or Astronomers</b>

<p><b>HRS §1-1 Common law of the State; exceptions.</b> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or <b>fixed by Hawaiian judicial precedent, or established by Hawaiian usage</b>; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.</p>	<p>There is <b>no consideration given to any body of laws associated with Astronomy or Astronomers</b> continuing from Kingdom Law or established by Astronomer usage.</p>
<p><b>HRS §7-1 Building materials, water, etc.; landlords' titles subject to tenants' use.</b> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.</p>	<p>There are <b>no statutes protecting the rights of Astronomers to gather materials</b> to support a traditional lifestyle (or any other lifestyle).</p>
<p>HRS § 343-2 Definitions defines an Environmental Impact Statement as including <b>cultural practices of the community and State</b></p>	<p>There are <b>no requirements</b> in the Hawaii Environmental Policy Act <b>to consider any cultural practices by Astronomers.</b></p>
<p>Penalization powers of Board of Land and Natural Resources HRS § 171-6-(15): “No person shall be sanctioned pursuant to this section for the exercise of <b>native Hawaiian</b></p>	<p>Penalization powers of Board of Land and Natural Resources: <b>No exception for Astronomers</b></p>

<p><b>gathering rights and traditional cultural practices</b> as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii state constitution</p>	
<p>Hawaii Administrative Rules, Chapter 10: Entire chapter devoted to rules applicable to Department of <b>Hawaiian Homelands</b></p>	<p><b>Nothing in Hawaii Administrative Rules</b> devoted to rules <b>applicable to lands owned by Astronomers or Astronomy facilities</b></p>
<p>Hawaii Administrative Rules § 13-261-1 Kaho'olawe Island Reserve: The reserve is to be used <b>solely and exclusively</b> for the preservation and practice of all rights customarily and traditionally exercised by <b>native Hawaiians</b> for cultural, <b>spiritual</b>, and subsistence purposes</p>	<p><b>No island set aside for sole and exclusive use of Astronomers</b></p>
<p>In <i>Ka Pa'akai O Ka 'āina v. Land Use Comm'n</i>, 94 Haw. 31, 45 (2000) the Hawai'i Supreme Court ruled that <b>state agencies</b> are "<b>obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians[,]</b>" and "<b>may not act without independently considering the effect of their actions on Hawaiian traditions and practices.</b>"</p>	<p>There are <b>no court decisions</b> in Hawai'i <b>requiring state agencies to protect the practices of Astronomers or to prepare reports on state action potentially affecting Astronomers.</b></p>

This comparison illustrates the special protections that exist for Native Hawaiians. These protections stand apart from the eight criteria regulating the use of Conservation District land as additional concerns that must be addressed. The question is the impact of the proposed telescope on Native Hawaiians, not the impact of Native Hawaiians on the proposed telescope.

**8. The Applicant knew that the proposal to construct the Thirty Meter Telescope would cause outrage.**

**a. Before selecting Mauna a Wākea as the site for the Thirty Meter Telescope, the Applicant knew that selection was likely to produce outrage.**

Before the TMT Corporation selected Mauna a Wākea as the site for the Thirty Meter Telescope, a telescope funder commissioned an independent risk assessment from the Keystone Center.

The Keystone Center report, Exhibit L23 (“Assessment of the Risks for Siting the Thirty Meter Telescope on Mauna Kea”), predicted strong adverse community reactions to the selection of Mauna Kea as the site for the telescope.

**A Sour History and Heavy Baggage.** Unfailingly, almost every interviewee we spoke with, even those who are great proponents of placing observatories on Mauna Kea, acknowledge a complex and, for many, **a bad history on the mountain.** Hawaiians, both Native and non-Native, speak of **poor planning, bureaucratic bumbling, broken promises, technocratic arrogance, and a persistent failure to engage the Native Hawaiian community in meaningful and appropriate ways.** Some of this has been reported in two legislative audits. While there are many fine individual efforts underway to rectify long-running problems, the situation remains **contentious** and confusing. **Should TMT decide to pursue a Mauna Kea site, it will inherit the anger, fear, and great mistrust through previous telescope planning and siting failures and an accumulated disbelief that any additional projects, especially a physically imposing one like the TMT, can be done properly.**

L23 at 3-4.

