

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ōhe Mauka,
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02

**JOSEPH KUALII LINDSEY CAMARA'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, DECISION AND
ORDER; CERTIFICATE OF SERVICE**

The Applicant, University of Hawaii (UH), seeks a Conservation District Use Permit to construct the proposed Thirty Meter Telescope (TMT). If approved, this project would include constructing the tallest building on Hawaii Island on the most culturally significant site in all of Hawaii, the summit of Mauna Kea. The cultural and visual resources of this area have already endured substantial, adverse and significant impacts from Astronomy related development. Constructing the largest observatory to date would increase the **CUMULATIVE** impact of Astronomy on the natural and cultural resources of the summit of Mauna Kea, and cannot be permitted.

FINDINGS OF FACT

1. Joseph Kualii Lindsey Camara was admitted as a party and found to have standing by Judge Ricky Amano a party in the Contested Case for the issuance of Conservation District Use Application (CDUA) HA-3568 at the 2nd prehearing conference in Hilo, Hawaii on June 17th 2016.

Eight Criteria

The proposed land use is consistent with the purpose of the conservation district

2. The purpose of the conservation district “is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.” HAR §13-5-1.

The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur.

3. HAR § 13-5-24 identifies permissible land uses in a resource subzone. Those permissible uses include astronomy facilities under a management plan.

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 May 30 6:43 am

4. Audits of UHs management of Mauna Kea reveal that critical elements of the current comprehensive management plan have not been fulfilled.

The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable.

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

5. From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse (TMT FEIS, R-3, p.s-8)
6. The cumulative impact of past and present actions on geologic resources in the astronomy precinct has been substantial, significant and adverse, primarily due to reshaping of summit cones. (TMT FEIS, R-3, p.s-8)
7. Preliminary engineering plans indicate that the total volume of excavated material ("cut" material) will be 64,000 cubic yards. (CDUP Application, R-1, p.B-3)

The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels.

8. The tallest building on Hawaii Island is Hilo Bayshore Towers at 135 ft.
9. The proposed TMT would be 184 ft. tall above finished grade (A001, p. 1-6)
10. The TMT is not compatible with anything on this island
11. Cross examination of UH witness Perry White by Kualii Camara

Q: That TMT is compatible with the surroundings because there are other telescopes and it fits in with the surroundings because there are other telescopes around?

A: That's correct, within the observatory precinct there have been many other similar facilities developed.

Q: And that is the basic basis for why you feel the TMT is compatible with the surrounding area?

A: That's correct.

Q: Thank you very much.

So I actually -- a statement, I'm not sure how to do this, but I actually -- the witness too from UH, James T. Hayes, the EIS expert, I was looking at a Quote from his testimony that states: The overall existing level of accumulative visual impacts from the past projects at the summit is considered to be substantial, significant and adverse. So would you say that the TMT is compatible with those elements that have a substantial, significant and adverse impact on the visual impacts to the summit area?

A: My understanding of what that statement meant was that compared to predevelopment of observatories on the mountain, there had been quite a bit of change up there. And the incremental development of this project, if it were to be approved, would add to that. And the point that was made in the Conservation District Use Application was that if you were only doing that as part of this, then it would be clearly additive. I think the EIS determined that things are already so changed, that the addition of one more would not be a Significant, huge change. Not the way the first, you know, one was (Perry white cross exam, Oct. 20, 2016 Tr vol 1, p.218-220).

