

FLORES-CASE 'OHANA
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Petitioners pro se

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
A Contested Case Hearing Re)	
Conservation District Use Application)	FLORES-CASE 'OHANA'S
(CDUA) HA-3568 for the Thirty Meter)	RESPONSE TO UHH AND TIO'S
Telescope at the Mauna Kea Science)	JOINT PROPOSED FINDINGS OF
Reserve, Ka'ohe, Hamakua District,)	FACT, CONCLUSIONS OF LAW, AND
Island of Hawai'i, TMK (3) 4-4-015:009)	DECISION ORDER [DOC. NO. 671];
)	CERTIFICATE OF SERVICE
)	
)	Hearing Officer: Hon. Riki May Amano
)	(Ret.)

**FLORES-CASE 'OHANA'S RESPONSE TO UHH AND TIO'S JOINT
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION ORDER [DOC. NO. 671]**

Petitioner, the FLORES-CASE 'OHANA, in the capacity as pro se, respectfully submits the Flores-Case 'Ohana's Response to UHH and TIO's Joint Proposed Findings of Fact, Conclusions of Law, and Decision Order [Doc. No. 671], pursuant to Minute Order No.43 filed on April 19, 2017.

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I. INTRODUCTION

E ala ē me ka ‘oia‘i‘o, e pili i ka piko o ke aloha o Mauna a Wākea.
Awaken with the truth, connecting in the *piko* of aloha of Mauna a Wākea.¹

In order for CDUA HA-3568 to be approved by the Board of Land and Natural Resources (“BLNR”) for a conservation district use permit (“CDUP”), it’s required that 1) the application is accurate and complete, 2) that the proposed Thirty Meter Telescope (TMT) project can satisfy State laws and conservation district requirements, and 3) that the Applicant University of Hawaii at Hilo (“Applicant” or “UHH”) is in compliance with its mandated plans.

Likewise, the BLNR and the Hawaii State Department of Land and Natural Resources (“DLNR”) and BLNR must take measures to ensure that 1) CDUA HA-3568 is accurate and complete, 2) that the proposed TMT project can satisfy State laws and conservation district requirements, and 3) that the Applicant is in compliance with its mandated plans.

In addition, the DLNR and BLNR must demonstrate that they are in compliance with their constitutional obligations and State statutory provisions prior to approving a permit in the Conservation District. In particular, DLNR and BLNR are required to be in compliance with Hawaii State Supreme Court decisions including, but not limited to *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission*, 94 Hawai‘i 31, 47, 7 P.3d 1068, 1084 (2000).

Based upon the preponderance of the evidence, it’s very clear that CDUA HA-3568 was deficient due to its incompleteness and the inaccurate information contained within. In addition, the Applicant is not in compliance with its mandated plans. Despite all the plans that have been approved by the BLNR and University of Hawaii Board of Regents (“UH BOR”) to ensure the protection of the natural and cultural resources on Mauna Kea, the Applicant has failed to properly and timely implement significant Management Actions of the CMP and Subplans as well as the Design Guidelines of the 2000 Master Plan. As a result, the TMT project is incapable of satisfying State laws and conservation district requirements and the Applicant is incapable of being issued a permit for any type of new development until it’s in compliance with its mandated plans.

¹ **Exhibit “J”** attached hereto of a photograph was taken 4 March 2011 from Waimea by Kehaulani Marshall showing a portal opening above the *piko* of Mauna a Wākea when such an event was occurring.

Based upon the Proposed Findings of Fact, Conclusions of Law, and Decision Order² (hereinafter referred to as “document”) filed jointly on May 30, 2017 by the Applicant University of Hawaii at Hilo (“Applicant” or “UHH”) and the Thirty Meter Telescope International Observatory, LLC (“TIO”) demonstrates two significant aspects in this contested case hearing.

Firstly, the joint filing clearly validates that UHH, represented by Carlsmith Ball LLP, has aligned itself with TIO, represented by Watanabe Ing LLP, in this proceeding that pertains to the public lands of Mauna Kea.

Secondly, the joint filing of UHH and TIO establishes that both of these parties are concurring to all the positions presented in their filing and that both assume responsibility for the accurateness or inaccuracy of the findings and conclusions within their joint document.

UHH-TIO’s joint proposed findings and conclusions are not merely one-sided; they are, to a disturbing degree, unsupported by the factual record. Reading it, one might think that the contested case hearing (“CCH”) - which lasted 44 days over the course of seven months, heard live testimony from 71 witnesses, generated over 50 volumes of transcripts totaling over 12,200 transcript pages, and included an enormous volume of about 800 exhibits and over 700 documents filed - had not occurred at all. Substantial sections of UHH-TIO’s proposed findings and conclusions ignore the testimony of the witnesses altogether. Instead, testimony was taken out of context to knowingly misconstrue and mispresent the evidence presented during this CCH. It is one thing for a party in litigation to present only those facts that favor it, it is something very different for the party to represent as "fact" things that misstate the cited evidentiary record. There are numerous examples throughout UHH-TIO’s document that illustrates that information was altered, omitted, or completely misstated in their findings and conclusions to distort the truth or systematically mischaracterized the record on these matters.

It’s also very apparent that counsel for both UHH and TIO have forgotten or disregarded the fact that the University of Hawaii is a public agency with legal obligations and statutory duties that extend beyond a private corporation. As a State entity, the University is also

² UHH and TIO’s proposed findings of fact are cited herein as " **UHH-TIO FOF _**," and their proposed conclusions of law are cited herein as " **UHH-TIO COL _**." Flores-Case ‘Ohana’s proposed findings of fact are cited herein as "**FCO FOF _**," and their proposed conclusions of law are cited herein as "**FCO COL _**"

compelled to protect the public trust and Native Hawaiian practices and rights. It's very evident that both counsels have demonstrated adversary positions towards Native Hawaiian cultural practitioners associated with the public lands of Mauna Kea. What is more disturbing is that both counsels knowingly presented inaccurate information to distort Native Hawaiian traditional and customary practices, dismiss *'ike kupuna* (indigenous knowledge and ancestral insight), discredit cultural practitioners and their witnesses, or diminish the significant adverse impacts upon the natural and cultural resource on Mauna Kea in order to get approval for this project. In addition, UHH-TIO attempt to paint an incorrect picture that the members of the Flores-Case 'Ohana and other Native Hawaiian cultural practitioners are categorical opposed to science or astronomy facilities on Mauna Kea. This is totally false. Instead the Flores-Case 'Ohana as well as other Native Hawaiian cultural practitioners and members of the public are deeply troubled about the mismanagement and in many cases the total disregard of the protection of the extremely sensitive natural and cultural resources on Mauna Kea that are within a Conservation District. This has been a pattern that spans several decades.

It's practically impossible for any *pro se* party within the short period of time pursuant to Minute Order No. 43 to provide a detailed refutation of UHH-TIO's most egregious and significant misstatements from their 224-page document as well as exhibits. It was for this anticipated reason that the Flores-Case 'Ohana had requested for an extension of time in their motion for reconsideration [Doc. 558]. The denial of this motion for reconsideration adversely impacted upon the Flores-Case 'Ohana and other *pro se* parties to adequately respond to UHH-TIO's document resulting in a violation of due process. Due to the fact that the Flores-Case 'Ohana couldn't reply in detail to everyone of UHH-TIO's errors, attached hereto as **Exhibit 1** is a matrix responding, at least summarily, to some of the other UHH-TIO's proposed findings and conclusions. However, even as such, it was impossible to complete even an abbreviated summary of all the listed 1014 findings and 482 conclusions in UHH-TIO's document. In addition, it was extremely difficult to respond to UHH-TIO's findings because they often included long narratives inserted with several different findings comingled together with conclusions, resulting in the whole or in parts being either inaccurate, misleading, and/or mischaracterized. Therefore, if any UHH-TIO findings or conclusions were not responded to or only partially responded to, this doesn't infer that the Flores-Case 'Ohana concurs with such findings and conclusions. Instead, it's a reflection that the Flores-Case 'Ohana was not granted

sufficient time as requested to adequately review, answer, defend and/or address our positions regarding all of the findings and conclusions contained in this proceeding. The Flores-Case ‘Ohana also incorporates all of its previously filed findings and conclusions as well as motions as part of its substantial, material, and relevant evidence for this CCH.

Throughout this process that extends back to 2010, BLNR and DLNR, representatives of the State of Hawaii (“the State”), have also forgotten or disregarded that they’re a governmental entity that serves as the trustee of the public lands at issue for the benefit of the general public and native Hawaiians, as stipulated in section 5(b) of the Admissions Act, pursuant to Article XVI Section 7 of the State Constitution, and as is set forth in the Article XII Section 4 of the Hawaii Constitution (Public Trust) and that they also have a fundamental duty to preserve and protect customary and traditional Native Hawaiian rights pursuant to Article XII Section 7 of the State Constitution.

If the Applicant is not in compliance with its mandated management plans pertaining to the lands of Mauna Kea under its leases, then the BLNR and DLNR, as Lessor, could not legally approve any Conservation District Use Permit (“CDUP) at this time. Furthermore, the BLNR and DLNR failed to complete an independent “*Ka Pa ‘akai*” analysis to assess the impacts of the proposed development would have on Native Hawaiian customary and traditional practices.

II. COMMENTS TO UHH-TIO’S JOINT FINDINGS OF FACT

A. Applicant FAILS to Follow 2000 Master Plan Design Guidelines

The proposed TMT project is not consistent with the objectives and provisions of the 2000 Master Plan. Consequently, the proposed TMT project is also not in compliance with the mandated CMP and Subplans. The Applicant failed to follow the stipulated Design Guidelines for this project being proposed on the northern plateau. As a result, this project is not capable of satisfying the criteria of HAR § 13-5-30(c) and the purpose of the Conservation District.

UHH-TIO FOF 171-174 affirm that that the *2000 Master Plan* design review and guidelines were approved by the UH BOR to ensure that a major project, such as the proposed TMT project, (1) conforms to the Master Plan’s goals and objectives; (2) is consistent with the Master

Plan's design guidelines; (3) relates harmoniously with the summit environment; (4) promotes resource conservation; and (5) does not contribute significantly to cumulative impact. Failure of the Applicant to follow these guidelines would result in this project not establishing a harmonious relationship with the summit environment, not promoting resource conservation, and contributing significantly to the cumulative impacts of this project upon Mauna Kea's natural and cultural resources.

UHH-TIO FOF 241, 365 are examples of UHH and TIO knowingly inserting inaccurate and false information into the record and attempting to avoid the Applicant's mandated obligation to implement the UH BOR and BLNR approved CMP and associated management actions. Since the proposed TMT project has significantly failed to satisfy the *2000 Master Plan* Design Guidelines, the Applicant is now falsely claiming that these design guidelines "*were conceptual*" and that the project "*compiles with the goals and objectives of the Master Plan*".

CMP Management Action FLU-1 clearly stipulates the action to be taken by the Applicant: "Follow design guidelines presented in the 2000 Master Plan." Ex. B.28 at 7-57, CMP. See **FCO FOF 462** at 64. In addition, there are absolutely no references in the *2000 Master Plan* or the CMP that these Design Guidelines "*were conceptual*". Ex. B.37, MP; Ex. B.28, CMP. Yet, despite the TMT project not being in compliance with this CMP requirement and the *2000 Master Plan* objectives and provisions, the Applicant is promoting and pushing this project through for BLNR approval.

The Applicant failed to follow and enforce its own mandated Design Guidelines (in particular those that pertained to ***Facility Siting, Surfaces, Textures and Material, Colors; and Scale***) as set forth in the *2000 Master Plan*. As a result, the proposed TMT project is not able to mitigate its adverse impacts upon the natural and cultural resources in a Conservation District. See **FCO FOF 462-463** at 64 - 65; **FOF 646-648** at 88 - 89; **FOF 683-711** at 94 - 99; **COL 118-122** at 136 - 137; **COL 158-159** at 140 - 141.

If the Applicant had actually followed the *2000 Master Plan* Design Guidelines, they might have been able to mitigate the adverse visual impacts of the TMT project. As noted in the diagram of **Exhibit "A"** within the captioned box "POTENTIAL NEW OBSERVATORIES", the height of the observatory for a NGLT (which the TMT is classified as) would have been significantly reduced to nearly half the height of the existing Canada France Hawaii Telescope

(“CFHT”) at the height of 38 meters/114 feet and significantly less than the proposed 184 feet above finished grade for the TMT observatory dome. Figure IX-16, Ex. B.37 & B.02t at IX-28. R-1 at 1-8. Likewise, if the colors of the proposed TMT project truly followed these guidelines, the telescope would blend in with the surrounding landscape. As note in **Exhibit “B”**, the shape and color of the telescope would blend in similar to a *pu‘u*. Figure IX-21, Ex. B.37 & B.02u at IX-38. Consequently, failure by the Applicant to follow these stipulated Design Guidelines would result in significant and adverse visual impacts from the proposed TMT observatory dome and structure design. See **FCO FOF 683-711** at 94 – 99.

B. Applicant is NOT in Compliance with Mauna Kea CMP and Subplans

The Applicant is not in compliance with the Mauna Kea CMP and Subplans. In order to mask this non-compliance, UHH-TIO inserted inaccurate, false, and misleading information into their findings. It’s unperceivable how BLNR could approve a permit for a new CDUA until the Applicant is in compliance with this court mandated comprehensive management plan as stipulated in *Mauna Kea Anaina Hou, et al v. Board of Land and Natural Resources*, Civ. No. 04-1-397, Decision and Order dated January 19, 2007 (Hara 2007).

UHH-TIO FOF 189 is another example of UHH and TIO knowingly inserting inaccurate and false information into the record and attempting to avoid the Applicant’s mandated obligation to implement the UH BOR and BLNR approved CMP and associated management actions. In the two specific CMP Management Actions MEU-1 and MEU-2, these actions unambiguously state that a five-year review report and revisions of the CMP are required. However, UHH-TIO instead makes the following erroneous statements that plainly contradict what is stated in the CMP:

- *“When the BLNR approved the CMP, it only required the University or its designee to submit and present annual reports”*
- *“The BLNR does not require the University to prepare a five-year update”*
- *“This language is permissive, not mandatory.”*

The CMP explicitly states that five-year reports are required in the following CMP Management Action MEU-1:

MEU-1. Reporting system

A variety of annual **and five-year reports are required as part of the evaluation process for the CMP.** (Emphasis added.) Ex. B.28 at 7-64, CMP.