The report is filled with the many challenges to be expected from the community, such as the following:

There is a **long litany of perceived problems** that includes **poor master and management planning, placing telescopes on inappropriate sites, poor disposal of rubbish and waste, the failure to consult Native Hawaiians in management decisions, and inadequate access for cultural and spiritual practices.**

Ibid. at 4 (emphasis added).

As well-intentioned as they are, we were told by many individuals that the [Institute for Astronomy] has **failed in its interactions with non-university communities of interest.**

Id. (emphasis added)

**Sentiments against further telescope development are strong.**

Ibid. at 5. (emphasis added)

To succeed at a Mauna Kea site, TMT must **run a gauntlet** that entails a number of potential challenges, not all of which are of TMT's making and some of which could be potential showstoppers if TMT's schedule and timing do not have great flexibility.

Id. (emphasis added)

The Science Reserve sits on ceded lands, another long-standing and highly **contentious** issue.

Ibid. at 6. (emphasis added)

[The Thirty Meter Telescope] will be **physically imposing and visible from Waimea** on the north side of the island if it is sited at or around test site 13 North.

Ibid. at 7. (emphasis added)

Traditionally, EIS documents are a **battleground** for development projects and it would seem likely that TMT will be a **magnet for litigation**, especially if prior issues (CMP, lease, ceded land payments, visual issues) have not been meaningfully addressed and resolved.

Id. (emphasis added)

**The PanSTARRS EIS, telescope issues on Haleakala, unsettled clean-up issues on Kaho'olawe, EIS concerns for the Superferry on Kauai and Maui, disputes over depleted uranium shells, and the realignment of Saddle Road on Hawaii Island** may fuel environmental issues related to TMT.

Id. (emphasis added)

The **history of poor or no consultations with Hawaiians**, both Native and non-Native, was chronicled repeatedly in our conversations as a **serious problem**. None of this is TMT's fault, but **all of it will be inherited**.

Id. (emphasis added)

The long-running history of disputes on Mauna Kea has been disappointing for many who are deeply supportive of both Native Hawaiian culture and a solid Hawaii Island science industry. Moreover, **possibilities for a successful reconciliation of the two are, for many, diminishing**. "It is the **wrong mountain at the wrong time by the wrong people**," one interviewee told us. "It might have been alright 20 years ago, but not today. **They've broken our hearts.**"

Id. (emphasis added)

"Letting the scientists lead has created **a cultural disconnect of epic proportions.**"

Ibid. at 8. (emphasis added)

**b. After the decision to pursue the project on Mauna Kea, still further indicators of potential outrage surfaced.**

In furtherance of the CDUA, the Applicant conducted various studies and prepared various reports that documented the *hewa*<sup>27</sup> Native Hawaiians associated with the telescope proposal. As noted earlier, the Cultural Impact Assessment found the following:

Ten of the community members interviewed, and three of the respondents who provided brief commentary, explicitly stated their opposition to the proposed actions on Maunakea which is traditionally, and continues to be, one of the most sacred locations in all of Polynesia, not to mention Hawai'i. These participants voiced **sadness, frustration or negative feelings about the cumulative impacts of past and present developments on Maunakea. In the words of one participant, referring to the telescopes on the summit of Maunakea, "When is enough, enough?"**

R-5 at vi-vii.

---

<sup>27</sup> *Hewa* means "Mistake, fault, error, sin, blunder, defect, offense, guilt, crime, vice; wrong, incorrect, wicked, sinful, guilty." [www.wehewehe.org](http://www.wehewehe.org).

**c. Whatever measures the TMT proponents took to prevent the predicted outrage, those measures failed.**

The Keystone Report did propose “Options for Consideration.” Ibid at 9-13.

History has demonstrated that either the options proposed were not adopted or, if they were adopted, had little effect on public opposition.