The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable

12. The proposed TMT would be visible from 14% of Hawaii Island and by 15.4% of its population (A003, p. 3-86)
13. In 2005 a federal Environmental Impact statement (EIS) for the Keck outrigger telescopes stated that "Visual impacts of past and present astronomy related activities in the MKSR have been substantial." (B.08k, xxi)
14. Written direct testimony of primary TMT EIS author and UH witness Jim Hayes states that "Overall, the existing level of the cumulative visual impact from past projects at the summit is considered to be substantial, significant, and adverse." (p.5)
15. In oral testimony on October 25 2016 Jim Hayes responded "yes" to the statement "So the TMT would add to the cumulative impact that you have already stated is substantial, significant and adverse." (Direct Testimony Jim Hayes, tr. Vol 3 p 156)
16. HAR 11-200- 2 defines "Cumulative impact" to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."
17. HAR §11-200-12 Environmental Assessment Significance Criteria
 - (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action.
 - (b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it:
 - (1) involves an irrevocable commitment to loss or destruction of any natural or cultural resource;
 - (3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders;
 - (7) Involves a substantial degradation of environmental quality;
 - (8) is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;

(12) Substantially affects scenic vistas and view planes identified in county or state plans or studies.

Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district

18. A (contested) sublease of the proposed TMT site would be utilized to build the largest telescope on Mauna Kea to date, significantly increasing the intensity of land use in the conservation district.

The proposed land use will not be materially detrimental to the public health, safety, and welfare.

19. In 2015 there were numerous events directly linked to construction activities for the proposed TMT that required law enforcement and included situations detrimental to public health, safety and welfare.

Native Rights

20. The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) was passed in 2007, it set forth the Human Rights of Indigenous Peoples, including Hawaiians. The UNDRIP sets forth clearly the rights of Hawaiians to the lands, territories and resources they traditionally owned and used, including sacred sites and landscapes.
21. Article 11 of the Declaration states: “Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.”
22. Article 12 of the Declaration States: “Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.”
23. Article 25 of the Declaration states: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. ”
(H-2)
24. And I wanted to say that we're really fortunate In Hawaii that we have international law, national law and state law and they are all in consonance. There is no conflict here. There are different expressions of the law, but we're in consonance. Whether international, national or state law, we acknowledge that the cultural properties of indigenous peoples are part of their cultural heritage, international, federal and state law. What do these laws call for? They call for respect, acknowledgment, preservation and conservation of the resource. (Mililani Task, Tr vol 42, p. 185-186)

25. Ka Paakai came out in 2006. It's 2017. We still have this problem because there is no process. If you don't have the process to protect human rights, they are abridged. So we need the process. (Tr. Vol 42, p. 204-205)

Lease Issues and Public Land Trust

26. HRS §171-17 Appraisals. (a) The appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board; provided that the upset price or upset rental shall be determined by disinterested appraisal whenever prudent management so dictates. No such lands shall be sold or leased for a sum less than the value fixed by appraisal; provided that for any sale or lease at public auction, the board may establish the upset sale or rental price at less than the appraisal value set by an employee of the board and the land may be sold or leased at that price. The board shall be reimbursed by the purchaser or lessee for the cost of any appraisal required to be made by a disinterested appraiser or appraisers contracted for by the board.
27. HRS §171-18 Public land trust. All funds derived from the sale or lease or other disposition of public lands shall be appropriated by the laws of the State; provided that all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act and later conveyed to the State under section 5(e) shall be held 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. [L 1962, c 32, pt of §2; Supp, §103A-18; HRS §171-18]
28. Although the provisions of Chapter 171 require fair market rental be paid for the use of public lands, these laws have been violated for 48 years, ever since the University received a 65 year lease for Mauna Kea in 1968 for free. The University ignored these laws when it subleased lands on the summit for 22 buildings for \$1.00 per year. (Mililani Trask WDT, p6)
29. We have a law in this state. It says that when ceded lands are leased out, you get an appraisal. You do an appraisal process. You can even use DLNR staff. If not, If there's a fight, you can get an independent appraiser. But ceded lands, Including Mauna Kea, are to be leased out at fair market value. And there's to be a regulatory framework. Even Chapter 171 in the Constitution calls for it. So I know what Mr. Lemmo Is saying, but if you don't follow the law, you don't have the money to do the consultation and to take care of the cultural resources. (Mililani Trask Tr. Vol. 42, p. 197)

Desecration

30. 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.

