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BOARD OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

|  |   |
|--|---|
| A Contested Case Hearing Re Conservation )   | DLNR File No. HA-CC 16-002              |
| District Use Application HA-3568 for the )   | (CDUA HA-3568)                          |
| Thirty Meter Telescope on the Northern )     |   |
| Plateau in the Mauna Kea Conservation )      | <b>PETITIONERS MAUNA KEA ANAINA</b>     |
| District, Ka'ohē, Hamakua District, Island ) | <b>HOU, K. PISCIOтта, D. WARD, P.</b>   |
| of Hawai'i TMK (3) 4-4-015:009 )             | <b>NEVES, K. KANAELE, L.</b>            |
|  | <b>SLEIGHTHOLM, B. KEALOHA,</b>         |
|  | <b>C.FREITAS, M. KIHOL, PROPOSED</b>    |
|  | <b>FINDINGS OF FACT, CONCLUSIONS OF</b> |
|  | <b>LAW, DECISION AND ORDER, COS</b>     |

PETITIONERS RESPONSE TO UHH/TIO FINDINGS OF FACT,  
CONCLUSIONS OF LAW, DECISION AND ORDER

The University of Hawaii at Hilo, an entity of the state University of Hawaii

Received  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
2017 June 13 2:31 pm

(hereinafter referred to as “The University” or “Applicant”), filed an application for a Conservation District Use Permit (hereinafter referred to as “CDUA”) on September 2, 2009, pursuant to chapter 183C of the Hawaii Revised Statutes (hereinafter “HRS”) and chapter 13-5 of the Hawaii Administrative Rules (hereinafter “HAR”) for the construction of a Thirty Meter Telescope (hereinafter referred to as “TMT” or “project”) on the northern plateau of the conservation district on Mauna Kea in the Mauna Kea Science Reserve, Ka’ohe Mauka, Hamakua, Hawai’i, TMK (3) 4-4-015:009.

The Applicant and TIO have filed their joint proposed findings of fact and conclusions of law. DOC-671 (The University of Hawaii at Hilo and TMT International Observatory, LLC’s joint [proposed] Findings of Fact, Conclusions of Law, and Decision and Order). <sup>1</sup>

The Applicant/TIO filed 1,014 separate findings of fact and 482 separate conclusions of law. *Id.*

The Hearing Officer provided two weeks in which to file responses. Minute Order 43 (Order setting post-hearing deadlines). DOC-552.

The above mentioned Petitioners hereby makes the following Response to Doc 671 UHH/TIO Findings of Fact, Conclusions of Law, and Decision and Order denying CDUA HA-3568 for the Thirty Meter Telescope (TMT). In the interest of efficiency and the amount of time provided, several petitioners have combined

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<sup>1</sup> The Applicant and TIO filed joint proposed findings and conclusions. DOC-671. That fusion supports the original challenge by various parties to the inclusion of TIO as a party in this proceeding. The University clearly represented the interests of TIO and TIO had no basis for independent standing.

their responses, and so more than one response may be noted to a single Applicant's Finding of Fact. Petitioners herein incorporate by reference the responses of Temple of Lono, William Freitas, Clarence Kukaukahi Ching, Flores-Case Ohana, and KAHEA.

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## STATUTES

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R. §13-5-2430 R. §13-5-30(c) R. §15-3-2

## CONSTITUTIONAL PROVISIONS

Haw. Const. Art. XII Haw. Const. Art. XI 6

## DISCLAIMERS, OBJECTIONS, RESERVATIONS AND JOINERS AND INCORPORATIONS

These Disclaimers, Objections, Reservation, Joiners, and Incorporations are filed on behalf of Pro Se Petitioner's MKAH's and Kealoha Pisciotta as a part of their RESPONSES to UH/TIO FOF COL, D&O.

1. We incorporate by reference MKAH's FOF COL, D&O and all witness exhibits and testimony.
2. We have used the terms Native Hawaiian with a capital "N" and the small "n" interchangeably. We assert our rights as Native Hawaiians, native Hawaiians and Kanaka Maoli under county, state, federal and international laws (including the United Nations Declaration on the Rights of Indigenous Peoples) and other rights protected customary international legal standards relating to the human and civil rights of all people including indigenous peoples.
3. We incorporate by reference MKAH's FOF COL, D&O and all witness exhibits and testimony in RESPONSE TO UH/TIO COL 158-162 (re Standing, Jurisdiction (Subject Matter Jurisdiction)), COL 168 - 175 and 196 -200 (re Burden of Proof, Case law (including PASH, HANAPI, PRATT. KAPA'AKAI ANALYSIS etc)), COL 204-208 (re Religious Freedom and Contemporary Practice), COL 209-218 (re Waivers, Desecration, Sublease, NHPA/NEPA federal review and any and all other issues addressed or contained in the UH/TIO's Collective table of contents and FOF COL D&O.
4. We reassert our positions re the relevant issues as they are laid out in our original Petitions and we reassert our written and oral objections contained in the entire hearing etc., including our Motions.
- 5.. We incorporate by reference the entire Na Leo video recordings of the five months of evidentiary hearings. See naleo.tv and search to TMT Contested Case Hearing.
- 6.. The HO may take Judicial Notice and the OIP has ruled regarding our request to

BLNR regarding our Motion and Motion for Reconsideration regarding On-Line Access to the Tran

7.. We also incorporate by reference all of the Pro Se Parties FOF COL, D&O and again restate that we do not believe we were given enough time to review, answer, defend and/or to adequately address our positions regarding all of facts and information contained in this preceding.

8.. We join here with the Temple of Lona (TOL) represented by Lanny Sinkin, supplements FOF COL, D&O relating to the multitude of filing if MO including ones that are obviously many long after the fact and moot. Some of the Dispositive Motions could have changed the outcome of this proceeding and so by failing for rule on the them in a timely manner means our due process rights again have been violating. Further, by ruling on them now means the actually record of this case is not in fact compile as is defined by the law. This also biases and borders on contempt for the Pro Se Petitioners to inundate them with Minute Order after Minute Oder with only 5 days to file Motions for Reconsideration simultaneously seeing our due date for filing our Responses and previously our collective FOF COL, D& O.

9.. Because we filed a Petition with the BLNR (DOC 622, dated May 5, 2017) and a Motion for Reconsideration (DOC 643, dated May 20m 2017) that were also sent to the Office Of Information Practice (OIP), we have added an Appendix ("A") to include our efforts and exchanges with the OIP. We object to BLNR's decision to not upload a full set of the transcripts for this CCH. WE object to the lack of a full and complete record being made available to the Parties. We object to the entire treatment of not only the Pro Se Petitioners but the Public as well regarding the Transcripts. There was no reason for the BLNR to deny our request to upload the transcripts to the online electronic documents library system that has been used throughout the entire hearing. the BLNr and OIP's decision biased the Petitioners and violated our due process rights.

10. We object to the HO not allowing MKAH's to call rebuttal Witness (Tom Peek and Kupuna Liko Martin). Both of these witnesses had substantive information to

add to the hearing that no other witnesses could have added and their testimony we relevant and material to help inform this proceeding.

## INTRODUCTION

### I.THE PARTIES (FOF 1-28)

FOF #3 incorrectly states: “Pisciotta, a native Hawaiian practitioner, did not participate as a party in her individual capacity in the prior contested case.” This is not the case. in the prior contested case hearing the Applicant agreed that Ms. Pisciotta as an individual had standing to participate in the contested case hearing. (Lui Kwan, Tr. May 13, 2011, 45:22-46:4). On May 27, 2011, the HO (Paul Aoki) issued Minute Order 6 “granting Ms. Pisciotta standing in this contested case hearing”. (Min. Ord. 6; Aoki, Tr. May 13, 2011, 6:17-23,46:19-47 and 82:17-25).

### II.PROCEDURAL HISTORY: PREHEARING

#### A. PRIOR CONTESTED CASE, REMAND, APPOINTMENT OF HEARING OFFICER (FOF 29-39)

FOF# 35-36 BLNR failed to reconsider the adequacy of the EIS and CDUA, given the six intervening years, during which time draft studies had been finalized, new studies had been conducted, new rules and been amended, and public outrage had been generated. BLNR failed to conduct a public hearing to take public comments, consider calls for a contested case, or provide an opportunity for petitioners to present standing statements.

#### B.MOTIONS TO INTERVENE (FOF 40-53)

FOF #49. The Applicant fails to mention there was no standing hearing for new parties. “All remaining applicants for intervention had standing to participate in the contested case as parties and their motions to intervene were granted.”

FOF #49: Mauna Kea Anaina Hou (MKAH) through their council Naiwi Wurdman, filed a Memorandum in Opposition ( DOC 069) to P.U.E.O’S Motion to Intervene (DOC 033) dated May 16, 2016. In MKAH’S Memorandum in Opposition, it states; “...While any of the individuals associated with P.U.E.O., Inc., i.e. Richard Ha, Jr., the apparent “Incorporator,” according to the Articles of

Corporation of P.U.E.O., Inc., Shadd Keahi Warfield, listed as its President, Patrick Le'o Kahaiwaiola'a, William H. Brown, and any others could have requested a contested case hearing on February 25, 2011 and then paid the related fee or received a waiver of the fee and then proceeded to the contested hearing if admitted, none of these individuals made such an effort..." (DOC 069) dated June 13, 2016.

- P.U.E.O's request is not timely. (DOC 033) dated May 16, 2016.
- P.U.E.O Inc. failed to demonstrate how the corporation will be so directly and immediately affected by the requested CDUP that the corporation should be admitted as a party and has failed to show how its interests are distinguishable from that of the general public. (DOC 033) dated May 16, 2016.
- Criteria 8 of HAR 13-5-30 states that a proposed land use will not materially detrimental to the public health, safety and welfare. It does not require that a proposed project/land use be beneficial to public welfare safety and welfare. P.U.E.O's reasoning for intervening in this case is unfounded.

On April 8, 2016, TIO filed a Motion to Intervene in the remanded contested case hearing (DOC 002). On June 13, 2016, MKAH filed it's Memorandum in Opposition (DOC 070) To TIO (TMT International Observatory LLC). First, "...at no time did TMT Observatory Corporation make a timely request to be part of the contested case process on February 25, 2011, almost four-and-one-half years ago, with a number of the entity members of the current TMT International Observatory, having every opportunity to make a timely request at that time." (DOC 070). Therefore, their request was not timely. Second, TIO's alleged property interest is still at issue and has not yet been determined.

FOF #49;. No other motions objecting to new parties were submitted.

C.PREHEARING PLEADINGS (FOF 54-61)

#### D.SETTING THE ISSUES (FOF 62-73)

FOF # 63;(65,66). "The Hearing Officer requested that P.U.E.O submit a Proposed Minute Order Granting PUEO's motion to Set Issues setting forth the issues to be addressed and issues not to be addressed in the contested case hearing, as ruled upon at the hearing." TR. 8/29/16 at 83:5-19. We take exception with the Hearing Officer requesting a new party in this contested case to set the issues - especially when their standing was being challenged. MKAH submitted a position statement (DOC 164) regarding PUEO's setting the issues and recommended some issues to be decided that were ignored.

#### E. SITE VISIT (FOF 68-73)

#### F. PRIOR CDUP WAS VOIDED BY BLNR (FOF 74)

#### G. SCHEDULING THE EVIDENTIARY HEARING (FOF 75-87)

FOF # 77-81 UH referenced and acknowledged that Mr. Wurdeman council for original petitioners MKAH, Deborah Ward, KAHEA, EK Flores/Case Ohana and Clarence Ku Ching raised conflicts in scheduling as far back as June 17, 2016 TR.Viii. He submitted the request for a scheduling conference on September 8, 2016 because after all of the hearings on the dispositive motions in August 2016, that the H.O had still not ruled on at the time, we still did not have any definitive schedule on anything. He had followed up on September 23, 2016 (DOC 282) after we were served the day before with the Notice of Hearing with the attached letter. H.O set a scheduling conference on October 5, 2016. H.O's scheduling of hearings in October was never more than "an aspiration."

FOF# 80-81 It would have been unreasonable, as ordered on October 3, 2016, to have all witness lists, exhibit lists and subpoena requests due on October 11, 2016 and to commence the evidentiary hearing on the same day the witness lists and exhibit lists were due.

#### III.PROCEDURAL HISTORY: HEARING (FOF 88-106)

FOF# 92 Some parties were not afforded sufficient time to complete cross examination.

FOF# 93 In spite of his oath that he was the author, Nees admitted during cross that he had not written his own testimony, except for the first paragraph, and that he used a template provided by his superior.

FOF #102; The applicant misrepresents the expertise of witness Dr. Joseph Keawe'aimoku Kaholokula by referring to him only as "Professor" throughout their FOF/COL when actually, he is a PHD. In his current position, he is Professor and Chair of Native Hawaiian Health at the Department of Hawaiian Health at John A. Burns School of Medicine. This is an important omission by the Applicant because they attempt to reduce and minimize the weight and importance of his testimony. Ex Q-11.

#### IV.PROCEDURAL HISTORY:POST HEARING (FOF 107-109)

FOF #108, 109. There were numerous verbal requests and motions submitted by Petitioners and Parties as to being able to access the transcripts online. (DOC #622) dated May 5, 2017 (DOC #635) joinder filed by Flores Case Ohana dated May 16, 2017, (DOC # 643) motion for reconsideration submitted by MKAH dated May 20, 2017. Yuklin Aluli for KAHEA asked for transcripts online. TR Vol VIII P 17-18. TIO/UHH filed motions in opposition to the parties request for online access to the transcripts (DOC #'s 627, 630, and 632). The Office of Conservation and Coastal Lands managed a website where all documents, exhibits, witness lists, motions, objections etc were kept for the use and access of all parties. Every document throughout the pre-hearings and evidentiary hearings has been uploaded except for the transcripts. Putting the transcripts at the libraries put the pro-se petitioners at a disadvantage because of the limited library hours, petitioners work schedules, not being able to copy (except by hand), holiday scheduling, summer hours (UHH), and a missing volume of the transcript at the Waimea Library. On May 17, 2017, (DOC # 637) HO/BLNR filed Minute Order 49 Denying online access. HO/BLNR have not answered Motion for Reconsideration (DOC #643) as of June 5, 2017.

FOF#111 Minute order 44 did not address discrepancy in simultaneous Receipt and Denial of Exhibits B.28, B.37a and B.37.b, and B.38

FOF#112. Amended Minute order 44 did not address discrepancy in Receipt and Denial of B.37a and B.37.b, and B.38 and two different titled exhibits numbered B.28.

## FINDINGS OF FACT

### I.DEVELOPMENT OF MODERN ASTRONOMY

#### A.GENERAL LEASE, MK SCIENCE RESERVE, UNIVERISTY MANAGEMENT AREA (FOF 113-117)

FOF # 113; This is another “cart before the horse” situation as addressed at the Hawaii State Supreme Court. Here we have an observatory that will cost \$1.4 billion, and if approved, will not be completed until at least 2025. R-1, p1-19. Decommissioning will take 5 years R-1, p1-19 (note #3 at the bottom of chart). This would leave 3 years of operation.

FOF # 114 The General Lease also states:

Exhibit A under “The Lessee, in Consideration of the Premises, Covenants with the Lessor as follows:”

12. Objects of Antiquity. The Lessee shall not appropriate, damage, remove, excavate, disfigure, deface or destroy any object of antiquity, prehistoric ruin or monuments of historical value.

FOF# 117. Astronomy precinct is not a designated land unit with metes and bounds, it is “defined where development will be consolidated”, and “without a surveyed boundary, it is difficult to discern the exact location”. Ex A009 MP2000 p. IX-20, Ex CMP p. 7-2 and Tr. Hayes 10.25.16 Vol 3: p22:1-8

### B. ASTRONOMY PRIOR TO 2000 (FOF 118-122)

FOF# 120 From a cumulative perspective, the impact on cultural resources has been and would continue to be, substantial, adverse, and significant. The cumulative impact to geological resources in the Astronomy Precinct has been substantial, adverse, and significant... The magnitude of significance of cumulative impact to the alpine stone ecosystem is not yet fully determined. Ex A-2 p SS-1.

The existing cumulative impact on geology, soils, and slope stability is considered to be substantial, adverse, and significant, primarily due to the alteration of the cinder cone morphology. Ex.A-3 p. 3-219

FOF # 121; The University is attempting to establish that the proposed TMT site is grouped together with all the other telescopes and is one big developed area. While Mauna Kea is overdeveloped (on the summit) it is not fully developed. The proposed TMT site is on the Northern Plateau, which is a wide open space. The site is 3/4 three fourths of a mile from any observatory. And is one of the last open space areas. See the TMT frequently asked questions at <https://goo.gl/images/JljL4z> and Ex R-3 V 1, fig 2-3 p 2-11, fig 2-4 p 2-12, fig 2-4 p 2-13, Ex B.03R R-1 fig 1.7 p.1-12 pdf 23 of 294.

The Applicant itself has stated, “[T]he proposed location for the TMT is on and estimated five acres of presently undeveloped land off the summit in an area referred to as the northern plateau within the Astronomy Precinct of the Science Reserve. .” A013 p.31

FOF # 122; The proposed site is not on the summit among the other telescopes, it is on a pristine plateau. Not on any Pu’u. id.

[C.2000 MASTER PLAN/OMKM \(FOF 123-135\)](#)

FOF #123 Applicant FAILED to update the Master Plan on MAJOR projects addressing future development. Master Plan X1-14

“UH must—must take corrective action to ensure compliance with the Mauna Kea CMP and the Mauna Kea Science Reserve Master Plan 2000. WDT E. Kalani Flores Exhibit B.02; E. FloresTr. 1/20/17:V32:P38:L19-21.

Applicant is not in compliance with its mandated management plans. E. FloresTr. 1/20/17:V32:P31:L16-17;AFOF 123

A protocol that includes requesting permission from the aina, kupuna and akua, expresses appreciation for the generosity and bounty of nature and follows practices of stewardship is the key to appropriateness. Ex A-28 (Master Plan Appendix N page 74)

FOF #124 Applicant FAILED to preserve and protect the cultural, natural, landscape for the future generations.

Dr. Abad is a trained anthropologist, ethnohistorian, and archaeologist specializing in Hawaiian culture and history. Exh. B.08a (Abad WDT) at 1 Abad testified “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:V27:P60:L6-20

FOF # 129: UH/TIO not only misrepresented Ms. Kakalia’s testimony, but states the opposite - this is the last paragraph from her Pre Hearing Statement. “I served 2, 4 year terms as a volunteer on the Kahu Ku Mauna Advisory Council (KKMC), both in Interim Chair and Vice-Chair capacities. I contributed to many discussions relating to management issues, astronomy initiatives, including development and the lack of attention to cultural matters relating to Maunakea. As a layperson with little to no experience on technical procedures, I had to learn at a very fast pace, about the many issues presented to KKMC for review most of which had more to do with astronomy initiatives than cultural matters. I distinctly remember Uncle Larry Kimura reminding us that the function of the council is to “heighten the awareness of Hawaiian consciousness” not have our names down as cultural advisors to support astronomy.” Tiffnie Kakalia PHS at 1, TR. 2/27/19 At 148:4-148:8.

FOF# 131 The purpose of Title 13, chapter 5 of the Hawaii Administrative Rules “is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long term sustainability and the public health, safety, and welfare.” HAR 13-5-1 BLNR is attempting to

transfer its authority of this kuleana of the state to an entity that has no authority or legal obligation to enforce this statute.

An example of an act of desecration conducted in the name of the University without legal authority is the following:

Applicant witness Wally Ishibashi, in his capacity as an employee of OMKM, testified that as a construction monitor/cultural advisor has unilaterally made decisions to take down ahus or upright shrines that he feels don't belong in areas that he might be in. Mr Ishibashi could not cite the "rule" he referred to is his testimony. TR. 11.16.16 V9 p.127: 24-25, p.128: 1-24, P.129: 10-22, p.159: 1-25, p.160: 1-12, 13-22, p.161: 1-19, p.162: 1-4, 6-25, p.163: 1-25, p.164: 3-25, p.165: 1-25, p.163: 1-25, p.164: 3-25, p.165:1-25, p.172: 1-25, p.173: 1-25, p.175: 1-22, p.186:8-24. TR12.1.16 V10 p.60: 20-25, p.61 23-25, p.62: 1-20, p.63: 14-20, p.135;11-22.

The Master Plan does not provide affirmative guidance regarding removal of shrines and ahus.

"Whether all new features constructed for religious purposes in the Science Reserve or at Hale Pohaku required permit is somewhat ambiguous as these kinds of minimal structures and this type of land use are not specifically addressed in the Conservation District regulations." Master Plan Appendix F SHPD page 89

FOF# 132 The University is not a land manager, and it attempts to serve many masters. DLNR, by delegating responsibility to manage the natural and cultural resources Mauna Kea, does not protect the Conservation District, as it is mandated to do.

KAHEA wrote in 2011 "On one side of the table, the University asserts itself as the objective land manager and enforcer of management activities on Mauna Kea. It hires 100% of the staff at the Office of Mauna Kea Management. It appoints 100% of the Mauna Kea Management Board, and

the cultural advisory group, Kahu Ku Mauna. It holds meetings and make decisions about the management of resources on the summit.

Then at the same time, on the other side of the table, The University sites with the corporations and foreign governments seeking permission to exploit the conservation lands on the summit. The University facilitates and benefits from this ongoing exploitation of summit resources. Just as an example of the University's perverse incentive to encourage construction on the summit, the TMT repeatedly highlights throughout the CDUA and management plan that in order to construct the telescope, the TMT Corporation will make sublease payments directly to the University". Ex. A- KAHEA comments to BLNR 1.5.11 A-23 OCCL Case File

FOF # 133 and 135. Applicant has not maintained compatibility and consistency between the Master Plan; the CMP and its sub-plans are not consistent with the Master Plan. Flores stated "UH must—must take corrective action to ensure compliance with the Mauna Kea CMP and the Mauna Kea Science Reserve Master Plan 2000. DLNR, BLNR must ensure that UH is in compliance with these plans." Tr.1/30/17:V32:P38:L19-23

FOF # 134; 240; 241; 245; 246; 247; 248; 252; 254; 255; 258

The MKMB, with input from Kahu Ku Mauna, makes recommendations to UH Hilo Chancellor to approve or disapprove major projects presented to them by OMKM.

A project approval and design review process is to be established to ensure that projects conform to and implement the concepts, themes, and development standards and guidelines set forth in this plan. Plans should support the Master Plan goals and objectives and contribute to the mountain's overall character and environmental quality. Ex A-28 (Master Plan page XI-7)

As with the permanent facilities there will be a distinction made between Class A and Class B facilities paralleling the Class A and B amendment

criteria identified in this chapter. Those that may have potentially significant impacts will be processed through the major projects review channels. Ex A-28 (Master Plan page XI-13)

Class A amendments would be major amendments for proposals that require approval by the Board of Regents. Examples of these include:

New projects not identified in the Master Plan with site coverage over 2,000 square feet or a building envelop over 24,000 cubic feet (40' x 50' x 12')

Major expansions of existing facility sites not anticipated in the Master Plan (more that 50% of existing floor area or 2,000 square feet, whichever is greater).

Improvements identified in the Master Plan which require significant changes in site or location

New utility alignments and corridors.

One of the major purposes of the Master Plan was to guide the development of observatories. Nagata Tr. 12/12/16:V15:P70:L13-14 Were there any amendments to the master plan? No. Nagata Tr. 12/12/16:V15:P245:L4-7

Dr. Fujikane states that as NASA's FEIS indicates, Mauna Kea is already overbuilt. The EIS claims that the TMT Project will add a "limited increment" to the level of cumulative impact, but that claim is irrelevant because what must be considered is not the individual impact of the TMT Project but the cumulative impact of the TMT Project and the existing observatories. Tr. 01/9/2017, V. 23 at 211. HAR §11-200-12

#### [D.COMPREHENSIVE MANAGEMENT PLAN AND SUBPLANS \(FOF 136-159\)](#)

FOF# 136 The OMKM environment committee initiated efforts to develop a natural resources management plan in 2005, but the comprehensive management plan was mandated by 3rd Circuit Court Judge Hara in 2006 as a result of the Keck Outrigger CDUP appeal. Ex B.17d

#### E. CURRENT AND FUTURE DECOMMISSIONING (FOF 159-166)

#### F. ASTRONOMY DEVELOPMENT UNDER MASTER PLAN (167-178)

#### G. BLNR SUPERVISION AND MANAGEMENT (FOF 179-182)

FOF #179-181 This is unlawful delegation authority. The State has an affirmative duty to uphold the constitution and cannot transfer this to another entity that is not mandated to uphold the constitution. A long term lessee is not granted the authority to protect NH rights even it's to the "highest authority within the university" The state cannot transfer its authority or its duty by or through management plans and sub plans.

FOF # 182; Nagata nowhere in her WDT, states that she is a lawyer or has had any legal training in law and therefore is not qualified to make a legal opinion/statement. Nagata at 12.

#### H. UNIVERSITY MANAGEMENT EFFORTS (FOF 183-190)

FOF # 188; The University omits Mr. Ho's testimony regarding OMKM being in conflict as a proponent of development and a manager tasked with protecting the mountain. TR. V. 39, p 39,19-25. Feb 22, 2017

FOF# 189 The CMP is intended to be an actively managed doc to reflect ongoing changes in management as issues arise. "The plan should be reviewed and updated every five years as part of the evaluation and revision process for the Mauna Kea CMP...to incorporate changes to DLNR rules and regulations, renegotiated leases, new and renegotiated subleases, new management agreements, or new statutes of changes to existing laws and or court decisions that are related to deconstruction and site restoration." Ex.A013 pg35

## II.THE PROPOSED PROJECT

#### A.PROCEDURAL HISTORY OF TMT PROJECT (FOF 191-205)

FOF 191. Applicant's and TIO's characterization of what Dr. Edward Stone said in his Verbal Testimony on December 19, 2016, is a stretch. Dr. Stone said: "In fact, the National Academy of Sciences recommended that there is a priority for a 30-meter segmented mirror telescope in the year 2000." Dr. Stone's "there is a priority" does not equate to the Applicant's and TIO's characterization as "recommended to prioritize a 30-meter segmented mirror telescope." While the creative use of "to prioritize" may connote to most readers that the TMT may be assumed to have been awarded a "first priority," the truth of the matter is that the TMT did not. Tr. 12/19/16, Vol. 18, at 6.

In "New Worlds, New Horizons in Astronomy and Astrophysics: National Research Council (2010)," in evidence, the following is stated:

Recommendations for New Ground-based Activities - Large Projects  
Priority 1 (Large, Ground). Large Synoptic Survey Telescope (LSST)  
Priority 2 (Large, Ground). Mid-Scale Innovations Program  
Priority 3 (Large, Ground) Participation in a Giant Segmented Mirror Telescope (GSMT)  
Priority 4 (Large, Ground) Participation in an Atmospheric Cerenkov Telescope Array (ACTA)

Yes, the TMT, being a Giant Segmented Mirror Telescope, does have a priority - a Priority of 3. That is a far cry from what the Applicant and TIO seem to intend in FOF 191. TMT - in national discussions - has a Priority of 3 (not 1 as is seemingly hinted at). Ex. B.19e.

The Final Environmental Impact Statement (FEIS), dated May 8, 2010, is outdated. On Page S-2 of the EIS, the text reads:

"Project Purpose, Need, and Objectives

The Project's overall purpose is to provide a 30-meter ground-based telescope, which was identified in the 2001 National Academy of the Sciences Decadal Survey for Astronomy as the most critical need for ground-based astronomy. Such a telescope would be a critical part of future astronomy facilities planned for 2015 and beyond."

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

The 2011 National Academy of the Sciences Decadal Survey had a change of heart, making the most important statement of this Final Environmental Impact Statement, the 2001 statement untrue. The 2011 position of the Decadal Survey, although it continued to like these very large, ground-based telescopes, didn't categorize them by giving them the highest priority. In essence, the primary purpose that drove the initial movement to build the TMT Project had evaporated - and no money was produced. Ex. B.19d, p. 4-5 (pages were not actually numbered.) This is another example of the FEIS being outdated. It should have been either amended or supplemented, but neither modification was adopted, resulting, because of changes in the NSF world, in a defective and out-dated document. The document should be stricken.

.An article in Science Magazine, dated May 14, 2015, written by Jeffrey Mervis and Adrian Cho:

"NSF should help build massive telescope in Hawaii, says senior appropriator" states:

A 2011 decadal survey of the field by the National Research Council of the U.S. National Academies ranked a giant segmented-mirror telescope as one of its top three priorities for ground-based optical and infrared astronomy. The report recommended the United States pay for 25% of construction of either TMT or its competitor, the Giant Magellan Telescope, which would sit atop Cerro Las Campanas in Chile. The panel also recommended NSF eventually spend a similar amount in equipping or operating the second telescope. Ex. B.19d, p.5 (pages were not actually numbered).

\* \* \*

\* Correction, 15 May [2015], 2:36 p.m.:

The priority ranking given to a giant segmented-mirror telescope by the 2011 decadal survey has been corrected. It was given third priority, not first, primarily because other projects were more "mature." Ex. B.19d, p.5 (pages were not actually numbered).

As of 2011, the TMT Project does not have the mistaken first priority that was seemingly announced in 2001, but had slipped to 3rd Priority by the 2011 Decadal Survey. And all of the propaganda that seemingly suggested that the TMT Project that its PR appointees continued to communicate to the world had the highest priority was plain old b.s. That b.s. cannot be allowed to control the results of this Contested Case Hearing and the Final Environmental Impact Statement must be stricken. Ex. B.19d, p. 5-6 (pages were not actually numbered).

FOF #193, 204. Applicant has been inconsistent with the Master Plan Design for the NGLT . The Master Plan states:

A single optical/IR telescope of 25 m. aperture or greater. This is currently only being discussed in the astronomy community and there is a 50 percent possibility that this facility may be developed in the next 20 years.

The NGLT and facilities on new site locations may require adjustments after viewing tests and archaeological inventory level surveys are conducted. The following siting criteria should be considered early in project development:

Site facilities to avoid negative visual or functional impacts to existing facilities. Where known archaeological, cultural and natural resources exist the following sequence of evaluation is to be followed: 1) avoid disturbance of the resource, 2) minimize impact if unavoidable and 3) mitigate impact as needed. Natural resources include biological populations and geo-morphological features and geo- chemical resources.

Set sufficient buffer distances between the facility and the cultural or natural resource. Buffer distances should be assessed individually based on the feature and the proposed facility.

Site facilities to minimize visual impact from both the summit areas and off-mountain locations such as Hilo, Hamakua and Waimea.

Cluster facilities for proximity to roadway and utility lines. This should reduce site development costs and minimize visual impacts and unnecessary disturbances of the natural environment.

If possible, avoid steeper areas and drainage paths.

Ex A-048 Master Plan

#### B. FORMULATION OF TIO (FOF 206-207)

#### C.SUBLEASE BETWEEN UH AND TIO (FOF 208-209)

FOF # 206-207; TIO is not listed or mentioned in CDUA . TIO does not have any legal binding document or contract for this massive project. If TMT doesn't exist anymore, and TIO is not on the CDUA who is responsible? Ex A-001 CDUA

#### D.CONSULTATION FOR PROPOSED PROJECT (FOF 210-237)

FOF# 210, 211; These statements are not credible nor founded on fact. Public hearings are not consultations.

FOF# 214; None of the known cultural descendants, lineal descendants, or “individuals with knowledge about the identity and history of burials on Mauna Kea” were notified i.e. Kealoha Pisciotto, Paul Neves, Clarence Ku Ching about the preparation of the development of a burial treatment plan. According to 6-E law,... / Dr. Abad testifies she hadn’t ever seen a burial treatment Plan for Mauna Kea. TR. V27 p37; 24-25 p38; 1-2 Jan 19, 2017. Dr. Kahakalau said she had never seen or heard of a burial treatment plan for the summit area of Mauna Kea. TR. V23 p63; 13-24, p64; 1 Jan 9, 2017. Ruth Aloua had never seen it before TR. V36 p85; 25 p86; 1-25 Feb 15, 2017. The University appears to have slipped this document in under the radar after several critical witnesses who could have reviewed it and testified to it had already testified.

FOF # 218; Ms. Aloua doesn’t claim to have legal expertise or has had any training in the laws of the State of Hawaii. She was testifying in her capacity as an archaeologist. Ex B.24a WDT, ex CV B.24b.

FOF #227; There was not sufficient consultation with cultural practitioners, cultural descendants, or lineal descendants conducted for this proposed project. Dr. Kehaunani Abad TR. V27 p60; 5-25, p61; 1-9, p29; 16-25, p30; 1-2, p37; 24-25, p38; 1-25, p39; 1-23, p55; 2-25, p56; 1-2 Jan 19, 2017. Dr. Peter Mills TR. V30 p117; 1-25, p118; 1-12, p98; 4-25, p99; 1, p63; 6-25, p64; 1-13, p45; 19-25, p46; 1-11, p101; 20-25, p102; 1-6 Jan 25, 2017. Millilani Trask TR V43 p195; 11-25, p196; 1-9.

FOF # 228; The Applicant confuses “speaking” with “consulting”. Dr. Hasinger in his testimony that the Applicant leaves out states he spoke to cultural practitioners or protectors (Lanikila, Jon Osorio, Lilikala Kame’eleihiwa, Kamahana Kealoha) that were against the construction. TR. V5 p81; 18-25, p82; 1-24. He does not state this was any form of consultation of any kind. Also, Brannon Kealoha in the same TR. V5 p269; 15-25, p270; 1-25, p271; 1-11 makes it clear they did not discuss the TMT. Hasinger is aware Mr. Kealoha is not in support of the TMT.

FOF #234 Mr. Kanaele's "extensive" interview and consultation consisted of 4 and 1/2 pages. He was never asked to come up and talk about sites, history, or to educate archaeologists on any thing. Ex A-5 app D.

FOF # 236; Open Houses are not in any way, shape, or form a consultation. By boycotting an open house process, the Applicant cannot claim they "consulted" with practitioners.

FOF # 237; In reading the testimony and seeing the evidence in WDT'S, it is clear that the University did not do adequate, thorough, comprehensive, extensive consultations with cultural practitioners that lawfully practice their traditional and cultural practices on Mauna Kea.

#### E. PROJECT DESCRIPTION (FOF 238-261)

FOF 238 The proposed TMT Observatory will be located in the northern plateau, ...Applicant cannot mitigate the impacts upon the natural and cultural resources, .. this massive project will do harm to in the northern plateau, where there's no existing telescopes at the moment. E. Flores Tr. 1/30/17:V32: p93:L11-14

FOF# 239; There currently no development out in "Area E" the North Plateau. this "Area E" is 1/2 mile from the nearest telescope and is a wide open space. R-1 fig 5.1 p5-2 pdf 86 of 294, R-3 p 2-12, 2-13, R-1 Section 4 Cultural Resources p4-3 pdf 76 of 294.

FOF# 244. Master Plan states:

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. Master Plan Page XI-4

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.

Support facilities in the astronomy precinct should be designed to reduce the height of vertical planes on exterior walls.

Facilities that can be built underground are encouraged to do so to reduce the part that must remain above grade.

Mounding cinders around telescope bases could be considered to reduce visible heights.

Where practical, build into existing slopes to reduce the visible height.

Facilities at Hale Pohaku should be a maximum of two stories and designed to look like one story structures by techniques such as building into attic spaces as per the existing buildings.

In reviewing plans and specifications the DRC, Mauna Kea Management Board and UH will be concerned with both the overall design concept, design details and overall impact. General concerns will include whether the proposed project:

Conforms to the goals and objectives of the Mauna Kea Master Plan;

Is consistent with the Design Guidelines in the plan;

Will not negatively impact adjacent facilities or uses;

Promotes resource conservation and sustainability;

Relates harmoniously to the surrounding landscape.

to add significantly to negative cumulative impacts.

Plans found to be inconsistent with the Master Plan concepts and objectives shall be rejected. Major variations from development standards shall also be rejected.

Ex. A-048 Master Plan page XI-9

FOF #249, 251. Applicant is mischaracterizing the substantial adverse impact that construction will have on Mauna Kea. During the construction and decommissioning of the proposed project, there will be temporary adverse impacts due to noise, traffic, dust, visual intrusion, and the increase in human presence on the mountain; possible adverse impacts during construction and decommissioning also include potential disturbance beyond the project limits. Ex A-001 CDUA page 2-7

FOF# 251 Dormitory rooms for the workers to be housed at Hale Pohaku are limited. Although they will provide rideshare there is still a cumulative impact from the number of workers beside the visitors coming up on Mauna Kea on a daily basis. Ex A-001 CDUA

FOF #253. The proposed TMT project would not conform to Master Plan guidelines in building half of the building below grade.

Strict design guidelines will dictate the size and color of the NGLT. The preliminary design concept proposed for the NGLT employs a unique sliding dome mirror enclosure with a sub-grade foundation, as shown in Figure IX-21. **The lower half of this observatory will be built below grade to minimize the apparent height and mass of the facility.** The facility shown in the concept has a 30-m. mirror, with a dome shaped and colored to simulate a small pu'u to blend well with the surrounding landscape. Ex A-048 Master Plan XI-35 (emphasis added)

FOF #256. Applicant mischaracterized the issue of the roadway it should minimize roadway development in the Science Reserve to what is needed to support functions approved in the master plan. Ex. A-048 Master Plan page XI-6

TMT would cut 30,000 cubic yards of material from the access road and only 3,000 cubic yards will be used in the access road. That is a major cut that is

inconsistent with the Master plan. Any major cut of access road will be amended in the Master plan. Ex. A-001 CDUA page B-3; Ex. A-048 Master Plan XI-13.