The language in the CMP to this effect is not permissive, but instead clearly mandatory as noted in the use of the terms “required” and “shall” as noted in the findings herein.

Five-Year Outcome Analysis Report

In preparation for the CMP five-year revision, **OMKM shall prepare a Five-Year Progress Report** that describes the state of the resources, the status of the various management programs, progress towards meeting CMP goals, and other relevant information. This report should be based on information obtained from Progress Reports, and any other pertinent sources. (Emphasis added.) Ex. B.28 at 7-65, CMP.

Because OMKM has failed to complete the mandatory five-year major review and revision by April 2014, its Director Stephanie Nagata testified and the Applicant is now implying that such a review isn’t required or that it’s “*premature*”. It’s very apparent that Ms. Nagata has been misinforming the MKMB and others on this matter. Tr. 12/12/16 vol 18 at 173-184.

It’s very evident that the testimony provided by Ms. Nagata is not only dreadfully unreliable and inaccurate, but it’s also very bias as further demonstrated in the evidence. Ms. Nagata as Director of the OMKM submitted *Annual Reports* for 2014, 2015, and 2016 to BLNR in which the comments for Management Action MEU-2 clearly demonstrate the need to complete a five-year review and revision. Ex. A-21 at 27; Ex. B.02h at 27; Ex. A-22 at 28 & 36. See **FCO FOF 447-448**.

Dating back to the *2014 Annual Report* that OMKM/UHH submitted to BLNR, it clearly reaffirmed this management action as noted in the comments for Management Action MEU-2: **“Five-year CMP revision commences in 2014. Revision process initiated by OMKM for eventual submission to BLNR.”** (Emphasis added.) Ex. A-20 at 18.

UHH-TIO FOF 189 stated, “OMKM’s position is that a separate five-year review and a five-year amendment is premature because five years is too short a period to fully vet all management actions.” This is another example of UHH-TIO attempting to distort the truth and insert inaccurate and false information into the record. It’s clearly stated in the CMP Implementation Plan that this five-year cycle must go through two cycles before determining if the process needs

to be adjusted. At the moment, the Applicant has not even completed one five-year review and revision cycle yet.

If it is determined that the five-year cycle is too short to show real changes in resource conditions, then **after two five-year review and revision cycles, the frequency of the process can be lengthened**, as needed. (Emphasis added.) Ex. B.02z at 17, CMP IP.

UHH-TIO FOF 189 also inaccurately stated, *“If OMKM were to amend the CMP, it would be relatively minor edits, such as the spelling of place names and eliminating redundancies. Moreover, a five-year review is not necessary because OMKM’s annual reports are cumulative and reflect everything that was done since the CMP was first implemented.”* Statements such as these demonstrate why the Applicant and their counsel either don’t comprehend the purpose of the CMP five-year review or are trying to downplay the significance of this review process because it hasn’t been completed. The purpose of this review is to do a comprehensive analysis, not merely an editing of the document or a simple compilation of annual reports. The five-year report would include a thorough analysis as well as feedback from agencies and stakeholders. The CMP clearly outlines the components and process for this five-year review as described below.

The first section of the Five-Year Progress Report will discuss the state of the cultural and natural resources in the UH Management Areas. This section will summarize data collected during monitoring, research, restoration, and threat prevention and control activities conducted over the preceding five years. This portion of the report will analyze trends in cultural and natural resources, and the impacts (positive, negative, or neutral) that management actions have had on them. It will also summarize what future management actions are needed to protect, enhance, or restore Mauna Kea’s natural resources.

The second section of the Five-Year Progress Report should include a summary of the progress of the programs towards meeting management goals, objectives, and actions, as outlined in the CMP. This analysis will be based on information in the annual progress reports from the last five years.

The report will be reviewed and approved internally and will then be submitted to the stakeholders and agencies participating in the review process, allowing ample time before the meeting for the agencies to review it. This report, along with feedback received from stakeholders, will be used to conduct the five-year update of the CMP.

Ex. B.28 at 7-65, CMP.

Guidelines for revising the CMP are described further in the CMP Implementation Plan:

Following the production of the Five-Year Management Outcome Analysis, and after input from appropriate stakeholders, the CMP should be revised and updated to

incorporate current status descriptions, new or updated desired outcomes, and new management actions. Ex. B.02z at 17, CMP IP.

The CMP is also required to be updated with a major review and revision as the proposed TMT project was beyond the scope of this plan. Ex. B.28 at 2-3, CMP. See FCO FOF 451. The CMP also states the conditions such as changes to the UH lease with DLNR, new development, or changes to state law that would require a significant revision of the CMP as stipulated in following CMP Management Action MEU-2 because these and other issues and concerns were not within the scope of the CMP:

MEU-2. Update and revision process

Once the CMP is approved by BLNR, it will be considered the approved management plan for UH Management Areas, supplementing the 1995 Management Plan (see Section 7.2.2). OMKM will be responsible for implementing the CMP and ensuring adherence to its provisions (see Section 7.4.1). The CMP should be updated every five years, based on data collected during various program management activities (e.g., natural or cultural resources monitoring, research projects), analysis of program strengths and weaknesses, and relevant new laws, regulations, and policies that have come into effect since the last update. **Conditions under which a significant revision of the CMP would be required at an interval of less than five years include changes to the University lease with DLNR lands for Mauna Kea Lands, new development, or changes to state and federal laws and regulations with direct impact in UH Management Areas.**

During the update process, OMKM should solicit recommendations for modifications to the management plan from the wide range of stakeholders including agency partners and community members. It is recommended that stakeholders first be given a copy of the five-year progress report, so that they are aware of program successes, failures, and ongoing activities, as well as updated on the current status of the resources. Comments received on program needs and recommended management activities can then be addressed in the update of the CMP.

(Emphasis added.) Ex. B.28 at 7-65, CMP.

As noted above as well as below in the CMP, the other significant part of the five-year review and revision is the required feedback from agencies and stakeholders. In addition, OMKM is also negligent for not establishing a grievance procedure as required in CMP Management Action OI-4. Ex. A-22 at 28.

Gathering input from the community, federal and state agencies, and other stakeholders has also been identified as a need for implementation of the CMP. Community outreach is discussed in Section 7.1.3. Feedback on the effectiveness of the

CMP will be received from stakeholders via comments on the five-year outcome analysis report and through interagency meetings conducted annually (see Section 7.4.3).

Additionally, OMKM should establish a grievance procedure to address problems and issues as they arise, so that community concerns can be addressed in the periods between CMP updates. (Emphasis added.) Ex. B.28 at 7-60, CMP.

The ongoing mismanagement on the part of OMKM and the Applicant for failing to be in compliance with its mandated plans puts Mauna Kea's cultural and natural resources at risk for further substantial, significant, and adverse impacts. The Applicant is mandated to follow the CMP management actions, yet has failed to complete significant components of the CMP. Instead, UHH-TIO attempt to cover-up these deficiencies by distorting the information with inaccurate and false information. Irrefutably, the Applicant is presently not in compliance with the CMP and as such could not be issued a CDUP for a new development. In essence, any CDUA is 'premature' at this time until the Applicant is in compliance with the mandated CMP.

FCO FOF 426-451 details findings as to why **UHH-TIO FOF 189** is clearly inaccurate and false and provides an explanation as to the purpose of this CMP Management Action to ensure resource protection of Mauna Kea. It is for these same reasons that **UHH-TIO COL 137-138** are misleading and false.

Simply stated, if the Applicant is not in compliance with the mandated plans, then the proposed TMT project can't satisfy the required criteria stipulated in HAR § 13-5-30(c) for a CDUP.

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

The Applicant failed to meet the burden of proof and failed to provide reliable, probative, substantial, and credible evidence to demonstrate that the proposed TMT project can satisfy the eight criteria of HAR §13-5-30(c). Instead, reliable, probative, substantial, and credible evidence was provided during this CCH to demonstrate that this project can't satisfy these eight criteria.

1. TMT Project FAILS to Satisfy Criterion 1 of HAR § 13-5-30(c)

The TMT project distinctly doesn't meet CDUP Criterion 1, which required consistency with the purpose of the conservation district.

UHH-TIO FOF 356 -358 are clearly inaccurate and false. Conservation districts are so designated because they "contain important natural resources essential to the State's fragile natural ecosystems and the sustainability of the State's water supply[.]" HRS §183C-1. The purpose of the conservation district is to "conserve, protect, and preserve 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 (1994). Building a massive 18-story building and excavating over eight acres on the untouched, undeveloped area of the northern plateau cannot preserve or improve Mauna Kea's natural and cultural resources. Construction of huge concrete industrial centers on a conservation land and UHH's piecemeal management plans demonstrates that the TMT project is inconsistent with the purpose of the conservation district.

UHH-TIO FOF 359, 363, 365-367, 370, 384 are also clearly inaccurate and false because the Applicant can't satisfy Criterion 1 of HAR §13-5-30(c) due to the fact that it is not in compliance with the CMP and sub-plans, proposed TMT project is inconsistent with the objectives and provisions outlined in mandated plans, and TMT Management Plan is outdated and not in compliance with HAR §13-5 rules amended in 2011. See detailed discussion in previous sections. The Applicant acknowledges in the CDUA that these plans are being utilized to fulfill the purpose of the Conservation District and Criterion 1 HAR §13-5-30(c) as noted below:

The TMT Management Plan is intended to provide site-specific information and be an extension of the CMP and subplans and together (CMP, subplans and TMT Management Plan), these documents are intended to fulfill the purpose of the Conservation District concerning the TMT project. In addition to this and in conjunction with one another, these plans are intended to fulfill the requirements for the Resource subzone, specifically management plan requirements under Exhibit 3 to the Conservation District Rules. Ex. R-1 at 2-3 to 2-4, CDUA.

2. TMT Project FAILS to Satisfy Criterion 2 of HAR § 13-5-30(c)

The TMT project also doesn't meet CDUP Criterion 2, which required consistency with the objectives of the subzone.

UHH-TIO FOF 391, 393, 398, 400, 403, 404, 407, 409-414, 416 are inaccurate and false for the same reasons that the Applicant can't satisfy Criterion 1 is also why Applicant can't satisfy Criterion 2 of HAR §13-5-30(c). In particular, HAR §13-5 rules were amended in 2011 subsequent to CDUA HA-3568 being initially submitted to DLNR. However, after the Hawaii State Supreme Court invalidated this CDUA in 2015 and this CCH commenced in 2016, the application is now subjected to be reviewed in accordance with the existing version of HAR §13-5 (2011). The Applicant failed to update the TMT Management Plan according to the amended

guidelines as outlined in HAR §13-5-39 and thus the Applicant can't satisfy Criterion 2. See **FCO COL 67-68, 73-75** at 127 - 129.

3. TMT Project FAILS to Satisfy Criterion 3 of HAR § 13-5-30(c)

The TMT project doesn't meet CDUP Criterion 3, which required compliance with the provisions and guidelines in HRS chapter 205A.

UHH-TIO FOF 422-423 are inaccurate and false for the similar reasons that the TMT project can't satisfy the other criterion such as Criterion 1, 4, 5, and 6. All State agencies are required be in compliance with HRS chapter 205A and to ensure their rules comply and that they enforce the objectives and policies of this chapter. HRS § 205A-5. The TMT project can't satisfy the relevant objectives and policies such as those that pertain to historic resources and scenic and open space resources outlined in HRS chapter 205A. HRS § 205A-2. See **FCO COL 52-55** at 124 - 125.

4. TMT Project FAILS to Satisfy Criterion 4 of HAR § 13-5-30(c)

The TMT project doesn't meet CDUP Criterion 4, which required not causing substantial adverse impact to existing natural resources within the surrounding area, community, or region.

UHH-TIO FOF 435-436, 440, 443, 445-446, 448-450, 454, 464, 472-476 are inaccurate and false as the proposed TMT project would cause substantial impacts upon the natural and cultural resources upon an undeveloped cultural landscape within the Mauna Kea Summit Region Historic District.

UHH-TIO FOF 505-506, 517-520 are actually irrelevant and misleading in regards to addressing the impacts to existing historic and cultural resources. The UHH and TIO failed to provide any creditable witness or evidence to substantiate information in CDUA Section 4 Cultural Resources or to adequately address the adverse impacts of the proposed project upon the hundreds of shrines and the Mauna Kea Summit Region Historic District. As a matter of fact, UHH's witness, Archaeologist Nees, wasn't familiar with and haven't even seen the CDUA prior to this CCH. In addition, he also disclosed that most of his written direct testimony wasn't his own. Likewise, TIO's witness, Archaeologist Rechtman or his firm weren't involved with preparing any information for the CDUA. Ex. C-11. See **FCO FOF 632-638** at 86 - 87.

UHH-TIO FOF 503 affirms that the archaeological process generally consists of "contacting people with knowledge about the area". However, none of the archaeological survey, reconnaissance, or monitoring work done by Mr. Nees, Mr. Rechtman, or their firms included any consultation with Native Hawaiian cultural practitioners associated with customary

and traditional practices in the vicinity of the proposed TMT project. Ex. C-12; C-14; C-15; C-16; B.02a. See **FCO FOF 567-568, 569-570** at 78.

UHH-TIO FOF 453, 455-459, 492 are also inaccurate and false as the proposed TMT project has failed to provide actual measures to mitigate the substantial adverse impacts.

UHH-TIO FOF 256, 306, 309-311, 313, 453, 457, 579, 581, 584, 586, 775-795; COL 119, 122-125, 207, 230, 232-235, 238-242, 244-245, 255 are also inaccurate, false, and/or misleading as the proposed TMT project is not capable of mitigating its known significant visual impact based on its existing design or by the non-mitigation measures being proposed. Overall, the existing level of the cumulative visual impact from past observatory construction projects at the Kūkahauʻula summit has been considered to be substantial, significant, and adverse. The TMT project now proposes to extend that substantial, significant, and adverse visual impact to the undeveloped northern plateau.

5. TMT Project FAILS to Satisfy Criterion 5 of HAR § 13-5-30(c)

The TMT project, including its buildings, structures, facilities, and paved access way would not be compatible with the locality and surrounding areas, nor would they be appropriate to the physical conditions and capabilities of the undeveloped northern plateau, and therefore could not comply with Criterion 5.

UHH-TIO FOF 841-860 are false and misleading as the proposed TMT project for all the reasons stated below.