31. UH is well aware of the cultural and spiritual significance of Mauna Kea to Hawaiian people. An excerpt from their 2009 Cultural Management Plan (A-9, p. ii) reads: "Mauna Kea is probably one of the most significant cultural and astronomical sites in the world. For the Hawaiian people Mauna Kea is their cultural connection or piko (umbilical cord) to Papa and Wakea, it is the beginning and the end."
32. "Mauna Kea is 'ka piko o ka moku,' which means 'Mauna Kea is the navel of the island.' ... When we understand the three piko of the human anatomy, we may begin to understand how they manifest in Mauna Kea. Mauna Kea as the fontanel requires a pristine environment free of any spiritual obstructions." (A-9, p. i-ii)
33. Mauna Kea as a cultural landscape, and that is a term that we use in the international arena, but it's a different type of cultural resource. Cultural landscapes are not one or two sites, but they are geographical areas. (Tr. Vol. 42 p. 177)
34. The Final EIS for the TMT project (A-003, p.3-24) recognizes that a substantial segment of the public feel that "Any development or disturbance of Mauna Kea by someone other than a Native Hawaiian following proper protocols is a significant desecration to the spiritual and sacred quality of the mountain and impacts the cultural practices on the mountain."
35. OMKM **Cultural Advisor** Wallace Ishibashi answered "yes" to the following questions relating to desecration asked in cross examination by Kahookahi Kanuha: (Wallace Ishibashi, Direct testimony Dec. 1 2016, Tr. Vol 10, p. 31-34)
 - Q: Is Mauna Kea a place of worship and/or burial? A: Yes
 - Q: Is Mauna Kea considered an object of veneration by an amount of people? A: Yes.
 - Q: In order to build the TMT on Mauna Kea, would this construction damage the landscape of that site on Mauna Kea in any way? A: Yes.
 - Q: Would said construction deface the landscape? A: Yes.
 - Q: Would it disfigure the landscape? A: Yes.

Q: Would it mar the landscape? A: Yes.

Q: Would one have reason to be outraged due to this defacement, this disfigurement, this marring of the proposed construction site? A: Yes, if there is grounds for those who oppose the project, there would be – anger people, yes.

36. On March 28, Mililani Trask was cross examined by Kaliko Kanaele (transcripts vol 42, p. 234)

Q: Do you think after reading HRS 7 11, is that a sufficient protection for sacred sites or districts?

A: You know, the language of our state desecration law is sufficient. What we don't have is anyone who has the Integrity to Invoke It.

37. By building the largest structure on this entire island, in the most culturally significant area in Hawaii, we risk irreversibly impacting spiritual landscape of this area before we fully realize its true function, value and implications for humanity and all life on this planet. Without understanding the traditional function of Mauna Kea, there is no way to gauge the impact of further development. (Camara, WDT, p. 4)

CONCLUSIONS OF LAW

8 CRITERIA

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

1. Considering the existing well documented CUMULATIVE significant impacts of Astronomy development on the resources of the summit area of Mauna Kea, any additional impacts to said resources in this must be considered significant. (FOF 13-17) This is particularly true considering the size and scope of this proposed project. The TMT would be by far the largest telescope in a sensitive landscape that has already suffered significant, adverse and substantial impacts at the hands of astronomy development. (FOF 5,6,7)

The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;

2. The TMT would be the tallest building on this Island. Zoning for this area is conservation. (FOF, 8-11)
3. This development would be visible from 14% of the island. No other structures, beside other telescopes on Mauna Kea, have a greater impact on the visual landscape of Hawaii Island. (FOF 12-16)

4. The visual impact of existing telescopes have been substantial, significant and adverse (FOF 12-17)

The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;

5. The TMT Project does not satisfy this criterion, on the contrary, it adds to the cumulative substantial, significant and adverse visual impacts of Astronomy development on the summit area (FOF 12-16)

Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district;

6. Defining a specific area for development of the TMT, whether by subdivision or sublease, would facilitate increased intensity of land uses in the conservation district.

