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Cindy Freitas  
P.O. 4650  
Kailua Kona HI 96745  
hanahanai@hawaii.rr.com

BOARD OF LAND AND NATURAL RESOURCES  
FOR THE STATE OF HAWAII

IN THE MATTER OF	)	Case No. BLNR-CC-16-002
	)	
A Contested Case Hearing Re Conservation;	)	CINDY 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	)	
	)	

**CINDY FREITAS PROPOSED FINDING OF FACT, CONCLUSIONS OF LAW,  
DECISION AND ORDER**

**I. INTRODUCTION**

This case is based on the Conservation District Use Application HA-3568 ("CDUA") for the Thirty Meter Telescope Project ("TMT") to be located in the District of Mauna Kea in the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawai'i, TMK (3) 4-4-015:00. The total area of parcel is 11,288 acres and the area of proposed use is 8.7 acres on the northern plateau of the conservation district on Mauna Kea Science Reserve. The University of Hawai'i at Hilo, ("UH") is the applicant and Dr. Donald Straney, Chancellor who is authorized to sign the application on September 2, 2010 pursuant to chapter 183C of the Hawaii Revised Statutes ("HRS") and chapter 13-5 of the Hawaii Administrative Rules ("HAR").

## **A. First Proceeding – Procedural Matters**

1. CDUA HA-3568 First Contested Case Hearing & Remanded Supreme Court ruling as stated on December 2, 2015. 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 Decision 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 officer, or for other proceedings consistent with this opinion.

## **B. Second Proceeding - Procedural Findings of Fact**

2. On February 22, 2016, circuit court judge Greg K. Nakamura remanded The matter to the Board. February 26, 2016 the Board met to restart the contested process. A public solicitation for the hearing officer occurred, a three member committee evaluated applications, and the hearing officer was announced on March 31, 2016. Three supplemental disclosures were filed by Judge Amano in April, followed by more opportunities for the Petitioners to respond. The Board more gave all parties until May 2, 2016 to raise legal argument for or against the selection process and selection of the Hearing Officer (“HO”).

## **C. Selection of Hearing Officer**

3. March 31, 2016, in Minute Order No. 1 [Doc 1], the BLNR chair issued Notice of selection of Riki May Amano as HO on subject contested case. DOC 1 (All DOCS refer to dated March 31, 2016. BLNR has selected Riki Amano as the Hearing Officer. See all Docs’ in “<http://dlnr.hawaii.gov/mk/evidentiary-hearing-submittals/>” Document Library.
4. April 8, 2016, in Minute Order No. 2 [Doc.3], The BLNR issued Order delegating the conduct of the contested case hearing to a HO, and confirming that the chairperson was authorized to engage the services of a HO.
5. April 8, 2016 [Doc 4] , The BLNR Notice of filing of HO supplemental disclosure.



6. April 15, 2016 [Doc 5], Petitioners' objections to selection process and to appointment of HO made pursuant to Minute Order No. 1 dated March 31, 2016; Declaration of counsel; Exhibits 'A'-'G'. pursuant to HRS 92-6(a)(2)
7. April 21, 2016 [Doc 8], Applicant's response to Petitioners' objections to selection process and to appointment of HO made pursuant to Minute Order No. 1, dated March 31, 2016, filed on April 15, 2016
8. April 22, 2016 [Doc 9], Notice of filing of HO second supplemental disclosure, dated April 29, 2016; Exhibit 3
9. April 27, 2016 [Doc 10] Notice of filing of HO third supplemental disclosure, dated April 25, 2016; Exhibit 4
10. April 29, 2016 Minute Order 3 [Doc 11] Order setting deadlines for responses to HO supplemental disclosures
11. May 2, 2016 [Doc 13] Petitioners' responsive and supplemental objections to selection process and to appointment of HO made pursuant to Minute Order No. 1 date March 31, 2016
12. May 6, 2016 in Minute Order 4 [Doc 14]. Order regarding objections to the selection process, and regarding objections to the HO.
13. May 6, 2016 [Doc 15], Petitioners' objections regarding procurement committee and process and committee member/BLNR Board member; Declaration of Counsel; Exhibits "A"-"E".
14. May 13, 2016 [Doc 31] Petitioners' motion for reconsideration of Minute Order No. 4, filed on May 6, 2016 and/or motion to strike selection process and to disqualify various member and hearing officer; Memorandum in support of motion; declaration of Richard Naiwieha Wurdeman; Exhibits "a"-"D", pursuant to HRS 13-1-32.2; Chapter 92F
15. May 23, 2016 in Minute Order 6 [Doc 41] Order setting response date.
16. May 25, 2016 [doc 43] The UH statement of position on Petitioners' motion for reconsideration of minute order no. 4 filed on May 6, 2016 and/or motion to strike selection process and to disqualify various member and HO, filed May 13, 2016; Declaration of Counsel; Exhibits "1" and "2". Pursuant to HRS 13-1-39 and HRS 103D-304(b).
17. May 25, 2016 [Doc 42] Response to Petitioners' objection to Christopher Yuen.
18. May 26, 2016 [Doc 45] Amano fifth supplemental disclosure.



19. May 26, 2016 [Doc 46] TMT International Observatory, LLC's supplemental memorandum in support of its motion to have TMT International Observatory, LLC admitted as a party in the cch, Filed April 8, 2016
20. June 3, 2016 in Minute Order 9 [Doc 63] Order denying Petitioners' motion for reconsideration of Minute Order No. 4 filed on May 6, 2016 and/or Motion to strike selection process and to disqualify various members and HO.
21. August 26, 2016 in Minute order 17 [Doc 245] Order denying motion objecting to HO and the HO Selection Process.
22. October 16, 2016 [Doc 375] Amano seventh supplemental disclosure.

#### **D. Scheduling Pre-Hearing Conference**

23. Minute Order No. 4 [Doc 16], filed on May 6, 2016 submitted the above captioned matter to the hearing officer to proceed with a contested case accordingly, pre-hearing conference is set for Monday, May 16, 2016, at Noon, in the Kalanimoku Board Room located on the first floor, Makai side, of the Kalanimoku Building at 1151 Punchbowl Street, Honolulu, Hawaii
24. May 9, 2016 [Doc 17] Correspondence from HO to counsel regarding pre-hearing conference.
25. May 26, 2016 Minute Order 7 [Doc 44] Order regarding 1st pre-hearing conference and Amano fourth supplemental disclosure.
26. May 27, 2016 Minute Order 8 [Doc 49] Order setting hearing on motions to intervene and 2<sup>nd</sup> pre-hearing conference.
27. August 9, 2016 in Minute Order [Doc 185] Order regarding change of location for august 12, 2016 continued hearing and 3<sup>rd</sup> pre-hearing conference.
28. August 22, 2016 in Minute Order [Doc 238] Order regarding third pre-hearing conference.
29. October 10, 2016 in Minute order No. 21 [Doc 344] Order regarding fourth pre-hearing conference.
30. September 26, 2016 in Minute order 20 [Doc 289] Order setting fifth pre-hearing conference.

#### **E. Parties, Intervenor and Witnesses**

31. Minute Order No. 13, DOC 115 Dated July 21, 2016. Admission as a party in a contested case proceeding and standing, are set forth in Hawaii Administrative Rule (“HAR”) Section 13-1-31(b) and (c), HAR 13-1-31(b) provides the requirements for “mandatory admission”. The following individuals are GRANTED because each individual’s participation will substantially Assist the Hearing Officer in her decision making: Mehana Kihoi, C.M. Kaho’okahi Kanuha, Harry Fergerstrom, Joseph Kualii Lindsey Camara, Jennifer Leina’ala Sleightholm, Maelani Lee, \*Cindy Freitas, \*William Freitas, Richard Maele Deleon, Temple of Lono by Lanny \*\*Sinkin, Kalikolehua Kanaele, Stephanie-Malia:Tabbada, Tiffnie Kakalia, Glen Kila, Dwight J. Vicente and Brannon Kamahana Kealoha.

\*Cindy Freitas and William K. Freitas submitted their respective requests after the deadline. Upon inquiry, explanations were proffered by the requestors and the Hearing Officer found good cause existed for the late filings. \*\* Lanny Sinkin’s representation of the Temple of Lono is allowed as an officer of the organization and subject to submission of the Declaration confirming the same.

32. Applicant University of Hawai’i at Hilo (“UH”) Timothy Lui-Kwan, Esq.; John Manaut, Esq.; and Ian Sandison, Esq. Attorneys for the UH.
33. Petitioner Mauna Kea Anaina Hou Kealoha Pisciotto and Paul Neves.
34. Petitioner Deborah J. Ward
35. Petitioner Flores-Case ‘Ohana
36. Petitioner Clarence Kukauakai Ching
37. Petitioner The Hawaiian-Environmental Alliance (“KAHEA”) Yuklin Aluli, Esq. and Dexter K. Kaiama, Esq., Attorneys for KAHEA
38. David Louie, Esq., Attorney for Attorney General Doug Chin Department of the Attorney General and Individual Attorneys General
39. Intervenor Thirty Meter Telescope International Observatory LLC (“TMT”) J. Douglas Ing, Esq. and Ross Shinyama, Esq., Attorneys for TMT
40. Intervenor Perpetuating Unique Educational Opportunity (“P.U.E.O.”) Lincoln Ashida, Esq. and Newton Cho, Esq., Attorneys for PUEO.
41. Intervenor Lanny Sinkin for Temple of Lono with Kahuna Tamehameha Kamealoha Anumealin Nobriga.

42. Intervenor Harry Fergerstrom
43. Intervenor Mehana Kihoi
44. Intervenor C.M. Kahookahi Kanuha
45. Intervenor Joseph Camara
46. Intervenor Jennifer Leina'ala Sleightholm
47. Intervenor Stephanie-Malia Tabbada
48. Intervenor Tiffnie Kakalia
49. Intervenor Dwight Vicente
50. Intervenor Brannon Kamahana Kealoha
51. Intervenor Cindy Freitas
52. Intervenor William Freitas
53. Intervenor Kalikolehua Kanaele

**F. Cindy Freitas Witnesses**

54. There are some Exhibit ("Ex") discussed in the finding of fact and conclusion of law, in the interest of completeness, a comprehensive recitation of all Ex. entered in this proceeding.
55. Nanci Munroe  
Written Direct Testimony ("WDT") Ex. S-14a.  
Nanci Munroe stated, around or about April 2015 Nanci Munroe joined with the protectors of Mauna a Wakea at the Hale Pohaku. She also began to document activities on the Mauna with her phone and shared it on social media. Also she did daily and continued a routine to go up to the TMT access road to monitor any activities is going on up at the TMT site. (All Exhibit to this witness as follows: Ex. S-3, S-9, S-10, S-11, S-12, S-14b. S-14cS-14d, S-14g, S-14e. S-14f, S-15 and S-16).
56. Susan Rosier WDT Ex S-17a and S-17.

I was a mechanic assistant for over 33 years, up until May 2013. Ms. Rosier had been a heavy equipment truck driver hauling a lot of overwide overweight this



heavy equipment machineries and a lot of them are Goodfellow is and other companies. So she been monitoring the TMT events and noticed all this equipment going up to the mountain. And she has extensive knowledge of this equipment, how they work, the leakage, and mechanical things to do with heavy equipment.

