BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	DLNR File No. HA-CC 16-002 (CDUA HA-3568) B. Kamahana Kealoha's Statement to Incorporate by Reference and join on to Mauna Kea Anaina Hou and Ms Pisciotta's Exceptions, and provide Additional Exceptions (if any).

STATEMENT TO INCORPORATE BY REFERENCE AND JOIN TO MAUNA KEA ANAINA HOU AND MS. PSCIOTTA'S EXCEPTIONS AND PROVIDE ADDITIONAL EXCEPTIONS

I **B. Kamahana Kealoha**, in the capacity of pro se, having previously agreed with Ms. Pisciotta and Mauna Kea Anaina Hou, respectfully incorporate by reference, and join on to, Mauna Kea Anaina Hou and Ms Pisciotta's Exceptions, and provide Additional Exceptions (if any). I also join and incorporated by reference all other Pro Se Petitioners/Parties.

My additional exemptions to Ms. Pisciotta and Mauna Kea Anaina Hou's Exemptions include:

1) A misrepresentation on p.13 item number 26 in the very last statement "Mr. Kealoha stopped appearing in person and participating in the proceedings on or about December 8, 2016." In this misrepresentation the reader is left to think that upon my own will and agency I stopped appearing in person. Nothing is further from the truth as I have stated time and again in numerous motions and verbal submissions to the Hearing and to the Custodian of Records. The lack of this hearing to accommodate pro se needs, in particular my own is the reason for my involuntary result in not being able to participate. The 500 mile round trip trek to my place of residence, schooling, and income and the exclusive location and dictated schedule of the hearing has failed to accommodate those like myself with burial, lineal and cultural rights and whom reside on a neighboring island. The cost incurred for logistics, travel, and shelter are disadvantaging for the majority of the residents in the Hawaiian archipelago. 1 million residents of the 1.4 million total in Hawaii live on Oahu and the majority of the population lives under the tax bracket known as the poverty level. All those with lawful rights also not residing on Hawaii Island or in Hilo and whom do not have the funds are also subjugated directly violating the intent of the law that created this system to accommodate the pro se, those that cannot afford lawyers. I had made known to the DLNR and the Hearing officer time and again through verbal and written submissions that if I was unable to attend do to the coercive and exasperated duress of cost that it would be directly due to the fact that the exclusive, non pro se serving, location and schedule had been set for the majority without any consideration of neighbor island parties with lawful interest. This I had made

Signed: Kamahana Kealoha
Name: KAMAHANA KEALOHA
Date: August 20, 2017

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 August 21 4:02 am

known in many a written notice including documents 190, 328, and 450 among my almost daily verbal submissions to the Hearing in person. The correct representation in the HO's FOF on page 13 number 26 should not say "stopped appearing in person and participating in the proceedings" and instead should clarify that "because of the duress of the economic challenges presented by the dictated and exclusive schedule and location, Brannon Kamahana Kealoha was unable to attend due to being unable to afford to make the 500 mile round-trip trek from Nanakuli, his place of residence, schooling and work, to the hearing in Hilo." I in no way stopped attending of my own will and as document 450 in the document library is clear evidence of, I in no way stopped participating in these hearings and as evidenced in this communication and every consistent communication throughout, I am still in fact participating and have not stopped despite my pro se needs not being accommodated.

2) I also find cause of exemption- an invalidation of this entire fraud of a pro se accommodating venue and find this farce of a hearing directly in violation of the intent of the law that created this contested hearing process according to HRS 91 Title 13 Subchapter 5 mainly in that it does not accommodate the majority under the poverty level, a majority of the Hawaii citizenry and therefore expressly negligent in its law and intent as a contested hearing for the purpose of accommodating the pro se. Instead this hearing creates a predatory environment in which corporations and public institutions with limitless resources can hire unlimited amounts of lawyers to disadvantage the pro se in a pro se venue.

3) The attached Exemptions of Kealoha and Mauna Kea Anaina Hou are attached and I hereby incorporate their Exemptions with mine exactly as submitted by Kealoha and Mauna Kea Anaina Hou in their final draft.

Signed:
Name: KAMAHANA KEALOHA
Date: August 20, 2017

PETITIONERS RESPONSE TO HEARING OFFICER RIKI MAE AMANO'S PROPOSED FINDINGS OF FACT CONCLUSIONS OF LAW, DECISION AND ORDER

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

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

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

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

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

The above mentioned Petitioners hereby make the following Exceptions/Responses to Hearing Officer's proposed Findings of Fact, Conclusions of Law, and Decision and Order denying CDUA HA-3568 for the Thirty Meter Telescope (TMT). In the interest of efficiency and the amount of time provided, several petitioners have combined their responses, and so more than one response may be noted to a single Applicant's Finding of Fact. Petitioners herein incorporate by reference the exception/responses of Temple of Lono, William Freitas, Clarence Kukaukahi Ching, Flores-Case Ohana, and KAHEA.

