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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;)	WILLIAM FREITAS' PROPOSED
Use Application (CDUA) HA-3568 For the)	FINDING OF FACT, CONCLUSIONS
Thirty Meter Telescope at the Mauna Kea)	OF LAW, DECISION AND ORDER;
Science Reserve, Ka'ohe Mauka, Hamakua,)	CERTIFICATE OF SERVICE
Hawai'i TMK(3)4-4-015:009)	

WILLIAM FREITAS' PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER

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INTRODUCTION

I, intervener William Freitas, under threat, duress, and coercion, offer the following findings of fact, conclusions of law, and decision and order in Contested Case HA-16-02 regarding Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Hawaii, TMK (3) 4-4-015:009. I offer this testimony as part of the second contested case hearing for the project, subsequent to the State Supreme Court decision of December 02, 2015, which invalidated the permit for the TMT project previously issued by BLNR. The Court found that the BLNR “put the cart before the horse” by holding a contested case following the permit’s issuance, and reiterated that both “fairness and the appearance of fairness” are not just ideals but mandates for permitting practices.

As a Kanaka Maoli Ko Pae Aina (Aboriginal, Indigenous Native Hawaiian cultural practitioner of his lands by blood beyond 1778), I conduct religious ceremonies on Mauna a Wakea (Mauna Kea) and in “Kaohe Akau” (north side of summit in the area of proposed TMT site) in particular. Granted standing in this case by Hearing Officer Amano in the summer of 2016, I have been a diligent participant to the best of my abilities as a Kanaka Maoli in the case proceedings at every level. With this document I present my findings of fact, conclusions of law and a decision order, as established through my testimony and exhibits. I also present findings of fact and conclusions of law based on the testimony of my witnesses, Professor Greg Johnson and Ron Fujiyoshi.

I make the following case in hopes of preventing *further* injury to myself and others from the desecration of the most sacred place to Kanaka Maoli (Native Hawaiians). This spiritual place of worship is the very essence and necessity to the existence of a people that has survived in the middle of the Pacific for thousands of years, and to this day. My own religious practises on the “Wao Akua” (Spiritual realm) of Mauna a Wakea include participation in mele (song), pule (prayer), oli (chant), ho’okupu (offerings), and helping to construct and consecrate several “Ahu”

(altars/shrines), including two on the proposed TMT site, established with traditional customary religious practices.

One thing I know: A spirit is with me that is leading me, towards the truth! The truth is all I am standing for as Kanaka Maoli ka pae aina, for Mauna a Wākea as said, the Mauna is Sacred. So! Through my spiritual practice I am guided, and I need to follow my na'au, I need to follow the spirit. If one feels that spirit, then one will understand that win or lose, the truth will prevail. Maybe not now, but in following battles to come.

I make the following case in hopes of preventing further injury to myself and others. Mauna Kea is sacred and a focal site of Native Hawaiian traditional and customary practices. My own religious practices on the mauna include participation in mele (song), pule (prayer), oli (chant), ho'okupu (offerings), and helping to construct and consecrate several ahu (altars/shrines), including two on the proposed TMT site.

My traditional and customary practices on the mauna and at the ahu are not addressed by the documents upon which the CDUA relies (including the FEIS and the CMP) or in the CDUA itself. I have not been consulted about my religious and spiritual practices and rights on the mauna. Absent consultation and meaningful mitigation, construction of the TMT project will irreparably injure me *further* through curtailing my religious and spiritual practices and thereby stifling expression of my beliefs, passed to me by my Kupuna (ancestors).

For these reasons, I am seeking relief from the BLNR. I request that the permit be denied and that due process be accorded to me through consultation as stipulated by mechanisms including but not limited to HRS 183c, HSR Section 11-200-12, the Hawai'i State Constitution (12/7), the First Amendment of the U.S. Constitution, provisions of the American Indian Religious Freedom Act, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Further, I feel obligated on behalf of myself, my co-petitioners, and future petitioners in similar cases to outline the ways I have experienced a lack of fairness in this case. My due process rights, under threat, duress, and coercion, have been violated not only by procedural matters in this case, but also by the very framework of the process. It is my sincere hope that the State of Hawai'i will rectify the framework for such processes so that future generations may enjoy the rights expressed and promised by the state's constitution, particularly the rights of Kanaka Maoli, Native Hawaiians uniquely protected therein.

As a lineal descendant of Hawaiian ancestry, most important to me is standing on the spiritual practice that led me to the Mauna by living the ways of my kūpuna. I don't want the future of the mauna to continue to be damaged. I want to strengthen Article 12 Sec. 7 of the state constitution to fully include the religious and spiritual practices of Kanaka Maoli and meaningful consultation about them. I want to strengthen the right of Kanaka Maoli to stand against desecration to the 'aina. I want Kanaka Maoli not to be treated as less than they deserve in their own land; I want Kanaka Maoli not to be homeless and landless. I want the rights of kanaka maoli to be addressed before any development is even considered. I want Kanaka Maoli to feel good about themselves with happiness.

These things are just a few of what needs to be addressed on behalf of Kanaka Maoli ka pae aina. When Kanaka lose their spirit, they start a downward direction. This is about Kanaka Maoli and the sacred Mauna a Wākea. Without meaningful consultation with current practitioners, the CDUA fails to understand or contemplate the preponderance of religious and spiritual practices and shrines on the mauna today. If we can huikala, he mu oi'a, we move as one. With Kapu Aloha, the truth of one's consciousness, one can stand in peace to face what comes.

PROCEDURES

A. FIRST PROCEEDING INVALIDATED

1. On December 2, 2015 the State Supreme Court of Hawai'i found a due process violation by the BLNR for issuing a permit prior to the holding of a contested case hearing and vacated the subsequent circuit court's validation of that permit. See *Mauna Kea Anaina Hou v. Board of Land and Natural Resources (BLNR)*, 136 Hawaii 376, 363 P. 3d 224 (2015).

“For the foregoing reasons, this court vacates the circuit court’s May 5, 2014 Decision and order Affirming Board of Land and Natural Resources, State of Hawaii’s Finding of Fact, Conclusions of Law and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve Dated April 12, 2013, and final judgment thereon. This matter is remanded to the circuit court to further remand to BLNR for proceedings consistent with this opinion, so that a contested case hearing can be conducted before the Board or a new hearing, or for other proceedings consistent with this opinion.”

B. SECOND PROCEEDING: SELECTION OF HEARING OFFICER AND ADMITTANCE OF PARTIES

1. On February 22, 2016, circuit court judge Greg K. Nakamura remanded the matter to the Board of Land and Natural Resources.
2. On February 26, 2016 the BLNR met to restart the contested case hearing process.
3. On March 31, 2016 (Doc 001) Minute Order 1 was issued to first parties “Mauna Kea

Anaina Hou” and “UHH” in the 2014 proceedings. Notice of first disclosure was given that Riki May Amano was selected as the contested case hearing officer for the “Second Proceeding” regarding the CDUA HA-3568 for the TMT.

4. Possible conflicts of interest by the hearing officer were noted by petitioners, but ultimately they were dismissed by the BLNR Minute Order 4 on May 6, 2016.

5. On May 27, 2017 (Doc. 49) Minute Order 8, the hearing date for unrepresented parties was heard. William Freitas’ request to Intervene June 13 2016, and accepted by hearings officer on June 17, 2016. Mr. Freitas would testify regarding cultural practices on Mauna Kea, the creation and protection of “ahu” established for prayers and offerings. (Filed late on June 13, 2016 due to a misunderstanding of the procedure to intervene as a pro-se petitioner).

6. On June 03, 2016, with (Doc. 63) Minute Order 9, Hearing Officer Amano “Denied” Mauna Kea Anaina Hou’s motion to reconsider and/or disqualify various parties, stating that the reasons to strike or disqualify various parties were “baseless.”

C. PRE-HEARING MATTERS, MOTIONS, AND MINUTE ORDERS

1. On June 17, 2016 in Hilo, Hawaii County Building 25 Aupuni St. Suite 1401, following the acceptance to Intervention in Contested Case Hearing of the CDUA HA-3568 for the Thirty Meter Telescope, the list of parties to this case is as follows:

<u>PARTIES</u>	<u>REPRESENTING</u>
1. William Freitas	Pro-se
2. University of Hawaii at Hilo	Carlsmith LLP
3. TIO, TMT International Observatory LLC	Watanabe LLP
4 Tiffnie Kakalia	Pro-se

5. The Temple of Lono	Lanny Alan Sinkin
6. Stephanie Malia Tabbada	Pro-se
7. Richard Maele DeLeon	(withdrew)
8. P.U.E.O.	Torkildson, Katz, Moore, Hetherington & Harris
9. Mauna Kea Anaina Hou	Richard M. Wurdeman
10. Maelani Lee	(withdrew)
11. KAHEA: Environmental Alliance	Yuklin Aluli, Dexter Kaiama
12. Joseph Kualii Camara	Pro-se
13. Jennifer Leina'ala Sleightholm	Pro-se
14. Harry Fergerstrom	Pro-se
15. Glen Kila	Pro-se
16. Flores Ohana:Kalani Flores, Pua Case	Pro-se
17. Dwight Vicente	Pro-se
18. Debora Ward	Pro-se
19. Cindy Freitas	Pro-se
20. C. M. Kaho'okahi Kanuha	Pro-se
21. Judge Riki May Amano	Hearings Officer

2. On July 21, 2016 (Doc. 115) Minute Order 13 provided notice to parties of being accepted by filling in documents library for Contested Case Hearing for Pre-Hearing Conference on June 17, 2016.

3. On July 18, 2016 (Doc. 090) William Freitas Pro-se, under threat, duress, and coercion, filed a request for Continuance in regard to an instruction given by Hearing Officer on June 17.

4. On July 18, 2016 (Doc. 125) William Freitas Pro-se "letter" to Judge Amano in response to Mr. Ing's accusations of attempting to slow proceedings of the Contested Case Hearings. Judge Amano did rule on motion for continuance filed by William Freitas Pro-se.

5. On August 01, 2016 (Doc. 166) William Freitas Pro-se filed first amended Witness List, listing Dr. Professor Greg B. Johnson, and Reverend Ronald S. Fujiyoshi.
6. On August 17, 2016 (Doc. 214) William Freitas Pro-se filed "Site visit proposal" requesting to be able to stop at places of worship, Exhibit T-3.j "Hale Ku Kia'i Mauna" (across from visitor's center at Hale Pohaku), Exhibit T-3.c between mile marker 3.0 and 3.5 where "Ahu Kauakoko" was desecrated, (located off the side of access road to summit), Exhibit T-3.a "Ahu" Ku Kia'i Mauna e Kahi (on access road down to proposed TMT site), Exhibit T-3.b "Ahu" Ku Kia'i Mauna e Lua (located at bottom of proposed TMT site), for Hearings Officer to witness, and perform protocol at areas of worship. Note: Hearing Officer denied request follow spiritual protocol at various places of worship and demonstrate Traditional Customary Religious Spiritual Practices.
7. On September 12, 2016 (Doc. 258) William Freitas Pro-se filed memorandum in support of Petitioners Mauna Kea Anaina Hou, et al.'s request for further status conference and/or consideration of proposed scheduling; COS. Note: Hearings Officer did not respond to this memorandum.
8. On September 25, 2016 (Doc. 271) William Freitas Pro-se filed response to (Doc. 281) Minute Order 19, requesting that all issues should be considered in this proceedings for the CDUA HA-3568 for the applicant. Note: Hearing Officer "Denied" any issues of land use, as to the legal jurisdiction of Hawaii's land that is of my kupuna (ancestors).
9. On September 28, 2016 (Doc. 292) William Freitas Pro-se motion joinder in support of Joseph Kualii Camara's motion to reconsider Minute Order 19. (Doc) 281. Note: Hearing Officer Denied rights of Native Hawaiians.

10. On October 03, 2016 (Doc. 300) William Freitas Pro-se motion to amend second witness list (Doc. 166) to include William Freitas as an additional witness to contested case hearing.

D. THIRD PROCEEDINGS “EVIDENTIARY HEARINGS ON WITNESSES AND EXHIBITS”

On October 20, 2016 Evidentiary Hearings for the Second Contested Case began with 71 witnesses and 105 testimonies. The hearing was televised live on Na Leo TV with each day archived. Over 800 exhibits and 41 hearing days complete the totality of the record from which parties must prepare a Findings of Facts/Conclusion of Law/Decision and Order for Hearings Officer Amano to consider as she makes an impartial opinion to the BLNR for the CDUA HA-3568 for the TMT.

E. TRANSCRIPT CORRECTIONS OF MAJOR SIGNIFICANCE

- A. Please note substantive error in the transcript: “early practitioners” should read “religious practitioners” G.Johnson, vol.37 Tr.02.16.17 at 16:13
- B. Please note substantive error in the transcript: “degenerative” should read “generative” G.Johnson, vol.37 Tr.02.16.17 at 37:11
- C. Please note substantive error in the transcript: “...numerous whining groups” should read “numerous Hawaiian groups” G.Johnson, vol. 37 Tr.02.16.17 at 106:8
- D. Please note substantive error in the transcript: G.Johnson, Tr.02.16.17 vol. 37 at 151:18 “Linnekin decision” should read “Lyng decision”

FINDINGS OF FACT

Summary of Witness & Petitioner Credentials

1. William Freitas is a traditional Native Hawaiian religious practitioner whose ceremonial life is focused on Mauna Kea and ahu thereon. He is a lineal descendant of Native Hawaiians who resided in the islands prior to 1778. Mr. Freitas has a lifelong connection to Hawai'i Island. Mr. Freitas is a Pohaku Kane whose ritual specialization includes the construction and care of ritual structures, including ahu (altars). Mr. Freitas also regards the teaching of Kapu Aloha as one of his primary religious kuleana (obligations). Mr. Freitas was granted standing in this case by Hearing Officer Amano in the summer of 2016 (Exhibit T-3.0)

2. Mr. Ronald Susumu Fujiyoshi attended the University of Hawaii Hilo campus when it was a two-year college, graduated from the University of Hawaii in Manoa and then completed a degree in theology specializing in Christian ethics in 1968 at the Chicago Theological Seminary. He has served as pastor of the Ola'a First Hawaiian Church and is a licensed minister of the United Church of Christ. Mr. Fujiyoshi served as the *Luna Ho'omalu* or president of the Association of Hawaiian Evangelical Churches from 2008 through 2010. Additionally, Mr. Fujiyoshi has worked with people of different faith traditions or religions in countries around the world, including Muslim, Hindu, Buddhist and Shintoist traditions. (Exhibit T-2)

3. Greg Johnson is an Associate Professor of Religious Studies at the University of Colorado/Boulder with a Ph.D. in the academic study of religion from the University of Chicago (2003). He recently served on the Board of Directors of the American Academy of Religion (2013-2016). Over the past twenty years, Professor Johnson has studied with both scholars of Native Hawaiian traditions and religious practitioners across Hawai'i. His primary area of scholarly focus in Hawai'i is the intersection of law and traditional and customary practice. For an extensive list of his publications on this topic, please see his CV. (Exhibit T-1)

Testimony of Greg Johnson

Witness Credibility and Accusations of Bias

4. Counsel for UH, John Manaut, asks Greg Johnson if he takes the position that TMT should not be built and Professor Johnson replies no, he does not take that position. G.Johnson, vol. 37

Tr.02.16.17 at 85:16-18

5. Professor Johnson further responds that his research is not a form of advocacy for indigenous positions regarding development. G.Johnson, vol. 37 Tr.02.16.17 at 87:1

6. Professor Johnson is asked by counsel for TIO, Jeffrey Ono, if he risks social-political ostracism from the Hawaiian community were he to label ahu constructed after June 24, 2015 as inauthentic expressions of Hawaiian religious practice. G.Johnson, vol. 37 Tr.02.16.17 at 105:15-20

7. Professor Johnson responds that he is a scholar of religion who is willing to take such risks when necessary. His analysis is frank and direct. G.Johnson, vol. 37 Tr.02.16.17 at 106:4-17

8. Professor Johnson has published research that entailed examining conflicting Hawaiian interests in numerous cases. G. Johnson, vol. 37 Tr. 02.16.17 at 147:25, 148:1-3; see Professor Johnson's CV for further examples pertinent to his credibility and objectivity.

9. Mr. Ono introduced one of Professor Johnson's articles into evidence, "Authenticity, Invention, Articulation: Theorizing Hawaiian Traditions from the Outside" (C-46), in order to assert that Professor Johnson is biased in his view of tradition on Mauna Kea. G.Johnson, vol. 37 Tr.02.16.17 at 112:21

10. Mr. Ono's challenge to Professor Johnson—that he was lifting up one voice and silencing others—misunderstands Professor Johnson's point about tradition and intra-cultural struggle.

Professor Johnson's argument is premised on frameworks wherein contesting groups struggle over more-or-less the same thing (a ritual, a canoe, or a burial site) in religious terms (see C-46, *passim*). Professor Johnson focuses on how such struggles generate tradition. To be generative, such struggles must be in general agreement about the overall meaning of their tradition as a point of departure—in conversation and using a shared language. The examples Mr. Ono presents (e.g., a telescope as a ritual site [G.Johnson, vol. 37 Tr.02.16.17 at 122:16-20] or P.U.E.O as a traditional group [G.Johnson, vol. 37 Tr.02.16.17 at 148:14-16]) entail no such common conversation.

11. Mr. Ono described the overall debate among Hawaiians concerning Mauna Kea, framed in a vast range of ways, and implied that Professor Johnson should have attended to all voices therein equally. Professor Johnson, as a scholar of religion, was not attempting to understand all voices in this manner. Instead, he was drawn to those voices in “conversation” and debates about ongoing religious life on Mauna Kea and how it is they expressed themselves, including through pule, oli, mele, and ahu construction. G.Johnson, vol. 37 Tr.02.16.17 at 116:1-7

12. A quotation from the above-mentioned article (FoF 9) represents Professor Johnson's approach to Hawaiian traditions: “...my research in Hawai'i has made clear to me the ways tradition is constituted in and through moments of struggle.... These struggles are not merely political, though they are hardly immune from politics and questions regarding authority and power. A discursively focused articulation theory enables us to see that they are cultural in the strongest, most generative sense. When contesting one another over the terms of their traditions—proper ritual protocol, for example—Hawaiians are actively constituting culture and tradition” (C-46:247).