(All Exhibit to this witness as follows: Ex. S-18, S-18a, S-18b, S-18b 1, S-18 2, S-18b 3, S-18b 4, S-18c, S-18e, S-18f, S-18g, S-18h, S-8I, S-18m, S-18n, S-18o, S-18p, S-18L)

57. Cindy Freitas, WDT Ex S-2a

I have visit Mauna Kea for years in the past as well as other places on the island. The issues about the water aquifer, and dikes, and some of them is the Manitowoc cranes, and the excavation of the area that they going to do to put the TMT down and the roads. And I've been going up there, like I said, since 1987, and then more so in 2015 and observing all the destruction and things that have been happening up there when we were up there mostly eight months. (2-21-17 Tr. V.38P.73L.14-22). (All Exhibit to this witness as follows: S-4, S-5, S-6, S-7, S-8, S-19, S-20, S-21, S-22, S-23, S-24, S-25, S-26, S-27, S-27a, S-27b, S-27c, S-27d, S-27e, S-27f, S-28, S-28a, S-28b, S-28c, S-28d, S-28d 2, S-28e, S-28f, S-29, S-29a, S-29b, S-30, S-30a, S-31, S-31a, S-31b, S-31c, S-31d, S-31e, S-31f, S-31g and S-31h).

## **G. Parties Witnesses**

58. Mr. Gray Sanders have been with the TMT Corporation since 2004 and since May 2014 with Thirty Meter Telescope International Observatory ("TIO") that was formed on May 6, 2014. Mr. Sanders is responsible for managing the design and construction of the TMT and her report to its board of directors. (TIO Witness; Ex C-2)
59. Mr. Perry J. White was the principal author of the Conservation District Use Application ("CDUA") HA-3568 for the TMT project. (UH Witness; Witness Statement 1)
60. Mr. Walter M. Heen. He was the first Director of the Office of Mauna Kea Management ("OMKM") at the UH and was appointed as Director of OMKM by Chancellor Rose Tseng in 2000. (UH Witness; Witness Statement 13)
61. Ms. Kehaunani Abad, PHD. Her professional areas are in anthropology, ethnography, archaeology, historic preservation, and Hawaiian Culture. (KAHEA Witness; Ex B.08a)
62. Mr. Braian Kawika Cruz. He is the author of the 2009-2010 cultural impact assessment ("CIA") for the TMT and was assigned to the TMT CIA project in 2009. (KAHEA Witness; Ex. B-57)



63. Ms. Ruth Aloua is a Kanaka Maoli (Native Hawaiian) and cultural practitioner from Kailua-Kona. I received my Bachelor of Arts in Anthropology from the University of Hawai'i at Hilo in 2011. Three years later in 2014 I graduated from Simon Fraser University in British Columbia, Canada with a Master of Arts in Archaeology. My knowledge and skills range from familiarity with archaeological and anthropological practices, policies, management plans, at the county, state, and federal level, agriculture and aquaculture food production, to place-based knowledge grounded in the people, place, and culture of the Kona District. ( Flores-Case 'Ohana Witness; Ex B.24a)

## **H. Hearing Officer Witnesses**

64. Minute Order No. 13, DOC 115 Dated July 21, 2016 Confirming the following individuals withdrew their requests and will instead be called as Hearing Officer WITNESSES as the contested case hearing as followed:
65. Wilma H. Holi P.O. Box 368 Hanapepe, HI 96716
66. Ivy McIntosh 67-1236 Panale'a St Kamuela HI 96743 [3popoki@gmail.com](mailto:3popoki@gmail.com)
67. Moses Kaelamakia Jr. 1059 Puku St. Hilo, HI 96720 [mkealama@yahoo.com](mailto:mkealama@yahoo.com)
68. Crystal F. West P.O. Box 193 Kapaau, HI 96755 [crystalinx@yahoo.com](mailto:crystalinx@yahoo.com)
69. Patricia Ikeda [pehekeanila@gmail.com](mailto:pehekeanila@gmail.com)

## **I. Site Visit to Mauna Kea**

70. August 22, 2016, in Minute Order No. 16 [Doc 238], on page 3 and 4 states as follows:
- There will be a site visit to Mauna Kea on Monday, September 26, 2016. For health and safety reasons, only approved participants will be allowed on the site visit. Approved participants will meet at Hale Pohaku at 10:00 a.m. to caravan together to pre-designated Sites. Please review the attached "Mauna kea Hazards" and follow the precautions therein, if you intend to participate in the site Visit.
- Proposal regarding the locations to be visited, who will attend, and the procedures to be following during the Site Visit shall be submitted by the parties/counsels no later than five (5) business days after the filing of this Minute Order. Any responses, objection, oppositions, ect. Shall be filed no later than ten (10) business days after the filing of this Minute Order.
71. August 17, 2016, C. Freitas filed DOC 220 Site Visit Proposal (Exhibit S-29 or 22). Minute Order 18 (DOC 274) filed on September 19, 2016 ONLY approved persons

for Site Visit and did not address other request stated in DOC 220 nor did the HO respond to the request.

72. September 19, 2016 in Minute order No 18 [Doc 274] Order regarding site visit to Mauna Kea September 26, 2016:  
Persons Approved for site visit to Mauna kea on September 26, 2016 as follows:  
William Freitas, Tim Lui-Kwan, Ian L. Sandison or John P. Manaut (two of three attorneys for the UH), three representatives from the Office of Mauna Kea Management the Institute for Astronomy or the Office of the General Counsel, J. Leina'ala Sleightholm and First responder/medical personnel Bimo Akiona, Douglas Ing and/or Ross Shinyama, attorneys for TIO, two TIO representatives, Richard Wurdeman, attorney for Mauna kea Anaina Hou Petitioners; Kealoha Pisciotto, Keomailani Van Gogh, Clarence Kukauakahi Ching, e. Kalani Flores, Pualani Case, Hawane Rios, Deborah Ward and Candance Fujikane, Harry Fergerstrom, Cindy Freitas, Lincoln Ashida, attorney for PUEO; Shadd Keahi Warfield, Richard Ha, Bill Brown and Mehana Kihoi.
73. September 21, 2016, C. Freitas filed DOC 278 Motion to Amend DOC 274 Site Visit to Include Request in DOC 220 (Exhibit S-24) Minute Order 45, HO responded eight months later violation of Due Process.
74. September 26, 2016, C. Freitas Filed DOC 285 Objection to Phone call by Michael Cain on 9/23/16 that was instructed by Hearing Officer. HO did not respond to this Motion.
75. September 26, 2016 at 10:00 the parties meet at Hale Pohaku board on three Arnot's vans then ascend up to Mauna Kea. Designated Sites were at 1) Proposed Thirty-Meter Telescope Site where a red helium balloon on a rope that was approximately 187 feet ( it did not have any indication if it was 187 feet to illustrate how high is the TMT building, it seems a lot less and you could not see the whole scope of the balloon, we were not allow to stop or get out of the van) 2) The summit loop road near the Keck Observatory no stopping and 3) batch plant where we stop to use the restroom and 4) 3. or 3.5 mile marker where the ahu was once located.
76. September 27, 2016, C. Freitas filed DOC 290 Objection to September 26, 2016 Site Visit On Mauna kea (Exhibit S-25). HO did not respond to this Motion

## **J. Minute Orders**

77. There are some Minute Orders discussed in the finding of fact and conclusion of law, in the interest of completeness, a comprehensive recitation of all Minute Order in this proceeding as follows, otherwise all Minute Orders were issued by the HO.
78. On March 31, 2016, in Minute Order No. 1 [Doc. 1], the BLNR Chair issued Notice of selection of Riki May Amano as Hearing Officer on subject contested case.



79. On April 8, 2016, in Minute Order No. 2 [Doc. 3], the BLNR issued Order delegating the conduct of the contested case hearing to a hearing officer, and confirming that the chairperson was authorized to engage the services of a hearing officer.
80. On April 29, 2016, in Minute Order No. 3 [Doc. 11], the BLNR Chair issued Order setting deadlines for responses to Hearing Officer's supplemental disclosures.
81. On May 6, 2016, in Minute Order No. 4 [Doc. 14], the BLNR issued Order regarding objections to the selection process, and regarding objections to the Hearing Officer.
82. On May 9, 2016, in Minute Order No. 5 [Doc. 16], the Hearing Officer issued Order setting pre-hearing conference.
83. On May 23, 2016 in Minute Order No. 6 [Doc. 41], the Hearing Officer issued Order setting response date.
84. On May 26, 2016 in Minute Order No. 7 [Doc. 44], the Hearing Officer issued Order setting hearings on motions to intervene and 2nd pre-hearing conference.
85. On May 27, 2016, in Minute Order No. 8 [Doc. 49], the Hearing Officer issued Order setting hearings on motions to intervene and 2nd pre-hearing conference.
86. On June 3, 2016, in Minute Order No. 9 [Doc. 63], the BLNR issued Order denying Petitioners' motion for reconsideration of Minute Order No. 4 filed on May 6, 2016 and/or Motion to strike selection process and to disqualify various members and Hearing Officer.
87. On June 6, 2016 in Minute Order No.10 [Doc. 65], the Hearing Officer issued Order regarding hearing /conference room rules and extended coverage.
88. On June 9, 2016 in Minute Order No.11 [Doc. 66], the Hearing Officer Order issued regarding relocation of hearings on motions to intervene.
89. On July 12, 2016 in Minute Order No. 12 [Doc. 82], the BLNR Chair issued Order denying Temple of Lono's motion for refund of filing fee, filed June 23, 2016.
90. On July 21, 2016 in Minute Order No. 13 [Doc. 115], the Hearing Officer issued Order on the hearing on admission or intervention as a party.
91. On July 22, 2016 in Minute Order No. 14 [Doc. 124], the BLNR issued Order denying Dwight J. Vicente's motion to disqualify Judge Riki May Amano (ret.); State of Hawaii lack of jurisdiction to hear the contested case hearing.

92. On August 9, 2016 in Minute Order No. 15 [Doc. 185], the Hearing Officer issued Order regarding change of location for August 12, 2016 continued hearing and 3rd pre-hearing conference.
93. On August 22, 2016 in Minute Order No. 16 [Doc. 238], the Hearing Officer issued Order regarding third pre-hearing conference.
94. On August 26, 2016 in Minute Order No. 17 [Doc. 245], the BLNR issued **unsigned** Order denying motion objecting to the Hearing Officer and the Hearing Officer Selection Process.
95. On September 19, 2016 in Minute Order No. 18 [Doc. 274], the Hearing Officer issued Order regarding site visit to Mauna Kea - September 26.
96. On September 23, 2016 in Minute Order No. 19 [Doc. 281], the Hearing Officer issued Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues Doc. 99; Order setting issues.
97. On September 26, 2016 in Minute Order No. 20 [Doc. 289], the Hearing Officer issued Order setting fifth pre-hearing conference.
98. On October 10, 2016 in Minute Order No. 21 [Doc. 344], the Hearing Officer issued Order regarding fourth pre-hearing conference.
99. On October 10, 2016 in Minute Order No. 22 [Doc. 345], the Hearing Officer issued Order denying Harry Fergerstrom's (1) Motion to reconsider all motions, application, and/or request for admission or intervention as a party or other parties in this matter; and (2) Motion to strike all motions, applications, decision, etc.; Essentially making moot the entire hearing (Doc. 96).
100. On October 10, 2016 in Minute Order No. 23 [Doc. 346], the Hearing Officer issued Order denying Temple of Lono's motion for partial summary judgment (Doc 78).
101. On October 10, 2016 in Minute Order No. 24 [Doc. 347], the Hearing Officer issued Order denying Kalikolehua Kanaele's motion to exclude/remove PUEO, TMT, UH Manoa/Hilo, and all petitioners seeking for permit for TMT by circumvention of religious protections of the Hawaii Constitution Article XI and HRS 7-11-1107 committing desecration.
102. On October 10, 2016 in Minute Order No. 25 [Doc. 348], the Hearing Officer issued Order denying Stephanie-Malia:Tabbada's motion to vacate entire process for violation of BLNR and University of Hawaii fiduciary trust, rights, responsibilities, breach of contract, etc. mandated the by the law of the land (Doc 97).
103. On October 10, 2016 in Minute Order No. 26 [Doc. 349], the Hearing Officer issued Order denying Maelani Lee's motion to intervene (Doc 84).