FOF #260; The University has created subdivisions within the Conservation District. Within the Science reserve, UH has created an area they call the "Astronomy Precinct". This area is not legally designated by the Land Board as such. Within their "Astronomy Precinct there are 6 separate areas mapped out they are; A, B, C, D, E, and F. **Area A** holds The Canada -France -Hawaii Telescope, The Gemini North Telescope, UH 2.2 Meter Telescope, United Kingdom Infrared Telescope, and UH at Hilo 0.9 m Observatory. **Area B** holds the NASA Infrared Telescope. **Area C** holds the Caltech Submillimeter Observatory, James Clerk Maxwell Telescope, and the Submillimeter Array. **Area D is currently un-occupied. Area E currently is un-occupied. Area F is currently un-occupied.** Ex. R-1 fig 1.3 p 1-4.

FOF# 261 Circuit Court Judge Greg Nakamura ruled the Board of Land and Natural Resources violated constitutional rights of E. Kalani Flores by failing to hold a hearing before allowing the University of Hawaii to issue a sublease to TMT International Observatory, LLC, and the Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and The University of Hawaii sign on July 28, 2014 S-419, whose consent was withdrawn by the Court, titled Ex B.02f, cites rent on page 4.

#### F. ASTRONOMICAL CONDITIONS (FOF 262-264)

FOF # 264 - The proximity of other astronomical facilities in this age of electronic and fiber optic communications is a non-considerative factor. With remote and robotic electronic communications and connections, including fiber optics, "proximity" just does not matter.

#### G. SCIENTIFIC VALUE OF TMT OBSERVATORY (FOF 265-274)

The following Findings of Fact are not relevant or material and are beyond the scope of the issues to be considered by Rule of the Hearing Officer and are definitely outside the scope of the 8 Criteria:

FOF# 266. There seems to be a dis-connect between touting "[o]bservatories on Mauna Kea were involved in the majority of astronomical breakthroughs in the last 50 years." Or "[t]he yearly number of scientific publications from Mauna Kea observatories is greater than that from the Hubble Space Telescope or the European Southern Telescope." With all of these breakthroughs, the mere age of the CDUA, being upwards of 7 years and counting, must make it old, out-moded and out-dated to be considered in these 2017 deliberations.

On the other hand, FOF 266 states: "TMT would [sic] able to provide more detailed information about their [asteroid] orbits, composition, and ultimately the danger they pose. This would aid in predicting the path of the asteroid, and potentially aid in, preventing an asteroid from impacting the Earth."

However, this preceding paragraph is NOT totally true. What Dr. Hasinger said was: "So the professional telescopes ... are discovering the asteroids [sic] on the first night of observations.... Then the amateur astronomers around the world are following up on the objects. And they are actually extremely important to pin down the orbit ... They [TMT-class telescopes] are not specifically designed to look for asteroids [sic] .... Usually the big telescopes are not the ones that find the asteroids [sic]. Tr. October 27, 2016, Vol. 5, at p. 71-2.

#### H. ECONOMIC BENEFITS OF TMT (FOF 275-278)

#### I. TMT CONSTRUCTION ACTIVITIES (FOF 279-283)

FOF # 279 Applicant witness Hayes admitted that three different deconstructions and a new construction will have impacts; "Typically construction and demolition are considered temporary impacts, and most of the impacts evaluated in the EIS are more of the long-term impacts". Hayes Tr.10/25/16:V3:P168

#### J. EDUCATIONAL AND EMPLOYMENT OPPORTUNITIES (FOF 284-303)

This section is irrelevant to the issues to be decided in the Contested Case.

*EDUCATIONAL OPPORTUNITIES 284-290*

FOF #284; This statement holds no water. The creation of educational and employment opportunities is not part of the 8 criteria nor was it one of the issues to be decided so is therefore irrelevant.

FOF # 285-290; P.U.E.O Inc. failed to demonstrate how the corporation will be so directly and immediately affected by the requested CDUP that the corporation should be admitted as a party and has failed to show how its interests are distinguishable from that of the general public. (DOC 033) dated May 16, 2016.

*NATIVE HAWAIIANS AND ASTRONOMY 291-296*

*COMMUNITY BENEFITS PACKAGE 297-300*

FOF# 297-300, 330

The TMT proposes a Community Benefits Package and a voluntarily contributed rent, which would be paid directly to the University, not for management, and not as fair market assessed rent paid to the General Fund for DLNR conservation efforts. The following dialog recorded in 2011 between DLNR and Sierra Club highlights a shared goal (appropriate management) that the TMT CDUA proposal fails to address.

OCCL writes: “[s]trong management –which [Sierra Club] fought for-- requires significant investment. Environmental protection costs money. Protecting historic and cultural resources costs money. Education costs money. Maintaining public access and ensuring public safety costs money. Routine infrastructure costs money. Stopping TMT, and fighting any and all development will not resource the mountain to a pre-contact state of grace. The existing roads, electric lines, and facilities will not disappear. Rather, as funds dry up, active and strong management will become difficult, maintenance and renovations will slow, infrastructure will crumple, and the very cultural and environmental resources Sierra Club et al purport to protect will suffer.” Ex. A-7 OCCL Responses

Sierra Club writes: “This TMT CDUA attempts to substitute a “community benefits package” for payment of fair market lease rents (as required by law) significantly harms community efforts to address long-standing lease rent inequities in the use of conservation district lands for observatories without just, proper and legal compensation. ...Sam Lemmo {OCCL} wants to blame Sierra Club for the sorry state of management should the TMT CDUA be disapproved. The sorry state of management is something Lemmo helped the UH establish to subsidize development and impoverish conservation efforts. And Now he and the UH wants BLNR to bless a Ponzi scheme where new telescopes must be welcomed or the management comes crashing down for lack of money.” Sierra Club comments Ex A-23 OCCL case file

#### *WORKFORCE PIPELINE 301-303*

#### *K.TMT MITIGATION MEASURES (FOF 304-330)*

FOF # 304 The Applicant in this case has not designed the TMT project mitigation actions in accord with guiding documents nor has it demonstrated that the proposed mitigation actions would directly reduce the admitted significant impacts of the project to a level that is less than significant. It is important to note that the Applicant has the burden of proving that mitigation measures offered would actually reduce the significant impact of the TMT proposal to a level that is less than significant.

FOF #306; (1). This statement is patently false. There has been extensive testimony to the fact that cultural view planes were not taken into consideration. There was not an “emic” perspective used when identifying cultural view planes. TR V27 Jan 19, 2017 p31; 7-5, p34; 6-23, p35; 10-24, p36; 1-14, p41; 13-18, p56; 7-25 1-5, p63; 20-25, p64; 1-25, V34 p172; 3-14. R-4 V2 FEIS p7, p8 pdf 30 and 31. Pisciotta testifies that the summit (Kukahau’ula) contains the existing telescopes therefore, the TMT would not fit and has to be in an undeveloped area. TR. V34 Feb 13, 2017, p.198: 7-10

FOF #308; Placing the proposed TMT Project on the Northern Plateau does not mitigate the significant, and adverse impacts this project would cause. This substantial, credible and reliable evidence demonstrates this point. B.02a WDTp14, 15-17, Ex. B.01a at 16; Ex. B.13a at 4; Tr. 1/10/17 at 41:1-21; Tr. 1/19/17 at 226:9-226:13, 226:9-226:13; Tr. 1/26/17 at 138:3-19; Tr. 1/30/17 at 86:3-87:8.

FOF #309-310; A portion of the access way will cut through a portion of the Traditional Cultural Property known as Kukahau'ula. R-3, pdf 358, R-1 CDUA Fig 4.2 p4-4 pdf 77 of 294.

FOF # 322. Only to be un-restored again upon TMT Decommissioning when the "restored" material at the Batch Plant will be sequestered to "restore" Area E. In other words, this seemingly positive resulting "restoration" of the Batch Plant area will only be temporary.

FOF # 323. This not mitigation. Actually, this isn't needed. In fact, it discriminates against older and disabled cultural practitioners who have a difficult time in walking and could be advantaged by being able to ride to important cultural locations on 4-wheel drive vehicles. In a few years, I might have problems visiting Pu'uPoliahu

FOF # 324. Would the TMT Project get credit for this "mitigation" item if it only sent over \$1? Will \$10 be 10 times better and get more points? This is such a nebulous project from which to garner nebulous credit.

FOF #324; The Off-site mitigation measure described here are not sufficient. Financial Contributions, educational exhibits, and creating materials "that explore the connection between Hawaiian culture and astronomy" are not part of the 8 criteria in HAR 13-5-30c.

FOFs # 325 and 326. Can real results be guaranteed if these people only need to be engaged for the required times (One hour training)

? It isn't as "required" enough because some have testified as witnesses (including Mr Nees) in this contested case hearing that were able to work on the Mountain without having had to take the "required" training.

FOF #327 Dr. Kahakalau testified as a witness for the Flores-Case 'Ohana, but is not a practitioner on Mauna Kea. She has criticized the Cultural and Natural Resources Training Program by stating that an annual training is inadequate for any employee to gain an understanding and respect for any cultural and religious practices, and/or sensitivity to the negative impacts on cultural resources. Ex. B.06a (WDT Kahakalau) at 5.

Dr. Kahakalau is a native Hawaiian educator, researcher, scholar, composer and recognized expert in Hawaiian language and culture. She holds a Bachelor's in Secondary Education and a Professional Diploma in Hawaiian Language, and a Master's Degree in European Languages and Literature (focusing on German literature about Hawai'i). Moreover, she is the first person in the world to earn a Ph.D. in Indigenous Education, has over 30 years of experience teaching Hawaiian language, history and cultural studies to learners of all ages and levels, in and outside of the classroom. She has developed and implemented multiple educational pilots and spent over two decades researching the impact of Hawaiian-focused education on native learners and lectured all over the world on diverse aspects of Hawaiian language and culture revitalization through culturally-driven models of education. She's also an active community leader, serving on multiple non-profit boards, representing Hāmākua for eight (8) years on the Hawai'i Island Burial Council and currently serving as chair of the Hawai'i County Board of Ethics. Tr. 3/1/17 at 97:23-103:22; Ex. C-52. FOF #328;

Dr. Kahakalau is an educator. The Applicant has only cut one small sentence into this FOF with out context. To put her testimony back into context see; TR V23 p32; 2-25, p33; 1-25, p34; 1-8.

FOF # 329. The letter from University President Lassner (Exhibit A-39) to Governor Ige is Lassner's written promise or offer. It is NOT formal AND binding. Will any of this offer be enforceable in court? I don't think so. Or would it be enforceable and binding on succeeding presidents and administrators of the University and governors? I don't think so.

Furthermore, to subtract the small impacts of a number of "small" observatories and replace them with a gigantic observatory with gigantic impacts is NOT mitigation. It is just the replacement of small "old" impacts with large "new" impacts. Because of the unprecedented size of the proposed TMT, the cumulative impacts become enormous. A unilateral letter that speculates on a future speculation is not legally binding. It is only an expectation, if any. Ex. A-39

FOF# 329 President Lassner's letter to Governor Ige, relates to a condition of a current lease, lease renewal, or lease extension. It does not offer a commitment regarding a proposed lease. Significantly, it also does not preclude proposing another telescope in the *area* where TMT is proposed. (emphasis added).  
Exhibit A-39

FOF # 330. The Petitioners and opposing Intervenors are also members of the public who do not agree. Additionally, the THINK Fund is discriminatory. For example, an example of discrimination is Ku'u lei Freitas, the daughter of opposing Intervenors, Billy and Cindy Freitas, a graduate student working on a Masters degree and is in good standing with her university, who was rejected from participating in THINK Fund moneys (it is believed because she has been anti-TMT). This ought not to happen.

#### [L.TMT PROJECT DECOMMISSIONING \(FOF 331-337\)](#)

FOF 331. The Decommission Plan is "a plan to plan" a decommissioning. There is nothing that the TMT will be agreeing with other than to agree to participate in a Plan to Decommission at some future date that will be triggered by termination of

the General Lease, termination of a Sublease or TMT's decision to end operations. The process starts with the filing of a Notice of Intent.

FOF # 331; This is another “cart before the horse” situation as addressed at the Hawaii State Supreme Court. Here we have an observatory that will cost \$1.4 billion, and if approved, will not be completed until at least 2025. R-1, p1-19. Decommissioning will take 5 years R-1, p1-19 (note #3 at the bottom of chart). This would leave 3 years of operation. This is not plausible or reasonable to suggest The Applicant would consider this.

Significantly, the TMT Sublease has been effectively terminated (by revocation of BLNR's Consent by the 3rd Circuit Court). Ex. B.19h.

The TMT Sublease states:

#### AGREEMENT

10. Effect of Termination or Expiration: Decommissioning. Upon termination or expiration of this Sublease, Sublessee shall at Sublessor's sole option and at Sublessee's sole cost and expense either (a) surrender the Subleased Premises with all improvements existing or constructed thereon, or (b) decommission and remove the TMT Facilities and restore the land in accordance with the CMP and the Decommissioning Plan for Mauna Kea observatories. Ex. B.02f.

The Decommissioning Plan states:

#### 4.2 Site Decommissioning Plan

A Site Decommissioning Plan (SDP) documents the condition of the site, outlines an approach to decommissioning, and proposes a plan for site restoration, if applicable. Each SDP shall be developed in stages consisting of the four components: (1) a Notice of Intent, .... Ex. A013.

TIO, according to the requirements of the TMT Sublease and the Decommissioning Plan, is now in Non-Compliance to their requirements. The Non-Compliance to the requirements of the TMT Sublease AND the

Decommissioning Plan should disqualify TMT Observatory Corporation (the real 3rd Party Beneficiary AND TMT International Observatory LLC, the pretender stranger corporation) from being granted a CDUP. The TMT Observatory AND TMT International Observatory LLC are disqualified from being granted a CDUP.

FOF # 332. If indeed, the TMT is built and the excess materials are used to restore the Batch Plant area, it will only be un-restored again upon TMT Decommissioning when the "restored" material at the Batch Plant will be sequestered to "restore" Area E. In other words, this seemingly positive resulting "restoration" of the Batch Plant area will only be temporary.

FOF # 333. With termination of the TMT Sublease, that triggers the Notice of Intent, Site Decommissioning Plan, a Site Deconstruction and Removal Plan and a Site Restoration Plan. The Site Restoration Plan can be initiated with restoration of the Groundbreaking Pad, the geotechnical holes and the Access Road. TMT International Observatory LLC is presently in Non-Compliance by failing to file a Notice of Intent that has been triggered by termination of the TMT Sublease. Ex. A-13 See FOF 331 response above.

FOF # 336. That some underground facilities may be left in place is a cop-out. This is another example of the Decommissioning Plan being a plan to plan. There is no guarantee that cultural practitioners, for instance, will have any part of the decision-making process that could/would take place.

#### M.FUNDING (FOF 338-339)

FOF # 339. While The Mauna Kea Plan (of 1977) is entitled "The Mauna Kea Plan," it would have been more properly be entitled "The Mauna Kea Master Plan of 1977." The Mauna Kea Plan was promulgated by memorandum of then Acting Governor George Ariyoshi to Sunao Kido, Chairman of the Board of Land and Natural Resources on November 1, 1974. In the memo, Governor Ariyoshi, stated: " To assure that full consideration is given to all aspects of permitted, controlled and prohibited uses, you are hereby directed to develop and promulgate as

expeditiously as possible, a Master Plan for all of the Mauna Kea above Saddle Road." Governor Ariyoshi added: "Finally, the promulgation of the Master Plan should include its adoption by the Board of Land and Natural Resources following public hearings, and should provide for both the enforcement of the Plan and procedures for its amendment."

While some aspects of the Plan were couched in "guideline" language, there are key parts of the Plan that are "mandatory" and are written in mandatory language. The item that Ching brings up is written in "mandatory" language. It isn't possible to write a directive in more mandatory language that it is in this case. "No application for [sic in FOF 339] any proposed facility shall have final approval without the applicant having first filed with the Board, adequate security equal to the amount of the contract to construct the telescope facilities, support facilities and to cover any other direct or indirect cost attributed to the project.

Other current plans do not curtail the present effectiveness of "The Mauna Kea Plan." The "Mauna Kea Science Reserve Master Plan" approved by the University's Board of Regents on June 16, 2000, is "an internal policy and planning guide for the University...." See discussion at FOF 123. "The Comprehensive Management Plan is an integrated planning guide for resource management that is designed to promote the protection of Mauna Kea's unique cultural, natural, recreational, educational, and scientific resources.... The CMP is an adaptive management plan that provides general management guidelines and does not provide full or complete details on all projects contemplated." The CMP does not cover TMT. See discussion at FOF 136.

The Mauna Kea Plan (of 1977) as it relates to the subject of "security" continues to be effective as mandatory (when it says it is) to any potential approval of the CDUA by the Board of Land and Natural Resources.

[N.OCCL REPORT \(FOF 340-343\)](#)

FOF # 340-342(See responses to FOF# 297-300, 330)

The TMT proposes a Community Benefits Package and a voluntarily contributed rent, which would be paid directly to the University, not for management, and not as fair market assessed rent paid to the General Fund or to DLNR conservation efforts. The following dialog recorded in 2011 between DLNR and Sierra Club highlights a shared goal (appropriate management) that the TMT CDUA proposal fails to address.

OCCL writes: “[s]trong management –which [Sierra Club] fought for-- requires significant investment. Environmental protection costs money. Protecting historic and cultural resources costs money. Education costs money. Maintaining public access and ensuring public safety costs money. Routine infrastructure costs money. Stopping TMT, and fighting any and all development will not resource the mountain to a pre-contact state of grace. The existing roads, electric lines, and facilities will not disappear. Rather, as funds dry up, active and strong management will become difficult, maintenance and renovations will slow, infrastructure will crumble, and the very cultural and environmental resources Sierra Club et al purport to protect will suffer.” Ex. A-7 OCCL Responses

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### III.TMT COMPLIES WITH EIGHT CRITERIA HAR 13-5-30

FOF #348; Perry White the principal planner for Planning Solutions. Planning Solutions in turn works for Carlsmith Ball law firm, who is representing the UHH. Mr. White cannot make an unbiased decision about whether the proposed TMT can meet the 8 criteria in 13-5-30c. He has no legal training in order to make a legal conclusion. TR V1 p104; 6-13, p139; 15-25. Perry White Witness Statement 1.

#### A.CRITERION ONE

FOF #353/COL#131. The conservation district rules specifically state that “land uses shall not be undertaken in the conservation district.” HAR 13-5-30(b). The rules allow only those land uses that comply with all eight criteria – that is to say, land uses that do not have a “substantial adverse impact.” HAR 13-5-30(c)(4).

The Board manages the Conservation District consistent with Article XI, Section 1 of the Hawai`i Constitution and Chapter 183C. Article XI, Section 1 provides:

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.

The Board and the Department of Land and Natural Resources ("DLNR") administer lands within the Conservation District pursuant to Haw. Rev. Stat. 183C. This chapter makes the following statement of public policy:

[t]he 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. Haw. Rev. Stat. §183C-1.

When interpreting a statute, the “whole act” rule demands that “the court will not look merely at a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.” *Azarte v. Ashcroft*, 394 F.3d 1287-88 (9th Cir. 2005) quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Against this rule of statutory interpretation, the Applicant focuses solely on the latter half of the regulation to focus on “appropriate management,” ignoring the context of this general term and therefore the stated purpose of the conservation district

From this plain reading of the relevant statutory and regulatory provisions it is clear that conservation districts are established specifically “for the purpose of conserving, protecting and preserving the important natural resources of the State.” HRS §183C-1, HAR §13-5-1 (emphasis added). Statute and regulation provide that this purpose shall be met “through appropriate management to promote [the natural resources’] long-term sustainability and the public health, safety, and welfare.” HAR §13-5-1, see also, HRS §205-2(e)2. This is to say, conservation -- not management -- is the purpose of the conservation district. To conclude anything else would be a gross misinterpretation of the law.

FOF#354/COL#132. A plain reading of the entire relevant statute and regulation makes clear that conservation of natural resources is the purpose of conservation districts. The Conservation District is the most restrictive of the four land use classifications authorized under Hawai‘i’s Land Use Law, Chapter 205. The Conservation District 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. Haw. Rev. Stat. § 205-2(e).

The law provides for distinct districts, such as urban, agriculture, and conservation, because these land areas have characteristics suited to each district designation; the activities allowed in each district are consistent with characteristics of those land areas. Conservation districts are designated to provide for public uses and purposes (i.e. protecting watershed zones, conservation, public parks, open spaces, protection of endangered indigenous and endemic species, and protection of historic resources etc.). Haw. Rev. Stat. § 205-2

FOF#355/COL#133. The “Astronomy Precinct” is an aspiration described conceptually in the Master Plan 2000 with vaguely described boundaries. The “Astronomy Precinct” is a legal fiction because it has never been formally designated; the only formal designations are the Conservation District and the University’s leased Mauna Kea Science Reserve. The eleven facilities in place are sited on the Mauna Kea Summit Ridge and saddle between Kukahau’ula and Pu’u Poliahu. The TMT project proposed by the Applicant would be sited over 1100 meters (3/4 mile) away from the existing infrastructure on the undeveloped northern plateau, far from any developed area. Ex.A048 p. IX-20-23, R-1 Fig 1.7 p 1-2 pdf 23 of 294.

FOF#356/COL#134. Of the approximately 525 acres described in the 2000 Master Plan (of which approximately 92 acres are currently disturbed), siting areas for telescopes were designated comprising 150 acres of land within the “Astronomy Precinct”. Ex A-048 p. XI-22 Only Siting Areas A, B and C are already developed with observatories. All the instruments proposed in the previous plan are constructed, and the limits of these observatory sites define Areas A, B and C. Areas D, E, And F have not been developed, nor is infrastructure such as electrical groundwork in place in these areas. While there has been some historical and more recent disturbance for roads and site testing, Area E, (where the TMT is proposed), remains free of visual impact, the alpine stone desert ecosystem remains intact, and

cultural and recreational use and access remain unimpeded. (Ex.A048 P. IX-20, Ex A-3 pg. 2-8, 2-9, R-1 Fig 1.7 p 1-2 pdf 23 of 294.)

FOF#357/COL#135. The University does not have funding dedicated to conservation management. Even if management were considered the purpose of the conservation district, the record does not support the Applicant's assertion that the TMT project would be appropriately managed. The University is not a land management agency, and the University's Comprehensive Management Plan (UH CMP) does not provide the management necessary to prevent substantial harm from the TMT proposal or ameliorate the 40 years of substantial harm telescope activities have already inflicted on the natural and cultural resources of Mauna Kea. The UH CMP is the ultimate example of an unfunded mandate issued to an entity without experience or expertise and with no triggers or benchmarks to ensure compliance. KAHEA WDT

FOF#360/COL#138. The University has not demonstrated its expertise and experience in managing important natural and cultural resources. The history of mismanagement of natural and cultural resources on Mauna Kea is instructive for deciding whether the promises of improved management in the present case are reliable. In 1985, the BLNR approved the Mauna Kea Management Plan, which contained conditions that included biological inventory, habitat mitigation and monitoring. Ward WDT 2011

The inventory and monitoring were not funded. The habitat mitigation plans were ignored. In 1996, recreational visitors to the summit alerted DLNR staff of industrial activities contrary to board mandated conditions, and subsequently, DLNR Chair Mike Wilson outlined a series of errors by UH Institute for Astronomy (IfA) and DLNR that led to Wekiu habitat destruction in several areas of Pu'u Hau Oki, a cinder cone with prime (Type 2 & 3) habitat for the Wekiu bug. Mr. Wilson stated, in part, that UH IfA failed to include the management plan conditions as part of the FEIS, and the department also failed to discover these omissions in its review of the respective CDUAs and plan approvals. The Gemini Northern 8-meter telescope, Japan National Large Telescope (Subaru), and the

Smithsonian (SMA) were all determined to have destroyed habitat beyond that disclosed in the FEIS or allowed in the approved management plan. Although these telescope construction activities and related infrastructure were completed under the 1985 Management Plan, the mitigation measures described in the plan were not implemented. The inventories and monitoring mandated as conditions in the 1983 MRSRCDP were not funded by the University, and as a result, baseline information required to manage and protect this fragile ecosystem from industrial development impact remains incomplete.

Ward WDT Ex. A-010

The Applicant claims that a new paradigm – embodied in the UH CMP, 2000 Master Plan, and UH Hilo Office of Mauna Kea Management – has replaced the pattern of mismanagement on Mauna Kea. The University has proposed twelve new telescope facilities in the past ten years, including the TMT. None, not even the TMT -- the newest proposal to build one of the world's largest telescopes -- were addressed in the CMP and is referenced without detail only in the Decommissioning Sub-Plan. Ward WDT

FOF#362/COL#140. While the Applicant claims that unique astronomical characteristics are “important natural resources of the state” that “must be appropriately managed and used” to “promote their long term sustainability”. It is absurd to claim that the Applicant can manage attributes such as favorable latitude, altitude, atmospheric clarity and stability, low humidity, low mean temperature, and absence of /distance from light pollution.

FOF#363, 372/COL#141. The Applicant cites planned financial contributions to pay for management on Mauna Kea, yet neglects to mention that the Mauna Kea Lands Fund was not established for conservation management.

Haw. Rev. Stat. 304A-2170 provides the University with a special fund entitled “Mauna Kea Lands Fund”. The purpose of this special fund is:

Managing the Mauna Kea lands, including maintenance, administrative expenses, salaries and benefits of employees, contractor services, supplies, security, equipment, janitorial services, insurance, utilities, and other operational expenses.

Haw. Rev. Stat. 304A-2170

Missing from the list of uses for the Mauna Kea Lands Fund is anything to do with conservation, natural and cultural resources management or environmental protection. The University cannot claim that the Mauna Kea Lands Fund will manage away the substantial impacts of telescope activities on the natural and cultural resources of Mauna Kea, when “natural and cultural resources” are not even mentioned in the long list of uses for money deposited in the fund.

Response to FOF#363/COL# 141. Under the version of HAR § 13-5-2 that was in effect when the CDUA was submitted to the BLNR, “Natural resource” is defined as meaning “resources such as plants, aquatic life and wildlife, cultural, historic and archeological sites, and minerals.” The amendment added to this definition “recreational” and “geologic” sites, “scenic areas, sociologically significant areas,” and “watersheds. Nowhere in the older or newer versions of HAR 13-5-2 are the astronomical natural resources of the State provided protection.

FOF# 373, 378 The Applicant has not considered the sacred nature of pristine water in the wao akua. Native Hawaiian practitioners who collect water for ceremony, medicine and prayer have a right to collect water they are confident is clean, pure and unsullied. The Applicant freely admits that runoff from construction, parking and buildings will run down slope until it percolates into substrate, and Applicant freely admits that they cannot say where the high level ground water is stored, or where it will overflow into seeps and springs.

## B.CRITERION TWO

FOF#387/COL# 145. The Applicant has proposed, in CDUA Ex A001, to build the TMT project in the resource subzone of the Conservation District.

FOF#394 /COL #150: Nowhere in the HAR 13-5-30 can one find a description of the objectives of the resource subzone described as the Applicant in this statement. The FOF 394 misrepresents the statute.

FOF#395, 401 COL#152, 158: The Applicant misstates the language of HAR 13-5-24(c). Astronomy facilities are an *identified* use, not a permitted use.

FOF#397, #398 COL#154, #155: The Applicant fails to note that the CMP does not include the TMT. The University has proposed twelve new telescope facilities in the past ten years, including the TMT. None, not even the TMT -- the newest proposal to build one of the world's largest telescopes -- were addressed in the CMP and is referenced without detail only in the Decommissioning Sub-Plan.

A-13 p.31 Decommissioning Sub-Plan states as follows:

There are currently two projects that are considering Mauna Kea as a site for their observatory facility. IfA is pursuing a project to replace the UH 2,2 meter Telescope with a wide field imaging facility called Pan-STARRS. The second proposed observatory project is the construction and operation of an O/IR next generation telescope known as the Thirty Meter Telescope (TMT). The proposed location for the TMT is on an estimated five acres of presently undeveloped land off the summit in an area referred to as the northern plateau within the Astronomy Precinct of the Science Reserve.

FOF#400.COL#157: Credible witnesses have testified that the "use" of the natural resources, will in fact diminish them. **CITE** While astronomy is an identified use in the conservation district subzone, such use is permitted if and only if it will not entail substantial adverse impacts on the conservation district. The DLNR's "Conservation District Review Project: The Discussion Draft" explains the purpose and function of the hierarchical permitting requirements in this version of the conservation district rules. The TMT would have project-specific substantial adverse impacts, as well as contribute to the existing cumulative negative impact of telescope activities on the natural and cultural resources of Mauna Kea. Thus, the

TMT does not meet the “if and only if” requirement of criterion two and the application must be denied. Ex B.03t

FOF#405: HAR 13-5-2 Definitions: “natural resource” means resources such as plants, aquatic life, and wildlife, cultural, historic, recreational, geologic, and archaeological sites, scenic areas, ecologically significant areas, watersheds and minerals. Nowhere in the definition does it define “Mauna Kea’s high altitude, large fraction of clear nights, atmospheric stability, low mean temperature, low perceptible water vapor, distance from light pollution, and optimal latitude.” As resources to be managed and protected. This statement mischaracterizes the intent of the rule.

FOF#415: The Applicant ironically claims that HAR 13-5-30(c)(2) does not apply, but simultaneously states that HAR 13-5-30(c)(3) does apply (See FOF#417 ). The proper interpretation of HAR 13-5-30(c)(2) is that a proposed land use must satisfy all eight criteria – that is, be an identified land use, as well as not harm public health, subdivide land, cause substantial adverse impacts, and more. Where a proposed land use is not consistent with the subzone of the conservation district where it is proposed, then it cannot be granted a permit. Identifying astronomy facilities as a possible land use does not exempt the University from demonstrating it complies with all eight criteria.

FOF#416/COL#165: The proposed TMT project is not consistent with the objectives of the Conservation District to conserve, protect and preserve the natural resources, nor would the project ensure the sustained use of the natural resources critical to the health and welfare of the people of Hawaii. According to HAR §13-5-13(a), “[t]he objective of this [Resource] subzone is to develop, with proper management, areas to ensure sustained use of the natural resources of those areas.” Id. (emphasis added).

Ensuring sustained use of Mauna Kea’s natural resources necessarily means ensuring that these resources are actually conserved, maintained, or enhanced, not degraded. The DLNR’s “Conservation District Review Project: The Discussion

Draft” explains the purpose and function of the hierarchical permitting requirements in this version of the conservation district rules. Exhibit B.03t.

### C.CRITERION THREE

FOF 420,421/COL#169: The Applicant contends the TMT CDUA complies with criterion three because it does not require a special management area permit. This is incorrect. The conservation district rules require that the proposed land use be consistent with the objectives of the Coastal Zone Management Act, regardless if the proposal triggers additional permitting through that Act. Moreover, the Coastal Zone Management Act requires compliance with the objectives, regardless of the Special Management Area. Haw. Rev. Stat. §205A-4(b) provides:

The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority.

Moreover, the statute states that:

In implementing the objectives of the coastal zone management program, the agencies shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development.  
HRS § 204A-4(a).

Thus, the question before the BLNR, under this criterion, is whether issuing a CDUP for the TMT would be consistent with following relevant objectives:

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

(6) Coastal hazards: Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution.

HRS §205A-2(a).

The TMT would undermine important scenic viewplanes, destroy areas of historic importance, and increase the risk of water pollution. The issues of important viewplanes, scenic and open space resources, historic sites and risks to water quality are addressed in the analysis of criterion four, six, and eight respectively. The fact that the Applicant's proposal would have an added "increment" of impact on these important resources under those criteria, is grounds for also denying the request under this criterion.

#### D.CRITERIONFOUR

The Petitioners' position is: the conservation district rules do not allow for land uses that have a substantial impact. The TMT FEIS concedes that the cumulative impact of past, present, and reasonably foreseeable telescope activities is already significant, substantial, and adverse.<sup>3</sup> Ex 309, FEIS Vol 1, p. S-8, S-9 on cumulative impact. The TMT would contribute to this existing state of substantial adverse impact. The fourth criterion, however, prohibits land uses that cause substantial adverse impact. Because the BLNR and the University have failed to address the existing substantial impact on the mountain's resource, it is improper to consider any new projects that would contribute to that substantial impact in anyway. There are no exceptions to the fourth criterion. The threshold of significance has already been surpassed on Mauna Kea, the TMT would contribute to that existing significant impact, thus it cannot be granted a construction permit.

The method and extent of any remediation is the topic of a separate permit application that is not before the BLNR at this time. This is to say, given the context of substantial adverse harm from current telescope activities, consideration of the TMT CDUA is unreasonable.

FOF#436, 437, 439/COL#181, 182,184. While all of the current facilities are in the summit region areas described as Areas A, B, and C, none are in Areas D, E and F. MP2000 p.IX-23-5. Applicant admits that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea (areas A, B, and C) have resulted in impacts that are considered substantial, significant and adverse. Ex.A-3 p. 3-219 The Applicant proposes to expand astronomical development (one of the world's largest telescopes) into an area (E) that is far (1000 meters or ¾ mile) from the developed infrastructure, in an alpine stone desert discrete from the summit cinder cones, with flora and fauna unlike those at the summit, in a Historic District, with an Access Way impacting a Kukahau'ula, (a Traditional Cultural Property) Thus creating a significant increment of impact to an area that is not at all built upon. Ex.A-3 p. 3-219

FOF#440, 443/COL#185 The Applicant contends the TMT CDUA complies with criterion four, because, although it is undisputed that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have resulted in impacts that are significant and adverse, the TMT project will not tip the balance of any existing impact from a level that is currently less than significant to a significant level.

The proposed TMT Project would cause substantial, significant, and adverse impacts to historic and traditional cultural properties (TCPs) contained within the Mauna Kea Summit Region Historic District (MKSRLHD).

“It is our view that the effect of astronomy development on cultural resources and on the landscape of Mauna Kea has been significant and adverse. While a project such as the TMT can bring new resources into play that may mitigate certain cultural impacts...we believe the project will increase the level of impact on cultural resources, which remains significant

and adverse. “Laura Thielen, Chair, DLNR Ex A-004 FEIS Vol II p 17 of 531

The TMT would be the first observatory to be constructed at the elevation and the specific zone on the north plateau that includes several hundred shrines and other religious structures. Likewise, the proposed TMT observatory would drastically alter the surrounding environment and cause visual and alignment obstructions for these many cultural and religious sites, thus adversely impacting the constitutionally protected traditional and cultural and religious practices exercised by Hawaiian Petitioners. R-5 p. 735 of 1,110

Additionally, while the cumulative impacts of astronomical development to the summit area (App FOF#439) are undisputed, the cumulative impacts to the alpine ecosystem have yet to be determined (Ex.A-3 p. 3-219).

The bulk of human activity has occurred on the cinder cones near the summit of Maunakea, where eight of the existing observatories are located. Human activities have had a very limited impact on the relatively extensive habitats beyond the summit cinder cones. ***Therefore, human activity has not had a significant cumulative impact on species that dwell in these other habitats, such as lichens, mosses, and vascular plants.*** (emphasis added). Ex.A003 FEIS p 3-215

In addition, the growth rates of the lichens and mosses in the severe environment at the summit are extremely low... Therefore, ***recovery of disturbed areas will be extremely low.*** Ex B.64, Appendix D1p 8-9 (emphasis added)

FOF#443 Mitigation of land use intensity through decommissioning of existing facilities described in the CDUA is aspirational. The TMT/TIO project could not compel the decommissioning of facilities operated by other lessees.

With the exception of two UH telescopes, the entities that own or operate the existing observatories each have a sublease with UH outlining the terms of their occupancy. Terms of current subleases are tied to the terms of the

master lease and expire on December 31, 2033. A-13 p. 6

FOF #445 The Applicant's witnesses, including planners White and Hayes, manager and Sanders (who have limited, if any, educational background in biology, archaeology, or Hawaiian culture) and witnesses Nees, Nance, Rechtman , (whose specific knowledge and testimony regarding the TMT site were extremely limited) could not provide probative, reliable, substantial, and credible evidence and relevant exhibits to demonstrate that the TMT project would not, in fact, cause and expand the substantial cumulative impact to existing plants, cultural, historic, recreational sites, geologic sites, scenic areas, watersheds and ecologically significant areas. Applicant's witness, Dr Smith, through his authored exhibit, Ex B.64, Appendix D1, wrote

"The long-term stability of the lichen and moss communities is dependent on ***minimizing disturbance*** in the area. The colonization rate of species is extremely low. (emphasis added)

FOF# 446/COL# 193 Witnesses Hansen, Ward, Abad, Kahakalau, **AND MORE** provided probative, reliable, substantial, and credible evidence and admitted relevant exhibits to demonstrate that the TMT project would, in fact, cause and expand the substantial cumulative impact to existing plants, cultural historic, recreational sites, geologic sites, scenic areas, watersheds and ecologically significant areas.

FOF#448, 149, 450/COL#196, 197 ,198 Under HAR 13-5-30(c)(4), the Applicant did not provide evidence that the TMT project would not will have a substantial adverse impact on the natural and cultural resources of Mauna Kea – both in terms of the project-specific harms and the cumulative impact of telescope activities on the mountain. These substantial and adverse impacts are not reduced to a level that is less than significant based on the mitigation measures proposed by the Applicant. The incremental nature of the one of the world's largest telescope

projects on the cultural, historical and vulnerable alpine region's existing significant, substantial and adverse cumulative impacts is not a tiny insignificant increment, as the Applicant portrays it. Because the BLNR and the University have failed to address the existing substantial impact on the mountain's resource, it is improper to consider any new projects that would contribute to that substantial impact in any way. There are no exceptions to the fourth criterion. The threshold of significance has already been surpassed on Mauna Kea, the TMT would contribute to that existing significant impact, thus it cannot be granted a construction permit.