There are no current developments in this main part of the northern plateau, which exists as pristine open space. The northern plateau is about a half-mile from the concentration of telescopes and associated industrial buildings on Mauna Kea. This plateau is a unique natural space, treasured for its unencumbered view of Haleakalā, the opportunity to experience breathtaking silence and the inspiring interplay of light, shadow, snow and mist, its geology, and cultural significance. If built, the TMT would be the largest structure on Mauna Kea and the tallest on the island of Hawaiʻi. It would be the dominant feature on the landscape looking north from Kūkahauʻula and looking towards the summit from the hundreds of shrines on this plateau.

Also, it would be a new visual element and would be physically imposing for the communities of Waimea, Honokaʻa, Waikoloa, Kawaihae as well as the residents and visitors in the districts of Kona, Kohala, and Hamakua. UHH cannot define the “locality and surrounding areas” by presumptively nominating the summit an “astronomy precinct.” Kūkahauʻula has been,

and continues to be, sacred to Native Hawaiian cultural practitioners. The proposed 18-story, 8-acre development is incompatible with the natural, cultural, and historical character of the Mauna Kea cultural landscape, alpine desert ecosystem, and unique glacial features, and open space that still remains undeveloped on the northern plateau.

UHH-TIO FOF 750, 844, 846-847, 850, 859-860, 862-865 includes inaccurate, misstatements, and misleading findings for all the reasons stated below.

UHH-TIO attempt to knowingly misstate and mislead in their findings by vaguely defining the “summit area”³ to be inclusive of the northern plateau in order to falsely imply that

³ OCCL staff has observed that the term “summit” and “summit region” are not used with much precision in the discussions on Mauna Kea. As such, they use the following definitions in order to speak more specificity:

The **Wēkiu summit cone**, for the highest point on the mountain. This cinder cone is commonly known as Pu‘u Wēkiu, although some sources identify it as Pu‘u Kūkahau‘ula. The cone rises 13,796 ft. ASL.

The **Kūkahau‘ula summit**, for the cluster of cones and ridgelines that are above 13,385 ft. ASL, including Pu‘u Wēkiu, Pu‘u Kea, and Pu‘u Hau‘oki. Some sources present these three cones as part of one unit, Pu‘u Kūkahau‘ula. The State Historic Preservation Division identifies Kūkahau‘ula as a Traditional Cultural Property (TCP). This area has a strong association in traditional Hawaiian culture with both piko ceremonies and burial practices. The nearby Pu‘u Poli‘ahu and Puu Hau Kea also rise above 13,120 ft. ASL.

The **summit plateau**, for the alpine desert ecosystem above 12,795 ft. ASL. The slope shifts abruptly here, from approximately 27% downslope to less than 10% on the plateau. Geological evidence indicates that this broad, circular region was formed by remnant lava flows in the former caldera, and subsequently sculpted by glaciers. The plateau itself varies only approximately 330 ft. in elevation, but it is dotted with hundreds of cinder cones that rise 100 ft. to almost 600 ft. in elevation. Other significant geological features are the outcrops of hawaiite, an olivine basalt formed via the interaction of glacial ice and hot lava, and prized for adze making; the alpine Lake Waiau; and the glacial till that blankets most of the upper summit above 11,000 ft. ASL.

The **north plateau** is the portion of the plateau to the north of the summit, identified as the Great Rocky Table Summit in an 1891 government survey. This is the location of Area E, and the site of the proposed observatory.

The **lower summit region**, for the alpine shrub and grassland ecosystem above the tree line at 9,514 ft. ASL. OCCL notes that the record indicates that the tree line has shifted down-slope since the introduction of cattle.

the TMT project would be situated in an already developed area in order to be consistent with the *Kilakila ‘O Haleakalā v. Bd. of Land and Natural Resources*, 138 Hawai‘i 383, 382 P.3d 195 (2016) (“*Kilakila*”) decision. Likewise, counsel from UHH-TIO attempted to manipulate responses in the cross examination to have witnesses testify that the Astronomy Precinct is overdeveloped with existing telescopes. This is true in part as it applies to the Kūkahau‘ula summit. However, it is very obvious that other parts of the Astronomy Precinct are clearly undeveloped such as the northern plateau. It is for these reasons that these types of findings are false and misleading. Furthermore, the subdivision of the lands of Mauna Kea into the 525-acre parcel identified as the Astronomy Precinct was done by the Applicant without following legal procedures and in violation of HAR § 13-5-30(c)(7). The TMT project is not being proposed amongst the concentration of other existing telescopes on the Kūkahau‘ula summit. Instead, it’s being proposed on the undeveloped northern plateau at a significant distance and at a different elevation from the existing astronomy development as clearly demonstrated in the figures in Exhibits “C”, “D”, “E”, “F”, and “G” attached hereto.

6. TMT Project FAILS to Satisfy Criterion 6 of HAR § 13-5-30(c)

The TMT project would not preserve or improve existing physical and environmental aspects of the land, such as natural beauty and open space under Criterion 6.

UHH-TIO FOF 869-885, 887-913 includes inaccurate, misstatements, and misleading findings for all the reasons stated below.

The TMT project would destroy 8 acres of a sacred landscape to construct an 18-story structure with an extremely reflective aluminum-like coating in a pristine, undeveloped area. The northern plateau is a landscape, important for its unique geology, culturally significant snow of Poliahu, hundreds of shrines, and natural silence. These are the resources for which the conservation district was established and there are no activities described in the TMT CDUA that would improve on the natural beauty or open space of the northern plateau. Interpretation of Criterion 6 accords with the plain language of the rule and would not meet with absurd results. Under this criterion, permissible proposed actions in conservation districts could include invasive

Ex. R-7/B.70 at 4.

species removal, replanting of native species, protective fencing, or erecting culturally appropriate *ahu* or *lele*. Such actions could, in specific conservation districts, preserve or improve upon the existing physical and environmental aspects of lands that are, in the case of all conservation districts, public lands. The northern plateau is one of that last remaining open spaces and undeveloped vistas from the the Kūkahau‘ula summit as clearly demonstrated in the figures in **Exhibits “C”, “D”, “F”, and “G”** attached hereto.

Furthermore, the proposed TMT project doesn’t include any actual mitigation measures. Also, as previously noted, failure by the Applicant to follow the *2000 Master Plan Design Guidelines* would result in significant and adverse visual impacts from the proposed TMT observatory dome and structure design. See **FCO FOF 639-653, 680-711** at 94 – 99.

7. TMT Project FAILS to Satisfy Criterion 7 of HAR § 13-5-30(c)

The TMT project would result in further subdivision of land that would intensify land uses in the conservation district that is contrary to Criterion 7.

UHH-TIO FOF 915, 918, 920-922, 924-930, 932-936 includes inaccurate, misstatements, and misleading findings for all the reasons stated below.

HAR § 13-5-30(c)(7) forbids subdivision of conservation district lands undertaken to "intensify land uses." Under conservation district rules, a "subdivision" is "the division of a parcel of land into more than one parcel. HAR § 13-5-2. UHH divided "UH Managed Lands" which resulted in the concentration and intensification of astronomy development in the 525-acre Astronomy Precinct. At least eleven separate subleases for observatories further separated areas of land use within UH's Astronomy Precinct resulting in the illegal subdivision of these lands. The TMT project would be part of UHH’s de facto illegal subdivision pattern. This type of subdivision is considered a “land use” pursuant to HRS §183C-2. However, the Applicant has failed to follow proper procedures as outlined in HRS chapter 183C to create the "Astronomy Precinct" that encompasses the separate project parcels for the various different telescopes as outlined in their subleases. The TMT project constitutes an additional subdivision of the Astronomy Precinct that would further intensify this land use because it requires: (1) the laying out of the TMT project premises; (2) the laying out of the Access Way road with an easement; (3) installation of new electrical power lines and conduits on the pristine northern plateau; and

(4) a survey of the premises and easement areas through maps and legal metes and bounds descriptions.⁴ The proposed sublease for the TMT project included a survey and map, *Legal Description of Subleased Premises*, and *Legal Description of Easement Area*. See Ex. B.02f, Exhibits C-1, C-2, and C-3 to Sublease. The act of subdividing the 8.7 acres of land out of 11,288 acres for TIO's use, occupancy, and construction work is deemed to be a special form of "land use" that would further intensify the existing land uses and development on Mauna Kea. However, this aspect has not been addressed in the CDUA. The Applicant further affirms the existence of the Astronomy Precinct throughout their findings and conclusions as well as in CDUA HA-3568 and acknowledges that the Applicant never sought or obtained any proper permit for this de facto subdivision. UHH-TIO also knowingly included irrelevant and inapplicable citations to HRS § 484-1(2008) and Hawai'i County Code 23-2 (1983). See **FCO FOF 724-734; COL 50, 71**.

8. TMT Project FAILS to Satisfy Criterion 8 of HAR § 13-5-30(c)

The TMT would be materially detrimental to the public health, safety, and welfare and therefore noncompliant with Criterion 8.

UHH-TIO FOF 357-358, 378, 938-941, 943-947, 950-955, 957-967, 981-983, 992-1000 includes inaccurate, misstatements, and misleading findings for all the reasons stated below.

UHH-TIO wrongly interpreted HAR §13-5-30(c)(8) in presuming this criterion could be met through unsubstantiated economic benefits such as construction contracts, new jobs, and incoming research grants; and educational benefits.

a. Economic benefits cannot constitute "public welfare" within the context of compliance with conservation district rules. Interpreting "welfare" under Criterion 8 to mean capital investment would mean any revenue-generating enterprise, no matter how environmentally destructive, could meet this criterion while directly undermining the purpose of the conservation district. BLNR's rules do not authorize the agency to destroy conservation district resources in exchange for economic benefits. The relevant inquiry is not whether hoped-for "economic benefits" would

⁴ metes and bounds. The boundary lines of lands, with their terminating points or angles. *People v. Guthrie*, 40 111. App. 128; *Rollins v. Mooers*, 25 Me. 190. The Law Dictionary. <http://thelawdictionary.org/metes-and-bounds/>

affirm public health, safety, or welfare, but rather how the project would affect significant public resources - Mauna Kea is a wilderness cherished by the public for its reprieve and rejuvenation. Interpreting “public welfare” to mean economic benefits rendered HAR §13-5-30(c)(8) an absurdity. C.f. *Kewalo Ocean Activities v. Ching*, 124 Hawai‘i 313, 324, 243 P.3d 273, 284 (App. 2010) (“The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality.”). DLNR's "Conservation District Review Project" discussion draft (Nov. 1993) stated “[t]he concept of welfare was added [to the conservation district mission] to include the notion of aesthetics – preserving Hawaii's unique natural beauty.” The drafters of conservation district rules intended the public welfare to be served through supporting an aesthetic appreciation of nature.

b. “Educational benefits” of the TMT project have not been established and contrary evidence establishes the TMT project would be materially detrimental. UHH-TIO wrongly rely on “educational benefits” to UHH’s astronomy programs as a means of complying with Criterion 8. Keeping UHH, which has not established itself as a “Hawaiian institution,” at the forefront of astronomical research may be beneficial to the welfare of a few subdivisions of UHH, but such benefits did not overcome detrimental aspects of locating the TMT on Mauna Kea. On the contrary, educators, including those within the UH system, explained that locating the TMT on Mauna Kea would actually be detrimental to educational practices of *aloha ‘āina* and *mālama ‘āina*.

c. The TMT would be materially detrimental to the health of many Native Hawaiians and such compelling evidence was presented through the written and direct testimonies of several witnesses. The Applicant or any other party failed to provide any credible testimony or evidence to rebut or discount any of testimony or evidence regarding the TMT project’s adverse impacts upon Native Hawaiians. Because UHH-TIO failed to provide any material evidence during the CCH, instead they have attempted to discredit, mischaracterize, or misstate the testimony by asserting their conclusions into the findings without providing any citations to any evidence to substantiate their arguments. In addition, during the public hearing for this project, many members of the public attested to stress, grief, and constraints on cultural practices – all of which entail health impacts. When desecration occurs, native people are impacted and are often not able to continue their cultural practices. This in turns affects their cultural identity, and causes the connection between the sacred space and the people to become disrupted. When this link is strained or broken, health is affected. By not being able to fulfill stewardship/covenant it breaks or harms that connection/relationship. Telescope development on Mauna Kea has come at a significant cost to the cultural practices of the Hawaiian people. The TMT would be materially detrimental to the public's health, safety, and welfare and did not comply with Criterion 8.

D. CDUA HA-3568 is Deficient

CDUA HA-3568 is deficient for several reasons as already noted in the previously filed Flore-Case ‘Ohana’s findings and conclusions. Thus, the Flore-Case ‘Ohana is only responding to a few examples of blatant inaccuracies pertaining to deficiencies that were noted in UHH-TIO’s findings and conclusions.

Despite the matter of TMT Corporation transitioning into TIO being disclosed by TIO's witnesses Mr. Stone and Mr. Sanders, UHH and TIO have failed to produce any legal documentation that verifies that TIO would assume the commitments and liabilities set forth in the CDUA which can't be simply implied by an ex-officio member or employee. Any legal commitments would have to be formally voted upon and approved by TIO's Board of Governors.

If and when that occurs, then CDUA HA-3568 would need to be revised and updated to reflect these changes. Then the UH BOR would need to approve any such changes to CDUA HA-3568 as stipulated in the CMP. Ex. B.28 at 6-5, 7-55 to 7-56.

UHH-TIO COL 424 affirms that "it is the **undisputed** that TMT Corporation and TIO are **different legal entities**". (Emphasis added.) TIO's witness Mr. Fred Stone made certain conflicting representations in his testimony regarding the matters of which legal entity would be assuming which aspects of the project as he interchanges the roles between both the TMT Corporation and TIO. Ex. C-1 at 2.

UHH-TIO COL 420 is correct as stated. However, **UHH-TIO COL 424-426** are inaccurate, and/or misleading since TMT Observatory and TIO are totally different legal entities that do affect the validity of the outdated CDUA. TIO failed to produce any legal documentation that verifies that TIO's Board of Governors would assume the commitments and liabilities set forth in the CDUA.

CDUA HA-3568 is also deficient as Sect. 4 Cultural Resources failed to properly assess the project impacts upon the Mauna Kea Summit Region Historic District ("MKS RHD"), Traditional Cultural Properties ("TCP"), various historic and cultural properties, and Native Hawaiian traditional customary practices and rights. In addition, this section included inaccurate information and manipulated Figures. Likewise, the CDUA omitted consultation with Native Hawaiian cultural practitioners. Also, analysis and data in the CDUA relied upon draft or non-existence documents. The Applicant or any other party failed to provide any creditable witness or evidence in the CCH to substantiate information in Sect. 4 Cultural Resources. See FCO COL 101-105.

