

CARLSMITH BALL LLP

IAN L. SANDISON 5597
JOHN P. MANAUT 3989
LINDSAY N. McANEELEY 8810
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
JPM@carlsmith.com
lmcaneley@carlsmith.com

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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

WATANABE ING LLP
A Limited Liability Law Partnership

J. DOUGLAS ING 1538-0
BRIAN A. KANG 6495-0
ROSS T. SHINYAMA 8830-0
First Hawaiian Center
999 Bishop Street, Suite 1250
Honolulu, HI 96813
Telephone No.: (808) 544-8300
Facsimile No.: (808) 544-8399
DougIng@wik.com
BKang@wik.com
rshinyama@wik.com

Attorneys for
TMT INTERNATIONAL OBSERVATORY, LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO AND TMT INTERNATIONAL
OBSERVATORY, LLC'S JOINT
RESPONSE TO JOSEPH KUALII
LINDSEY CAMARA'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND

**THE UNIVERSITY OF HAWAI‘I AT HILO AND TMT INTERNATIONAL
OBSERVATORY, LLC’S JOINT RESPONSE TO JOSEPH KUALII LINDSEY
CAMARA’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND ORDER, FILED MAY 30, 2017 [DOC. 661]**

Applicant UNIVERSITY OF HAWAI‘I AT HILO (“UH Hilo”) and TMT INTERNATIONAL OBSERVATORY, LLC (“TIO”), through their respective counsel, jointly submit this Response to Joseph Kualii Lindsey Camara’s *Findings of Fact, Conclusions of Law, and Decision and Order*, filed May 30, 2017 [Doc. 661] (“Response”).

**I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF
ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS**

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes (“HRS”), the Board of Land and Natural Resources (“BLNR”) should, upon review of the record, reverse or modify findings that are “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” *In re Gray Line Hawaii Ltd.*, 93 Hawai‘i 45, 53, 995 P.2d 776, 784 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination; or (2) despite substantial evidence to support the finding or determination, the BLNR is left with the definite and firm conviction that a mistake has been made. *Kienker v. Bauer*, 110 Hawai‘i 97, 105, 129 P.3d 1125, 1133 (2006).

Similarly, conclusions of law should be reversed or modified where the BLNR finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. *Id.*

II. DISCUSSION

A. Responses to Joseph Kualii Lindsey Camara's ("Camara") Proposed FOF and COL

The UH Hilo and TIO object to each of the FOF and COL in Camara's *Findings of Fact, Conclusions of Law, and Decision and Order* ("**Camara's Proposed FOF/COL**") to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence. UH Hilo and TIO also object to the Camara's Proposed FOF/COL to the extent they assert alleged "findings" that are beyond the scope of issues set forth in Minute Order No. 19.

Appendix A contains general objections to the Camara's Proposed FOF/COL, which UH Hilo and TIO hereby incorporate by reference to its response to each of Camara's FOF and COL, to the extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO have prepared a table of specific responses and objections to Camara's proposed FOF and COL, which is attached hereto as Appendix B. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections.

The UH Hilo and TIO further object to Camara's Proposed FOF/COL to the extent they seek to challenge the FEIS for the TMT Project. This proceeding is not an EIS challenge under HRS Chapter 343; Camara's ability to make such a challenge expired long ago, and he cannot reopen the FEIS approval process through improper arguments of insufficiency under the statutes and rules governing the EIS process. This proceeding is entirely governed by the applicable constitutional law and the Conservation District rules that are genuinely at issue here.

The FOF/COL and page numbers referenced herein follow those as provided in Camara's Proposed FOF/COL. References to the UH Hilo and TIO's Joint [Proposed] Findings of Fact, Conclusions of Law, and Decision and Order, filed on May 30, 2017 [Doc. 671] ("UH-TIO FOF/COL") are denoted by the prefixes "UH-TIO FOF" and "UH-TIO COL" for the numbered FOF and COL, respectively, in the UH-TIO FOF/COL.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms, which was filed as part of the jointly-submitted UH-TIO FOF/COL.

B. Responses to Camara's Proposed Decision and Order

Camara's proposed Decision and Order is not supported by the record. As set forth in the UH-TIO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in Hawai'i Administrative Rule ("HAR") § 13-5-30(c). The record also shows that the TMT Project is consistent with the UH Hilo's and the BLNR's obligations under the public trust doctrine, *Ka Pa'akai*, and Article XI, section I and Article XII, section 7 of the Hawai'i Constitution.

Ultimately, Camara is categorically opposed to the construction of TMT regardless of whether or not the TMT Project satisfies the eight criteria. No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to Camara. That position is not supported by the law.

III. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the UH-TIO FOF/COL, the testimony of the UH Hilo's and TIO's witnesses, the examination of the Petitioners' and Opposing Intervenor's witnesses, and in UH Hilo's and TIO's other filings, UH Hilo and TIO respectfully request that the Hearing Officer adopt the UH-TIO FOF/COL, and reject Camara's Proposed FOF/COL.

DATED: Honolulu, Hawai'i, June 13, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO



J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA

Attorneys for
TMT INTERNATIONAL OBSERVATORY
LLC

APPENDIX A

Appendix A

| General Responses to Petitioners'/Opposing Intervenors' Proposed Findings of Fact ("FOF") and Conclusions of Law ("COL") | |
|---|---|
| Citation does not support the proposition. | The citation offered by Petitioners/Opposing Intervenors does not support the proposed FOF or COL. |
| Estoppel/Improper Reconsideration | The proposed FOF or COL or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling, |
| Inaccurate/False | The proposed FOF or COL or a portion thereof is inaccurate or false. |
| Incomplete. | The proposed FOF or COL is materially incomplete. |
| Irrelevant/Inapplicable. | The information in the proposed FOF or COL is irrelevant or inapplicable in this contested case proceeding. <u>See</u> Minute Order No. 19 [Doc. No. 281]. |
| Lack of Jurisdiction | The proposed FOF or COL exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority |
| Mischaracterization. | The proposed FOF or COL mischaracterizes legal authority or the contents of the record. |
| Misleading. Partial quotation. | The proposed FOF or COL contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader. |
| Misleading. Presented out of context. | The proposed FOF or COL presents law or information in the record out of context and/or in a way that is likely to mislead the reader. |
| Misrepresentation | The proposed FOF or COL affirmatively misrepresents legal authority or the contents of the record. |
| Not credible. | The proposed FOF or COL is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the proposed FOF or COL. |

APPENDIX A

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| <p>Not in dispute.</p> | <p>Either (1) the proposed FOF or COL is not at issue in this proceeding, or (2) standing alone, the proposed FOF or COL is not objectionable. The designation of any individual proposed FOF or COL as “not in dispute” does not and should not be construed as an admission of said FOF or COL or a concession that said FOF or COL should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts.</p> |
| <p>Not in evidence.</p> | <p>The proposed FOF or COL asserts “facts” and/or cites documents that are not in evidence.</p> |
| <p>Unsupported/Unsubstantiated</p> | <p>The proposed FOF or COL is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process.</p> |

APPENDIX B

Appendix B

Summary Table of Responses to Camara's Proposed FOF/COL

| FOF/ COL # | Page | FOF/COL | Response |
|-----------------------|-------------|--|--|
| 1 | 1 | Joseph Kualii Lindsey Camara was admitted as a party and found to have standing by Judge Ricky Amano a party in the Contested Case for the issuance of Conservation District Use Application (CDUA) HA-3568 at the 2nd prehearing conference in Hilo, Hawaii on June 17th 2016 | The Hearing Officer admitted Camara as a party based upon her finding that Camara's "participation will substantially assist the Hearing Officer in her decision making." See Minute Order NO. 13 at 5 [Doc. 155]. |
| 2 | 1 | The purpose of the conservation district "is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare." HAR §13-5-1 | Not in Dispute. |
| 3 | 1 | HAR § 13-5-24 identifies permissible land uses in a resource subzone. Those permissible uses include astronomy facilities under a management plan. | Not in Dispute. |
| | 2 | Audits of UHs management of Mauna Kea reveal that critical elements of the current comprehensives management plan have not been fulfilled. | Inaccurate/False. See UH-TIO FOF 123, 183, Ex. A-34. Updated, most recent audit identifies that "UH lacks critical rules but progress has been made on other prior commitments." See Ex. A-3 at 3. |
| 5 | 2 | From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse (TMT FEIS, R-3, p.s-8) | Incomplete/improper analysis of Criteria One and Two. See UH-TIO FOF 350-416. Misleading; Presented out of Context. UH-TIO FOF 433-440. Incomplete/improper analysis of Criterion Three. See UH-TIO FOF 417-432. Citation does not support the proposition. |

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| 6 | 2 | The cumulative impact of past and present actions on geologic resources in the astronomy precinct has been substantial, significant and adverse, primarily due to reshaping of summit cones. (TMT FEIS, R-3, p.s-8) | (R-3 is Brannon Kealoha Document). Misleading; Presented out of Context. UH-TIO FOF 433-440. Incomplete/improper analysis of Criterion Three. See UH-TIO FOF 417-432. Citation does not support the proposition. |
| 7 | 2 | Preliminary engineering plans indicate that the total volume of excavated material ("cut" material) will be 64,000 cubic yards. (CDUP Application, R-1, p.B-3) | Misleading; Presented out of Context. UH-TIO FOF 433-440. Incomplete/improper analysis of Criterion Three. See UH-TIO FOF 417-432. |
| 8 | 2 | The tallest building on Hawaii Island is Hilo Bayshore Towers at 135 ft. | The mere fact that a project will require excavation does not automatically disqualify a project from approval. See UH-TIO FOF 480, 493, 911. |
| 9 | 2 | The proposed TMT would be 184 ft. tall above finished grade (A001, p. 1-6) | Irrelevant/Inapplicable. Unsupported/Unsubstantiated. |
| 10 | 2 | The TMT is not compatible with anything on this island. | Citation does not support proposition in FOF 10. Otherwise, Not in Dispute. Unsupported/Unsubstantiated. Inaccurate/False. See UH-TIO FOF 840-867. |