FOF#451/COL#199 Under the version of HAR § 13-5-2 that was in effect when the CDUA was submitted to the BLNR, "Natural resource" is defined as meaning "resources such as plants, aquatic life and wildlife, cultural, historic and archeological sites, and minerals." The amendment added to this definition "recreational" and "geologic" sites, "scenic areas, sociologically significant areas," and "*watersheds*". (emphasis added).

While the HAR Definition does not specifically cite cultural practices, it does cite sociologically significant areas.

FOF#453/ COL#(201)The Applicant concedes that by constructing observatories near and on the slopes of the cinder cones that comprise the Historic Property of Kukahau'ula, spiritually the most important area of Mauna Kea, little consideration was given to the potential impact on traditional cultural resources. As a result construction of these observatories has had cumulative impacts on cultural, archaeological, and historic resources that are substantial, significant, and adverse.

The Applicant also admits that existing astronomical observatories are prominent visual elements on the summit of Mauna Kea. At the summit, the existing observatories obscure portions of the 360-degree panoramic view from the summit area. Overall, the existing level of the cumulative visual impact from past projects at the summit is considered to be substantial, significant, and adverse. A-3 FEIS

#### FOF 457, 459/COL#207, 201 Mitigation

The mitigation measures proposed by the Applicant are insufficient to reduce the substantial adverse impacts to cultural and natural resources. In *Morimoto V Bd of Land and Natural Resources*, 107 Haw.296 (2005), the question posed to the Court was whether BLNR had the authority to consider mitigation measures when applying the eight criteria of HAR 13-5-30(c). In addition to concluding that the BLNR does have the authority to consider mitigation measures when evaluating a CDUA, the Court also gave direction as to characteristics of adequate mitigation. The court specifically found that the mitigation actions imposed on the Federal Highway administration's(FHA) road realignment actually served to "protect and enhance the natural, environmental, cultural, historical, and other resources" of the district. *Id.* At 303, fn.20. by contrast, the Applicant in this case has not designated the TMT project mitigation actions in accord with guiding documents, nor demonstrated that the proposed mitigation actions would directly reduce the admitted significant impacts of the project to a level that is less than significant. It is important to note that the Applicant has the burden of proving that mitigation measures would actually reduce the significant impact of the TMT proposal to a level that is less than significant. They have not.

Location: The Applicant contends that locating the TMT project on the northern plateau minimizes the substantial impact of the project on visual and scenic resources. The Applicant has not shown that locating the TMT on the ridge would have been desirable or even possible. Indeed, the Cultural Impact Assessment (CIA) specifically “recommended that the TMT Observatory project be built on a recycled site of an outdated telescope on the summit instead of Area E”. Ex. A-4, p. 204-5. Instead of considering this alternative location, the Applicant summarily dismissed this recommendation as “not deemed feasible.” Ex. A-3, p. 3-32. The fact is, the Applicant’s siting process only considered “Area E” on the northern plateau. Ex A-3, p. 4-5. Because it is unlikely that the five-acre TMT project could have been located on the summit ridge, the fact that it is not proposed to be located there cannot be claimed as a mitigation measure.

Size: The Applicant has not shown that the size of the project would reduce the significant impact of the project as proposed to a level that is less than significant. The fact that the project designers could have engineered a bigger, structure but didn’t, does not prove that the significant impacts of the project that is proposed will be minimized to a level that is less than significant. Without evidence, the Applicant cannot prove that “it could have been worse” is any mitigation at all.

Money: The promise to pay “substantial rent” is not a mitigation measure. Not only does the claim fail to consider fair market rent, it also pits compliance with one law against another. Pursuant to HRS 171-17 and -18, fair-market rent is required to be paid into the general fund for the private use of public lands. All telescope facilities should be paying rent to the general fund, regardless of any other requirements or pre-requisites for permission to be on Mauna Kea. It is improper for the DLNR staff to suggest that compliance with this requirement –

paying fair market rent – mitigates the substantial adverse impact of the proposed TMT project “because management costs money.” (Ex. B-33). The requirement to pay rent is not a management fee, it is not a fine, and it is not a rationalization for authorizing a land use that otherwise fails to comply with the basic requirements for a permit. If a proposed land use has unmitigated substantial adverse impacts, then its CDUA cannot be granted, in which case the BLNR never reaches the question of what would be fair-market rent for that land use.

The additional offers of money for educational services and workforce development are completely irrelevant to the BLNR’s consideration of whether this CDUA complies with the eight requirements for a permit. No matter how many jobs or classes the Applicant promises to provide in exchange for permission to build in the conservation district, the BLNR cannot based its decision on such factors for they are outside the confines of the eight criteria for a permit.

The cacophony of additional mitigation measures offered by the Applicant (furnishing items with a sense of place, ride-sharing, paving some roads while remediating others, monitoring Wēkiu bugs, painting facilities, complying with laws, etc.) do not directly address the harm caused by the proposed TMT or telescope activities in general.

The Applicant failed to present evidence that these mitigation measures would actually reduce the substantial impact of the project to a level that is less than substantial. By contrast, the Petitioners presented evidence that demonstrates the mitigation measures do not minimize the substantial and adverse impacts of the project and in some instances actually worsen the injury (silver paint creating a lighthouse effect for mauka views) or add insult to the injury of the proposed

project on Mauna Kea (art and furnishing in the project for a sense of the place just recently destroyed). In fact, the Applicant admits that even with proposed mitigation measures for the TMT, significant impacts on the Mauna Kea conservation district will persist.

FOF #463/COL#215 RENT (see A134) See Ward FOF#482-487

The Applicant asserts that sublease rental payments will be used for management of Mauna Kea's natural and cultural resources. The sublease rent amount negotiated in the sublease whose consent has been vacated by the 3rd Circuit Court, so it is currently unknown how much money would be deposited into the fund. The Mauna Kea Lands Fund special fund is established under section 2170 of Chapter 304A, HRS. (HRS §304A-2170)

Per Chapter 304A, the University is authorized to: "give thorough instruction and conduct research in, and disseminate knowledge of, agriculture, mechanic arts, mathematical, physical, natural, economic, political, and social sciences, languages, literature, history, philosophy, and such other branches of advanced learning as the board of regents from time to time may prescribe and to give such military instruction as the board of regents may prescribe and that the federal government requires..." (HRS §304A-102)

Section 2170 of Chapter 304A, HRS, states in relevant part:

"(b) The proceeds of the special fund shall be used for:

(1) Managing the Mauna Kea lands, including maintenance, administrative expenses, salaries and benefits of employees, contractor services, supplies, security, equipment, janitorial services, insurance, utilities, and other operational expenses"

“Managing the Mauna Kea lands” fails to mention the protection, preservation, or conservation of natural and cultural resources as a purpose of the special fund.

(HRS §340A-2170(b)(1))

FOF#464 The TMT FEIS does address the existing natural resources within the surrounding area, community or region. The cumulative impact of astronomy development on cultural and natural resources has been demonstrated. The Applicant cannot then claim that only the impact of a specific project on a specific site has relevance, irrespective of the added impact of new development on the surrounding area, community or region. The Applicant admits that the incremental nature of a project’s impacts, standing alone, cannot endlessly justify development within an existing developed area. While areas A, B, and C are currently developed areas, Areas D, E, and F are not. The placement of an 18-story telescope in an undeveloped area far from existing infrastructure in a sensitive region already cited for its unique historic, sacred, and geologic value is not an incidental impact, it is a significant increase in additive impact to the region that is not mitigated by off-site unrelated actions’. The Applicant has not demonstrated that the TMT management plan and the mitigation proposed would in any way reduce the added impact of cumulative damage to a level that would be less than significant.

#### *Biological Resources 466-502*

FOF#474 The MKSR is indeed a large area, but the alpine desert ecosystem is not. The Applicant proposes a development in an ecosystem whose cumulative impact has not yet been fully determined, and the Applicant’s witness has written that the recovery rate, once impacted, will be low. The Applicant’s witness, Dr Smith,

referred to his publication, published after the CDUA application was submitted, that included the following evidence:

“Astronomy. The construction of the observatories has had a permanent impact on the biological resources in the immediate area as well as the batch plant areas, roads, and associated areas. **No new lichens or mosses have become established in the area as a consequence of the construction** or have used the structures as their habitat...”

“Long-term stability. **The long-term stability of the lichen and moss communities is dependent on minimizing disturbance in the area. The colonization rate of species is extremely low** and probably restricted to years in which there is moisture present for an extended period of time. Since lichens are a symbiotic association of alga and fungus, the two species have to arrive at the same place at the same time or the two have to arrive as a vegetative propagules containing both species already in the symbiotic association. The chances of diaspore(s) finding a suitable situation for establishment in an environment where growth conditions are unfavorable are low which is supported by the very low cover of the few species present and the low number of individuals per unit area.

In addition, the growth rates of the lichens and mosses in the severe environment at the summit are extremely low. There are very few periods of favorable moisture levels for sustained growth. Even when growth conditions become favorable the lichens and mosses have to undergo a period of resuscitation expending stored resources to repair the damage caused, particularly to membrane systems, during dessication. Exposed rocks heat up very rapidly exceeding temperatures suitable for metabolic processes. But conversely, in shaded situations where moisture levels may remain high enough for sustained growth, the ambient temperature levels are low enough to slow down metabolic activity substantially. **Therefore, recovery of disturbed areas will be extremely low.**”

FOF#475 The Applicant claims the TMT project would not have a substantial adverse impact on the biological resources of Mauna Kea, but it readily admits that the prime habitat for the endemic wekiu bug (*Nysius wekiuicola*) is limited to the cinder cones at the summit of Mauna Kea (and nowhere else on earth) and that it's habitat is primarily impacted by human disturbance and climate change. While neither the Applicant or the BLNR are likely to mitigate climate change in the current political climate, human disturbance can be avoided to a large degree by regulatory management. Applicant Witness Smith and KAHEA witness Hansen both concluded that restoration of the lichen habitat would take more than a century, if at all.

FOF#484 Irrelevant to CDUA, not verifiable.

FOF#485 Contrary to the assertions in the Master Plan 2000 that wekiu bug habitat would be avoided:

“Only the existing disturbed locations on pu'u or areas outside of the Wekiu bug habitat will be considered as potential siting areas” Ex A-48 MP2000 IX-22

the Applicant proposes to take another increment of wekiu bug habitat (Type 3) on the slope of Pu'u Hau'oki, to install electrical conduits and a paved road with guardrail. Over 92 acres has already been impacted by astronomy development, and the loss of additional habitat is another cumulative impact. While the largest area of impact of by the TMT project would affect Type 4 and Type 5 habitat for wekiu bugs (see App FOF#486) , the damage to *any* prime Type 3 habitat is not insignificant. (emphasis added)

FOF#488. The Applicant's claim that 10 acres is 10.25% of 4000 acres does not compute.

FOF#490 The Applicant claims that any potential adverse impact would (or could) be mitigated by various mitigation measures is highly speculative. The potential for introduction of invasive species, particularly the Argentine ant, is significant, given the transport of thousands of tons of material and hundreds of workers arriving at the jobsite daily from homes at sea level. The Invasive Species Management Plan for monitoring incoming vehicles could be helpful, but the University has no track record for control of invasive arthropod species once established at the summit, and several alien arthropods have already become established.

FOF#499 The Applicant claims that Petitioner Ward did not support testimony with data and casts doubt on her training at the University of Hawaii at Manoa in the field of biology with a Master of Science in Horticulture, which requires training in environmental science, botany and entomology. Ward, who retired as a full professor from the Department of Natural Resources Environmental Management, has served on the OMKM Environment Committee since its inception in 2000 as a volunteer. The entomological and botanical data provided in her testimony was fully supported by exhibits, most of which were generated or commissioned by OMKM at the recommendation of the Environment Committee. Because the both the FEIS (2009) and the CDUA(2010) for the TMT project were outdated, Ward relied on studies conducted and management plans developed since the production of The Applicant's documents as evidence for her statements.

FOF#501 The Applicant incorrectly asserts, **mis-citing their own exhibit**, that the ant discovered recently in the Hale Pohaku area, *Ochetellus glaber*, is an invasive

fire ant. The opposite is the case; *Ochetellus glaber*, known as a black ant, displaces fire ants and termites. Exhibit A135 p3

*Archaeological Resources*

*Cultural Resources and Practices*

FOF# 642

The Applicant/TIO find:

“Some Native Hawaiians, including Native Hawaiian cultural practitioners with lineal or other significant ties to Mauna Kea - such as Ishibashi and Baybayan - support the TMT Project and testified that it would have no adverse impact on their cultural practices.”

Response:

Wallace Ishibashi testified to be a lineal descendant of the goddess Poli’ahu, yet has no evidence to prove this claim, and when questioned by Kihoi to name her (Poli’ahu’s) parents, he answered “Papahanaumoku and Wakea”. Which is incorrect. Tr. 11/16/16 vol. 9 pg. 224 at 23-9.

When asked, “Do you believe with the construction of the TMT telescope, that Native Hawaiians will be injured?,”

Wallace Ishibashi responded with: “Yes, you can see how much opposition we’re at now, yes”. Tr. 11/01/16 vol. 9 pg: 218 at 14-18.

When asked, “Do you believe with the construction of the TMT telescope, that

Native Hawaiian planet and insects will be injured?,”

Wallace Ishibashi responded with: “Injured, yes.” Tr. 11/01/16 vol. 9 pg: 218 at 19-22

Though Chad Baybayan does consider Mauna Kea to be sacred, he has never testified to have lineal or other significant ties to the Mountain. Ex. A-138a; WDT Baybayan at 1.

When asked, “If a cultural site on Mauna Kea was bulldozed in the building of the TMT Observatory, would you consider this action to be a form of desecration?”

Chad Baybayan responded with: “Absolutely”. Tr. 11/02/16 vol. 7 pg: 27 at 7-11.

When asked, “If there are cultural sites on Mauna Kea that would provide knowledge to Native Hawaiians, do you believe these sites should be protected?”

Chad Baybayan responded with: “Yes, I strongly affirm they should be protected”. Tr. 11/02/16 vol. 7 pg: 31 at 19-22.

When asked, “If the TMT were to be built in its proposed site, would the construction damage the landscape of Mauna Kea?”

Chad Baybayan responded with: “It would change the landscape of Mauna Kea”. Tr. 11/02/16 vol. 7 pg: 77 at 2-5.

When asked, “If the TMT were to be built, would this action building the TMT on Mauna Kea create a sense of outrage within those who are likely to see these actions being done or to know of these actions being done?”

Chad Baybayan responded with: “I would assume, as demonstrated by the protest, that a certain segment of the population, both Hawaiian and non-Hawaiian, would be outraged”. Tr. 11/02/16 vol. 7 pg.: 78 at 21-3.

Chad Baybayan agreed that practitioners would be subjected to the sound of construction, the smell of exhaustion, and dust and dirt while carrying out their practice on the Northern Plateau. Tr. 11/02/16 vol. 7 pg: 96 at 18-22.

FOF #643 The Applicant/TIO find:

“Dr. Coleman and Dr. Kaluna are native Hawaiian who conduct cultural practices on Mauna Kea and testified that the TMT Project would have no adverse impact on their practices”.

Response:

Though it has been stated that Heather Kaluna is a “native Hawaiian”, she has never testified nor has she offered any evidence to prove or support this claim.

Heather Kaluna does NOT consider herself to be a cultural practitioner. Tr. 01/05/17 vol. 22 pg: 35 at 18-21

Heather Kaluna has stated that her practices will not be impacted, however, Mrs. Kaluna testified that her practices/offerings are conducted at the lele behind the Visitors Center, and ONLY at that location. Very far away from the proposed TMT site. Tr. 01/05/17 vol. 22 pg: 32 at 6-14

Heather Kaluna does NOT have any active, regular, cultural practices at the proposed TMT site. Tr. 01/05/17 vol. 22 pg: 36 at 8-12

Though it has been stated that Shadd Warfield has “testified in support of the TMT Project, despite his personal and cultural ties to Mauna Kea”, Warfield never testified that he conducts regular cultural practices on Mauna Kea or the proposed TMT site.

Dashiel Stevens is an employee of the Visitor Information Station as a tour guide on Mauna Kea, and does NOT consider himself to be a cultural practitioner, nor does he identify where exactly on the summit of Mauna Kea that he conducts his cultural practices.

Dashiel Stevens was born in San Francisco in 1994, and did not move to Hawai’i until 2010. Tr. 12/16/16 vol. 17 pg: 204 13-17.

FOF #699 The Applicant/TIO finds:

Dashiel Stevens makes claims that “in ancient Hawai’i, it was kapu for maka’ainana to travel to the summit area of Mauna Kea. Until the kapu system broke down, only the ali’i and kahuna were allowed to go to the summit”, and “commoners were not allowed near the summit of Mauna Kea”.

Response:

Stevens was unable to recall where he received this information from. Tr. 12/16/16 vol. 17 pg:213 16-21.

FOF #744 The Applicant/TIO finds:

“Kihoi was able to conduct her practices on Mauna Kea despite the presence of 13 existing telescopes, paved roads, and power and telecommunication lines.”

Response:

Kihoi testified that, when she is in ceremony and deep spiritual prayer and a structure like a telescope observatory is in view, it makes her feel like she is closed in. And her spirit is restricted when she can hear the machinery, and the sounds that the telescopes make. She feels restricted and it is not a welcoming feeling. She testified, that at the Northern Plateau, where it is undisturbed, is where she can practice and say her prayers a lot more freely. Tr. 02/14/17 vol. 35 pg: 116 at 10-18.

Kihoi testified that, when these structures are around her, her prayers for guidance, for wisdom, and for healing, turn into prayers for forgiveness, for not being able to stop the other telescopes from going up, because she was too young and it wasn't her time to stand. She believes that this is why she is here, and that now, she has no choice but to stand. Tr. 02/14/17 vol. 35 pg: 117 at 25-7.

Before the groundbreaking ceremony on Oct. 7, 2014, Kihoi had never been to the proposed TMT Project site. Kihoi testified that on that day, she made a number of choices that changed her life forever. From being in ceremony that morning at Pu'u Huluhulu, to making the choice to go up to Hale Pohaku, to making the choice to go up to the summit, to eventually making the choice to go to the site. Kihoi testified that on that day, with many others, she chanted and sang at the site. The Mauna had called them home. Tr. 02/14/17 vol. 35 pg:78 at 25-19. Kihoi

testified that she was called to Mauna Kea because she felt there was an impending injury to the mountain. Tr. 02/14/17 vol. 35 pg: 104 at 24-1. In other words, Kihoi has never visited the site prior to this day, because the Mauna had not called to her. On this day, the Mauna called to her, and allowed her to stand.

Kihoi testified that, throughout her entire life, she was born and raised with an understanding that Mauna Kea is sacred. So sacred, that you don't just go up for any reason. And she believes that when you honor and acknowledge that understanding your entire life, and you simply do not go up there out of reverence to that place and the sacredness of that area, that that is a cultural practice. Tr. 02/14/17 vol. 35 pg: 109 at 3-10.

Kihoi testified that, her first time to the mountain was like a whole new world. Her whole life she had so much reverence and honor for a place, and that place finally called her. Her life was never the same. She had gone through so many years carrying so much weight on her shoulders, that she had no way of releasing. And from the first time she was able to go up, she could feel it lifting. Tr. 02/14/17 vol. 35 pg: 104 at 4-13

Kihoi testified that she is a victim of domestic violence. When she was 19 years old, she was violently attacked with her 7 month old baby in her arms. 5 parts of her face were broken, she lost so much blood she could have died. The blows and kicks to her face were just inches away from her baby, she could have died. She was prescribed many different pain killers and referred to many different types of western therapy and rehabilitation, all which she refused. For years she carried grief and pain, never having a way of releasing this hurt. Until, she went to the Mauna. Tr. 02/14/17 vol. 35 pg: 77 at 11-25.

Kihoi has been conducting active and regular spiritual practices directly connected with Mauna Kea, for the past 33 years. Tr. 02/14/17 vol. 35 pg: 108 at 7-10. She testified that she was not called by the Mauna until 2012. She was called for healing, and it was a kind of healing that she had never felt before in her life. Tr. 02/14/17 vol. 35. pg: 97 at 3-5.

Kihoi testified that she comes from a family of paniolo from Waimea, cowboys who honored the mountain so deeply, they referred to her as “Mama Nui” or “Big Mama”. Tr. 02/14/17 vol. 35 pg: 78 at 1-3.

FOF #745 The Applicant/TIO finds:

“S. Kihoi’s practices do not include pilgrimages to Mauna Kea. Her experiences on Mauna Kea are minimal”.

Response:

Similar to Mehana Kihoi, mother Sarah Kihoi has been honoring and conducting the same spiritual practices that are directly connected to Mauna Kea, for her entire life. Sarah Kihoi testified that when something is sacred, you don't go there unless you are invited by the place. Tr. 02/14/17 vol. 35 pg: 168 at 23-25.

Sarah Kihoi testified that many years ago, she was invited to do a presentation on a sailing trip, and stayed on the mountain over night. During this time she went up to the summit, and walked to the lele to offer her ho’okupu and absorbed the beauty of the mountain. Tr. 02/14/17 vol. 35 pg: 169 11-2.

Sarah Kihoi testified that she hadn't gone up again until June 2015 - in protection of the mountain and in support of aloha 'aina. Tr. 02/14/17 vol. 35 pg:170 at 3-6.

FOF #746 The Applicant/TIO finds:

“Leina’ala Sleightholm did not conduct any practices on Mauna Kea until October 7, 2014, when she ascended the mountain to protest the TMT project. Sleightholm has followed the principles of Case, and both oppose the TMT Project”.

Response:

Leina’ala Sleightholm has participated in a number of ceremonies, and 24 hours vigils since 1992 at Halema’uma’u to lay the foundation for the movements today. Leina’ala is a native Hawaiian cultural practitioner and has been conducting spiritual practices directly connected to Mauna Kea since 2012. Far before she knew or became a student of Case.

FOF #863 The Applicant/TIO finds:

“Kihoi “had no idea that all of those structures and telescopes were - had been up there. I didn’t that there were that much”.

Response:

Kihoi was indeed shocked the first time that she traveled up to the summit of Mauna Kea, because she would have never imagined that the BLNR/OMKM/State of Hawai’i would have allowed it to turn into the industrial like park that it has become. Kihoi understands that the summit of Mauna Kea is a CONSERVATION

DISTRICT, and even having just ONE telescope facility in this area goes against its rules.

FOF #956 The Applicant/TIO finds:

“Kihoi testified that she is a victim of prior domestic violence and suffered physical and emotional trauma, as well as deep psychological and emotional pain from that violence”. “S. Kihoi testified generally about her daughters trauma arising from domestic violence and the healing process through Mauna Kea.”

Response:

Kihoi testified that, she is a victim of domestic violence. When she was 19 years old, she was violently attacked with her 7 month old baby in her arms. 5 parts of her face were broken, she lost so much blood she could have died. The blows and kicks to her face were just inches away from her baby, she could have died. She was prescribed many different pain killers and referred to many different types of western therapy and rehabilitation, all which she refused. For years she carried grief and pain, never having a way of releasing this hurt. Until, she went to the Mauna. Tr. 02/14/17 vol. 35 pg: 77 at 11-25.

Kihoi testified that, when she was present on the Mauna on April 2, 2015, that she felt the most trauma had ever felt in her entire life. As a victim of domestic violence, who had experienced deep physical, and emotional pain, nothing could have prepared her for what she would feel that day. Armed men surrounded her while she was in prayer at a place that for her entire life, she had so much relevance for. A place that had given her so much healing, had turned into a place

of pain and fear. Feelings that she and her daughter had been so familiar with. Her daughter watched as her mother, father, the midwife who helped bring her into this world, aunties and uncles who she loved and adored were criminalized for praying and chanting at their highest temple and ancestral homelands. Tr. 02/14/17 vol. 35 pg: 79 at 20-9.

Kihoi's daughter, Tahlia Kihoi who was 11 years old at the time, testified that, on April 2, 2015, she was present at the TMT Proposed site and that it was a very intense time for her. She remembered seeing the DLNR Officers approaching her mom which left her in tears, and she felt very hurt because she didn't want her mom to get taken away. Tr. 02/14/17 vol. 35 pg: 83 at 10-20.

Kihoi's daughter, Tahlia Kihoi who was 11 years old at the time, testified that, on June 24, 2015, she was present on the access road above Hale Pohaku and that she remembers crying, because that day she felt the same emotions she felt when she saw her mom getting arrested. She felt pain. Tr. 02/14/17 vol. 35 pg: 85 at 9-13.

Kihoi's daughter, Tahlia Kihoi, testified that, she has seen the many sacrifices her mom, and aunties, and uncles have to make to protect our 'aina, and that she feels that when they are protecting the 'aina, they are protecting her. And if the TMT were to be built, the life of the land would be destroyed, and she would feel destroyed. Tr. 02/14/17 vol. 35 pg: 86 at 2-7.

S. Kihoi testified that, when Mehana Kihoi went up to the Mauna in 2012, she was able to begin to free and heal herself from the fear of the domestic violence. Tr. 02/14/17 vol. 35 pg: 159 at 25-2.

#### *Visual and Aesthetic Resources*

#### *Hydrology and Water Resources*

FOF#796 Applicant's witness, Mr Nance, stated that he was not hired to conduct hydrologic tests or studies for the TMT project, just to review what was in the EIS. Tr.12.13.16 V16 p. 128, Mr Nance stated that he has not worked with USGS, and that he has not worked on high level water in the Mauna Kea summit region. He has not published any peer-reviewed papers on hydrology of Mauna Kea, nor on Hawaii Island. Nance Tr.12.13.16 V16 p. 128:16-21, V16 at 129:1-23 Mr Nance could not provide data to support his conclusions, which were based on the Applicant's EIS regarding the TMT proposal. Mr Nance's testimony is not probative, substantial and credible, and he could provide no evidence otherwise.

#### *Hazardous Waste, Solid Waste and Wastewater*

FOF #796 Mr Nance stated that he had conducted no studies on Mauna Kea, or at the TMT site, nor could he cite peer-reviewed publications he had authored. Mr Nance testified that he relied on the reading the TMT EIS in order to provide his testimony. (Nance generally Tr.12.13.16 V16)

FOF#797/798 While domestic and industrial wastewater from the proposed project would be transported offsite, runoff from unpaved parking lots and impervious

surfaces would percolate into the surrounding highly permeable areas (see App FOF#798).

FOF#803 High level groundwater impounded by subsurface geological features, such as intrusive dikes, do in fact overflow during periods of high precipitation, such as storms. Such high level groundwater serves as the source of springs.

As evidenced by modest spring and seeps, shallow groundwater does exist in the mountain's flanks below the summit area. The most prominent of these springs and seeps are the series of springs found near Pōhakuloa and Waikahalulu Gulches. The gulches are on Maunakea's south flank at a distance of approximately 3.25 and 1.25 miles west of Hale Pōhaku, respectively. Scientific dating tests of the spring's water indicate that it is recent, meaning that the water is not from the melting of ancient subsurface ice or permafrost, and analyses of the water shows it to be identical to rainfall at the summit. This indicates that at least some of the rainfall and snow melt at the summit percolates downward to a perching layer to ultimately discharge at the ground surface as a spring or seep. Ex. A-3 FEIS p.3-117

FOF#804 Reference to the Kahalu'u shaft and Kealakehe wastewater treatment plant is not only irrelevant it is not supported by facts. The Kahalu'u shaft is located at the base of a different volcano (Hualalai), in a basal lens system floating on salt water, and bears no relevance to the high-level groundwater at risk from the development of the TMT project.

FOF#805 The claim that precipitation is minimal in alpine deserts is incorrect. Precipitation is sporadic, and is largely evident in fog drip and mist, except in the case of storm events. Lake Waiau, which was nearly dry in 2014, was filled in 2016. As noted in Applicant's FOF#801, Lake Waiau is surrounded by the ridges of the pu'u which define an enclosed area of approximately 32 acres.... The near-vertical and impermeable intrusives complete Lake Waiau's hydrologic isolation.

FOF#808 Applicant claims that witness Kanehele provided only anecdotal evidence to substantiate her testimony regarding Hawaiian understanding of Mauna Kea water, citing Mr Nance's expertise. However, Mr Nance stated that he has no traditional Hawaiian cultural background. Tr.12.13.16 V16 at 179 Mr Nance stated that he has not conducted any studies, nor has he tested ground or surface waters on Mauna Kea for hazardous material or sewage. Tr.12.13.16 V16 at 155:24-5

FOF#809 Applicant claims that witness Teale did not provide scientific or empirical evidence to support her concerns that waters used in cultural hearing could be contaminated. Mr Nance provided no data, but stated that he has not tested the water in the substrate for permafrost at the TMT site, he has not conducted percolation tests at the TMT site, he has no knowledge of the amount of waste deposited into the substrate by telescopes presently in use. Nance Tr.12.13.16 V16 p. 143:2-10, V16 at 144:7-20 Mr Nance stated that he has not conducted any studies, nor has he tested ground or surface waters on Mauna Kea for hazardous material or sewage. Tr.12.13.16 V16 at 155:24-5

FOF#812 The Applicant claims that Petitioner Ward did not support testimony with data and despite her training at the University of Hawaii at Manoa with a Master of Science and her quarter century of experience as a full professor in the Department of Natural Resources Environmental Management. Ward has served on the OMKM Environment Committee since its inception in 2000, and the data provided in her testimony and finding of fact was fully supported by exhibits, which were generated by the United States Geological Survey and the Hawaii County Department of Water Supply. A member of the Environment Committee, James Kauahikaua, is co-author of the recently published study of Lake Waiau in

2015 by USGS (not referenced in the outdated CDUA) that Ward cited.

FOF#813 The Applicant claims that witness Rosier, who has a lifetime of experience with heavy machinery and the impact of harsh conditions on lubrication malfunctions, and testified regarding her concerns about runoff from construction equipment and parked vehicles, could not rebut the testimony of Mr Nance.

However, Mr Nance could provide no data to substantiate his testimony. Exhibit A071, page 8 Summary of TMT Mitigation Measures says that the project will use storm-water dry wells and grading to maximize groundwater recharge. Mr Nance stated that the runoff would percolate downward, but he didn't know if it would be confined. Nance Tr.12.13.16 V16 p. 145. Runoff would move downward through the unsaturated lava, traversing vertically downward to underlying groundwater. Mr Nance stated that we don't know the distance because we don't know exactly where the groundwater is. Nance Tr.12.13.16 V16 p.99-100. The runoff from the TMT site will go downslope to the North, following topography, on the northern flank of Mauna Kea. Nance Tr.12.13.16 V16 p. 110. Mr Nance provided no evidence that spills and leaks would not impact percolate into high level groundwater. Mr Nance did admit that three potable wells are tapped into high level dike-confined groundwater. Nance Tr.12.13.16 V16 at 113:7-8.

FOF# 822 Mr Hayes, who has an educational back ground in international development, is not a hydrologist, and Mr Nance could provide no reliable, probative, substantial, credible evidence to demonstrate that the TMT project will not have substantial adverse impact on the groundwater resources and hydrology of Mauna Kea. Mr Nance stated that he did not depict any dike confined areas in his Exhibit A044 Mauna Kea Groundwater Schematic, and *deliberately left it blank*.

He surmised that you would expect to see numerous dikes. Mr Nance stated that no one has mapped perching members. Nance Tr.12.13.16 V16 p. 135-6. Mr Nance stated that the level of high level groundwater below the summit is unknown. Nance Tr.12.13.16 V16 p. 130. Mr Nance stated that we don't know what's underground at the 12,800 level, and he has no knowledge to determine if there are dike-contained waters or perched waters at that level. Tr.12.13.16 V16 p. 182:13-24

FOF#823 The Applicant could provide no credible data to support the claim.

FOF# 830 Notwithstanding the Applicant's confidence that an accidental release of hazardous materials or hazardous waste is extremely remote, the Applicant has an extensive track record of accidental spills, as documented in the CMP Ex#, and cannot provide credible data to show that an accidental release during transport, construction or conduct of business is extremely remote.

FOF#837 Mr Sanders testimony to the contrary, drips and spills from earthmoving machinery abandoned after TMT "groundbreaking" at Area E were left to drip into the substrate for months unattended until the machinery was finally removed.

FOF# 839 Despite the Applicant's claims otherwise, the proposed TMT will have a substantial adverse impact on the natural and cultural resources of Mauna Kea – both in terms of the project-specific harms and the cumulative impact of telescope activities on the mountain. These substantial and adverse impacts are not reduced to a level that is less than significant based on the mitigation measures proposed by the Applicant.

## E.CRITERION FIVE

The Fifth criterion in HAR 13-5-30(c)(5) states; “The proposed land use, including buildings, structures, and facilities, shall be comparable with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels.”

FOF #841-485; The proposed TMT projects, buildings, structures, and facilities are **not** compatible with the surrounding areas. Purpose of the Conservation District in Title 13, Chapter 5 of the Hawaii Administrative Rules “*is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long term sustainability and the public health, safety and welfare*” HAR 13-5-1.

The proposed TMT site is in a wide open pristine area with no other observatories within 3/4 three fourths a mile. R-1 Fig 1.7 p 1-2 pdf 23 of 294.

The proposed TMT project would be located within the Mauna Kea Summit Region Historic District (State Inventory of Historic Place #50-10-23-26869) which was determined by the DLNR - State Historic Preservation Division to be historically and culturally significant under all five criteria (A, B, C, D, & E) of the Hawai‘i Register of Historic Places and Hawai‘i Administrative Rules (§13-275) and under all four criteria (A, B, C, & D) of the National Register of Historic Places. Ex. A-63, SHPD letter

The objectives of the NNL program are fourfold: to encourage the preservation of sites illustrating the geological and ecological character of the United States; to enhance the scientific and educational value of the sites thus preserved; to strengthen public appreciation of natural history; to foster a greater concern for the

conservation of the nation's natural heritage. Laura Thielen, Chair, DLNR EX. A-004 FEIS Vol II p 19 of 531

This proposed project is within a National Natural Landmark. Mauna Kea was listed as a National Natural Landmark in 1972. One of the reasons given for placing the mountain on this register by the National Park Service is that Mauna Kea is the "Most majestic expression of shield volcanism in the Hawaiian Archipelago, if not the world." Ex A-009 CMP Appendix 4, p.9. "Rising nearly 33,000 feet from the ocean floor, with a peak elevation of 13,796 feet, Mauna Kea is the highest point in the Pacific Basin and the highest island mountain in the world. Ex. A-009 CMP Appendix 4, p. 9. "Few sites posses [*sic*] better credentials to justify their national significance than does Mauna Kea." Ex. A-003 FEIS, p. 3-106, Mauna Kea NNL program.

"A natural national landmark is a nationally significant natural area that has been designated by the Secretary of the Department of the Interior. To be nationally significant, a site must be one of the best examples of a type of biotic community or geologic feature in its biophysiographic province. Examples of this natural diversity include terrestrial and aquatic ecosystems, fossil evidence of biological evolution, as well as features, exposures and landforms that record active geologic process, like mauna Kea NNL". R-4 V2 p3 of 531 pdf.

The Chair of BLNR Laura Theilen is concerned that the proposed TMT project would affect the National Natural Landmark status of Mauna Kea "... The objectives of the NNL Program are fourfold: to encourage the preservation of sites illustrating the geological and ecological character of the United States; to enhance the scientific and educational value of the sites thus preserved; to strengthen public appreciation of the nations natural heritage. Has the DOI been consulted on the proposed TMT project? We advise that the TMT consult directly with the DOI's NNL program and determine if this project will impact the designation." July 9, 2009, FEIS V2 R-4, p.6 or 29 of 541 pdf

"The National Park Service contends that the permanent destruction of and surface geologic structures within Mauna Kea NNL is significant and that it denigrates from its overall status as a national natural landmark." R-4 V2 p5 of 531 pdf.

The National Park Service is considering if this project proceeds, removing this area from the National Natural Landmark designation. R-4 V2 6 of 531 pdf.

FOF#841/COL#219 When this project was proposed, the expansion of astronomical development into the northern plateau, off of the summit ridge, great concern arose, because many in the community felt strongly the TMT is incompatible with the surrounding area, which is 11,288 Acre MKSR within the conservation district, which extends from 6,000 feet to the summit. The proposed location of the TMT – the northern plateau – is undeveloped land, wide open space important to cultural practice and recreational uses on Mauna Kea, and is encompassed by the Mauna Kea Summit Region Historic District. The outrage had been foretold by the Keystone report prior to the initiation of the proposal. Ex. B.03an

FOF #842/COL# (220) The “Astronomy Precinct” is a construct and a legal fiction, it is not a locality. The “Astronomy Precinct” is an aspiration described conceptually in the Master Plan 2000 (Ex.A-48 IX-22) with vaguely described boundaries. The “Astronomy Precinct” has never been formally designated; the only formal designations are the Conservation District and the University’s leased Mauna Kea Science Reserve.

FOF#843 The Applicant misstates the language of HAR 13-5-24(c). Astronomy facilities are an identified use, not an expressly permitted use.