UHH-TIO FOF 522-523, 527, 529-532, 534-539, 579 make references to the Mauna Kea Summit Region Historic District and/or Traditional Cultural Properties associated with the lands

of Mauna Kea. However, the CDUA Sect. 4 Cultural Resources and Archaeological Inventory Surveys (“AIS”) done for the MKSR and AP by Pacific Consulting Services, Inc. (“PCSI”) have omitted any impact assessments of the proposed TMT project upon the MKSRHD and TCPs within this region. The Applicant or any other party failed to provide any creditable witness associated with PCSI to substantiate the completeness and accurateness of the information in Sect. 4 Cultural Resources of the CDUA. See **FCO FOF 330-334, 540-572, 633-638**.

UHH-TIO FOF 441, 580, 621, 623, 684-685 reaffirms that analysis and data in CDUA HA-3568 relied upon draft or non-existence documents. See **FCO FOF 531-539**.

UHH-TIO FOF 542-558, 561-564, 571-572, 577-578 are inaccurate or misleading as the CDUA Sect. 4 Cultural Resources failed to properly assess project impacts upon the historic and cultural properties. Likewise, the CDUA and the archaeological survey work done in the vicinity of the proposed TMT project omitted consultation with Native Hawaiian cultural practitioners to properly identify these historic and cultural properties. See **FCO FOF 573-621, 633-638**.

UHH-TIO FOF 560 is another example of UHH-TIO attempting to insert inaccurate or misleading information into the record. The CDUA is deficient as pointed out by Prof. Flores, Dr. Mills, Dr. Abad, and Ms. Aloua in both written and oral testimony as it pertains to the proper assessment of the historic properties and cultural resources with the Mauna Kea Summit Region Historic District. These assessments are required and are directly tied to CDUA Criterion 1,2,3,4 and 5. UHH-TIO is now attempting to assert that they “*are not part of the CDUA criteria*”. Yet, UHH-TIO or any other party failed to provide any creditable witness or evidence to substantiate these arguments. As previously noted, the AISs done by PCSI for the MKSR and AP omitted any impact assessments of the proposed TMT project because these were not project specific to the TMT. The AIS for the TMT project done by Cultural Surveys Hawai‘i, Inc. (“CSHI”) was only in Draft form when it was included in the FEIS. Also, CSHI wasn’t the archaeological firm contracted to contribute information to CDUA HA-3568. That was done by PCSI. Most noteworthy, the Applicant or any other party failed to provide any witness in this CCH associated with Cultural Surveys Hawai‘i, Inc. to substantiate the TMT site specific archaeological survey, report, and findings. In fact, the Applicant even failed to submit into evidence the Final AIS done by CSHI. Furthermore, the Applicant or any other party failed to provide any creditable witness associated with PCSI to substantiate the completeness and accurateness of the information in Sect. 4 Cultural Resources of the CDUA. Ex. B.02a. See **FCO FOF 330-334, 540-638**.

UHH-TIO FOF 602-610 are yet other examples of UHH-TIO attempting to insert inaccurate or misleading information into the record.

UHH-TIO FOF 571 is incomplete and inaccurate as CDUA Sect. 4 Cultural Resources included inaccurate and manipulated information. Upon closer examination of CDUA Figure 4.1 (p. 4-2)

when compared to Figure 5.17 (Ex. A-55 at 5-59 AIS, Vol. 1.), both attributed to PSCI, as well as Figure 2.9 (Ex. B.40 at 2-52, CMP CRMP.), it is very apparent that information in CDUA Figure 4.1 has been manipulated and altered to downplay and reduce the significance of historic properties and cultural resources within the vicinity of the proposed location of the TMT. See **Exhibits “H” and “I”** attached hereto. As previously noted, the Applicant or any other party failed to provide any creditable witness associated with PCSI to substantiate the completeness and accurateness of the information in Sect. 4 Cultural Resources of the CDUA. See **FCO FOF 622-631**.

E. Failure to Protect to Native Hawaiian Customary and Traditional Practices and Rights

The Hawai‘i State Constitution and subsequent court rulings hold the State to a high standard when it comes to protecting the public trust and traditional and customary practices and rights of Native Hawaiian cultural practitioners. The BLNR has not met this obligation, and in fact has authorized, tacitly and implicitly, the improper infringement of constitutionally protected rights reasonably exercised in the Mauna Kea Conservation District, including but not limited to access to trails, view planes, subsistence gathering, and spiritual, religious, and cultural practices connected to Mauna Kea. Likewise, UHH also violated these protected rights and the public trust doctrine in these past several decades with its mismanagement and overdevelopment of the culturally and environmentally significant public lands of Mauna Kea. If built, the TMT project would further contribute to the ongoing violations of the public trust doctrine and Native Hawaiian traditional and customary practices and rights.

In order for the proposed land use to be termed consistent with Article XII, Section 7 of the Hawai‘i State Constitution and *Ka Pa‘akai O Ka‘Aina v. Land Use Comm’n. State of Hawai‘i*, 94 Hawai‘i 31, 7 P.3d. 1068 (2000), the State agency DLNR and BLNR as its executive board are “obligated to make an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians” and to determine the actions to be taken to protect such native Hawaiian rights. Since DLNR and BLNR has failed the fundamental first step to conduct any such *Ka Pa‘akai* assessment or analysis, the DLNR/BLNR is incapable of fulfilling their constitutional obligations to

protect Native Hawaiian customary and traditional practices and rights associated with Mauna Kea.

UHH-TIO COL 110-111, 325-326 are incomplete for leaving out significant portions of the *Ka Pa‘akai* decision. In particular, UHH-TIO omitted the reference, “agencies are obligated to make an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians”. See **FCO COL 32-34** at 118 – 119. See **FCO COL 180-191** at 143 – 144.

In the *Ka Pa‘akai* decision, the Hawaii Supreme Court articulated an analytical framework for the State’s obligation to protect Native Hawaiian traditional and customary rights. The court ruled:

- (1) the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;
- (2) agencies are obligated to make an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians; and
- (3) the independent assessment must include the three factors (A, B, and C) listed below, otherwise known as the “*Ka Pa‘akai* framework.”
 - A) the identity and scope if “valued cultural, historical, or natural resources” in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
 - B) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and
 - C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa'akai, 94 Hawai'i at 47,7 P.3d at 1084 (footnotes omitted).

It’s very apparent that UHH-TIO omitted this particular key reference because as it was disclosed during this CCH by Mr. Samuel Lemmo, OCCL Administrator, that the State agency DLNR and BLNR as its executive board, had not conducted “an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians” associated with the lands of Mauna Kea. Mr. Lemmo testified that OCCL-DLNR didn’t have the resources, time, or staffing to complete an independent analysis as stipulated in the *Ka Pa‘akai* decision. See **FCO FOF 502-508** at 70 – 71.

Mr. Lemmo testified that when preparing a staff report on a CDUP application, he informed his OCCL staff that “when you’re looking at the *Ka Paakai* analysis, that you can’t just take what the applicant says verbatim and cut and paste it and place it into your staff report,” Tr. 2/27/17, V.41 at 253. See **FCO FOF 502** at 70. However, it’s very apparent that the brief and abbreviated discuss about Cultural Practices and Historic Resources that was included in OCCL’s Staff Report (dated February 25, 2011 that was submitted to BLNR for consideration regarding CDUA HA-3568) was taken directly out from the Applicant’s own documents including, but not limited to CDUA HA-3568 and *2000 Master Plan*. Not only is this two-page analysis inadequate in identifying those resources - including traditional and customary native Hawaiian rights – that will be affected or impaired by the proposed action, but the actions OCCL proposed to protect native Hawaiian rights were taken directly from the Applicant’s list of proposed mitigation actions. Ex. R-7/B.70 at 50 – 52; Ex. R-1; Ex. B.37.

Mr. Lemmo further testified that OCCL cannot rely solely on information from the applicant to determine whether or not Native Hawaiian values, interests, and beliefs have been assessed and considered and whether mitigation measures have been imposed that reduce impacts to those values and interests. Tr. 2/27/17, V.41 at 254. See **FCO FOF 504** at 70.

UHH-TIO COL 336, 348, 353, 383 are inaccurate and false based upon the findings and conclusions stated above.

UHH-TIO COL 112, 339 are inaccurate and false and is based upon an unfounded conclusion. UHH-TIO attempt to assert this fabricated conclusion due to DLNR and BLNR’s failure to complete an independent analysis as noted above.

The Applicant is also incapable of fulfilling their constitutional obligations to protect Native Hawaiian customary and traditional practices and rights associated with Mauna Kea. The Applicant has failed to implement significant CMP management actions to protect the natural and cultural resources. UHH-TIO inserted inaccurate, false, and misleading information into their findings and conclusions in order dismiss these obligations.

Instead of trying to identify and protect Native Hawaiian customary and traditional practices and rights associated with Mauna Kea, the Applicant has executed several actions

to exclude or discount these practices and rights. In addition, OMKM personnel have even gone to extreme efforts to destroy and desecrate cultural resources associated with Native Hawaiian customary and traditional practices.

UHH-TIO FOF 764, 772 are examples of UHH-TIO attempting to insert inaccurate and misleading information in the record regarding those significant impacts upon Native Hawaiian customary and traditional practices that would result from the proposed TMT project. Ms. Pualani Case stated that by building the TMT, the area in its pristine form would be no more and that cultural practitioners would not be able to recite and perform the hula traditions there because of the overwhelming sense of despair and guilt that they would be consumed with. It would be akin to forfeiting her right to be there if she is unsuccessful in protecting the mountain and she would not be able to return there to chant, dance and sing in the same manner and would not be able to pray in the way that they had been led to do. Ex.B.21a at 5. Ms. Case's customary and tradition practices on the northern plateau are clearly cited in her WDT as such, "At this time I have consistent traditional practices connected to the entire mountain, including the northern plateau." Ex. B.21a at 4. Ms. Case also testified in her WDT in regards to formal ceremonies on the *pu'u* of Waimea and on Mauna Kea and described the adverse impact of the building of the 18-story TMT observatory, "We would not be able to pray in the way that we have been led to do. A connection would be lost between the ancestral realm and the human realm. Information shared between us, knowledge passed down ancestrally would be lost. Interaction between the mountain and the human would be diminished like a loss of a family member and the death of a way of life." Ex. B.21a at 5. In addition to asserting inaccurate and misleading information, UHH-TIO has omitted information from Ms. Case's WDT and therefore the information was not been fully considered and given the appropriate weight in these findings even though Case has been identified as a cultural practitioner associated with Mauna Kea.

UHH-TIO FOF 378, 512-513, 618, 639, 655, 672, 700, 723, 727; COL 201, 335, 338, 341, 346, 383 are examples of UHH-TIO attempting to mispresent information in the record. In order to avoid the Applicant's obligation to protect Native Hawaiian customary and traditional practices and rights, UHH-TIO are falsely labeling such practices as being "contemporary".

UHH-TIO FOF 511-513, 516, 528, 551, 553, 555, 557, 597; COL 384 are additional examples of UHH-TIO attempting to discount the significance of "find spots" by falsely referring to all of them as being "modern" or by discounting their association with Native Hawaiian customary and traditional practices and rights. "Find spots" are cultural resources which need to be considered in developing appropriate management strategies. A total of 339 cultural resources ("find spots") were recorded in the Mauna Kea Science Reserve ("MKSR"). Only about 16 of these find spots recorded in the MKSR have been identified as potentially being modern features. The functions of over 65 of these find spots are listed as *Unknown* and the vast majority (over 250) are listed as *Markers* recorded in the MKSR. It is highly likely that some of these are actually

historic properties, but to demonstrate this would require a more detailed analysis of their morphology and location. See **FCO FOF 310-321**.

UHH-TIO COL 346 is inaccurate and false as substantial material evidence has been presented during this CCH to substantiate that Native Hawaiian traditional and customary practices occurred on the northern plateau and in the vicinity and location of the proposed TMT site. The MKSR AIS identified hundreds of shrines and other cultural sites on the northern plateau that are associated with Native Hawaiian practices predating 1892. Several of these sites (SIHP Site Nos. 16169 and 21447 along with other cultural resources referred to as “find spots” Nos. 1997.034, 2005.05, 2005.06, 2000.7, & 2005.08) that were identified within the Astronomy Precinct and within the vicinity of the proposed TMT project area in a 2005 and earlier surveys.. These cultural sites affirm they were located prior to the selection of this site for the TMT project. See **FCO FOF 577**.

UHH-TIO FOF 669 demonstrates UHH-TIO’s lack of understanding about Native Hawaiian culture and traditions associated with Mauna Kea by distorting and inserting misleading information into the record. The comment by Ms. Ku‘ulei Kanahele regarding water from Wao Kanaka region not being brought to the Wao Akua region on Mauna Kea is actually correct in certain cases. Likewise, Ms. Case bringing sacred water from elsewhere to Lake Waiau is actually appropriate. It all depends upon certain protocols, the source of the water, and the purpose for the bringing the water into this region. According to Mo‘oinanea, “Kahuna would also go for their chief to gather water from the lake as an offering for chiefs or places they travel to. First, they would have to state why they wanted to collect this water and their purpose for it. They also needed to state how much water was needed. Then a *la‘i* (ti-leaf) was put on the lake. If permission was granted *la‘i* floats. If not, *la‘i* sinks. If an exchange of water from the same island, a *la‘i* was not needed. If from another island, than a *la‘i* was needed. One needed to state where the water was from first. If there was an exchange of water and permission was granted, one would collect water first and then pour their water in afterwards.” B.21a at 3.

UHH-TIO FOF 507-509 are inaccurate and misleading as the TMT project has received federal funds from the National Science Foundation and it might be needing additional federal funds in the future to complete the project and thus should be required to complete the NEPA and NHPA Section 106 consultation process.

F. UHH-TIO’s Mischaracterization, Misleading, and False Comments re Witnesses

As a result of UHH-TIO failing to provide any material evidence during the CCH to rebut or discount the testimony of witnesses of other parties, they have attempted to discredit, mischaracterize, or mislead the testimony by asserting statements without

providing any citations to any material evidence or credible testimony to substantiate their arguments. As previously noted, because it's practically impossible for any *pro se* party within the short period of time to provide a detailed refutation of UHH-TIO's most egregious and significant misstatements, the Flores-Case 'Ohana was only able to address a few examples that pertained to witnesses who testified on its behalf.