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| 11 | 2-3 | <p>Cross examination of UH witness Perry White by Kualii Camara.</p> <p>Q: That TMT is compatible with the surroundings because there are other telescopes and it fits in with the surroundings because there are other telescopes around?</p> <p>A: That's correct, within the observatory precinct there have been many other similar facilities developed.</p> <p>Q: And that is the basic basis for why you feel the TMT is compatible with the surrounding area?</p> <p>A: That's correct.</p> <p>Q: Thank you very much.</p> <p>So I actually -- a statement, I'm not sure how to do this, but I actually -- the witness too from UH, James T. Hayes, the EIS expert, I was looking at a Quote from his testimony that states: The overall existing level of accumulative visual impacts from the past projects at the summit is considered to be substantial, significant and adverse. So would you say that the TMT is compatible with those elements that have a substantial, significant and adverse impact on the visual impacts to the summit area?</p> <p>A: My understanding of what that statement meant was that compared to predevelopment of observatories on the mountain, there had been quite a bit of change up there. And the incremental development of this project, if it were to be approved, would add to that. And the point that was made in the Conservation District Use Application was that if you were only doing that as part of this, then it would be clearly additive. I think the EIS determined that things are already so changed, that the addition of one more would not be a Significant, huge change. Not the way the first, you know, one was (Perry white cross exam, Oct. 20, 2016 Tr vol 1, p.218-220).</p> | <p>Citation does not support proposition in FOF 10.</p> <p>Misleading. Presented out of context.</p> <p>See UH-TIO FOF 840-867.</p> |
| 12 | 3 | <p>The proposed TMT would be visible from 14% of Hawaii Island and by 15.4% of its population (A003, p. 3-86)</p> | <p>Not in Dispute as per exhibit reference.</p> |
| 13 | 3 | <p>In 2005 a federal Environmental Impact statement (EIS) for the Keck outrigger telescopes stated that "Visual impacts of past and present astronomy related activities in the MKSR have been substantial." (B.08k, xxi)</p> | <p>Document speaks for itself.</p> <p>Misleading. Presented out of context.</p> <p>See UH-TIO FOF 118-122 (impacts). 159-166 (decommissioning), 194-202</p> |

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| 14 | 3 | Written direct testimony of primary TMT EIS author and UH witness Jim Hayes states that "Overall, the existing level of the cumulative visual impact from past projects at the summit is considered to be substantial, significant, and adverse." (p.5) | (compliance with EIS law), 304-330 (mitigation): Document speaks for itself. Misleading. Presented out of context. See UH-TIO FOF 118-122 (impacts). 159-166 (decommissioning), 194-202 (compliance with EIS law), 304-330 (mitigation). |
| 15 | 3 | In oral testimony on October 25 2016 Jim Hayes responded "yes" to the statement "So the TMT would add to the cumulative impact that you have already stated is substantial, significant and adverse." (Direct Testimony Jim Hayes, tr. Vol 3 p 156) | Misleading; Presented Out of Context. TMT Project will not cause substantial adverse impacts. See UH-TIO FOF 433-839 (analysis of Criterion Four); UH-TIO COL 177-217. |
| 16 | 3 | HAR 11-200- 2 defines "Cumulative impact" to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." | Presented Out of Context. A finding is a COL. Not in Dispute as to regulation wording. |

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| 17 | 3-4 | <p>HAR §11-200-12 Environmental Assessment Significance Criteria</p> <p>(a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action.</p> <p>(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it:</p> <ul style="list-style-type: none"> (1) involves an irrevocable commitment to loss or destruction of any natural or cultural resource; (3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders; (7) Involves a substantial degradation of environmental quality; (8) is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions; (12) Substantially affects scenic vistas and viewplanes identified in county or state plans or studies | <p>Misleading; Partial quotation.</p> |
| 18 | 4 | <p>A (contested) sublease of the proposed TMT site would be utilized to build the largest telescope on Mauna Kea to date, significantly increasing the intensity of land use in the conservation district.</p> | <p>Unsupported/Unsubstantiated. Inaccurate/False. See UH-TIO FOF 914-936.</p> |
| 19 | 4 | <p>In 2015 there were numerous events directly linked to construction activities for the proposed TMT that required law enforcement and included situations detrimental to public health, safety and welfare.</p> | <p>Unsupported/Unsubstantiated. Irrelevant/Inapplicable. See UH-TIO FOF 719-722 (Prof. Johnson admitting that the activities of the protestors, not TMT, posed a threat to public health, safety, and welfare).</p> |
| 20 | 4 | <p>The United Nations Declaration of the Rights of Indigenous Peoples</p> | <p>Irrelevant/Inapplicable.</p> |