FOF# 844 Existing astronomical facilities are sited largely on the summit ridge and saddle, not on the undeveloped northern plateau. The immense size and height of the TMT observatory is a significant reason why this project is inappropriate and incompatible for this conservation district. Due to the TMT observatory's enormous size of 216 feet in diameter and its extreme height of over 180 feet, it would be the LARGEST observatory on Mauna Kea as well as the TALLEST building on Hawai'i Island surpassing the maximum height limits of 90 feet (120 feet for Hilo) for any commercial or resort buildings on this island based upon Hawai'i County zoning codes. Hawai'i County restricts the height of buildings to protect the cherished island landscape from obtrusive development. Yet, the Applicant proposes a man-made structure in the conservation district that would be at least twice as high as most existing commercial and resort buildings on the island. Hence, the TMT Project is not only inappropriate and incompatible for Mauna Kea, but it is also inappropriate and incompatible for the entire Hawai'i County.

FOF#846/COL223 Contrary to the Applicant's assertion, the eleven facilities in place are sited on the Mauna Kea Summit Ridge and saddle between Kukahau'ula and Pu'u Poliahu. The TMT project proposed by the Applicant would be sited over 1100 meters (3/4 mile) away from the existing infrastructure on the undeveloped northern plateau, far from any developed area. R-1 Fig 1.7 p 1-2 pdf 23 of 294.

The proposed TMT site is in a wide open pristine area with no other observatories within 3/4 three fourths a mile. It is quite obvious that if you are looking towards Haleakala, North, Northwest, Northeast, it is all wide open space. R-1 Fig 1.7 p 1-2 pdf 23 of 294

FOF # 847; The University is attempting to establish that the proposed TMT site is grouped together with all the other telescopes and is one big developed area which is false. While Mauna Kea is over developed (on the summit) it is not fully developed. The proposed TMT site is on the Northern Plateau, which is a wide open space. The site is 3/4 three fourths of a mile from any observatory. And is one of the last open space areas. See the TMT frequently asked questions at <https://goo.gl/images/JljL4z> (this is the photograph on the front cover of this doc) and Ex R-3 V 1, fig 2-3 p 2-11, fig 2-4 p 2-12, fig 2-4 p 2-13, Ex B.03R R-1 fig 1.7 p.1-12 pdf 23 of 294.

FOF#848/COL224 The northern plateau is not a built environment, it is still in a natural state with an open vista, notable for its breathtaking views, and one of the last open space areas with unhindered views from the summit region down to the sea, along the coasts, and across the island chain. From the vantage points where the TMT would be visible from the northern sides of Mauna Kea, the landscape remains uncluttered by human architecture. The Applicant proposes new development in an ecosystem with substrate unlike that of the cinder cone substrate where astronomy development has taken place. To quote the FEIS,

“The bulk of human activity has occurred on the cinder cones near the summit of Maunakea, where eight of the existing observatories are located. Human activities have had a very limited impact on the relatively extensive habitats beyond the summit cinder cones. Therefore, human activity has not had a significant cumulative impact on species that dwell in these other habitats, such as lichens, mosses, and vascular plants. Due to the level of development that has occurred within the relatively small area of summit cinder cones, many studies have been conducted to evaluate if that

development has impacted natural inhabitants of the cinder cone habitat.  
Ex.A003 FEIS p 3-215 (emphasis added)

FOF#849 This statement is patently false and the Applicant has the burden of proof to prove based on the preponderance of evidence. The historic “Ring of Shrines” where the proposed project would be built proves there is an ongoing cultural practice down on the northern plateau - historic sites and find spots. R-3 pS-7 executive summary p 19 of 376 pdf 2nd para. A009 p.5-21 71 of 300 pdf.

The Master Plan’s Mauna Kea Historic Preservation’s Management Components Appendix F states:

Within the historic district, the significance of properties is not evaluated individually because the summit region as a whole is considered eligible for inclusion in the National Register....Within the historic district, the effect of a project on the historic district as a whole needs to be assessed as well as the individual historic properties located within or immediately adjacent to the project area....Effects on a district would consider the visual impact of a facility on the surrounding landscape (i.e. the various land forms creating the setting and context of multiple historic properties encompassed in the district). A-048 Appendix F p. 20

The proposed site is situated in the middle of “The Ring of Shrines” which is on the National register of Historic Places. That is the highest level of acknowledgement of the significance of a site in terms of history preservation. TR V27, Jan 19, 2017, p87: 16-20, p.88: 7-13.

The largest concentration of historic properties and cultural resources is on the northern slope (plateau) of Mauna Kea below the summit cones. Ex. A-55, FAIS-AP, p. 6-1

Kehaunani Abad cites a 2013 report by Pat McCoy - “ [A]nd in looking at the regional perspective, he could see that, well, these aren’t just shrines that are, sort of, you know, randomly located, but my goodness, they follow along a pathway of access to - - to and from - - or access to or exit from the quarry area, and they form

a pattern. But he had to do the wide lens view to see that that there are a very special type of individual who's been supported with - - with some kako'o or kuleana given by, probably, ali'i and that they are going into a kapu space and that along the way, these shrines play a role in transitioning into that kapu space both in and back out from noa to kapu and kapu to noa." Tr. Jan. 19, 2017, Dr. Kehaunani Abad, TR. Vol 27 Jan 19, 2017 p34:8-23.

Dr. Abad also, goes on to testify "... cultural perspectives, similarly, would suggest that you need to look a a wider lens, because like I was saying, as archaeologists recognize, of course, we, from a cultural perspective, would know that we don't just go to one place, do something there, and then turn right around and no interact with anything along the way or have a number of instances of interactions. That's just how humans behave. And so, you really need to look at the whole perspective". TR V27 Jan 19, 2017 p25; 7-16.

Dr. Abad with her extensive experience and background in archaeology, anthropology, ethnography, historic preservation and Hawaiian culture states that the CDUA does not meet the 5th criteria - HAR 13-5-30(C) (5) "The proposed land use, including buildings and structures, facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels." Her testimony is credible, reliable, and probative and the applicant UHH did not put any witnesses forward to contest it. WDT B.08 p.20

"I think that what we have here is a perfect example of settler colonial logic, which indigenous studies of the settler colonial studies scholars discuss and sort of boil-down to the destruction and alienation of native peoples to their land - to our lands, in order to replace it with settler structures. So the logic of settler colonialism is to dispossess natives of land in order to replace them with settler regimes of knowledge and power and governance and sovereignty". Goodyear TR V39 p.157; 2-11.

The Applicant claims to know of no known customary or traditional uses or practices that occur within Area E location site of the proposed TMT project. The Applicant bases this assumption on interviews with just 14 participants who agreed to take part in a Cultural Inventory Analysis (CIA), and ranger informants. The assessment is unfounded.

FOF# 851 Contrary to the Applicant's assertion that the locality of the Conservation District or the Mauna Kea Science Reserve, is substantially developed, 11,288 acres is not developed at all, and only 150 acres has been significantly impacted by astronomy industry development. The existing development in no way justifies a proposal to expand the sprawl into a sensitive undeveloped area. The Applicant's governing management document (CMP and subplans) mentions the TMT only once: in the Decommissioning Subplan it says "

The proposed location for the TMT is on an estimated five acres of ***presently undeveloped*** land off the summit in an area referred to as the northern plateau ...  
Ex. A-013, Page 31(emphasis added)

FOF # 851; The proposed TMT site is in an undeveloped wide open pristine area with no other observatories within 3/4 three fourths a mile. It is quite obvious that if you are at the Kukuau'ula ridge with your back to the summit proper there is no development there. Looking towards Haleakala, North, Northwest, Northeast, it is all wide open space. R-1 Fig 1.7 p 1-2 pdf 23 of 294.

The State agrees there are no current developments on the Northern Plateau. Ex B.70  
CDUA Staff Report Feb 25, 2011, p.7

".... The second proposed observatory project is the construction and operation of an O/IR next generation large telescope known as the Thirty Meter Telescope (TMT). The proposed location for the TMT is on an estimated 5 acres of presently ***undeveloped*** land off the summit in an area referred to as the northern plateau..."  
A013 p. 31

FOF #852 Contrary to the Applicant's claim, locating the TMT Project in Area E does not result in its impacts being "less than significant" upon historic properties, cultural resources, and customary and traditional cultural practices, as well as on viewplanes, species habitat, and existing facilities. In addition, locating the TMT project access road does not avoid impact to Kukahau'ula; it would place a roadway on the slope of the Traditional Cultural Property. The University conceded that the past construction of observatories had cumulative impacts on the cultural, archaeological, and historic resources that are substantial, significant, and adverse. The TMT FEIS also affirms that, "From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse; the impacts would continue to be substantial, significant and adverse with the consideration of the Project and other reasonably foreseeable future actions. The TMT Project would contribute further to these cumulative impacts that will be significant. If the existing observatory development (many of which were retroactively permitted after construction) on Mauna Kea resulted in such cumulative impacts, then these projects were never in fact appropriate and compatible for this conservation district.

FOF #855; The Access road will cut through a portion of the Traditional Cultural Property known as Kukahau'ula for 800 ft.. R-3, pdf 358, R-1 CDUA Fig 4.2 p4-4 pdf 77 of 294, TR. V3 p178: 2-13.

FOF #857-8 The Applicant attempts to compare the destruction of a sacred landscape of Mauna Kea by comparing the proposed construction of the TMT Project with the gathering activities by Native Hawaiians of stone resources at the adze quarry. When viewed in both a cultural and historical perspective in the discussion of compatible activities on Mauna Kea, there is a distinct difference between the construction of an observatory and the gathering of pohaku (basalt stones) for tool making. Whenever Native Hawaiian made a pilgrimage up the mountain, they came in deep respect and reverence for this particular realm. At times, they built small shrines from stones gathered from the landscape to acknowledge their intentions, ask permission, and give gratitude for bestowing such resources.

The ahus or pohaku that were stood up completely blend in with the landscape as opposed to an 18 story tall, 130' diameter, 6 acre structure. This is the definition of the 1st, 4th, 5th, 6th, 7th and 8th Criteria. What this Conclusive evidence shows is that Native Hawaiians recognized the importance of Mauna Kea is reflected in these small shrines that were created with consecrated protocols when they ventured up to this sacred landscape.

Ex A-122 , Ex A-48

FOF#859-66 Witnesses Townsend, Flores, Ward, Pisciotta, Kihoi, Osorio, Kahakalau, and Abad correctly observed the “industrial” landscape on the summit ridge, reflecting the significant impact of telescopes, roads and outbuildings on the cultural and recreational landscape. At great personal sacrifice, they and many hundreds of others, including native Hawaiian practitioners and recreational users, have dedicated their heartfelt effort to insuring that further damage is not inflicted on the *undeveloped* landscape, locality and surrounding area. (emphasis added)

FOF# 867/COL226 The proposed land use with the construction of the TMT observatory, structures, paved access way, and associated development are incompatible and inappropriate for this undeveloped cultural and recreational landscape of the northern plateau and the surrounding sacred areas within the conservation district that encompasses the Mauna Kea Summit Region Historic District.

FOF # 868; Based on all the above mentioned facts, testimony, and exhibits even in the Applicants own documents, we can clearly see that the proposed TMT with a 187' tall by 130' diameter structure that will spread out over 5 acres if completed, cannot be comparable with the locality and surrounding areas and is not appropriate to the physical conditions in the conservation/historic district.

F.CRITERION SIX

Criterion six in HAR 13-5-30(c)(6), provides: “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;

UH/TMT has not and cannot meet the requirement under the sixth criterion. First, the TMT is a very large (18 story) man made structure that is proposed to be sited on the North Plateau, which, significantly, is one of the last un-hindered open space areas with views down to the sea, along the coasts, and across the island chain. The Applicant attempts to try and make the purposes of the conservation district fit into a resource sub zone rather than the resource sub zone fitting into the purposes of a Conservation District. as the Temple of Lono puts it; “The Applicant UH/TIO filed a Conservation District Use Application (CDUA), not a resource subzone use application. By its very nature, the context for such an application is the purpose and goals of the Conservation District, not the purpose and goals of the resource subzone within the Conservation District.” Temple of Lono Responses to UH/TIO FOF COL DO

FOF# 869/COL#228 The abundant evidence presented demonstrates that the existing physical and environmental aspects of the land will be neither preserved nor improved upon. The TMT Observatory would be an industrial massive 18 story, 5 acre, man-made structure that unequivocally impacts the public and Native Hawaiian view scape and cultural practices. As such, it can neither preserve nor improve upon the natural beauty and open space characteristics of Mauna a Wakea, as required in the sixth criterion of the CDUA. The Applicant with the burden of proof has not shown any reliable, credible or substantive evidence that the proposed project will preserve or improve upon the natural beauty and open space characteristics.

FOF # 870: The proposed development neither preserves nor improves upon Mauna Kea's natural beauty, which is what the law requires; 183C-1 Findings and purpose; 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. [L 1994, c 270, pt of §1]

FOF# 871/COL#230 The pre-existing condition of the viewplane from the northern slope is a vast cultural and sacred landscape overlooking a ring of shrines encircling the flanks of Mauna Kea in a Historic District larger than the Mauna Kea Science Reserve. If permitted, the TMT would intrude upon the currently unobstructed view of Haleakala Mountain from the northern ridge of Kukahau`ula, as well as the primary view of the setting sun from the mountain. It will also obstruct viewplanes used for traditional, customary, spiritual, and religious Native Hawaiian practices. Likewise, this project will impede upon the viewplanes and degrade the natural beauty cherished by visitors, residents, and recreational users.

As the Applicant acknowledges in the governing management documents for the MKSR, (CMP and Subplans) "The proposed location for the TMT is on an estimated five acres of presently undeveloped land off the summit in an area referred to as the northern plateau" ...Exhibit A013 p 31

FOF #871: Visual impacts along with other impacts are to be analyzed by looking at the project in the context of a whole region. TR V27 p.21: 24-25, p.22: 1-25, p.23: 1-19, p.25: 7-16, p.29: 16-25, p.30: 1-2. TR. V.30 p.16: 8-25, p.17: 1-15. Ex B.01t

The DLNR staff criticized the view plane analysis because the visual impacts were downplayed in the analysis. "The analysis does not seem to account for the visual impact of the project on the individuals that move within and between impacted view planes, impact on visitors, and more importantly, the impact of viewing a new very large observatory from the perspective within the summit area." Laura Thielen, Chair, DLNR. Ex R-5/B.34 FEIS Vol II p 21 of 531

Professor Mills noted that the map included with the CDUA application was cropped from the version prepared by Pacific Consulting Services, Inc. (PCSI) to limit presentation to an even smaller implied "Area of Potential Effect." Ex. B.12a at 2.

The proposed TMT Observatory would add a new visual element to the northern plateau area that will be visible to varying degrees from the shrines along the northern slopes of Maunakea. Ex. R-3/B.32, TMT FEIS Section 3.2 Cultural Resources, p. 3-31.

The proposed TMT would intrude upon the currently unobstructed view of Haleakala Mountain as well as the primary view of the setting sun from the mountain. It will also obstruct view planes used for traditional and cultural spiritual

and religious Native Hawaiian practice. If the TMT were built, it would interfere with this alignment directly. Tr. 01/31/2017, Paul Neves, Vol. 33 p 185:7-12.

Within the view planes what Neves is concerned about is the view plane of the path of the sun because it has a connection with his family. Tr. 01/31/2017, Paul Neves, Vol. 33 p. 186:9-12; p. 244:13-17.

Neves named his daughter after this mark and the call of the sun, Akala Nahikulani. Tr. 01/31/2017, Paul Neves, Vol. 33 p. 183:18-20.

[T]he TMT does not preserve or improve upon the open space and natural beauty characteristics of Mauna Kea, nor does it demonstrate it will not have an adverse or significant impact on the cultural resources of Mauna Kea. Ex B.01a K. Pisciotta,

FOF #872: This statement is not based on any evidence cited.

FOF# 873 Contrary to the Applicant's assertion in FOF # 873, adding the TMT to the existing physical context would result in "new visual element" on the northern plateau, an additional increment of cumulative impact. Construction of the TMT would not be compatible with recreational uses of the Mauna Kea conservation district, and specifically the northern plateau. Visitors and island residents that reside outside the viewshed will be able to see the TMT Observatory when they travel through and visit locations within the viewshed., along roads and stops at view points. Ex A-003, FEIS p. 3-86, 3-99.

Visitors from the world over, and average of 302 commercial tours per month, or as many as 240 visitors per day, and 11,900 visitor trips per year, ascend the mountain for sightseeing, hiking, amateur astronomy, hunting, sled, ski, snowboard, and enjoy the unique conditions. Ex A-003 FEIS Vol 1 p. p-3, 3-153, 3-165.

Recreational users visit Mauna Kea for trail hiking, snow play, amateur astronomy, hunting, nature study and wilderness experience, including unfettered vistas, silence, spiritual peace, natural beauty, and cultural significance. Ward WDT at 2.

Mauna Kea's unique natural landscape is also popular site commercial film activities.

FOF #873: To be clear, the actual summit is Puu Wekiu and there are no observatories located there. The "Summit" as we've been referring to it, is Kukahau'ula, is a traditional cultural property and houses all the observatories except the SMA which is at the base of Puu Poliahu and the VLBA which is outside the science reserve. As we speak of the Northern Plateau or Area E, we speak of the open area to the northeast of Kukahau'ula. As can be plainly seen in these maps, the proposed site for the TMT is approximately 3/4 of a mile away from the rest of the observatories in an undeveloped wide open space. See; (Archaeology Inventory Survey for the TMT Observatory Project April 2010). R-5 Appendix G p.40 figs 9 and 10, p.41 figs 11 and 12, p.42 fig. 13, p. 43 fig 14, p48 fig 18

FOF # 874: There are several sites that an observatory can go to for observing, native Hawaiian practitioners only have Mauna Kea for cultural practices relating to Mauna Kea.

#### G.CRITERION SEVEN

FOF#915 The CDUA and permitting process do not reflect the subdivision of land, but the sublease does, in that metes and bounds are designated in the sublease. According the Conservation District rules, HAR 13-5-2(c)(6) Definitions, "subdivision" means a division of a parcel into more than one parcel. This definition is consistent with Black's Law Dictionary, where "subdivision" is defined as "1) The division of a thing into smaller parts, 2) A parcel of land in a larger development." Such a division, in and of itself, is not prohibited by the rules. However, where such a division of land is undertaken in order to "intensify land uses" on the parcel, it is forbidden under HAR 13-5-30(c)(7).

FOF#917 While it is true that the University has not officially requested permission to subdivide the Mauna Kea conservation district in this CDUA, the

Applicant's actions on Mauna Kea have resulted in the de facto subdivision of this land for the purpose of intensifying land uses undertaken there. This improper, de facto subdivision takes two forms: 1) Astronomy Precinct, 2) Subleases to telescope operators. The Astronomy Precinct, as Ms. Nagata confirmed, was subdivided from the remainder of the "UH managed lands" in order to focus future telescope construction in a 500-acre area of the conservation district. In addition, the TMT would operate on a sublease, which as other similar subleases indicate, effectively result in the division of the Mauna Kea Science Reserve into a many separate parcels under the control of different telescope operators.

Despite these facts, the Applicant makes several attempts to claim compliance with the seventh criterion. First, the Applicant contends that because it did not apply for a subdivision in its CDUA for the TMT, there is no subdivision of land. Not so. In the definition of "subdivision," Black's Law Dictionary offers a very useful example of an "illegal subdivision."

The division of a tract of land into smaller parcels in violation of local subdivision regulations, as when a developer begins laying out streets, installing sewer and utility lines, and constructing houses without the authorization of the local planning commission.

*BLACK'S LAW DICTIONARY*, 7<sup>th</sup> ed, (2000) at 1155.

Black's makes clear that a subdivision of land can occur regardless if the applicant properly applies for permission or not. Land use in the summit region of the Mauna Kea conservation district has the hallmarks of a de facto subdivision: facilities and improvements cost sharing, planned development, and defined, independent property interests. As the site visit and the record indicate, the telescope subleases intensified land use by increasing the burden of vehicles, visitors, and long-term personnel that use access roads, sewage, electricity, utilities, and base-level and mid-level facilities.

FOF# 918 The Applicant contends that a completely separate law exempts the University from the requirements of this law. The Applicant offers no reason to look outside the four corners of HAR 13-5 or HRS 183C for guidance in the interpretation of the conservation district rules. HAR 13-5-30(c)(7) is not

ambiguous or unclear, as such there is no reason to refer to other statutes for interpretation, especially where that interpretation contradicts the plain meaning of the rule in question. Because there is no reason to reference Hawaii's Uniform Land Sales Practices Act, the Applicant's reliance on the government exception is misplaced. There is no exception to HAR 13-5-30(c)(7).

FOF #922/COL#265 The subleases are agreements between the University and the telescope owners/lessees which describe separately owned facilities built on distinctly delineated parcels encompassed within the MKSR. The Applicant contends that construing every sublease as created by a subdivided parcel, County subdivision code would be operative, and it would lead to an absurd result and thus should not be followed. The plain reading of HAR 13-5-30(c)(7) is that a CDUA cannot be granted where subdivision is used to increase the intensity of land uses in the conservation district.

FOF #924-926/COL#268-270 The Astronomy Precinct, is not a legal land unit; it identifies a conceptual area for planning and management purposes. The BLNR has not reviewed or approved the Mauna Kea Science Reserve Master Plan in which the Astronomy Precinct is described.

FOF#927-928 The University has "subdivided" the lands under its general lease to ensure more land use in the astronomy precinct AND it has facilitated subleases with individual telescope owners and operators as a basis for construction of many industrial structures in the Mauna Kea conservation district. Indeed, by the University's own requirement, the TMT could not be built without a sublease.

FOF#932 The metes and bounds description for the TMT sublease contains the following description:

DESCRIPTION

**TMT SITE PREMISES**

All of that certain parcel of land being a portion of the Government Land of Kaohe, being also a portion of Mauna Kea Science Reserve covered by General Lease S-4191 to the University of Hawaii Situate at Kaohe, Hamakua, Island of Hawaii, Hawaii

Beginning at the southwest corner of this parcel of land referred to the Hawaii State Plane Coordinate System, Zone 1 (NAD83) 362,519.00 feet North and 1,646,660.00 feet East and the direct azimuth and distance from the Government Survey Triangulation Station "SUMMIT 1955" being 129° 52' 08"; 6,166.86 feet and running by azimuths measured clockwise from True South:

1. 152° 35' 33" 304.14 feet along the remainder of the Government Land of Kaohe and the remainder of Mauna Kea Science Reserved covered by General Lease S-4191 to the University of Hawaii;
2. 180° 00' 00" 190.00 feet same;
3. 270° 00' 00" 630.00 feet along same;
4. 0° 00' 00" 430.00 feet along same;
5. 90° 00' 00" 320.00 feet along same;
6. 0° 00' 00" 30.00 feet along same;
7. 90° 00' 00" 170.00 feet along the same to the point of beginning and containing an area of 5.9986 acres, more or less.



Description Prepared By:  
Engineering Partners Inc.

A handwritten signature of Ronaldo B. Aurelio in black ink.

RONALDO B. AURELIO  
Licensed Professional Land Surveyor  
Certificate Number 7564  
Expires April 30, 2014

Hilo, Hawaii, March 10, 2014

FOF#935 The Applicant's witness Hayes testimony in this regard is not reliable or credible. As the Applicant acknowledges in the governing management documents

for the MKSR, (CMP and Subplans) “The proposed location for the TMT is on an estimated five acres of presently undeveloped land off the summit in an area referred to as the northern plateau” ...Exhibit A013 p 31

FOF# 935 The TMT CDUA mitigation measure which describes decommissioning of other telescope facilities is entirely aspirational, and such a condition could not be imposed that would satisfy any purported reduction in intensity of land use by the TMT. As the Applicant acknowledges in the governing management documents for the MKSR, (CMP and Subplans) “UH sees a future for sustainable astronomy on the summit of Mauna Kea. The long-term goal is to eventually have fewer observatories in the summit region. Exhibit A013 p 28. Decommissioning is initiated when a sublessee decides to cease operation due to changing priorities, lack of funding, or obsolescence; when the sublease expires, or if UH revokes a sublease...Ex. A013 p 2 If a CDUP were to be granted it could not compel decommissioning of another leased facility.

FOF#936 Because the proposed TMT project is premised on and would further the subdivision of land in the Mauna Kea conservation district, the CDUA is not consistent with criterion seven and cannot be approved.

#### H. CRITERION EIGHT

The eighth criterion in HAR 13-5-30(c) (8), provides: “The proposed land use will not be materially detrimental to the public health, safety, and welfare.”

FOF # 938: The Applicant UH/TIO attempt to have it both ways here. Petitioners agree that in criteria 8 of HAR 13-5-30 does not require “that a land use be affirmatively beneficial to public health, safety and welfare”. So therefore, economic, educational and research benefits etc are not part of criteria 8.

FOF # 939-941: These statements are not credible or reliable. The preponderance of the evidence that the petitioners brought forward through its witnesses, evidence, and testimony is extensive, reliable and credible. Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge it. Therefore, by failing to challenge petitioners/intervenors witnesses, evidence and testimonies UH/TIO has defaulted. The petitioners/intervenors testimony, evidence and witnesses are undisputed.

#### **1.19.17 Kehaulani Abad Vol 27 page96:14-25**

***[questions from Kaliko Kanaele]***

14 Public health, safety, and welfare. I know most  
15 of us probably think about, you know, air quality and  
16 water quality, which are hugely important especially in  
17 the instance of water quality. But, it also includes  
18 the health of our people and psychological, spiritual,  
19 emotional health. And some of the questions that came  
20 up before remind us that when -- when a people -- when  
21 people are told that you don't matter, they start  
22 behaving like they don't matter. And what you care  
23 about, we don't care about, then it's hard for -- for  
24 any people to -- care.  
25 So, there definitely are some huge impacts, and it

***1.19.17 Kehaulani Abad Vol 27 page97:1-2 and 5-13***

***[questions from Kaliko Kanaele]***

1 -- yeah. Studies that have been done by others -- I'm  
2 thinking about the work of Dr. Kamana'opono Crabbe --

5 THE WITNESS: Dr. Kamana'opono Crabbe and  
6 Keawe Kaholokula, Dr. Keawe Kaholokula -- he's the  
7 director of the Department of Native Hawaiian Health at  
8 the John A. Burns School of Medicine. They've done  
9 some important research indicating the connection of  
10 these, sort of, larger societal treatment of culture  
11 and how it impacts our own kanaka when the cultural  
12 integrity of what is held dear by a people gets  
13 impacted and how it impacts people's health.

FOF #943: This statement is not supported by any evidence. Dr. Taulii's experience is extensive; She holds a doctorate in Health Services, with expertise in public health informatics, epidemiology, genetics and Indigenous health, she submitted her testimony as a leading expert in health for Native Hawaiians. "The research of myself and my colleagues demonstrate three key findings: 1) desecrating sacred spaces impacts cultural identity and health, 2) participation in traditional practices are protective factors against distress, and 3) health disparities

of Native Hawaiians cannot be explained by standard determinants of health (e.g. poverty or low education) and that causes, such as forced assimilation are causal factors in poor health outcomes”. B.04a WDT

FOF # 944: Dr. Taulii’s “opinion” is based on her extensive educational background as a Dr. in Health Services and Informatics, she holds a certificate in Public Health Genetics, a MPH in Social Behavioral Sciences, and a BA in American Indian Studies. She is the author of numerous publications, articles and technical reports and has served on editorial review boards. Her theories are supported by extensive empirical data. Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge it. Therefore, by failing to challenge petitioners/opposing intervenors witnesses, evidence and testimonies UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex B04b

FOF #945-947: Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge it. Therefore, by failing to challenge petitioners/intervenors witnesses, evidence and testimonies UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

FOF #948: Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge any of these witnesses or their testimonies. Therefore, by failing to challenge petitioners/intervenors witnesses, evidence and testimonies UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

FOF # 950: Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Dr. Meyer’s testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

FOF # 951: Dr. Osorio is Professor of Hawaiian Studies at the University of Hawai’i Mānoa where he has taught courses in the history of the Hawaiian kingdom, history of music, history of law and Hawaiian literature since 1992. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Dr. Osorio’s testimony. Therefore, by failing to

challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex B.07a

FOF # 952 Dr. Kaholokula is the Chair and Professor of Native Hawaiian Health at the John A. Burns School of Medicine, University of Hawaii at Manoa. He holds a PhD in clinical psychology, completed a clinical health psychology post-doctoral fellowship at Tripler Army Medical Center, and holds a license to practice in Hawaii. He has over 20 years of clinical and research experience regarding issues of Native Hawaiian health, to include mental and physical health. He has over 50 scientific publications specific to Native Hawaiian and Pacific Islander health in national and international peer-reviewed journals and provided numerous keynotes, talks, consultations on Native Hawaiian and Pacific Islander health nationally and internationally. He sits on several boards of organizations whose mission is focused on either Native Hawaiians or public health issues to include Queen's Health Systems and Papa Ola Lokahi Native Hawaiian Health Board. He is also a member of a Native Hawaiian cultural group known as Halemua o Kualii and has been involved in various Hawaiian cultural practices (e.g., hula and lua) throughout his life. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Dr. Kaholokula's testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex F-7b.

FOF #954: Over the past 20 years Ms. Perreira has worked professionally, in Hawaii rural communities, in the field of community mental health as a mentor, teacher, counselor, consultant and now clinical psychologist. Her particular interests and expertise is in individual, family, community and national trauma exposure, identification of symptoms, diagnosis and treatment of discrete and complex traumas associated with physical, emotional, psychological, spiritual and medical conditions or disorders. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Ms. Perreira testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

FOF #955: Laulani Teale is a Kanaka Maoli traditional practitioner and advanced student of many customary practices, such as laau lapaau and hooponopono. She also holds a Master's degree in Public Health, and has worked in peacemaking and

community health development professionally for 16 years. Much of her work focuses on health issues affecting Kanaka Maoli. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Ms. Teale's testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex B.15a WDT, Ex B.15b.

FOF # 958: This alleged poll cannot be found in the "I" (P.U.E.O) series of submittals.

FOF #959: UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge the testimony of Dr. Mailie Taulii (TR V29, Ex B.04a, B.04b), Dr. Kaholokula, ( TR V40, Ex F-7b, F-7), Dr. Osorio (TR V25b, Ex B.07a, B.07b), Dr. Meyer (TR V31, Ex B.05a) Laulani Teal (TR V23, V25 Ex B.15a, B.15b), Tammie Noelani Perreira (TR V40, Ex 0-14), Dr. Abad ( TR V27, Ex B.08a, B.08b), Dr. Peter Mills (TR V30, Ex B.12a, B.12b), Noelani Goodyear Kaopua (TR V39, Ex J-3) and Dr. Kahakalau (TR V23 Ex B.06a, B.06b) as well as the petitioners /opposing intervenors themselves (cultural practitioners who are experiencing the harm). Therefore, by failing to challenge the petitioners/intervenors witnesses, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

FOF #962: id.

FOF's #963-967: These statements by UH/TIO don't hold water, are not credible, reliable or based on any evidence cited.

FOF # 971: UH/TIO have failed to submit any evidence that mirror washing wastewater is not considered a hazardous waste. Actually, the Applicant claims "...the volume of hazardous waste generated does not require any of the observatories to register as other than "conditionally exempt or small quantity generators of hazardous waste". (FEIS VI sec 3.8 Waste and Material Management p3-125).

In 1995, the Hawaii State Health Department Clean Water Branch sent a letter to The Gemini Observatory in regard to their status as a hazardous waste generator. In part it states; "Based on the project quantity of waste to be generated, the

observatory may be an Episodic Large Quantity Generator” subject to full state and federal hazardous waste regulations under 40 CFR 262 AND HAR 11-262. As a LQG the facility must obtain an EPA number...” (Ex B.01a)

FOF #992: As the Applicant itself has stated, “[T]he proposed location for the TMT is on and estimated five acres of *presently undeveloped land* off the summit in an area referred to as the northern plateau within the Astronomy Precinct of the Science Reserve. .” A013 p.31

FOF #993-995, 997: The Applicant UH/TIO attempt to have it both ways here. Petitioners agree that in criteria 8 of HAR 13-5-30 does not require “that a land use be *affirmatively* beneficial to public health, safety and welfare”. So therefore, economic, educational and research benefits etc are not part of criteria 8.

FOF #999: UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge the testimony of Dr. Mailie Taulii (TR V29, Ex B.04a, B.04b), Dr. Kaholokula, ( TR V40, Ex F-7b, F-7), Dr. Osorio (TR V25b, Ex B.07a, B.07b), Dr. Meyer (TR V31, Ex B.05a) Laulani Teal (TR V23, V25 Ex B.15a, B.15b), Tammie Noelani Perreira (TR V40, Ex 0-14), Dr. Abad ( TR V27, Ex B.08a, B.08b), Dr. Peter Mills (TR V30, Ex B.12a, B.12b), Noelani Goodyear Kaopua (TR V39, Ex J-3) and Dr. Kahakalau (TR V23 Ex B.06a, B.06b) as well as the petitioners /opposing intervenors themselves (cultural practitioners who are experiencing the harm). Therefore, by failing to challenge the petitioners/intervenors witnesses, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

## DESECRATION

### DESECRATION IS AGAINST THE LAW IN HAWAII

Witness Ms. Trask had this to say about the desecration law its enforcement or lack thereof:

See 2.28.17 Mililani Trask Vol 42 page 227:17-25  
(questions from Kaliko Kanaele)

17 Q. (By Mr. Kanaele): Does HAR 13-5 override 18 HRS 711?

19 A. No. No, it doesn't.

20 Q. Do you think after hearing the HRS 7-1121 (sic), is that a sufficient protection for sacred 22 sites or districts?

23 A. You know, the language of our state

24 desecration law is sufficient. What we don't have is

25 anyone who has the integrity to invoke it

Desecration is defined as any act that would cause "outrage" a segment of the population. Burials, monuments and places of worships are all specifically named as having special protection against this crime. The penalties for the commission of the crime of desecration include imprisonment, a substantial fine and or both. There are no exceptions.

Mauna Kea has been and continues to be a place of worship, a burial ground of the highest born and most sacred ancestors

See Ex. B.01q Mauna Kea Anaina Hou/Royal Order of Kamehameha I - Temple Report).

There are hundreds of sacred sites that exist on Mauna Kea , including burial sites of renowned people such as Hawai'i Loa (an ancestor of the Hawaiian people), Lilinoe, the goddess of the Mist, who lived also as human and for whom Kamehameha I was named after), and many of the grandparents (Kupuna) and family of those living today have been laid to rest there. Mauna Kea clearly meets the definition of the HRS §711-1107 the desecration statute.

This is further evidenced by the fact that 66,528 people signed the Petition to stop the bulldozers and desecration of Mauna Kea.(please see <https://www.change.org/p/governor-david-y-ige-stop-tmt-construction-and-arrests-of-mauna-kea-protectors>) and that as many as 700 to 1000 Kia'i or Earth Protectors showed up on Mauna Kea to hold back the TMT's bulldozers demonstrates the "outrage" people felt when the sanctity or sacred nature of Mauna Kea was threatened.

We submit, that the State and the UH representatives who attempted to close the Mauna Kea access road (a public road and neither owned nor controlled by the University or they representatives) the Office of Mauna Kea Management (OMKM) used both State and Country enforcement officers to not only infringed upon on the rights of Native Hawaiian and other supporters but further acted in conspiratorial ways to use state police power against the citizens and people of Hawai'i (including subjects of the Hawaiian Kingdom of any ethnicity). The

State's Attorney General, the Deputy Attorney Generals, the County Prosecutor and University and TMT representatives have been slow to have detailed conversations to how to deal with the "protestors".

Applicant witness Wally Ishibashi, in his capacity as an employee of OMKM, testified that as a construction monitor/cultural advisor has unilaterally made decisions to take down ahus or upright shrines that he feels don't belong in areas that he might be in.

TR. V9 p.127: 24-25, p.128: 1-24, P.129: 10-22, p.159: 1-25, p.160: 1-12, 13-22, p.161: 1-19, p.162: 1-4, 6-25, p.163: 1-25, p.164: 3-25, p.165: 1-25, p.163: 1-25, p.164: 3-25, p.165:1-25, p.172: 1-25, p.173: 1-25, p.175: 1-22, p.186:8-24. TRV10 p.60: 20-25, p.61 23-25, p.62: 1-20, p.63: 14-20, p.135;11-22.

#### On Civil Assistance not Disobedience

We wish to clarify that the actions of the Kia'i were not a form of protest nor an act of civil disobedience because they were not breaking any law and were instead trying to stop the TMT bulldozers from committing a crime (the crime of desecration).

We have great respect for Mahatma Gandhi and for his gifts of wisdom to help the people resist the onslaught of Industrial Revolution and the oppression that followed, such as the acts of resistance/civil disobedience in the face of unjust laws meant to oppress. However, in this instant case, the laws were on our side, in that the courts were in fact in the middle of reviewing the question whether or not BLNR erred in issuing a CDUP for the TMT project prior to conducting a CCH.

The distinction is important, because it is our understanding that under American jurisprudence the court alone answer questions of law. In **Marbury v. Madison**, 5 U.S. 137, the court established that it was the province and duty of the judicial department to say what law is. In this case, the court had the final say on whether the CDUP issued by BLNR was valid or not. The Supreme Court did in fact invalidate the TMT CDUP for due process failures.

The Kia'i, ("protectors") therefore were acting in accordance to the law. They were not protesting an unjust law as is usually the case of civil disobedience, they were

instead protecting the Mauna from desecration which is against the law in Hawai'i. If this were not the case, the TMT would have committed an unlawful act, the act of desecration resulting in irreparable damage and harm to the sacred landscape of Mauna Kea.

TMT CDUA should not be approved because to do so would be to allow the State to issue a permit (CDUP) to desecrate a place of worship, a burial ground, and a place of serious veneration.

#### IV. PUBLIC TRUST DOCTRINE

See MKAH AND PISCIOTTA'S responses to Applicant's COL s.