104. On October 10, 2016 in Minute Order No. 27 [Doc. 350], the Hearing Officer issued, Order denying Petitioners' request for continuance on submissions and next hearing date (Doc 81) and Petitioners' supplemental request for continuance on submissions and next hearing date (Doc 82).
105. On October 10, 2016 in Minute Order No. 28 [Doc. 351], the Hearing Officer issued Order denying Mehana Kihoi's motion to deny the intervention of Perpetuating Unique Educational Opportunities as a party in the contested case hearing (Doc. 98).
106. On October 10, 2016 in Minute Order No. 29 [Doc. 352], the Hearing Officer issued Order denying Temple of Lono's motion to dismiss for lack of jurisdiction based on unresolved land claims (Doc 126).
107. On October 10, 2016 in Minute Order No. 30 [Doc. 353], the Hearing Officer issued Order denying Kamahana Kealoha: Motion invoking Quo Warranto, respectfully, a demand of jurisdiction; Declaratory judgment on a constitutional issue / violation resubmitted 8/8/2016 (Doc 180).
108. On October 10, 2016 in Minute Order No. 31 [Doc. 354], the Hearing Officer issued Order denying motion for protective order for the Honorable David Y. Ige, Suzanne Case and Stanley Reohrig (Doc 182).
109. On October 10, 2016 in Minute Order No. 32 [Doc. 355], the Hearing Officer issued Order denying motion to strike motion for protective order for the Honorable David Y. Ige, Suzanne Case and Stanley Roehrig, filed on August 8, 2016 (Doc. 187).
110. On October 10, 2016 in Minute Order No. 33 [Doc. 356], the Hearing Officer issued Order denying Temple of Lono's motion to dismiss out of time (Doc. 179).
111. On October 11, 2016 in Minute Order No. 34 [Doc. 363], the Hearing Officer issued Order denying Kamahana Kealoha's motion demanding inventory of the so-called ceded lands containing the specific land and parcel the TIO plans to be sub-leased by UH who leases said lands from the BLNR, a survey of these lands also (Doc. 191).
112. On October 13, 2016 in Minute Order No. 35 [Doc. 365], the Hearing Officer issued Order re: dismissal of Shelley Stephen's request to be part of Contested Case Hearing (Doc. 213).
113. On October 14, 2016 in Minute Order No. 36 [Doc. 376], the BLNR issued Order voiding permit.
114. On October 19, 2016 in Minute Order No. 37 [Doc. 388], the Hearing Officer issued Order denying motion to strike Conservation District Use Application, HA-3568, dated September 2, 2010, and/or motion for summary judgment (Doc. 94)

115. On October 19, 2016 in Minute Order No. 38 [Doc. 389], the Hearing Officer issued Order denying motion to disqualify BLNR's and Hearing Officer's counsel (Doc 95).
116. On October 28, 2016 in Minute Order No. 39 [Doc. 406], the Hearing Officer issued Order denying renewed motions to disqualify Hearing Officer (Doc 340).
117. On October 28, 2016 in Minute Order No. 40 [Doc. 407], the Hearing Officer issued Order denying J Leinaala Sleightholm's motion to clarify minute.
118. On January 20, 2017 in Minute Order No. 41 [Doc. 446], the Hearing Officer issued Order regarding date to set witnesses.
119. On February 17, 2017 in Minute Order No. 42 [Doc. 464], the Hearing Officer issued Order granting Flores-Case Ohana's request for subpoena for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii (Doc. No. 452) and denying the University of Hawaii at Hilo's motion to quash Flores-Case Ohana's request for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii (Doc 444).
120. On April 18, 2017 in Minute Order No. 43 [Doc.552], the Hearing Officer issued Order setting post-hearing deadlines.
121. On April 20, 2017 in Minute Order No. 44 [Doc. 553], the Hearing Officer issued Order regarding documentary evidence.
122. On May 2, 2017 in Minute Order No. 45 [Doc. 590], the Hearing Officer issued Order granting in part / denying in part petitioners Mauna Kea Anaina Hou, et al.'s request for further status conference and/or consideration of proposed scheduling (Doc. 254).
123. On May 2, 2017 in Minute Order No. 46 [Doc. 595], the Hearing Officer issued Order related to Temple of Lono motion to recuse Hearing Officer (Doc. Nos. 262, 434, 436, 536, 544).
124. On May 4, 2017 in Minute Order No. 47 [Doc. 609], the Hearing Officer issued Order related to Temple of Lono motion for summary judgment (disqualification) (Doc. 263).
125. On May 12, 2017 in Minute Order No. 48 [Doc. 631], the BLNR issued Order denying the Temple of Lono's emergency motion to Board to stay proceedings, filed April 27, 2017 [Doc. 573] and related documents [Docs 582, 583, 584, 585, 600, 602, 624].

## **K. Motions**

126. On July 18, 2016 C Freitas filed DOC 89 Request for Continuance for time and next Hearing Date. **HO did not respond to this Request.**
127. July 20, 2016 C. Freitas filed DOC 114 Reply to TMT International Observatory LLC's and UH responses to Petitioners' request for a continuance letter sign on July 15, 2016. **(HO did not respond to this request.)**
128. On August 22, 2016, C Freitas filed DOC 227 Motion to file Motion out of Time. **(Have been considered in relation to the motion Minute order 33 DOC 356)**
129. On September 1, 2016, C Freitas filed DOC 250 Motion to withdrawal Ku'uipo Freitas as witness; Memorandum in Support HO **did not respond to this Motion.**
130. On September 12, 2016, C Freitas filed DOC 259 Memorandum In Support of Petitioners Mauna Kea Anaina Hou, Et Al.'s Request for Further Status Conference and or Consideration of Proposed Scheduling **Minute Order No. 45 (DOC 590) is moot was answer 7 months later.**
131. On September 26, 2016, C Freitas filed DOC 284 Motion to Amend DOC 281 Minute Order No. 19. (DOC 284) **HO did not respond to this Motion**
132. On October 3, 2016, C Freitas filed again DOC 297 Respond to Proposed DOC 256 all issues should also be considered (Exhibit S-21). **(See email on 9/19 and mailed hard copy with William Freitas Respond also DOC 297 Hearing Officer did not respond).**
133. On October 4, 2016, C Freitas filed DOC 305 Motion for Extension of Time for Filling of Motions, witness and Exhibit Lists and Direct Testimonies and Pre-Hearing Statement. **(HO did not respond to this Motion)**
134. On October 7, 2016, C Freitas filed DOC 333 Objection to all Minute Order No. \_\_\_\_ That was filed in the Document Library on October 5, 2016 DOC 322, 321, 320, 319, 318, 317, 316, 315, 314, 313, 312, 311, 309 and 308. **(Minute Order No. 22 states premature filing of a motion for reconsideration it unclear though it was filed on time)**
135. October 14, 2016, C. Freitas filed DOC 372 In support of UHH statement to re schedule. **(HO did not respond to this Support)**
136. On October 18, 2016, C Freitas filed DOC 391 Motion to Dismiss Contested Case Hearing RE Conservation Use Application HA-3568. **(HO did not respond to this Motion)**



137. February 26, 2017, C. Freitas filed DOC 481 Motion to admit exhibits and written testimony into Evidence; Memorandum in support of motion. (HO respond in Minute Order 44 need to clarification)
138. March 3, 2017 Cindy Freitas filed DOC 492 First supplemental Motion to Admit Exhibits and Written Direct Testimony Into Evidence; Memorandum in Support of Motion. (HO respond in Minute Order 44 need clarification)
139. March 16, 2017 C. Freitas filed DOC 512 motion in opposition to the admission of exhibits A-141, A-142, A-143, A-45, A-45a, A-41 and witness testimony Sara Collins, PH.D, David Lassner, Jesse Alan Eiben, Ph.D., Dennis Charles Gosser and Pat Kaawaiolaa. (HO respond in Minute Order 44)
140. March 22, 2017 C. Freitas filed DOC 529 joinder to Temple of Lono motion to Board of Land and Natural Resources to dismiss HA-3568 Minute Order 43, the HO issued Order setting post-hearing deadlines.
141. March 22, 2017 C. Freitas filed DOC 530 joinder to Mauna Kea Anaina Hou motion requesting time to respond to exhibit objections. April 20, 2017, in Minute Order No. 44 [Doc 553], the HO issued Order regarding documentary evidence.
142. March 25, 2017 C. Freitas filed DOC 548 William Freitas and Clarence Kukkauakahi Ching's motion for joinder to Temple of Lono's motion for protective order. (HO did not respond to this Motion.)
143. April 25, 2017 C. Freitas filed DOC 557 memorandum in support of motion for reconsideration of Minute Order 43. May 23, 2017 in Minute Order No. 50, HO Denied Doc 557, is still unclear on the due process issue.
144. April 26, 2017 DOC 562 filed Errata re: Cindy Freitas memorandum of support of motion for reconsideration of Minute Order 43. This is reflecting on Finding of Fact No. \_\_hereinabove.
145. April 26, 2017 C. Freitas filed DOC 571 Cindy Freitas motion to reconsideration to Minute Order 44; Memorandum in support. (HO did not respond to this Motion.)

#### **L. Conduct of Contested Case Hearing**

146. The contested case hearing commenced on October 20, 2016. Testimony was taken evidence was submitted during the forty four days: October, 20, 24, 25, 26, 27, 31, 2016: November 2, 3, 5, 16, 2016: December 1, 2, 5, 6, 8, 12, 13, 16, 19, 20, 2016: January 3, 4, 5, 9, 10, 11, 12, 19, 25, 26, 24, 30, 31, 2017: February 13, 14, 15, 16, 21, 22, 23, 27, 28, 2017: March 1 and 2, 2017. Most of the Parties attended everyday.



147. Pursuant to Minute Order No. 21 [Doc 344] issued on October 10, 2016, At the contested case hearing, all witnesses shall have ten minutes to summarize their testimony before cross examination will commence. Re-direct examination will be permitted. Re-cross examination will be considered. Tr.10/20/16:V1:P.18:L12-15
148. On October 20, 2016 at Contested Case Hearing (“CCH”) there were certain procedural issues, most of the parties objected to designate a witness as an “expert” because the burden of proof is based upon the preponderance of evidence, and either everyone is an expert or no can be an expert in order to weight this properly. Tr. 10/20/16:V1P:46L12-19
149. The HO ruled this is a contested case hearing administrative, that HAR does not apply, although I don’t think it’s necessarily applicable to this particular issue, and I don’t see having to qualify other people who wish to be witness to this proceeding. Tr. 10/20/16:V1:P52:L1,2 and P53:L-13
150. The HO ruled on the testimony has come up. When your turn comes, you can go ahead and make the objection. Tr. 10/20/16:V1:P170:L3-5
151. The HO ruled on exhibits which she will take it under advisement until all the cross-examination is completed. Tr. 10/20/16:V1:P230:L15-21
152. The HO did not set aside any inspection of the transcripts. *See* DOC 633 and 562; HAR 13-197-19.