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| | | (UNDRIP) was passed in 2007, it set forth the Human Rights of Indigenous Peoples, including Hawaiians. The UNDRIP sets forth clearly the rights of Hawaiians to the lands, territories and resources they traditionally owned and used, including sacred sites and landscapes. | Unsupported/Unsubstantiated. Lack of Jurisdiction. |
| 21 | 4 | Article 11 of the Declaration states: "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature." | Irrelevant/Inapplicable. Unsupported/Unsubstantiated. Lack of Jurisdiction. |
| 22 | 4 | Article 12 of the Declaration States: "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains." | Irrelevant/Inapplicable. Unsupported/Unsubstantiated. Lack of Jurisdiction. |
| 23 | 4 | Article 25 of the Declaration states: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." (H-2) | Irrelevant/Inapplicable. Lack of Jurisdiction. |
| 24 | 4 | And I wanted to say that we're really fortunate In Hawaii that we have international law, national law and state law and they are all in consonance. There is no conflict here. There are different expressions of the law, but we're in consonance. Whether international, national or state law, we acknowledge that the cultural properties of indigenous peoples are part of their cultural heritage, international, federal and state law. What do these laws call for? They call for respect, acknowledgment, preservation and conservation of the resource. (Mililani Task, Tr vol 42, p. 185-186) | Irrelevant/Inapplicable. Not credible. Lack of Jurisdiction. |
| 25 | 5 | Ka Paakai came out in 2006. It's 2017. We still have this problem because there is no process. If you don't have the process to protect human rights, they are abridged. So we need the process. (Tr. Vol 42, p. 204-205) | Not credible as biased and argumentative. The record is replete with evidence that there is a comprehensive management |

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| <p>framework in place. See UH-TIO FOF 123-190. Furthermore, this very contested case proceeding is part of the process to protect rights.</p> <p>Unsupported/unsubstantiated. See UH-TIO FOF COL 110-112, 324-354 (Ka Pa'akai analysis).</p> | | |
| <p>Irrelevant/Inapplicable. Lack of Jurisdiction.</p> | <p>HRS §171-17 Appraisals. (a) The appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board; provided that the upset price or upset rental shall be determined by disinterested appraisal whenever prudent management so dictates. No such lands shall be sold or leased for a sum less than the value fixed by appraisal; provided that for any sale or lease at public auction, the board may establish the upset sale or rental price at less than the appraisal value set by an employee of the board and the land may be sold or leased at that price. The board shall be reimbursed by the purchaser or lessee for the cost of any appraisal required to be made by a disinterested appraiser or appraisers contracted for by the board.</p> | <p>5</p> |
| <p>Irrelevant/Inapplicable. Lack of Jurisdiction.</p> | <p>HRS §171-18 Public land trust. All funds derived from the sale or lease or other disposition of public lands shall be appropriated by the laws of the State; provided that all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act and later conveyed to the State under section 5(e) shall be held as a public trust for the support of the public schools and other public educational</p> | <p>5</p> |

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| | | institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use. [L 1962, c 32, pt of §2; Supp, §103A-18; HRS §171-18] | |
| 28 | 5 | Although the provisions of Chapter 171 require fair market rental be paid for the use of public lands, these laws have been violated for 48 years, ever since the University received a 65 year lease for Mauna Kea in 1968 for free. The University ignored these laws when it subleased lands on the summit for 22 buildings for \$1.00 per year. (Mililani Trask WDT, p6) | Irrelevant/Inapplicable. Lack of Jurisdiction. Citation does not support proposition. Inaccurate/False. Not credible. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 29 | 5 | We have a law in this state. It says that when ceded lands are leased out, you get an appraisal. You do an appraisal process. You can even use DLNR staff. If not, if there's a fight, you can get an independent appraiser. But ceded lands, including Mauna Kea, are to be leased out at fair market value. And there's to be a regulatory framework. Even Chapter 171 in the Constitution calls for it. So I know what Mr. Lemmo is saying, but if you don't follow the law, you don't have the money to do the consultation and to take care of the cultural resources. (Mililani Trask Tr. Vol. 42, p. 197) | Irrelevant/Inapplicable. Lack of Jurisdiction. Citation does not support proposition. Unsupported/Unsubstantiated. Inaccurate/False. Not credible. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 30 | 5 | HRS § 711-1107 (Desecration) (1) A person commits the offense of desecration if the person intentionally desecrates: (a) Any public monument or structure; or (b) A place of worship or burial; or (c) In a public place the national flag or any other object of veneration by a substantial segment of the public. (2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action. | Lack of Jurisdiction. Irrelevant/Inapplicable. See Minute Order No. 53 ("[T]his contested case hearing is an improper venue to adjudicate criminal law violations."). |
| 31 | 6 | UH is well aware of the cultural and spiritual significance of Mauna Kea to Hawaiian people. An excerpt from their 2009 Cultural Management Plan (A-9, p. ii) reads: "Mauna Kea is probably one of the most significant cultural and astronomical sites in the world. For the Hawaiian people Mauna Kea is their cultural connection or piko (umbilical cord) to Papa | There is no credible evidence of desecration. See UH-TIO COL 392-407. The document speaks for itself and UH Hilo and TIO do not dispute the CIA contains the quoted language. There was no physical evidence that the |