## CONCLUSIONS OF LAW

### I. INTRODUCTION (COL# 1-6)

### II. JURISDICTION AND STANDING

#### A. JURISDICTION (COLF#11-16)

COL# 13-15 These issues were excluded from issues to be decided in this Contested Case Hearing.

#### B. STANDING OF THE PARTIES (COL#17-23)

#### C. TIO'S STANDING (COL#24)

COL# 24. The 3<sup>rd</sup> circuit court has withdrawn BLNR's consent of the Sublease, so TIO has no valid sublease.

MKAH objected to TIO (and PUEO group) being allowed to participate in the proceeding for the reasons set further in DOC 069 and 070. See DOC 069 (MKAH Memorandum in Opposition to TIO request to become a Party) and DOC 069 (MKAH Memorandum in Opposition to P.U.E.O's request to become a party).

Foreign corporations (international observatories currently using the Mauna Kea's Conservation District) and corporations such as the TMT Corporation and the TIO LLC, are not, in fact, the beneficiaries of the public lands of Hawai'i.

[NOTE: The original CDUA submitted on 9/2/10 was never amended or resubmitted, so the UH remains on the CDUA as applicant and the TMT Observatory Corporation (TMT) remains the third party listed on the CDUA application].

The TMT International Observatory (TIO)) is not even listed on the original Conservation District Use Application.

While TIO representatives continue to argue that TMT and TIO are the same entity they failed to answer why there are two separate legal entities with two separate names (TMT and TIO) and why the TIO should have standing to participate in this CCH. The TMT is the entity on the actual CDUA and the UH is Applicant who is applying for the CDUA on TMT's behalf. The TIO is nowhere in that chain of the process. Also, TIO is an LLC while the TMT is not. Allowing the TIO in as an "intervenor" allowed them to introduce two separate law firms to put on witnesses, present evidence and to submit FOF COL and D&O, thus allowing them to

influence the weight and preponderance of the evidence, in favor of the UH Applicant.

D.HEARING OFFICER WITNESSES (COL#25-35)

III.DENIAL OF OUTSTANDING MOTIONS (COL#36)

IV.GENERAL AUTHORITY OF HEARING OFFICER (COL#37-43)

V.‘EVIDENTIARY STANDARDS (COL#44-63)

VI.CROSS EXAMINATION PROCEDURES (COL#64-66)

VII.REBUTTAL WITNESSES (COL#67-74)

VIII.OFFICIAL NOTICE (COL#73-77)

IX.LEGAL FRAMEWORK

A.BURDEN OF PROOF (COL#78-83)

B.STATE CONSTITUTIONAL AUTHORITY (COL# 84-87)

C.STATUTE AND ADMINISTRATIVE RULES (COL#88-99)

D.CASE LAW

Insert here Burden of Proof re Hanapi and Pratt, and Reference MKAH Response to Standing Bullet or number responses

*PASH 100-103*

*HANAPI 104-106*

*PRATT 107-109*

*KA PA’AKAI 110-112*

*MORIMOTO 113-114*

*MAUNA KEA ANAINA HOU 115*

*KILAKILA O HALEAKALA 116-121*

*BLNR DECISIONS 122-125*

X.DISCUSSION AND CONCLUSIONS

A.TMT PROJECT SATISFIES EIGHT CRITERIA HAR 13-5-30 (COL#126-127)

*CRITERION ONE (COL#128-142)*

FOF #353/COL#131. The conservation district rules specifically state that “land uses shall not be undertaken in the conservation district.” HAR 13-5-30(b). The rules allow only those land uses that comply with all eight criteria – that is to say, land uses that do not have a “substantial adverse impact.” HAR 13-5-30(c)(4).

The Board manages the Conservation District consistent with Article XI, Section 1 of the Hawai'i Constitution and Chapter 183C. Article XI, Section 1 provides:

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.

The Board and the Department of Land and Natural Resources ("DLNR") administer lands within the Conservation District pursuant to Haw. Rev. Stat. 183C. This chapter makes the following statement of public policy:

[t]he 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. Haw. Rev. Stat. §183C-1.

When interpreting a statute, the “whole act” rule demands that “the court will not look merely at a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.” *Azarte v. Ashcroft*, 394 F.3d 1287-88 (9th Cir. 2005) quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Against this rule of statutory interpretation, the Applicant focuses solely on the latter half of the regulation to focus on “appropriate management,” ignoring the context of this general term and therefore the stated purpose of the conservation district

From this plain reading of the relevant statutory and regulatory provisions it is clear that conservation districts are established specifically “for the purpose of conserving, protecting and preserving the important natural resources of the State.” HRS §183C-1, HAR §13-5-1 (emphasis added). Statute and regulation provide that this purpose shall be met “through appropriate management to promote [the natural

resources'] long-term sustainability and the public health, safety, and welfare.” HAR §13-5-1, see also, HRS §205-2(e)4. This is to say, conservation -- not management -- is the purpose of the conservation district. To conclude anything else would be a gross misinterpretation of the law.

FOF#354/COL#132. The University contends that management -- not conservation -- is the purpose of the conservation district. A plain reading of the entire relevant statute and regulation makes clear that conservation of natural resources is the purpose of conservation districts. The Conservation District is the most restrictive of the four land use classifications authorized under Hawai'i's Land Use Law, Chapter 205. The Conservation District 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. Haw. Rev. Stat. § 205-2(e).

The law provides for distinct districts, such as urban, agriculture, and conservation, because these land areas have characteristics suited to each district designation; the activities allowed in each district are consistent with characteristics of those land areas. Conservation districts are designated to provide for public uses and purposes (i.e. protecting watershed zones, conservation, public parks, open spaces, protection of endangered indigenous and endemic species, and protection of historic resources etc.). Haw. Rev. Stat. § 205-2

FOF#355/COL#133. The “Astronomy Precinct” is an aspiration described conceptually in the Master Plan 2000 (Ex.A048) with vaguely described boundaries. The “Astronomy Precinct” is a legal fiction because it has never been formally designated; the only formal designations are the Conservation District and

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the University's leased Mauna Kea Science Reserve. The eleven facilities in place are sited on the Mauna Kea Summit Ridge and saddle between Kukahau'ula and Pu'u Poliahu. The TMT project proposed by the Applicant would be sited over 1100 meters (3/4 mile) away from the existing infrastructure on the undeveloped northern plateau, far from any developed area.

FOF#356/COL#134. Of the approximately 525 acres described in the 2000 Master Plan (of which approximately 92 acres are currently disturbed), siting areas for telescopes were designated comprising 150 acres of land within the "Astronomy Precinct". Ex A-048 p. XI-22 Only Siting Areas A, B and C are already developed with observatories. All the instruments proposed in the previous plan are constructed, and the limits of these observatory sites define Areas A, B and C. Ex A048 p. IX-23.

Areas D, E, And F have not been developed, nor is infrastructure such as electrical groundwork in place in these areas. While there has been some historical and more recent disturbance for roads and site testing, Area E, (where the TMT is proposed), remains free of visual impact, the alpine stone desert ecosystem remains intact, and cultural and recreational use and access remain unimpeded.

FOF#357/COL#135. The University does not have funding dedicated to conservation management. Even if management were considered the purpose of the conservation district, the record does not support the Applicant's assertion that the TMT project would be appropriately managed. The University is not a land management agency, and the University's Comprehensive Management Plan (UH CMP) does not provide the management necessary to prevent substantial harm from the TMT proposal or ameliorate the 40 years of substantial harm telescope activities have already inflicted on the natural and cultural resources of Mauna Kea. The UH CMP is the ultimate example of an unfunded mandate issued to an entity without experience or expertise and with no triggers or benchmarks to ensure compliance.

FOF#360/COL#138. The University has not demonstrated its expertise and experience in managing important natural and cultural resources. The history of mismanagement of natural and cultural resources on Mauna Kea is instructive for deciding whether the promises of improved management in the present case are reliable. In 1985, the BLNR approved the Mauna Kea Management Plan, which contained conditions that included biological inventory, habitat mitigation and monitoring. (Ex D-14) The inventory and monitoring were not funded. The habitat mitigation plans were ignored. In 1996, recreational visitors to the summit alerted DLNR staff of industrial activities contrary to board mandated conditions, and subsequently, DLNR Chair Mike Wilson outlined a series of errors by UH Institute for Astronomy (IfA) and DLNR that led to Wekiu habitat destruction in several areas of Pu`u Hau Oki, a cinder cone with prime (Type 2 & 3) habitat for the Wekiu bug. Mr. Wilson stated, in part, that UH IfA failed to include the management plan conditions as part of the FEIS, and the department also failed to discover these omissions in its review of the respective CDUAs and plan approvals. The Gemini Northern 8-meter telescope, Japan National Large Telescope (Subaru), and the Smithsonian (SMA) were all determined to have destroyed habitat beyond that disclosed in the FEIS or allowed in the approved management plan. Although these telescope construction activities and related infrastructure were completed under the 1985 Management Plan, the mitigation measures described in the plan were not implemented. The inventories and monitoring mandated as conditions in the 1983 MRSRCDP were not funded by the University, and as a result, baseline information required to manage and protect this fragile ecosystem from industrial development impact remains incomplete. Ex. A-010

The Applicant claims that a new paradigm – embodied in the UH CMP, 2000 Master Plan, and UH Hilo Office of Mauna Kea Management – has replaced the pattern of mismanagement on Mauna Kea. The University has proposed twelve new telescope facilities in the past ten years, including the TMT. None, not even the TMT -- the newest proposal to build one of the world's largest telescopes -- were addressed in the CMP and is referenced without detail only in the Decommissioning Sub-Plan.

FOF#362/COL#140. While the Applicant claims that unique astronomical characteristics are “important natural resources of the state” that “must be appropriately managed and used” to “promote their long term sustainability”. It is absurd on its face to claim that the Applicant can manage attributes such as favorable latitude, altitude, atmospheric clarity and stability, low humidity, low mean temperature, and absence of /distance from light pollution.

FOF#363, 372/COL#141. The Applicant cites planned financial contributions to pay for management on Mauna Kea, yet neglects to mention that the Mauna Kea Lands Fund was not established for conservation management. Haw. Rev. Stat. 304A-2170 provides the University with a special fund entitled “Mauna Kea Lands Fund”. The purpose of this special fund is:

Managing the Mauna Kea lands, including maintenance, administrative expenses, salaries and benefits of employees, contractor services, supplies, security, equipment, janitorial services, insurance, utilities, and other operational expenses.

Missing from the list of uses for the Mauna Kea Lands Fund is anything to do with conservation, natural and cultural resources management or environmental protection. The University cannot claim that the Mauna Kea Lands Fund will manage away the substantial impacts of telescope activities on the natural and cultural resources of Mauna Kea, when “natural and cultural resources” are not even mentioned in the long list of uses for money deposited in the fund.

Response to FOF#363/COL# 141. Under the version of HAR § 13-5-2 that was in effect when the CDUA was submitted to the BLNR, “Natural resource” is defined as meaning “resources such as plants, aquatic life and wildlife, cultural, historic and archeological sites, and minerals.” The amendment added to this definition “recreational” and “geologic” sites, “scenic areas, sociologically significant areas,” and “watersheds. Nowhere in the older or newer versions of HAR 13-5-2 are the astronomical natural resources of the State provided

*CRITERION TWO (COL #143-164)*

FOF#394 /COL #150 Response: Nowhere in the HAR 13-5-30 can one find a description of the objectives of the resource subzone described as the Applicant in this statement. The FOF 394 misrepresents the statute.

FOF#395, 401 COL#152, 158 Response: The Applicant misstates the language of HAR 13-5-24(c). Astronomy facilities are an identified use, not a permitted use.

FOF#397, #398 COL#154, #155 Response: The Applicant fails to note that the CMP does not include the TMT. The University has proposed twelve new telescope facilities in the past ten years, including the TMT. None, not even the TMT -- the newest proposal to build one of the world's largest telescopes -- were addressed in the CMP and is referenced without detail only in the Decommissioning Sub-Plan

FOF#400.COL#157 Response: Credible witnesses have testified that the "use" of the natural resources, will in fact diminish them. CITE While astronomy is an identified use in the conservation district subzone, such use is permitted if and only if it will not entail substantial adverse impacts on the conservation district. The TMT would have project-specific substantial adverse impacts, as well as contribute to the existing cumulative negative impact of telescope activities on the natural and cultural resources of Mauna Kea. Thus, the TMT does not meet the "if and only if" requirement of criterion two and the application must be denied. CITE Atwater

FOF#416/COL#165 Response: The proposed TMT project is not consistent with the objectives of the Conservation District to conserve, protect and preserve the natural resources, not would the project ensure the sustained use of the natural resources critical to the health and welfare of the people of Hawaii. According to HAR §13-5-13(a), "[t]he objective of this [Resource] subzone is to develop, with proper management, areas to ensure sustained use of the natural resources of those areas." *Id.* (emphasis added). Ensuring sustained use of Mauna Kea's natural resources necessarily means ensuring that these resources are actually conserved, maintained, or enhanced, not degraded. The DLNR's "Conservation District

Review Project: The Discussion Draft” explains the purpose and function of the hierarchical permitting requirements in this version of the conservation district rules. CITE Atwater

*CRITERION THREE (COL #165-176)*

FOF 420,421/COL#169 Response: The Applicant contends the TMT CDUA complies with criterion three because it does not require a special management area permit. This is incorrect. The conservation district rules require that the proposed land use be consistent with the objectives of the Coastal Zone Management Act, regardless if the proposal triggers additional permitting through that Act. Moreover, the Coastal Zone Management Act requires compliance with the objectives, regardless of the Special Management Area. Haw. Rev. Stat. §205A-4(b) provides:

The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority.

Moreover, the statute states that:

In implementing the objectives of the coastal zone management program, the agencies shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development.

HRS § 204A-4(a).

Thus, the question before the BLNR, under this criterion, is whether issuing a CDUP for the TMT would be consistent with following relevant objectives:

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

(6) Coastal hazards: Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution.

HRS §205A-2(a).

The TMT would undermine important scenic viewplanes, destroy areas of historic importance, and increase the risk of water pollution. The issues of important viewplanes, scenic and open space resources, historic sites and risks to water quality are addressed in the analysis of criterion four, six, and eight respectively. The fact that the Applicant's proposal would have a substantial adverse impact on these important resources under those criteria, is grounds for also denying the request under this criterion.

FOF 420,421/COL#169 Response: The Applicant contends the TMT CDUA complies with criterion three because it does not require a special management area permit. This is incorrect. The conservation district rules require that the proposed land use be consistent with the objectives of the Coastal Zone Management Act, regardless if the proposal triggers additional permitting through that Act. Moreover, the Coastal Zone Management Act requires compliance with the objectives, regardless of the Special Management Area. Haw. Rev. Stat. §205A-4(b) provides:

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*CRITERIONFOUR (COL #177-217)*

FOF#436, 437, 439/COL#181, 182,184. While all of the current facilities are in the summit region areas described as Areas A, B, and C, none are in Areas D, E and F. MP2000 p.IX-23-5. Applicant admits that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea (areas A, B, and C) have resulted in impacts that are considered substantial, significant and adverse. Ex.A-3 p. 3-219 The Applicant proposes to expand astronomical development (one of the world's largest telescopes) into an area (E) that is far (1000 meters or ¾ mile) from the developed infrastructure, in an alpine stone desert discrete from the summit cinder cones, with flora and fauna unlike those at the summit, in a Historic District, with an Access Way impacting a Kukahau'ula, (a Traditional Cultural Property) Thus creating a significant increment of impact to an area that is not at all built upon. Ex.A-3 p. 3-219

FOF#440, 443/COL#185 doublecheck The Applicant contends the TMT CDUA complies with criterion four, because, although it is undisputed that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have resulted in impacts that are significant and adverse, the TMT project will not tip the balance of any existing impact from a level that is currently less than significant to a significant level.

The proposed TMT Project would cause substantial, significant, and adverse impacts to historic and traditional cultural properties (TCPs) contained within the Mauna Kea Summit Region Historic District (MKSRLHD).

“It is our view that the effect of astronomy development on cultural resources and on the landscape of Mauna Kea has been significant and adverse. While a project such as the TMT can bring new resources into play that may mitigate certain cultural impacts...we believe the project will increase the level of impact on cultural resources, which remains significant and adverse. “Laura Thielen, Chair, DLNR Ex A-004 FEIS Vol II p 17 of 531

The TMT would be the first observatory to be constructed at the elevation and the specific zone on the north plateau that includes several hundred shrines and other religious structures. Likewise, the proposed TMT observatory would drastically alter the surrounding environment and cause visual and alignment obstructions for

these many cultural and religious sites, thus adversely impacting the constitutionally protected traditional and cultural and religious practices exercised by Hawaiian Petitioners.

Additionally, while the cumulative impacts of astronomical development to the summit area (App FOF#439) are undisputed, the cumulative impacts to the alpine ecosystem have yet to be determined (Ex.A-3 p. 3-219).

The bulk of human activity has occurred on the cinder cones near the summit of Maunakea, where eight of the existing observatories are located. Human activities have had a very limited impact on the relatively extensive habitats beyond the summit cinder cones. *Therefore, human activity has not had a significant cumulative impact on species that dwell in these other habitats, such as lichens, mosses, and vascular plants.* (emphasis added). Ex.A003 FEIS p 3-215

In addition, the growth rates of the lichens and mosses in the severe environment at the summit are extremely low... *Therefore, recovery of disturbed areas will be extremely low.* Ex B.64, Appendix D1p 8-9 (emphasis added)

FOF# 446/COL# 193 Witnesses Hansen, Ward, Abad, Kahakalau, **AND MORE** provided probative, reliable, substantial, and credible evidence and admitted relevant exhibits to demonstrate that the TMT project would, in fact, cause and expand the substantial cumulative impact to existing plants, cultural historic, recreational sites, geologic sites, scenic areas, watersheds and ecologically significant areas.

FOF#448, 149, 450/COL#196, 197 ,198 Under HAR 13-5-30(c)(4), the Applicant did not provide evidence that the TMT project would not will have a substantial adverse impact on the natural and cultural resources of Mauna Kea – both in terms of the project-specific harms and the cumulative impact of telescope activities on the mountain. These substantial and adverse impacts are not reduced to a level that is less than significant based on the mitigation measures proposed by the Applicant. The incremental nature of the one of the world’s largest telescope projects on the cultural, historical and vulnerable alpine region’s existing significant, substantial and adverse cumulative impacts is not a tiny insignificant increment, as the Applicant portrays it. Because the BLNR and the University have failed to address the existing substantial impact on the mountain’s resource, it is improper to consider any new projects that would contribute to that substantial

impact in any way. There are no exceptions to the fourth criterion. The threshold of significance has already been surpassed on Mauna Kea, the TMT would contribute to that existing significant impact, thus it cannot be granted a construction permit.

FOF#451/COL#199 Under the version of HAR § 13-5-2 that was in effect when the CDUA was submitted to the BLNR, “Natural resource” is defined as meaning “resources such as plants, aquatic life and wildlife, cultural, historic and archeological sites, and minerals.” The amendment added to this definition “recreational” and “geologic” sites, “scenic areas, sociologically significant areas,” and “*watersheds*”. (emphasis added).

While the HAR Definition does not specifically cite cultural practices, it does cite sociologically significant areas.

FOF#453/ COL#(201)The Applicant concedes that by constructing observatories near and on the slopes of the cinder cones that comprise the Historic Property of Kukahau‘ula, spiritually the most important area of Mauna Kea, little consideration was given to the potential impact on traditional cultural resources. As a result construction of these observatories has had cumulative impacts on cultural, archaeological, and historic resources that are substantial, significant, and adverse. The Applicant also admits that existing astronomical observatories are prominent visual elements on the summit of Mauna Kea. At the summit, the existing observatories obscure portions of the 360-degree panoramic view from the summit area. Overall, the existing level of the cumulative visual impact from past projects at the summit is considered to be substantial, significant, and adverse. A-3 FEIS

FOF 457, 459/COL#207, 201 Mitigation

The mitigation measures proposed by the Applicant are insufficient to reduce the substantial adverse impacts to cultural and natural resources. In *Morimoto V Bd of Land and Natural Resources*, 107 Haw.296 (2005), the question posed to the Court was whether BLNR had the authority to consider mitigation measures when applying the eight criteria of HAR 13-5-30(c). In addition to concluding that the BLNR does have the authority to consider mitigation measures when evaluating a CDUA, the Court also gave direction as to characteristics of adequate mitigation. The court specifically found that the mitigation actions imposed on the Federal Highway administration’s(FHA) road realignment actually served to “protect and enhance the natural, environmental, cultural, historical, and other resources” of the district. *Id.* At 303, fn.20. by contrast, the Applicant in this case has not designated

the TMT project mitigation actions in accord with guiding documents, nor demonstrated that the proposed mitigation actions would directly reduce the admitted significant impacts of the project to a level that is less than significant. It is important to note that the Applicant has the burden of proving that mitigation measures would actually reduce the significant impact of the TMT proposal to a level that is less than significant. They have not.

**Location:** The Applicant contends that locating the TMT project on the northern plateau minimizes the substantial impact of the project on visual and scenic resources. The Applicant has not shown that locating the TMT on the ridge would have been desirable or even possible. Indeed, the Cultural Impact Assessment (CIA) specifically “recommended that the TMT Observatory project be built on a recycled site of an outdated telescope on the summit instead of Area E”. Ex. A-4, p. 204-5. Instead of considering this alternative location, the Applicant summarily dismissed this recommendation as “not deemed feasible.” Ex. A-3, p. 3-32. The fact is, the Applicant’s siting process only considered “Area E” on the northern plateau. Ex A-3, p. 4-5. Because it is unlikely that the five-acre TMT project could have been located on the summit ridge, the fact that it is not proposed to be located there cannot be claimed as a mitigation measure.

**Size:** The Applicant has not shown that the size of the project would reduce the significant impact of the project as proposed to a level that is less than significant. The fact that the project designers could have engineered a bigger, structure but didn’t, does not prove that the significant impacts of the project that is proposed will be minimized to a level that is less than significant. Without evidence, the Applicant cannot prove that “it could have been worse” is any mitigation at all.

**Money:** The promise to pay “substantial rent” is not a mitigation measure. Not only does the claim fail to consider fair market rent, it also pits compliance with one law against another. Pursuant to HRS 171-17 and -18, fair-market rent is required to be paid into the general fund for the private use of public lands. All telescope facilities should be paying rent to the general fund, regardless of any other requirements or pre-requisites for permission to be on Mauna Kea. It is improper for the DLNR staff to suggest that compliance with this requirement – paying fair market rent – mitigates the substantial adverse impact of the proposed TMT project “because management costs money.” (Ex. B-33). The requirement to pay rent is not a management fee, it is not a fine, and it is not a rationalization for authorizing a land use that otherwise fails to comply with the basic requirements for a permit. If a proposed land use has unmitigated substantial adverse impacts,

then its CDUA cannot be granted, in which case the BLNR never reaches the question of what would be fair-market rent for that land use.

The additional offers of money for educational services and workforce development are completely irrelevant to the BLNR's consideration of whether this CDUA complies with the eight requirements for a permit. No matter how many jobs or classes the Applicant promises to provide in exchange for permission to build in the conservation district, the BLNR cannot base its decision on such factors for they are outside the confines of the eight criteria for a permit.

The cacophony of additional mitigation measures offered by the Applicant (furnishing items with a sense of place, ride-sharing, paving some roads while remediating others, monitoring Wēkiu bugs, painting facilities, complying with laws, etc.) do not directly address the harm caused by the proposed TMT or telescope activities in general. The Applicant failed to present evidence that these mitigation measures would actually reduce the substantial impact of the project to a level that is less than substantial.

By contrast, the Petitioners presented evidence that demonstrates the mitigation measures do not minimize the substantial and adverse impacts of the project and in some instances actually worsen the injury (silver paint creating a lighthouse effect for mauka views) or add insult to the injury of the proposed project on Mauna Kea (art and furnishing in the project for a sense of the place just recently destroyed). In fact, the Applicant admits that even with proposed mitigation measures for the TMT, significant impacts on the Mauna Kea conservation district will persist.

FOF #463/COL#215 RENT (see A134) See Ward FOF#482-487

The Applicant asserts that sublease rental payments will be used for management of Mauna Kea's natural and cultural resources. The sublease rent amount negotiated in the sublease whose consent has been vacated by the 3rd Circuit Court, so it is currently unknown how much money would be deposited into the fund. The Mauna Kea Lands Fund special fund is established under section 2170 of Chapter 304A, HRS. (HRS §304A-2170)

Per Chapter 304A, the University is authorized to: "give thorough instruction and conduct research in, and disseminate knowledge of, agriculture, mechanic arts, mathematical, physical, natural, economic, political, and social sciences, languages, literature, history, philosophy, and such other branches of advanced learning as the board of regents from time to time may prescribe and to give such military instruction as the board of regents may prescribe and that the federal government requires..." (HRS §304A-102)

Section 2170 of Chapter 304A, HRS, states in relevant part:

“(b) The proceeds of the special fund shall be used for:

(1) Managing the Mauna Kea lands, including maintenance, administrative expenses, salaries and benefits of employees, contractor services, supplies, security, equipment, janitorial services, insurance, utilities, and other operational expenses”

“Managing the Mauna Kea lands” fails to mention the protection, preservation, or conservation of natural and cultural resources as a purpose of the special fund. (HRS §340A-2170(b)(1))

### Archaeological and Historic Resources

#### VIEW PLANES ARE IMPORTANT CULTURAL FEATURES

Mauna Kea Anaina Hou and Kealoha Pisciotta’s Responses to UH/TIO FOF COL Decision Order. We incorporate by reference our FOF COL, Decision and Order.

Many of the Pu`u [cinder cones], associated burials and kinolau; The TMT DEIS fails to address the cumulative impacts to the kinolau (bodily forms of the deities) such those impacts to the image of Poliahu seen from the east side of the island.

**See** Ex. B.23 the photo image of Poliahu.

View plane (including mauka-makai and makai-mauka view planes). The TMT DEIS fails to address the cumulative impacts of the practitioners’ view planes at the summit looking outward (mauka-makai). **See** B.01o

The view plans (view scapes) cannot only be evaluated from sea level looking up. The impacts include the practitioners’ view planes which are viewed from Mauna Kea to the sea, to the other islands and to the night sky. **Id.**

#### Mountain landscape in navigational traditions

The TMT DEIS fails to evaluate the cumulative impacts on the ritual landscape including impacts on solstice, equinox ceremonies and other ceremonies relating to navigation.

We wish also to state our objections to the TMT DEIS hearing presentations. The TMT hired people to give a presentation suggesting that modern astronomy is

nothing more than an extension of what our ancestors accomplished. This is an unreasonable assertion. The two disciplines may not be reasonably compared; it is like comparing apples and oranges. Our ancestors may not have done what Plato did, but what they did accomplish was amazing. It is righteous to give credit where it is due.

The presentation is based on a book written about King Kalakaua, whom supported the construction of a small telescope in Honolulu. Unfortunately, the book also claims, the King supported it because it would help prove to the Hawaiian people the earth was round. The Hawaiian people certainly understood the earth was round- traditional knowledge dating back to before the time of Christ. They understood this because they could not have navigated and peopled 10 million square miles of the oceans and tiny islands without having known this. *Id.*

x. The Kupuna (ancestors) understood this because they had identified a celestial equator, using knowledge kept in the traditions (and family mo`oleo) of Mauna Kea, which made the TMT presentations even more egregious. What our Kupuna (ancestors) accomplished was important to Polynesia but is also to the world, contributing to the global knowledge base. The Kupuna should be properly credited for this. Mauna Kea is the land of our history and knowledge—and it requires maximum protection.

*See* Ex B.01.o Request for Section 106, Section Cultural Impacts #1,2,3)

x. The mountain landscape in navigational traditions: Hawaiian Navigational, it is noted that while none of the archival historical literature has made specific references to the sites or features that were recorded as being associated with navigational practices and customs, the gods and deities associated with Mauna Kea have celestial body forms and some were evoked for navigational practices.

*See* Ex. B.37 MP, App. I, p.29

x. Mauna Kea is actually the fulcrum of such ceremonies, because the Mauna sets the ultimate relationship to all other sacred sites for such ceremonies, as Mauna Kea is the highest point and from there you can see all else.

*See* Ex B.01a K. Pisciotto, WDT, p. 5

[T]housands of years ago our navigators and star people developed a system that allowed our ancient people to circumnavigate the globe and to people the tiniest islands scattered across the largest ocean on earth, the Pacific Ocean. We did this before the birth of Christ and at a time when no one on earth was doing a similar

method of ocean voyaging...they did develop a system of advanced mathematics that allowed them to understand and determine that the earth was round and to a concept of a celestial equator. If this were not the case they could not have found the tiny little islands across a vast ocean with any accuracy at all. If your measurements are off by only a few degrees you will get lost at sea, because even tiny discrepancies in measurement on the sky translate to hundreds of miles on the ocean.

**See** Ex B.01a K. Pisciotta, WDT, p. 5

I had an astronomer friend query me on this very thing, asking how the Hawaiian people knew the earth was round before the Europeans did?...I finally explained how we did understand these principles (i.e. celestial equator), but that they were contained for example in our stories of Creation and Papa (Earth Mother) and Wakea (Sky Father). His response was surprising to me, in that he was resistant to the idea that any science could flow from mythical stories...I explained that these stories are not myths but rather teaching tools. Our teachings are storied but they also meet the criteria of science, in that they are based on observation and are measurable and repeatable. Our modern Navigator's and their many accomplishments are evidence of this. Our oral traditions are not mere mythical stories, and they are dependent on the landscape and that is why the landscape of Mauna Kea needs to be protected and preserved.

**See** Ex B.01a K. Pisciotta,, WDT, p. 5

These ceremonies are about tracking the motion of the sun across the sky throughout the year and were used by our people and most of the ancient people around the world to keep track of the year. The po'e kahiko (ancient Hawaiian people) are not alone in these ceremonies for keeping track of the motions of the celestial bodies and their relationship to the observers on earth. The Celtic Shaman, Egyptian Priests, Mayan Priests, Chinese, Arab and Middle Eastern astronomers and holy people all performed the ceremonies similar to those we perform on Mauna Kea.

**See** Ex B.01aK. Pisciotta, WDT, 6

Tracking the sun is for growing and harvesting. But more important is the need to track the annual time in the context of a much greater time frame known as the precession, which is the 26,000 year cycle (although some used slightly different time frames).

**See** Ex B.01a K. Pisciotta, ,WDT, 6

This cycle is the measure of the wobble of the earth's axis, and the time it takes for the wobble to make a complete cycle. The wobble was important to keep track of because relative to earth the pole stars appear to change over time. If the pole stars change it drastically impacts navigation. If the poles are changing then over time our knowledge must change to reflect these changes or we will get lost, and for us especially that means getting lost at sea. Ex C-1 K. Pisciotta, June 28, 2011, WDT, 5

The idea that so many ancient people understood this concept is amazing in and of itself. It would take about 70 years for a single person to realize that such a motion was actually happening and another great leap of consciousness to understand it would take about 26,000 years for the precession cycle to be completed. How the ancient peoples of the world came to this understanding is amazing. I learned about this from my Kupuna first, and then did some of my own research. *See* Ex B.01a K. Pisciotta, WDT, p. 6.

The ceremonies I just described are specifically dependent upon our ability to observe and track the motion of the sun and other celestial bodies in order to find our way and to determine when and how to perform certain things for the care of the land and sea. Our traditional resource management models are dependent on these ceremonies. Our ancient knowledge relating to our relationship to our other Pacific people are also a part of this knowledge. And lastly our sacred prophecies are based in this knowledge.

*See* Ex B.01a K. Pisciotta, WDT, p. 6

But more important is the need to track the annual time in the context of a much greater time frame known as the precession, which is the 26,000 year cycle (although some used slightly different time frames). This cycle is the measure of the wobble of the earth's axis, and the time it takes for the wobble to make a complete cycle. The wobble was important to keep track of because relative to earth the pole stars appear to change over time. If the pole stars change it drastically impacts navigation. If the poles are changing then over time our knowledge must change to reflect these changes or we will get lost, and for us especially that means getting lost at sea.

*See* Ex B.01a K. Pisciotta, WDT, p. 5

Our traditional resource management models are dependent on these ceremonies. Our ancient knowledge relating to our relationship to our other Pacific peoples are also a part of this knowledge. And lastly our sacred prophecies are based in this knowledge. Ex C-1 K. Pisciotta, June 28, 2011, WDT, p. 6 We refer to the summer

solstice ceremonies as "Ke Ala Polohiwa a Kane", Winter as "Ke Ala Polohiwa a Kanaloa, spring equinox as "Ke Ala`ula a Kane", and autumnal equinox as "Ke Ala Ma`awe`ula a Kanaloa" *Id.*

x. Winter Solstice = "Ke Ala Polohiwa a Kanaloa" -- The Black Glistening Path of Kanaloa--is when the sun hits its farthest point south in the sky, occurring in December. *Id.*

The Sumer Solstice is "Ke Ala Polohiwa a Kane" --The Black Glistening Path of Kane-- when the sun reaches its most northern point in the sky, occurring in June. *Id.*

Whereas, the equinoxes (where the sun crosses the equator ("Ka Piko o Wakea" from my family tradition) to the far winter and summer points are called: *Id.*

"Ke Ala`ula a Kane " (The Spring Equinox--The Dawning of the Path of Kane") occurring in March and; *Id.*

"Ke Ala Ma'awe`ula a Kanaloa" (The Autumnal Equinox--"The Red Track or Tentacle") of Kanaloa) occurring in September.  
*See* Ex B.01a K. Pisciotto, WDT, p. 6-7

The map of Exhibit C-5 (NOTE: for CCH 2017 it is Ex. B.01t) describes traditional cultural view planes. This map incorporates our testimony as well as others. It is not a complete map but it does help provide a visual representation of some of the view planes including some of the solstice and equinox view planes and those in relation to other the sites and also to the other islands.  
*See* Ex B.01a K. Pisciotto, WDT, p. 7

On this viewplane map, you can see that the TMT will be in direct line of sight of Maui and the NW plane which is used for ke ala ao (solstice and equinox) ceremonies. There are also lines that represent the relationship between Mauna Kea and Poli`ahu Heiau on Kaua`i, Ahu a Umi Heiau situated between the three great mountains (Hualalai, Mauna Loa and Mauna Kea) on Hawai`i Island, the Pu`u Kohola Heiau in Kawaihae, Hawai`i Island, and Motu Manamana (Necker Island) of the North Western Hawaiian Island which marks the great turn around of the sun during the ke ala polohiwa time. The shrines on this tiny island are related to this relationship too. *Id.*

For the CDUA to determine that there would be no effect on archeo-astronomy, it would need to have a full understanding of the cultural values of those shrines through extensive discussion with cultural practitioners who may have cultural knowledge of how those shrines should be used. *Id.*, at 83: 1-11.

Exhibit B.01w is a picture of the Southern Sky from Mauna Kea. At the left is the glow of the lava from Kilauea volcano. In the sky at the center is the Southern Cross. The Snow covered peak in the center is the true summit of Mauna Kea, the highest point in the Pacific. At the right, the dome of the 8-meter Gemini North Telescope is under construction - found in the Atlas of Hawai'i, 3rd Ed. Edited by Juvik and Juvik, Chief Cartographer Thomas R. Paradise, at Photograph by Mr. R.J. Wainscoat, copyright 1997, p. 98. Ex B.01a K. Pisciotta, WDT, p. 7, The Summit Access Road was built with government funds and is a public road ("non-exclusive road easement").

**See** Ex. B.42 CMP MKPAP, p. 1-4

Kealoha Pisciotta has cultural practices that are spread over several different areas on Mauna Kea. View planes are a very important part of her practice her that go out to Haleakala, Kauai (Poliahu Heiau) to Motumanamana. TRV34 p. 48: 9-25, p.49: 1-25 p.50: 1-10, 25

**Please see also the following Exhibits:**

Ex B.01t (NH Traditional View Plane Map showing some of the view used in ceremonies), Ex B.01w (a picture showing the Southern Cross an important star constellation for NH practices), Ex. B28 (the image and Kinolau (bodily form of Poliahu, the snow goddess found in the contours of the Pu'u Cinder Cones of the summit of Mauna Kea—found through oral histories and Mo'oleo), and B. 18c – B. 18g (the hand drawn maps made to describe the importance of the view planes for the Solstice and Equinox ceremonies by Ms. Pisciotta during testimony.)

The shrines are specifically set up in relationships to the commanding, that is what is sites in the Cultural Assessment. So I wan to be clear, because when we say alignments we mean tangible and intangible connections between those places and the Mauna Kea. We mean we can literally see the other sacred peaks of the hill on the island, or even other—on of the island is such as the one on Kaua'i.