13. Mr. Ono held up Professor Johnson's book, *Sacred Claims: Repatriation and Living Tradition*, and initiated discussion of it. G.Johnson, vol.37 Tr.02.16.17 at 141:24

14. On the issue of bias raised by Ono, on the back cover of *Sacred Claims* one finds a quotation about Professor Johnson's credibility from the renowned scholar of religion, Joel Martin, currently president of Franklin & Marshall College. It reads: "This is one of the smarter books I've read on Native American religion.... [Johnson] refuses to 'seal off [anyone's] claims from analysis,' including those of Native Americans seeking to negotiate within/across a hegemonic situation. This book is refreshing and bold and succeeds because of the author's superb and steady intelligence and analytical rigor."

15. Professor Johnson recognizes the sincerity of PUEO petitioners. G. Johnson, vol.37 Tr. 02.16.17 at 148:12, 24

16. While Professor Johnson agrees with Mr. Ono that the Hearing Officer will balance and weigh the sincerity of the different petitioners, he states that the key issue is the permitting process. G. Johnson, vol.37 Tr. 02.16.17 at 149:5-13

17. Expanding upon the intellectual integrity of his work as challenged by Mr. Manaut and Mr. Ono, Professor Johnson elaborates on his training at the University of Chicago and states: Religion "plays out in social worlds, and we need to hold at bay our commitments as scholars of religion and study things as we see them and call as such. That's part of why I've been drawn to moments of conflict because I've always been invested not in burnishing a tradition, not in celebrating it, but in calling it like I see it. I was trained hard that way and it's-- it has frankly caused me to have tensions within the communities I study, but those are my intellectual commitments. Those are different from my political commitments, but those are my intellectual commitments." G.Johnson, vol.37 Tr.02.16.17 at 153:9-23

18. Another point on which opposing counsel misconstrued Professor Johnson's scholarship came when Mr. Ono questioned Professor Johnson about his book chapter, "Caring for Depressed Cultural Sites, Hawaiian Style," which Ono submitted as exhibit C-47.

19. Professor Johnson's primary point in the chapter is about malama (care) for cultural sites that have been neglected in various ways (C-47, *passim*).

20. Mr. Ono appears to have deduced that Professor Johnson's point was to affirm that the integrity of sites may persist by way of malama practices even once such sites are developed or otherwise changed G.Johnson, vol. 37 Tr.02.16.17 at 141:9-13, 142:5-7

21. Professor Johnson acknowledged that malama practices often persist in settings of development, sometimes as a result of consultation and negotiation. In particular, he refers to "the creation and following of legal due process and adjudicative mechanisms to make compromise meaningful and possible" G.Johnson, vol. 37 Tr.02.16.17 at 142:11-14

22. However, Professor Johnson was explicit in reinforcing the primary point of the article, which is that a cornerstone manifestation of malama work today is found in how Hawaiian practitioners seek to care for sites through the legal and administrative mechanisms of the State of Hawai'i. In doing so, practitioners rely upon the state to hear and weigh their claims in a spirit of fairness and respect. Mr. Ono focused on malama *after* development; Professor Johnson's point was to emphasize the ways working for protection of sites *before* development is a primary site of malama and other forms of tradition expression in the present. Concluding the chapter in question, Professor Johnson writes, "For scientists, land managers, administrators, and politicians, I would offer encouragement not to be afraid of living indigenous traditions as their practitioners continue to emerge. In Hawai'i, the most vibrant sites are those that receive local malama. This has meant such radical things as Hawaiians performing rituals at sites, engaging them as they would have been utilized centuries ago" (C-47:275).

Mauna Kea as Sacred Landscape

23. In his oral testimony, Professor Johnson seeks to add his perspective and opinion regarding the sacredness of Mauna Kea to members of the Native Hawaiian community. "Whether

considered from within Hawaiian tradition or in a comparative perspective with reference to other religious landscapes around the world, there is no question as to the sacred character of Mauna Kea. It is quite literally the very ground of Hawaiian tradition--its stories, practices, and prayers. It has long been a nexus point where place, humans, and other worldly energies are understood to converge and commune. In specifically Hawaiian terms, it is a wahi pana—sacred place—where ancestral memories, present actions, and future intentions fuse. It is a kula iwi—homeland—in the most palpable sense: a place where humans, bones, and spirits traverse time and dimensionality. It is a place of heightened kīno lau expression (forms, embodiment), where the most ancient of Hawaiian stories live on in the actions of those who seek to protect Mauna a Wakea. G.Johnson, vol.37 Tr.02.16.17 at 19:5-23

24. Beyond looking at history, oral tradition, and academic reports, as a scholar of religion, when attempting to discern what is sacred to a community, Professor Johnson asks: What do they chose to protect? With what commitment? And by what means? On Mauna Kea, the commitments of the community stand out in stark relief, and in strongly religious ways, including through sustained and exacting ritual activities, occupation of the mountain, willingness to be arrested, and, not least, laboring through the process of this contested case. Their primary means of protecting Mauna Kea have been through a non-violent ethic—kapu aloha—and through ceremony, including offerings, prayer, song, dance, and chant. G.Johnson, vol.37 Tr.02.16.17 at 19:24-25, 20:1-12

Tradition as Dynamic Process

-Protests as religious and political

25. Professor Johnson has written extensively on the concept of religious tradition. In his view, “tradition is not a thing; it is a *process*. Living tradition draws upon the past but is necessarily constituted in the present. Living traditions are of *this* world, not only with reference to time but also with regard to context. The constituent parts of traditions cannot be disarticulated from on-the-ground circumstances. This means traditional practices take place—*always and*

everywhere—in moments configured by political and legal realities.” G.Johnson, vol.37 Tr.02.16.17 at 22:10-19

26. In order to be protected—as the State of Hawai‘i Constitution demands (12/7) —tradition must be recognized and protected in *specific* places, times, and jurisdictions. G.Johnson, vol.37 Tr.02.16.17 at 23:1-4

27. In Hawai‘i, as in many indigenous contexts, sacred places are often left unto themselves out of deference to their power and sanctity. If threatened, however, the opposite dynamic is triggered as practitioners exercise their kuleana (responsibility) to care for the sacred. G.Johnson, vol.37 Tr.02.16.17 at 23:4-9

28. Traditional Hawaiian religious practices should be understood in this manner, in the past and present. As is well known, many heiau and ahu were historically constructed in moments of struggle. In such moments, ancestors, deities, and other forces were called upon to assist the people trying to protect them. Aspects of Hawaiian religious life today follow this pattern. Tradition is manifest in action when catalyzed by circumstances, most especially when the very ground of tradition itself is threatened. Sacred places—e.g., places regarded as having ties to oral traditions, healing, burial, and worship practices—thus receive focused attention when threatened. G.Johnson, vol.37 Tr.02.16.17 at 23:10-24

29. Professor Johnson cites the “concrete example of the religious nature of the protest actions,” and asks the Hearing Officer to consider the following: “On June 24th, as DLNR officers approached, rather than scatter or react with violence, Lakea Trask, a young cultural practitioner, led his line of protectors in traditional group purification chants. Such chanting continued all morning, framing the event as one of sacred duty.” G.Johnson, vol.37 Tr.02.16.17 at 20-22-25, 21:1-2

30. Continuing his description of the day, Professor Johnson states, “One chant in particular stood out—an ancient pule huikala (group chant), *He Mu Oia*. Historically intoned during the consecration of sacred temples and during other heightened religious moments such as the opening of the opelu fishing season, this chant cleanses, purifies, and wards off threats. In English, the core of *He Mu Oia* goes thus: *defend us from them; defend us from nightmares; from things in the night and ill omens; free us.*” G.Johnson, vol.37 Tr.02.16.17 at 21:3-12

31. *He Mu Oia* was also chanted at the TMT site on June 22nd, 2015, as a group of Native Hawaiian religious practitioners prepared themselves to build and consecrate the first of two ahu on the site. Professor Johnson urges the Hearing Officer to view a video of this action at Exhibit T-1.f.

32. This group included Mr. Freitas, who oversaw construction of the ahu in his capacity as an expert in traditional and customary rockwork, and who carries a deep responsibility to care for the site. G.Johnson, vol.37 Tr.02.16.17 at 21:19-22

33. For a video of the traditional and customary ahu construction overseen by Mr. Freitas, see Exhibit T-1.e

34. In Professor Johnson’s opinion as an expert in religious expression, the ahu constructed in ceremony now stand as material focal points of living Hawaiian tradition and also as dense symbols of Mauna Kea’s sacredness to the members of the Native Hawaiian community. G.Johnson, vol.37 Tr.02.16.17 at 22:3-6

35. During cross-examination of Professor Johnson, Mr. Kaiama asks him if he understands the protests and ahu construction as attempts to stop the project (TMT). G.Johnson, vol.37 Tr.02.16.17 at 44:15-19

36. Professor Johnson responds, no, and added the following with regard to the general point concerning religion in contexts of political strife: "... religion through times, [a]cross cultures, has been most adamant, most engaged, most expressive in moments of crisis." G.Johnson, vol.37 Tr.02.16.17 at 44:20-25

37. On the specific point concerning the protests and ahu construction, Professor Johnson stated: "Theological richness is a function of crisis. People have a problem they need to solve, they look to the cosmos, to elsewhere, to deal with the biggest, most trying questions that could possibly be brought on them. Hawaiians do this through prayer, through dance, through song, through the construction and consecration of `ahu, and then the care of them, malama [and] kuleana, to care for those sites. So I would say this stands -- the kind of actions you're referring -- to not only stand in continuity with long-standing Hawaiian traditions, but are recognizable [to] historians and [of] religion as being very fundamental to religions in all contexts [contexts]" G.Johnson, vol.37 Tr.02.16.17 at 45:4-17

-Continuity with Historical Traditions

38. Professor Johnson asserts that the ahu (altars) constructed on the TMT site in the days immediately prior to the mass protest of June 24, 2015, are expressions of living Hawaiian tradition and deserve protection as such. Acting in a traditional manner, a group of Native Hawaiian ritual practitioners constructed two ahu and conducted ceremonies at them. Subsequently, these same practitioners, and especially William Freitas, have taken on the responsibility to care for these religious sites through ministering to them with regular offerings and ceremony. In this way tradition has been sustained on Mauna Kea and is an expression of deeply held traditional beliefs—evidence of sincere religious action in a moment of crisis. G.Johnson, vol.47 Tr.02.16.17 at 24:7-17

-Sincerity of Religious Expression

39. Professor Johnson witnessed the protectors in action on the morning of June 24, 2015, and was immediately struck by their level of conviction, engagement, and their deeply traditional sensibilities and comportment. On these issues, he urges the Hearing Officer to view the short documentary, *Kapu Aloha 101*, produced by Oiwi TV and submitted as Exhibit T-1.d.

G.Johnson, vol.47 Tr.02.16.17 at 20:13-19

40. Professor Johnson was asked by Mr. Fergerstrom if the demonstrations on Mauna Kea were religious or political. G.Johnson, vol. 37 Tr.02.16.17 at 56:3-6

41. Professor Johnson replies, “These events are to me clearly religious, the protests and subsequent care for the mauna.” G.Johnson, vol. 37 Tr.02.16.17 at 57:3-6

42. Professor Johnson testified as to having witnessed ceremonies at Ahu o Kauakoko on June 25, 2015 and represents the ahu as a “nexus” point of sincere traditional ritual practice on Mauna Kea. G.Johnson, vol. 37 Tr.02.16.17 at 41:13-16

43. Professor Johnson WDT (exhibit T-1, page 6) makes specific reference to ceremonies at Ahu o Kauakoko, its subsequent destruction, and the sincerity of several Kia`i in their expression of grief upon learning of its destruction. For a video of two Kia`i expressing their grief about the destruction of Ahu o Kauakoko, see T-1.g

Permitting Processes/CDUA/FEIS

44. In the view of Professor Johnson, this contested case hinges on land use permitting and procedure. In this context, the Hearing Officer and the BLNR must consider principles and practices of permitting in the State of Hawaii, and the degree to which it satisfactorily meets criteria of the CDUA process. Permitting questions at these various levels have recently been considered intensively by the Hawaii State Supreme Court, including in the Super Ferry, Rail, and Kawaiaha`o Church cases, the latter two involving the DLNR. In all three of these cases the

court found serious problems with permitting practices of state agencies. Cumulatively, these cases amount to a clarion call for higher standards of permitting diligence. Valid permitting in such cases entails, as a prior step, meaningful consultation with those affected, including religious practitioners. Professor Johnson hopes one outcome of this contested case process will be exactly this: serious, sustained, and meaningful consultation. G.Johnson, vol.37 Tr.02.16.17 at 15:19-25, 16:1-16

45. In Professor Johnson's extensive experience conducting research at the intersection of administrative law and religion, this form of meaningful consultation can only occur if the EIS and CDUA/CMP are updated and revised to reflect the current traditional and customary practices occurring on Mauna Kea today. G.Johnson, vol.37 Tr.02.16.17 at 28:12-20

46. Citing the CDUA at 2.3.2: 2-4 in the section entitled Historic Cultural Resources, Professor Johnson quotes from this document: "Protection of historic and cultural resources has been a major objective in the planning of the proposed TMT project." G.Johnson, vol.37 Tr.02.16.17 at 17:1-3

47. Professor Johnson argues that "religious life on the mountain has been catalyzed, magnified, and otherwise intensified since the time of the CDUA. This is true of religious activity on the mountain in general and it is specifically true of religious practices at the proposed TMT site itself. These reasons...warrant review and revision of the CDUA and the accompanying EIS, with particular attention to consultation with affected practitioners and those they serve." G.Johnson, vol.37 Tr.02.16.17 at 17:8-17

48. In terms of the CDUA, Professor Johnson considers criteria 5 and criteria 8 to be of major significance to the determination of this hearing. G.Johnson, vol.37 Tr.02.16.17 at 19

49. Criterion 5 of the HAR §13-5-30 reads: “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.”

50. The CDUA addresses Criterion 5 and concludes that the TMT project “will result in less than significant impact on historic properties, cultural practices and Native Hawaiian rights, as well as viewplanes, species habitat, and existing facilities.” CDUA 2-27

51. Professor Johnson asserts the opinion that the CDUA in its response to Criterion 5 is deficient in this finding of “less than significant impact,” particularly in terms of impact to “historic properties, cultural practices and Native Hawaiian rights.” G.Johnson, vol.37 Tr.02.16.17 at 19:1-25, 20:1-25

52. Criterion 8 of the HAR §13-5-30 reads: “The proposed land use will not be materially detrimental to the public health, safety, and welfare.”

53. Professor Johnson asserts the opinion that the CDUA does not adequately address this mandate, focusing solely on a narrow framework of physical harm, for example harm caused by pollutants. G.Johnson, vol.37 Tr.02.16.17 at 18:10-14

54. Professor Johnson urges the Hearing Officer and BLNR to recognize the ways this criterion is of direct relevance to this contested case in terms of significant impacts on the psychological, social, and ultimately physical well being of Native Hawaiian traditional practitioners, principally through traumatic injuries that would be caused by having a sacred site significantly impacted. G.Johnson, vol.37 Tr.02.16.17 at 18:15-24

55. It is the opinion of Professor Johnson that the hearings officer and the BLNR appear to be confronted with a choice: Either disregard the ahu as instances of living Hawaiian tradition and

thus allow the FEIS and CDUA to stand mute with reference to them; OR acknowledge the ahu as significant expressions of tradition, considering them and the communities who worship at them to be relevant to this proceeding. G.Johnson, vol.37 Tr.02.16.17 at 24:18-25, 25:1-2

56. If the latter view is taken, then the demands of due process should trigger *reconsideration* of section 3.2 of the FEIS, entitled “Cultural Practices and Beliefs.” This section of the FEIS includes the following statement at 3-21: “The following practices and beliefs have been considered traditional and customary in previous studies: Performance of prayer and ritual observances important for the reinforcement of an individual’s Hawaiian spirituality, including the erection of ahu or shrines. ” The EIS states that the proposed site contains no ahu other than “one near the end of the 4-wheel drive road in Area E.” The FEIS also quotes Ed Stevens at 3.2, 3-15, who is reported to have said, “the site that they picked is free of bonafide, historic treasures.”(FEIS, Sec. 3.2, pg3-15) G.Johnson, vol.37 Tr.02.16.17 at 25:3-21

57. At this juncture, Professor Johnson made a point that is as obvious as it is pivotal for adequate consideration of cultural and traditional practices on Mauna Kea: “The authors of the EIS were able to reach this conclusion [i.e., that there are no ahu on the proposed TMT site other than the one mentioned by Stevens at # 56 above] because the ahu did not exist on the site at the time the EIS was written.” G.Johnson, vol.37 Tr.02.16.17 at 25:23-25

58. Thus the ahu were not described by the EIS, are not addressed in the CDUA, and therefore no proposals for mitigation of them have been conveyed to William Freitas or other affected members of the practitioner community. G.Johnson, vol.37 Tr.02.16.17 at 26:1-6

59. As Professor Johnson concludes, “[s]imply put, the `ahu, now undeniably present, were not accounted for in the determination of no significant impact, or less than significant impact.” G.Johnson, vol.37, 2.1.6.17 at 25:25, 26:1-3

60. Professor Johnson then observed that if the telescope were to be built on the planned site, this would entail removal of the ahu. G.Johnson, vol.37, 2.1.6.17 at 26:4-6

61. According to Professor Johnson, 3.1.2 of the EIS is relevant is relevant here. On this point, he testifies about the section entitled “Thresholds Used to Determine Level of Impact.” G.Johnson, vol.37, 2.1.6.17 at 26:7-8