UHH-TIO FOF 216, 751 is another example of UHH-TIO knowingly inserting inaccurate and false information into the record. This finding states, "*Though Flores was sent information about consultation, he did not respond or otherwise participate in that process.*" Tr. 1/30/17 at 222:3-22; Ex. A-131. This statement is absolutely false. It clearly shows in the copy of the string of emails, submitted by UHH as Exhibit A-131, that Prof. Flores responded on April 13, 2009 to Mishalla Spearing's email as such "Yes, I would like to comment on the project." Also, Prof. Flores also responded on April 17, 2009 to another email sent by Ms. Spearing as such, "I would prefer to submit a written statement. Do you happen to have a complete copy of the scope of this project? The previous email only included diagrams." Exhibit A-131 verifies that Prof. Flores did respond at least twice. However, if there was no scope of the project sent to him as noted, how would he have been able to participate in this consultation process? UHH provided no other evidence that Ms. Spearing ever sent the requested scope of the project to Prof. Flores. What Exhibit A-131 demonstrates instead is that the CIA consultation process was flawed and inadequate in this case as Prof. Flores was willing to participate.

UHH-TIO FOF 235-236 are additional examples of UHH-TIO knowingly inserting inaccurate, false, and misleading information into the record. Firstly, it asserts "*University's and TIO's substantial efforts to consult with practitioners and others on an ongoing basis*". Firstly, TIO has not conducted any consultation with cultural practitioners or provided any evidence to this effect. Likewise, UHH has failed to provide any evidence that they have actually made substantial efforts to consult with cultural practitioners on an ongoing basis. Instead, Ms. Stephanie Nagata, OMKM Director, testified that the OMKM has not yet finalized such a list of individuals, families, organizations, or Native Hawaiian cultural practitioner despite this action item being identified with the priority of High to Medium. Tr. 12/12/16 vol 18 at 120 – 127. See **FCO FOF 475-476**. How can the University, represented by OMKM in these matters, conduct any consultations when they haven't even finalized a list to contact cultural practitioners? Since substantial efforts to consult with cultural practitioners wasn't previously done, UHH-TIO are now erroneously implying that this CCH proceeding constitutes as consultation. This is further disturbing if both of these entities lack the understanding of the process associated with proper consultation. Also, the reference to "boycotting" the University's open houses on the EISPN was misleading and inaccurate as these events didn't pertain to cultural practitioner consultation. The Facebook post really pertained to "PROTESTING A FAKE EIS PROCESS":

To be clear we are NOT protesting the environmental review process. We are protesting the ways UH is misusing this process to manufacture a veneer of community consent to projects (like the TMT) that they have no intention of stopping on their own. The EIS Process is meant to inform decision makers so they can make an informed decision.

The BLNR knew about the NEGATIVE impacts of astronomy development

on Mauna Kea. Prior EIS documents, from UH, NASA, and TMT, informed them of the negative and significant impacts that the TMT project would have on Mauna Kea and the people. Unfortunately, BLNR rubber stamped the project anyway--a clear indication of the level of political corruption that has come to define Hawai'i today. Exhibit A-129 at 2.

UHH-TIO FOF 233 distorts and mischaracterized the testimony of Dr. Manulani Meyer and attempt to portray it as “personal bias”. Dr Meyer testimony is not personal bias, but instead based on her expertise with 30+ years as a cultural practitioner of ho‘oponopono [healing process through ritualized communication], and a scholar-practitioner of Hawaiian knowledge working as a Wilderness Instructor and Outdoor Educator for 20+ years, and as a Professor of Education for 15+ years. Her work is in the field of Indigenous Epistemology or Philosophy of Knowledge as it applies to world-wide awakening within systems [ie: education, economics, evaluation, prison reform, health]. Meyer testified in her WDT, “ I am writing this testimony through the trilogy of what is now known as Holographic Epistemology within Indigenous scholarship and philosophy. Here is how we critique the “One-Truth Epistemology” – [aka: “There is only one way to see the world and it is through belief structures shaped by European, WASP and the commodification of land, time and people.”] - within academia, society and science.” WDT Ex. B.05a at 1.

UHH-TIO FOF 327 includes citations that don’t support the proposed findings for Dr. Ku Kahakalau. Firstly, citation Tr. 3/1/17 at 97:23-103:22 is inaccurate as Dr. Kahakalau testified on 1/9/17. In addition, citation Tr. 1/9/17 at 116:22-117:6 is also inaccurate as it doesn’t include any reference to comments about the Cultural and Natural Resources Training Program.

UHH-TIO FOF 327 also distorts and mischaracterized the testimony Dr. Kahakalau and attempt to portray it as “personal bias”. Dr. Kahakalau’s testimony is not personal bias, but instead based on her expertise as a native Hawaiian educator, researcher, scholar, composer and recognized expert in Hawaiian language and culture with over 30 years of experience teaching language, history and cultural studies to learners of all ages and levels, in and outside of the classroom. Ex. B.06 at 1. Her cultural perspective does not support the construction of the TMT on Mauna Kea based upon the value of *aloha ‘āina* and mālama ‘āina, a way of life taught to her by her *‘ohana* and shared by all of her *kūpuna* mentors from Ni’ihau to Ka’ū.” In addition, her testimony cited religion and spiritual practices that are land based tied to sacred places and responsibility to love, protect and take care which applies to an even greater extend to *‘āina* designated as “special” by our *kūpuna* referring to Mauna Kea. Ex. B.06a at 2.

UHH-TIO FOF 698, COL 381 again distorts and mischaracterized the testimony of Dr. Kahakalau regarding who should go to summit of Mauna Kea. She actually stated, “I definitely don't think it's a place for everybody to go and worship. I do believe that it's a place for some

people to go and worship, and if that is your tradition and your practice, then that's what you need to do.” Tr. 1/9/17 at 104:1133-11:34.

UHH-TIO FOF 566 distorts and mischaracterized the testimony of Ms. Diana LaRose, a Canadian Cree traditional native healing practitioner for over 25 years who has demonstrated her indigenous knowledge, insight, and abilities. These aspects are not based upon “subjective feelings” or “speculation” as asserted in this finding. Ms. LaRose affirmed that she has had this gift all of my life and it has been proven accurate. She also testified that she has a very good, high accuracy rate with many different groups of people from different countries and cultures. In addition, she stated that “she has over 95 percent accuracy rate, confirmed by psychologists, by doctors, by other people and other experiences.” Ex. B.25a. at 1. Tr. 1/19/17 at 204, 240. Ms. LaRose did testify that she noted burials in the summit area, but didn’t attempt to pinpoint the actual locations because she wasn’t asked to do so. She has also located identified cultural sites on the northern plateau in the vicinity of the proposed TMT project that were missed and not identified in any of the archaeological inventory surveys. Ex. B.25a. at 1 – 2. Tr. 1/19/17 at 204-205, 214-216, 238-240

UHH-TIO FOF 635 misstates Prof. Flores’ testimony as he didn’t state “that not all religious practices are spiritual and cultural”. Tr. 1/30/17 at 234:9-19. Therefore, this finding is unsupported by this citation.

UHH-TIO FOF 750 is another example of UHH-TIO knowingly inserting inaccurate and false information into the record by misstating that Prof. Flores stated “that he was able to continue these practices despite this development” of the Astronomy Precinct. Tr. 1/30/17 at 234:5-8. Therefore, this finding is unsupported by this citation.

UHH-TIO FOF 751 mischaracterizes Prof. Flores’ experience, expertise, and knowledge. As noted in his WDT and Vitae, he has served for over 30 years on commissions, committees, and boards that included the review of archaeological surveys, mitigation plans, technical reports, and other similar types of documents.⁵ Prof. Flores also has extensive experience and knowledge in the review and assessment of reports and documents. Ex. B.02a at 1; B.02b.

UHH-TIO FOF 753 misstates and mischaracterizes Prof. Flores’ testimony by attempting to dismiss his cultural practices. As noted in his WDT, he provides evidence of his cultural practices connected to Mauna Kea. Ex. B.02a at 1, 24-25.

⁵ [see Exhibit B.02b Vitae for complete listing] served on Hawai‘i County Public Access, Open Space, & Natural Resources Preservation Commission (5 yrs); Kaua‘i County Historic Preservation Review Commission (6 yrs); OHA - Native Hawaiian Historic Preservation Council (10 yrs); Bishop Museum Native Hawaiian Culture & Arts Program (7 yrs)

UHH-TIO FOF 754 is another example of UHH-TIO misstating and mischaracterizing Prof. Flores' testimony. As previously noted, the Applicant and contracted archaeological firms' failure to adequately consult with Native Hawaiian cultural practitioners associated with Mauna Kea is the reason that UHH-TIO contrive absurd conclusions and inaccurate statements about the functions and significance of the cultural sites on the northern plateau and in the vicinity of the proposed TMT site. Ex. B.02a at 14, 19, 24, 26-27.

UHH-TIO FOF 675 misstates and mischaracterizes Dr. Kahakalau's testimony on the burials and associated plans. Therefore, this finding is unsupported by this citation.

UHH-TIO FOF 760 incorrectly stated that Dr. Taualii was a witness for the Flores-Case 'Ohana. She was actually a witness for KAHEA.

UHH-TIO FOF 603 is inaccurate, misleading and mischaracterizes the testimony of Ms. Hawane Rios. This finding attempts to discredit Ms. Rios by implying that her ability to use *'ike kupuna* to connect and receive information is "alleged". It has been well established by Mary Kawena Pukui, noted scholar, educator, dancer, and composer, that *'ike kupuna* could be received through individuals termed "*haka*", an individual chosen by the spirit, or spirits, to serve as a "speaking-mouth." It is said that in the old days there was no lineage, or *'ohana*, which did not have someone who served as a channel of communication. There are several kinds of "possession" (*noho*), in which gods (*akua*) or guardian spirits (*'aumakua*) speak to the family through the *haka*. There is also another type of mediumship known as *noho* or dwelling. Ex. B.21c at 1 - 2. Ms. Rios also testified that through her abilities as a *haka*, it has been shared that the *ahu* within the vicinity of the proposed TMT site and on the northern plateau are directly connected to the ancestral beings who delivered the message and that these shrines and sites are interconnected. The proposed TMT site would cause destruction to some of these sites. If the TMT were to be built, there the interconnectedness of the *ahu* to our ceremony would be severed. Tr. 2/5/17 at 152 – 153.

UHH-TIO FOF 602 contains numerous inaccuracies that are discussed in point below. Firstly, it is stated that Ms. Ruth Aloua "*lacks the requisite historical practice and expertise as a credible scientific expert.*" With the first point, "*historical practice*," this term that is not defined nor justified in relation to Ms. Aloua's experiences. Secondly, as demonstrated in her CV, Ms. Aloua has a Bachelor of Arts Degree in Anthropology and her Bachelor of Arts in Archaeology qualifying her as a scientific expert in the fields of Anthropology and Archaeology. This finding goes on to argue that Ms. Aloua did not review a few documents in-depth, therefore, issues noted in her direct testimony should be disqualified. Ms. Aloua's familiarity to listed documents is irrelevant because the issues raised by Ms. Aloua have relevancy beyond these particular documents. To assume a position to disqualify her testimony is unsupported in this finding. For example, Ms. Aloua raises concerns regarding how the TMT project did not take into account the

impacts to the Mauna Kea Summit Region Historic District. In the transcripts, while being questioned, UHH counsel stated that Table 2.1 on Page 2-11 in the CDUA assessed impacts to historic properties. While the table might support this statement, it does not, however, assess the TMT project's impact to the Mauna Kea Summit Region Historic District as a whole; this issue remains. Tr. 2/15/17 at 68:12-17. Furthermore, issues regarding the lack of the TMT projects consultation with cultural practitioners is demonstrated through problems with conclusions made in the AIS regarding "CSH 1" and "CSH 2". Her testimony states that there was a lack of consultation with Native Hawaiian cultural practitioners by SHPD staff and Dr. Pat McCoy regarding conclusions made in the AIS. This issue is demonstrated in the AIS because it doesn't reference any cultural practitioners who were consulted before conclusions were made. In her opinion, by not adequately consulting cultural practitioners, these sites were not determined to be historic properties and could then be conveniently bulldozed so that the TMT project could continue. Additionally, the final report for the AIS was not a part of the CDUA. Tr. 2/15/17 at 105:15-25; 106:1-21; 110:11-16; 114:18-22.

UHH-TIO FOF 218 misrepresents the contents of the record. Though Ms. Aloua clearly stated she also stated in her testimony that there was a lack of consultation with Native Hawaiians cultural practitioners by SHPD staff and Dr. Pat McCoy regarding conclusions made in the AIS. This report did not state that discussions with cultural practitioners took place before conclusions were made. Tr. 2/15/17 at 105:15-25, 106:1-21.

UHH-TIO FOF 376 inaccurately represents the contents of the record. Ms. Aloua did not testify that the TMT project should not be placed in any part of the summit area of Mauna Kea or the Astronomy Precinct because it is a sacred site according to her beliefs.

UHH-TIO FOF 1013 incorrectly stated that Attorney Frankel, as a former attorney for the Native Hawaiian Legal Corporation, he had represented Flores in other matters. In fact, it was clearly stated in the redirect of his testimony that he had not represented Prof. Flores. Tr. 1/11/17 at 52.

UHH-TIO COL 360 mischaracterizes and misstates that the "*Petitioners and Opposing Intervenors claim broadly that, in essence, their beliefs should give them veto power over any proposed land use on Mauna Kea.*" This is absolutely false. What the Flores-Case 'Ohana and other cultural practitioners have asserted is that their constitutionally protected Native Hawaiian traditional and customary practices and rights associated with Mauna Kea have been systematically ignored, adversely impacted, and violated with the mismanagement of astronomy development.

UHH-TIO COL 382 mischaracterizes and misstates in the same manner as noted above in COL 360.

UHH-TIO COL 379-380, 382 mischaracterizes and misstates these conclusion by redefining Native Hawaiian cultural practices as being specifically “*religious beliefs*”. Furthermore, UHH-TIO imply that certain witnesses referred to these cultural practices as “*religious beliefs*”. However, the citations don’t support these proposed conclusions and the use of this reference “*religious beliefs*” is not found anywhere in these citations.

UHH-TIO COL 376 mischaracterizes and misstates this conclusion in reference to Prof. Flores’ testimony.

G. Other Incongruities in UHH-TIO’s Document

As previously noted, because it’s practically impossible for any *pro se* party within the short period of time to provide a detailed refutation of UHH-TIO’s most egregious and significant misstatements, the Flores-Case ‘Ohana was only able to address a few examples of incongruousness findings and conclusions in UHH-TIO’s document.