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| <p>and Wakea, it is the beginning and the end.”</p> | <p>TMT Project site was used for piko, iwi, placenta or otherwise storing artifacts. Tr. 12/20/16 at 145:9-12; Tr. 2/21/17 at 122:12-123:2, 147:2-12; UH-TIO FOF 562, 563, 671.</p> <p>Native Hawaiians have many different forms and types of practices that are personal to each individual. See UH-TIO FOF 744; see also UH-TIO FOF 641-642, 740, 808.</p> <p>See UH-TIO COL 324-354 (Ka Pa'akai analysis).</p> |
| <p>32</p> | <p>“Mauna Kea is ‘ka piko o ka moku,’ which means ‘Mauna Kea is the navel of the island.’ ... When we understand the three piko of the human anatomy, we may begin to understand how they manifest in Mauna Kea. Mauna Kea as the fontanel requires a pristine environment free of any spiritual obstructions.” (A-9, p. i-ii)</p> |
| <p>6</p> | <p>The document speaks for itself and UH Hilo and TIO do not dispute the CIA contains the quoted language. UH Hilo and TIO deny all other inferences and allegations contained in this FOF.</p> <p>The fact that certain individuals may hold and/or express such religious or spiritual beliefs is not in dispute, but the legal impact of such beliefs is clearly in dispute. There is no reliable probative and substantial evidence that the substance of the belief is factual.</p> |
| <p>32</p> | <p>There was no physical evidence that the TMT Project site was used for piko, iwi, placenta or otherwise storing artifacts. Tr. 12/20/16 at 145:9-12; Tr. 2/21/17 at 122:12-123:2, 147:2-12; UH-TIO FOF</p> |

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| <p>562, 563, 671.</p> <p>See UH-TIO COL 324-354 (Ka Pa'akai analysis).</p> | | |
| <p>Citation does not support proposition. Unsupported/Unsubstantiated. Not credible.</p> | <p>Mauna Kea as a cultural landscape, and that is a term that we use in the international arena, but it's a different type of cultural resource. Cultural landscapes are not one or two sites, but they are geographical areas. (Tr. Vol. 42 p. 177)</p> | <p>33</p> <p>6</p> |
| <p>Inaccurate/False. Mischaracterization. Misrepresentation; Presented out of Context. See UH-TIO FOF 728, 740, 958 (public polls support TMT). Lack of Jurisdiction. See Minute Order No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because "this contested case hearing is an improper venue to adjudicate criminal law violations.").</p> | <p>The Final EIS for the TMT project (A-003, p. 3-24) recognizes that a substantial segment of the public feel that "Any development or disturbance of Mauna Kea by someone other than a Native Hawaiian following proper protocols is a significant desecration to the spiritual and sacred quality of the mountain and impacts the cultural practices on the mountain."</p> | <p>34</p> <p>6</p> |
| <p>Misleading; Presented out of Context. There was no physical evidence that the TMT Project site was used for piko, iwi, placenta or otherwise storing artifacts. Tr. 12/20/16 at 145:9-12; Tr. 2/21/17 at 122:12-123:2, 147:2-12; UH-TIO FOF 562, 563, 671. There are no known burials or funerary relics of any significance found or located within the TMT Project site and no proof</p> | <p>OMKM Cultural Advisor Wallace Ishibashi answered "yes" to the following questions relating to desecration asked in cross examination by Kahookahi Kanuha: (Wallace Ishibashi, Direct testimony Dec. 1 2016, Tr. Vol 10, p. 31-34) Q: Is Mauna Kea a place of worship and/or burial? A: Yes Q: Is Mauna Kea considered an object of veneration by an amount of people? A: Yes. Q: In order to build the TMT on Mauna Kea, would this construction damage the landscape of that site on Mauna Kea in any way? A: Yes. Q: Would said construction deface the landscape? A: Yes. Q: Would one have reason to be outraged due to this defacement, this disfigurement, this marring of the proposed construction site? A: Yes, if</p> | <p>35</p> <p>6</p> |