62. On Professor Johnson’s representation: “HRS Section 11-200-12 provides 13 significance criteria against which an action is to be evaluated in order to assess its potential impact. Numbers one, two, four, and five are particularly germane here. Number one reads, quote, involves an irrevocable commitment to loss or destruction of any cultural resource. Number two, reads, quote, curtails the range of beneficial uses of the environment. Number four, substantially affects the ... cultural practices of the community or State. Number five, substantially affects public health.” G. Johnson, vol.37, 2.1.6.17 at 26:7-23

63. Professor Johnson then offers the following conclusion: “Based on the sections of the EIS I have underscored, the EIS itself designates contemporary `ahu construction as a traditional and customary practice that should trigger assessment and acknowledges that destruction of such a site would constitute, quote, significant impact.” G.Johnson, vol.37, 2.1.6.17 at 27:1-4

64. At this point in his testimony, Johnson turns from the EIS to the CDUA itself, asserting: “If the `ahu are considered to be significant manifestation of living Hawaiian tradition, then the CDUA itself needs to be revisited, particularly with reference to 4.1.4, in which the `ahu construction – in which `ahu construction and the leaving of offerings are described as traditional practices, and 4.2.1, which reads, in part, quote: the Project is not anticipated to significantly impact the resources available on Mauna Kea used for traditional and customary Native Hawaiian rights involving pilgrimage, prayer, shrine construction and offerings, end quote.” G.Johnson, vol.37, 2.1.6.17 at 27:5-18

65. With direct reference to the permitting process, Professor Johnson states: “Religious life on Mauna Kea has changed since and because of the CDUA. These changes are significant and should be accounted for in the permitting process. In other words, a lot has happened since those papers were filed, and responsible permitting process should account for them.” G.Johnson, vol.37, 2.1.6.17 at 28:3-9

66. Immediately following, Professor Johnson expanded the jurisdictional and moral reach of his point by observing that the cultural protection and procedural provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) “holds out an ideal” by means of which reconsideration of the permit and the documents it relies upon should be engaged. G.Johnson, vol.37 Tr.02.16.17 at 28:10-16

67. Professor Johnson, in response to a question from C. Freitas, describes how UNDRIP sets out standards for international indigenous rights, including with regard to traditional and customary practices. G.Johnson, vol.37 Tr.02.16.17 at 81:10-25

68. Professor Johnson closed his statement by urging the Hearing Officer and the BLNR to require the applicant to revise and resubmit relevant sections of the EIS and CDUA. In his words, “As a scholar of religion, it is my opinion that the `ahu are significant sites of cultural belief and practice on a mountain generally held to be sacred by many Hawaiians. On this basis, I respectfully urge the Hearings Officer and the BLNR to require the permit applicant to revise and resubmit relevant sections of the EIS and CDUA in the interest of due process.” G.Johnson, vol.37, 2.1.6.17 at 28:12-20

69. When cross-examined by Mr. Kaiama, Professor Johnson testified that ongoing traditional religious actions on Mauna Kea should be accounted for in the permitting process. G.Johnson, vol. 37 Tr.02.16.17at 45:23

70. On cross-examination, petitioner C. Freitas asked Professor Johnson, “What do you think about Native Hawaiians having to get a permit to build an `ahu?” G.Johnson, vol. 37 Tr.02.16.17 at 78:7-8

71. Professor Johnson responds, “On the one hand, it strikes me, as a scholar of religion, as offensive and a limitation that many people don’t face. However, I would hasten to add that in any democratic system, there is going to be competition over rights and so forth, and that there are mechanisms even within Hawai`i state law that enable reasonable recognition of religious freedoms if administrative procedures are adequately followed.” G.Johnson, vol. 37 Tr.02.16.17 at 78:9-17

Testimony of Ronald Fujiyoshi

Background

72. Mr. Ronald Susumu Fujiyoshi was a witness as a church person, trained in theology, who served as a pastor of the Ola`a First Hawaiian Church for many years, and served as a missionary in Asia for twenty years testified about the sacredness of Mauna Kea, his participation in religious activities on Mauna Kea and his belief that the practice of religion is protected by law. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 93-94; WDT Fujiyoshi, T-2 at 1

73. Mr. Fujiyoshi traced his paternal grandparents living in Hawai`i to the census of 1900, and his living on Hawai`i Island to 1956 when his father became the pastor of the Church of the Holy Cross in Hilo. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98

74. Mr. Fujiyoshi attended the University of Hawaii Hilo campus when it was a two-year college, married a Hilo girl, graduated from the University of Hawaii in Manoa and graduated from the Chicago Theological Seminary in Chicago with a degree in theology specializing in Christian ethics in 1968. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98

75. Mr. Fujiyoshi was awarded a fellowship by the World Council of Churches, the ecumenical Christian body that comprises most of the Christian denominations in the world, and studied Buddhism in Singapore for a year. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98

76. Mr. Fujiyoshi became a missionary of the United Church of Christ in 1969, lived in Asia for 20 years in Singapore, Malaysia, Thailand and Japan working as a community organizer in countries where Christians are a minority of the population. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98

77. Mr. Fujiyoshi worked with people of different faith traditions or religions, including Muslim, Hindu, Buddhists and Shintoist. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98

78. Mr. Fujiyoshi returned to Hawai'i in 1988 and has resided in Hilo to the present. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 98-99

79. Mr. Fujiyoshi became the pastor of the Ola'a First Hawaiian Church in Kurtistown in 1992 through 1999 and again from 2013 to January 1, 2017. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 99

80. Mr. Fujiyoshi's standing as a licensed minister of the United Church of Christ is with the Association of Hawaiian Evangelical Churches of the Hawaii Conference United Church of Christ since 1992. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 99

81. Mr. Fujiyoshi served as the *Luna Ho`omalua* or president of the Association of Hawaiian Evangelical Churches from 2008 through 2010. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 99

Sacred Status of Mauna Kea

82. Mr. Fujiyoshi quoted from the ruling of the Supreme Court of Hawai'i that Mauna Kea, "is of profound importance in Hawaiian culture. The summit region is sacred to native Hawaiian, and because of its spiritual qualities, traditional and customary cultural practices are exercised throughout the summit area." (Mauna Kea Aina Hou vs. Board of Land and Natural Resources). R.Fujiyoshi, vol. 44 Tr.03.02.17 at 99

83. Mr. Fujiyoshi offered a definition of sacred from Dr. Mircea Eliade, historian of religion, professor and chair of the history of religions at the University of Chicago Divinity School from 1958 through 1986. Dr. Eliade wrote *The Sacred and the Profane: The Nature of Religion* (1957) and provided the following definition: "'sacred' is taken from the Latin *sacer*, meaning set apart, dedicated, distinguished, as in set apart from the public or mundane world. 'Sacred' is to be distinguished from profane. 'Sacred' is used to describe that which is shared in common among all religions and that which manifests itself in varied forms throughout the symbols of the world's religions: the experience of the Sacred." WDT Fujiyoshi, T-2 at 2

84. Dr. Eliade wrote, "Historically many mountains have been called sacred by members of certain religions." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 100

85. Mr. Fujiyoshi testified that the Shinto, Buddhist and other religions in Japan consider Mount Fuji sacred, and Tibetans who are followers of the Dalai Llama consider Mount Everest sacred. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 100

Native Hawaiian Rights to Religion

86. Mr. Fujiyoshi testified that Native Hawaiians have a right to practice their own religion and in the definition of their religion, they have considered Mauna Kea to be sacred. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 100

87. Mr. Fujiyoshi named four laws that protect the right of Native Hawaiians to practice their own religion: 1) The U.S. Constitution Amendment No. 1, “Freedom of Religion, Press and Expression, 2) Article 12, Section 7 of the Constitution of the State of Hawai‘i, “Traditional and Customary Rights” which among other words, says, “The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes.” 3) Hawaii Revised Statutes 1-1, “Common Law”, in the exceptions it includes those things established by Hawaiian usage, and 4) American Indian Religious Freedom Act of 1978. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 100-101

88. Mr. Fujiyoshi was invited by Native Hawaiians to join them on Mauna Kea to protest the desecration of their sacred mountain, participated in a religious event on April 2, 2015 and was arrested by Hilo County police on a charge of obstruction. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 101

89. This religious event had a direct relationship to the belief in the sacredness of Mauna Kea. There were at least a hundred other participants in the event. There were chants, singing, prayers, blowing of the “pu,” greeting of others by *honi*, an agreement by all to act in *kapu Aloha*, an explanation from leaders of the sacredness of Mauna Kea even to the police personnel who were present, some were dressed in religious attire, others wore *leis* and presented *leis* to others including the police, some carried religious objects and *hula* was performed. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 101-102

90. Numerous videos taken by media, the State of Hawai'i personnel and individuals can attest to the religious nature of this event. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 102

91. The event had religious attire, implements and chants, prayers and dances of a religious nature. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 102

92. Mr. Fujiyoshi on June 24, 2015 along with his wife again participated in a religious event on Mauna Kea with hundreds of others and again arrests were made. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 102

93. After the Hawai'i Supreme Court decision in Mauna Kea Anaina Hou v. Board of Land & Natural Resources was made, the judge (in the Waimea court cases) began finding those arrestees innocent and the prosecutors dropped the charges on the other cases. WDT Fujiyoshi, T-2 at 4-5

94. Mr. Fujiyoshi testified that religion is not only a set of beliefs that holds to be true, religion can only be an active religion by the practice of that religion. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 103

95. Mr. Fujiyoshi testified the opponents of the TMT telescope were practicing their religion. If one alters the practice of that religion, one is altering that religion. To make rules that alter a religion or to build a large structure that interferes with the practice of a religion is an interference with that religion. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 103

96. Mr. Fujiyoshi testified the lease to build TMT on top of a sacred mountain, Mauna Kea, will so alter the practice of religion that it will interfere with that religion. R.Fujiyoshi, vol. 44 Tr.03.02.17 at 103; WDT Fujiyoshi, T-2 at 5

Altars in Sacred Places

97. Part of the practice of a religion has to do with building of altars, placing offerings on the altars and ceremonies related to death—called funerals in the Christian tradition. WDT Fujiyoshi, T-2 at 5

98. In the past altars were built at sacred sites. WDT Fujiyoshi, T-2 at 5

99. In the Holy Bible scriptures of Jacob building an altar are in the book of Genesis 35:1 and Genesis 35:7. WDT Fujiyoshi, T-2 at 5

100. For Christians, altars are usually built inside a church building at the front of the sanctuary right below the cross, the most important symbol of the Christian church symbolizing the crucifixion of Jesus of Nazareth. WDT Fujiyoshi, T-2 at 5

101. For Christians offerings that are collected during the worship service are placed upon the altar. WDT Fujiyoshi, T-2 at 5

102. Mr. Fujiyoshi's first experience visiting the summit of Mauna Kea and participating in a religious ceremony with offering on the altar at the top began on the night of December 20, 2000. WDT Fujiyoshi, T-2 at 5

103. Mr. Fujiyoshi accompanied members of the Royal Order of Kamehameha including some contestants in this hearing to the summit of Mauna Kea for the Winter Solstice. WDT Fujiyoshi, T-2 at 5

104. On the morning of December 21, 2000 standing close to the summit Mr. Fujiyoshi and others chanted "E Ala E" and experienced the sunrise. WDT Fujiyoshi, T-2 at 5

34. Due to this experience Mr. Fujiyoshi believes that Mauna Kea is sacred. WDT Fujiyoshi, T-2 at 5

105. Mr. Fujiyoshi participated in the Winter Solstice ceremonies this past winter (2015) at the various altars beginning at Puhi Bay and leading up to Mauna Kea. WDT Fujiyoshi, T-2 at 6

106. Mr. Fujiyoshi offered with others an offering at the altar built on the site of the proposed TMT telescope on the one-year anniversary of his arrest on April 2, 2015. WDT Fujiyoshi, T-2 at 6

Religious Ceremonies and Specific Observations

107. Mr. Fujiyoshi shared some of his experiences participating in religious ceremonies on Mauna Kea to support his statement that he believes Mauna Kea to be a sacred mountain. WDT Fujiyoshi, T-2 at 6

108. Mr. Fujiyoshi concluded his written direct testimony, “I believe that the rights of native Hawaiians to practice their religion is guaranteed by law and by universal principles of justice. That Mauna Kea is sacred has been accepted by tradition and public opinion. To alōter the religion of the native Hawaiian people by the building of a tall and large telescope is not right and justified.” WDT Fujiyoshi, T-2 at 6

109. Mr. Fujiyoshi offered exhibit authored by scholar Noelani Goodyear-Ka'ōpua in the journal *The South Atlantic Quarterly* and stated, “I believe that article substantiates my claim that the even on Mauna Kea on April 2nd of 2015, when 31 of us were arrested, was a religious even. And it includes even, on page 192, a photo of a police officer greeting a protector (sic) with a *honi*.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 104:14-21

110. Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "And is it your understanding that Mauna Kea is treated and specifically named as a temple?" was "Yes. When I first went up to Mauna Kea, one of the signs says—talked about protecting their temple. And so I think that was the message that really got to me that this was different—that this was talking about something that was sacred." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 108-109

111. Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "So, if someone were to propose to build a big structure, a man-made structure in the holies of holies, do you believe that that would be construed as desecration?" was "Of course. I don't think people would even think of allowing that something would be built in which they consider the holy of holies." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 110

112. Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "So, would it be your testimony that for Hawaiian people, this would be akin to building something in the holiest of holies?" was "From everything that I have read and what I have heard through this contested case hearing, (sic) Mauna Kea is probably the most sacred place for Hawaiians." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 110

113. Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "So it was your fundamental belief that you needed to help stop the desecration that would have occurred?" was "Yeah, when I was invited by Hawaiians to join them in what I saw as protecting a sacred place, I felt that I should respond and join them." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 111

114. Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "And if people had not done what they did, is it your belief that irreparable harm would have been done to Mauna Kea?" was "Of course, it will further the injustice. And this one would be even worse because of its size." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 111

115. In explaining the difference between a more western understanding of religion and an indigenous understanding of religion, Mr. Fujiyoshi's answer to the question by Ms. Pisciotta, "Do you think it may be hard for others to understand how Mauna Kea is sacred because they are used to four walls or, you know, a man-made structure, as opposed to a structure made by the *akua*, such as Mauna Kea?" was "Yes, My—of course, I'm not trained in law, but as a religious person, I think that my understanding of law has been, it recognizes a more western understanding of law rather than indigenous understanding of religion. So that western religion talks more site specific. And that is how a lot of the laws are related, rather than (sic) indigenous understanding of religion, which says the whole mountain is sacred." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 112-113

116. Mr. Fujiyoshi's answer to the question by Mr. Pisciotta on whether the sacredness of Mauna Kea is protected by law was "I think it should be. But I think that's what this whole contested case is about whether something like the sacredness of Mauna Kea is understood by our tradition of western law, which has a hard time figuring that out." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 114

117. Mr. Fujiyoshi added, 'Like, if I can add, when I was in the court in Waimea, the judge made a statement, and I hope it's on record. She says, "You can pray on the side of the road." And when I thought about that, I thought that is an insult that has no understanding of what the sacredness of Mauna Kea is.' R.Fujiyoshi, vol. 44 Tr.03.02.17 at 114

118. Mr. Fujiyoshi's answer to the question by Mr. Kaiama, "I think you testified earlier that you have practiced or you've participated in Hawaiian traditional cultural practices on the mauna; is that correct?" was "Correct." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 123

119. Mr. Fujiyoshi's answer to the question by Mr. Kaiama, "And for how long have you been doing that?" was 'Well, the first time, as I put in my testimony, was in the winter solstice in 2000. So I went up with some members, Kaliko, Kahu, I think, Paul Neves, I think even Kealoha

Pisciotta. And I went up on the night of December 20th, and stayed overnight. On the 21st we chanted, “e ala e” (sic) and watched the sunrise come up.’ R.Fujiyoshi, vol. 44 Tr.03.02.17 at 123:12

120. Mr. Fujiyoshi’s answer to the question by Mr. Kaiama, “And is it fair to say that since that first participation, you’ve participated in a number of times—practiced in that tradition on the Mauna?” was “When invited. And I participated in some, yes.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 124

121. Mr. Fujiyoshi’s answer to the question by Mr. Kaiama, “Now, turning your attention to the date of arrest. You, yourself, is your statement that you were participating in a spiritual and religious event at the time?” was “Yes.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 124

122. Mr. Fujiyoshi’s answer to the follow-up question by Mr. Kaiama, “And is it fair to say that in your opinion, that the arrests that occurred, including the arrest of yourself, violated your spiritual and religious practice?” was “Yes.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 124

123. Mr. Fujiyoshi’s answer to the question by Mr. Kaiama related to Mr. Fujiyoshi’s arrest, “But in your mind, sir, you did invoke your sincere belief in your religious practices on the Mauna?” was “Yes. And that’s the basis for my appeal. It’s on appeal now.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 126

124. Mr. Fujiyoshi’s answer to the follow-up question by Mr. Kaiama, “And it’s your sincere belief that your religious practices, among other things, were protecting the sacredness of the Mauna?” was “Yes.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 126

125. Mr. Fujiyoshi’s answer to the follow-up question by Mr. Kaiama, “And is it also fair to say that in your opinion, sir, that your sincere belief in your religious and cultural practices, in order

to protect something that you believe is sacred, sometimes transcends the law?” was “Yes. Sometimes you need to break a (sic) unjust law to follow what you believe is real justice.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 126

126. Mr. Fujiyoshi’s answer to the question by Ms. Kihoi, “Do you believe that a person’s spiritual connection to Mauna Kea should be measured by how long. (sic) That person has been physically familiar with this area?” was “No. I think one’s faith is by the depth of your commitment. And commitment cannot be just measured in terms of number of times that you have performed a ritual.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 129

127. Mr. Fujiyoshi’s answer to the question by Ms. Kihoi, “Do you believe that a spiritual connection to Mauna Kea can be felt even if one has never physically visited the mountain?” was “Of course. I think we have heard much discussion that the mountain was so sacred that people who believed that wouldn’t go up there. But it doesn’t mean that they didn’t believe the mountain was sacred. They believe that the depth was so great that they would respect that and not go up there.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 129