UHH-TIO FOF 340-343 are irrelevant and inapplicable to this CCH since OCCL’s conclusions and recommendations as well as the OCCL Administrator’s opinion are based upon the OCCL Staff Report that was compiled and submitted to BLNR on Feb. 25, 2011 prior to holding a CCH. It is for this very particular reason that the Hawaii Supreme Court issued its decision in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai’i 376, 363 P.3d 224 (2015) that invalidated CDUP HA-3568 in the first place. Also, due to the spoliation of evidence in regards to the OCCL Staff Report, Exhibit R-7, and that the Applicant’s Exhibit A-7 is actually a draft copy of the OCCL Staff Report, it’s more so why these findings should be disregarded.

UHH-TIO FOF 96 affirms that TIO presented the following witnesses: Professor David Callies (“Callies”), Naea Stevens (“Stevens”), Dr. Ed Stone (“Stone”), Robert Rechtman (“Rechtman”), Dr. Sanders (“Sanders”), Dr. Heather Kaluna (“Kaluna”), and Dr. Paul Coleman (“Coleman”). As such, the testimony of witnesses Stevens, Kaluna, and Coleman shouldn’t be given any significant weight due to their outmost bias as employees of the Applicant who are directly employed in astronomy related positions that would directly or indirectly benefit from this project. Likewise, because the testimony of witness Callies offered irrelevant legal opinions and due to his bias in these matters, his testimony shouldn’t be given any significant weight.

UHH-TIO FOF 643, 648,659, 662, 665, 668, 683, 699, 709, 749, 790; COL 345 are inaccurate and/or misleading as the testimony provided by Coleman, Kaluna, and Stevens lacked any creditability in the areas pertaining to Native Hawaiian cultural traditions and practices, separate from their own practices, as this information was notably beyond their areas of knowledge and

expertise. Much of their statements and opinions regarding cultural traditions and practices connected to Mauna Kea contradicted the University's own primary documents (i.e. 2000 Master Plan, CMP, etc.) pertaining to Native Hawaiian traditional and customary practices on Mauna Kea.

UHH-TIO FOF 93 affirms that UHH presented the following witnesses: Perry White ("White"), James Hayes ("Hayes"), Dr. Günther Hasinger ("Hasinger"), Chad Baybayan ("Baybayan"), Dr. Robert McLaren ("McLaren"), Wallace Ishibashi ("Ishibashi"), Dr. Clifford Smith ("Smith"), Hon. Walter Heen ("Heen"), Fritz Klasner ("Klasner"), Richard Nees ("Nees"), Stephanie Nagata ("Nagata"), and Tom Nance ("Nance"). As noted in the FCO FOF/COL, other Petitioner's FOF/COL as well as in this filing, some of the testimony of UHH's witnesses were lacking creditability and/or were immaterial and irrelevant to the core issues set forth in Minute Order No. 19.

UHH-TIO FOF 222, 642-643, 649, 651-653, 708-710, 713-714, 721, 856 demonstrates that UHH witnesses Ishibashi and Baybayan have an extreme bias and that their testimony shouldn't be given any significant weight due to their outmost bias as employees of the Applicant who are or were directly employed in positions and programs (i.e. OMKM, Imiloa Astronomy Center, UHH) that have directly received funds and are anticipated to receive additional funds from funders of the TMT project. Both of these individuals have testified at the first CCH and other hearings on behalf of the Applicant to support this project. In addition, testimony of these witnesses were lacking creditability and/or were immaterial and irrelevant to the core issues set forth in Minute Order No. 19.

UHH-TIO FOF 11, 104 affirms that Perpetuating Unique Educational Opportunities, Inc. "P.U.E.O." presented its witnesses, Keahi Warfield ("Warfield"), Richard Ha ("R. Ha"), Elroy Osorio ("E. Osorio"), and William Brown ("Brown") on February 15, 2017 and February 21, 2017 and that they were represented by the law firm of by Torkildson, Katz, Moore, Hetherington & Harris. Yet, the counsel of P.U.E.O. failed to submit any findings of fact, conclusions of law, or decision order pursuant to Minute Order No. 43. Failure to submit any findings and conclusions to substantiate its positions, testimony of its witnesses shouldn't be given any significant weight. In addition, the testimony of P.U.E.O.'s witnesses were immaterial and irrelevant to the core issues set forth in Minute Order No. 19.

III. OTHERS MATTERS

During the CCH there was an undisputed case of spoliation of evidence by OCCL Staff that effected the integrity of this administrative hearing and the Hearing Officer failed to provide any disclosure on the matter. This was referenced in the Motions filed by the Flores-Case ‘Ohana in Docs. No. 577 and 623. Since there wasn’t any response to this matter. The Flores-Case ‘Ohana filed another *Motion for Full Disclosure Re Spoliation of Evidence* [Doc. No. 676] on June 2, 2017. Failure to have previously addressed this issue in a timely manner has now further tainted and corrupted the due process of parties such as the Flores-Case ‘Ohana in this proceeding and have also impacted the filings of findings of facts, conclusions of law, and decision orders. This procedural error is further compounded when parties have referenced these exhibits in their findings of fact and these are not the accurate and true copies as originally filed with OCCL-DLNR and are not what was posted online in the Evidentiary Hearing Submittals. In UHH and TIO’s Joint [Proposed] Findings of Facts, Conclusions of Law, and Decision Order, it’s noted that their counsel explicitly references this Exhibit R-7 and testimony associated with the originally filed OCCL Staff Report in their findings of fact and citations under the heading, “THE OCCL REPORT RECOMMENDS APPROVAL OF CDUA” (UHH-TIO FOF 340-343 at 56).

The Flores-Case ‘Ohana as well as others have been prejudiced in these proceedings by the time frames set forth in Minute Orders and other procedural irregularities during this hearing. Although, we were required to submit our findings of facts, conclusions of law, and decision order by May 30, 2017, numerous Minute Orders have been issued by the Hearing Officer and motions filed by parties/intervenors subsequent to this submittal date. As a result, these Minute Orders, motions, and issues pertaining to them could not be included or addressed in our findings and conclusion. In addition, the issuance of these Minute Orders in an untimely manner made moot the ability to respond with a motion of reconsideration or a motion of opposition. There’s an appearance of unfairness in the unjustified denials, untimely issuance of Minute Orders, and the inability to respond to after-the-fact rulings. This is clearly a violation of due process as noted in the Hawaii State Supreme Court’s decision of *Mauna Kea Anaina Hou. v. Board of Land and Natural Resources* 136 Hawai’i 376, 363 P.3d 224 (2015).

IV. CONCLUSION

For the reasons set forth in the Petitioners' Collective Prehearing Statement; in the testimony of the Flores-Case 'Ohana witnesses; in the testimony of the other Petitioners' (Mauna Kea Anaina Hou, Kealoha Pisciotto, Clarence Kukauakahi Ching, Paul K. Neves, Deborah J. Ward, and KAHEA: The Hawaiian Environmental Alliance) witnesses; in the testimony of Interveners' (identified as Mehana Kihoi, Harry Fergerstrom, Joseph Kualii Lindsey Camara, Jennifer Leina'ala Sleightholm, Cindy Freitas, William K. Freitas, Temple of Lono represented by Lanny Sinkin, Kalikolehua Kanaele, Tiffnie Kakalia) witnesses; in the examinations of other parties' witnesses; in the Flores-Case 'Ohana's and other Petitioners' Proposed Findings of Fact, Conclusions of Law, Decision and Order; in the Flores-Case 'Ohana's and other Petitioners' other filings in this matter; and in this document, the Flores-Case 'Ohana respectfully requests that its Proposed Findings of Fact, Conclusions of Law, Decision and Order be adopted, and that UHH-TIO's joint proposed findings of fact, conclusions of law, decision and order be rejected.

DATED: Pu'ukapu, Hawai'i, June 13, 2017

A handwritten signature in black ink, appearing to read 'E. Kalam Flores', is written over a horizontal line.

E. Kalam Flores
Representing Flores-Case 'Ohana

**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, Hāmākua,
Hawaii'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-002

Document title: FLORES-CASE 'OHANA'S
RESPONSE TO UHH AND TIO'S JOINT
PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION ORDER [DOC. NO.
671]; CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated below:

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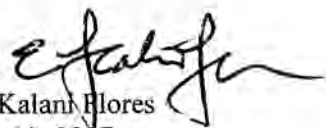
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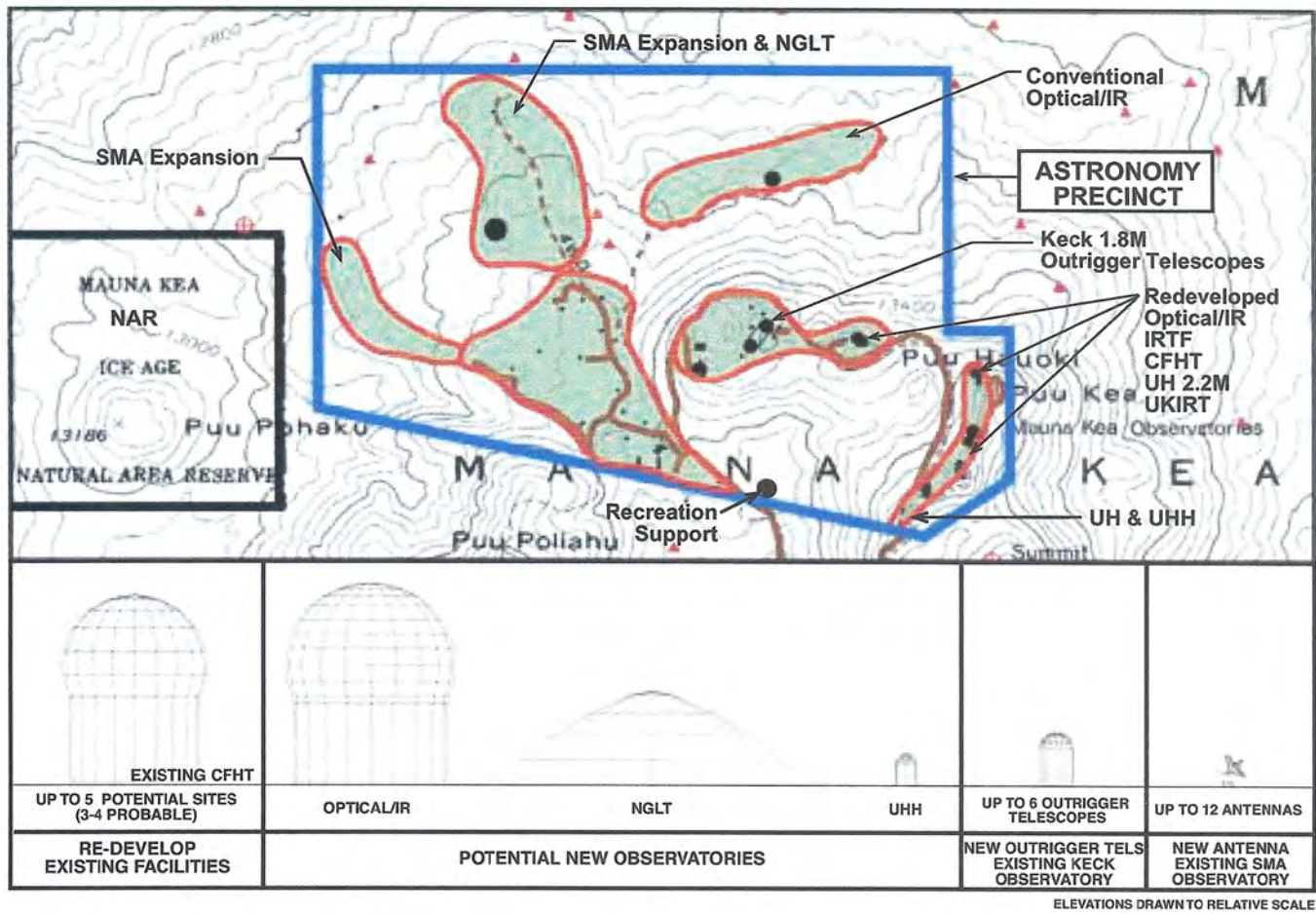
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Name: E. Kalani Flores
Date: June 13, 2017



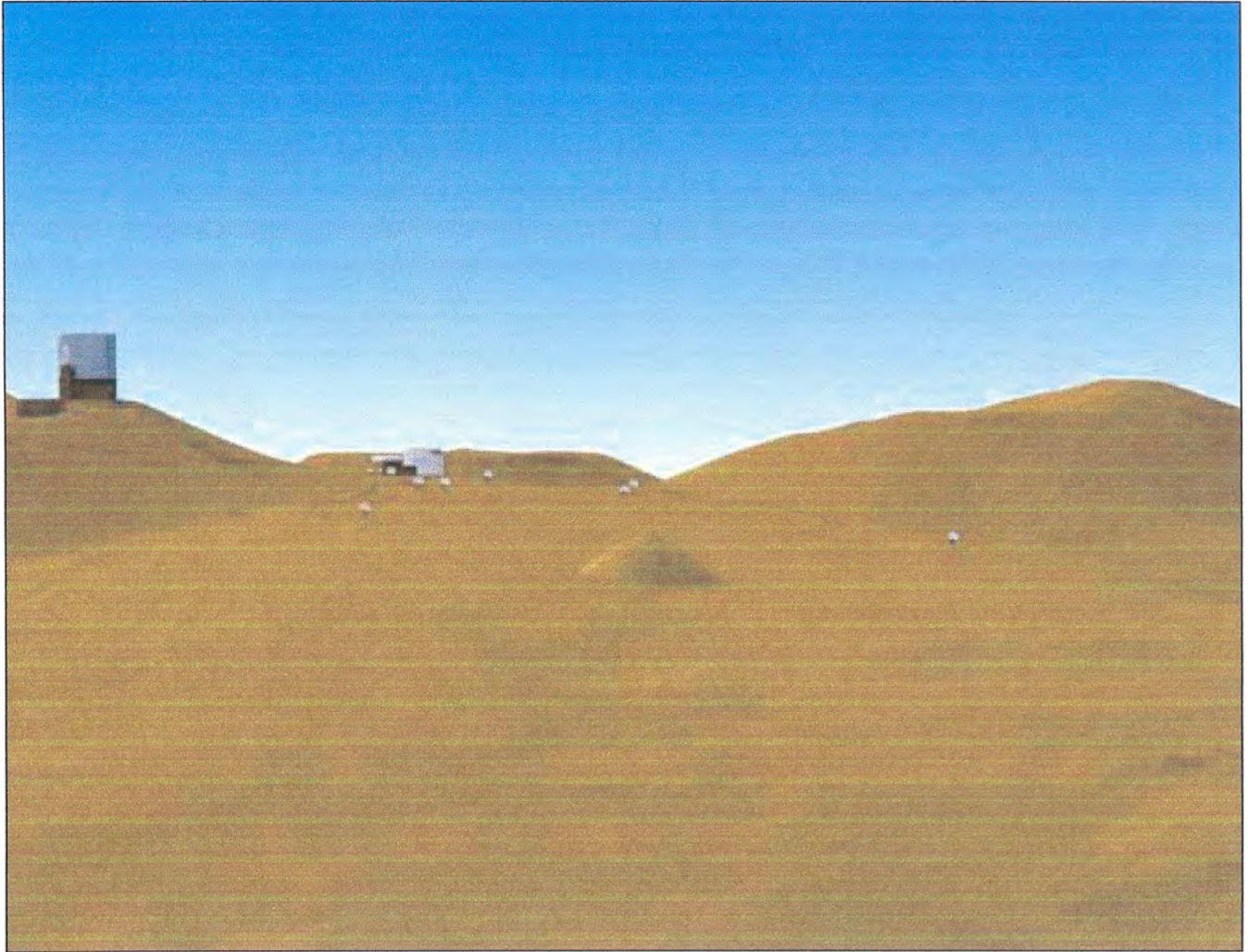
Physical Plan and Proposed Astronomy Facilities