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| | <p>there is grounds for those who oppose the project, there would be – anger people, yes.</p> | <p>of any related ongoing cultural or historical practice of any significance. Ex. C-11 (WDT Rechtman); Tr. 2/21/17 at 147:2-12; Tr. 12/05/16 at 217:18-23; 211:13-16; see UH-TIO FOF 627, 674-676, 703, 758.</p> <p>The fact that some native Hawaiians consider Mauna Kea to be sacred does not act as an absolute bar on development. The Board must evaluate the proposed project under the eight criteria. See HAR 13-5-30(c); see also UH-TIO COL 88-103, 355-382.</p> <p>Lack of Jurisdiction. See Minute Order No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because “this contested case hearing is an improper venue to adjudicate criminal law violations.”)</p> <p>The mere fact that a project will require excavation does not automatically disqualify a project from approval. See UH-TIO FOF 480, 493, 911.</p> <p>Approximately half of the native Hawaiian population supports the TMT Project. UH-TIO FOF 728, 740, 958.</p> |
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| 36 | 7 | <p>On March 28, Mililani Trask was cross examined by Kaliko Kanaele (transcripts vol 42, p. 234)</p> <p>Q: Do you think after [hearing] HRS 7-11 (sic), is that a sufficient protection for sacred sites or districts?</p> <p>A: You know, the language of our state desecration law is sufficient. What we don't have is anyone who has the Integrity to Invoke It.</p> | <p>Irrelevant/Inapplicable. Lack of Jurisdiction. See Minute Order No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because "this contested case hearing is an improper venue to adjudicate criminal law violations.")</p> <p>Not credible. Unsupported/Unsubstantiated. UH-Hilo and TIO do not dispute that Mr. Kanaele cross-examined Ms. Trask. However, Ms. Trask's testimony is her unsupported opinion.</p> <p>Inaccurate/False. Unsupported/Unsubstantiated.</p> <p>The fact that certain individuals may hold and/or express such religious or spiritual beliefs is not in dispute, but the legal impact of such beliefs is clearly in dispute. There is no reliable probative and substantial evidence that the substance of the belief is factual.</p> |
| 37 | 7 | <p>By building the largest structure on this entire island, in the most culturally significant area in Hawaii, we risk irreversibly impacting spiritual landscape of this area before we fully realize its true function, value and implications for humanity and all life on this planet. Without understanding the traditional function of Mauna Kea, there is no way to gauge the impact of further development. (Camara, WDT, p. 4)</p> | <p>Inaccurate/False. Unsupported/Unsubstantiated.</p> <p>The fact that certain individuals may hold and/or express such religious or spiritual beliefs is not in dispute, but the legal impact of such beliefs is clearly in dispute. There is no reliable probative and substantial evidence that the substance of the belief is factual.</p> |
| | 7 | <p>CONCLUSIONS OF LAW</p> | |
| 1 | 7 | <p>Considering the existing well documented CUMULATIVE significant impacts of Astronomy development on the resources of the summit area of Mauna Kea, any additional impacts to said resources in this must be considered significant. (FOF 13-17) This is particularly true considering the size and scope of this proposed project. The TMT would be by far the largest telescope in a sensitive landscape that has already suffered</p> | <p>Unsupported/Unsubstantiated. Inaccurate/False. See UH-TIO COL 177-217.</p> |

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| 2 | significant, adverse and substantial impacts at the hands of astronomy development. (FOF 5,6,7) | | |
| 7 | The TMT would be the tallest building on this Island. Zoning for this area is conservation. (FOF, 8-11) | | Inaccurate/False See UH-TIO FOF 775-795. Misleading. Presented out of context. See UH-TIO FOF 350-384 (consistency with conservation district). |
| 3 | This development would be visible from 14% of the island. No other structures, beside other telescopes on Mauna Kea, have a greater impact on the visual landscape of Hawaii Island. (FOF 12-16) | | Citation does not support proposition. TMT Project will not cause substantial adverse impacts. See UH-TIO FOF 433-839 (analysis of Criterion Four); UH-TIO COL 177-217. |
| 4 | The visual impact of existing telescopes have been substantial, significant and adverse (FOF 12-17) | | Misleading; Presented out of Context. TMT Project will not cause substantial adverse impacts. See UH-TIO FOF 433-839 (analysis of Criterion Four); UH-TIO COL 177-217. |
| 5 | The TMT Project does not satisfy this criterion, on the contrary, it adds to the cumulative substantial, significant and adverse visual impacts of Astronomy development on the summit area (FOF 12-16) | | Improper application of Criterion Four Criterion Four is not a <i>per se</i> bar against any incremental impact—no matter how <i>de minimis</i> . TMT Project will not cause substantial adverse impacts. See UH-TIO FOF 433-839 (analysis of Criterion Four); UH-TIO COL 177-217. |
| 6 | Defining a specific area for development of the TMT, whether by subdivision or sublease, would facilitate increased intensity of land uses in the conservation district. | | Unsupported/Unsubstantiated. Inaccurate/False. See UH-TIO FOF 914-936. |
| 7 | Public opposition related directly to the construction of the TMT created hazardous conditions on Mauna Kea. These hazardous conditions would very likely arise again if construction attempts resume. | | Unsupported/Unsubstantiated. Irrelevant/Inapplicable. See UH-TIO FOF 719-722 (Prof. Johnson admitting that the activities of the |