128. Mr. Fujiyoshi’s answer to the question by Ms. Kihoi, “Is it your belief that a person who has a spiritual connection to Mauna Kea, who has never physically visited the mountain, can still feel injury and emotional trauma if the mountain is harmed?” was “Of course.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 129-130

129. Mr. Fujiyoshi’s answer to the question by Ms. Kihoi, “Do you believe that if the TMT project should proceed and be constructed that native Hawaiians and nonnative Hawaiians will be injured?” was “Yes, I think—I think especially native Hawaiians who are the host people, and they are primarily, they are the ones most hurt. And where the sacrilege is most directed to them. But other people, especially people who have similar faiths, can feel the hurt themselves because they see it as related to themselves as well.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 131

130. Mr. Fujiyoshi's answer to the question by Ms. Sleightholm, "When considering Mauna Kea, would we distinguish portions to be sacred or the Mauna as a whole?" was "The whole mountain." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 134

131. Mr. Fujiyoshi's answer to the question by Ms. Sleightholm, "So, would it be a fair statement that we would liken Mauna Kea and the building of the proposed Thirty-Meter Telescope to be like building that telescope on someone else's church?" was "Yes. I cannot believe, you know, that if that kind of monstrosity were built next to Olaa First Hawaiian Church that we would agree to that. It would be so huge and would obstruct the views of the surrounding area that it would interfere with our ability to worship." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 136

132. Mr. Fujiyoshi's answer to the question by Mr. Ashida, "And you go on to state that Mauna Kea is sacred, has been accepted by tradition and public opinion; is that correct?" was "Yes." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 138

133. Mr. Fujiyoshi's answer to the follow-up question by Mr. Ashida, "What do you mean by "public opinion"?" was "Well, I think one good source would be the most—the newspaper that we most read, like the Hawaii Tribune Herald. And so I always that it would be great if Jon Osorio assigned one of his students to go out and just research how many times an article written on Mauna Kea said that this was a mountain considered sacred. Because from my reading, there are many times. Almost every time an article is written about Mauna Kea, it talks about it being sacred. So, to me, that would be one source of public opinion. So if we take all of the other magazines and articles and things like that, I think that altogether it would be public opinion." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 138-139

134. Mr. Fujiyoshi's answer to the question by Ms. Freitas, "Number 2, Article 12, Section 7. The Constitution of the State of Hawaii, traditional and customary practices, rights. In your

opinion, do you believe that UH, the Applicant, had to uphold this rule when they did the CDUA?” was “Obviously, they know that this is one of the rules that they have to follow. But I think, as Kahuna Nobriga said, they have subsumed or diminished what is religious and spiritual and hide it under cultural. And so they pick out people that they think are cultural, and they use that to overwhelm what is religious and spiritual rights. And I think this is done purposefully. And I think that is where they’re weak in their arguments because they don’t really—have not really called to the table the ones that are most recognized in religious and spiritual understanding of Hawaiian religion and bring them to the table. And it’s obvious that they haven’t consulted with the ones who know or are most knowledgeable.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 157

135. Mr. Fujiyoshi’s answer to the question by Ms. Ward, “In one of the exhibits that you reference, which is T-2A, the article by Noelani Goodyear, I notice that there are a couple of important notes in there from Candice Fujikane, on Page 188 of the Southern Atlantic Quarterly that Noe referenced or wrote. She describes the settler strategies of enclosure to try to delink land from water and cordon off discrete sacred sites from the larger fields of relationability—that is the word, yes. And there have been discussions, for example, of saying that sacred places can be set aside for people—well, that pieces of land can be set aside for people who would like to practice their spiritual practice. Do you believe that that is an appropriate mitigation for construction of telescopes on Mauna Kea?” was “No. I think, as I understand what she means is that especially in indigenous religion and especially in Hawaiian religion, you cannot separate—make those separations. It’s all part of a whole. And so that to get around those things, you try to call some places more important than others, like you say those are historical sites, and you make them different from find (sic) spots. And you are saying, this is where you can practice religion, and the rest of it you don’t—you cannot. I think that is a misunderstanding of the indigenous religion and indigenous understanding of sacredness. And I think all through the years, that is what has been happening to encroach on indigenous peoples’ land because I think, as we have heard, that nature is part of them—part of themselves or part of their life. And western viewpoint

treats them as other objects that you can own or possess or manipulate. And I think that is the difference between understanding of indigenous religion and western concepts. And so they keep on dissecting and defining them in different ways to break up the continuity of the whole. And I think her article is arguing, no, the indigenous peoples' concept if it's all of this whole. And so she talks about settlers are people, like myself, who come from different backgrounds, who don't understand the concept of wholeness, or forgot that concept of wholeness, and agreed with the encroachment of the—especially the land rights of native peoples.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 158-160

136. Mr. Fujiyoshi's answer to the question from Ms. Ward, “So we see in the final EIS that the analysis, for example, the view plains from the cultural practice sites, were Puu Wekui's at the top of the mountain, the traditional cultural property, Kukahau'ula, Lake Waiau and Pu Lilinoe. And that those were the three cultural properties that were considered, without consultation, the cultural properties that made a difference. And, therefore, the view plain analysis did not consider the view plain going out towards Waimea from any side of Kukahau'ula. And as a result I'm asking, do you feel that the—in your analysis, is where the cultural practice of the people who view are familiar with taken into consideration?” was “Definitely not. And that is why my saying that my main thing is to say that we have to accept that all of Mauna Kea is sacred. You can't divide it up and say, this part is sacred to our religion, the rest of it is not. I think that is a —it's a ploy to justify development, or in their—from their viewpoint is desecrating what is sacred in order to have other advantages, which are basically the term, economic.”

137. Mr. Fujiyoshi's answer to the question by Ms. Ward, “When you, over the period of the 20 years that you have been involved with Mauna Kea and you have observed human behavior, both on the mountain going up and also at the top, have you observed a change in the kinds of behavior what you have seen during your practice—or during your visits, let's say?” was “Yes, I've observed a change.” R.Fujiyoshi, vol. 44 Tr.03.02.17 at 161-163

138. Mr. Fujiyoshi's answer to the rephrased question from the Hearings Officer for Ms. Ward, "What change have you observed?" was "The awareness of cultural practitioners that this desecration cannot go on." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 163

139. Mr. Fujiyoshi's answer to the question of Ms. Ward, "And you mentioned that ho'oponopono would be a more appropriate approach than determining what needs to be done and then deciding what mitigation is to reduce the impact; is that correct?" was "Because that's the Hawaiian way." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 166

140. Mr. Fujiyoshi's answer to the redirect question of Mr. Freitas, "In relating to Mr. Ashida's poll, would you agree that this particular poll could be inaccurate because it's an electronic poll?" was "Yes." R.Fujiyoshi, vol. 44 Tr.03.02.17 at 178

Usage of the Land of Mauna Kea

141. The land upon which the TMT is proposed to be built is listed on all of the documents in this contested case hearing as being in the ahupua'a of Kaohe.

142. Kahea entered into evidence the map of the ahupua'a of Ka'ohe at the time of the Mahele in 1848. Exhibit B-13m: Map of Ka'ohe Ahupua'a from the Mauna Kea Cultural Resources Management Plan

143. Kahea entered into evidence document showing the ahupua'a of Ka'ohe was given by Victoria Kamamalu at the time of the Mahele of 1848. Exhibit B-13n: Mahele Book, 1848, p. X

144. Hearings officer accepted into evidence Hawai'i Island map of Crown and Government lands submitted by Wilma H. Holi. Exhibit Z-1-C

145. Cultural practitioner Ku Kahakalau shared the story of the meaning of the word Ka`ohe in the Hamakua district and its connection to the bamboo used for circumcision for the ali`i, a religious ceremony. K.Kahakalau, vol. 23 Tr. 01.19.17 at 49:12-18

146. Professor Jon Osorio's answer to the question of Cindy Freitas, "In your written testimony on page 1, the last full paragraph, you wrote about the land on Mauna Kea as 5F ceded land. And then you go on talking about the Mahele in 1847. According to Candice Fujikane, who presented a map of Mauna Kea, highlighting the government land, Mauna Kea—is on the government land of Kaohe as designated in the Mahele, is it your conclusion as a historian, a historian, (sic) that the building of the TMT and (sic) the government land of Kaohe is a misuse of land?" was "It is my belief that the building of the TMT culminates many, many violations of process and procedure, and that we have only now been able to properly address whether it is really a misuse of land. I think it is a misuse—when we consider the historical sacredness of Awakea (sic) and the historical understandings that people had of places like the summits and the near summits of Mauna Awakea (sic). I believe that our traditional people would not have built such a huge thing on that mountain so, yes, it was a misuse from, you know, our historical and traditional values and behaviors. It is a misuse of many, many things." J.Osorio, vol25b Tr. 01.12.17 at 130-131:15-13

147. Professor Osorio's answer to the question of Cindy Freitas, "In your book on the Lahui, you trace the history of how the legal system was strongly affected by westerners, mainly American law. It is your opinion as a historian (sic) that the laws presented used in the State of Hawaii have had the effect of disposing Native Hawaiians from their rights to the land in Hawaii?" was "I believe that it was not so much the law as the economic system ushered into here and the encouragement of development, outside investment, and transformation of the lands that has actually dispossessed our people. I believe that many of the laws that were created by the early kingdom were done with the intent that it would actually protect people on the land, for instance, the Land Commissions—basically, they're finding that the maka`ainana or the people that are

not chiefs had a one-third undivided interest in all of the aina. When I think about that, I find that to be an unusual development for a government in modern times to make sure that lower classes share—have the opportunity to share in the wealth of the nation. I find that unusual. J. Osorio, vol. 25b Tr. 01.12.17 at 132-133:7-4

Testimony of William Freitas

Background

148. William Freitas is a descendant of the Native Hawaiian people who occupied the islands of Hawai'i prior to 1778 beyond the period of Pa'ao. W.Freitas, vol.44 Tr.03.02.17 at 183:9-10

149. William Freitas testifies he is a aboriginal, indigenous Kanaka Maoli Ka Pae Aina, identified today by the State of Hawaii, as Native Hawaiian. W.Freitas, vol.44 Tr.03.02.17 at 183: 10-13

150. William Freitas testifies he engages in the traditional practices of his Kupuna (ancestors). W.Freitas, vol.44 Tr.03.02.17 at 183:13-14, 19-20

151. William Freitas testified that he is a descendant of Pi'ilani and Umialiloa; the latter is a part of his connection to Mauna a Wakea through "Umialiloa," as he is known for Umi's Trail that he used. His genealogy goes beyond the time of Pa'ao. He has genealogy that goes to the beginning of time, also known as the "kumulipolipo," Wakea creator of all. W.Freitas, vol.44 Tr.03.02.17at 183:14-16

152. William Freitas testifies his knowledge of spiritual practices of his kupuna are still embedded in in our people today, not just physically, but spiritually. W.Freitas, vol.44 Tr.03.02.17 at 183:19-21

153. William Freitas was born in 1957, at St. Francis Hospital, and lived in Punalu'u until 1½ years old and because of domestic violence, moved to Kona at the age of two. His mother did not know that her grandmother was from Kona, and her great grandfather was from Kohala, specifically Hawi. W.Freitas, vol.44 Tr.03.02.17 at 184:22-25, 185:1-4

154. William Freitas testifies that his oldest sister gave him the opportunities for learning, reverence, love, caring and respect through the Mormon Church, LDS. W.Freitas, vol.44 Tr.03.02.17 at 185:5-7

155. William Freitas testifies he was baptized in the Catholic Church and the Mormon Church. Growing up in this type of a Christianity, they gave him a good foundation of spirituality. W.Freitas, vol.44 Tr.03.02.17 at 185:14-16

156. Mr. Freitas has resided on Hawai'i island, where he has ancestral ties, much of his life, beginning when he was one and a half years old. W.Freitas, vol.44 Tr.03.02.17 at 185:1-4

157. As a child, Mr. Freitas spent many summers in the shadow of Mauna Kea near Waimea. W.Freitas, vol.44 Tr.03.02.17 at 186:23-34

Traditional and Customary Practices and Connection to Pohaku

158. Mr. Freitas states that he continues to live with traditional customary cultural religious and spiritual practices of my Native Hawaiian ancestral people. He engages in practices shown to him by his Mom, Aunties, Uncles and Kupuna, including Hawaiian families that live these traditions and share with him hands on knowledge passed to them from generation to generation. He has witnessed Mauna a Wākea, pure as his ancestors saw it! W.Freitas, vol.44 Tr.03.02.17 at 187:11,12, WDT Exhibit T-3.0 of William Freitas at 2 para. 1

159. William Freitas testified, “ I learned things growing up in Kona, I learned about-- I watched my mom. My mom-- my mother was very versed in the ways of our kupuna, what you can do and what you cannot do. And she taught me a lot of things that needed to be done prior to stepping into areas. In fact, she always said, do not go in those areas. I was always warned, do not go in those areas because I was too young to know. And I respected those things.” W.Freitas, vol.44 Tr.03.02.17 at 186:13-21

160. William Freitas testified that his uncle Jack Paulo gave him his Hawaiian name at the age of 5 at Kiholo in north Kona. W.Freitas, vol.44 Tr.03.02.17 at 189:25, 190:1-19

161. William Freitas testified that at the age of 5 years old unforeseen events occurred and the spiritual guidance of his kupuna was revealed. W.Freitas, vol.44 Tr.03.02.17 at 189:8-25

162. William Freitas testified to finding a special pohaku at the age of 5 yrs old while helping his mom pick kukui nuts to make “Ina Mona” and gives a descriptive account of his journey as a “Pohaku Kane.” Exhibit T-3.j13 (photo of stone); W.Freitas, vol.44 Tr.03.02.17 at 188:16-22

163. William Freitas testified: “Later on, 2015, after my sister had noticed that I was participating in the stand for Mauna a Wakea, she presented -- she presented that pohaku to me. And she told me that mommy said not to have -- to have this until you are ready. And so, I believe 2015 was awakening for me to understand my destiny and this pohaku started at five years old.” W.Freitas, vol.44 Tr.03.02.17 at 190:13-19

164. WDT Exhibit T-3.0 of William Freitas at 1-2 para.. 1-7 includes descriptive accounts of the Hawaiian Kingdom that led to the colonization by illegal U.S. occupation to his family and himself, religion, family ancestral genealogy, and traditional Hawaiian spiritual protocols, Teachings by Auntie Iolani Luahine, Uncle George Naope, Mother and many family aunts and uncles of Hawaiian Spiritual connection to Mauna A Wakea to Papahānaumoku, Poliahu,

Lilinoe, Waiau, Kukahau'ula, Noenoe and all the deities of Kane, Kane Wai ola. Source of life to Haloa, deity of food staple for the survival Hawaiian existence in the middle of the pacific, to be respected today, with continued spiritual ceremonies of prayers and offerings on Ahu, Ku Ahu, Ku'ula and Ku Pohaku to channel to the creator as Kanaka maoli ko pae Aina refer to "Wakea" in Kauikioli Kamehameha III, birth Chant the, "Kumulipolipo."

165. Mr. Freitas continues to practice the traditions of his kupuna (elders). W.Freitas, vol.44 Tr.03.02.17 at 183:19-20

166. Mr. Freitas is a spiritual/religious practitioner. W.Freitas, vol.44 Tr.03.02.17 at 195:3-5

167. Specifically, Mr. Freitas is a Pohaku Kane (specialist in rockwork), a calling that began at the age of five. W.Freitas, vol.44 Tr.03.02.17 at 188:16-19

168. Mr. Freitas's connection to pohaku has remained strong through his life, including several instances in recent years that eventually connected him with his current religious practices on Mauna Kea in which he focuses on helping young people in the practice of Kapu Aloha. W.Freitas, vol.44 Tr.03.02.17 at 193:23-24

169. William Freitas identified himself as a Pohaku Kane (Stone mason) who has been guided through "pohaku" to Mauna A Wakea by opportunities and events up to 2015, such as, (Exhibit T-3.j1 and T-3.j2) SIHP 21220 Ku'ula Stone (Fishing Shrine) for the Kipapa Ohana in Kona, in the area of Pahoeohoe, known today as Magic Sands. WDT Exhibit T-3.0 pg. 2 parag. 6, W.Freitas, vol.44 Tr.03.02.17 at 191:5-25, 192:1-25 (note: The transcript does not accurately reflect the video recording of Na Leo TV: On pg.192: 5, it states "300"lbs. while the accurate audible recording is "800"lbs).

170. William Freitas testified: “I have done many different things with pohaku, but one of the most interesting things is that during the period of this time, of 2015, the same year -- this is Exhibit T-3.j12-- I found this pohaku while I was working. And this was in the year 2015. And for what some “kahunas” explained to me that this is a pohaku the use for kukui oil for lamps. and with that understanding, there was enlightenment for me to be and stand on Mauna a Wakea. And this is the reason why I’m here today.” W.Freitas, vol.44 Tr.03.02.17 at 190: 20-25, 191:1-4. Note: The transcript does not accurately reflect video recording of Na Leo TV, on pg. 190: 25 states “kahunas” an accurate audible is “Kupunas”.

171. William Freitas gives a descriptive spiritual account of events that have led to his desperate necessity to Protect Mauna a Wākea from the development of TMT and future developments in and around the proposed TMT site (area “E” in the 2010, CDUA approved by BLNR). WDT Exhibit T-3.0 pg. 2-3 parag. 1-7

172. William Freitas testified regarding the “Hina” (representing women) stone (Exhibit T-3.j4) that was picked out to support the Ku’ula, that is being carried by the Kipapa Ohana (Exhibit T-3.j5) to be placed in the “Piko” (center) of the Kihikihi (corners) of the “Kahua” (foundation). W.Freitas, vol.44 Tr.03.02.17 at 193:1-22. (note: The transcript does not accurately reflect video recording of Na Leo TV: On pg. 193:7, while transcript states “kihiki” an accurate audible is “kihikihi.”