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EXECUTIVE SUMMARY

MAUNA KEA--THE GREAT UNIFIER

BEFORE WE BEGIN WE WISH TO TAKE TIME TO ACKNOWLEDGE THE SACRED NATURE THE THE GREAT AND PROFOUND MAUNA KEA

Mauna Kea's cultural and religious significance is well documented in oral and written historical archives, as well as in legislative and court records. Mauna Kea is revered in the same way that other religions revere their churches, temples, synagogues, and mosques. The upper regions of Mauna Kea reside in Wao Akua, the realm of the Akua-Creator. It is considered the Temple of the Supreme Being, and also home of Na Akua (the Divine Deities), Na 'Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (Sky Father) who are considered the progenitors of the Hawaiian People. Mauna Kea, it is said, is where the Sky and Earth separated to form the Great-Expanse-of-Space and the Heavenly Realms.

Mauna Kea in every respect represents the zenith of the Native Hawaiian people's ancestral ties to Creation itself. Mauna Kea, as a Wahi Kapu, is dedicated to life, peace, and Aloha. Anything that is contrary to these mandates impacts the temple and those who worship there. While the Hawaiian (and Polynesian) people's relationship with Mauna Kea dates back many millennia, the Mauna is used by many people today for spiritual practices, rest and rejuvenation and many forms of recreational enjoyment. What happens to the land and life forms of Mauna Kea impacts us all.

Mauna Kea protects all life big and small. When a species becomes extinct, it sets the process of creation unraveling. This impacts our relationship to all living things and our relationships with Akua. We offer our deepest gratitude to our the Akua,

Na Akua and Na `Aumakua for the the blessings and the honor of standing in this hearing for our beloved Mauna.

In 2015, the Supreme Court of the Hawai'i found in favor of the Petitioners because the Board of Land and Natural Resources (Hereafter BLNR) had among other things "…put the card before the horse" by approving the University of the Hawai'i's Conservation District Use Application (hereafter CDUA) prior to hearing the evidence from the Petitioners, thus violating Petitioner's Due Process rights. BLNR had failed to ensure that a fair Contested
Case Hearing (hereafter CCH) process was conducted and to to ensure Petitioners rights including their civil rights, human rights, and those right enumerated in the constitution and other related laws were protected.

The Court remanded the case back to BLNR to be redone, so as, to insure we were given a fair opportunity to be heard in a meaningful way and a meaningful manner. The Court was also concerned that we be given an opportunity to present evidence, put on witnesses and to argue our case before a fair and impartial tribunal and or Hearing Officer (hereafter HO). This is also to say, the remand was necessary not because the Petitioners had done any thing wrong but instead because BLNR had denied us a fair process as is provided for under laws of Hawai'i. The Court holding the following:

> "In appearance and substance, BLNR's FOFs/COLs/D&O is substantially the same as the hearing officer's findings, substantially the same as the hearing officer's findings, conclusions, and decision and order."

And,

substantially the same as the hearing officer's findings, conclusions, and decision and order. *See SC at p. 21-21*

And,

> Further, the conditions enunciated in BLNR's FOFs/COLs/D&O in 2013 are virtually the same as those in the 2011permit. This similarity is significant because BLNR appears to suggest that in 2011, BLNR anticipated serious consideration of evidence presented during the contested case hearing. **But the similarity between the 2011 permit and the 2013 decision gives the appearance that less than full consideration was given to the voluminous legal and factual arguments and materials presented in the contested case hearing. Such similarity "give[s] the appearance that [BLNR] ha[d] already prejudged the case and that the ultimate determination of the merits [had] move[d] in predestined grooves." Cinderella, 425 F.2d at 590.** (Emphasis added) *See SC at p. 38-39*

Also,

> "…the similarity between the 2011 permit and the 2013 decision gives the exact opposite impression, because this similarity exists despite what BLNR received in between: thousands of pages of written testimonies, exhibits, and factual and legal arguments, and dozens of hours of verbal testimonies and more legal arguments. **As a result, the virtually indistinguishable documents of 2011 and 2013 give the impression that none of the testimonies, arguments, or evidence submitted to BLNR between the two were seriously considered. BLNR should not have issued the permit before the request for a contested case hearing had been resolved. The appearance of prejudgment continues."** Cinderella, 425 F.2d at 590. Emphasis added) *See SC at A. 55*