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| 8 | 8 | The State has the obligation to conduct fair market value appraisals of all lands that are to be sold or leased | protestors posed a threat to public health, safety, and welfare). Inaccurate/False. Irrelevant/Inapplicable. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 9 | 8 | The State has the obligation to charge no less than fair market value for lands that are sold or leased. | Inaccurate/False. Irrelevant/Inapplicable. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 10 | 8 | No such appraisal has been conducted for any of the public lands on Mauna Kea leased to UH since 1968 | Inaccurate/False. Irrelevant/Inapplicable. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 11 | 8 | No fair market value appraisal has been done for any public lands on Mauna Kea subsequently subleased by UH. | Inaccurate/False. Irrelevant/Inapplicable. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 12 | 8 | UH leases more than 11,000 acres of the best area for astronomy in the world for a dollar a year. | Irrelevant/Inapplicable. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. |
| 13 | 8 | Portions of the revenue from the lease of public lands are meant for the betterment of native Hawaiians. | Irrelevant/Inapplicable. TIO will pay fair market rent under the |

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| 14 | | | <p>TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463. By statute, 20 per cent of the rent would go to OHA. See HRS § 10-13.5.</p> <p>Moreover, the TMT Project will provide long-term educational and employment opportunities and funding for the CBP that will benefit the public, including native Hawaiians. See UH-TIO FOF 284-303; see also UH-TIO FOF 265-278 (scientific and economic value of the TMT Observatory).</p> |
| 15 | 8 | Failure to assess [sic] and collect fair market value for lease lands equates to theft from native Hawaiians | <p>Inaccurate/False. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463.</p> |
| 16 | 8 | Failure to assess and collect fair market value on leases undermines the State's ability to facilitate and protect native Hawaiian rights and cultural practices. | <p>Inaccurate/False. Unsupported/Unsubstantiated. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463.</p> |
| 17 | 9 | A sublease from UH to TMT would continue these illegal actions and put the State in breach of its fiduciary responsibilities to native Hawaiians. (FOF 26-29) | <p>Inaccurate/False. Citation does not support proposition. TIO will pay fair market rent under the TMT Sublease. See UH-TIO FOF 208, 215, 261, 278, 463.</p> |
| | | UH and the BLNR is well aware of the spiritual significance of the summit of Mauna Kea (FOF 31-33) | <p>The fact that some native Hawaiians consider Mauna Kea to be sacred does not act as an absolute bar on development.</p> |

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| <p>The fact that certain individuals may hold and/or express such religious or spiritual beliefs is not in dispute, but the legal impact of such beliefs is clearly in dispute. There is no reliable probative and substantial evidence that the substance of the belief is factual.</p> <p>The Board must evaluate the proposed project under the eight criteria. See HAR 13-5-30(c); see also UH-TIO COL 88-103, 355-382.</p> | | |
| <p>Lack of Jurisdiction. See Minute Order No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because "this contested case hearing is an improper venue to adjudicate criminal law violations.").</p> <p>There is no credible evidence of desecration. See UH-TIO COL 392-407.</p> <p>That some individuals oppose the TMT Project, on its own, does not act as an absolute bar on development. The Board must evaluate the proposed project under the eight criteria. See HAR 13-5-30(c); see also UH-TIO COL 88-103, 355-382.</p> <p>Approximately half of the native Hawaiian population supports the TMT Project. UH-TIO FOF 728, 740, 958.</p> | <p>UH and the BLNR is aware that a substantial segment of the public considers astronomy development of the summit of Mauna Kea to be desecration (FOF 34, 35)</p> | |
| <p>Lack of Jurisdiction. See Minute Order</p> | <p>The TMT project is considered desecration by many native Hawaiians</p> | <p>9</p> |