The outpouring of public opposition took many forms, including disruption of the ground-breaking ceremony, Exhibit T-2 at 4; multiple confrontations between law enforcement and people objecting to the telescope to protect the Mauna, id.; DOC-135 (Declaration of Counsel at ¶3 and Exhibit 1 at 3 and Declaration of Lanny Alan Sinkin at 1-2; hundreds of people blocking access to the construction site by the construction company to protect the Mauna, id.; people subjecting themselves to being arrested, see T-2 at 4; and a petition opposing the project signed by 66,554 people. <https://www.change.org/p/governor-david-y-ige-stop-tmt-construction-and-arrests-of-mauna-kea-protectors>

The public gatherings in opposition had a spiritual quality, with those participating calling themselves Protectors of the Mountain, not protestors. Exhibit T-2 at 4.<sup>28</sup>

The Applicant had foreknowledge that proposing the construction of the Thirty Meter Telescope on Mauna Kea would very likely produce outrage. The statutory test is whether the defendant knows that the action adversely impacting the sacred site “will outrage the sensibilities of persons likely to observe or discover the defendant’s actions.” HRS § 711-1107(2). Surely the tens of thousands who

---

<sup>28</sup> The extensive expressions of strong opposition to the Thirty Meter Telescope provide further support for a finding that Mauna Kea is an object of veneration.



rose up against the Thirty Meter Telescope more than satisfy any reasonable standard for when sufficient outrage is caused.

The Applicant had a risk assessment that clearly put the Applicant on notice that the Thirty Meter Telescope proposal was highly likely to produce outrage. Exhibit L23.<sup>29</sup>

The risk assessment proved a reliable predictor. Subsequent to announcing the project, that outrage manifested itself.

The evidence of predictive knowledge could hardly be more compelling than a report, prepared by an independent third party, in advance of the decision to proceed with a project, that went into great detail about why outrage was going to result. Exhibit L23.

**9. The application seeks to give a private corporation the right to break the law.**

The Applicant argues that “by its own terms, HRS § 711-1107 does *not* apply to actions by either the University or the Board” because the University and Board do not fall within the definition of “person” found in the statute. DOC-473 at 6. Specifically, the Applicant argues that a government agency is exempt from penal liability under the statute. Id.

While a government agency may be exempt from criminal prosecution for engaging in desecration, that does not mean that the government agency has the authority to grant permission to a private corporation to break the law by engaging in desecration.

---

<sup>29</sup> Just to be clear, the statute defines the violation as based on knowledge that outrage would happen, not on the manifestation of outrage itself.

At a minimum, the government agency would be subject to an injunctive action to prevent the authorization of law breaking. Just the acceptance of the application, hiring of a hearing officer, and initiating a contested case is sufficient action to trigger such a legal challenge to an agency decision to consider granting a permit to break the law. This motion is simply an alternative to that option, allowing the agency to take care of this issue, rather than being compelled by a court to do so.

If the agency did grant permission to break the law, officers and employees of the government agency could face personal liability based on their acting *ultra vires*, even if the agency itself would not be subject to prosecution.

As the Applicant is well aware, the application seeks a permit that will then be the basis for the Applicant signing a lease agreement with a private corporation that will construct and operate the Thirty Meter Telescope. The Applicant apparently has no concern about the potential exposure of that private corporation and its officers and employees to criminal prosecution.

As the CDUA states:

**On behalf of the TMT Observatory Corporation**, the University of Hawa'i is seeking a Conservation District Use Permit (CDUP) from the State of Hawa'i Board of Land and Natural Resources (BLNR) that will allow the construction, operation, and eventual decommissioning of the Thirty Meter Telescope (TMT) Observatory [footnote omitted] 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.

DOC-R-1 (CDUA) at 1-5.

As the Applicant admits, DOC-473 at 9, a private corporation does fall within the definition of "person" found in the desecration statute.

The Thirty Meter Telescope International LLC and/or TMT Corporation will not be exempt from criminal liability, if the construction of the Thirty Meter Telescope violates the desecration statute. Any defense claiming immunity from prosecution because a “government corporation” granted the private corporation the right to break the law will fail because such authorization would itself be illegal.<sup>30</sup>

**10. The Board’s consideration of this issue is *de novo*.**

The issue of desecration was raised in the proceeding.