Mauna Kea Science Reserve
Master Plan

Figure IX-16
Page IX-28

B.02+

EXHIBIT "A"



Proposed Next Generation Large Telescope (NGLT)

Mauna Kea Science Reserve
Master Plan

Figure IX-21
Page IX-38

EXHIBIT "B"

Figure 7.7: Naked Eye View from Near Keck Observatory Viewing Northwest



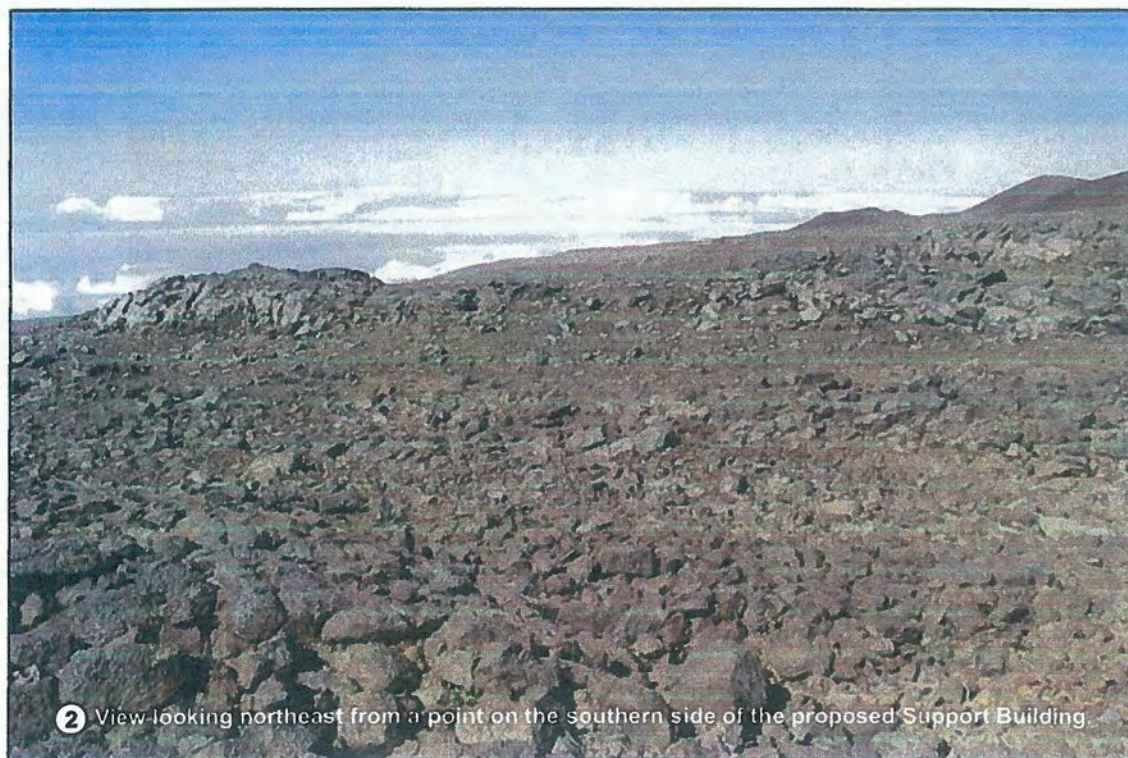
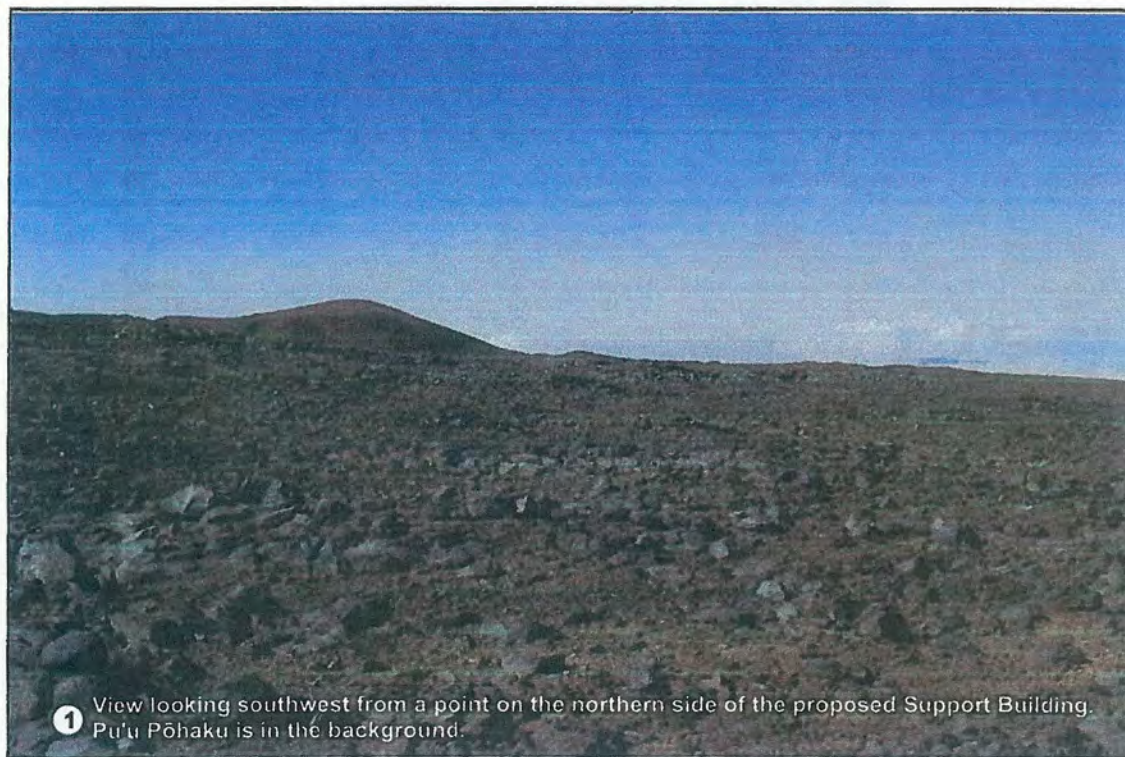
Figure 7.8: Simulation of the TMT Observatory from Near Keck Observatory Viewing North



Photo Credit: Charles R. West Photography

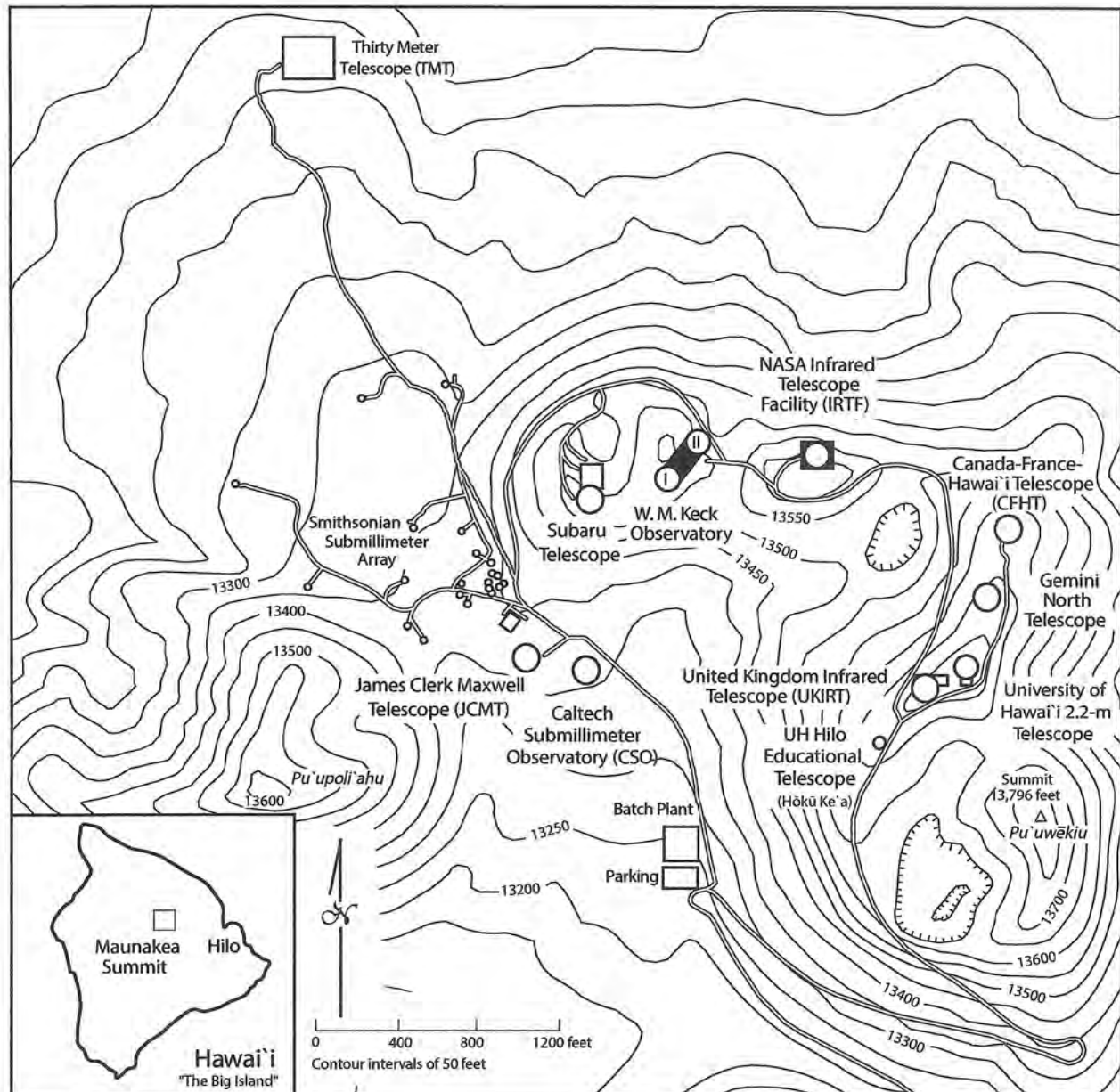
Source: Figure 3-24, *Final EIS for the Thirty Meter Telescope*.

Photographs of the 13N Site



The Maunakea Observatories

Locations of Summit Facilities



B.02y

EXHIBIT "E"



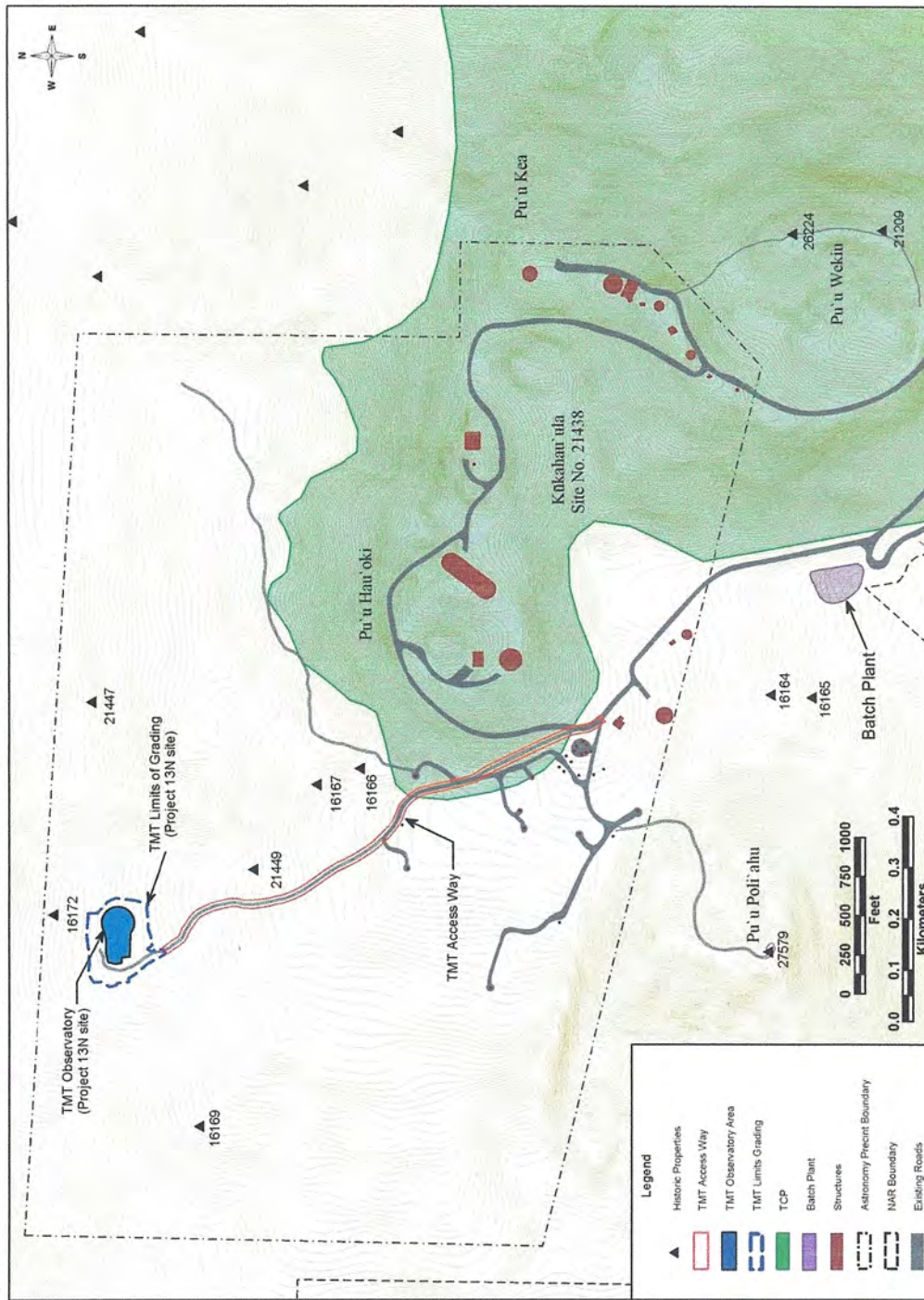
Overview of Observatories, TMT lower left