## II. FINDING OF FACTS

### M. APPLICANT CDUA FAILED TO MEET HAR 13-5-30(c)

- a. HAR 13-5-30(c)(4) The Proposed land use will cause substantial adverse impact to existing natural resources within the surrounding area, community, or region.**
153. The entire footprint of the TMT Observatory dome, support building, and parking area will be roughly five acres, including the area of disturbance during construction. A half-acre portion of this area has previously been disturbed by the existing 4-wheel drive road and site testing equipment; the original disturbance occurred during site testing in the 1960s, site testing was also performed in this area for the TMT project in the 2000s. (CDUA Ex. A-001:TMT Management Plan:P2-5)
154. Preliminary engineering plans indicate that the total volume of excavated material (“cut”material) will be 64,000 cubic yards. These preliminary engineering plans, which illustrate proposed changes in contours, are included in Attachment B. The estimated cut and fill volumes are based on geotechnical assumptions concerning the subsurface in the area and could change following the completion of geotechnical borings. (CDUA Ex. A-001:TMT Management Plan:PB-3)

155. Heating, ventilation, and air-conditioning (HVAC) equipment at the proposed facility will produce mechanical noise that is not now present. The TMT Observatory HVAC equipment (which would be used to cool the dome during the daytime so that heat from it does not degrade viewing conditions during the nighttime observing hours, among other needs) will be similar in function to the systems currently in use by existing observatories and will be no louder than the existing equipment. (CDUA Ex A-001:p2-33)
156. The Observatory and Access Way, fall within the Mauna Kea Summit Region Historic District but would have minimal adverse impact on the character of the District. (CDUA Ex. A-001:P2-6)
157. Paving approximately 1,600 feet of the Access Way. (CDUA Ex. A-001:P2-14)
158. Applicant states that the batch plant staging area is roughly 4 acre area and they will continue to use it for storing bulk materials and a concrete Batch Plant. (CDUA Ex. A-001:P1-13; PDF 24)
159. Project will have little impact on the integrity of cinder cones, including Kukahau'ula. (CDUA Ex. A-001:P2-8)
160. Surface geologic structures present in the Project areas, such as lava flow morphology and glacial features, will unavoidably be removed. (CDUA Ex. A-001:P2-18)
161. Applicant states that the acreage that will be disturbed by construction of the proposed TMT Access Way is 3.6 total disturbances and 1.9 previously disturbed. (CDUA Ex. A-001:1-3; PDF 24)

**N. IMPACT: CONSTRUCTION PLANS IS INADEQUATE WITH THE CDUA ((The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

**a. Land space**

162. Mr. Sanders stated, **"We would have to enlarge the five acres."** (Tr. 1/4/17:V21:P36:L14-15)
163. Mr. Sander stated, **"That 12- and-a-half acres is the acreage in which we will do disturbance of the ground, in other words, construction related disturbance of the ground"**. Tr. (1/4/17:V21:P49:L6-9.)

**b. Access way**

164. Mr. Sanders stated, "Yes. So that sentence In Section H, I guess, that is construction areas, the previous page, the previous sections describe the work on the access way, the Site, and Hale Pohaku. This section discusses **additional areas that are going to be temporarily disturbed**. (Tr. 1/4/17:V21:P17:L14-15).
165. Mr. Sander admitted that the TMT management plan, saying they may bring base course from other aggregate, "It said that at the time this was written, **but I don't believe that's our plan now**. Our plan now is to prepare rock crushing of appropriate size and do it with local material meaning on the mountain." 1/4/17 Tr.V21P42L17-24.

**c. Batch Plant**

166. Mr. Sander stated, We also went to the batch plant area which we will be **temporarily disturbed during construction**. 1/3/17 Tr.V.20P.39L.8-9
167. Mr. Sanders admitted that "Yeah, the **batch plant hasn't been studied carefully**", if TMT and decommission construction will be using the current size of the batch plant. 1/3/17 Tr.V.20P.230L22-25 and P.231L.1

**d. Underground tunnel**

168. Mr. Sander stated, "So that was contained, that was part of the early plans for the release of heat, waste heat from the observatory. The plan was to go from the mechanical room in the support building where the air-conditioning equipment chillers are. And the waste heat would go through an underground tunnel and vent in that vent that you're talk -- that you're showing in that picture. **We no longer have that as part of our plan**." Tr.1/4/17V;21:P47:L9-17

**b. HAR 13-5-30(c) (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.**

169. Access Way is also the best from the viewpoint of minimizing visual and physical impacts... (CDUA Ex. A-001:P1-13)
170. Construction and decommissioning of the proposed project, there will be adverse impact due to noise, traffic, dust, visual intrusion, and the increase in human presence on the mountain and adverse impacts potential disturbance beyond the project limits. (CDUA Ex.A-001:P2-7; PDF 38) HAR §11-46 establishes HAR §11-46-7 HAR §11-46-8
171. The Project will not block or substantially obstruct the identified views and viewplanes of the mountain, thus the Project's visual impact will be less than significant. (CDUA Ex. A-001:P1-17)



172. The Project, however, will still add visual element to the Northern Plateau. (CDUA Ex. A-001:P27)
  173. Table 7.5 summarizes the results of the silhouette analysis for 13 representative viewpoints where the TMT Observatory may be visible. The purpose of the analysis was to determine whether the view of the facility will be a full or partial silhouette against the sky, or whether it will be seen against the backdrop of Mauna Kea. (CDUA Ex. A-001:P7-8; ExhibitS-31b)
  174. The finish for the TMT Observatory dome will be a reflective aluminum-like finish, similar to that of the Subaru observatory. The use of a reflective aluminum-like finish was based on the following considerations (1) visibility of the dome, (2) optimum performance of the observatory, and (3) reduced need of cooling air within the dome during the day. (CDUA Ex. A-001:P7-9; Exhibit S-31c)
  175. The Visual impacts of the TMT Observatory, which will house a telescope with a primary mirror 98 feet (30 meter) in diameter, are also due to the size of the dome enclosure. The diameter of the dome is 216 feet. (CDUA Ex.A-001:P4-30; White Tr. 10/20/16:V1:P76:L18-23)
  176. The 2000 Master Plan includes a discussion of a large “Next Generation Large Telescope (NGLT) telescope such as the TMT. The 2000 Master Plan recognizes that the size of such facilities makes the visual considerations very important to siting and design. (CDUA Ex. A-001:P7-2)
  177. It will be visible from other locations within the summit region, primarily the northern plateau and the northern ridge of Kūkahau’ula where the Subaru, Keck, IRTF, and CFHT observatories are located. (CDUA Ex. A-001:P7-9)
  178. The TMT Observatory will appear in the view directly toward the summit from only a few of the shrines on the northern plateau. (CDUA A-001 page 7-13)
  179. The proposed Access Way will also result in a visual effect (particularly from a cultural perspective) as it passes within the Kūkahau’ula Historic Property. (CDUA A-001 page 7-13)
  180. Description of Historic Properties and Traditional and Customary Practices, **will have a substantial adverse impact to the view plain when the people are in full prayer on the customary spiritual, religions practices on Mauna a Wakea** (also know as Mauna Kea). (CDUA Exhibit A-001, page 4-1)
- O. IMPACT; VIEW PLANE IS NOT CONSISTENT WITH THE CDUA (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

181. Mr. Sanders admitted, "So I think it's fair to say that largely, the open space is preserved, but not perfectly." Tr. 01/4/2017, V. 21 at 80-81: 23-25, 1-12.
182. **Overall the existing level of cumulative visual impacts from the past projects at the summit is considered to be substantial, significant and adverse.** If the TMT is built the TMT project would represent an additional increment. **Cumulative impact is the sum of increments, essentially, and would add to the cumulative impact that is substantial, significant and adverse.** (Hayes Tr.10/25/16:V13:P155:L10-25 and P156:L1-6)
183. Ms. Aloua testified that the TMT project will not help preserve or improve upon the natural beauty and open space characteristics of Mauna Kea (Tr. 2/15/2017:V36:P42)
184. Mr White testified that the cultural and recreational viewplane would be altered, and would be clearly visible, and that an 18 story, five acre project would or could impact the view between archaeological and or cultural sites. Tr. 10/1/16 Vol 1: 76:9-23

**c. HAR 13-5-30(c)(8) THE PROPOSED LAND USE WILL NOT BE MATERIALLY DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE**

185. It does not entail substantial air emissions, (Exhibit CDUA Ex. A-001P2-28)
186. Construction and decommissioning of the proposed project, there will be adverse impact due to noise, traffic, dust, visual intrusion, **and** the increase in human presence on the mountain and **adverse impacts potential disturbance beyond the project limits.** (Exhibit CDUA Ex. A-001 page 2-7; PDF 38) HAR §11-46 establishes HAR §11-46-7 HAR §11-46-8 (Tr. 10/20/16:V1P:75:L3)
187. Potential impacts related to dust and exhaust emissions from vehicular travel and emissions related to operation and maintenance activities will not substantially affect the existing air quality or climate. Sky illumination effects will be limited and not substantial. TMT project impacts are expected to be less than significant. (CDUA Ex. A-001:P2-22)

**P. IMPACT: POTENTIAL DUST ISSUES NOT DISCLOSED IN THE CDUA (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

188. Mr. Sander admitted that dust caused by extraction and movement of rocks will have an impact on the air quality. (Tr. 1/3/17:V20:P.74:L22-25)
189. Mr. Sander stated, "During grading and breaking up rock will be the dustiest portion. (Tr. 2/3/17:V20:P113:L.4-10)



**Q. MAUNA KEA IS A SACRED LANDSCAPE WITH NUMEROUS SPIRITUAL, CULTURAL AND NATURAL RESOURCES AND HISTORICAL PROPERTIES (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

190. The summit region, which includes the **Mauna kea Summit Region Historic district and the Kukahau'ula TCP**, is a sacred area in Hawaiian culture and serves as a site for individual and group ceremonial and spiritual practices. The approximately **5-acre area to be occupied by the TMT** observatory structure would not be available for future cultural practices of this nature. (CDUA Ex. A-001P:4-7)
191. Increase in number of trips to the summit area of Mauna Kea and associated production of dust and noise. (CDUA Ex. A-001:P3-13)
192. Native Hawaiian traditions state that **ancestral akua** (gods, goddesses, deities) **reside within the mountain summit area**. These personages are **embodied within the Mauna Kea landscape** and they are believed to be **physically manifested in earthly form as various pu'u** (hills) and as the **waters of Lake Waiau**. (CDUA Ex. A-001:P2-1). (Cultural Resource Management Plan Exhibit ("CRMP") A-011;
193. **Project's impact to the cultural, spiritual and sacred quality of the summit region will be significant.** (CDUA Ex. A-001:P4-6)
194. The summit region, which includes the **Mauna Kea Summit Region Historic District and the Kukahau'ula Traditional Cultural Practices ("TCP")**, is a **sacred area in Hawaiian Culture** and serves as a site for individual and group ceremonial and spiritual practices. (CDUA Ex. A-001:P4-7)
195. To some individuals, the Project could represent a significant impact on the suitability of the Northern Plateau area for **spiritual observances and offerings**. (CDUA Ex.A-001:P4-7)
196. The site of the proposed TMT Observatory is over one mile from the nearest known or possible burial identified during past archaeological studies. (CDUA Ex.A-001:P4-8)
197. **Use of the summit region as a repository for human burial remains, by means of interment, particularly on various pu'u, during early times**, and more recently by means of releasing ashes from cremations. (CDUA Ex. A-001:P2-2)
198. "State Inventory of Historic Places **"SIHP" No. – 16172** is located about **225 feet north of the proposed TMT Observatory site** and consists of a single upright with several support stones. A Bishop Museum entomologist also reported seeing a



crude C-shaped structure and other walls in this general area in 1982. (CDUA Ex A-1:P4-1.)