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| | | <p>No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because "this contested case hearing is an improper venue to adjudicate criminal law violations.").</p> <p>There is no credible evidence of desecration. See UH-TIO COL 392-407.</p> <p>That some individuals oppose the TMT Project, on its own, does not act as an absolute bar on development. The Board must evaluate the proposed project under the eight criteria. See HAR 13-5-30(c); see also UH-TIO COL 88-103, 355-382.</p> <p>Approximately half of the native Hawaiian population supports the TMT Project. UH-TIO FOF 728, 740, 958.</p> |
| 20 | 9 | <p>The State BLNR cannot issue a permit for an illegal action.</p> <p>No. 53 (denying motion for summary judgment under HRS 711-1107 (Desecration) because "this contested case hearing is an improper venue to adjudicate criminal law violations.").</p> <p>Unsupported/Unsubstantiated There is no credible evidence of desecration. See UH-TIO COL 392-407.</p> |

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

DLNR Office of Conservation and Coastal
Lands ("OCCL")
dlnr.maunakea@hawaii.gov

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(original + digital copy)

DAVE M. LOUIE, ESQ.
CLIFFORD K. HIGA, ESQ.
NICHOLAS R. MONLUX, ESQ.
Kobayashi Sugita & Goda, LLP
dml@ksglaw.com
ckh@ksglaw.com
nrm@ksglaw.com
Special Deputy Attorneys General for
ATTORNEY GENERAL DOUGLAS S. CHIN,
THE DEPARTMENT OF THE ATTORNEY
GENERAL, and DEPUTY ATTORNEYS
GENERAL IN THEIR CAPACITY AS
COUNSEL FOR THE BOARD OF LAND AND
NATURAL RESOURCES and HEARING
OFFICER

WILLIAM J. WYNHOFF, ESQ.
Deputy Attorney General
bill.j.wynhoff@hawaii.gov
Counsel for the BOARD OF LAND AND
NATURAL RESOURCES

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
SUMMER H. KAIAWE, ESQ.
skaiawe@wik.com
Watanabe Ing LLP
*Counsel for TMT INTERNATIONAL
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leinaala.mauna@gmail.com
leina.ala.s808@gmail.com

LANNY ALAN SINKIN
lanny.sinkin@gmail.com
Representative for the Temple of Lono

MAUNA KEA ANAINA HOU
c/o Kealoha Pisciotta
keomaivg@gmail.com

LINCOLN S.T. ASHIDA, ESQ.
lsa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
Torkildson, Katz, Moore, Hetherington &
Harris
*Counsel for PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
dwrightjvicente@gmail.com
(via email & U.S. mail)

RICHARD L. DELEON
kekaukike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

C. M. KAHO'OKAHI KANUHA
kahookahi.kukiaimauna@gmail.com

KALIKOLEHUA KANAELE
akulele@yahoo.com

MEHANA KIHOI
uhiwai@live.com

STEPHANIE-MALIA: TABBADA
s.tabbada@hawaiiantel.net

DONNA H. KALAMA, ESQ.,
Deputy Attorney General
donna.h.kalama@hawaii.gov
*Counsel for the Honorable DAVID Y. IGE, and
BLNR Members SUZANNE CASE and
STANLEY ROEHRIG*

E. KALANI FLORES
ekflores@hawaiiantel.net

DEBORAH J. WARD
cordylinecolor@gmail.com

YUKLIN ALULI, ESQ.
Law Offices of Yuklin Aluli
yuklin@kailualaw.com
DEXTER KAIAMA, ESQ.
Law Offices of Dexter K. Kaiama
cdexk@hotmail.com
*Counsel for KAHEA: THE ENVIRONMENTAL
ALLIANCE*

IVY MCINTOSH
3popoki@gmail.com
Witness for the Hearing Officer

PATRICIA P. IKEDA
peheakeanila@gmail.com
Witness for the Hearing Officer

CRYSTAL F. WEST
crystalinx@yahoo.com
Witness for Hearing Officer

CLARENCE KUKAUAKAHI CHING
kahiwaL@cs.com

B. PUALANI CASE
puacase@hawaiiantel.net

PAUL K. NEVES
kealiikea@yahoo.com

WILMA H. HOLI
P. O. Box 368
Hanapepe, HI 96716
w_holi@hotmail.com
*Witness for the Hearing Officer
(via email & U.S. mail)*

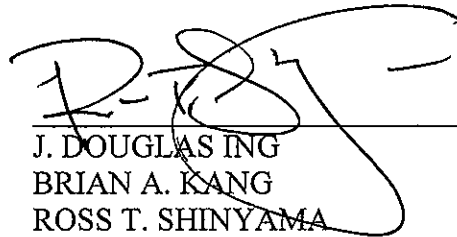
MOSES KEALAMAKIA, JR.
mkealama@yahoo.com
Witness for the Hearing Officer

DATED: Honolulu, Hawai'i, June 13, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO



J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA

Attorneys for
TMT INTERNATIONAL OBSERVATORY
LLC