**See** Ex. B.01i The Transcript record of Kealoha Pisciotta Closing Statements from the 2011 CCH at p. 137-141

Once in my life I saw the while island chain, but this view is rare. Nevertheless, Poli'ahu Heiau on Kaua'i was constructed specifically to be in alignment with the ceremonial direction established on Mauna Kea. Mauna Kea is fulcrum and baseline for all alignments of this nature. *Id.*

Therefore, when we speak of alignments being blocked, it means we cannot do ceremony in the way that we need to be apart of those alignments. Because we are — they are being physically and spiritually blocked. That in turn interests our ability to perform those ceremonies and other cultural practices. *Id.*

**NOTE:** The HO did not admit Kealoha Pisciotto's closing statement for the 2011 CCH it into evidence. We objected to the Exhibit situation and argued that all relevant evidence should be allowed HAR § 91- 10(1) and HAR 13-1-32.4 (the records relating to an application (CDUA)) shall be included in the CCH record. **See MKAH Motions**

### **Paul K. Neves Response to UH/TIO FOF COL, D&O**

UH/TIO FOF 747 misconstrues and misrepresents Kumu Paul K. Neves oral and written testimonies. Kumu Neves, is a Traditional and Customary cultural and religious Practitioners and his written, oral testimony and his Petition asserts the same. Kumu Neves has been found to have standing to assert his claims and his injury by the BLNR, by the Circuit Courts and the Supreme Court of Hawai'i. *See* Ex. A029 and A028 the original six Petitioners Petitions and Ex. B.18a Paul K. Neves WDT

x. The UH/TIO put up no rebuttal testimony to refute or to attempt to impeach Kumu Neves oral testimony or his WTD so they may not make such claims against Kumu Paul K. Neves. *Id.*

x. When the UH says the TMT will not obstruct our view planes—I am not sure I understand what they are talking about—does that mean just me eyes—our eyes will not be covered by the domes or building? The view plane is about the open spaces — the view unobstructed by man-made features—like building. *Id.*

x. When we look out the plateau where the TMT is proposing to site their project—it is not just that it will not be blocking our eyes (depending on where we are looking from) but it will be the most coronal feature in our eyes and therefore

the most feature in our customary and traditional view plane. It is this view plane that we use to look and hone the high mains down the island chain. For me and my Ohana-that view is significant -the view of Haleakala-it is the view and the practice of honoring our ancestors, our akua residing in the high lewa. It is our way of honoring the motions of the heavens-which is also honoring the movements of the kupuna and the Akua. we can partition our beliefs. *Id.*

x. For comparison, the Jewish people go to the Wailing Wall-the Temple is not there but they still go to the wall-in order to recognize the Temple—you can't partition off your beliefs and you practice of this belief. Mauna Kea is the environment of our belief-just like the Wailing Wall still represents the temple, which represents the Jewish peoples' beliefs. And what we see from Mauna Kea, from atop there or across there -like from the Pu'u to Pu'u pr aha to aha are all a part for our beliefs. When this environment is destroyed well wail—just as the Jewish mourn at their wailing wall—and we all mourn with them because we feel their pain too. We mourn the loss of Temple-but we don't want to have to mourn the loss of this temple known as Mauna Kea—we want to rejoice in the Creator's creation and in Akua's beauty. This is house are rights are negatively impacted because they destroy the very environment of our spirituality and beliefs, we lose the landscape which we use to perform this ceremonies of Aloha and Peace. *Id.*

#### *CRITERION FIVE (COL #218-226)*

FOF#841/COL#219 When this project was proposed, the expansion of astronomical development into the northern plateau, off of the summit ridge, great concern arose, because many in the community felt strongly the TMT is incompatible with the surrounding area, which is 11,288 Acre MKSR within the conservation district, which extends from 6,000 feet to the summit. The proposed location of the TMT – the northern plateau – is undeveloped land, wide open space important to cultural practice and recreational uses on Mauna Kea, and is encompassed by the Mauna Kea Summit Region Historic District. Ex. B.03an

FOF #842/COL# (220) The “Astronomy Precinct” is a construct and a legal fiction, it is not a locality. The “Astronomy Precinct” is an aspiration described conceptually in the Master Plan 2000 (Ex.A-48 IX-22) with vaguely described boundaries. The “Astronomy Precinct” has never been formally designated; the

only formal designations are the Conservation District and the University's leased Mauna Kea Science Reserve.

FOF#846/COL223 Contrary to the Applicant's assertion, the eleven facilities in place are sited on the Mauna Kea Summit Ridge and saddle between Kukahau'ula and Pu'u Poliahu. The TMT project proposed by the Applicant would be sited over 1100 meters (3/4 mile) away from the existing infrastructure on the undeveloped northern plateau, far from any developed area. R-1 Fig 1.7 p 1-2 pdf 23 of 294.

FOF#848/COL#224 The northern plateau is not a built environment, it is still in a natural state with an open vista, notable for its breathtaking views, and one of the last open space areas with unhindered views from the summit region down to the sea, along the coasts, and across the island chain. From the vantage points where the TMT would be visible from the northern sides of Mauna Kea, the landscape remains uncluttered by human architecture. The Applicant proposes new development in an ecosystem with substrate unlike that of the cinder cone substrate where astronomy development has taken place. To quote the FEIS,

"The bulk of human activity has occurred on the cinder cones near the summit of Maunakea, where eight of the existing observatories are located. Human activities have had a very limited impact on the relatively extensive habitats beyond the summit cinder cones. Therefore, human activity has not had a significant cumulative impact on species that dwell in these other habitats, such as lichens, mosses, and vascular plants. Due to the level of development that has occurred within the relatively small area of summit cinder cones, many studies have been conducted to evaluate if that development has impacted natural inhabitants of the cinder cone habitat. Ex.A003 FEIS p 3-215 (emphasis added)

FOF# 867/COL226 The proposed land use with the construction of the TMT observatory, structures, paved access way, and associated development are incompatible and inappropriate for this undeveloped cultural and recreational landscape of the northern plateau and the surrounding sacred areas within the

conservation district that encompasses the Mauna Kea Summit Region Historic District.

*CRITERION SIX(COL #227-256)*

FOF# 869/COL#228 The abundant evidence presented demonstrates that the existing physical and environmental aspects of the land will be neither preserved nor improved upon. The TMT Observatory would be an industrial massive 18 story, 5 acre, man-made structure that unequivocally impacts the public and Native Hawaiian viewscape and cultural practices. As such, it can neither preserve nor improve upon the natural beauty and open space characteristics of Mauna a Wakea, as required in the sixth criterion of the CDUA.

FOF# 871/COL#230 The pre-existing condition of the viewplane from the northern slope is a vast cultural and sacred landscape overlooking a ring of shrines encircling the flanks of Mauna Kea in a Historic District larger than the Mauna Kea Science Reserve. If permitted, the TMT would intrude upon the currently unobstructed view of Haleakala Mountain from the northern ridge of Kukahau`ula, as well as the primary view of the setting sun from the mountain. It will also obstruct viewplanes used for traditional, customary, spiritual, and religious Native Hawaiian practices. Likewise, this project will impede upon the viewplanes and degrade the natural beauty cherished by visitors, residents, and recreational users.

As the Applicant acknowledges in the governing management documents for the MKSR, (CMP and Subplans) "The proposed location for the TMT is on an estimated five acres of presently undeveloped land off the summit in an area referred to as the northern plateau" ...Exhibit A013 p 31

FOF #922/COL#265 The subleases are agreements between the University and the telescope owners/lessees which describe separately owned facilities built on distinctly delineated parcels encompassed within the MKSR. The Applicant contends that construing every sublease as created by a subdivided parcel, County

subdivision code would be operative, and it would lead to an absurd result and thus should not be followed. The plain reading of HAR 13-5-30(c)(7) is that a CDUA cannot be granted where subdivision is used to increase the intensity of land uses in the conservation district.

FOF #924-926/COL#268-270 The Astronomy Precinct, is not a legal land unit; it identifies a conceptual area for planning and management purposes. The BLNR has not reviewed or approved the Mauna Kea Science Reserve Master Plan in which the Astronomy Precinct is described.

FOF#927-928 The University has “subdivided” the lands under its general lease to ensure more land use in the astronomy precinct AND it has facilitated subleases with individual telescope owners and operators as a basis for construction of many industrial structures in the Mauna Kea conservation district. Indeed, by the University’s own requirement, the TMT could not be built without a sublease.

FOF#932 The metes and bounds description for the TMT sublease contains the following description:

DESCRIPTION

**TMT SITE PREMISES**

All of that certain parcel of land being a portion of the Government Land of Kaohe, being also a portion of Mauna Kea Science Reserve covered by General Lease S-4191 to the University of Hawaii Situate at Kaohe, Hamakua, Island of Hawaii, Hawaii

Beginning at the southwest corner of this parcel of land referred to the Hawaii State Plane Coordinate System, Zone 1 (NAD83) 362,519.00 feet North and 1,646,660.00 feet East and the direct azimuth and distance from the Government Survey Triangulation Station "SUMMIT 1955" being 129° 52' 08"; 6,166.86 feet and running by azimuths measured clockwise from True South:

1. 152° 35' 33" 304.14 feet along the remainder of the Government Land of Kaohe and the remainder of Mauna Kea Science Reserved covered by General Lease S-4191 to the University of Hawaii;
2. 180° 00' 00" 190.00 feet same;
3. 270° 00' 00" 630.00 feet along same;
4. 0° 00' 00" 430.00 feet along same;
5. 90° 00' 00" 320.00 feet along same;
6. 0° 00' 00" 30.00 feet along same;
7. 90° 00' 00" 170.00 feet along the same to the point of beginning and containing an area of 5.9986 acres, more or less.



Description Prepared By:  
Engineering Partners Inc.

A handwritten signature in black ink that reads "Ronaldo B. Aurelio".

RONALDO B. AURELIO  
Licensed Professional Land Surveyor  
Certificate Number 7564  
Expires April 30, 2014

Hilo, Hawaii, March 10, 2014

CRITERION SEVEN (COL #257-272)

CRITERION EIGHT (COL #273-293)

B.TMT PROJECT SATISFIES PUBLIC TRUST DOCTRINE AND CUSTOMARY AND TRADITIONAL  
NATIVE HAWAIIAN RIGHTS ARE APPROPRIATELY PROTECTED (COL #294)

THE PUBLIC TRUST DOCTRINE 295-323

UH/TIO misconstrues and mischaracterizes the Public Trust Doctrine.

Contrary to the UH/TIO's assertion at (COL 301), Public Trust Doctrine (PTD) does apply to the TMT Project and to BLNR's approval of the such a project and it is the law of the land.

UH/TIO FOF COL 295-323 found at p. 196 - 200.

We incorporate by reference MKAH and Pisciotta previous FOF COL, D&O here and also respond as follows.

The TMT or TIO (without conceding our positions that the TMT Corporation and the TIO LLC are not necessarily the same entity) we assert that both entities are third parties and NOT beneficiaries of the Public Trust.

While the University may benefit from the use of public trust lands for educational purposes under Section 5(f) of the Hawai'i Admissions Act, the law does not provide private corporations and foreign countries that same privilege.

The University may not extend their public trust lands privilege to non-state (Caltech and UC California) and foreign government and/or corporations such as the internationally owned observatories.

x. Here again the UH remains the Applicant on the actual CDUA not TMT or TIO.

x. In the *Waiahole* (2000) case the Court also makes the following findings:

- The State is obligated to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people as a public trust.

- Private commercial use is not a public trust purpose.
- Retention of waters in their natural state does not constitute waste. Rather, a public trust interest exists in maintaining a free-flowing stream for its own sake.
- The Water Commission “inevitably must weigh competing public and private water uses on a case-by-case basis” but any balancing must “begin with a presumption in favor of public use, access, and enjoyment.”
- Domestic uses and the exercise of Native Hawaiian and traditional and customary rights are public trust purposes.

## PRECAUTIONARY PRINCIPLE

*Is a Standard for Managing Public Trust Resources that Specifically Mitigates in Favor of Protecting the Resources.*

x. In the *Waiahole* (2000) case the Court discusses what is known as the precautionary principle, holding that in the absence of conclusive evidence to the contrary, trustee should err on the side of caution and mitigate the side the protection the resource(s); thus stating in relevant part:

x. “Where scientific evidence is preliminary and not yet conclusive regarding the management of fresh water resources which are apart of the of the public trust, it is prudent to adopt the “precautionary principles” in protecting the resources. That is, where there are present or potential threats of serious damage, lack of full scientific certainty should not be the basis for postponing effective measures to prevent environmental degradation...in addition, where uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protects the resources. x. “ (In re Water Use Permit Application, 94 Hawaii 97; 9 P.3d 409 (2000)(hereafter “Waiahole”) at p.154.))

x. The Court in McBryde Sugar Co. v. Robinson (1973), stated:  
[t]he right to water was specifically and definitely reserved for the people of Hawaii for their common good....[a]nd the ownership of water in natural watercourses and rivers [remains] in the people of Hawaii for their common good.  
 (Emphasis the Court’s) at p.129

x. But the Court when further in In Robinson v. Ariyoshi (1982) stating;

[a] public trust was imposed upon all waters of the kingdom. (Emphasis of the Court) *Id.*

x. Then in 1978 the people of Hawai'i adopted protection of the all the waters of Hawai'i in the Constitution, in Article XI, Section 1 and Section 7, which read in relevant part:

Section 1. **For the of present and future generations, the State and its political subdivisions shall preserve and protect...all natural resources including water,...and shall promote the development and utilization of these resources in a manner consistent with their conservation....**

And,

**All public natural resources are held in trust by the State for the benefit of the people.** (Emphasis the Court's)

x. **Article XI, under the WATER RESOURCES section provides;**

**Section 7. The State has an obligation to protect, control and regulate the use of the Hawaii's water resources for the benefit of its people.** (Emphasis of the Court), Waiahole at p. 129, 130

Further, the Court affirming the scope of the "States Resource Trust" had this to say;

[t]he public trust doctrine applies to all water resources without exceptions or distinction [including surface and underground water]. *I'd.* at 133.

### **Public Trust Doctrine is the Law of the Land**

The principles of the public trust informs every decision made about shared resources in Hawai'i, such as the public lands of Mauna Kea. The Public Trust Doctrine is at the foundation of law in Hawai'i.

The Hawai'i Supreme Court has repeatedly held that an agency's discretionary authority is "circumscribed" by the Public Trust Doctrine. (*Kelly v. 1250 Oceanside Ptnrs*, 111 Hawai'i 205, 230, 140 P.3d 985, 1010 (2006)). See also, *In re*

Water Permits, 94 Hawai‘i 97, 133, 9 P.3d 409, 445 (2000), In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui, 116 Hawai‘i 481, 508, 174 P.3d 320, 347 (2007)). An entity seeking to use public trust resources for other than their intended use must demonstrate that the proposed use does not harm that public resource or the public’s interest in that resource, especially for Native Hawaiians. (In re Water Permits, 94 Hawai‘i at 136-7, 9 P.3d at 448-49.

x. The recent Supreme Court in MKAH (2015), held; *Waiahole I was an explicit acknowledgment of by this court that the public trust doctrine, as incorporated into the Hawai‘i Constitution, necessitates “a balancing process” between the constitutional requirements of protection and conservation of public trust resources, on the one hand, and the development and utilization of those resources, on the other. (Id. At 142, 9 P.3d at 454.) This balancing process, however, exists in a framework demanding that “any balancing between public and private purpose [must] begin with a presumption in favor of public use, access and enjoyment.” (Id.) The burden of showing that the requisite balance has been properly evaluated “in light of the purposes protected by the trust” rest on “those seeking or approving such uses.” (Id.) (Emphasis added).*

x. The Court holds agencies responsible for implementing the Public Trust Doctrine. BLNR has a legal duty to preserve the public’s right to ensure the public trust is not degraded. (In re Water Permit Applications, 94 Hawai‘i at 141, 9 P.3d at 453.) Where an agency fails to uphold its obligation to protect the Public Trust Doctrine, citizens, as beneficiaries of that public trust, have an independent cause of action against to uphold their rights. This case involves §5(f) of the Admissions Act, a federal law that addresses public trust lands. “Under basic trust law principles beneficiaries have the right to “maintain a suit (a) to compel the trustee to perform his duties as trustee; (b) to enjoin the trustee from committing a breach of trust; [and] (c) to compel the trustee to redress a breach of trust.” (Price v. Akaka, 3 F.3d 1220, 1224 (9th Cir. 1993), citing Restatement 2d of the Law of Trusts, §199.)

x. The Ninth Circuit later clarified that Native Hawaiians can bring suit as §5(f) beneficiaries under federal law. (Day v. Apoliona, 496 F.3d 1027, 1032 (9th Cir.

2007) (“[W]e twice explicitly held that because it creates a trust, §5(f) also creates a right enforceable under 42 U.S.C.S. § 1983 (LEXIS Pub. L. 112-18 through 2011) by the trust's beneficiaries.”)) The Supreme Court of Hawai‘i further clarified that “a private implied right of action . . . to enforce the terms of the §5(f) trust under Hawai‘i law” exists under State Constitutional Protections in Haw. Const. Art. XII, § 4.” *Pele Defense Fund v. Paty*, 73 Haw. 578; 837 P.2d 1247 (1992). In *Pele*, the Court reviewed a number of cases in which Hawai‘i citizen beneficiaries sued to enforce their rights as beneficiaries of public trust lands. (*Id.* at 604-07; citing, *Kapiolani Park Preservation Society v. City & County of Honolulu*, 69 Haw. 569, 751 P.2d 1022 (1988) (public trust beneficiaries were held to be able to bring suit to prevent a government agency from disposing of trust lands) and *Natatorium Preservation Committee v. Edelstein*, 55 Haw. 55, 515 P.2d 621 (1973), (“citizens can bring suit for an injunction against the government agencies charged with the management of public lands when those agencies seek to dispose of the public lands in violation of the statutes governing their management and disposition.”))

The sacred waters of Mauna Kea include but are not limited to, the snow, ice (including fossil ice), meltwaters, the waters collected from the clouds and mist, the surface and underground water, rivers, ice caves, and the water that flows into the sea are protected under the precautionary principle and the public trust doctrine.

Neither the State BLNR nor the UH/TMT who are the proponents and the agency responsible for protecting the waters of Mauna Kea, have presented conclusive evidence to ensure the sacred waters will be protected from the telescopes’ use of hazardous material, sewage treatment, mirror washing treatment, or that other hazardous materials and sewage handling will not contaminate the waters that feed the multiple aquifers for Hawai‘i island.

UH/TMT witnesses did not present any conclusive evidence or witness testimony that demonstrated they have met their burden to prove the water is safe and will be protected into the future. In fact their witnesses in some case testified to

disagreeing with the historical holdings of the Supreme Court of Hawai'i and specifically about the public trust doctrine.

The cumulative impacts of all of the telescopes over a thirty year period have already been shown to be adverse, significant and substantial to the natural and cultural resources of the Mauna Kea.(see Ex. B.01.o Request for Section 106 consultation and DEIS comments 7/7/09) (Emphasis added)

The UH/TMT witnesses also did not present any conclusive evidence demonstrating that they have met their burden to show that Native Hawaiian practices relating to the access, gathering, use and enjoyment of the sacred waters would be protected.

Native Hawaiian practice and use of the water for medicinal, ritual, and ceremonial purpose cannot be done if the water is not clean and pristine. It is not known and this unknowing has led some practitioners not to harvest some waters and to use some of the waters in limited ways. So our practices are being negatively impacted.

If Hawaiians cannot use the water for healing then it probably should not be used for drinking water either. With so much uncertainty there is no way to be certain that the water sources for public consumption are not being negatively impacted. If we are unsure, then the precautionary principle should be applied, and that is to err on the side of caution.

It matters not how many black holes we discover, when we haven't figured out how to clean our own drinking water once it has been contaminated at its source. Therefore as Hawai'i citizens and Native Hawaiian beneficiaries of §5(f) public trust lands, we assert a private right of action to compel the BLNR to enforce compliance with statutory provisions that ensure the protection of public trust lands and waters of Mauna Kea.

PROTECTION OF CUSTOMARY AND TRADITIONAL NATIVE HAWAIIAN RIGHTS (COL #324-385)  
ARTICLE XII, SECTION 7 324-354

RELIGIOUS FREEDOM 355-382

## CONTINUITY OF HISTORY, USE, PRACTICE AND CULTURAL ATTACHMENT

UH/TIO COL 383 at p. 208, claims that *K Pa'akai* is concerned with the preservation and protections of customary and traditional native Hawaiians rights, not with contemporary cultural practices. Nonetheless UH Hilo claims extensive efforts to identify cultural practices, the potential impacts on or the impairment of those practices, and the reasonable actions to be taken to reasonably protect the native Hawaiian rights that exist, set forth above, encompass not only customary and traditional practice, but the contemporary practices as well.

The above UH/TIO claim is false and is an admission demonstrating how the BLNR unlawfully delegates their responsibility to protect the constitutional rights of Native Hawaiian traditional and customary cultural and religious rights and practices. The following statement demonstrates how this is the case. BLNR has a non-delegable duty “...to identify, cultural practice, the potential impacts on or the the impairment of those practices, and the reasonable action to be taken to reasonably protect those Native Hawaiian rights that exist.“

In **Mauna Kea** Concurring Opinion by Justice Pollack, joined by Justice Wilson and Justice McKenna in part, at foot note 8 on p. 21, states in relevant part:

The court clarified, In re Contested Case Hearing on Water Use Permit Application filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 174 P.3d 320 (2007), that in cases where Native Hawaiian rights figure in an agency's public trust balancing, the burden is not on the parties of Native Hawaiian ancestry to prove that the proposed use would harm traditional and customary Native Hawaiian rights; rather, the permit applicants and the agency are the parties obligated to justify the proposed use and the approval thereof in light of the trust purpose of protecting Native Hawaiian rights. Id. at 507-09, 174 P.3d at 346-48.

The record is filled with facts in support of the traditional and customary Native Hawaiian cultural and religious practices currently conducted on the

summit and surrounding areas of Mauna Kea. The identification of the “ring of shrines” that has hundreds and maybe even thousands of individual historic ‘ahu or kuahu and associated “find spots” (archeological features with uncertain ages) and the construction of new ‘ahu or kuahu, built on undeveloped lands and testified to by Petitioners; including but not limited, to Kealoha Pisciotto, Kumu Paul k. Neves, Keomailani Von Gogh, Kaliko Kanaele, and William Freitas further demonstrate that an on going and continuation of the Native Hawaiian traditional and customary cultural and religious practices exists and therefore also a continuity and time depth of the said traditional and customary Native Hawaiian cultural and religious practices recorded on Mauna Kea.

The Pro Se Petitioner’s Native Hawaiian traditional and customary cultural and religious rights that are challenged and threatened in two ways. First, because the State continues to abdicate, delegate and or act in excess of their authority to affirmatively to protect the “reasonable” exercise of the Native Hawaiian traditional and customary cultural and religious rights.

They do this by unlawfully delegating this duty first to the University of Hawai’i at Manoa (UH), which then is transferred to a set of entities under the University of Hawai’i at Hilo (UHH) including the Office Of Mauna Kea (OMKM) who then transfers the duty to an advisory group called Kahu Ku Mauna (KKM). The University of Hawai’i at Hilo (UHH) clearly transfers the responsibility of protecting constitutionally protected Native Hawaiian rights to entities that are **not** affirmatively mandated to protect those rights and resources, which belonging to the people of Hawai’i.

This ‘wholesale delegation of the responsibility for protecting Native Hawaiian Traditional and Customary cultural and religious rights to the University and to other entities is specifically what the Supreme Court warned against and prohibited in **Ka Pa’akai**.<sup>5</sup>

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<sup>5</sup>See **Mauna Kea Anaina Hou** Concurring foot note 17 at p. 47, that reads : The non-delegable nature of an agency’s duty to protect and enforce constitutional rights only intensifies the important role that an agency pls. See Ka Pa’akai O Ka’Aina, 94 Hawai’i at 51, 7 P.3d at 1088 (holding that “the delegation of protection and preservations of native Hawaiian practices to [the party petitioning for the reclassification of land] was inappropriate”). In this particular case, outside of judicial review, no other entity but he Board can preserve constitutional rights involved in the permitting of a proposed use of a conservation district land. See HRS § 26-15 (Supp. 2005)

**The UH/TIO has been aware of the tradition and customary Native Hawaiian rights for over a decade and this fact is clear from the following excerpts from the Mauna Kea Master Plan 2000. (Emphasis added) *See* Ex. A048, App. N, P. 43**

For the purposes of evaluating the significance of Native Hawaiian cultural practices, features and beliefs identified in association with the Science Reserve Master Plan Project Area, it would be useful to consider them in terms of the three types of informant claims that were defined earlier ... information obtained by **Maly** in his oral history and consultation study (1999) **suggests that several of the identified practices and beliefs would appear to fall within the category of traditional and customary practices claims.** (Emphasis added) *See* Ex. A048, App. N, P. 43

**These would be claims that would lie within the purview of Article XII, Section 7, of the Hawai'i State Constitution ("Traditional and Customary Rights") particularly as reaffirmed in 1995 by the Hawai'i State Supreme Court in the decision commonly referred to as the "PASH decision", and further clarified in the 1998 decision in "State v. Hanapi." Which would include various cultural practices and beliefs associated with the general geographical area of the summit region rather than a clearly definable property or site.** (Emphasis added) *See* Ex. A048, App. N, P. 43

**While certain other practices, such as prayer and ritual services involving the new construction of new *kuahu* (altars), or the releasing of cremated humans rather than internment on *pu'u*, might seem to be contemporary cultural practices they may as well be considered reasonable cultural development evolving from earlier traditional practices.** (Emphasis added) *Id.*

Based on the evaluation of the findings of the present cultural impact assessment study made in reference to (a) the known content of the traditional Hawaiian culture and (b) the National Register Criteria as clarified by the National Register Bulletin No. 38, it is believed that with the exceptions noted above, most of the Native Hawaiian cultural practices, feature and beliefs as identified as being currently associated with the Mauna Kea Science Reserve Master Plan Project area

can be considered to be culturally and historically significant. **Most if not all of the identified practices and beliefs would seem to qualify as traditional and customary practices within the meaning of the Hawai`i State Constitution,** while the principle *pu`u* and the shallow lake with adjacent *pu`u* would seem to satisfy the criteria for being regarded as a legitimate traditional and cultural property. **Finally, none of the identified practice and beliefs would seem to represent strictly contemporary cultural practice or beliefs lacking some measure of traditional connection.** (Emphasis added) *Id.* P. 45

#### PETITIONERS AND OPPOSING INTERVENORS OTHER ARGUMENTS

##### WAIVER OF CHALLENGES TO EIS (COL#386-393)

##### ALLEGED DESECRATION 392-407

Please find MKAH and Kealoha Pisciotta's RESPONSES to UH/TIO's FOF COL, D&O. We incorporate by reference MKAH's FOF COL, D&O and all witness exhibits and testimony in RESPONSE TO UH/TIO COL relating to desecration and any and all other issues addressed or contained in the UH/TIO's Collective table of contents and FOF COL D&O.

We also join and would like to incorporate by reference Temple of Lono's Responses.

Our Responses to Applicant's COLs # 392-407 are as follows:

The original six petitioners asserted their claims against desecration in the previous CCH. See Petitions of the original Petitioners at Ex. A029 and A029

The Supreme Court stated:

"Opponents including Native Hawaiians who stated that the summit areas was sacred in Native Hawaiian cultural and that the construction of the eighteen-one-half-story high observatory would be a desecration. "

See MKAH at p.2.

and

“An example of concerns raised can be found in a letter, which was submitted to the Board during the course of the public hearings, from petitioner Mauna Kea Anaina Hou, the Royal Order of Kamehameha, Sierra Club and petitioner Clarence Kukauakahi Ching. The letter emphasized that “Mauna Kea is considered the Temple of the Supreme Being [,] the home of Na Aka (the Divine Deities), Na ‘Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (Sky Father). Additionally, the letter states that “[t]he ceremonies and practices on Mauna Kea are practices nowhere else [] and formed the basis of the navigational knowledge that allowed Hawaiians to navigate over 10 millions square miles of the Pacific.”

See MKAH Concurring Opinion by Justice Pollack, join by Justice Wilson and Justice McKenna in part, foot note 5 at p. 11

## DESECRATION IS AGAINST THE LAW IN HAWAII

Witness Ms. Trask had this to say about the desecration law its enforcement or lack thereof:

See 2.28.17 Mililani Trask Vol 42 page 227:17-25  
(questions from Kaliko Kanaele)

17 Q. (By Mr. Kanaele): Does HAR 13-5 override 18 HRS 711?

19 A. No. No, it doesn't.

20 Q. Do you think after hearing the HRS 7-1121 (sic), is that a sufficient protection for sacred 22 sites or districts?

23 A. You know, the language of our state

24 desecration law is sufficient. What we don't have is

25 anyone who has the integrity to invoke it

Desecration is defined as any act that would cause “outrage” a segment of the population. Burials, monuments and places of worship are all specifically named as having special protection against this crime. The penalties for the commission of the crime of desecration include imprisonment, a substantial fine and or both. There are no exceptions.

Mauna Kea has been and continues to be a place of worship, a burial ground of the highest born and most sacred ancestors

See Ex. B.01q Mauna Kea Anaina Hou/Royal Order of Kamehameha I - Temple Report).

There are hundreds of sacred sites that exist on Mauna Kea , including burial sites of renowned people such as Hawai'i Loa (an ancestor of the Hawaiian people), Lilinoe, the goddess of the Mist, who lived also as human and for whom Kamehameha I was named after), and many of the grandparents (Kupuna) and family of those living today have been laid to rest there. Mauna Kea clearly meets the definition of the HRS §711-1107 the desecration statute.

This is further evidenced by the fact that 66,528 people signed the Petition to stop the bulldozers and desecration of Mauna Kea.(please see <https://www.change.org/p/governor-david-y-ige-stop-tmt-construction-and-arrests-of-mauna-kea-protectors>) and that as many as 700 to 1000 Kia'i or Earth Protectors showed up on Mauna Kea to hold back the TMT's bulldozers demonstrates the "outrage" people felt when the sanctity or sacred nature of Mauna Kea was threatened.

We submit, that the State and the UH representatives who attempted to close the Mauna Kea access road (a public road and neither owned nor controlled by the University or they representatives) the Office of Mauna Kea Management (OMKM) used both State and Country enforcement officers to not only infringed upon on the rights of Native Hawaiian and other supporters but further acted in conspiratorial ways to use state police power against the citizens and people of Hawai'i (including subjects of the Hawaiian Kingdom of any ethnicity). The State's Attorney General, the Deputy Attorney Generals, the County Prosecutor and University and TMT representatives have been slow to have detailed conversations to how to deal with the "protestors".

#### On Civil Assistance not Disobedience

We wish to clarify that the actions of the Kia'i were not a form of protest nor an act of civil disobedience because they were not breaking any law and were instead trying to stop the TMT bulldozers from committing a crime (the crime of desecration).

We have great respect for Mahatma Gandhi and for his gifts of wisdom to help the people resist the onslaught of Industrial Revolution and the oppression that followed, such as the acts of resistance/civil disobedience in the face of unjust laws meant to oppress. However, in this instant case, the laws were on our side, in that the courts were in fact in the middle of reviewing the question whether or not BLNR erred in issuing a CDUP for the TMT project prior to conducting a CCH.

The distinction is important, because it is our understanding that under American jurisprudence the court alone answer questions of law. In **Marbury v. Madison**, 5 U.S. 137, the court established that it was the province and duty of the judicial department to say what law is. In this case, the court had the final say on whether the CDUP issued by BLNR was valid or not. The Supreme Court did in fact invalidate the TMT CDUP for due process failures.

The Kia'i, ("protectors") therefore were acting in accordance to the law. They were not protesting an unjust law as is usually the case of civil disobedience, they were instead protecting the Mauna from desecration which is against the law in Hawai'i. If this were not the case, the TMT would have committed an unlawful act, the act of desecration resulting in irreparable damage and harm to the sacred landscape of Mauna Kea.

TMT CDUA should not be approved because to do so would be to allow the State to issue a permit (CDUP) to desecrate a place of worship, a burial ground, and a place of serious veneration.

x. See 2011 Hawaii Code,  
DIVISION 5. CRIMES AND CRIMINAL PROCEEDINGS  
TITLE 37. HAWAII PENAL CODE  
711. Offenses Against Public Order  
§711-1107 Desecration.

Universal Citation: HI Rev Stat § 711-1107 (2011 through Reg Sess)  
§711-1107 Desecration. (1) A person commits the offense of desecration if the person intentionally desecrates:

- (a) Any public monument or structure; or
  - (b) A place of worship or burial; or
  - (c) In a public place the national flag or any other object of veneration by a substantial segment of the public.
- (2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both. [L 1972, c 9, pt of §1; gen ch 1993; am L 2002, c 198, §1]

#### COMMENTARY ON §711-1107

Previous Hawaii law prohibited certain types of desecration. For example, desecration of the United States flag was prohibited.[1] Section 711-1107 deals more generally with all acts of desecration; i.e., acts of physical damage to or mistreatment of venerated places and objects under circumstances which the defendant knows are likely to outrage the sensibilities of persons who observe or discover the defendant's actions. Thus, any desecration of a public monument or structure; or a place of worship or burial (public or private); or, in a public place, the national flag, or any other object (such as certain religious objects) revered by a substantial segment of the public, will constitute an offense. Damage by desecration is treated separately from other types of property damage because the sense of outrage produced by such acts is out of proportion to the monetary value of the damage. Thus, desecration is a misdemeanor, although many such cases might otherwise be petty misdemeanors under §708-823 because the object desecrated is worth less than \$50.

#### SUPPLEMENTAL COMMENTARY ON §711-1107

Act 198, Session Laws 2002, amended this section by changing the penalty for desecration from a misdemeanor to one year imprisonment, a fine of \$10,000, or both. The legislature found that recent vandalism at cemeteries denoted that the current financial penalties of a misdemeanor offense for desecration were an insufficient deterrent. The \$10,000 fine was consistent with the penalty in §6E-11(c), relating to destruction of historic property. The legislature believed that a burial place or grave deserved no less a penalty for damage than did a historical monument. Senate Standing Committee Report No. 2957, House Standing Committee Report No. 416-02.

#### §711-1107 Commentary:

1. H.R.S. §733-6; another example is §734-3 which prohibits desecration of a grave.

VACATUR OF CONSENT TO SUBLEASE 408-415

See response to COL#24

UH HILO AUTHORITY TO EXECUTE CDUA 416-419

CDUA REFERENCES TO TMT CORPORATION 420-426

NHPA SECTION 106 REVIEW :NEPA 427-444

## SECTION 106 CONSULTATION IS REQUIRED BY LAW

We incorporate by reference, MKAH's FOF COL, D&O, including witness testimony and related exhibits into these RESPONSES to UH/TIO's FOF COL, D&O regarding NHPA Section 106 Consultation and NEPA requirement discussed below.

UH/TIO Findings at COL 386-391 p. 209 claims Petitioners waived any challenges to the Final Environmental Impact Statements (FEIS). Without waiving our rights regarding the State level FEIS, in any way, the TMT is a federal undertaking that has received substantial federal funds from the federal government (i.e. NSF). Therefore, we maintain that the TMT Project meets the standards of being a undertaking that is required to follow the National Environmental Policy Act (NEPA) along with other Federal laws such as the NHPA Section 106 Consultation Process.

x. UH/TIO COL 427-441 at p. 214 that NHPA Section 106 Review/ National Environmental Policy Act does not apply to the either the TMT or the TIO.

x. The UH/TIO Condition (1) of their proposed Decision and Order states: **“UH Hilo, shall comply with all applicable statutes, ordinances and rules, regulations and conditions of the Federal, State, and County governments and applicable parts of HAR § 13-5 et seq.** (Emphasis added)

**See** UH/TIO Proposed Decision and Order Conditions (1) and (24) at p. 221 and 222 respectively.

x. As early as 2009 we requested that the TMT begin Consultation under the National Historic Preservation Act begin. MKAH has previously been recognized by the Advisory Council on Historic Preservation (ACHP) as a Native Hawaiian Organization (NGO) for the purpose of consulting regarding the Traditional

Cultural Properties (TCP) of Mauna Kea sometime around 2003 during the NASA/KECK Outriggers Project.

We provided comments part of which are included below from Ex. B.01o under Section III:

### “III SPECIFIC ISSUES

The TMT Draft EIS is filled with inaccuracies, misleading and/or false Information and is wholly inadequate

#### 1.TMT claims no federal funding used for Project

The TMT DEIS states,  
Federal rules, such as the National Environmental Policy Act (NEPA), do not apply to the Project, no Federal agency is involved in the Project, **no Federal Funding is being used for the Project**, and the Project does not use Federal Land.”

(TMT DEIS at p. 3-105, emphasis added)

[T]he TMT project has received substantial federal funding from the National Science Foundation (NSF). NSF Award 0443999 confirms this. The NSF Award also confirms that \$18 million federal tax dollars were awarded to the TMT and Giant Magellan Telescope (GMT), for “(1) The Design and development phase for a 30-meter diameter segmented-mirror, optical/infrared telescopes, the Thirty Meter Telescope (TMT).” Further confirmation of federal funding used by TMT is found at the link below, (See Executive Summary second paragraph) (<http://www.noao.edu/dir/spo/GSMT-annual-report08.pdf>).”

See Ex. B.01o under Section III:

### **NEPA Is Required By Law**

**See** also UH/TIO Proposed Decision and Order Conditions (1) and (24) at p. 221 and 222 respectively.

NEPA is the nation’s federal law for protecting the environment.

The NEPA rules state in relevant part:

NEPA is not to generate paper work, even excellent paper work, but to foster excellent action... The NEPA process is intended to help public officials make decision that are based on the understanding of the environmental consequences, and take actions that protect, restore and enhance the environment.” (40 CFR § 1500.1, 1502.1)

The National Science Foundation (NSF) funding of the project constitutes a significant federal undertaking. Neither NSF as the funding agency nor the TMT as the receiving agency has prepared a federal level environmental review document (i.e. an Environmental Assessment (EA) or Environmental Impact Statement (EIS)) pursuant to the National Environmental Act, as amended 1969, relevant federal rules and regulations, and legal precedent (court made law).

Listing the University of Hawai`i at Hilo (UHH)--a state agency, as the proposing agency on the TMT DEIS does not allow the Project to escape federal legal requirements, it means either the UHH will be “federalized” for the purpose of fulfilling NEPA and the NHPA, or will cause UHH to be enjoined in any legal challenges brought against this process.