199. The sites in the adze quarry and many of the shrines embody distinctive characteristic of traditional Hawaiian stone tool manufacture by craft specialists and a distinctive type of shrine construction found in only a few other places in the Hawaiian Islands, these make the district significant. (CRMP Ex A-011:P2-49)
200. The Batch Plant Staging Area is adjacent to the southwestern boundary of the Kūkahau'ula TCP, across the Mauna Kea Access Road. (CDUA Ex. A-001:P4-3)
201. **SIHP No. -16167** is located approximately **500 feet east of the Access Road** and about **1,300 feet southeast of the proposed TMT Observatory site** and consists of **one, possibly two, uprights placed in a bedrock crack**. In 1995, the site was revisited and both stones were found in a vertical position. (CDUA A-001 page 4-1)
202. **SIHP No. -16166** is approximately **350 feet east of the Access Road** and **1,600 feet southeast of the proposed TMT Observatory site** and is a **multi-feature shrine with a total of eight, possibly nine uprights arranged in two groups**. When the site was revisited in 1999 it was noted that several of the uprights had been reset in a vertical position along the edge of the outcrop. (CDUA A-001 page 4-3)
203. The site proposed for the TMT Observatory is nearly one-half mile northwest of Kūkahau'ula, and the **Access Way leading to the observatory would intersect the northwestern edge of Kūkahau'ula for approximately 800 feet**. **Kūkahau'ula (SIHP No. -21438)** includes the summit cinder cones (referred to separately as Pu'u Wēkiu, Pu'u Kea, and Pu'u Hau'oki) and covers roughly 463 acres, of which nearly one third is within the Astronomy Precinct. (CDUA A-001 page 4-3)
204. **"SIHP No. – 21449** were documented in 2005; it is located in Area E approximately **200 feet east of the Access Road and 700 feet south of the proposed TMT Observatory site.**" (CDUA Exhibit A-1, page 4-3.)
205. Performance of prayer and ritual observances important for the reinforcement of an individual's Hawaiian spirituality.(CDUA Ex. A-001:P2-1)
206. Collection of water from Waiau for a variety of healing and other ritual uses.(CDUA Ex. A-001:P4-7)
207. Deposition of Piko (umbilical cords) at Waiau and the summit peaks of Mauna Kea.(CDUA Ex. A-001:P2-1)
208. **Belief in the upper mountain region of Mauna kea, from the Saddle area up to the summit, as a sacred landscape, as the personification of the spiritual and physical connections BETWEEN one's ancestors, history, and the heavens.** ( CRMP Ex.A-011)

209. **Association of unspecified traditional navigation practices and customs with the summit area.** (CDUA Ex. A-001:P2-2)
210. Annual Calendrical rites (i.e. solstice and equinox observations) that take place at the summit of Kukahau'ula. (TMT Management Plan Ex. A-001:P2-2)
211. **Project will have a substantial impact** to construction noise and activities in the vicinity of cultural practices. (CDUA A-001 page A-10; PDF 222)
212. In addition, the portion of the Access Way which follows and goes over an existing single-lane, 4-wheel drive road on the **flank of the Pu'u Hau'oki cinder cone** will result in a minor **disturbance of the Kūkahau'ula Historic Property.**(CDUA Ex. A-001:P2-6)

**R. CONSTRUCTION WILL POTENTIAL EFFECT HISTORIC PROPERTY NOT DISCLOSE IN THE CDUA (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

213. Abad admitted, the TMT CDUA (Exhibit R-1) contained inaccurate and misleading statements that cultural activities have not been associated with a specific historic property in or near the Project Area. Tr. 01/19/2017, V. 27 at 60: 6-20.
214. Abad admitted, despite these acknowledgments, **“the TMT CDUA fails to address the full range of sites that should be considered in [the] regional analysis” required pursuant to HAR §13-5-30(c)(4).** Ex. B.08a at 5. HAR §13-5-30(c)(4) requires BLNR, prior to granting a CDUP, to determine that a “proposed land use will not cause substantial adverse impact to existing natural resource within the surrounding area, community, or region[.]” Id.; Tr. 01/19/2017, V. 27 at 22: 17-25
215. CDUA (Exhibit R-1) contained inaccurate and misleading statements that cultural activities have not been associated with a specific historic property in or near the Project Area. Tr. 01/19/2017, V. 27 at 60: 6-20
216. McCoy's analysis connected cultural practices, archaeological sites, and physical remains, and this bridging was made possible by using a regional perspective and knowledge of fundamental characteristics of Hawaiian culture. Tr. 01/19/2017, V. 27 at 35: 3-8.
217. CDUA failed to properly assess upright sites or ahu of various shapes and sizes on Mauna Kea, which do not exist in isolation, but are rather alignments that connect to other ahu or ridge peaks, for example. Tr. 01/19/2017, V. 27 at 35: 15-25
218. Mr. Cruz, spent six months researching and interviewing community consultants, including cultural practitioners from Hawaii island. Tr. 2/28/17V42:P102:L15-16.



219. Mr. Cruz, research led to the conclusion that there should be “no further action’ on the summit of Mauna Kea because of the sacredness of the site.” Tr. 2/28/17:V42:P102:L17-20

220. Mr White stated that the TMT project would be developed within the Historic District, and that **the project would involve the alteration of the Kukahau’ula traditional cultural property**, and that it would involve the placement of underground utilities and paving a road on the flank of Pu’u Hauoki, in the Traditional Cultural Property. Tr. 10/1/16 Vol 1:75:11-25. 76:5-8

**S. CDUA FAILED TO COMPLY WITH HRS 183C.**

221. Locating the TMT project within the Northern Plateau (Area E) **will result in a significant substantial adverse impact due to the area is in a pristine and untouched landscape which holds natural and environmental resources** .(CDUA Exhibit A-001, Exhibit A. page A-1)

222. The findings of the research performed by TMT may provide inspiration for the people around the world and Hawaii to conserve the earth's and the state's resources.(CDUA Ex. A-001:P4-37)

223. The TMT project has been developed to achieve full compliance with all existing State requirements that protect resources on Mauna Kea associated with traditional and customary Native Hawaiian rights.(CDUA Ex A-001:P4-10)

224. One goal is to “Protect scenic vistas and view planes from becoming obstructed.” (CDUA Ex. A-001:P7-1)

225. **“protect the pu’u of Waimea that have cultural, historical and visual importance” and which have “grand views of Mauna Kea.”** (CDUA Ex. A-001:P7-1)

226. Increase understanding of the status of Mauna Kea natural resources and address particular threats to these resources to better protect these resources. (CDUA Ex. A-001:P1-2)

**T. IMPACT: CDUA IS INADEQUATE WITH HRS 183C**

227. Ms. Abad stated, Special emphasis shall be placed on environmental resources that are rare and unique to the region and the project site including natural or human-made resources of historic, archaeological, or aesthetic significance. ( Tr 1/19/17:V27:P23:L15-19)

228. Ms. Abad admitted, that the **existing natural resources would be bulldozed is my understanding because it’s right there in that five acres. It would be destroyed.** (Tr. 1/19/17:V27:P236:L10-14)



229. Mr. Cruz stated, My formulation and the way that I see it legally is **the state has a primary obligation to protect the cultural resources, including the natural resources that are cultural, and to ensure that the rights of the native practitioner are accommodated.** (Tr 2/28/17:V42:P208:L8-13)

**U. POTENTIAL IMPACTS OF HEAVY CONSTRUCTION WILL CAUSE SUBSTANTIAL EFFECTS (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

230. Major construction activities at the summit, undertaken to build, redevelop, or deconstruct facilities, require at least MKMB and UH Board of Regents approval, BLNR/DLNR permits (such as a CDUP), and appropriate environmental analysis.

231. Applicant states it will take approximately seven years and workers will work 12-15 hours a day, seven days a week; however some construction phases will require longer work hours. (Exhibit CDUA A-001 page 1-19; PDF 30)

232. Construction of the proposed facilities, particularly Observatory site and Access Way grading, will involve the use of heavy construction equipment, including that needed for excavation of relatively dense rock. (Exhibit CDUA A-001 page 2-31 and 32; PDF 62 & 63 )

233. With an average construction crew of 50 to 60, it is estimated 9 or 10 vehicles will be required to transport the crew on a daily basis. (CDUA A-001 page 4-26; PDF 188).

234. Due to the expected increase of heavy traffic during construction there is a chance for more rapid deterioration of the unpaved portions of the Mauna kea Access Road surface. (CDUA A-001 page 4-26; PDF 188)

235. **TMT pier foundation will be a depth of approximately 20 feet below the finished floor grade.** (CDUA A-001 page B-7; PDF 230)

236. **The utility tunnel bearing on the soil at a depth of 21.5 feet below the finished floor.** (CDUA A-001 page B-7; PDF 230)

237. **Table -2: Estimated Cut and Fill Volumes: TMT Observatory 13N site Cut 34,000 cubic yards fill 29,000 cubic yards: Access Way Cut 30,000 cubic yards fill 3,000 cubic yards: Batch Plant staging area fill 30,000 cubic yards.** (Exhibit S-31b; A-023 page B-3)

238. The diameter of the dome is 216 feet. Because the center of the dome will be placed only 36 feet above grade, the observatory will have a **height of approximately 180 feet above grade level.** (CDUA A-001 page 4-30)

239. “A roughly 6,000 square foot exterior equipment area on the north side of the support building will include two electrical transformers and electrical service switchboards; **three 5,000-gallon underground storage tanks (UST) one for water storage, one for domestic waste storage, and one double-walled for chemical waste storage; two 25,000-gallon UST for water storage as part of the fire suppression system; and one double-wall 2,000-gallon above-ground storage tank for diesel fuel** to power the emergency generator. (CDUA Exhibit A-1, page 1-10)
240. Appendix B, Construction plan states, “Some **coarser material from on-island quarries will be transported to the TMT Observatory site and used under concrete foundation slabs as “base course”. Aggregate from on-island quarries will also be used to make the foundation concrete.** (TMT Management Plan Exhibit S-31b Appendix B page B-3)
241. Construction Plan, Southernmost Cinder Section states, “Where the access Way occurs **on the cinder lower slope of Pu’u Hau’oki**, the Access Way features will be as illustrated in Figure B-1 – a **12 foot wide paved travel way (and), a four foot paved shoulder with drainage channel and guardrail, and slope graded to 2.5:1.** (TMT Management Plan Exhibit S-31b Appendix B, page B-4)
242. Construction Plan, Lava Flow Section, states, “Throughout the lava flow section, the Access Way features will be as illustrated in Figure B-3, a **24 foot wide gravel travel way (Two lanes), one foot shoulders, and slopes graded to 2,5:1.** (TMT Management Plan Exhibit S-31b Appendix B, page B-6)
243. Construction Plan, TMT Observatory 13N Site Grading Plan states, “**The TMT pier foundation will consist of a continuous, circular outer wall shallow concrete spread footing that will bear on the soil at a depth of approximately 20 feet below the finished floor grade.** There will be a central shallow concrete pad for a **pintle bearing, used to hold the center of rotation of the telescope in place when at rest, that will bear on the soil at a depth of 16 feet below finished floor grade.** The central shallow concrete pad will be connected to the telescope pier outer wall and footing with six radial concrete spokes. A utility tunnel bearing on the soil at a depth of 21.5 feet below the finished floor elevation will connect the telescope pier with the mechanical equipment room on the utility level of the support building. **The utility tunnel for venting** warm air from the mechanical room out to the north side of the site will **bear on the soil at a depth of 21.5 feet below the finished floor elevation.** (TMT Management Plan Exhibit S-31b Appendix B, page B-7).
244. As with other activities, there is a **potential for accidents, including fire and the accidental release of hazardous materials or solid waste, including trash and construction materials.** (FEIS A-003 page S-7)
245. **22.7 gallons of hydraulic oil fluid spilled in the Caltech Submillimeter Observatory (“CSO”). The contaminated backfill of 3,500 lbs, and 1,000 lbs of**