173. William Freitas testified as to how this “Ku’ula” reestablishment and the spiritual guidance of the practices of using “Pohaku” in traditional customary religious and spiritual practices have allowed him to meet Lanakila Mangauil and his kipapa Ohana, as well as the “Hoailona” (spiritual sign) that followed before, during and after the completion of the “Ku’ula” which has lead him to Mauna A Wakea in a spiritual endeavor. W.Freitas, vol.44 Tr.03.02.17 at 194:1-25, 195:1-10 (photo of day after completion) “Exhibit T-3.j7”, and WDT Exhibit T-3.0, (view of Ku’ula as it sets from start to finish that day March 02, 2015). (Note: The transcript does not

accurately reflect video recording of Na Leo TV: at 194:1, transcript states “Manuel,” while an accurate audible is “Mangauil.”

174. William Freitas describes a pohaku (stone) that has been revealed to him spiritually through Hoailona (spiritual sign) in 2015 while removing a dried roots from cleaning in the ahupua’a where I live. His Kupuna told him it is a sign of awakening, enlightenment and that it led him to Mauna A Wakea to stand and protect. This stone was used for Kukui hele po (lamp) and La,au lapa au (medicine). Exhibit T-3.j12 (photo of pohaku kukui hele po (lamp)), WDT Exhibit T-3.0 at 3 parag. 1, W.Freitas, vol.44 Tr.03.02.17 at 190:20-25, 191:1-4

175. Mr. Freitas’s experiences and work helped lay a foundation for him to assist in establishing two ahu at the proposed TMT site. W.Freitas, vol.44 Tr.03.02.17 at 194:19-24

Describing the traditional and customary purpose on the ahu, Mr. Freitas testifies, “And this was one of the ahus built on June 22nd. And it was built in necessity and for prayers and offering of the desecration of this bulldozing of this access road.” W.Freitas, vol.44 Tr.03.02.17 at 199:10-13

176. William Freitas describes “Spiritual Practices with Pohaku” by Kanaka Maoli of other Islands and areas in Hawaii, and was asked to share his spiritual protocol of ceremony and knowledge in constructing a place worship for offerings and prayers of “Dedication and Consecration.” WDT Exhibit T-3.0 pg. 3, parag. 4, such as “Ahu, Ku Ahu, Ahu Ku’ula, (Exhibit T-3.j8 Ku’ula (fishing shrine) at “Onikahakai” beach park in Keaukaha, Hilo Hi., Exhibit T-3.j9, Ahu and Lele, in “Kohanaiki” Kona, Hi., Exhibit T-3.j10, “Traditional Hale Wa’a” at Kohanaiki Kona Hi., Exhibit T-3.j11, “Ku Ahu” for Mala (Garden) Kalihi, Oahu Hi.. Loko ia, and Heiau restoration, Traditional Hale thatching including letters of recognition and acknowledgment. Exhibit T-3.0a

Sacredness of Mauna Kea, Ahu Consecration, Ceremony, Desecration and Ongoing Traditional Practices

177. Mr. Freitas discusses the injury incurred by destruction of Ahu o Kauakoko: “This particular ahu was dedicated and consecrated. And the exhibit that I’m about to put up (T-3.F), will show how much that hurt.” W.Freitas, vol.44 Tr.03.02.17 at 207:5-7

178. Mr. Freitas describes the purpose for building the ahu: “It was built to give prayers and offerings in protection and forgiveness for those who desecrated the area.” W.Freitas, vol.44 Tr.03.02.17 at 199:20-22

179. Mr. Freitas testifies that ahu at the proposed TMT site were intended to give prayers of protection of workers who built the access road. W.Freitas, vol.44 Tr.03.02.17 at 209:13-15

180. Mr. Freitas testified that oli (chants), mele (songs), and prayers were performed at Ahu o Kauakoko prior to its destruction. W.Freitas, vol.44 Tr.03.02.17 at 214:8-12

181. Mr. Freitas testified being involved in the construction of two ahu on the proposed TMT site on June 22nd and 23rd, 2015. W.Freitas, vol.44 Tr.03.02.17 at 220:19-22

182. Mr. Freitas testified that traditional cultural protocols were invoked and practiced in construction of ahu on TMT proposed site. W.Freitas, vol.44 Tr.03.02.17 at 221:1-3

183. Mr. Freitas testifies that Mauna Kea is a temple. W.Freitas, vol.44 Tr.03.02.17 at 225:11

184. Mr. Freitas testifies that he believes his religious rights to be protected by the United Nations Declaration on the Rights of Indigenous People. W.Freitas, vol.44 Tr.03.02.17 at 226:4

185. Mr. Freitas affirms that his “spiritual, religious, cultural and traditional values” will be injured by the proposed development. W.Freitas, vol.44 Tr.03.02.17 at 226:13-17

186. Mr. Freitas testifies that his practices on Mauna Kea are traditional and customary. W.Freitas, vol.44 Tr.03.02.17 at 227:6-8

187. Mr. Freitas testifies that it is his kuleana (responsibility) to help young people on Mauna Kea understand cultural and spiritual practices. W.Freitas, vol.44 Tr.03.02.17 at 231:1-8

188. Mr. Freitas testifies to the religious character and purpose of the ahu at the proposed TMT site: “And that is the real purpose. We didn’t just build those things. The purpose was for the spirituality.” W.Freitas, vol.44 Tr.03.02.17 at 232:9-11

189. Mr. Freitas testifies that prayer at ahu is an example of Kapu Aloha. W.Freitas, vol.44 Tr.03.02.17 at 238:22-24

190. Mr. Freitas affirms that Kapu Aloha is a central tenet of traditional Hawaiian religious practice. W.Freitas, vol.44 Tr.03.02.17 at 239:1-6

191. Mr. Freitas testifies that his religious practices on Mauna Kea were not “made up” in order to thwart the TMT development. W.Freitas, vol.44 Tr.03.02.17 at 239:11-13

192. Mr. Freitas testifies that he put his “life on the line” to remove an ahu constructed in the roadway, establishing the level of seriousness with which he takes ahu construction and deconstruction. W.Freitas, vol.44 Tr.03.02.17 at 285:11-14

Lack of Consultation

193. When asked by Ms. Kakalia if he had been consulted by Kahuku Mauna or any other entity about religious practices and the ahu, Mr. Freitas responded that he had not. W.Freitas, vol.44 Tr.03.02.17 at 245:16-21

194. When asked by Ms. Kakalia if he was open to consultation regarding his religious practices and the ahu, he replied in the affirmative. W.Freitas, vol.44 Tr.03.02.17 at 246:3

CROSS EXAMINATIONS OF WILLIAM FREITAS

Deborah Ward

195. William Freitas testified that as a pohaku kane practitioner, he shared his knowledge in pohaku construction of “Ku’ula” at Onikahakai in Keaukaha Hilo for “Hale Mua” (mens gathering) spiritual and cultural practice. Exhibit T-3.j8 photo of Ku’ula (fishing shrine). W.Freitas, vol.44 Tr.03.02.17 at 197:2-25, 198:1-10

196. William Freitas testified to significant “Ahu” alignment from Haleakala to Poliahu for prayers and offerings due to the desecration entailed in bulldozing of this access road. Exhibit T-3.a photo of “Ahu Ku Kia’i e Kahi.” W.Freitas, vol.44 Tr.03.02.17 at 198:22-25, 199:1-9

197. William Freitas testified, “Ahu Ku Kia’i E Lua” was constructed out of intense necessity for prayers and offerings due to the continued effort of the DLNR, UHH, and TMT, to desecrate sacred ground. Exhibit T-3.b photo of “Ahu Ku Kia’i e lua.” W.Freitas, vol.44 Tr.03.02.17 at 200:16-25, 201:1-25, 202:1-4

198. William Freitas identifies and describes the necessity of establishing a place for worship with prayers and offerings in traditional customary religious and spiritual practice to a sacred area that would be further desecrated in the proposed site of TMT by the construction of the telescope. WDT Exhibit T-3.0 at 6 para. 4 and 5

Kealoha Pisciotta

199. William Freitas testified when asked by Ms. Pisciotta: “Do you consider Pohaku and/ or ahu or ku’ula a form of anchoring of certain tensions?” The answer: “Absolutely.” W.Freitas, vol.44 Tr.03.02.17 at 203:21-23

200. William Freitas testified regarding “Hoailona” (spiritual sign) to Pohaku Hina (woman stone) at magic sands in Kona (Exhibit T-3.j4) describing presents of a Kohola (whale) giving her chicken skin (goosebumps). W.Freitas, vol.44 Tr.03.02.17 at 204:1-25, 205:1-19

201. William Freitas testified to “Cross Examination by Ms. Pisciotta” when asked what “Ahus” were destroyed. Mr. Freitas answers and describes the “destruction to Ahu Kauakoko,” then describes the necessity of the establishment for prayers and offerings located between the 3 and 3.5 mile-markers (Exhibit T-3.c); (Exhibits T-3.e, and T-3.f show many people in prayer on their knees, with thousands of spirit kupuna on the slopes behind and around them in prayer on the day it was dedicated and consecrated. They stood with conviction and spiritual intensity against the aggressive actions by BLNR, DLNR and UHH on behalf of TMT). W.Freitas, vol.44 Tr.03.02.17 at 205:22-25, 206:1-25, 207:1-25, 208:1-25, 209:1-16

202. William Freitas testified, when asked by Ms. Pisciotta: “ Is it your belief that such [traditional and customary] rights on Mauna Kea are specifically -- are protected under state law?” Mr. Freitas answered: “Well, yes.” W.Freitas, vol.44 Tr.03.02.17 at 209:16-19

203. William Freitas testified to Ms. Pisciotta regarding her “Exhibit B-28” and asks the Hearings Officer for permission to call her back to explain a spiritual acknowledgment or “Hoailona” revealed to him at that particular moment in the hearing. W.Freitas, vol.44 Tr.03.02.17 at 210:1-25, 211:1-7

Ku Ching

204. William Freitas testified to Mr. Ku Ching regarding the great significance of the pohaku of Kanaloa to the Mauna, Exhibits T-3.a, W.Freitas, vol.44 Tr.03.02.17 at 213:6-19

205. William Freitas testified to Mr. Ku Ching regarding the Exhibit T-3.e, which showed the photo of “Ahu Kauakoko” and people in ceremony, demonstrating its religious and spiritual significance. W.Freitas, vol.44 Tr.03.02.17 at 213:21-25, 214:1-13

206. William Freitas testified to Mr. Ku Ching when asked of activities taken place at “Ahu sites” in regards to cultural practices and find sites in relation to the FEIS and CDUA. Exhibit T-3.4 FEIS pg. 3-8 section 3-2 - Cultural Resources, W.Freitas, vol.44 Tr.03.02.17 at 214:14-25, 215: 1-25, 216:1-25

207. William Freitas testified to Mr. Ku Ching, when asked “what has happen to this specific ahu in Exhibit T-3.e, Ahu Kauakoko, and the desecration of the Ahu?” W.Freitas, vol.44 Tr.03.02.17 at 217:14-25, 218:1-25, 219:1-15

KAHEA, Dexter Kiama (counsel)

208. William Freitas testified to Mr. Kaiama, referring to Exhibit T-3.j Hale Ku Kia’i Mauna, about his involvement in establishing a place of preparation to enter the “Wao Akua” and conducting of ceremony in relation to traditional customary religious and spiritual practices. Exhibit T-3.j Hale Ku Kia’i Mauna, W.Freitas, vol.44 Tr.03.02.17 at 220:1-25, 221:1-3

209. William Freitas testified to Mr. Kaiama, when referring to “Exhibit T-3.i” photo of ceremony outside of Kiholo bay with two la’i (ti leaf), that Mauna A Wakea can be seen in the background. W.Freitas, vol.44 Tr.03.02.17 at 221:5-25, 222:1

210. Mr. Freitas provides Mr. Kaiama with descriptive accounts at Kiholo, of his Hawaiian name given to him, and how the waters flow through caverns from Mauna A Wakea connect this special place to him. WDT Exhibit T-3.0 at 3, para. 2; Exhibit T-3.i referencing W.Freitas, vol.44 Tr.03.02.17 at 221:7

Corroborating Testimony on Mauna Kea's Significance for Traditional and Customary Practice, the Religious Significance of Ahu, Causes of Spiritual Harm and Injuries, Additional Impacts to Traditional Practitioners, and Lack of Consultation and Meaningful Mitigation

Hawane Rios

211. Ms. Rios testified that she descends from a line of “seers, of medicine people” and that healing is in her lineage; this is where her practices come from. She is also a dancer and chanter. Tr.02.14.2017 vol.36 at 130-131

212. Ms. Rios testified that Mauna Kea is a temple, one of highest significance, a place of prayer and worship where ceremonies are conducted. These ceremonies are about the supreme law of the universe. Tr.02.14.2017 vol. 36 at 131-132

213. Ms. Rios testified that she is a haka, a seer, a medium that has received these gifts genealogically. This is a traditional gift that allows her to receive ancestral insight. Her mediumship has taken place on Mauna Kea in areas at the Northern Plateau, Lake Waiau and different pu'u. Mediumship allows her to receive information that others like archaeologists might not receive. Tr.02.14.2017 vol.36 at 142-144

214. Ms. Rios testified that she has received ancestral knowledge through mediumship in areas on the Northern Plateau. The ancestors have shared with her the significance of shrines along the Northern Plateau. In visions she received that these shrines are energetic points that connect to one another and are aligned with constellations and tides at certain times throughout the year;

they are portals that connect to celestial bodies of the universe. In particular, the Northern Plateau is a place of learning, a celestial realm in the cosmos that is also connected to voyaging. She describes the Northern Plateau as “a very sacred space of higher learning, spiritual learning, higher consciousness.” Tr.02.14.2017 vol.36 at 149-152

215. These shrines were built and cared for by certain families and that there is knowledge that is embedded into the site. She explained that: “The knowledge from these ancient beings of a celestial realm and of the kupuna realm are in the fabric of the mountain. They are a part of the portal that exists there. They're not separate.”

216. And so these shrines, these pohaku, these 'ahu, are directly connected to all of these ancestral beings that come through, through the visions, through the mediumship, and they all are Interconnected energetically through vibrations. They're interconnected through the connection to star realm and to the earth realm. There is no degree of separation between them.” Tr.02.14.2017 vol.36 at 151-152

217. Many shrines and sites of Mauna Kea are interconnected; by destroying one particular site or ahu you cause destruction to others. If built, the TMT project would cause destruction to some of these sites severing, permanently closing, access to knowledge of the celestial realm. Tr.02.14.2017 at 153-154

218. Ms. Rios testified that she has laid down her prayers at the ahu built near the potential TMT project site. These sacred structures have the ability to create portal connections to those of the mountain and have the ability to be strengthened through ceremony. Tr.02.14.2017 at 171-172

219. Ms. Rios testified that protecting Mauna Kea is ceremony. Standing for the right of Mauna Kea, the earth, and the many mountains is ceremony well. Tr.02.14.2017 vol.36 at 184

220. Ms. Rios testified that she and others are hurt and traumatized by events that have occurred through the Protect Mauna Kea movement. Tr.02.14.2017 vol.36 at 134

221. Ms. Rios testified that the trauma she has experienced has affected her life physically, spiritually, emotionally and mentally. She is working on healing these emotions with healing through forgiveness and love. Tr.02.14.2017 vol.36 at 136-138

222. Ms. Rios testified that she was violated when she was arrested during the night praying on the mountain. Tr.02.14.2017 vol.36 at 164

223. Ms. Rios testified that the trauma and pain that would be caused by the TMT project if built is unfathomable. If built the TMT project would cause immense pain and trauma to Mauna Kea, the earth, and the many mountains is ceremony well. Tr. 2/14/2017 vol.36 at 185

Ruth Aloua

224. Ms. Aloua testified that she is a traditional and customary practitioner of Mauna Kea. Tr.02.15.2017 vol. 26 at 91

225. Ms. Aloua testified that her traditional and customary practices are negatively impacted by visual impacts (e.g., telescopes, roads) and noises (e.g., cars, traffic). Tr.02.15.2017 vol. 36 at 95

226. Ms. Aloua testified that Mauna Kea is a cultural landscape that is deeply connected to traditional, Native Hawaiian traditional and customary practices. This landscape includes man made objects and places, in addition to, natural features. Tr.02.15.2017 vol. 36 at 104

227. Ms. Aloua testified that representatives from the Hawaii State BLNR never consulted with her regarding her traditional Native Hawaiian customary practices related to Mauna Kea. Tr.02.15.2017 vol. 36 at 110-111

228. Ms. Aloua testified that the TMT project would cause personal injury if built. Tr.02.15.2017 vol.36 at 43

229. Ms. Aloua testified that her arrests on Mauna Kea were oppressive, offensive and brutal attacks that have caused her trauma. WDT Aloua at 2

230. Ms. Aloua testified that her arrests on Mauna Kea have created fear of law enforcement officers and concern for personal safety during ceremony. WDT Aloua at 2

Manulani Aluli Meyer

231. In her WDT, Dr. Meyer stated that we *cultivate* transpatial relationships with Maunakea, or relationships that transcend space and distance. Ex. B.05a at 1

232. According to Dr. Meyer, indigenous epistemologies, or ways of knowing, are integral for understanding those things that are ineffable, or too grand to be measured for value using “mainstream” or “empirical” methods. Maunakea, she argued, is one such entity that must be understood with indigenous wisdom if we are to truly understand why it is “beloved” to people. Ex. B.05a at 2

233. Dr. Meyer explained that “Ku Kia‘i Mauna” is to “care for our [collective] beloved inspiration.” Tr.04.01.17 vol. 31 at 32

234. Dr. Meyer affirmed that she believed her Hawaiian ancestors identified places and natural resources that had healing powers. Tr.04.01.17 vol. 31 at 83

235. Dr. Meyer affirmed that Mauna Kea was identified by Hawaiian ancestors as a place of great healing. She explained that it was in the wao akua and was a place of inspiration, or renewal and rejuvenation. Tr.04.01.17 vol. 31 at 84

236. Mauna Kea, according to Dr. Meyer, has always been inspiring for her. Tr.04.01.17 vol. 31 at 84

237. According to Dr. Meyer, “the minute you...have a relationship with something and you love it, it loves you back.” This was said in reference to the relationship that people have with Mauna Kea. Tr.04.01.17 vol. 31 at 85