Therefore,

> "In sum, BLNR put the cart before the horse when it approved the permit before the contested case hearing was held. Once the permit was granted, Appellants were denied the most basic element of procedural due process–-

an opportunity to be heard at a meaningful time and in a meaningful manner. Our Constitution demands more." Thus concluding this matter is remanded to the circuit court to further remand to BLNR for proceedings consistent with this opinion, so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion. ***Id.***

GENERAL EXCEPTIONS

Our General Exception are as follows:

WE TAKE EXCEPTIONS TO THE HEARINGS OFFICER (HEREAFTER HO) REPEATING THE SAME ERROR THAT THE HAWAI'I SUPREME COURT JUST FOUND UNLAWFUL. See **Mauna Kea, 2015**

We take EXCEPTION to the HO's Proposed FOF/COL and D&O in **whole**, because the HO failed to review, consider, take into account and or to rule upon Petitioners proposed FOF/CO, D&O.

N.B. The HO identifies some Pro Se Petitioners as Intervenors and some as Petitioners, and then also classify some Pro Se Parties as "Opposing Intervenors." We take Exceptions to such characterizations and have instead referred to all Pro Se Petitioners/Intervenors as Petitioners and affirm that all of the Pro Se Parties remain solidly for the maximum protections for Mauna Kea.

For all intents and purposes the HO ignored (1) the collective Petitioners filings, motions, arguments etc. submitted over a 5 month period (2) 55 days of evidentiary hearings and the information contained therein and (3) the Petitioners collective testimony and witness testimony (including over 74 witnesses). The HO excluded virtually all of Petitioner's Written Direct Testimony (hereafter WDT), witnesses WDT, oral testimony, objections etc, Exhibits, 1000s of pages of documents and evidence submitted, and hundreds of motions, pleadings and or objections etc. This is unacceptable!

The HO provided no rational explanation and or justification as to why she denied/ignored/or failed to consider most if not all of the information presented by the Petitioners to date. **What the HO did instead was to simple cut and past the UH positions, arguments, FOF/COL, D&O, and inso doing repeated the same error the Supreme Court just found unlawful but also reversible.** (Emphasis added) See SC excerpts below.

According to the statute relating to the conduct of Contested Case Hearings (hereafter CCH), or Haw. Rev. Stat. Section 91-12 that reads in relevant part:

> Every decision and order ***adverse*** to a party to the proceeding, rendered by an agency, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusion of law. **If any party to the proceeding has filed proposed finding of fact, the agency shall incorporated it in its decision a ruling upon *each* proposed finding of fact so presented**. HRS § 91-12

According to the UH there where over 5,000 FOF and COL contained in the combined CCH parties proposed FOF/COL and D&O. Therefore based on the plain reading of the law under HRS § 91-12, either the HO or the BLNR must provided a reasoned answer and or justification for each and every one of the 5,000 FOF/COL, D&O. HO was required to ***consider and rule upon the*** facts and conclusions presented by all parties. If a HO fails to rule and or to provide an explanation parties for whom the decision is adverse have no way to determine what facts are actually under dispute.

The burden is not on the Petitioners to try to guess not only what FOF/COL are where denied or have to figure which FOF/COL are appealable if they so decide to ask the court to determine the validity of the the adverse decision regarding the FOF/COL, D&O. This is unreasonable and it has the effect of unlawfully shifting the burden of proof from the HO (or BLNR) on to the Petitioners.

The HO by failing to rule on every point also fails to provide the BLNR with a clear understanding and picture of the actual issues and what is actually involved in the case. By doing this, the HO has obscured the actual issues while simultaneously manufacturing an illusionary idea of what the case is actually about or not.

BLNR, you have the responsibility to amend, modify, add conditions etc. on to the final decision.

For example, if the HO fails to provided notice to the BLNR that some of the issues in the is case involved questions regarding the National Historic Preservation Act or other important and relevant points of dispute then the BLNR will not really understand what this case is actually about and cannot properly make and informed decision.

From the perspective of the Petitioners, if the HO fails to identify and rule on each issue(s) under dispute then the Parties cannot determine which issue(s) are to be appealed or not. Judicial Review is a right afforded to each Party; put another way, it is each Parties right under the law, to ask a court to determine the lawfulness of BLNR's final decision. In the end, all questions of law including any final decision adversarial to any of the Parties, in this case the final say with the courts to affirm, uphold, modify or over turn any of the BLNR's final decision.

Therefore the BLNR must either remand back to the HO with instructions to provided adequate review and rulings pursuant to HRS § 91-12 the Parties Proposed FOF/COL, D&O. to do otherwise is to violate yet again our Due Process rights and therefore committing the same error the Court just found unlawful . We whole heartedly object and takes serious exceptions if such should be the final outcome of this CCH as well.