On June 21, 2016, the Temple of Lono filed the first motion following the determination of the parties. DOC-78 (Temple of Lono Motion for Partial Summary Judgment). That motion sought to establish the preliminary facts that the summit of Mauna Kea is sacred, i.e. a place of worship, HRS §711-1107(1)(b), and that the traditional Hawaiian faith that holds the summit as sacred is still practiced, i.e. the worship is a continuing practice.

---

<sup>30</sup> In its joinder to the Applicant’s unauthorized opposition to the Temple’s motion for summary judgment on the question of desecration, DOC-484, TMT International Observatory, LLC (“TIO”) makes similar arguments regarding the jurisdiction of the agency. Much like the Applicant, TIO creates straw man arguments, attempting to portray the Temple as arguing that this proceeding is the “proper forum to adjudicate alleged violations of the Hawai’i Penal Code,” that the Board has “jurisdiction over criminal offenses,” that the Board can “enjoin or prohibit” violations of law,” or that the Board can implement “criminal procedures.” DOC-484 at 2-3.

The Temple makes none of those arguments. The Temple does agree with TIO that “an administrative agency only has those powers expressly granted to it by statute. [citation omitted]” *Ibid.* at 2. There is no statute that grants the BLNR the power to authorize a private corporation to break the law. The agency, therefore, lacks that power.

Any attempt by the Board to exercise that power *ultra vires* will create criminal liability for the members of the Board and those engaged in implementing the Thirty Meter Telescope project.

On July 29, 2016, Intervener Kalikolehua Kanaele raised the desecration issue directly. DOC-173 at 1-3.

On October 10, 2016, the Hearing Officer denied the Temple of Lono's motion for partial summary judgment filed in June. DOC-346. The Hearing Officer did not discuss the issue of desecration.

Also on October 10, 2016, the Hearing Officer denied the Kanaele motion without discussing the possible application of the desecration statute to this proceeding. DOC-347.

On September 17, 2016, the Temple of Lono filed a Motion for Summary Judgment (Desecration). DOC-264. That motion argued that the Thirty Meter Telescope met all the legal tests for desecration as defined in the statute, which meant that the Board of Land and Natural Resources was required to dismiss the permit application.

The Hearing Officer never addressed the Temple of Lono motion. The Hearing Officer did not set a schedule for the filing of opposition to the motion, did not hold a hearing on the motion, did not make a ruling on the motion, nor take any other action in response to the filing of the motion.

Because the Hearing Officer refused to allow litigation of the desecration statute's applicability to this proceeding, the Board is left to address this motion *de novo*.

**11. The application to build the Thirty Meter Telescope on Mauna Kea seeks permission to violate the desecration statute.**

Applying the law on desecration to the proposal to build the Thirty Meter Telescope leads inexorably to the conclusion that the application is a request for

permission to violate the law.

For the Board to find that the application is not seeking permission to violate the desecration statute, the Board would have to make all of the following findings of fact:

1. Mauna Kea is not a place of worship.
2. Mauna Kea is not a place of burials.
3. Mauna Kea is not an object of reverence.
4. The construction of the Thirty Meter Telescope will not damage Mauna

Kea.

5. The proposal to build the Thirty Meter Telescope was (and is) not likely to produce widespread public opposition based on the sacred nature of Mauna Kea.

The evidence precludes all four of those findings.

The abundant evidence that the summit of Mauna Kea is a place of worship, a place of burials, and an object of veneration puts the proposed Thirty Meter Telescope within the confines of the desecration statute. HRS §711-1107(1)(b) and (c).

The predictive report, Exhibit L23, and the subsequent massive outpouring of public opposition to the proposal to build the project satisfies the remaining requirement of the desecration statute. HRS §711-1107(2).

With all the elements of the desecration statute satisfied, the Board is compelled to dismiss or deny the application.

#### IV. CONCLUSION

Based on the statute and the evidence, the Board must find that (1) the Applicant erroneously omitted consideration of HRS §711-1107 in preparing the Conservation Use District Application, (2) that the facts and evidence support a conclusion that the construction of the Thirty Meter Telescope would fall within the prohibitions of the desecration statute, (3) the Board does not have the authority to authorize violation of a statute, and (4) the application must, therefore, be denied or dismissed.