238. Spirituality, as Dr. Meyer explained, is often dismissed. Indigenous epistemologies, or ways of knowing, similarly, are often dismissed as “soft science” by the so-called “hard sciences.” But this leads to dysfunction. Spirituality is real and cannot be confused with religion. Tr.04.01.17 vol. 31 at 117-119

239. Based on her knowledge and expertise, Dr. Meyer affirmed that the proposed mitigation that the “TMT project facilities will be furnished with items to provide a sense of place and acknowledge the cultural sensitivity and spiritual attributes of Mauna Kea” is *not* a sufficient mitigation. Tr.04.01.17 vol. 31 at 139

Candice Fujikane

240. Dr. Fujikane stated that the TMT CDUA cannot fulfill the 8 Conservation District Use Criteria because cumulatively, the TMT project would add to the impacts of existing observatories that are “substantial, adverse, and significant.” Tr.01.9.2017 vol. 23 at 209-210

241. The TMT’s FEIS Vol. 1 also acknowledges that cumulatively, the TMT can only add to the substantial, significant and adverse impact on Mauna Kea: “From a cumulative perspective, the

impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse; these impacts would continue to be substantial, significant, and adverse with the consideration of the Project and other reasonably foreseeable future actions” Ex. B32 at S-8. Tr. 01.9.2017, vol. 23 at 210

Professor Jonathan Osorio

242. Dr. Osorio stated that the struggle over the future of Mauna Kea is not a conflict between Hawaiians and non-Hawaiians, nor is it a clash between western science and Hawaiian cultural beliefs. It is a conflict between different people who see the history and future of Hawai‘i very differently from one another, and he states, “the issue is about how we manage resources and how we align our laws, our economy and the values of a whole, yet diverse society in Hawai‘i in order to connect a ruptured past, contentious present, and a very uncertain future.” Ex. B.07a at 1

243. Historically, Hawaiians were people who could, as they journeyed and settled new lands, completely confident, oceanic people that could make a home, prosper, and thrive wherever they went because of their observations of the world around them. Tr. 05/11/2017, V. 26 at 31: 1-6. “This is not an anti-science kind of perspective. This is a deep respect for science in all of its ways.” Tr. 05/11/2017, V. 26 at 31:7-9. Hawaiians were rational people who were discerning about the kinds of technologies and tools they sought to develop. Tr. 05/11/2017, V. 26 at 32: 10-12

244. Dr. Osorio emphasizes that the reason this current permitting process has begun again is because the State Supreme Court recognized the lack of actual and meaningful public consultation during the previous application process. Ex. B07 at 2. “Difficult decisions have to be made about how we use resources, about how we allow investment. All sorts of things that have to do with our economy and our society going forward, and yes, I’m saying that state agencies from the governor all the way down really have to take – they really have to understand they have a kuleana for this.” Tr. 05/11/2017, V. 26 at 37:9-15

245. Dr. Osorio pointed out that the concerns raised by the TMT CDUA were not only the cultural concerns of Native Hawaiians, “but also the political processes and procedures of the State.” Tr. 05/11/2017, V. 26 at 14: 13-15. The TMT, particularly in addition to existing telescopes on Mauna Kea, is not consistent with the purpose of the conservation district. Tr. 05/11/2017, V. 26 at 24: 10-19. They are evidence of “messaging around with regulation and the spirit of regulations that have been set up since the State was first formed” because this “lessens people’s respect for government and governance . . . when the government presents incidents like this where what you think is meaningful really is not.” Tr. 05/11/2017, V. 26 at 24-25

246. Dr. Osorio states that the “TMT will add to the significant, sustained and adverse affects [sic] that already resulted from the previous 13 telescopes on the mountain.” Ex. B07 at 3. Dr. Osorio commented on the approval of multiple industrial telescope projects in the Mauna Kea summit region: “If one wants to have confidence in government, if one wants to have confidence in political society, then decisions should be made and approvals should be given in a way that makes sense that is rational. I don’t believe that this is – when you – on the face of it, it doesn’t look rational to me.” Tr. 05/11/2017, V. 26 at 25:13-20

247. Dr. Osorio states that the TMT would have a “devastating” impact on Hawaiian emotional, mental and physical health. Dr. Osorio goes on to state, “it is especially offensive for the TMT, building a 16 story monstrosity on a sacred place, to claim a cultural connection with the Native people because astronomy looks at the same stars as our voyager ancestors.” Ex. B07 at 3. He points out that there have been extensive efforts on the part of those who find the TMT culturally, environmentally, and legally offensive to protect Mauna Kea, and that evidence of this can be found in “a few hundred reasons in the form of men and women who braved the elements and the possibility of arrest last year in order to proclaim their commitment to the mountain.” Ex. B07 at 3

248. Dr. Osorio states that approval of the TMT by the DLNR evidences “the state’s failure to protect vulnerable communities and willingness to ignore inconvenient regulations in its rush to approve sizable capital projects,” as well as “Hawaiians’ increasing impatience with the state’s management of our national lands.” Ex. B07 at 3

249. As a historian, Dr. Osorio compares the movement to protect Mauna Kea with the magnitude of the civil rights movement. He states, “So this brings to mind much more the civil rights movement, where you really have a broad base of people, not just Hawaiians but people from many different communities who participate because they consider this an issue of involving really an important statement about being human.” Tr. 05/11/2017, V. 26 at 59:6-12

250. He goes on to point out that this movement to protect Mauna Kea has garnered international support: “I think that this movement has shown a tremendous -- that it has a tremendous impact on people in many, many parts of the world.” Tr. 05/11/2017, V. 26 at 59:16-19

Diana LaRose

251. LaRose has gone to ceremonies on Mauna Kea for about eight years with Hawaiian cultural practitioners. Tr.01.19.17 vol. 27 at 234

252. In August of 2016, LaRose accompanied Native Hawaiian cultural practitioners to the proposed TMT site on top of Mauna Kea. She was there along with three others. Ex.B25a at 1,2

253. LaRose states that all of the native people she knows says that the top of a mountain is where the mountain spirit dwells. Her home is the most sacred place and out of respect they do not go there except when called to do a vision quest, prayers, or ceremony. Ex.B25a at 1

254. LaRose asks all who are considering in allowing the building of the proposed new observatory to take into consideration the rights and needs of the sentient life of Mauna Kea,

including the forces of nature such as Mo‘oinanea, guardian of Lake Waiau. Along with others, LaRose states in her WDT, that she has have felt and seen her. [see portrait of Mo‘oinanea in Exhibit B.23b] The feelings Mo‘oinanea conveyed to LaRose were of concern and sadness for the mountain and uncertainty of what will happen to Lake Waiau. The concern is also for our own consequences and what we don’t know of the impact that will be created on all life forms on the mountain. Ex.B25a at 1

255. LaRose testified on the impacts of building the TMT on Mauna Kea, “You’ll feel it in your own body, and there will be a lot lost.” Tr.01.19.17 vol. 27 at 219

256. LaRose testified, “of course, those telescopes are a major impact on this mountain, just the presence of them, whether or not you’re for or against them. It’s a physical alteration that is huge.” Tr.01.19.17 vol. 27 at 225

257. When asked if the building of the thirty meter telescope would in any way block access to the kind of information (ancestral information) that was available through those stones on the northern plateau at the proposed site of the Thirty Meter Telescope LaRose indicated that it would actually bulldoze them over. Tr.01.19.17 vol. 27 at 227

258. If the pohaku at the proposed TMT site was destroyed, it would cause LaRose great sorrow because she knows there is a lot of knowledge there waiting. Tr.01.19.17 vol. 27 at 237

Dr. Ku Kahakalau, with specific attention to ahu construction and significance

259. However, in this case it's not about looking out in the stars that's the problem. It's where we choose to desecrate the earth to look out to the stars. It's not astronomy that's the issue, or using telescopes. Tr.01.9.17 vol. 23 at 161

260. Because we knew the right spots to go to, where we could learn, and in some cases being in a huge place like Mauna Kea, meaning that you have the whole heavens is not always necessarily the best idea from a Hawaiian perspective. Tr.01.9.17 vol. 23 at 161

261. There are many forms, first of all, of things that you can give offerings on. And then there is the construction 'ahu, and then there's ku'ahu, which is more of a home base, home altar if you want to call it. Tr.01.9.17 vol. 23 at 164

262. And those 'ahu were and continue to be constructed by Hawaiian practitioners in places that are very cautiously selected, not just a haphazard, but really with intense pule and with searching for truth and for light and for understanding and being driven by a kuleana to build that 'ahu, that comes from an ancestral guidance is what I would call it. Tr.01.9.17 vol. 23 at 164

263. When we build 'ahu, we are very, very selective. We don't just build 'ahu everywhere. And certain places people asked us to put 'ahu where we don't build 'ahu, because we don't feel it's the right spot to build them. Tr.01.9.17 vol. 23 at 164, 165

264. So it's really something that as a practitioner you're taken very, very serious, and when you make the 'ahu, every rock is asked if it wants to come and be part of the 'ahu. When we built our school, we asked every pohaku that was part of the paia, you know, if it wanted to come because

we gathered it from Mauna Kea, and we feel that that's how we need to treat those rocks, those pohaku. Tr.01.9.17 vol. 23 at 164, 165

265. So the rocks are asked if they want to come. The person who builds it has to be very pono, clean inside and out so the cleansing ceremonies before you build an 'ahu, here is a kapu, I guess is the best way to put, when you build that 'ahu and throughout the life of that 'ahu there is kuleana, once you build that 'ahu, to malama it in every way. Tr.01.9.17 vol. 23 at 164, 165

266. So if a rock falls down, you need to make sure that it's put up again. Whatever ho'okupu you put on there, you need to make sure they are taken care of, so you not really rubbish the landscape and things. Tr.01.9.17 vol. 23 at 165

267. Yeah, whether it's an 'ahu or whether it's any other sacred site, whenever that happens to us, again, the message is sent that we are not important, that our ways are not important, that they're secondary to somebody else's wishes and values and demands, and just their perceived needs. Tr.01.9.17 vol. 23 at 165, 166

268. And when things we feel responsible for, when those are violated, it's so hard because we're responsible. Whether they did it or not is neither here nor there. (Regarding whether a Hawaiian built the 'ahu or not.) It was desecrated, and that was our kuleana and this is something that is very, very painful to Hawaiian practitioners to create something and then to have that destroyed, that is a very, very, heavy, heavy burden to carry. Tr. 01.9.17 vol. 23 at 166

Dr. Maile Taulii

269. Dr. Taulii's research demonstrates 3 key findings: 1) desecrating sacred spaces impacts cultural identity and health, 2) participation in traditional practices are protective factors against distress, and 3) health disparities of Native Hawaiians cannot be explained by standard determinants of health (e.g. poverty or low education) and that causes, such as forced assimilation are causal factors in poor health outcomes. Exhibit B.04a at 1; Tr.01.24.2017 vol. 29 at 11:1-25

270. Research showed that people had many poor health outcomes directly related to their sacred places. This included mental, emotional as well as physical effects. Tr.01.24.2017 vol. 29 at 13:5-10

271. Statistics demonstrating what is going on population wise showed there was a cause of illness in the indigenous populations that is related to the only thing that is common among those indigenous populations which is forced assimilation and colonization relating now to the experiences of the building of the telescope and the threat on the lives of Native Hawaiian people. Tr.01.24.2017 vol. 29 at 14: 22-25, 15:1, 2

272. The term desecration of sacred spaces as a health issue is considered any form of preventing people from practicing and engaging in that space is held culturally in reverence to the native people. Tr.01.24.2017 vol. 29 at 17:10-15

273. When a sacred place is destroyed or harmed or something is built on it that is desecration which means that the value in the way native people can interact in that space has been harmed by an outside force that has disrupted their ability to practice traditionally. Tr.01.24.2017 vol. 29 at 17:17-18

274. The elevated harm due to the fact that one is unable or prohibited from practicing their religious faith and spiritual practices harms the bodies in many physical ways as well as mental ways. Desecration of the sacred can affect one's ability to not be able to function on a daily basis and also not to be able to function as a whole as native people. Tr.01.24.2017 vol. 29 at 18:18-25, 19:1-2

275. Some of the worst and gravest health effects including strokes, heart attacks and even death have occurred to people who identified themselves as having kuleana and stewardship to engage respect and hold those sacred places. Tr.01.24.2017 vol. 29 at 21:11-14

276. So not to just make it a spiritual theoretical conversation, but a physical, chemical, measurable effect on the body that I would say, yes those who indeed are tighter, closer, more involved, directly related feel that responsibility are feeling some of the worst effects of this construction. Tr.01.24.2017 vol. 29 at 22:1-7

277. Loss of land, loss of language, all of those are associated with assimilation colonization and forced relocation off of native spaces have a health effect. Tr.01.24.2017 vol. 29 at 22:12-15

278. "I know that many people, whether native or not native, feel physical harm as a result of the disconnect and the desecration of those places that they hold sacred and special." Tr.01.24.2017 vol. 29 at 25:23-25

279. "I'd say the 10,000 people who marched in Waikiki, many did not get a chance and will not get a chance to visit the mountain, yet, still regard the space as sacred and will still feel the effects and still do report the effects of the building of the telescope." Tr.01.24.2017 vol. 29 at 30:9-13

280. Dr. Taulii stated that she believes that once a sacred place is damaged or desecrated, that event creates emotional or spiritual harm leading to physical manifestations in the body, the answer was Yes. Tr.01.24.2017 vol. 29 at 30:15-19

281. My data shows specifically that those who are practitioners as well as those who hold sacred the mountain as well as all those who support Native Hawaiians having connection to place will feel and have reported feeling ill health effects as a result of the building of the telescope. Tr.01.24.2017 vol. 29 at 31:2-7

282. It can also happen in the future for those who will be affected by a sacred space being desecrated today that many generations from now that possibility of historical trauma may result as related to construction happening today. Tr.01.24.2017 vol. 29 at 34:7-11

283. I specifically say those who value traditional and customary practices. They don't even have to be daily practitioners but who value and respect those of us who do as well as those who would like to...then there is health effects, deleterious meaning harmful, health effects, when we are unable to practice and I believe that's valued by those who value traditional and customary practices as well. Tr.01.24.2017 vol. 29 at 39:11-15, 20-25

284. My research specifically asks people who were feeling ill effects. I asked people what the effects of that were, of the building of the telescope, so there was a direct connection between the telescope and how their health was affected. Tr.01.24.2017 vol. 29 at 40:7-12

285. When asked if construction of the TMT would affect people who are not Native Hawaiian, Dr. Taulii responded affirmatively, "absolutely." Tr.01.24.2017 vol. 29 at 41:1-3

286. We're doing research now that shows that when you practice traditional practice, they are protective factors against distress, that returning to traditional practices helps to reconnect than

disconnect. We can return to them as long as they haven't been destroyed or desecrated that we can heal from some of the health effects that have caused over many years. Tr.01.24.2017 vol. 29 at 9:50, 8-15, 19-22

287. Damage of a holy place or object or to treat a holy place or object with disrespect to be irreverent or outrageous to violate sanctity of a shrine, cemetery or burial "that definition fits my description." Tr.01.24.2017 vol. 29 at 43:2-6

288. You're relying on a system to protect you. And when it fails and you feel a constant sense of loss and hopelessness, that is actually in the causal model associated with health assimilation and colonization and harm effects lead to hopelessness, loss of identity and those things also lead to the poor health outcome. When you believe that law is set in place to protect you and if it doesn't it can create a sense of loss and hopeless that can lead to poor health outcomes. Tr.01.24.2017 vol. 29 at 46: 23-25; 47:1-11

289. Dr. Taulii stated that she has not seen any studies that report on the public health relating to, you know, the building of the TMT from any other sources and states that she thinks that we have to actually ask that question before we can determine that it's not going to harm people, because my research shows that it does. Tr.01.24.2017 vol. 29 at 48: 9-16

290. We will still see grave health disparities among native Hawaiians regardless of income and education unless we address these issues. Tr.01.24.2017 vol. 29 at 49:9-12

291. So you can't destroy a sacred site and then use it again to heal from the destruction of the sacred site. Tr.01.24.2017 vol. 29 at 53:1-3

292. Dr. Taulii states that absolutely she has seen individuals reporting receiving instruction from their ancestors or the spiritual realm in terms of kuleana or responsibility to protecting

sacred places? There are grave health effects when one is not able to respond to their responsibilities. A perspective as a pure scientist-the idea that the physical manifestation of the guilt, of pain, of anguish, of loss of connection, can result in poor health outcomes, heart problems, stress in the body and that can cause many health impacts. That's just the physical. Tr.01.24.2017 vol. 29 at 57:2-8, 14-22

293. High suicide rates, substance abuse, there is a lot of downstream effects of not being able to address those issues. I'm a scientist, I could draw you a model that shows how not being able to fulfill one's personal responsibility whether it be in a dream, or through an elder or generational knowledge passed on, that not being able to fulfill it can cause physical health effect, and that they are downstream effects of that initial prevention of being able to practice to fulfill that duty and responsibility whether it be physical, or whether it be emotional, the body reacts the same. Tr.01.24.2017 vol.. 29 at 58:5-19

294. I think there are things we can look at today that are happening, Standing Rock throughout the United States as well as Aotearoa where there are indigenous people who have relationships to place historically, health of populations are affected by the outcomes of decisions and the destruction of sacred places. Tr.01.24.2017 vol. 29 at 60:7-14

295. When you have no control is when you feel the greatest sense of loss and the greatest sense of health outcomes as a result of that loss. Tr.01.24.2017 vol. 29 at 60:12-15

296. The belief that we can change something, prevent desecration, prevent something that we know will cause ill health effects have that hope that we can change that and prevent loss of life, prevent illness, prevent irreversible destruction. We have hope for that. Tr.01.24.2017 vol. 29 at 61: 21-23, 62:1-6

297. The World Health Organization defines health as the physical, mental, social well-being and not merely the absence of disease or infirmity. Tr.01.24.2017 vol. 29 at 67:7-12

298. Places like Mauna Kea that allow us to practice and connect culturally and spiritually to our ancestors help Hawaiians and others find that quiet, spiritual connection that allows for healing that must occur and can only occur in places that hold that kind of reverence. Tr.01.24.2017 vol. 29 at 68:9-14

299. Our health is in grave danger if those places are not available to us. Our health is directly connected to them and the health of those places, and if they are not healthy, it will have grave effects on our health. We have already seen it for 200 years and we can't afford any more health disparity among a population that has been reduced so small because of the damage that's been done to our culture, our history, our aina, our language, our ability to practice without being prosecuted and unencumbered from our access. Tr.01.24.2017 vol. 29 at 69:2-12

300. Risks for children who are involved in this process are loss of culture and identity in self, hopelessness. Tr.01.24.2017 vol. 29 at 71:16-18

301. The Behavioral Risk Factor Surveillance System conducted by the US Govt. conducts an entire section that has ten questions on adverse childhood experiences that specifically gathers data from across the country to show that when someone witnesses as a child harm done that we can connect the to poor health outcomes. Tr.01.24.2017 vol. 29 at 70:20-25

302. The impact on the child is greater than any other impacts, and all of our children are witnessing this. The harm would be irreparable. Tr.01.24.2017 vol. 29 at 71:7-14

303. Dr. Taulii clarifying desecration stated that I would say no "it does not focus on feeling" I think that the term that I'm using has occurred not only in the recent with TMT, but other places

in which the people how are in my study, the term used in my study was the definition that I have used throughout my testimony. Tr.01.24.2017 vol. 29 at 73:19-20

304. I actually specifically said, not in my testimony, that education alone will not address the harm that will occur as building of the TMT. I specifically said that, we've eliminated after eliminating education and income, which are associated here that it will not alone address the issues. Tr.01.24.2017 vol. 29 at 81:16-22, Exhibit 1.1

305. Research shows that trauma can be cumulative and over and entire lifetime. Tr.01.24.2017 vol. 29 at 85:3-4

306. I think any time that the practices of Native Hawaiians whether they be customary traditional practices are encumbered or opposed that it can lead to challenges loss of identity loss of hope and can lead to poor health outcome. Tr.01.24.2017 vol. 29 at 93:24-25, 94:1-3

307. States TMT will cause a substantial adverse impact to the existing natural resources as well as a sacred area within the culture would. Tr.01.24.2017 vol. 29 at 109:10-13.