**spent absorbent material was truck out by Pacific Commercial Services. (S-18d)**

246. There is a strong interest in the impact of the Project on the socioeconomic landscape of the island and the potential for local residents to work for the Project during construction and operation. (FEIS A-003 page 1-5)
247. **A 300-ton crawler crane**, in combination with a **200-ton assisting crawler crane**, was selected to be **used to erect the dome**. (CDUA A-001 page B-9)
248. **Crawler Crane is susceptible to tipping during high wind loads**. (CDUA A-001 page B-10; PDF 233)
249. **High winds are common in the summit region**. (CDUA A-001 page 3-16)
250. **Mauna Kea where strong winds are frequently combined with ice storms, which greatly increases both the weight on the crane structure and the wind cross section**. (CDUA A-001 page B-10)
251. **The crawler crane would be transported to the 13N site via transport trailers and assembled on site**. (CDUA A-001 page B-11)
252. **Ground preparations must be made to take the full bearing load of the crane out to the 40-foot width in the specified setup areas. The crawler crane has a pressure on the ground of 3,400 psf with no load. With a 45 ton load (the likely maximum during this project), the pressure on the ground is 5,600 psf.** Ground preparations to handle this load can be achieved by (1) preparing the soil, but this may not be possible and will only be known once the geotechnical studies have been completed. (CDUA A-001 page B-11; PDF 234)
253. **The most significant natural hazards are seismic activity and high wind. Hawai'i Island is one of most seismically active areas on Earth, and about two dozen earthquakes with magnitude 6 or greater have been documented on Hawai'i since the devastating earthquakes of 1868.** (CDUA Ex A-001, page 3-16)
- V. **IMPACT: CONSTRUCTION HAZARD NOT DISCLOSED IN CDUA(The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**
254. Mr. Sander stated "Yes", to direct effect is a potential to affect the **stability and the structure integrity of the Manitowoc 2250 crane, while the indirect effects are wind forces causing the load on the hook to move suddenly**. 1/4/17  
Tr.V.21P.38L.13-17



255. Mr. Sander stated "Correct", to the **wind speed doubles. The wind pressure increases four times.** 1/4/17Tr.V.21P.40L.12-14
256. Mr. Sander admitted that it would **cause it to collapse and the load to fill with potential disaster consequences.** 1/4/17Tr/V.21P40L.2325.
257. Mr. Sander admitted that **height of the crane between the ground and the wind pressure, the greater the risk.** 1/4/17 Tr.V.21P41L2-5.
258. Mr. Sander admitted that if the **wind coming from an opposite direction and not flowing in the same direction and it sweeps up from the side of the crane, wouldn't it throw the crane off in the stability of the jib.** 1/4/17 Tr.V.21P.41L21-24
259. Cindy stated, **This Manitowoc crane has a height of 360 in height.** (2-21-17Tr.V.38P.89L17-19; Exhibit S-27)
260. Cindy stated, The **crane is not stable from wind that comes from the side view of the crane.** (2-21-17Tr.V.38P.90L.5-24; Exhibit S27.)
261. Cindy stated, **The Manitowoc crane, can only sustain legally by federal guidelines only 45 miles per hour other than that it is at high risk.**(2-21-17Tr.V.38P.91L.9-13; Exhibit S-27)
262. Cindy stated, High winds load. It can tip and crush anything in sight, including the humans.(2-21-17Tr.V.38P.91L.17-19; Exhibit S-27)
263. Cindy stated, **so when this things moves in a degree, sometimes with the factor of the snow and the wind, it can tip the crane down from the side.** (2-21-17Tr.V.38P.92L.8-10; Exhibit S-27)
264. Cindy stated, Correct. That's why the monitor that Mr. Gary Sanders had mentioned, they will have some kind of monitor to monitor the wind. But that **wind sometime comes in clusters that we know of from being up there a long period of time, meaning the will die; and all of a sudden, you get a real gust of wind.** (2-21-17Tr.V.28P.95L.12-17
265. Susan stated, The **reinforcement that they have on the inside (hydraulic equipment hoses)**is susceptible, depending on usually, the temperature; as the oil gets hotter, to breaking through the reinforcement and causing a leak because the out side is already ruptured in some fashion (Tr. 2/21/17:V38:P43:L9-14)
266. Susan stated, It can be a **leak in the engine**, which would be a different type of oil, or it can be a **leak in the hydraulic pump system**, which is another different type of oil, **a hydraulic oil.** (Tr. 2/21/17:V38:P43:L19-25)

267. Susan admitted That at a **extreme temperature** they would definitely wear out a lot faster or be **susceptible to breakage or crack or pinholes** that they would at a lower level. (Tr. 2/21/17:V38:P48:L22-25 and P49:L1-3)
268. Susan admitted, there is a **5000 gallon diesel tank** and **3000 gallon tanks** also **hydrostatic tank that's inside the facility**. They are **not free from any kind of hazard, environmental hazard** if there was a large earthquake. ( Tr. 38:V38:P60:L15-25)

**W. CDUA DOES NOT COMPLY WITH ARTICLE XII SECTION 7 OF THE HAWAII STATE CONSTITUTION.**

269. "It was the **nature of place that shaped the cultural and spiritual view of the Hawaiian people**. "**Cultural Attachment**" embodies the tangible and intangible values of a culture-how a **people identify with, and personify the environment around them**. It is the intimate relationship (developed over generations of experiences) that people of a particular culture feel for the sites, features, **phenomena, and natural resources, etc., that surround them-their sense of place**. This attachment is **deeply rooted in the beliefs, practices, cultural evolution, and identity of a people**. ( TMT FINAL EIS Volume 2 (May 8, 2010 Exhibit A-3, page 3.2)
270. "Practices identified as having religious associations include: **1) Recognitions of the summit area as a sacred place and the abode of divinities**. 2) Continued **worship practices**, including the **constructing of ahu or leaving of offerings**. 3) **Umbilical cord deposition** (Kanu piko), particularly at Lake Waiau. 4) **Scattering of cremation remains**. 5) Collecting water from Lake Waiau and snow from the summit area. 6) **Calendrical rites** carried out at the summit of Kaukahau'ula. 7) Practices identified as having **economic or subsistence associations** include: **Traversing the summit region from area of Hawai'i Island to another, via the trail system**. (CDUA Exhibit A-1, page 4-5)
271. "This attachment to environment bears direct relationship to the beliefs, practices, cultural evolution, and identity of a people. In **Hawai'i cultural attachment is manifest in the very core of Hawaiian spirituality and attachment of landscape**. (Master Plan 2000 Exhibit 48, page V-1)
272. Native Hawaiians traditions state that **ancestral akua (gods, goddesses, deities) reside within the mountain summit area**. These personages are embodied within the Mauna kea landscape and they are believed to be **physically manifested in earthly form as various pu'u (hills) and as the waters of Lake Waiau**. Because these akua are connected to the Mauna Kea Landscape in Hawaiian genealogies, and because **elders and akua are revered and looked to for spiritual guidance in Hawaiian culture, Mauna Kea is considered a sacred place**. (TMT Management Plan Exhibit A-23, page 2-1)



273. Belief that the **upper mountain region of Mauna kea, from the Saddle area up to the summit, is a sacred landscape as a personification of the spiritual and physical connection between one's ancestors, history, and the heavens.** (TMT Management Plan Exhibit A-23, page 2-2)

**X. IMPACT: CDUA WOULD CAUSE A SUBSTANTAIL EFFECT TO ARTICLE XII SECTION 7 OF THE HAWAII STATE CONSTITUTION.**

274. Mr. Cruz admitted, **Hayes told Cruz that he wanted CSH to conduct interviews with Native Hawaiians who supported the TMT to obtain a "balanced report,"** but the purpose of a CIA is not to balance a report, rather it is "designed to find impacts." (Tr 2/28/17:V42:P109:L10)

275. Mr. Cruz stated, **taking out bits and pieces here and there, but they took out the teeth from the Cultural Impact Assessment ("CIA")** that I wrote. (Tr 2/28/17:V42:P11:L23-25)

276. Mr. Cruz stated, No conclusion. No recommendations and no teeth, you know. If you work on a project that involves the most sacred site in the Pacific Ocean and there's nothing, no-recommendation. (Tr 2/28/17:V42:P112:L5-8)

277. Mr. Cruz stated, We always do **revisions on cultural Impact assessments to meet the basic memo requirements, but never have I been asked to remove recommendations.** This is the one and only project. (Tr 2/28/17:V42:P105:L4-7)

278. Mr. Cruz stated, I believe that any agency that is going to make a decision, they need all the information, and by leaving this information out, they could make the wrong decision. (Tr. 2/28/17:V42:P107:L19-22)

279. Ms Abad stated, The same degree that these wahi kupuna hold, the degree of impact will—will reverberate throughout our lahui if anything were to destroy it integrity. Tr. 1/19/17:V27:P57:L1-5)

280. Ms. Abad stated, there **should have been consultation in identifying sites, identifying the appropriate unit of analysis, identifying the functions of sites or region or districts, identifying the significance levels, the nature of the significance, that nature of potential impact, the degree of potential impact.** All of these **should have been done in consultation with cultural practitioners, those associated with the site.** (Tr. 1/19/17:V27:P61:L2-9)

**Y. CDUA DESIGN PLAN IS INCOMPLETE WITH THE 2000 MASTER PLAN (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**



281. Surfaces, Textures and Material, Roofs:, states, “Roof design and material and color selection in conventional structures should merge the facility into the natural landscape. **Reflective materials are to be avoided.** (Master Plan 2000 Exhibit A-48, page XI-6; Exhibit A-001 page 7-13.
282. Heights & Widths: Heights and widths of ridge facility designs should seek to minimize visible heights above existing ground as much as practicable. The following are maximum dimensions established to guide the design of facilities and to regulate the impact of new development. Facilities developed on ridge sites may be developed to a maximum height of approximately 130 feet measured from finished grade, and a maximum width of 130 feet. (Master Plan 2000 Ex. A-48, page XI 5)
283. As the CMP maintains consistency with the 2000 Master Plan, future updates to the plan should be consistent with the CMP. (CMP Ex –A-9 PAGE 2-3)

**Z. IMPACT: DESIGNED PLAN WILL IMPACT THE NATURAL ENVIRONMENT NOT DISCLOSED IN THE CDUA (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