### **NHPA Not The Same as NEPA**

The TMT is proposing to use Mauna Kea summit lands, which are eligible for listing on the National Historic Register, yet TMT has not begun Section 106 consultations under the National Historic Preservation Act (NHPA). Again, we made formal requests in our scoping comments calling for NHPA, Section 106 Consultation to begin. The U.S. District Court (Hawai`i) affirmed, NHPA mandates that a federal agency “shall consult... with any Native Hawaiian organization that attaches religious and cultural significance” to properties eligible for the inclusion on the National Register.”

See (OHA v. NASA, Civil No. 02-00227 (SOM/BMK), 2003, p. 18 of 39)

The State Historic Preservation Office, TMT DEIS review letter dated June 26, 2009, states:

Agencies Involved: Section 2.0 states that the TMT Observatory Corporation is a private non-profit partnership. Your memo dated May 28, 2009 notes that the National Science Foundation released the DEIS. There is no mention of the NSF in the DEIS, and we presume that is the case. If the NSF is involved, this project is subject to review under the National Historic Preservation Act, Section 106 (36 CFR 800).

TMT representatives appear to understand what federal laws require, yet continue to ignore them. (Please see TMT comments below).

"The federal government, federal agencies, they make that decision. We don't. And what triggers NEPA (National Environmental Protection Act) is a significant federal action," said Michael Bolte, director of California's Lick Observatory and member of the TMT Board of Directors.

See Ex. B.01o The request for Section 106

**x. When asked Ed Stone of the TMT stated the following:**

***12.19.16 Edward Stone Vol 18 page26:16-25***

***(questions from Kealoha Pisciotta)***

16 Q. Has your staff informed you that Native  
17 Hawaiians attach religious and cultural significance  
18 to the historic properties within the Historic  
19 District of Mauna Kea?

20 A. I'm aware of that, yes.

21 Q. Are you aware that the advisory council on  
22 Historic Preservation is a council that is made up of  
23 presidential appointees and it is a federal agency  
24 responsible for ensuring federal agencies and/or  
25 federal undertakings comply with the National

***12.19.16 Edward Stone Vol 18 page27:1-25***

***(questions from Kealoha Pisciotta)***

1 Historic Preservation Act?

2 MR. ING: Objection, Your Honor, this is  
3 beyond the scope and lacks foundation.

4 HEARINGS OFFICER AMANO: Could you set the  
5 foundation and also perhaps tell me where we're going  
6 with this?

7 MS. PISCIOтта: Well, the CDUA requires  
8 that all county, state and federal requirements and

9 laws be met and followed. So we believe it's  
10 relevant, and we believe that he's the witness who  
11 can talk about it because he is Executive Director of  
12 TMT, and so really the buck has to stop with someone  
13 and I think it's him.  
15 HEARINGS OFFICER AMANO: All right. So  
15 could you then set the foundation? In other words,  
16 you have to establish that he knows about that.  
17 MS. PISCIOтта: Sure, let me try.  
18 Q. Are you aware that the NASA Keck  
19 Observatory did complete Historic Preservation and  
20 National Environmental Policy Act review processes?  
21 A. I'm sorry, what is the question?  
22 Q. Are you aware that the TMT -- oh, sorry --  
23 that the NASA and Keck, for example, did have to  
24 comply with the National Environmental Policy Act and  
25 the Historic Preservation Act review processes?

***12.19.16 Edward Stone Vol 18 page28:1-25***  
***(questions from Kealoha Pisciotta)***

1 A. I don't remember.  
2 Q. Do you remember that the court had stated  
3 that your EA and finding of no significant impact was  
4 incorrect?  
5 MR. ING: Objection, Your Honor, beyond the  
6 scope of his direct.  
7 MS PISCIOтта: It's really not because he  
8 was in charge of the Keck Observatories during the  
9 period in which this lawsuit occurred. And he also  
10 was in charge of the -- he was in the lawsuit, so I  
11 think he should know NASA, Sean O'Keefe (phonetic)  
12 and University of California and Caltech were  
13 involved as well.  
14 So I'm just trying to establish that he  
15 knows. It's in 2003 -- that's part of his testimony

16 that he was this person in 2003 and CARA does oversee  
17 Keck Observatories, and that was their project?  
18 HEARINGS OFFICER AMANO: Mr. Ing.  
19 MR. ING: The Keck project is not at issue  
20 here. If she wants to ask with regard to NSF and the  
21 Historic Preservation Council, she can ask those  
22 questions of him with regard to the TMT project.  
23 That's what I'm objecting to. She is asking the  
24 issues with regard to the Keck project.  
25 MS. PISICOTTA: He objected to the earlier

***12.19.16 Edward Stone Vol 18 page29:1-25***  
***(questions from Kealoha Pisciotta)***

1 question, so I'm trying to lay foundation. He should  
2 be aware of because he's been involved in the exact  
3 same processes regarding federal review which is on  
4 of the requirements of the CDUP that they have to be  
5 in compliance with federal as well as state and  
6 county.  
7 HEARINGS OFFICER AMANO: How does that tie  
8 to TMT?  
9 MS. PISCIOтта: Because TMT has not  
10 conducted those same federal level review that he had  
11 to go through earlier.  
12 HEARINGS OFFICER AMANO: I'll overrule the  
13 objection, allow you to lay your foundation, please.  
14 Q. (By Ms. Pisciotta): Are you aware that the  
15 TMT has not conducted either the federal level  
16 environmental review or Historic Preservation review  
17 process?  
18 A. Yes.  
19 Are you aware that the federal review  
20 process would include compliance with National  
21 Environmental Policy Act?  
22 A. Federal government is not involved in the

23 way that in fact requires that review.  
24 A. And they're not -- okay. I'm going to  
25 quote something for you and then ask you another

***12.19.16 Edward Stone Vol 18 page30:1-25***  
***(questions from Kealoha Pisciotto)***

1 question.  
2 The National Historic Preservation Act as  
3 amended in 1992 defines an undertaking which means  
4 project activity or program, funded in whole or in  
5 part under the direct or indirect jurisdiction of  
5 federal agency, including those carried out on behalf  
7 of the federal agency or those carried out with  
8 federal assistance. Then it goes on for little bit  
9 more.  
10 Are you aware of that, what the definition  
11 after undertaking?  
12 A. There has been -- this is something the NSF  
13 would determine, and they have not determined that  
14 they have that role, as I understand it.  
15 Q. But it doesn't have to necessarily be NSF,  
16 it's whoever receives federal funds.  
17 A. Well, the federal funds have to come from  
18 organizations like NSF that determine whether or not  
19 this is something that is required.  
20 Q. That's correct.  
21 So are you aware that the TMT has received  
22 federal funding and federal assistance in the form of  
23 National Science Foundation funding?  
24 A. We have, but not for purposes covered by  
25 those laws, as I understand it.

***12.19.16 Edward Stone Vol 18 page31:1-25***  
***(questions from Kealoha Pisciotto)***

1 Q. Do you know what those purposes are?  
2 A. The purposes of what the funding we have  
3 had has been for community outreach to national U.S.  
4 community and to developing a plan for possible  
5 future federal contributions, but they're not in fact  
6 involved in funding the design or construction of  
7 TMT.  
8 Q. I'm going to put something on the  
9 projector. I have to turn it on.  
10 MR. ING: If these are exhibits, I would  
11 like to have them identified first all. If they're  
12 not exhibits, then they shouldn't be shown to the  
13 witness.  
14 MS. PISCIOтта: yeah, they're exhibits,  
15 it's already been shown before. This one is NSF  
16 grant for \$18 million, and it's a cooperative  
17 agreement, and it is the design and development of  
18 the giant segmented mirror that is -- I'm trying to  
19 go read which one it is.  
20 MR. ING: What is the exhibit number?  
21 MS. PISCIOтта: B.01b. It's in there  
22 already, but you can put it up? Thank you.  
23 Q. Are you familiar with that exhibit?  
24 A. Yes.  
25 Q. So are you familiar with that \$18 million?

***12.19.16 Edward Stone Vol 18 page32:1-25***  
***(questions from Kealoha Pisciotta)***

1 A. Yes.  
2 Q. So would you -- and would you identify what  
3 that 18 million is for?  
4 A. That's for the studies that were going on  
5 at the time. These were pre -- the period where we  
6 were actually designing the telescope and had -- and  
7 at that time NSF was involved in some of the site

8 testing in South America, which is part of that 18  
9 million dollars, for instance.  
10 But NSF, it's up to them to determine what  
11 laws they have to follow with respect to these  
12 things. They did not determine that this required an  
13 EIS or anything like that.  
14 Q. Okay. I'm going to show you another one.  
15 And this is -- we don't have it uploaded yet, but we  
16 have copies for everyone. We're going to identify it  
17 as B.01q.  
18 HEARINGS OFFICER AMANO: Could you give a  
19 copy to Mr. Ing, first, please?  
20 MS PISCIOTTA: Yeah. Excuse me, I'm  
21 sorry, just taking a moment here  
22 MR. ING: You Honor, I thought there were  
23 copies for each of the parties.  
24 MS. PISCIOTTA: I'm sorry?  
25 MR. ING: I object to the use of the

***12.19.16 Edward Stone Vol 18 page33:1-2, 20-25  
(questions from Kealoha Pisciotta)***

1 witness -- I don't have a copy of the exhibit and  
2 they will be asking questions from it.  
x.20 HEARINGS OFFICER AMANO: Yes. So you've  
21 hand B.01q and you've identified and intend to have  
22 uploaded -- a copy has been given to this witness as  
23 well as Mr. Ing and Mr. Ing is sharing with Mr.  
24 Lui-Kwan.  
25 Q. (By Ms. Pisciotta): Just a simple

***12.19.16 Edward Stone Vol 18 page34:1-25  
(questions from Kealoha Pisciotta)***

1 question.  
2 This one specifically is for 1 million  
3 dollars, and I guess you and Mr. Michael Bolte and

4 Gary Sanders, I believe, were the proponents of this  
5 grant; is that correct?  
6 A. Yes.  
7 Q. Are you aware of any other grants that NSF  
8 has awarded to the TMT?  
9 A. No, these are the two.  
10 Q. Were any others?  
11 A. No. To TMT?  
12 Q. Yes.  
13 A. No, nothing comes to mind.  
14 Q. Nothing for the STEM program?  
15 A. STEM program, I'm not aware, I don't --  
16 Q. Anyway, so I'll get on with the questions.  
17 You were saying that your testimony was  
18 that NSF needed to be the one to trigger it, but it  
19 also says that the one who gets federal funds is also  
20 responsible for federal compliance.  
21 I'm going to read an excerpt from Exhibit  
22 A-11, which is Cultural Resource Management Plan for  
23 University of Hawai'i. I'm going to read first from  
24 page 1-29, I'll read it for you.  
25 The National Historic Preservation Act

***12.19.16 Edward Stone Vol 18 page35:1-25***

***(questions from Kealoha Pisciotto)***

1 first passed in 1966 and subsequently amended covers  
2 the treatment of historic properties on federal lands  
3 under federal control and/or affected by federal  
4 funded activities or undertakings. The National  
5 Historic Preservation Act governs the identification  
6 and treatment of properties by public and private  
7 entities in order to ensure that, quote, the  
8 historical and cultural foundation of the nation  
9 should be preserved as a living part of the our  
10 community life and development in order to give a  
11 sense of orientation to the American people, unquote.

12 And then on page 1-3, I will read this part  
14 for you.  
14 Section 106 of the National historic  
15 Preservation Act governs how federal agencies  
16 proposing or funding an undertaking must proceed in  
17 order to -- in order to ensure the appropriate  
18 treatment of historic properties affected by the  
19 undertaking. There is a federal statute listing the  
10 16U.S.C. 470F, the head of any federal agency having  
21 direct or indirect jurisdiction of a proposed federal  
22 or federally assisted undertaking in any state, and  
23 head of federal department or independent agency  
24 having authority to license any undertaking shall,  
25 prior to the approval of the expenditure of any

**x.12.19.16 Edward Stone Vol 18 page36:1-25**  
**(questions from Kealoha Pisciotto)**

1 federal funds on the undertaking or prior to the  
2 issuance of any license or approval -- as the case  
3 may be taken into account the effects of the  
4 undertaking on any district, site, building,  
5 structure or object that is included or is eligible  
6 for the inclusion in the National Register.  
7 The head of such federal agency shall  
8 afforded by counsel [SIC: should be "Council"] on historic  
preservation  
9 establish under Title 2 of this act a reasonable  
10 opportunity to comment with regard to such an  
11 undertaking.  
12 It states, given this definition, it is  
13 clear that the activities within the UH management  
14 area that are carried out with federal funding, for  
15 example, from National Science Foundation or National  
16 Aeronautics and Space Administration are covered by  
17 Section 106 National Historic Preservation Act. In

18 addition, any activities that require federal permit  
19 license or approval from the U.S.S Fish and Wildlife  
20 under the Endangered Species Act also come under  
21 Section 106 in National historic Preservation Act.  
22 So my question, Mr. Stone, is have you  
23 talked to the National Science Foundation regarding  
24 either doing a federal Environmental Impact Statement  
25 or a Federal Level Section 106 consultation?

***x.12.19.16 Edward Stone Vol 18 page37:1-25***  
***(questions from Kealoha Pisciotto)***

1 A. It's my understanding it's not required.  
2 Q. Okay. Because you have read these rules?  
3 A. No, that's what I'm told. I'm not an  
4 expert on all those rules, but that's what I've been  
5 told.  
6 Q. Who is telling you this?  
7 A. They lawyers.  
8 Q. Oh, the lawyers?  
9 A. Yes.  
10 Q. All right. So in the past Yale University  
11 has paid money, I believe, in the amount of 14  
12 million to acquire time on the Keck Observatory. Are  
13 you aware of that?  
14 A. I'm aware of that, but I was not involved.  
15 Q. Have you or TIO or TMT Corporation  
16 negotiated any state -- negotiated with the state or  
17 BLNR for percentage of any proceeds that might come  
18 in from other places for use of the TMT?  
19 A. I don't have any knowledge of these  
20 details. I have not been involved.  
21 Q. Will TMT look to patent any of the  
22 technologies that they might produce on the TMT  
23 telescope?  
24 A. Patent?

25 Q. Yes.

We maintain the TMT project having received substantial federal funding thus constituting a federal undertaking as defined by federal law and to be in compliance with *all* federal law, the TMT Project and to the UHH must complete Section 106 of the National History Preservation Act (NHPA) as well as the with National Environmental Act (NEPA). In order for the BLNR to issue a permit for the construction of the TMT they must insure that the project has met *all* county, state and federal laws. The TMT project has not met the necessary county, state and federal requirements and therefore the CDUA should NOT be granted.

#### Violations of Surety, Lease, and Obligations to Public and Native Hawaiian Beneficiaries

#### RESPONSE TO FOF# 208, 261, 463, COL# 215

The Native Hawaiians and the general public are the two named beneficiaries of the public trust established in the Hawaii Admissions Act. Section 5(f), of the Act, includes support programs "for the betterment of the conditions of native Hawaiians." As both public and Native Hawaiian beneficiaries of this trust, Petitioners have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As beneficiaries of this trust, they have a right to reasonable revenues from the lease of public lands subject to the provisions of the trust.

Section 171-17 and -18, HRS, require the DLNR to assess and collect fair market lease rent, to be deposited in the Public Trust Land Fund.

HRS 171-17 (a) The appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board; provided that the upset price or upset rental shall be determined by disinterested appraisal whenever prudent management so dictates. No such lands shall be sold or leased for a sum less than the value fixed by appraisal; provided that for any sale or lease at public auction, the board may establish the upset sale or rental price at less than the appraisal value set by an employee of the board and the

land may be sold or leased at that price. The board shall be reimbursed by the purchaser or lessee for the cost of any appraisal required to be made by a disinterested appraiser or appraisers contracted for by the board. (a) Have the appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board.

HRS 171-18. All funds derived from the sale or lease or other disposition of public lands shall be appropriated by the laws of the State; provided that all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act and later conveyed to the State under section 5(e) shall be held as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

There are at least 13 leases for telescope structures on the public lands of Mauna Kea. These sub-leases are made between the State, UH and foreign and non-state governments and corporations that have no such protection under the relevant sections of the Admissions Act, including Section 5(f) of the Act.

The leases are signed by a representative of DLNR, a representative of the University, and representatives of the telescope owners/operators. Ex. B-7.

The annual lease rent paid by of the existing telescope owners/operators is either \$1 or less. Exhibit B-2, B-3, B-4, B-5, B-6, and B-7.

While the University may benefit from the use of public trust lands for educational purposes under Section 5(f) of the Hawai'i Admissions Act, however, the law does not provide private corporations and foreign countries that same privilege.

The University may not extend their public trust lands privilege to non-state and foreign government and or corporations.

As is evidenced in the sub-lease agreements the University is not assessing and collecting fair market lease rent and depositing it into the Public Trust Lands Fund for public purposes pursuant to HRS 171.

As is evidenced in the sub-lease agreements the DLNR is not assessing and collecting fair market lease rent and depositing it into the Public Trust Lands Fund for public purposes pursuant to HRS 171.

It is undisputed that fair market lease rent has not been collected by DLNR for the use of the public lands of Mauna Kea for astronomy related activities, commercial tours, and other revenue generating uses.

DLNR is required to assess and collect fair market lease rent to be deposited into the Public Trust Lands Fund to be used for specified public uses, regardless of the fact that the University under HRS 304, may also charge users rent.

DLNR's 1977 management plan for the Mauna Kea Conservation District required that no application shall have final approval without the applicant having first filed with the board adequate security equal to the amount of the contract to construct the telescope facilities, support facilities and to cover any direct or indirect costs attributed to the project.

Although the TMT Observatory Corporation has alluded to pay an un-specified amount of "substantial rent," the University is actually the Applicant on this CDUA, and the UHH has not provided at security deposit.

Moreover HRS 171, requires all lease rent for the use of public trust lands to be based on the fair market value. This means rent is not based on what the Applicant or the TMT Corporation is willing to pay.

Neither the CMP nor the CDUA ensure that either the general public or Native Hawaiian beneficiaries receives their constitutionally guaranteed portion of all money generated from the use of former crown and government lands of which Mauna Kea is a part as is provide under the law (HRS 171).

The DLNR, has a fiduciary duty to protect the interests of its beneficiaries.

Ed Stone of the TIO Corporation LLC stated regarding patents and funds to be paid to the state pursuant to HRS 171-17, -18, that patents might be acquired for

technologies developed with the TMT, and they could do so as an LLC. TR .  
12.19.16 Edward Stone Vol 18 page38:1-9, 10-25, p 17-25.

XI.SUMMARY (COL#485-482)

## RECOMMENDED DECISION AND ORDER

Based upon the Findings or Facts, Conclusion of Law (also Incorporated by reference by all) and the Collective Pro Se Petitioners Response's to UH/TIO's Finding or Facts, Conclusions of Law, Proposed Decision and Order found above, the Conservation District Use Application (CDUA) for the constructions of Thirty Meter Telescope on Mauna Kea should be DENIED.

## Appendix A

### Judicial Notice Regarding Transcripts

#### OIP 2017 EMAILS

1. The BLNR via the HO implemented an online electronic library for the filing of all documents and evidentiary submittals in the Mauna Kea Contested Case Hearing proceeding (CCH).
2. This was reasonable because many of the parties live on different islands and when they lived on the same island such as on Hawai'i Island this could help reduce their excessive travel time and costs.
3. It was also reasonable because many of the Pro Se Petitioners are on limited budgets and simply could not afford to pay the cost offered by the freelance reporter cost of the Transcripts.
4. The costs if we were to purchase the transcripts while the CCH was occurring where somewhere between \$8 to \$6 per pages. If we were to purchase a *nearly* the full set of transcript at the medium price of \$6 per page the transcript would be upward of \$72,000 dollars. This is just not something that any of us could actually pay.
5. This for all intents and purposes make the people process of a CCH untenable.
6. We based our request to the Board upon a OIP opinion that supported our requests. **See** OIP Opinion 95-22.
7. Despite numerous oral and written motions and a petition filed to the BLNR, the Board denied our request for access to electronic copies of the transcript of the CCH.
8. We attempted to ask for the Office of Information Practices to assist us with gaining such electronic access all to no avail as OIP also denied our request for an investigation and any other relief.

#### BACKGROUND

9. On May 10, 2017 we filed a Petition the BLNR asking for the help with providing us with complete copies of the transcripts for this CCH. See our correspondence with OIP and the BLNR below:

x. Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>

Date: May 5, 2017 at 5:09:43 PM HST

To: "oip@hawaii.gov" <oip@hawaii.gov>, Paul <kealiikea@yahoo.com>, clarence <kahiwaL@cs.com>, Debbie Ward <cordylinecolor@gmail.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, Hank Hawaiian <hankhawaiian@yahoo.com>, leina'ala s <leinaala.mauna@gmail.com>, Joseph Camara <kualiic@hotmail.com>, Cindy Freitas <hanahanai@hawaii.rr.com>, William Freitas <pohaku7@yahoo.com>, mehana kihoi <uhiwai@live.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, Kaliko Kanaele <akulele@yahoo.com>, Brannon Kealoha <brannonk@hawaii.edu>, Dexter Kaiama <cdexk@hotmail.com>, Bianca Isaki <bianca@kahea.org>, Yuklin Aluli <yuklinaluli@gmail.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Keo Von Gogh <makiaweli2012@gmail.com>  
Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha OIP,

Please find attached a Petition filed before the Board of Land and Natural Resources (BLNR) re Petitioners and to compel access to contested case hearing (CCH) transcripts in a timely and electronic format.

The Hearing Officer established an online electronic filing system and has excepted electronic submissions of all documents in the entire CCH. This was important protocol since some parties lived off island (majority of the parties live on Hawai'i Island).

We write here because we are seeking OIPs opinion regarding BLNR's failure to provide timely, easily accessible and copiable electronic transcripts. We have relied on OIP 95-22 in support of our Petition to the Board.

BLNR claims that providing access to the hard copies of the transcript in public and University libraries is sufficient, however, this limits accessibility to the transcripts to library hours (include closure on holiday's and weekends), the cost of copying is subject to what the library's will charge, the gas costs to those Petitioners who must travel far (over 30 miles in some cases) and then once they do make and pay for those copies they then must go home and re type those parts of the transcript into their files.

This is costly, exhausting and biases the Petitioners. Furthermore, some petitioners have been told by the library personnel that they may not copy the transcripts at all. This cannot be true.

BLNR has provided copies but in no convenient way. The contested case process is a normal government function and there is no harm or injury to any of the parties or to BLNR if BLNR uploads an electronic copy of the transcript. A copy that is electronically accessed and can be searched (cut and pasted). This is a minimum requirement.

Unlike the BLNR and the University who are both publicly funded and who could pay the retail price of the transcripts from the Recorder directly and daily, we petitioners where not able to and are not now able to do so.

The Petitioners have no such ability to pay excessive retail price of over \$72,000 to get their own copies of the very case they are bringing forward for the protection of their Constitutional rights. It is an injury when we are faced with choosing to protect our rights or to defaults because we cannot reasonably access the transcripts or to produce the FOF/COL, D&O in a timely manor. The injury is both to the Petitioner's and the Public whom are paying for the hearings and then must pay again to access the documents of that same hearing. This is not Pono.

Our deadline for the production for the completion of the FOF/COL, D&O is due on May 30, 2017. This case ran for 44 day with over 73 witnesses producing over 50 volumes to transcripts. There is no question that this was a big case and the time allotted for producing FOF/COL etc. was already sort but with the limits set on transcripts makes it is nearly impossible. The failure of BLNR to provide a reasonable protocol for accessing the record is to place a serious obstacles in our path for making our case and this therefore violates our due process rights.

The Hawai'i Supreme Court remanded this case back because the BLNR violated our due process rights by prejudging the outcome prior to conducting a proper contested case. It is our right to have a reasonable chance to make our case yet again.

We submit, we are not able to do so with the conditions that have been placed on the transcripts by BLNR. We further submit we can not make our case with out the transcripts and that since BLNR already accepted all of our filing electronically there is no reason for them to not provide electronic transcripts that can be accessed and used (cut and pasted) by the parties now.

In conclusion, this is a formal complaint and request to OIP to (1) provide any relief OIP can provide and (2) in the alternative for OIP to investigate and to render an opinion regarding electronic filing protocol where electronic filing has been the agreed upon filing procedure for the entire case EXCEPT in the case of Transcripts.

I thank you very much for your time and consideration.

I Aloha I remain,

Kealoha PISCIOTTA

Mauna Kea Anaina Hou

Keomaivg@gmail.com

x. On May 10, 2017, at 1:22 PM, OIP <oip@hawaii.gov> wrote:

Ms. Pisciotta:

There are two ways to handle your matter:

1. The UIPA permits expedited assistance by filing a lawsuit in circuit court and, if you are the prevailing party, you are entitled to recover reasonable attorney's fees and costs. HRS §§ 92F 15(d), (f) (2012).
2. If you want OIP's assistance and you consider your petition as your first written request for transcripts, please wait 10 business days for BLNR's response. If you do not hear from BLNR after 10 business days or you receive a written denial from them you may then contact OIP, providing BLNR's written denial and a copy of what you actually submitted.
3. Please note, BLNR's May 5, 2017 email to you is not considered a response to your request. A response to your request would include a Notice to Requestor which includes search and segregation and copying fees. Your request for OIP's assistance is premature today and OIP cannot assist you until after ten business days have passed. Since you submitted the petition on May 5, 2017 you must wait until the end of day on May 19, 2017.

If you choose option 2, please note that we are operating under a backlog, and it may take some time to resolve your issues.

Thank you,

Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 S. Hotel Street, #107  
Honolulu, HI 96813  
Ph (808) 586-1400  
Facsimile: (808) 586-1412  
Email: [oiip@hawaii.gov](mailto:oiip@hawaii.gov)  
Website: <http://oiip.hawaii.gov>

x. From: Kealoha <[keomaivg@gmail.com](mailto:keomaivg@gmail.com)>  
Date: May 10, 2017 at 4:11:07 PM HST  
To: OIP <[oiip@hawaii.gov](mailto:oiip@hawaii.gov)>, Kealoha Pisciotto <[keomaivg@gmail.com](mailto:keomaivg@gmail.com)>  
Subject: Re: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma,

Thank you for your response. I must affirm however, that the solution you have offered us, actually has no practical application since our request was for expedited assistance. Here is what I mean, if we wait until the 19th of May we will have less than 10 days to complete our findings of fact conclusions of law, proposed decision and order in a open and ongoing

case that has spanned over 44 days period, with over 70 witness's and 12,000 pages contained in 50 volumes. Ten days (10 days) is simple not enough time to produce our findings etc.

Also your last paragraph seems to indicate that the 10 day wait for BLNR's reply would not necessarily be the only wait that we may have to suffer since OIP is back logged. We recognized that so many people are over worked and under paid and we are sorry for this, and we do not wish to add anymore to your burdens. However, I believe we are asking for a simpler solution that should not tax the staff so much. That solution would involve a phone call and for the OIP to exercise their authority.

Here is what I mean, in our first Contested Case Hearing regarding the same subject matter (Telescopes Construction in the Mauna Kea Conservation District), the State's AG was unwilling to let us copy the transcripts because the Court Reporter claimed to hold a copyright on the transcripts.

We informed OIP of this problem and explained that we had less then a week to submit our findings and conclusions etc. The State had held the transcripts and the position that no one could copy the transcript using a modern photo copying machine and that we must copy the parts of the transcript we needed actually only by HAND.

The then, OIP lawyers, recognizing that the state's position was unreasonable since the state was permitting coping of the transcript but in no convenient way and therefore were setting us up to default regarding the filing our finding of fact etc. Just an aside for back ground, our contested case back then lasted for only 8 days, while our current case is over 44 day (not including the pre-hearings stages).

The OIP, intervened by simply calling the AG's office to inform them that they must at least allow us to photocopy our transcripts using a photo copy machine. Our current request is based on OIP opinion 95-22 that affirms correctly, that a transcript doesn't meet the copy right standards so that can't be used as an argument here either.

So, in desperation, will would like to ask one more time for OIP's assistance. We ask OIP to make a call on our behalf to determine if BLNR and or the AG is planing on providing an accessible (searchable and editable) electronic set of the transcripts in the documents library that has been used and agreed upon by the parties throughout the entire hearing.

If in fact, BLNR and or the AG are not planing to do so then. Then we are asking OIP to champion our right to the transcripts by ordering them to accommodate our request so that we are not prejudiced and our right protected against due process violations.

Because, I believe, we have adequately set forth a rational and solid set of arguments in support of our position, we are entitled to reasonable relief. The relief offered is not reasonable and serves only to frustrate our genuine attempt to find real justice.

We thank you for your time thus far and we hope this can be handled quickly, easily and in a expedited way. Please do not hesitate to contact me if you have any further questions.

In Aloha I remain,  
Kealoha Pisciotta  
Mauna Kea Anaina Hou  
Keomaivg@gmail.com

x. Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>  
Date: May 5, 2017 at 2:52:11 PM HST  
To: Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlnr.maunakea@hawaii.gov>, Kealoha Pisciotta-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, "cordylinecolor@gmail.com" <cordylinecolor@gmail.com>, "kealiikea@yahoo.com" <kealiikea@yahoo.com>, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, "tluikwan@carlsmith.com" <tluikwan@carlsmith.com>, "John P. (Pete) Manaut" <jpm@carlsmith.com>, "Lindsay N. McAneeley" <lmcaaneeley@carlsmith.com>, "T. Shinyama" <RShinyama@wik.com>, "douging@wik.com" <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, "lsa@torkildson.com" <lsa@torkildson.com>, "njc@torkildson.com" <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, "akulele@yahoo.com" <akulele@yahoo.com>, "s.tabbada@hawaiiantel.net" <s.tabbada@hawaiiantel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, "hanahanai@hawaii.rr.com" <hanahanai@hawaii.rr.com>, "pohaku7@yahoo.com" <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, "Kealamakia Jr." <mkealama@yahoo.com>, Patricia Ikeda <peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>, Keo Von Gogh <makiaweli2012@gmail.com>  
Subject: Fwd: FINAL Petition to BLNR copy.pdf

Aloha All,  
Please find attached a "Petition To BLNR To Provide Online Access To Transcripts".  
Michael this is a Petition to BLNR not to the Hearing Officer, so we hope it will be provided to the Board as is appropriate. If there is something else I must do please instruct.

As I have explained previously I am using my phone to do these filings because my computer is currently not working. I will be sending forward the following 5 documents in separate emails but I wish them to be file in the following order as one filling and hopefully with a single document number.  
Thank U very much Michael!

1. Petition To BLNR To Provide Online Access To Transcripts.
2. Exhibit title page
3. A copy of Office of Information Practices (OIP) Opinion 95-22.
4. Kealoha's Declaration
5. The relevant Certificate of Service (COS)

Aloha and Mahalo for you patience,  
KEALOHA PISCIOTTA

Subject: FINAL Petition to BLNR copy.pdf

x. From: Kealoha [mailto:keomaivg@gmail.com]  
Sent: Wednesday, May 10, 2017 1:00 PM  
To: OIP <oip@hawaii.gov>; Kealoha Pisciotta <keomaivg@gmail.com>  
Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma, please find attached a copy of our original request to OIP filed on May 5, 2017. I am resending in case you where not able to open the file from our previous correspondence. Also I will follow up with a email from Mr. Michael Cain (Custodian of the BLNR records) affirming receipt by BLNR of our filing and explaining the protocol that BLNR extracts anything directed to them demonstrating Their receipt also.

Again Mahalo for your time, patience and consideration.  
Aloha  
Kealoha Pisciotta  
Mauna Kea Anaina Hou  
Keomaivg@gmail.com

x. Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>  
Date: May 5, 2017 at 2:52:11 PM HST

To: Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlmr.maunakea@hawaii.gov>, Kealoha Pisciotto-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, "cordylinecolor@gmail.com" <cordylinecolor@gmail.com>, "kealiikea@yahoo.com" <kealiikea@yahoo.com>, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, "tluikwan@carlsmith.com" <tluikwan@carlsmith.com>, "John P. (Pete) Manaut" <jpm@carlsmith.com>, "Lindsay N. McAneeley" <lmcaneley@carlsmith.com>, "T. Shinyama" <RShinyama@wik.com>, "douging@wik.com" <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, "lsa@torkildson.com" <lsa@torkildson.com>, "njc@torkildson.com" <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, "akulele@yahoo.com" <akulele@yahoo.com>, "s.tabbada@hawaiiantel.net" <s.tabbada@hawaiiantel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, "hanahanai@hawaii.rr.com" <hanahanai@hawaii.rr.com>, "pohaku7@yahoo.com" <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, "Kealamakia Jr." <mkealama@yahoo.com>, Patricia Ikeda <peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>, Keo Von Gogh <makiaweli2012@gmail.com>  
Subject: Fwd: FINAL Petition to BLNR copy.pdf

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2. Exhibit title page
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4. Kealoha's Declaration
5. The relevant Certificate of Service (COS)

Aloha and Mahalo for you patience,  
KEALOHA PISCIOтта

Subject: FINAL Petition to BLNR copy.pdf

x. Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>

Date: May 10, 2017 at 1:00:28 PM HST

To: OIP <oip@hawaii.gov>, Kealoha Pisciotto <keomaivg@gmail.com>

Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma, please find attached a copy of our original request to OIP filed on May 5, 2017. I am resending in case you were not able to open the file from our previous correspondence. Also I will follow up with a email from Mr. Michael Cain (Custodian of the BLNR records) affirming receipt by BLNR of our filing and explaining the protocol that BLNR extracts anything directed to them demonstrating Their receipt also.

Again Mahalo for your time, patience and consideration.

Aloha

Kealoha Pisciotto

Mauna Kea Anaina Hou

Keomaivg@gmail.com

x. Begin forwarded message:

From: OIP <oip@hawaii.gov>

Date: May 12, 2017 at 3:05:44 PM HST

To: Kealoha <keomaivg@gmail.com>

Subject: RE: Honolulu library letter

Dear Ms. Pisciotto:

The Office of Information Practices (OIP) is a neutral third party that does not represent you, the Board of Land and Natural Resources (BLNR), or any other party in matters that come before OIP. While OIP has responded to your inquiries, there is no pending case before OIP as the BLNR has not yet granted or denied, in whole or in part, your request for records. Once you receive BLNR's written response to your request, you may provide OIP with a copy of BLNR's response and ask OIP to open a file at that time.

Although BLNR has until May 19, 2017, to respond to your May 5, 2017 request, OIP's Director has asked the BLNR's deputy attorney general to voluntarily expedite its response to you, as you requested. OIP's Director is also willing to expedite OIP's handling of this

case once a file is opened. For now, however, OIP must wait to receive BLNR's response, which OIP anticipates will be before May 19, 2017.

Please do not presume you will prevail in this matter as OIP will need to review BLNR's response. If time is of the essence, OIP advises that you do what you can with the written transcripts that have been provided for public access at various libraries on the Big Island and Oahu.

Very truly yours,

Liza R.H. Onuma  
Staff Attorney  
Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 South Hotel Street, Room 107  
Honolulu, Hawaii 96813  
Phone (808) 586-1400  
Fax (808) 586-1412

x. From: Kealoha [mailto:keomaivg@gmail.com]  
Sent: Friday, May 12, 2017 11:42 AM  
To: OIP <oip@hawaii.gov>; Kealoha Pisciotto <keomaivg@gmail.com>  
Subject: Fwd: Honolulu library letter

Aloha Ms. Onuma,

We have attached a copy of the letter BLNR supplied to the Honolulu Public Library, that affirms BLNR's instructions to the Librarians. The letter expressly affirms that those who ask to get "...copies of the transcripts, they should be told to contact the Court Reporter for their own personal copies."

The State logo letter head is not completely visible as it is covered by the Librarian's notes but the AG's name is identified and so is Michael Caine name listed as contact person. Mr. Cain is actually the BLNR "Custodian of the Records" so he is not responsible for denying us, the denial comes directly from the AG or Deputy AG in this case.

It is clear, that the State is not allowing individuals from the public including actual Parties from the case to even make copies and if they do the copies are subject to the Library's copying fees. We can confirm that this has been our experience also, with some Libraries allowing us to make copies, some not and some directing us to the Court Reporter for copies. We have about 20 Pro Se parties involved in this case that live on different islands.

The Transcripts are not complete either. Some Libraries have only some of the transcripts and are missing volumes. The Lawyers for KAHEA (the rest of the other Parties are Pro Se) did make a deal with the Office of Hawaiian Affairs (OHA) and the Reporter to purchase transcripts and they intend to make those electronically available to the Parties. That has not happened yet.

More importantly, this work around is not sufficient to fulfill the law we believe. First because, they did not secure a full record as there are still 5 volumes still missing. The whole point is that NO ONE should have to pay once the BLNR has purchased the original. That is double dipping.

Once BLNR pays the Court Reporter for a complete copy then it becomes a government record of a normal regulatory function. Contested Case Hearings are a normal regulators function and subject to due process and sun shine law etc. For BLNR to do otherwise is BLNR contracting on behalf of the public to burden the public. This is not right and it prejudices the Parties and the public who can't afford to pay.

So even if the OHA deal comes thru (and again it has not to date) we wish to continue our request for an OIP opinion and or assistance for timely relief regarding this situation. That is, just to reiterate, Contested Case Hearing Parties do hereby request OIP's assistance to gain to full access and complete online access to the transcripts of their hearing. Full and complete access includes searchable and editing capability of the transcripts. The transcripts should be placed online for the Parties and the public to review.