We as a people to help control the health issues and the psychological traumas, we as a people must heal today by having our sacred space intact. Tr.01.24.2017 vol. 29 at 110:2-5

308. My research specifically associated with the TMT focused on how the destruction of or the harm of sacred spaces affects health. Tr.01.24.2017 vol. 29 at 111:13-15

309. Dr. Taualii would include the destruction of an 'ahu that is used for prayers and offerings that Native Hawaiians built as within desecrating sacred spaces. Tr.01.24.2017 vol. 29 at 111:20-25

310. Participating in a the building of an ‘ahu is a traditional practice and one way to protect against distress. Tr.01.24.2017 vol. 29 at 112:4-15

311. Dr. Taulii states that it would be extremely important to have mentors and cultural practitioners helping Native Hawaiians especially the young to participate in traditional practices. Tr.01.24.2017 vol. 29 at 112:11-24

312. Dr. Taulii, in direct reference to Criteria 8, stated that all her research shows that the TMT is the direct opposite of meeting the criteria for health safety and welfare. Tr.01.24.2017 vol. 29 at 116:20-25

United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP)

313. A point made by many intervenors, including Mr. Freitas, and numerous witnesses pertains to the relevance of the UNDRIP and the moral foundation it articulates with regard to the protection of indigenous sacred sites. For this reason, and because it sets out globally-recognized standards for protection of traditional and customary practices and sacred lands in their own right, this section established a record of testimony regarding the UNDRIP.

314. In his opening statement before the Hearing Officer, Professor Johnson asserted his primary point in support of William Freitas’ traditional and customary practices on Mauna Kea:

“Religious life on Mauna Kea has changed since and because of the CDUA. These changes are significant and should be accounted for in the permitting process. In other words, a lot has happened since those papers were filed, and responsible permitting process should account for them.” G.Johnson, vol.37 Tr.02.16.17 at 28:3-9

315. Immediately following, Professor Johnson expanded the jurisdictional and moral reach of his point by observing that the cultural protection and procedural provisions of the UNDRIP

“holds out an ideal” by means of which reconsideration of the permit and the documents it relies upon should be engaged. G.Johnson, vol.37 Tr.02.16.17 at 28:10-16

316. Professor Johnson, in response to a question from C. Freitas, describes how UNDRIP sets out standards for international indigenous rights, including with regard to traditional and customary practices. G.Johnson, vol.37 Tr.02.16.17 at 81:10-25; see also M.Trask, vol. 42 Tr.02.28.17 at 181:1-8, 14-25

317. William Freitas affirms his belief that his cultural and traditional rights are protected by the UNDRIP. W.Freitas, vol.44 Tr.03.02.17 at 226:1-4

318. Ron Fujiyoshi affirms his understanding that Native Hawaiian traditional religious practices are protected by the provisions of the UNDRIP. R.Fujiyoshi, vol.44 Tr.03.02.17 at 138:1-4

CONCLUSIONS OF LAW

These Findings of Fact and Conclusions of Law shall be construed as follows:

- (1) If it is later determined that a Finding of Fact should be properly deemed to be a Conclusion of Law, the Court so concludes on those legal issues.
- (2) If it is later determined that a Conclusion of Law should properly be deemed to be a Finding of Fact, the Court so finds on those factual issues.
- (3) To the extent that any of the following Findings of Fact and Conclusions of Law include a mixed finding of fact and conclusion of law, each shall be given full effect.

I. LEGAL FRAMEWORK

A. Burden of Proof

1. The Conservation District rules state that "[t]he applicant shall have the burden of demonstrating that a proposed land use is consistent with" the criteria set forth in HAR § 13-5-30(c). As the party proposing a land use in the Conservation District, UH/UHH is clearly the "applicant" in this matter. Therefore, the burden of proof rests decisively upon the Applicant to prove that it meets the requirements for the granting of the CDUA. The degree of proof is a preponderance of the evidence. HAR § 13-5-30(c); HRS § 91-10(5).

B. Constitutional Authority

2. The Preamble of the Hawai'i State Constitution states:

We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "*Ua mau ke ea o ka aina i ka pono.*"

We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.

We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

3. Article I, Section 4, of the Hawai'i State Constitution states:

No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

4. Article I, Section 5, of the Hawai'i State Constitution states:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

5. Article XI, Section 1, of the Hawai'i State Constitution states:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

6. Article XI, Section 7, of the Hawai'i State Constitution states:

The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

7. Article XI, Section 9, of the Hawai'i State Constitution states:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

8. Article XII, Section 4, of the Hawai'i State Constitution states:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

9. Article XII, Section 7, of the Hawai‘i State Constitution states:

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 descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

10. Article XIV, of the Hawai‘i State Constitution states:

The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government. To keep faith with this belief, the legislature, each political subdivision and the constitutional convention shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies.

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction. The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees as provided by law to make public financial disclosures. Other public officials

having significant discretionary or fiscal powers as provided by law shall make confidential financial disclosures. All financial disclosure statements shall include, but not be limited to, sources and amounts of income, business ownership, officer and director positions, ownership of real property, debts, creditor interests in insolvent businesses and the names of persons represented before government agencies.

11. Article XVI, Section 7, of the Hawai'i State Constitution provides:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

12. Amendment I of the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

13. Amendment XIV, Section 1, of the U.S. Constitution provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C. Statutory and Regulatory Authority

1. State Level

14. HRS Chapter 205, State Land Use Law outlines the establishment and purpose of the classification of the four major land use districts in which all lands in the State shall be placed.

The conservation district is the most restrictive and is defined to include:

areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.

15. HRS Chapter 183C, Conservation District outlines the administration of public lands within the conservation district and articulates this public policy:

The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

16. HRS § 183C-3 outlines the powers and duties of BLNR and DLNR in the administration of public lands within the conservation district. Relevant parts of this statute are listed below:

- (3) Adopt rules, in compliance with chapter 91 which shall have the force and effect of law;
- (4) Set, charge, and collect reasonable fees in an amount sufficient to defray the cost of processing applications for zoning, use, and subdivision of conservation lands;
- (5) Establish categories of uses or activities on conservation lands, including allowable uses or activities for which no permit shall be required;

- (6) Establish restrictions, requirements, and conditions consistent with the standards set forth in this chapter on the use of conservation lands; and
- (7) Establish and enforce land use regulations on conservation district lands including the collection of fines for violations of land use and terms and conditions of permits issued by the department.

17. HRS § 183C-6 outlines DLNR's duties pertaining to permits and site plans for land use in the conservation district. Relevant parts of this statute are listed below:

- (a) The department shall regulate land use in the conservation district by the issuance of permits.
- (c) The department shall hold a public hearing in every case involving the proposed use of land for commercial purposes, at which hearing interested persons shall be afforded a reasonable opportunity to be heard. Public notice of the time and place of the hearing shall be given at least once statewide and in the county in which the property is located. The notice shall be given not less than twenty days prior to the date set for the hearing. The hearing shall be held in the county in which the land is located and may be delegated to an agent or representative of the board as may otherwise be provided by law and in accordance with rules adopted by the board. For the purposes of its public hearing or hearings, the department shall have the power to summon witnesses, administer oaths, and require the giving of testimony. As used in this subsection, the term "commercial purposes" shall not include the use of land for utility purposes.
- (d) The department shall regulate the construction, reconstruction, demolition, or alteration of any structure, building, or facility by the issuance of site plan approvals.

18. HRS Chapter 205A, Coastal Zone Management addresses issues from an integrated ecosystem perspective and all lands of the State are considered to be in the coastal zone management area.

19. HRS § 205A-2 The objectives and policies of the coastal zone management program relate to recreational resources, historic resources, scenic and open space resources, coastal ecosystems,

economic uses, coastal hazards, managing development, public participation, beach protection and marine resources.

20. HRS § 205A-2 outlines the objectives and policies of the coastal zone management program.

Relevant parts of this statute are listed below:

(a) The objectives and policies in this section shall apply to all parts of this chapter.

(b) Objectives.

(2) Historic resources;

(A) Protect, preserve, and, where desirable, restore those natural and manmade historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.

(3) Scenic and open space resources;

(A) Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.

(c) Policies.

(2) Historic resources;

(A) Identify and analyze significant archaeological resources;

(B) Maximize information retention through preservation of remains and artifacts or salvage operations; and

(C) Support state goals for protection, restoration, interpretation, and display of historic resources.

(3) Scenic and open space resources;

(A) Identify valued scenic resources in the coastal zone management area;

(B) Ensure that new developments are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;

HRS § 205A-2.

21. HRS § 205A-5 articulates that all agencies shall be in compliance with this chapter.

(a) All agencies shall ensure that their rules comply with the objectives and policies of this chapter and any guidelines enacted by the legislature.

(b) All agencies shall enforce the objectives and policies of this chapter and any rules adopted pursuant to this chapter.

22. HRS Chapter 226, Hawaii State Planning Act provides guidance for all state agencies to “set forth the Hawaii state plan that shall serve as a guide for the future long-range development of the State; identify the goals, objectives, policies, and priorities for the State.”

23. HRS § 226-12 outlines the Hawaii State Planning Act’s objective and policies for the physical environment--scenic, natural beauty, and historic resources.

(a) Planning for the State's physical environment shall be directed towards achievement of the objective of enhancement of Hawaii's scenic assets, natural beauty, and multi-cultural/historical resources.

(b) To achieve the scenic, natural beauty, and historic resources objective, it shall be the policy of this State to:

(1) Promote the preservation and restoration of significant natural and historic resources.

(2) Provide incentives to maintain and enhance historic, cultural, and scenic amenities.

(3) Promote the preservation of views and vistas to enhance the visual and aesthetic enjoyment of mountains, ocean, scenic landscapes, and other natural features.

(4) Protect those special areas, structures, and elements that are an integral and functional part of Hawaii's ethnic and cultural heritage.

(5) Encourage the design of developments and activities that complement the natural beauty of the islands.

24. HAR Title 13, Chapter 5, Conservation District regulates “land use in the conservation district for the purpose of conserving, protecting, and preserving the important natural 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.

25. BLNR amended its administrative rules, Chapter 5 HAR, relating to the Conservation District on August 12, 2011. HAR § 13-5.

26. HAR § 13-5-30 Permits, stipulates that “Land uses requiring comprehensive review by the board are processed as board permits, management plans, or comprehensive management plans, and temporary variances. Departmental permits and emergency permits are processed by the department and approved by the chairperson. Site plans are processed by the department and approved by the chairperson or a designated representative. If there is any question regarding the type of permit required for a land use, an applicant may write to the department to seek a determination on the type of permit needed for a particular action.” HAR § 13-5-30.

27. HAR § 13-5-30(c) stipulates that when evaluating the merits of a proposed land use, the department or board shall apply the following eight criteria:

- (1) The proposed land use is consistent with the purpose of the conservation district;
- (2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;
- (3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;
- (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;

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

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

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

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

28. HAR § 13-5-24 identifies land uses in the resource subzone and stipulates that identified land uses beginning with letter (D) such as R-3 Astronomy Facilities require a board permit and a management plan.

(D-1) Astronomy facilities under a management plan approved simultaneously with the permit, is also required. HAR § 13-5-24.

29. HAR § 13-5-39 Management plan approvals, stipulates:

(a) Where required, management plans shall be submitted with the board permit application and shall include the requirements listed in Exhibit 3, entitled "Management Plan Requirements: August 12, 2011," which is located at the end of this chapter and made a part of this section.

(b) The department or board may require the preparation of a comprehensive management plan where it finds that further development may lead to significant natural, cultural, or ecological impacts within the conservation district. The geographic area, specific resources to be protected and conserved, and other content of a comprehensive management plan shall be determined by the department or board.

(c) An annual report to the department is required which shall include the status of compliance of the permit conditions and the implementation of land uses pursuant to the approved management plan schedule.

30. Chapter 13-5, Exhibit 3 outlines Management Plan Requirements: August 12, 2011.

- 1 General description of the proposed use (e.g., forestry, fishpond, astronomy, aquaculture, agriculture).
- 2 Project location (e.g., island map, location map, site plan (drawn to scale)).
- 3 Natural resource assessment including descriptive information about the natural resources in the project vicinity such as biological, archaeological, cultural, geological, coastal, recreational, and scenic resources, where applicable. The presence of any threatened or endangered species shall be disclosed.
- 4 Natural hazard assessment including descriptive information of erosion, flooding, slope, tsunami, and volcanic hazards, where applicable.
- 5 A description of best management practices used during project construction and implementation (e.g., mitigation measures).
- 6 A description of the best management practices to be used during the lifetime of the project (e.g., mitigation measures).
- 7 A description of the conservation methods and applications to be used in the short term and long term (e.g., mitigation measures).
- 8 Description of existing uses and facilities, if any.
- 9 Description of proposed facilities and uses, including phases, if applicable.
- 10 Activity schedule
Project schedule including description of project sequencing from project construction to project completion and on-going maintenance plans, including a description and timing of natural resource monitoring and maintenance plans. A description of the annual reporting requirements.
- 11 Any other information or data, as required by the department.

31. HRS Chapter 343, Environmental Impact Statements articulates this public policy:

The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

It is the purpose of this chapter to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.

32. HRS § 344-3, Environmental policy, stipulates it shall be the policy of the State, through its programs, authorities, and resources to conserve the natural resources and enhance the quality of life. Relevant parts of this statute are listed below:

(1) Conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii.

(2) Enhance the quality of life by:

(C) Establishing communities which provide a sense of identity, wise use of land, efficient transportation, and aesthetic and social satisfaction in harmony with the natural environment which is uniquely Hawaiian; and

(D) Establishing a commitment on the part of each person to protect and enhance Hawaii's environment and reduce the drain on nonrenewable resources.

33. HRS § 344-4 outlines guidelines for all agencies, in the development of programs, shall, insofar as practicable, consider in pursuance of the state policy to conserve the natural resources and enhance the quality of life. Relevant parts of this statute are listed below:

(2) Land, water, mineral, visual, air, and other natural resources.

(A) Encourage management practices which conserve and fully utilize all natural resources;

(D) Encourage management practices which conserve and protect watersheds and water sources, forest, and open space areas;

(E) Establish and maintain natural area preserves, wildlife preserves, forest reserves, marine preserves, and unique ecological preserves;

(F) Maintain an integrated system of state land use planning which coordinates the state and county general plans;

(3) Flora and fauna.

(A) Protect endangered species of indigenous plants and animals and introduce new plants or animals only upon assurance of negligible ecological hazard;

(B) Foster the planting of native as well as other trees, shrubs, and flowering plants compatible to the enhancement of our environment.

(4) Parks, recreation, and open space.

(A) Establish, preserve and maintain scenic, historic, cultural, park and recreation areas, including the shorelines, for public recreational, educational, and scientific uses;

(C) Promote open space in view of its natural beauty not only as a natural resource but as an ennobling, living environment for its people.

(5) Economic development.

(A) Encourage industries in Hawaii which would be in harmony with our environment;

(D) Encourage all industries including the fishing, aquaculture, oceanography, recreation, and forest products industries to protect the environment;

(10) Citizen participation.

(A) Encourage all individuals in the State to adopt a moral ethic to respect the natural environment; to reduce waste and excessive consumption; and to fulfill the responsibility as trustees of the environment for the present and succeeding generations; and

(B) Provide for expanding citizen participation in the decision making process so it continually embraces more citizens

33. HRS § 711-1107, Desecration Statute

(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. [L 1972, c 9, pt of §1; gen ch 1993; am L 2002, c 198, §1]

State of Hawai'i Supreme Court decisions hinging on permitting processes of state agencies.