284. Mr. Sander states that, “**the height of the observatory aboveground is in the 180-187-foot range,**” and that “**the deepest part of the foundation is about 21 or 21-and-a-half feet.**” 01/4/2017, V. 21 at 56-57: 25, 1-5.
285. Mr. Sander stated we took all of this design guidance or guidelines into account in our design, yes, as well as the Comprehensive Management Plan. 1/3/17 Sanders Tr.V.20P.257L24-25 and P.258L.1-2
286. Mr. Sanders admitted TMT design plan comply with the master plan, “Generally, it’s consistent with the plan and compiles with it.” 1/4/17 Tr.V.21P.15L.13-15
287. Mr. Heen stated that, I suppose one can approve something presented to it without making that document a part of your policy or law, If you adopt it then it becomes a part of your policy, but **approving is not the same as adopting.** Tr.12/2/17:V11:P161:L22-25 and P162:L1)

**AA. CDUA PLAN ON OIL (The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

288. **Annual engine maintenance** including changing of engine oil and filters. Refill oil and coolant levels and **inspect for leaks, holes and loose connections.** CDUA Ex A-001 page D-3) Azimuth Drives: Motor – visual/noise inspection, seals, brake settings. Gearbox – visual/noise inspection, check oil level. Replace items as required. (CDUA Ex A-001 page D-4)
289. Shutter Drives: Motor – visual/noise inspection, seals, brake settings. Gearbox – visual/noise inspection, check oil level. Pinion – visual inspection or wear, check bushing functionality. Linear guides – visual inspection, lubrication. Preload spring

visual inspection Preload wheel – visual inspection. Replace worn components as required.(CDUA Ex A-001 page D-5)

290. Monitor compressor oil and oil cleanliness. Change the oil according to manufacturer's recommendations. Maintain oil level and sample the oil every month. Note compressor lubricant level, color, and pressure. Compare with trended values. Depending on use and compressor size, develop periodic oil sampling to monitor moisture, particulate levels, and other contamination. Replace oil as required. (CDUA Ex A-001 page D)
291. Cap Bogies: Check gas pressure and adjust, gas spring visual inspection. Bearings – visual inspection, check noise/vibration & lubricate. Bushings (at pivots) – check smoothness/tightness. Wheels – visual inspection of wear. Motor – visual/noise inspection, seals, brake settings. Gearbox – visual/noise inspection, check oil level. (CDUA Ex A-001 page D-4)

**BB. IMPACT: OIL SPILLS WILL POTENTIAL IMPACT THE ENVIRONMENT NOT DISCLOSE IN CDUA(The facts is verified in the LAWS & CASE LAW in the Conclusion of Law Section)**

292. Nanci stated that Tomas Brand of the **Environmental Protection Agency was notified on June 9, 2015 and did not take any action.** (2-16-17, Tr. V 37 P. 180 L. 7)
293. Nanci stated that the **Board of Land and Natural Resources in Honolulu was notified at a meeting on June 12, 2015 and did not take any action.** (2-16-17,Tr.V.37P.180,L.10-12;2-16-17,Tr.V.37P.186,L.17)
294. Nanci made a complaint to the Department of Land and Natural Resources in an email to a generic address from their website dated August 4, 2015. (2-16-17,Tr.V.37,P.180,Line14-16)
295. Nanci notified the Ranger Bruce Heidenfeldt. (2-16-17,Tr.V.37, P.187, L. 4; 2-16-17, Tr.V.37P.182, L.5-15)
296. Mr. Sanders stated that **he was aware of the oil leaks in 2015.** 1/3/17 Tr.V.20P.23L.2
297. Nanci stated that the Private security was aware. (2-16-16,TrV.37P183L. 8-26)
298. Nanci testified that attempts were made to obliterate some oil. (2-16-17Tr.V.37P.182L.16-17)
299. Nanci stated she didn't get the impression that some one observed it but kicked it or scuffed it with their feet. (Tr2/16/17:V37:P206:L11-13)



300. Nanci state that **no official clean up attempt was observed.** (2-16-17Tr.V.37P.182L.24 and L.21)
301. Nanci stated she was on the TMT access road bulldozer site. (2-16-17Tr.V.37P.208L.15; Exhibit S-10)
302. Nanci testified there were other witnesses who inspected the TMT access Road site for oil spills. (2-16-17Tr.V.37P.210L.6-9)
303. Nanci stated that she and others would check for fluid leaking and any movement of equipment. (2-16-17Tr.V.37P.211.6-10)
304. Nanci stated that Glover uses waterproof liner under equipment and is parked on it that holds it down. (2-16-17Tr.V.37P.217L.6-11)
305. Susan stated, And in the process they found out that partway down the hole, there was this 4-inch layer of oil that was spilled sometime 20 years ago before. (Tr.2/21/17:V38:P38:L10-13)
306. Susan stated, **35000 pounds of the backfill material and 1000 pounds of spent absorbent material** from the CSO. (Tr. 2/21/17:V38:P38:L19-20)
307. Susan admitted that, in Ex S-18d the **“cleanup for the rest of the material would deferred until decommissioning in 2016”. And CSO has not been decommissioned.** (Tr 2/21/17:V38:P39:L7-11)
308. Susan stated, February 21, 2017, a year later. (Tr 2/21/17:V38:P39:L13)
309. Susan admitted that **common spills were the Number 1 thing that I ran to get part for, for broken hoses, and hoses** are so complicated. (Tr 2/21/17:V38:P39:L18-21)
310. Susan admitted, when equipment is not in operation are they expected to leak, more so, because the oil would be under pressure. (Tr 2/21/17:V38:P44:L6-10)
311. Susan admitted there is an **employee called an oiler, who check the fluid levels and look for leaks, they only in the morning before the operator arrives. The oiler is not there to monitor all day.** (Tr 2/21/17:V38:P45:L21-25 and P46:L1-4)
312. Susan admitted that attitude towards oil on Mauna Kea makes no difference to them, I’m **HOPING** my testimony helps make a difference, I really am. (Tr2/21/17:V38:P51:L21-25)
313. Susan admitted that, when oil freezes it’s a concern, the interior reinforcement is getting the brunt of the expansion/contraction from the heat elements, and kind of doing the same. It goes from thin to thick. (Tr2/21/17:V38:P50:L6-13)



314. Susan admitted that, no job has been free of oil spills, no lines breaking, or not spillage of these fluids. (Tr 2/21/17:V38:P59:L10-14)
315. Susan stated, Yes. It could also **blow a seal and have oil come out of the hydraulic cylinder itself**. (Tr 2/17/17:V38:P61:L9-10)
316. Susan admitted that none of the excavations are free from environmental hazard. (Tr2/17/17:V38:P61:L22-24)
317. Susan stated the hydrostatic oil doesn't have those warning sheet that the government put out. It has one but it has not been assessed yet for its viscosity is flexible. Sincerely a huge problem. (2-16-17Tr.V.37P.246L.10-25 and P.246L.1-3; Exhibit S-18e)

### **III. CONCLUSIONS OF LAW**

#### **I. PRELIMINARY ISSUES**

- A. Motions to Disqualify Hearing Officer
- B. The Scheduling of Pre-Hearing Conference in Honolulu
- C. The Scheduling of Contested Case Hearings

#### **II. LEGAL FRAMEWORK**

##### **A. Burden of Proof**

- 2. 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**

- 1. 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.*"

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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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. Hawai‘i Supreme Court Rulings**

13. Mauna Kea Anaina Hou (2015)

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 Decision 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 officer, or for other proceedings consistent with this opinion.

14. PASH

In *Public Access Shoreline Hawai'i v. Hawaii County Planning Commission*, 79 Hawai'i 425, 903 P.2d 1246 (1995), (hereafter "PASH"), the Hawai'i Supreme Court stated:

i. The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian Rights, necessarily allows the State to permit development that interferes with such rights in certain circumstances... Nevertheless, the State is obligated to protect the reasonable exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible.

15. Ka pa'akai

In *Ka pa'akai O Ka 'Aina v. Land Use Commission* (hereafter "Ka Pa'akai v. LUC"), 94 Hawai'i 31, 47, 7 P.3d 1068, 1068 (2000) the Hawai'i

Supreme Courts states:

ii. To preserve and protect traditional and customary native Hawaiian rights, the Board examines the following factors:

The identity and scope of cultural, historical, and natural resources in the application area, including the extent to which traditional and customary native rights are to have been exercised in the application area; The extent to which those resources, including traditional and customary native Hawaiian rights, will be affected or impaired by the proposed action; and

The feasible action, if any to be taken to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa'akai v. LUC further states:

iii. Equally important, the Land Use Commission ("LUC") made no specific findings or conclusions regarding the effects on or the impairment of any Article XII, section 7 [Hawai'i State Constitution] uses, or the feasibility of the protection for those rules. Instead, as mentioned, the LUC delegated unqualified authority to Ka'upulehu development ("KD") ...

This wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity, however, was improper and misses the point...

16. Pele Defense Fund

In the 1992 case of *Pele Defense Fund v. Paty*, the Hawaii Supreme Court rendered a landmark decision which broadly held that native Hawaiian rights protected by article XII, section 7 of the Hawaii Constitution "may extend beyond the *ahupua'a* in which a native Hawaiian resides where such rights have been customarily and

traditionally exercised in this manner." This controversial decision abolished over 100 years of Hawaii Supreme Court precedent which restricted native tenant gathering rights to the *ahupua'a* of residency. The *ahupua'a* residency requirement had been judicially imposed since at least 1858 in *Oni v. Meek*, and reaffirmed as recently as 1982 in the case of *Kalipi v. Hawaiian Trust Co.*. Further, the *Oni* and *Kalipi* decisions were predicated upon the Kuleana Act of 1850 and its modern day successor, Hawaii Revised Statutes section 7-1. Both sources likewise limit the practice of customary and traditional rights to tenants residing within the *ahupua'a* in which they seek to exercise the rights.

17. Waiahole

In *Re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (2000) ("the Waiahole Ditch Case"), the Hawai'i Supreme Court recognized that public trust doctrine was "a fundamental principle of constitutional law in Hawai'i." Haw. Const., Art. XI, section 1, P. 133, 9 P.3d at 444.

18. Na Wai 'Eha

In *re Water Use Permit Applications "Waiâhole I"*, 94 Hawai'i 97, 9 P.3d 409, (2000). In reviewing Hui/MTF's and OHA's points of error, the court concludes that the Commission on Water Resource Management erred in several respects. First, in considering the effect of the IIFS on native Hawaiian practices in Nâ Wai 'Ehâ, the Commission failed to enter findings of fact and conclusions of law regarding the effect of the amended IIFS on traditional and customary native Hawaiian practices in Nâ Wai #Ehâ, and regarding the feasibility of protecting any affected practices. Second, the Commission's analysis of instream uses was incomplete, as it focused on amphidromous species and did not fully consider other instream uses to which witnesses testified during the hearings. Third, the Commission erred in its consideration of alternative water sources and in its calculation of diverting parties' acreage and reasonable system losses. The court must vacate the Commission's June 10, 2010 Findings of Fact, Conclusions of Law, Decision and Order, and remand the case for further proceedings.

**D. Statutory and Regulatory Authority**

19. County Level

- a. County of Hawai'i General Plan Division 3 Construction Documents
  - 1. Section 5-25 Construction documents required.
- Structures of R-3 or U occupancies that are three or more stories in height.



b. State Land use District Boundary Amendment Procedures Chapter 28

1. Section 28-2 Scope and applicability

The County council by ordinance may amend the districting of such lands fifteen acres or less located in the State land use urban, rural, and agricultural districts. This Chapter, however, does not apply to those lands situated within the State land use conservation district classification.

c. Building and grading rules; There is no record of any permit for grading on 44- 562 Mauna Kea Access Road around 2012 on the County of Hawaii Real Property Tax Office

a. 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.

b. 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.

c. 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.

d. 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.

e. 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.