Image © 2011 DigitalGlobe
© 2010 Google
Data SIO, NOAA, U.S. Navy, NGA, GEBCO

Overview of Observatories, TMT lower right

Figure 4.1. Historic Properties in the Vicinity of the TMT Project Areas



Source: Pacific Consulting Services Inc., (2010)

B.021

EXHIBIT "H"



Photo of Portal Opening overhead of Mauna a Wākea, taken by Kehaulani Marshall (4 March 2011)

B.02w

EXHIBIT “J”

KEY TO RESPONSES

Unsupported/Unsubstantiated.	The proposed finding or conclusion is not supported by information in the record or was not substantiated by UHH or TIO through the contested case process.
Inaccurate/False.	The proposed finding or conclusion or a portion thereof is inaccurate or false.
Misrepresentation.	The proposed finding or conclusion affirmatively misrepresents the contents of the record.
Misleading. Presented out of context.	The proposed finding or conclusion presents information in the record out of context and/or in a way that is likely to mislead the reader.
Misleading. Partial quotation.	The proposed finding or conclusion contains a partial quote from a document in the record, but the incompleteness of the quotation is likely to mislead the reader.
Mischaracterization.	The proposed finding or conclusion mischaracterizes the contents of the record.
Irrelevant/Inapplicable.	The information in the proposed finding or conclusion is irrelevant or inapplicable in this contested case proceeding.
Not in evidence.	The proposed finding or conclusion asserts "facts" and/or cites documents that are not in evidence.
Citation does not support the proposition.	The citation offered by UHH and TIO does not support the proposed finding or conclusion.
Incomplete.	The proposed finding or conclusion is materially incomplete.
Not in dispute.	Either (1) the proposed finding or conclusion is not at issue in this proceeding, or (2) standing alone, the proposed finding or conclusion is not objectionable. The designation of any individual proposed finding or conclusion as "not in dispute" does not indicate assent to inferences suggested by UHH/TIO from, e.g., their misleading grouping or ordering of otherwise unrelated facts.
-- or [blank]	Insufficient time to review proposed finding or conclusion.

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COL	PAGE	RESPONSE
1	158	
2	158	Not in dispute.
3	158	
4	159	--
5	159	--
6	159	--
7	159	Not in dispute.
8	159	Not in dispute.
9	159	Not in dispute.
10	159	Not in dispute.
11	159	Not in dispute.
12	160	Incomplete. BLNR also has the authority and jurisdiction to disapprove the CDUA for the TMT Project.
13	160	Inaccurate/False. The State of Hawai‘i is actually the unlawful government of the Hawaiian Islands. Unsubstantiated. As this issue was excluded from the setting of issues for this cch, UHH/TIO failed to submit evidence to substantiate this COL and now attempt to argue this issue.
14	160	Inaccurate/False. The State of Hawai‘i’s title to ceded land is actually clouded. Unsubstantiated. As this issue was excluded from the setting of issues for this cch, UHH/TIO failed to submit evidence to substantiate this COL and now attempt to argue this issue.
15	160	Unsubstantiated. As this issue was excluded from the setting of issues for this cch, UHH/TIO failed to submit evidence to substantiate this COL and now attempt to argue this issue.
16	160	Unsubstantiated. As this issue was excluded from the setting of issues for this cch, UHH/TIO failed to submit evidence to substantiate this COL and now attempt to argue this issue.
17	160	Not in dispute.
18	160	
19	160	
20	160	
21	161	Not in dispute.
22	161	
23	161	
24	161	Inaccurate/False. Misleading.
25	162	Inaccurate/False. Misleading.
26	162	Not in dispute.
27	162	Misrepresentation. Hearing Officer Witnesses weren't properly notified and scheduled.
28	162	Misrepresentation. Hearing Officer Witnesses weren't properly notified and scheduled.

EXHIBIT 1 - FCO Summary Responses

29	162	Not in dispute.
30	162	Not in dispute.
31	162	Not in dispute.
32	162	Irrelevant/Inapplicable.
33	162	Irrelevant/Inapplicable.
34	162	
35	163	
36	163	Inaccurate/False. UHH/TIO does provide any law to substantiate their COL that would ultimately deny any outstanding motions. The failure of the Hearing Officer to rule upon motions in a timely manner would not constitute them being automatically denied. This would be a violation of due process.
37	163	
38	163	
39	163	
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41	164	
42	164	Irrelevant/Inapplicable. Case citations are specific to pro se litigants in court cases vs. contested case hearings. Inaccurate/False. Certain matters in this cch didn't ensure adequate due process.
43	164	Inaccurate/False. Certain matters in this cch didn't ensure adequate due process and pertinent evidence was denied from being admitted which resulted in prejudice against various parties.
44	164	
45	164	
46	164	Not in dispute.
47	164	Not in dispute.
48	164	Not in dispute.
49	165	Not in dispute.
50	165	Not in dispute.
51	165	Not in dispute.
52	165	
53	165	
54	165	
55	166	Inaccurate/False. Hearing Officer excluded relevant, material, and non-repetitious evidence.
56	166	Misleading. Presented out of context.
57	166	Not in dispute.
58	166	Irrelevant/Inapplicable.
59	166	Irrelevant/Inapplicable.
60	166	Not in dispute.
61	166	Not in dispute.

EXHIBIT 1 - FCO Summary Responses

62	166	Not in dispute.
63	167	Inaccurate/False. Misleading.
64	167	
65	167	
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70	167	
71	168	
72	168	
73	168	
74	168	
75	168	
76	168	
77	168	Not in dispute.
78	168	Irrelevant/Inapplicable. HAPA citation is inapplicable as the Applicant has the burden of proof in this cch as noted in COL 78.
79	168	Irrelevant/Inapplicable. HAPA citation is inapplicable as the Applicant has the burden of proof in this cch as noted in COL 78.
80	169	Irrelevant/Inapplicable. HAPA citation is inapplicable as the Applicant has the burden of proof in this cch as noted in COL 78.
81	169	Misleading. UHH has the 'primary' v. 'initial' burden of proof.
82	169	
83	169	Not in dispute.
84	169	Not in dispute.
85	169	Not in dispute.
86	170	Irrelevant/Inapplicable.
87	170	Not in dispute.
88	170	Not in dispute.
89	170	Not in dispute.
90	171	Not in dispute.
91	171	
92	171	Irrelevant/Inapplicable. The older version of HAR § 13-5-13 is irrelevant/inapplicable as it was amended in August 2011.
93	171	Irrelevant/Inapplicable.
94	171	Not in dispute.
95	172	Irrelevant/Inapplicable.
96	172	
97	172	Misrepresentation.

EXHIBIT 1 - FCO Summary Responses

98	172	
99	172	
100	172	
101	172	Misrepresentation.
102	173	
103	173	
104	173	
105	173	
106	173	Irrelevant/Inapplicable. The <i>Pratt</i> pertained to a criminal case.
107	174	Irrelevant/Inapplicable. The <i>Pratt</i> pertained to a criminal case.
108	174	Irrelevant/Inapplicable. The <i>Pratt</i> pertained to a criminal case.
109	174	
110	174	Misleading. Partial quotation.
111	174	Inaccurate/False. Unsubstantiated. Case law doesn't substantiate this proposed COL.
112	174	
113	174	
114	175	Not in dispute.
115	175	
116	175	
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EXHIBIT 1 - FCO Summary Responses

175	182	
176	182	Not in dispute.
177	182	Inaccurate/False.
178	182	Not in dispute.
179	182	
180	183	
181	183	
182	183	
183	183	Not in dispute.
184	183	Inaccurate/False.
185	183	
186	183	
187	183	Irrelevant/Inapplicable. This Massachusetts case law citation pertains to lands that weren't within a conservation district and not regulated by the same type of statutory provisions and constitutional obligations as in Hawaii.
188	183	Not in dispute. The TMT project is being proposed on undeveloped lands.
189	183	
190	184	
191	184	Inaccurate/False. Several of these witnesses listed proved to be unreliable and not credible.
192	184	Inaccurate/False.
193	184	Inaccurate/False. The surrounding lava landscape includes unique geological formations such as glacial features.
194	184	Unsupported/Unsubstantiated.
195	184	Inaccurate/False.
196	184	
197	184	Inaccurate/False.
198	184	Inaccurate/False.
199	185	Inaccurate/False.
200	185	Inaccurate/False.
201	185	Inaccurate/False.
202	185	Inaccurate/False.
203	185	
204	185	Mischaracterization.
205	185	Mischaracterization.
206	185	Inaccurate/False.
207	185	Not in dispute.
208	186	Misleading. Presented out of context.
209	186	Inaccurate/False.
210	186	

EXHIBIT 1 - FCO Summary Responses

211	186	
212	187	Irrelevant/Inapplicable.
213	187	
214	187	Misleading. Presented out of context.
214	187	Inaccurate/False.
215	187	Inaccurate/False.
216	187	Not in dispute.
217	187	Inaccurate/False.
218	187	
219	187	Inaccurate/False. Due to the substantial and adverse impacts upon the natural and cultural resources in the proposed locality and surrounding areas on the undeveloped landscape of the northern plateau, the proposed TMT project doesn't satisfy HAR § 13-5-24.
220	187	Irrelevant/Inapplicable.
221	188	Inaccurate/False. The TMT project is proposed to be located on the undeveloped northern plateau several miles from the other 11 telescopes and not in relatively close proximity.
222	188	Inaccurate/False.
223	188	Inaccurate/False. TMT project would be visible from Kūkahau'ula. Misleading. Presented out of context. The project would be visible from other significant areas that were omitted from this very short listing.
224	188	Inaccurate/False.
225	188	Not in dispute.
226	188	Inaccurate/False.
227	188	Irrelevant/Inapplicable.
228	188	Misleading. Presented out of context.
229	188	
230	188	Irrelevant/Inapplicable. This California case law citation pertains to lands that weren't within a conservation district and not regulated by the same type of statutory provisions and constitutional obligations as in Hawaii.
231	188	Mischaracterization.
232	188	Misleading. Presented out of context.
233	189	Misleading. Presented out of context.
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294	196	Not in dispute.
295	196	Not in dispute.
296	196	Not in dispute.
297	196	Not in dispute.
298	196	--
299	196	--
300	197	Inaccurate/False. Misleading.
301	197	Inaccurate/False. The public trust doctrine applies to the TMT project.
302	197	Inaccurate/False. The TMT project is inconsistent with the public trust doctrine.
303	197	Inaccurate/False.
304	197	Inaccurate/False.
305	197	Inaccurate/False. Although the UHH is the Applicant, the proposed developer of the TMT project is a corporation incorporated and with private business interests from outside of Hawaii. Likewise, the TMT Observatory Corporation is not an educational institution.
306	197	Inaccurate/False. Although the UHH is the Applicant, the proposed developer of the TMT project is a corporation incorporated and with private business interests from outside of Hawaii. Likewise, the TMT Observatory Corporation is not an educational institution.
307	197	Inaccurate/False. Although the UHH is the Applicant, the proposed developer of the TMT project is a corporation incorporated and with private business interests from outside of Hawaii. Likewise, the TMT Observatory Corporation is not an educational institution.
308	197	Inaccurate/False. Although the UHH is the Applicant, the proposed developer of the TMT project is a corporation incorporated and with private business interests from outside of Hawaii. Likewise, the TMT Observatory Corporation is not an educational institution.
309	198	Inaccurate/False. UHH is not Lessor of the land.
310	198	Inaccurate/False.

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311	198	Inaccurate/False. Misleading. The privately operated TMT project proposes a private use of public lands.
312	198	Inaccurate/False. The astronomy development on Mauna Kea has resulted in the substantial, significant, and adverse impacts upon the natural and cultural resources as well as Native Hawaiian practices and rights.
313	198	--
314	198	Inaccurate/False.
315	198	--
316	198	Unsupported/Unsubstantiated. Misleading.
317	198	Not in dispute.
318	199	Unsupported/Unsubstantiated. Misleading.
319	199	Unsupported/Unsubstantiated. Misleading.
320	199	Inaccurate/False.
321	199	Inaccurate/False.
322	199	Inaccurate/False.
323	200	Inaccurate/False.
324	200	Incomplete.
325	200	Incomplete.
326	200	Incomplete.
327	200	Misleading.
328	200	Misleading.
329	201	--
330	201	--
331	201	--
332	201	Not in dispute.
333	201	--
334	201	--
335	201	--
336	201	Inaccurate/False. The DLNR/BLNR failed to complete an independant Ka Pa'akai assessment.
337	202	Inaccurate/False. Inventory was incomplete as noted in testimony and documents admitted into evidence in this cch.
338	202	Inaccurate/False. Misleading. UHH-TIO attempt to inaccurately define Native Hawaiian customary and traditional practices as being "contemporary".
339	202	Inaccurate/False. Not done.
340	202	Inaccurate/False. Not done.
341	202	Inaccurate/False.
342	202	Inaccurate/False.
343	202	--
344	203	Inaccurate/False.

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345	203	Irrelevant/Inapplicable.
346	203	Inaccurate/False.
347	203	Inaccurate/False.
348	203	Inaccurate/False.
349	203	Mischaracterization
350	203	Not in dispute.
351	204	Irrelevant/Inapplicable. Pratt decision pertained to a criminal case.
352	204	Inaccurate/False.
353	204	Inaccurate/False.
354	204	Inaccurate/False.
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390	209	Inaccurate/False.
391	209	Inaccurate/False.
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