These cases include:

1. *Kaleikini v. Yoshioka* (128 Hawai'i 53, 283 P.3d 60, 2012), affirming the significance of archaeological surveys under state law and underscoring the fact that HRS 6E-43 is clear in setting out the procedural priority of completing AIS surveys before commencing construction.
2. *Hall v. DLNR* (CAAP-12-0000061). Relying on the Supreme Court's position in *Kaleikini*, the Intermediate Court of Appeals ordered Kawaiaha'o Church to cease

construction activities pending conclusion of the appeal process. On December 4, 2013, the Hawai'i Supreme Court upheld the ICA ruling on the basis of Kaleikini, where there were significant procedural failures in permit issuance (SCWS-12-0000061).

3. *Sierra Club v. Dept. of Trans.* (202 P. 3d, 120 Haw. 188, 2009). The State of Hawai'i Supreme Court invalidated the Super Ferry permit, finding that a special legislative rule that removed the necessity for a comprehensive EIS was unconstitutional on several grounds, including that it violated the public's due process rights.

2. Federal Law

The American Indian Religious Freedom Act 1978 (42 U.S.C. § 1996) states that:

It shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The American Indian Religious Freedom Act of 1978 states specifically the “inherent right of freedom to believe, express, and exercise the traditional religions of . . . Native Hawaiians, including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rites” shall be protected and preserved.

3. International Level

United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP, see http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

From the Preamble, (p2):

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Further Articles of UNDRIP pertinent to this contested case hearing are as follows (see http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf):

On religious free and cultural and traditional rights:

Article 11

1. Indigenous peoples have the right to practise 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, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual,

religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, 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.

On land rights and traditional and customary practices thereon:

Article 25

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.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

With regard to development rights:

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

On procedural justice:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

II DISCUSSION OF LAW AND CONCLUSIONS

Historical and Legal Background Considerations

Chief Justice William Shaw Richardson wrote in a decision:

When the royal patents were issued in 1866 by King Kamehameha V, the sovereign, not having any knowledge of the data contained in the publications of the U.S. Coast and Geodetic Survey, did not intend to and did not grant title to the land along the ocean boundary as claimed by the

appellees. Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage. *Keelikolani v. Robinson*, 2 Haw. 514. 316 (Emphasis supplied).

United States Public Law 103-150 states:

Whereas, the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government; and

Whereas, the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum; (Emphasis supplied).

The lands of Mauna Kea were designated by the Mahele of 1848 as the Government land of Ka'ohē and the Crown land of Humu'ula.

At the time of the Mahele of 1848 the population of Hawai'i was comprised ethnically of 98% Native Hawaiian.

Prior to the Mahele of 1848 the ahupua'a of Kaohe belonged to Victoria Kāmāmalu, the *Kuhina Nui* (Premier) of Hawai'i and its crown princess, sister to Kamehameha IV and Kamehameha V.

The history of the lands of Mauna Kea require the use of these lands should be subject to the highest level of judicial scrutiny, with the priority of protecting traditional and customary practices by Native Hawaiians.

Concluding Discussion

1. I am a traditional Native Hawaiian cultural practitioner with standing as an intervenor in this contested case (FoF 1, 148-152; WDT of William Freitas at exhibit T-3). I offer my concluding discussion here.

2. Through a preponderance of evidence submitted and testified to by Native Hawaiian cultural practitioners and witnesses, it is evident that Mauna Kea is a sacred mountain and has historically been used as a site for the practice of customary and traditional religion (FoF 23, 34, 86, 212; FEIS Sec. 3.2, 3.3).

3. The State Supreme Court case remanded for a new permit for the TMT project and acknowledged the sacred nature of mountain in general and the summit region of Mauna Kea in particular. (*Mauna Kea Anaina Hou v. Board of Land and Natural Resources* 363 P.3d 224 (2015), concurring)

4. The CDUA through its acceptance and acknowledgment of the FEIS (CDUA Sec. 4 p.4-6) recognized and validated Native Hawaiian understanding of the sacred nature of what Maly (1999, 2005) terms “cultural landscapes” and “ritual landscapes” affording unique protections to these areas.

5. Furthermore and most significantly, the preponderance of evidence presented in this contested case hearing establishes that the building of the TMT telescope on top of Mauna Kea will interfere with the practice of this religion and desecrate a sacred mountain (FoF 23, 34, 86, 212; Article I, Section 4 and Article XII, Section 7, Hawai’i State Constitution; Amendments I & XIV U.S. Constitution; HRS § 205A-2, HRS § 226-12; HAR § 13-5-30(c); HAR Ch.343; HRS § 344-3, 344-4; HRS § 711-1107; 42 U.S.C § 1996; *American Indian Religious Freedom Act of 1978*; *United Nations Declaration on the Rights of Indigenous Peoples* Art. 11, 12, 25).

6. As had been made abundantly clear throughout this contested case, Mauna Kea *continues* to be sacred to many Native Hawaiians. Traditional and customary religious practices are frequently engaged on, around, and for the mauna. These include pule (prayer), song (mele), dance (hula), chants (oli), the building, consecrating, and care for altars (ahu), as well as the

making of regular offerings (ho`okupu) at them, among other ceremonies (FoF FoF 24, 31-33, 37, 91, 102, 105, 106, 119, 176, 180, 215-217, 251).

7. Protecting Mauna Kea is regarded as a form of ceremony (FoF 219).

8. My own traditional religious practices on the mauna are of this nature (FoF 150, 158, 165, 166-168, 182, 186-188).

9. These expressions of traditional and cultural practices are deeply sincere (FoF 39-43) and represent my kuleana with regard to threats to the wellbeing of the mauna (FoF 27, 28, 32, 37-38, 47, 171, 187, 219, 268).

10. For many traditional practitioners, the proposed project would be a form of desecration (FoF 113, 267-268, 303, 309). We have already experienced profound desecration at Ahu o Kauakoko (see Exhibits T-1 and T-1.g; FoF 42, 177, 180, 201, 205, 207), which was emotionally devastating to our community and a source of outrage (see *supra* HRS § 711-1107). We shudder to think how great the despair would be if unmitigated desecration were to continue on our beloved mauna (cf. FoF 113-114, 138, 223).

11. The State of Hawai'i has a mandated duty to prevent such desecration and afford protection and appropriate mitigation (HRS § 711-1107; HAR§ 13-5 Ex. 3).

12. In order to stay onipa`a and in line with our intention to malama Mauna Kea and each other, we have not reacted to such desecration with violence or anger (FoF 22). Instead, we embrace Kapu Aloha (FoF 24, 189, 190; exhibit T-1.d). A longstanding tradition of nonviolence, love, and intentionality, this practice is said to extend back at least to the time of Kamehameha and also prevails in current ritual contexts, including on the grounds of the Pu`ukohalā, a most sacred heiau at the foot of Mauna Kea. My own work with youth (FoF 187) on the mauna is a form of

Kapu Aloha (FoF 168). The practice of Kapu Aloha on the mauna is not contemplated by the current CDUA (CDUA Sec.4, p.4-7; Sec.2, p.2-11).

13. The Kia'i perpetuate the ono path of this tradition on the mauna, holding each other to the highest spiritual standards of our ancestors (see, for example, exhibit T-1.f). We know our kupuna are proud when they see us and our keiki walking in their paths, doing what we know to be pono. Kapu Aloha is living Hawaiian religion and its expression has a rightful place in Hawai'i. My participation in building, consecrating, and ministering at ahu on the proposed TMT site has been in the spirit of Kapu Aloha and in a traditional and customary manner (see exhibit T-1.e) which is protected by numerous provisions of law (Article I, Section 4 and Article XII, Section 7, Hawai'i State Constitution; Amendments I & XIV U.S. Constitution; HRS § 205A-2, HRS § 226-12; HAR § 13-5-30(c); HAR Ch.343; HRS § 344-3, 344-4; 42 U.S.C § 1996; *American Indian Religious Freedom Act of 1978*; *United Nations Declaration on the Rights of Indigenous Peoples* Art. 11, 12, 25).

14. In my life's spiritual work I have been focused on pohaku and construction of significant religious sites with them, including those at the proposed TMT site (FoF 162-163, 167-170, 172-176).

15. Ahu such as these are sites of prayer, healing and other forms of ceremony (FoF 32, 34, 37-38, 179, 181-182, 188, 196, 198-199, 217, 218, 262-268). Such ahu are also for anchoring intentions (FoF 199). The placement of ahu is spiritually guided (FoF 263-264). A revised and updated FEIS and CMP would provide the foundation for a meaningful determination as to whether the CDUA for the TMT project is accurate and complete.

16. These traditional and customary practices are not addressed in the FEIS and therefore are not adequately accounted for by the CDUA or the mitigation measures it proposes (Fof 56, FEIS Sec. 3.2, p.3-15, CDUA Sec.4, p.4-7; Sec.2, p.2-11).

17. A community of Native Hawaiians has been involved in traditional and customary practices at the ahu with me and independent of me. Collectively, we are distressed about the future of these religious sites and the fate of the mauna they stand on in protection and reverence.

Professor Johnson, one of my witnesses, testified to the fact that the FEIS designates contemporary ahu construction as traditional (FoF 63) and, based on the stated criteria of the FEIS and the CDUA and the “significance” criteria established by HRS Section 11-200-12, these ahu should be assessed in a revised CDUA via an updated FEIS/CMP with reference to possible adverse impacts to both the community at large and more specifically, the Native Hawaiian traditional religious and spiritual practitioners who practice regularly on the mauna (FoF 46-65).

18. So it is that we appeal to state, federal, and international legal instruments that provide for the protection of indigenous sacred places and for consultation regarding their development, ***including and especially by way of due process*** (Hawai‘i State Constitution, Article 12, Section 7; *American Indian Religious Freedom Act* [42 U.S.C. § 1996]; *United Nations Declaration on the Rights of Indigenous Peoples*, Articles 11-12, 18-19, 25-27, 32, 38-40; see also FoF 66-67, 87, 184). Our religious practices on Mauna Kea should be accorded such consideration. Our culture and the mauna itself deserve this level of respect.

19. Under State of Hawai‘i administrative laws and procedures, the front line for protection of Native Hawaiian traditional and customary rights is found in permitting processes such as the one we have endured here (see *supra*, HRS Chapter 183C, Conservation District; HAR Title 13, Chapter 5, Conservation District; with regard to CDUA application requirements in particular, *supra* HAR § 13-5-30(c); also of relevance, *supra* HRS § 344-3, Environmental policy).

20. The Native Hawaiian practitioner community is maka‘ala (awake) to this fact and has been working hard to ensure our rights are protected therein (FoF 134, 240). The State Supreme Court has indicated its understanding of the gravity of this predicament (see *supra*, *Kaleikini v.*

Yoshioka; Hall v. DLNR), which is why we are at this crossroads and why we have petitioned for the CDUA to be held to a standard worthy of this home we share.

21. My witnesses and I have argued that the CDUA did not take adequate account of Native Hawaiian customary and traditional practices on Mauna Kea, including my own and those of my family and community. The CDUA and the documents it relies upon (the FEIS, the CMP, and the Archeological Inventory Survey) are sorely and irresponsibly out of date. Furthermore, the documents do not demonstrate that robust consultation groundwork was laid in the process of reaching conclusions about the cultural significance of Mauna Kea and sites thereon (FoF 45, 47, 55-68, 134, 227; *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai‘i 376, 363 P.50 (2015) majority and concurring).

22. Primarily due to lack of timeliness, but also because of minimal consultation practices when the above mentioned requisite studies and surveys were conducted, the CDUA (relying on data from the FEIS) does not adequately represent the status of current traditional and customary beliefs and practices on the mauna (FoF 57-59, 69, 240-241, 244). For this reason it is unable to articulate meaningful mitigation measures (FoF 239). (CDUA Sec.2 p.2.8-11; FEIS p.S-12; FEIS Appendix E, demonstrating primary data for cultural survey was published in 1999 by Maly).

23. How can developers mitigate that which has not been adequately assessed and engaged? Criteria for measuring impact have not been met (FoF 62, 65, 239). The CDUA and FEIS bear a burden to propose reasonable and meaningful mitigation measures (see, e.g., *supra* HRS Chapter 343, CDUA Sec.2 p.2.8-11; FEIS p.S-12).

24. It cannot be stressed enough that meaningful mitigation—possibly including an informed decision NOT TO PROCEED WITH THE PROJECT—depends on robust, thorough, and responsive consultation with practitioners who have a stake in the health of the mauna and the

community. Without due consideration and humane mitigation, numerous individuals have testified that they will be harmed by the proposed project, myself among them (FoF 128-129, 185, 221-223, 228).

25. Collectively, we Native Hawaiians will be injured irreparably, including through wounds incurred by callous treatment from the very government entrusted with our well-being (FoF 54, 245, 247-248, 269-289).

26. If the permit is approved without further remand for an updated CDUA/FEIS/CMP, the mauna will suffer according to my religious and spiritual beliefs, and this in turn, will detrimentally affect the Kanaka Maoli for generations to come (FoF 171, 223). This is a direct violation of Criterion 8, HAR § 13-5-30 (c)

27. In my case, no representative of UH or TIO has approached me about consultation or mitigation with regard to the ahus on the proposed TMT site (FoF 193). Absent such consultation as a component of the CDUA process, my rights will not have been addressed, either substantially or by way of a fair process (FoF 45). I have gone on record saying I am open to such consultation (FoF 194).

28. The State Supreme Court has demanded fairness and the appearance of fairness in this matter (*Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.50 (2015)).

29. I trust that the Hearing Officer and the BLNR are thus eager to rectify this situation by requiring the applicant to resubmit its CDUA with documentation of responsible, representative, and timely consultation and mitigation measures that flow from those as envisioned by the state Supreme Court (*Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.50 (2015) majority and concurring).

30. I urge you not to let this become another case of failed permitting diligence (FoF 44; for recent legal cases on permitting in the State of Hawai'i see *supra*, *Kaleikini v. Yoshioka*; *Hall v. DLNR*; *Sierra Club v. Dept. of Trans.*).

Please let traditional practitioners have a meaningful voice in this process. Mahalo.

PROPOSED DECISION ORDER

Based upon the full record of this contested hearing, the permit for the proposed TMT telescope is *denied*. This order is based upon the following procedural issues, findings of fact and conclusions of law:

1. The preponderance of evidence presented at the contested case hearing supports the conclusion that a large majority of Native Hawaiian religious practitioners view the construction of the telescope as incompatible with their traditional and customary practices and religious life on Mauna Kea today.
2. Crucially, the full extent of traditional and customary practice on the mountain has not been documented in an updated CDUA as mandated by State of Hawai'i statutory law. The FEIS relies on data that is between 7-20 years old, and does not account for the growth and expression of traditional and customary practices occurring on the mountain over the last decade.
3. A new cultural impact study must be conducted and the FEIS revised in light of the robust and extensive religious life on Mauna Kea today.
4. Therefore, the mitigation measures proposed in the CDUA are irrelevant to current practices on the mountain and must be reconsidered and likely revised following a new cultural impact assessment focused on meaningful consultation with current traditional and customary religious practitioners such as William Freitas.
5. In 2015, the State Supreme Court ordered that the previously issued telescope construction permit be denied and a contested case hearing be held prior to the issuance

of the permit. According to the Court, this was a violation of petitioners' rights to due process by which "the dual requirements of the reality and the appearance of justice" must be met. (*Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.50 (2015)) "This means that the manner in which the justice system operates must be fair and must also appear to be fair." (*supra* p. 27) Numerous examples of unfairness and the lack of an appearance of fairness can be seen over the course of this contested case, and amount *in toto* to the necessity of legislative remedies for pro se defendants in contested case hearings. Three clear examples of this imbalance are as follows:

- a. The imbalance of pro se defendants' access to legal counsel due to financial limitations as compared to highly funded legal counsel from both UH and TMT/TIO
- b. This lack of legal counsel, compounded by the failure of the hearing officer to provide pro se defendants with models of FOF/COL/DO written from a perspective other than that of a hearing officer or BLNR, resulted in a notable imbalance in the ability on the part of pro se petitioners to create this essential document as compared to the legal teams of UH and TMT/TIO.
- c. While, by statute, transcripts of the hearing are not required, the fact that petitioners gained access to the transcripts made available first by hard copy in public libraries and then, only very brief time before the deadline, were provided with some transcripts digitally, amounted to a large and unfair imbalance in the ability of pro se petitioners to prepare their FOF/COL/DO documents. All parties should have equal and ongoing access to hearing transcripts if the dual prong fairness test is to be met.


The hearing officer may be constrained by statutory provision until such time legislative remedies are anticipated and enacted, but at minimum, the hearing officer can and must limit the actual and perceived unfairness by ensuring equal and extended time to prepare FOF/COL/DO's and by offering a legal workshop at both the outset and conclusion of the

hearing on how to prepare such documents, emphasizing their importance to the ultimate outcome and record of contested case proceedings. The fact that the hearing officer reminded petitioners that the FOF/COL/DO would be due at the conclusion of the hearing at numerous junctures in the proceeding is meaningless when petitioners have no training in preparation of such documents and have no access to transcripts along the way.

6. The current contested case hearing, while providing an initial opportunity to be heard in a “meaningful time and in a meaningful manner” (Sandy Beach Def. Fund v. City & City of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)), provides ample evidence to the BLNR and to the courts in the event of further judicial scrutiny that current religious practice is not reflected in the evidentiary basis for the FEIS and the CDUA, rendering the “meaningful time and meaningful manner” standard meaningless. The contested case hearing itself does not satisfy the “meaningful time and meaningful manner” standard, instead offering a venue through which current religious life on Mauna Kea is shown to be vastly different and much more extensive than the much older data employed in the CDUA and FEIS reflect.
7. The balancing of the constitutional rights of Native Hawaiian religious practitioners with the interests of UH and TMT to build the telescope can only be adjudicated with full knowledge of the scope and practice of the religious practitioners. Therefore, the case is remanded for an updated CDUA and EIS that accurately and meaningfully reflect current Native Hawaiian religious and cultural practices.

May 28, 2017

Kailua-Kona


William Freitas Pro Se Intervenor

(under threat, duress and coercion I stand in protection of Mauna Kea and Due Process)

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
Document title:

CERTIFICATE OF SERVICE

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