The proposed land use will not be materially detrimental to the public health, safety, and welfare;

7. Public opposition related directly to the construction of the TMT created hazardous conditions on Mauna Kea. These hazardous conditions would very likely arise again if construction attempts resume.

PUBLIC TRUST OBLIGATIONS

8. The State has the obligation to conduct fair market value appraisals of all lands that are to be sold or leased
9. The State has the obligation to charge no less than fair market value for lands that are sold or leased.
10. No such appraisal has been conducted for any of the public lands on Mauna Kea leased to UH since 1968.
11. No fair market value appraisal has been done for any public lands on Mauna Kea subsequently subleased by UH.
12. UH leases more than 11,000 acres of the best area for astronomy in the world for a dollar a year.
13. Portions of the revenue from the lease of public lands are meant for the betterment of native Hawaiians.
14. Failure to assess and collect fair market value for lease lands equates to theft from native Hawaiians
15. Failure to assess and collect fair market value on leases undermines the State's ability to facilitate and protect native Hawaiian rights and cultural practices.

16. A sublease from UH to TMT would continue these illegal actions and put the State in breach of its fiduciary responsibilities to native Hawaiians. (FOF 26-29)

DESECRATION

17. UH and the BLNR is well aware of the spiritual significance of the summit of Mauna Kea (FOF 31-33)

18. UH and the BLNR is aware that a substantial segment of the public considers astronomy development of the summit of Mauna Kea to be desecration (FOF 34, 35)

19. The TMT project is considered desecration by many native Hawaiians

20. The State BLNR cannot issue a permit for an illegal action.

DECISION AND ORDER

BASED ON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW THE UNIVERSITY OF HAWAII'S

**CONSERVATION DISTRICT USE PERMIT APPLICATION (HA-3568) IS DEFICIENT AND HEREBY
DENIED/REVOKED.**

Me ke aloha aina,

Joseph K. L. Camara _____ Hilo, Hawaii _____

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohe Mauka,
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02
Document title:

I.

II. CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by the means indicated:

(1)

Michael Cain
micheal.cain@hawaii.gov
dlnr.maunakea@hawaii.gov
Custodian of Records

Judge Riki May Amano (Ret.)
rma3cc@yahoo.com
Hearing Officer

Julie China, Deputy Attorney General
julie.h.china@hawaii.gov
*Counsel for the Board of Land and
Natural Resources*

Carlsmith Ball LLP
isandison@carlsmith.com
*Counsel for the applicant University of
Hawai'i at Hilo*

Richard N. Wurdeman
RNWurdeman@RNWLaw.com
*Counsel for the petitioners Mauna Kea
Anaina Hou, Clarence Kukauakahi
Ching, Flores-Case 'Ohana, Deborah J.
Ward, Paul K. Neves, and Kahea: The
Environmental Alliance*

Watanabe Ing LLP
rshinyama@wik.com
douging@wik.com
*Counsel for TMT International
Observatory, LLC*

Harry Fergerstrom
hankhawaiian@yahoo.com

Richard L DeLeon
kekaukike@msn.com

Mehana Kihoi
uhiwai@live.com

C. M. Kaho'okahi Kanuha
kahookahi@gmail.com

Joseph Kualii Lindsey Camara
kualiic@hotmail.com

Torkildson, Katz, Moore, Hetherington
& Harris
lisa@torkildson.com
njc@torkildson.com
*Counsel for Perpetuating Unique
Educational Opportunities (PUEO)*

J. Leina'ala Sleightholm
leina.ala.s808@gmail.com

Maelani Lee
maelanilee@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
Representative for The Temple of Lono

Kalikolehua Kanaele
akulele@yahoo.com

Stephanie-Malia:Tabbada
s.tabbada@hawaiiintel.net

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Cindy Freitas
hanahanai@gmail.com

William Freitas
pohaku7@yahoo.com

Joseph K. L. Camara _____ Hilo, Hawaii _____