And while their maybe limits set allowing only the Parties to manipulate the electronic files for the purposes of producing the necessary finding of fact, conclusions of law etc. as required, nevertheless, the public should have access also since public funds are being used to purchase and to subsidize the regulatory agency and its regulatory function (CCHs).

We wish to ask OIP to also make sure the entire record is in placed and made available for public inspections and copying. So that the Parties have a chance to review a complete the record for producing their finding and conclusions.

What we are asking for is reasonable because the entire hearing was made digital so all documents were allowed to be uploaded onto the documents library (<http://dlnr.hawaii.gov/mk/documents-library/>) and all documents except the transcripts can be accessed online.

All of the Parties also agreed to this electronic method of submitting evidence, filing Motions and Memos etc. The entire case was electronically and digitally handled. So for BLNR to change their methods at the end by refusing to upload the transcripts electronically is unreasonable, unnecessary harassment and a due process violation making it impossible for the Parties to complete findings and conclusions.

The Supreme Court just last year remanded us back to retry the case because BLNR violated our due process right, so this is BLNR repeating the same error the court just found unlawful.

We hope not to burden any of the OIP staff and we thank you for your assistance thus far. We hope you can assist us further so we can conclude this situation in a timely manner.

We thank you very much for your time and consideration.

In Aloha I remain  
Kealoha Pisciotto

x. On May 8, 2017, at 1:44 PM, OIP <oip@hawaii.gov> wrote:

Dear Ms. Kealoha,

The Office of Information Practices (OIP) has received both of your e-mails, respectively dated May 5 and May 8, 2017, along with your attachment. In your May 5, 2017 e-mail, you submitted a complaint that in response to your request to the Board of Land and Natural Resources (BLNR) for "access to contested case hearing (CCH) transcripts in a timely and electronic format," BLNR allegedly responded, "providing access to the hard copies of the transcript in public and University libraries is sufficient." Thereafter, you requested OIP "to (1) provide any relief OIP can provide and (2) in the alternative for OIP to investigate and to render an opinion regarding electronic filing protocol where electronic filing has been the agreed upon filing procedure for the entire case EXCEPT in the case of Transcripts." You also provided OIP with a copy of an unfiled Petition for Online Access to Transcripts dated May 5, 2017 (Petition).

From the explanation and materials you provided, it appears that you prepared your Petition after BLNR initial's denial of access. In accordance with section 2-73-12(c), Hawaii Administrative Rules (HAR), before OIP can assist you, OIP must receive the following documents:

1. Copy of your first written request to BLNR, which asks for a copy of the transcripts and the date you made this record request AND
2. Copy of BLNR's written denial of access, which allegedly responded, "providing access to the hard copies of the transcript in public and University libraries is sufficient."

Finally, in your May 8, 2017 e-mail, you noted, "the Hearing Officer (R.M.Amano) communicated to us the her husband works for the OIP, if this is the case we would ask that he not be allowed to work on our case because it may result in a conflict of interest problem." I will be handling the instant matter, if you provide the two abovementioned documents, as instructed. OIP has already properly screened Mr. Amano from any participation thereof.

Liza R.H. Onuma  
Staff Attorney  
Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 South Hotel Street, Room 107  
Honolulu, Hawaii 96813  
Phone (808) 586-1400  
Fax (808) 586-1412

x. On May 10, 2017, at 8:58 AM, OIP <oip@hawaii.gov> wrote:

Ms. Pisciotta:

1. If time is of the essence for you, you are entitled to file a lawsuit for access within two years of a denial of access to government records, and need not wait for a determination from OIP to do so. Hawaii Revised Statutes (HRS) §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if you are the prevailing party, you are entitled to recover reasonable attorney's fees and costs.
2. Again, in accordance with section 2-73-12(c), Hawaii Administrative Rules (HAR), for OIP's assistance, OIP must receive a copy of your first written request to BLNR. An oral request is not sufficient. Any written request is fine, it does not have to be considered a formal request.
3. Additionally, BLNR may have "told" you the transcripts weren't available but in accordance with section 2-73-12(c), Hawaii Administrative Rules (HAR), OIP must receive BLNR's written denial to you.
4. Also, please understand that, while OIP's services are free, we are operating under a backlog, and it may take some time to resolve your issues.

I hope this information is helpful.

Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 S. Hotel Street, #107  
Honolulu, HI 96813  
Ph (808) 586-1400  
Facsimile: (808) 586-1412  
Email: oip@hawaii.gov  
Website: <http://oip.hawaii.gov>

x. Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>

Date: May 10, 2017 at 10:30:33 AM HST

To: OIP <oip@hawaii.gov>, Kealoha Pisciotto <keomaivg@gmail.com>

Subject: Re: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma,

E kala mai, I am confused with your request for a copy of our "first written request" to BLNR, because our "first written request" to BLNR was/is attached to this email thread (at the very bottom of the thread) and has been since we sent the first email to OIP. Are you not able to open it? If not I can resend it to you.

Second, I am not sure why OIP would suggest we should go to court as opposed to OIP exercising its authority. We submitted our request to BLNR and to OIP over 5 days ago and while we do understand we have an ultimate right to litigate, we believe it is within OIP's purview and jurisdiction to insure the public's access to government information and access that is reasonable is protected.

BLNR has rarely ruled in a timely manner to any request or Motions made by any of the Pro Se Contested Case Petitioners. For example one party filed a motion to BLNR on March 19, 2017 (over two months ago) a Motion to Dismiss that still has not been ruled upon. Thus highlighting the additional injury of BLNR (and the Hearing Officer) setting a deadline to complete our finding of facts etc based upon a record that is incomplete in the first place.

Because of its history and if BLNR follows its pattern of not answering in a timely manner at what point will OIP consider their failure to response to our request for the production of government documents (i.e. Transcripts) a constructive denial and therefore how many days will it take OIP to reach that conclusion and then act upon our request?

As we have pointed out and you have acknowledged also we have a time limit and are asking for OIP's assistance regarding our Due Process rights.

Please let me know if I should resend our original written request to BLNR. I look forward to your response.

Thank you for your time and consideration,  
In Aloha I remain,  
Kealoha Pisciotto

x. From: Kealoha [mailto:keomaivg@gmail.com]  
Sent: Tuesday, May 09, 2017 5:17 PM  
To: OIP <oip@hawaii.gov>; Kealoha Pisciotto <keomaivg@gmail.com>  
Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma, please excuse the many typos in my last email. I have autocorrect on my phone and I don't always see the corrections made. Also although it is similar I did correct some substantial errors like how many witnesses we had in our hearing so can U please use the following attached copy for your records instead of my previous email.

Mahalo and Aloha  
Kealoha Pisciotto

x. Date: May 9, 2017 at 4:16:57 PM HST  
To: Kealoha <keomaivg@gmail.com>  
Subject: Re: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

From: Kealoha <keomaivg@gmail.com>  
Date: May 9, 2017 at 1:17:53 PM HST  
To: OIP <oip@hawaii.gov>, Kealoha Pisciotto <keomaivg@gmail.com>  
Subject: Re: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Aloha Ms. Onuma,

Mahalo for your timely response to our inquiry and request for assistance as well as the affirmation of receipt of our Petition to The Board of Land and Natural Resources re: Online Access to the Contested Case Hearing (CCH) Transcripts.

It is our understand that you are asking us to provide OIP copies of (1) our first written request to BLNR, which asks for a copy of the transcripts and the date you made this record request AND (2) a copy of BLNR's written denial of access, which allegedly responded, "providing access to the hard copies of the transcript in public and University libraries is sufficient."

First, the timing for us is very urgent with the pending deadline for submission of our Findings of Fact, Conclusions of Law (FOF/COL) etc. are due on May 30, 2017. If we do not meet the deadline we will default on our case. As I explained in the original request for assistance we were needing OIP's assistance and or a ruling by OIP in this situation.

The Petition for access to electronic copies of the transcript is the first formal request, although throughout the CCH, Pro Se Petitioner's repeated asked orally (it is on tape as the hearing was recorded by the Public Access -NaLeo Channel here in Hilo) and I believe some filed written requests during the hearing for access to the transcripts but were all categorically denied.

We were told by the BLNR staff representative (both the Deputy AG and the H.O.) that the transcripts were not available. Although we believe the University (Applicant) did have daily copies that they purchased.

Purchasing Transcripts defies the spirit and intent of CCHs as a people's process meant to relieve citizens of the costly burdens of court, hence the quasi-judicial nature of the CCH process under the law. Many of the Pro Se petitioner's also have Pauper status and the others may not be classified as Pauper but nevertheless could not possibly afford to pay the cost and especially not at the \$72,000 rate.

BLNR has selected and alleged alternative that puts the burden on the Petitioners where by they would submit copies of transcripts in public libraries, which means puts the burden on the Petitioner's to travel large distance in some cases, limits us to only certain hours of operation (i.e. for those of us who work we cannot go at night to work on our transcripts ), then to pay additional (cost subject to the library's rates) to make copies and then take them home to retype the section. And some library's are not actually allowing people to copy the transcripts. Based on a letter sent that saying the public must contact the Reporter to obtain copies.

All of this is taxing when there is also such a short deadline for the FOF/COL etc. Anyways. And especially so when we have been using a e-filing system and we had all agreed to that method because many live on Hawai'i Island and not on O'ahu.

The question remains however, how can a normal government function such as a CCH paid by taxpayers also require the same taxpayers to pay for a copy of the transcripts of a hearing they are the actual parties to. The Supreme Court of Hawai'i remanded, at least some of the parties, back to retry the case because the BLNR had violated OUR DUE PROCESS rights. We submit to deny our rights to our own case transcripts recorded during a normal government function (which is to insure our rights, duties and privileges are protected and inform the BLNR so they can make informed decisions) is to repeat the same DUE PROCESS failures Supreme Court just found unlawful.

We are parties and as a matter of course should be given at least the certified copy's of the transcript of our own case. Since we cannot use any other form of recordings such as the NaLeo video tape for findings and conclusions.

We should not be charged for it because BLNR has already paid for a copy and it cost virtually nothing to simply upload the file into the ELECTRONIC FILING SYSTEM previously established and excepted by the H.O..

All we are asking for here is to have an electronic copy uploaded for us and for public (a matter of disclosure). We should not have to choose between standing to protect our constitutional rights and or having our rights trampled on or violated. Nor is it a choice that some using public funds (like the Applicant) should use public funds to fight the public and then deny the public their right to review the process in the sun shine. Both BLNR and University of Hawai'i (Applicant) are bound by the Sunshine Laws.

The bottom line is we can't make our case without the transcripts and the BLNR by withholding the transcript is repeating same DUE PROCESS error the Supreme Court just found unlawful. The public (the agency which is BLNR) and the parties have already paid the Reporter.

So we are asking OIP to help us by expediting the process so we can have a chance, even if small, given the short time period to complete our FOF/COL etc. I also like the record to reflect that our CCH was a huge, lengthily and protracted case with over 50 witness and heard over a 44 day period. The record is very big!

We hope our explanation is sufficient. We would ask OIP given the urgency of our time constraints to contact the necessary BLNR authorities and or the Attorney General, to inquire into if they intend to grant the Petitioners request by releasing the transcripts to the Parties and Public and or uploading them in a form accessible and useable for the Petitioners (to cut and paste) for the purposes of completing their FOF/COL. Depending on the out come of that discussion, we ask OIP to direct BLNR to do so in a expedited way. It must be expedited and in a timely manner or it really can't help us make our deadline.

We again thank you for our time, patience and consideration.

Aloha and Mahalo  
Kealoha Pisciotta  
Mauna Kea Anaina Hou  
Keomaivg@gmail.com

x.From: Kealoha <keomaivg@gmail.com>  
Date: May 5, 2017 at 5:24:29 PM HST  
To: Kealoha Pisciotta <keomaivg@gmail.com>, Keo Von Gogh  
<makiaweli2012@gmail.com>  
Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf

Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>

Date: May 5, 2017 at 5:09:43 PM HST

To: "oip@hawaii.gov" <oip@hawaii.gov>, Paul <kealiikea@yahoo.com>, clarence <kahiwaL@cs.com>, Debbie Ward <cordylinicolor@gmail.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, Hank Hawaiian <hankhawaiian@yahoo.com>, leina'ala s <leinaala.mauna@gmail.com>, Joseph Camara <kualiic@hotmail.com>, Cindy Freitas <hanahanai@hawaii.rr.com>, William Freitas <pohaku7@yahoo.com>, mehana kihoi <uhiwai@live.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, Kaliko Kanaele <akulele@yahoo.com>, Brannon Kealoha <brannonk@hawaii.edu>, Dexter Kaiama <cdexk@hotmail.com>, Bianca Isaki <bianca@kahea.org>, Yuklin Aluli <yuklinaluli@gmail.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Keo Von Gogh <makiaweli2012@gmail.com>  
Subject: Fwd: OIP opinion needed-re BLNR Transcripts of a CCH - for FINAL Petition to BLNR copy.pdf  
Aloha OIP,

Please find attached a Petition filed before the Board of Land and Natural Resources (BLNR) re Petitioners and to compel access to contested case hearing (CCH) transcripts in a timely and electronic format.

The Hearing Officer established an online electronic filing system and has excepted electronic submissions of all documents in the entire CCH. This was important protocol since some parties lived off island (majority of the parties live on Hawai'i Island).

We write here because we are seeking OIPs opinion regarding BLNR's failure to provide timely, easily accessible and copiable electronic transcripts. We have relied on OIP 95-22 in support of our Petition to the Board.

BLNR claims that providing access to the hard copies of the transcript in public and University libraries is sufficient, however, this limits accessibility to the transcripts to library hours (include closure on holiday's and weekends), the cost of copying is subject to what the library's will charge, the gas costs to those Petitioners who must travel far (over 30 miles in some cases) and then once they do make and pay for those copies they then must go home and re type those parts of the transcript into their files.

This is costly, exhausting and biases the Petitioners. Furthermore, some petitioners have been told by the library personnel that they may not copy the transcripts at all. This cannot be true.

BLNR has provided copies but in no convenient way. The contested case process is a normal government function and there is no harm or injury to any of the parties or to BLNR if BLNR uploads an electronic copy of the transcript. A copy that is electronically accessed and can be searched (cut and pasted). This is a minimum requirement.

Unlike the BLNR and the University who are both publicly funded and who could pay the retail price of the transcripts from the Recorder directly and daily, we petitioners where not able to and are not now able to do so.

The Petitioners have no such ability to pay excessive retail price of over \$72,000 to get their own copies of the very case they are bringing forward for the protection of their Constitutional rights. It is an injury when we are faced with choosing to protect our rights or to defaults because we cannot reasonably access the transcripts or to produce the FOF/COL, D&O in a timely manor. The injury is both to the Petitioner's and the Public whom are paying for the hearings and then must pay again to access the documents of that same hearing. This is not Pono.

Our deadline for the production for the completion of the FOF/COL, D&O is due on May 30, 2017. This case ran for 44 day with over 73 witnesses producing over 50 volumes to transcripts. There is no question that this was a big case and the time allotted for producing FOF/COL etc. was already sort but with the limits set on transcripts makes it is nearly impossible. The failure of BLNR to provide a reasonable protocol for accessing the record is to place a serious obstacles in our path for making our case and this therefore violates our due process rights.

The Hawai'i Supreme Court remanded this case back because the BLNR violated our due process rights by prejudging the outcome prior to conducting a proper contested case. It is our right to have a reasonable chance to make our case yet again.

We submit, we are not able to do so with the conditions that have been placed on the transcripts by BLNR. We further submit we can not make our case with out the transcripts and that since BLNR already accepted all of our filing electronically there is no reason for them to not provide electronic transcripts that can be accessed and used (cut and pasted) by the parties now.

In conclusion, this is a formal complaint and request to OIP to (1) provide any relief OIP can provide and (2) in the alternative for OIP to investigate and to render an opinion regarding electronic filing protocol where electronic filing has been the agreed upon filing procedure for the entire case EXCEPT in the case of Transcripts.

I thank you very much for your time and consideration.

I Aloha I remain,

Kealoha PISCIOTTA

Mauna Kea Anaina Hou

Keomaivg@gmail.com

Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>

Date: May 5, 2017 at 2:52:11 PM HST

To: Michael Cain <michael.cain@hawaii.gov>, Office of Conservation & Coastal Lands <dlmr.maunakea@hawaii.gov>, Kealoha Pisciotto-Keomailani Von Gogh <keomaivg@gmail.com>, Clarence Ching <kahiwaL@cs.com>, Uncle Kalani Flores <ekflores@hawaiiantel.net>, Pua Case <puacase@hawaiiantel.net>, "cordylinecolor@gmail.com" <cordylinecolor@gmail.com>, "kealiikea@yahoo.com" <kealiikea@yahoo.com>, Bianca Isaki <bianca@kahea.org>, Ian Sandison <isandison@carlsmith.com>, "tluikwan@carlsmith.com" <tluikwan@carlsmith.com>, "John P. (Pete) Manaut" <jpm@carlsmith.com>, "Lindsay N. McAneeley" <lmcaaneeley@carlsmith.com>, "T. Shinyama" <RShinyama@wik.com>, "douging@wik.com" <douging@wik.com>, mehana kihoi <uhiwai@live.com>, Kahookahi Kanuha <kahookahi@gmail.com>, Joseph Camara <kualiic@hotmail.com>, "lsa@torkildson.com" <lsa@torkildson.com>, "njc@torkildson.com" <njc@torkildson.com>, leina'ala s <leinaala.mauna@gmail.com>, Maelani Lee <maelanilee@yahoo.com>, Lanny Sinkin <lanny.sinkin@gmail.com>, "akulele@yahoo.com" <akulele@yahoo.com>, "s.tabbada@hawaiiantel.net" <s.tabbada@hawaiiantel.net>, tiffniekakalia <tiffniekakalia@gmail.com>, Glen Kila <makakila@gmail.com>, Brannon Kealoha <brannonk@hawaii.edu>, "hanahanai@hawaii.rr.com" <hanahanai@hawaii.rr.com>, "pohaku7@yahoo.com" <pohaku7@yahoo.com>, Ivy McIntosh <3popoki@gmail.com>, "Kealamakia Jr." <mkealama@yahoo.com>, Patricia Ikeda <peheakeanila@gmail.com>, Yuklin Aluli <yuklin@kailualaw.com>, Dexter Kaiama <cdexk@hotmail.com>, Keo Von Gogh <makiaweli2012@gmail.com>  
Subject: Fwd: FINAL Petition to BLNR copy.pdf

Aloha All,

Please find attached a "Petition To BLNR To Provide Online Access To Transcripts". Michael this is a Petition to BLNR not to the Hearing Officer, so we hope it will be provided to the Board as is appropriate. If there is something else I must do please instruct.

As I have explained previously I am using my phone to do these filings because my computer is currently not working. I will be sending forward the following 5 documents in separate emails but I wish them to be file in the following order as one filling and hopefully with a single document number.

Thank U very much Michael!

1. Petition To BLNR To Provide Online Access To Transcripts.
2. Exhibit title page
3. A copy of Office of Information Practices (OIP) Opinion 95-22.
4. Kealoha's Declaration
5. The relevant Certificate of Service (COS)

Aloha and Mahalo for you patience,

KEALOHA PISCIOTTA

Subject: FINAL Petition to BLNR copy.pdf

Begin forwarded message:

From: OIP <oip@hawaii.gov>  
Date: June 7, 2017 at 2:44:18 PM HST  
To: Kealoha <keomaivg@gmail.com>  
Subject: RE: DLNR's Amended Notice to Requester dated May 24, 2017

Dear Ms. Pisciotta,

Thank you for your email. I have attached the Amended Notice to Requester I am referring to.

Also, for your information, OIP has received consent from Cindy Freitas, Clarence Kukauakahi Ching, Deborah J. Ward, Harry Fergerstrom, Lanny Sinkin, William Freitas, and Mehana Kihoi to be added to your OIP file.

Carlotta Amerino  
Staff Attorney

Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 S. Hotel Street, #107  
Honolulu, HI 96813  
Ph (808) 586-1400  
Facsimile: (808) 586-1412  
Email: oip@hawaii.gov  
Website: <http://oip.hawaii.gov>

x. From: Kealoha [mailto:keomaivg@gmail.com]  
Sent: Wednesday, June 07, 2017 2:14 PM  
To: OIP <oip@hawaii.gov>; Paul <kealiikea@yahoo.com>; cordylinecolor@gmail.com; clarence <kahiwaL@cs.com>; cindy freitas <hanahanai@hawaii.rr.com>; leinaala.mauna@gmail.com; Mehana Kihoi <uhiwai@live.com>; pohaku7@yahoo.com; hankhawaiian@yahoo.com; tiffniekakalia@gmail.com; puacase@hawaiiantel.net;

brannonk@hawaii.edu; Kaliko Kanaele <akulele@yahoo.com>; lanny.sinkin@gmail.com;  
ekflores@hawaii.edu; Kealoha Pisciotto <keomaivg@gmail.com>;  
makiaweli2012@gmail.com  
Subject: Re: DLNR's Amended Notice to Requester dated May 24, 2017

Aloha Ms. Amerino,  
Mahalo for your message, your time and consideration. I have CC'd the Petitioners who are collectively making this request to OIP.  
I am not sure of the document or information you are referring too, when u state:

"I have a copy of the Amended Notice to Requester sent to you by DLNR. This NTR states that DLNR will provide you with a disc containing digital copies of the 8 volumes of digital transcripts it currently has upon your prepayment of costs."

We are not aware of such a document called the "...Amended Notice to Requester sent to you by DLNR." We have only a copy of the BLNR's "Denial of Petitioners Request for Access to Online Transcripts." (See Minute Order 49 (DOC 637) issued May 17, 2017, Denying our Request to BLNR RE Access to Online Transcripts of Mauna Kea CCH (DOC 622 and 627)). You can access this mess documents in the BLNR documents library at the links below:

<http://dlnr.hawaii.gov/mk/evidentiary-hearing-submittals/>

<http://dlnr.hawaii.gov/mk/documents-library>

To be clear, our request is for BLNR to upload the transcripts on the BLNR Documents and evidentiary library. We are not seeking a disk, principally because I don't know if very many of us have the ability to read a disk, most computers no longer have disk players.

Further, BLNR established the online filing system and we as Petitioners have for over 6 months conducted the majority of our filings via the online electronic system established by BLNR.

The BLNR purchased the Transcripts using public funds as did the University (also a publicly funded institution) so the people and tax payers such as Petitioners have paid for these Transcripts twice actually. So I have no idea what cost they are saying we should be paying for copies of transcripts on for our own hearings.

The Transcripts are necessary to complete our Findings and Conclusions of Law and respective Responses, yet we as members of the Public and those who have standing to call for to to participate in the Contested Case Hearing have no sufficient access, time or funds to adequately complete such Finding, Conclusions of Law and Responses thus biasing the people and public who have constitutional rights at stake in this proceeding.

It is not altogether clear why, the BLNR cannot upload the Transcripts onto the documents library so we can all have clear and unbiased access and copies of our our own case.

There are 44 volumes of evidentiary hearings plus 7 additional pre hearing volumes, not 8 volumes as you report, so as I indicated I do not have knowledge of what the States Deputy Attorney General is directing your attention too as an Amended Notice or anything beyond what I have stated so far.

Lastly, the there are thousands of documents from this case uploaded on the BLNR documents and evidentiary hearing library. The Transcripts are the only document not uploaded. So again what is the reason for not uploading these so we can have a reasonable opportunity and ability to file our Findings, Conclusions and Responses?

Each Petitioner should have a copy of the files of their own case. And Contested Case Hearings are a normal part of the Governmental process and no one should need to pay for their case information when the BLNR has already done so and for BLNR to do otherwise amounts to BLNR making agreements with private individuals that support the interest of a private contractor against the interests members of the public interest and their associated rights.

We would like the record to reflect that we are not standing against the individual contractor(s), such as the free lance reporter(s) in any way, but we are standing in opposition to BLNR contracting with private contractors against the Public's interest as has been done in this instant.

Aloha and Mahalo for your time and patience in this matter.  
Kealoha Pisciotta  
Mauna Kea Anaina Hou

x. On Jun 7, 2017, at 11:47 AM, OIP <oip@hawaii.gov> wrote:

Dear Ms. Pisciotta,

I will be handling your issue with TMT transcripts henceforth, and want to make sure I am up to speed on your issue. I have a copy of the Amended Notice to Requester sent to you by DLNR. This NTR states that DLNR will provide you with a disc containing digital copies of the 8 volumes of digital transcripts it currently has upon your prepayment of costs. Are you planning to accept this method of access? In other words, will you be paying for the costs of the 8 transcripts to be provided on disc? If not, why not? Thank you in advance for your assistance.

Carlotta Amerino  
Staff Attorney

Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 S. Hotel Street, #107  
Honolulu, HI 96813  
Ph (808) 586-1400  
Facsimile: (808) 586-1412  
Email: [oiip@hawaii.gov](mailto:oiip@hawaii.gov)  
Website: <http://oiip.hawaii.gov>

x. Begin forwarded message:

From: OIP <[oiip@hawaii.gov](mailto:oiip@hawaii.gov)>  
Date: June 8, 2017 at 3:32:00 PM HST  
To: Kealoha <[keomaivg@gmail.com](mailto:keomaivg@gmail.com)>  
Cc: Cindy Freitas <[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)>, "kahiwal@cs.com" <[kahiwal@cs.com](mailto:kahiwal@cs.com)>, "dward@hawaii.edu" <[dward@hawaii.edu](mailto:dward@hawaii.edu)>, "hankhawaiian@yahoo.com" <[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)>, "lanny.sinkin@gmail.com" <[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)>, "pohaku7@yahoo.com" <[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)>, "uhiwai2@icloud.com" <[uhiwai2@icloud.com](mailto:uhiwai2@icloud.com)>  
Subject: Online Searchable Access to TMT Contested Case hearing Transcripts (CORR 2017-0608-01)

Ms. Pisciotta:

Attached is a letter dated June 8, 2017 from the Office of Information Practices regarding your request for assistance from OIP. Also attached is OIP Opinion Letter 10-03 which relates to your request.

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices  
State of Hawaii  
No. 1 Capitol District Building  
250 S. Hotel Street, #107  
Honolulu, HI 96813  
Ph (808) 586-1400  
Facsimile: (808) 586-1412  
Email: [oiip@hawaii.gov](mailto:oiip@hawaii.gov)  
Website: <http://oiip.hawaii.gov>

x. See our request for reconsideration, sent on June 12, 2017 below:

Begin forwarded message:

From: Kealoha <keomaivg@gmail.com>  
Date: June 12, 2017 at 4:45:57 PM HST  
To: Oip <oip@hawaii.gov>, Kealoha Pisciotta <keomaivg@gmail.com>, lanny.sinkin@gmail.com, puacase@hawaiiantel.net, cordylinacolor@gmail.com, Paul <kealiikea@yahoo.com>, makiaweli2012@gmail.com, leinaala.mauna@gmail.com, pohaku7@yahoo.com, hanahanai@hawaii.rr.com, uhiwai@live.com, hankhawaiian@yahoo.com, brannonk@hawaii.edu, tiffniekakalia@gmail.com, Kaliko Kanaele <akulele@yahoo.com>, kualiiic@hotmail.com, clarence <kahiwaL@cs.com>, ekflores@hawaiiantel.net  
Subject: Request for reconsideration regarding Mauna Kea Case electronic Transcripts.

OIP June 12, 2017

Aloha OIP,

A couple days ago, I on behalf of myself and other Petitioners I responded to OIP asking about the information that you shared regarding a document that BLNR allegedly had produced; offering the Mauna Kea CCH Pro Se Petitioners, a disk with a partial copy of transcripts to be given to us for a set price.

We affirmed that we could not find the document you were referring too yesterday. We still can't. Did OIP find it on the BLNR maintained online electronic documents library? We still have never seen the document that OIP claims remedies our situation and bases its opinion on regarding our case.

We must respectfully disagree and we request OIP reconsider their decision based up the following information:

The OIP position just issued is fails to address the following issues:

- (1) the record is not complete,
  - (2) to get complete copies of the whole record would be cost prohibitive which ends up defeating the purpose and mandate of contested case proceedings,
  - (3) the facts that OIP have relied to decide this case are based on incorrect ,uncorroborated and incorrect information and;
  - (4) although the records were sent to the public library many of the librarians were instructed by the State to direct "anyone who asks to make copies..."to the Free lance court reporter. I provided OIP copies of the state's letter stating as much.
- It is our understanding that the disk that that state allegedly has offered to us is also NOT a complete record. We can't complete our Findings of Fact and Conclusions of Law (FOF COL etc) if the record is not the complete.

Parties during the hearing were asked to pay upwards of at \$72,000 dollar if they wanted copies of the daily or weekly transcripts. That price is based on the medium price of \$6 per page.

We also know that OIP opinion found in OIP 95-22 clearly affirms that a free lance court reporter cannot copyright transcripts because transcripts do not reach the level of originality to be copyrighted. So OIP you did not address this question nor justification for not upholding a previous holdings (95-22).

We know the other parties who were able to pay were getting copies daily or weekly and that they were paying those high prices which makes contested case hearings (CCH) cost prohibitive to the average person.

But CCH are about the ensuring that the public rights, duties and privileges are protected. If people cant participate this effectively means they can't protect their rights. This is serious and it also means there is not fair access to complete government records.

If you have money you can make a case but if don't don't have money you can't. This is not right and lack basic fairness and defies the purpose of the CCH process.

We object to OIPs claim that we where able to access the OHA transcripts. That is taking the side of the State without investigating the facts. I personally did not access the OHA transcripts and I don't know if anyone who did or anyone who was able to download the OHA transcripts as the BLNR claims.

The questions is how would the state have any such knowledge when they did not make the agreement with OHA. Did OIP even find out if what the state said was even true? We did not get any copies from OHA and even if OHA's copies were viable they were still missing 5 volumes. So again it was not a complete record.

We ask OIP to reconsider their Opinion regarding accessing online transcripts as it relies on incomplete, unsubstantiated and facts not in the record, and it fails to answer the bigger questions previously ruled on in OIP 95-22 regarding free lance reporters charging for transcripts and the need Parties of a CCH having access to a complete record of their hearing.

Lastly, the OIP opinion fails to address the the main question of why State will not simply up loading the electronic file onto the BLNR electronics document and evidentiary website for the Parties and the public to access.

Would it not be the same file they allegedly would be providing to some of the parties at a fixed cost but only a partially complete copy on a disk? If they have digital copies to up load on a disk then why can't they just upload them just the same onto the BLNR public website? We maintain this is a violation of our due process rights and that of the publics as well.

We again thank you for time and consideration. However we do ask that OIP reconsider it finding. Because while any assistance at this juncture is nearly moot, it is important for future CCHs that are likely to result. We were not able to complete our Findings and Conclusions as of today which is June 12, 2017.

In Aloha we remain

Kealoha Pisciotta

x. NOTE: letters are OIP Op. Ltr No. 10-03 and OIP CORR 2017-0680-01 (dated June 8, 2017)

x. On June 12, 2017, we filed to the OIP a request for reconsideration regarding their opinion formal rendered for this case.

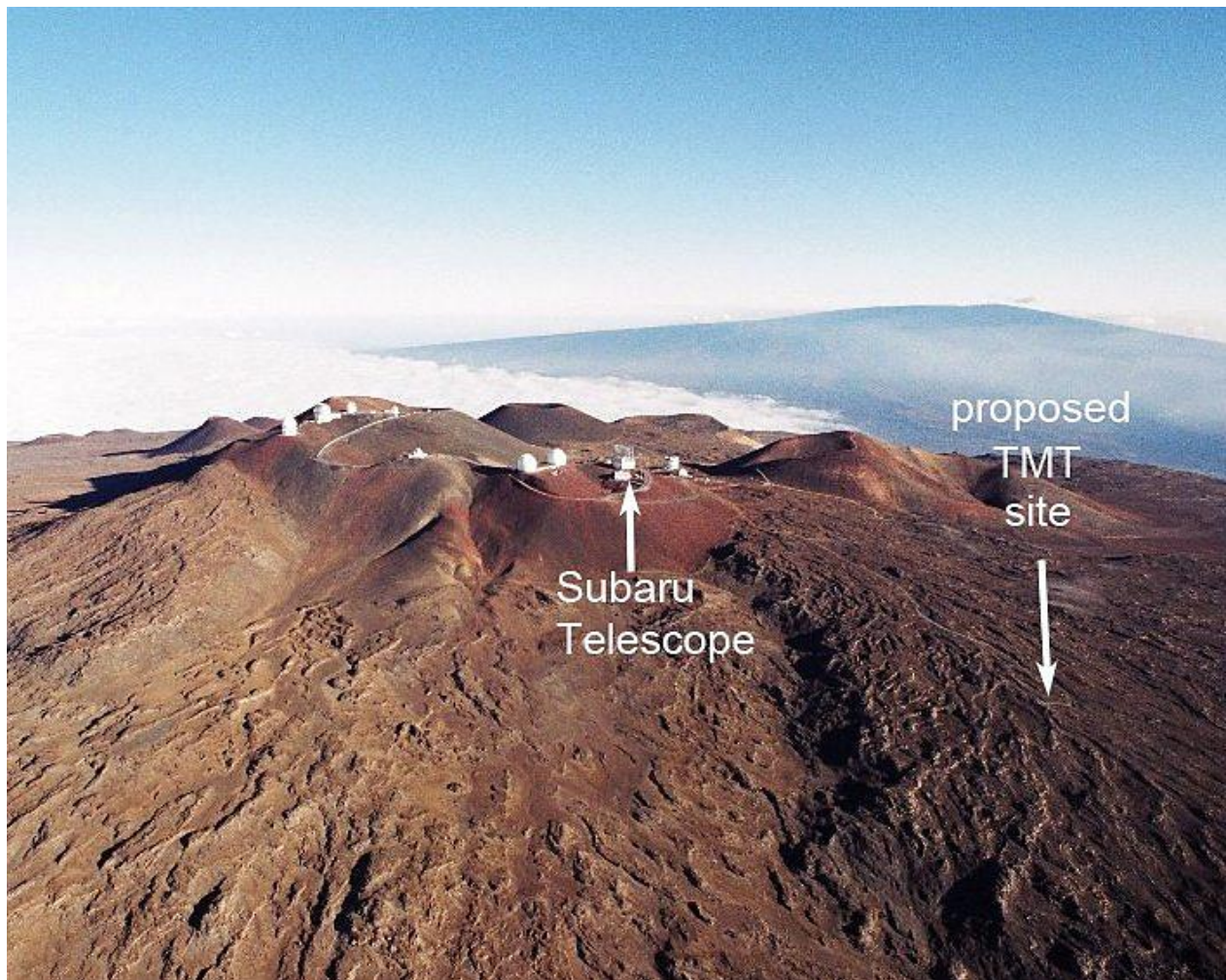
x. We believe, that both BLNR and OIP erred in their decisions not to provide electronic copies of the the CCH Transcripts.

x. We maintain the OIP opinion 95-22 supports our position that BLNR and OIP erred in deciding that Petitioners should pay for the Transcripts when BLNR already paid for them and a freelance reporter may not copyright the transcripts (see OIP opinion 95-22 holding that transcripts lack originality to support copyright claims.)

x. We maintain, that BLNR by contracting with an independent freelance reporter in a way that requires the Petitioners to have to pay large cost for government documents of a hearing they are parties too, means that BLNR has contracted unlawfully and way that prejudice Petitioners and the public.

x. A full set of Transcripts is required and was never obtained. To make our case effectively we needed a fair opportunity to access the record of the transcripts. We maintain that we were biased because we did not have enough access, time or ability to pay the large sum for the transcripts being charges by the freelance report. While we don't cite the freelance reporter their role, we do cite the BLNR for supporting the reporter charge us even when the BLNR had already paid for an electronic copy and simply needed to upload it to the electronic library where all including the public could access those then as they could of the majority of the evidentiary portion of the CCH.

x. Lastly, Petitioners were biased because we had to fight for the transcripts while simultaneously being expected to file our Findings and Conclusions, and Response etc. Time allocated, the lack of access to a full and complete record and transcripts of the record are all actions that made our ability to fully and effectively participate in making our case for the protection of Mauna Kea and the associated constitutional rights held by Native Hawaiians, recreational users and members of the general public. These actions were not Pono and we object.



*Photo source: National Astronomical Observatory of Japan (NAOJ)*

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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-02

**PETITIONERS K. PISCIOTTA,  
MAUNA KEA ANAINA HOU, D.  
WARD, P. NEVES, K. KANAELE, L.  
SLEIGHTHOLM, B. KEALOHA,  
C.FREITAS, proposed Findings of fact,  
conclusions of law, decision and order,  
COS**

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated on the date noted below:

Michael Cain  
[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)  
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*Counsel for Kahea*

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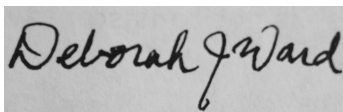
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Lanny Alan Sinkin  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for The Temple of Lono*

Signed,



Date: June 12, 2017

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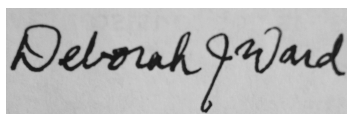
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Wilma H. Holi  
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Hanapepe, HI 96716  
*Witness for the Hearing Officer*

Moses Kealamakia Jr.  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Witness for the HearinOffice*

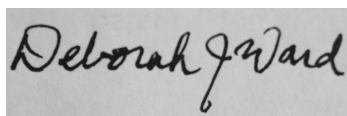
Signed,

A handwritten signature in black ink that reads "Deborah J. Ward". The signature is written in a cursive style with a large, stylized 'D' and 'W'.

Date: June 12, 2017

Signed,

Date: June 12, 2017

A rectangular area containing a handwritten signature in black ink. The signature is written in a cursive style and reads "Deborah J. Ward".