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. HRS § 205A-2.

f. 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;

g. 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.

h. 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”.

i. 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.

j. 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.

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

k. 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.

l. 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.

m. 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.

n. 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.



o. 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, tsunamis, 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.

p. 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.

q. 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.

r. 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 and more issues.

## **20. OTHER STATE LAWS TO CONSIDER**

- a. HAR Title 13, Administrative Rules of the Department of Land and Natural Resources.
- b. HAR Section 11-200, Environmental Review.
- c. HRS Chapter 6E, Historic Preservation.
- d. HAR Title 13, Subtitle 13, Chapter 300, Inadvertent Discovery of Human Remains.
- e. HRS Chapter 195D, Conservation of Aquatic Life, Wildlife and Land Plants.
- d. HAR Title 4, Administrative Rules of the Department of Agriculture.
- e. HRS Chapter 152, Noxious Weed Control.
- f. HRS Chapter 342B, Air Pollution Control.
- g. HRS Chapter 342D, Water Pollution Law.
- h. HRS Chapter 342J, Hawai'i Hazardous Waste Law.
- i. HAR Title 11, Administrative Rules of the Department of Health.
- j. HRS Chapter 171 (leases & disposition)
- k. HRS § 711-1107 (desecration law)
- l. HAR Chapter 1 of Title 13
- m. HRS Chapter 91
- n. HRS Chapter 84, § 171-4
- o. HRS §§ 171-17 and 171-33
- p. HAR Chapter 13 of Title 11
- q. HAR Chapter 200 of Title 11
- r. HAR 11-200 [-2 / -12(b)]
- s. Aloha law

**22. Federal Level**

- a. Clean Air Act (42 U.S.C. 7401 *et seq.*)
- b. Clean Water Act (33 U.S.C. 1251 *et seq.*)
- c. Coastal Zone Management Act (16 USC §145 *et seq.*)
- d. Endangered Species Act (16 USC §1531 *et seq.*)
- e. National Environmental Policy Act (42 USC §4321 *et seq.*)
- f. National Registry of Natural Landmarks (Program 15.9100 § 62.2)
- g. National Historic Preservation Act, Section 106 (16 USC §470f)

**23. International Level**

- a. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- b. EMRIP 2015

**F. Evidentiary Standards**

**IV. DISCUSSION AND CONCLUSIONS**

**A. CDUA HA-3568 is Deficient, Incomplete, and Outdated**

1. Failure of BLNR to follow HAR Chapter 1 of Title 13 and HRS Chapter 91
2. Failure of BLNR to require compliance of CDUA with revised HAR Chapter 13-5 (August 12, 2011)
3. Failure of BLNR to require Applicant to submit an updated CMP
4. Failure of Applicant to properly update CDUA
5. Failure of Applicant to submit a complete and accurate CDUA

**B. Mandated Comprehensive Management Plan is Inadequate for Proposed TMT Project**

1. Proposed TMT Project is beyond the scope of this CMP
2. Failure of Applicant to complete the required five-year update of this

**CMP**

**C. Applicant's Mismanagement Continues to Adversely Impact the Natural and Cultural Resources of Mauna Kea**

1. Failure to complete significant CMP Management Actions
2. Failure to adequately consult Native Hawaiian cultural practitioners
3. Failure to provide oversight of UH personnel
4. Failure to properly train individuals through Maunakea User Orientation
5. Failure to properly implement CMP Cultural Resources Policies

**D. Proposed TMT Project is NOT in Compliance with Master Plan (2000)**

1. Design Guidelines Disregarded



2. Construction Guidelines Disregarded

E. Proposed TMT Project FAILS to Satisfy the Eight Criteria of HAR §13-5-30(c)

1. Not consistent w/ purpose of conservation district
2. Not consistent w/ objective of resource subzone
3. Does not comply w/ Chapter 205A
4. Will cause substantial adverse impact
5. Not Compatible w/ locality and surrounding areas
6. Does not preserve natural beauty and open space.
7. Results in further subdivision of land
  - a. Subdivision of land into the Astronomy Precinct
  - b. Subdivision of land through Subleases
8. Detrimental to public health, safety, welfare

F. Proposed TMT Project Would Cause Significant Effects

G. Significant Effects of TMT Project NOT Mitigated

1. Mitigation measures are non-existent
2. Location of the TMT on the northern plateau
3. Dome design and coating
4. Furnishing TMT project facility
5. Design of Access Way
6. Developing exhibits for UHH's 'Imiloa Astronomy Center and Visitor Information Station
7. Cultural and Natural Resources Training Program
8. Invasive Species Control Program
9. Community Benefits Package

H. Supplemental EIS is Required as TMT FEIS is Deficient and Outdated

1. Significant changes have occurred since 2010
2. Significant sections incomplete and inaccurate
3. Significant conclusions were based upon draft reports
4. Alternative sites not considered (i.e. Canary Islands)

I. Violations of Hawai'i State and U.S. Constitutional and Statutory Provisions

1. BLNR/DLNR and UH have FAILED their Constitutional and Statutory Obligations

a. Violation of Native Hawaiian Customary and Traditional Rights

- b. Violation of Public Trust Doctrine
- c. Violation of Environmental Laws
- d. Violation of Conservation District Rules
- e. Violation of Desecration Law
- f. Violation of Surety and Lease Requirements

- g. Violation of Religious Freedoms
- h. Improper Delegation of Authority

J. Violations of Due Process of Law

**V. INCORPORATE THE FINDING OF FACTS AND  
CONCLUSIONS OF LAW**

I hereby incorporate the Findings of Fact and Conclusions of Law of ... into this document, my Findings of Fact and Conclusions of Law, by reference,  
As follows: Kealoha Piciotta and Mauna Kea Anaina Hou, Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. War, Paul K. Neves, Harry Fergestrom, Mehana Kihoi, C.M. Kaho'okahi Kanuha, Stephanie-Malia: Tabbada, Joseph Kaulii Lindsey Camara, J. Leina'ala Sleightholm, Lanny Alan Sinkin Rep., For Temple of Lono, Kalikolehua Kanaele, Tiffnie Kakalia, Dwight J. Vicente, Brannon Kamahana Kealoha, William Freitas

**VI. DECISION AND ORDER**

Based on the above Finding of Fact and Conclusions of Law the University of Hawai'i's Conservation District Use Permit Application (HA-3568) is deficient and hereby **DENIED/REVOKED.**

Kailua Kona HI. May 30, 2017

  
Cindy Freitas Petitioner

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'ohē Mauka,  
Hāmākua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02

Document title: **Cindy Freitas Proposed Finding  
of Fact, Conclusions of Law, Decision  
and Order**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by email (when indicated):

Carlsmith Ball LLP  
Ian Sandison, John P. Manaut, Lindsay N. McAneeley  
1001 Bishop Street  
ASB Tower, Suite 2200  
Honolulu, HI 96813  
[isandison@carlsmith.com](mailto:isandison@carlsmith.com)  
[jpm@carlsmith.com](mailto:jpm@carlsmith.com)  
[lmcaneley@carlsmith.com](mailto:lmcaneley@carlsmith.com)  
*Counsel for the Applicant University of Hawai'i at Hilo*

Law Offices of Yuklin Alulu  
415-C Uluniu Street  
Kailua, HI 96734  
[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)  
*Co-Counsel for Kahea*

Dexter K. Kaiama  
111 Hekili Street, #A1607  
Kailua, HI 96734  
[cdex@hotmail.com](mailto:cdex@hotmail.com)  
*Co-Counsel for Kahea*

Kealoha Pisciotta and Mauna Kea Anaina Hou  
PO Box 5864  
Hilo, HI 96720  
[keomaivg@gmail.com](mailto:keomaivg@gmail.com)

Clarence Kukauakahi Ching  
64-823 Mamalahoa Hywy  
Kamuela HI 96743  
[kahiwaL@cs.com](mailto:kahiwaL@cs.com)

Flores-Case 'Ohana  
E. Kalani Flores, B. Pualani Case  
PO Box 6918  
Kamuela, HI 96743  
[ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

Deborah J. Ward  
PO Box 918  
Kurtistown, HI 96760  
[cordylinecolor@gmail.com](mailto:cordylinecolor@gmail.com)

Paul K. Neves  
380 Nahale-a Avenue  
Hilo, HI 96720  
[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com)

Watanabe Ing LLP  
J. Douglas Ing, Ross T. Shinyama, Summer H. Kiawe  
First Hawaiian Center 999 Bishop Street, 23<sup>rd</sup> Floor  
Honolulu, HI 96813  
[rshinyama@wik.com](mailto:rshinyama@wik.com)  
[douging@wik.com](mailto:douging@wik.com)  
*Counsel for TMT International Observatory, LLC*

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

Mehana Kihoi  
PO Box 393  
Honaunau, HI 96726  
[uhiwai@live.com](mailto:uhiwai@live.com)

C. M. Kaho'okahi Kanuha  
77-6504 Maile St  
Kailua Kona, HI 96740  
[kahookahi@gmail.com](mailto:kahookahi@gmail.com)

Joseph Kualii Lindsey Camara  
192 Kualua Pl.  
Hilo, 96720  
[kualii@hotmail.com](mailto:kualii@hotmail.com)



Torkildson, Katz, Moore, Hetherington & Harris  
Attn: Lincoln S. T. Ashida  
120 Pauahi Street, Suite 312  
Hilo, HI 96720-3084  
[lsa@torkildson.com](mailto:lsa@torkildson.com)  
[njc@torkildson.com](mailto:njc@torkildson.com)  
*Counsel for Perpetuating Unique Educational  
Opportunities (PUEO)*

J. Leina'ala Sleightholm  
P.O. Box 383035  
Waikoloa, HI 96738  
[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)

Lanny Alan Sinkin  
P. O. Box 944  
Hilo, HI 96721  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for The Temple of Lono*

Kalikolehua Kanaele  
4 Spring Street  
Hilo, HI 96720  
[akulele@yahoo.com](mailto:akulele@yahoo.com)

Stephanie-Malia:Tabbada  
P O Box 194,  
Naalehu, HI 96772  
[s.tabbada@hawaiiantel.net](mailto:s.tabbada@hawaiiantel.net)

Tiffnie Kakalia  
549 E. Kahaopea St.  
Hilo, HI 96720  
[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)

Glen Kila  
89-530 Mokiawe Street  
Waianae, HI 96792  
[makakila@gmail.com](mailto:makakila@gmail.com)

Dwight J. Vicente  
2608 Ainaola Drive  
Hilo, Hawaiian Kingdom


Brannon Kamahana Kealoha  
89-564 Mokiawe Street  
Nanakuli, HI 96792  
[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)

Cindy Freitas  
PO Box 4650  
Kailua Kona, HI 96745  
[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)

William Freitas  
PO Box 4650  
Kailua Kona, HI 96745  
[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)

Wilma H. Holi  
P. O. Box 368  
Hanapepe, HI 96716  
[w\\_holi@hotmail.com](mailto:w_holi@hotmail.com)  
*Hearing Officer's witness*

Moses Kealamakia Jr.  
1059 Puku Street  
Hilo, HI 96720  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Hearing Officer's witness*

Signature:   
Name: *Cindy Freitas*  
Date: *5/30/17*