Dated:

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin  
Lay Representative for Temple of Lono

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, Hawai'i 96721  
(808) 936-4428  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF ) Case No. BLNR-CC-16-002  
)  
A Contested Case Hearing Re Conservation)  
District Use Application (CDUA) (HA- ) **CERTIFICATE OF SERVICE**  
3568) The Thirty Meter Telescope at the )  
Mauna Kea Science Reserve, Kaohe Mauka,) )  
Hamakua District, Island of Hawai'i, )  
TMK (3) 4-4-015:009 )  
\_\_\_\_\_ )

**CERTIFICATE OF SERVICE**

I hereby certify that on this day a copy of the **TEMPLE OF LONO MOTION TO BOARD TO DISMISS HA-3568** and **MEMORANDUM IN SUPPORT** was served on the following parties by email on March 19, 2017:

Michael Cain <[michael.cain@hawaii.gov](mailto:michael.cain@hawaii.gov)>, Office of Conservation & Coastal Lands <[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)>, Kealoha Pisciotto-Keomailani Von Gogh <[keomaivg@gmail.com](mailto:keomaivg@gmail.com)>, Clarence Ching <[kahiwaL@cs.com](mailto:kahiwaL@cs.com)>, Uncle Kalani Flores <[ekflores@hawaiiintel.net](mailto:ekflores@hawaiiintel.net)>, Pua Case <[puacase@hawaiiintel.net](mailto:puacase@hawaiiintel.net)>, cordylinecolor@gmail.com, kealiikea@yahoo.com, Bianca Isaki <[bianca@kahea.org](mailto:bianca@kahea.org)>, Ian Sandison <[isandison@carlsmith.com](mailto:isandison@carlsmith.com)>, tluikwan@carlsmith.com, John P. (Pete) Manaut <[jpm@carlsmith.com](mailto:jpm@carlsmith.com)>, Lindsay N. McAneeley <[lmcaneley@carlsmith.com](mailto:lmcaneley@carlsmith.com)>, T. Shinyama' <[RShinyama@wik.com](mailto:RShinyama@wik.com)>, douging@wik.com <[douging@wik.com](mailto:douging@wik.com)>, mehana kihoi <[uhiwai@live.com](mailto:uhiwai@live.com)>, Kahookahi Kanuha <[kahookahi@gmail.com](mailto:kahookahi@gmail.com)>, Joseph Camara <[kualiic@hotmail.com](mailto:kualiic@hotmail.com)>, lsa@torkildson.com <[lsa@torkildson.com](mailto:lsa@torkildson.com)>, njc@torkildson.com <[njc@torkildson.com](mailto:njc@torkildson.com)>, leina'ala s <[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)>, Maelani Lee <[maelanilee@yahoo.com](mailto:maelanilee@yahoo.com)>, Lanny Sinkin <[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)>, akulele@yahoo.com <[akulele@yahoo.com](mailto:akulele@yahoo.com)>, s.tabbada@hawaiiintel.net <[s.tabbada@hawaiiintel.net](mailto:s.tabbada@hawaiiintel.net)>, tiffniekakalia <[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)>, Glen Kila <[makakila@gmail.com](mailto:makakila@gmail.com)>, Brannon Kealoha <[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)>, hanahanai@hawaii.rr.com <[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)>, pohaku7@yahoo.com <[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)>, Ivy McIntosh <[3popoki@gmail.com](mailto:3popoki@gmail.com)>, Kealamakia Jr. <[mkealama@yahoo.com](mailto:mkealama@yahoo.com)>, Patricia Ikeda

<[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)>, Yuklin Aluli <[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)>, Dexter Kaiama <[cdexk@hotmail.com](mailto:cdexk@hotmail.com)>

and will be served by first class mail or hand delivery on March 20, 2017 to:

1. Dwight J. Vicente  
2608 Ainaola Drive  
Hilo, Hawaiian Kingdom

2. Harry Fergerstrom  
P.O. Box 951  
Kurtistown, HI 96760

3. Michael Cain, Custodian of Records  
Conservation and Coastal Lands  
1151 Punchbowl, Room 131  
Honolulu, Hawai'i 96813

Dated: March 19, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
Lanny Alan Sinkin