NOTE: We wish the record to reflect that for some of the Petitioners (MKAH, Kealoha Pisciotta, Paul K. Neves, Clarence Ku Ching, Deborah Ward, Hank Fergestrom, and Kaliko Kanalele) this CCH hearings marks the 3 CCH regarding the same subject matter (telescopes to be built on Mauna Kea) and the same people (i.e. UH, University of California, CALTECH etc.). However, in each CCH the merits of the our case were never heard nor fully reviewed. And although we did prevail in both state and federal courts in the past, the courts found again errors involving reversible Due Process errors necessitating the court (s) to vacated the CDUP.

This CCH however was an immense case with a large number Parties, many of which were Pro Se. Some lived on out islands, some live more then a 100 miles away for, Hilo.

WE RESUBMIT THE FOLLOWING

DISCLAIMERS, OBJECTIONS, RESERVATIONS AND JOINERS AND INCORPORATIONS

These Disclaimers, Objections, Reservations, Joiners, and Incorporations are filed on behalf of Pro Se Petitioners MKAH's and Kealoha Pisciotta as a part of their RESPONSES to the Applicant's Findings of Fact, Conclusions of Law, and Proposed Decision and Order (Hereafter FOF/COL, D& O) and we INCORPORATE by reference all these into our EXCEPTION/RESPONSES to the of HEARING OFFICER'S PROPOSED FOF/COL AND DECISION AND ORDER of JULY 26, 2017. We take EXCEPTION to all issues addressed or contained in Hearing Officers PROPOSED FOF COL D&O.

We incorporate by reference MKAH AND KEALOHA PISCIOTTA'S compete set of FOF COL, D&O and all witness exhibits and testimony for this current CCH (2016/2017) and the previous CCH (2011-2013).

Any statements construed as a Finding of Fact (FOF) that is more appropriately deemed a Conclusion of Law (COL) should be treated as a COL. Conversely any COL that is more appropriately deemed a FOF, should be treated as a FOF.

We have used the terms Native Hawaiian with a capital "N' and the small "n" interchangeably. We assert our rights as Native Hawaiians, native Hawaiians and Kanaka Maoli under county, state, federal and international laws (including our Human Rights and Civil Rights under the United Nations (UN) and the UN Decla-

ration on the Rights of Indigenous Peoples and customary international legal standards relating to the human and civil rights of all peoples.

We reassert our positions regarding the relevant issues as they are laid out in our original Petitions and we reassert our written and oral objections contained in the entire hearing etc., including our Motions.

We incorporate by reference the entire Na Leo video recordings of the five months of evidentiary hearings. See naleo.tv and search the subject "TMT Contested Case Hearing."

We also incorporate by reference all of the Pro Se Parties FOF COL, D&O and again reassert our position that we not were given enough time to review, answer, defend, record and/or to adequately address our any of our positions regarding the facts, legal conclusions and other relevant information contained in throughout the entire preceding.

We take exception the the fact that the **HO did not provide the Parties with a reasonable opportunity to be heard in a meaningful time and in a meaningful manner, thus violating our due process rights**. For Example, the HO did not apply the applicable rules under HRS Section 91 which affirms that the HO can chance any provision of a CCH provided that all Parties agree. The HO should have sought agreement with all Parties regarding scheduling the CCH dates.

The HO did not work with Petitioners and their Legal Council so that all Parties could reasonably participle in this CCH. Our lawyer (Mr, Naiwi Wudermen) was not able to continue to represent us in this CCH because of the HO inflexible attitude towards scheduling. He had other clients and court commitments and even though he tried to be flexible and had given the HO ample notice regarding his scheduling conflicts dates, the HO did not work with Mr. Wurderman . She did not work with the Parties to ensure they could participate given their work and or travel schedules either. Many were faced with the prospect of choosing to work or be at the hearing to defend their rights, and this CCH went on for months and presented great challenges for all of the Pro Se Parties who were not getting paid and did

not believe we should be subject to the TMT construction time table or schedule at all. Many could not do it and had to basically go their rights to be heard in a meaning full time and in a meaning full manner. This was totally unacceptable, unreasonable and biased the Pro Se Parties.

We join here with the Temple of Lono (TOL) represented by Lanny Sinkin, supplements FOF COL, D&O relating to the multitude of filings of MO's by the H.O and BLNR including ones that are obviously made long after the fact and thus rendered moot. Some of the dispositive Motions could have changed the outcome of this proceeding and so by failing for rule on the them in a timely manner means our due process rights again have been violated. Further, by ruling on them now means the record of this case is not in fact completed as is defined by the law. This also biases and borders on contempt for the Pro Se Petitioners to inundate them with Minute Order after Minute Oder with only 5 days to file Motions for Reconsideration simultaneously holding us to deadline for filing our Responses and previously our collective FOF COL, D&O.

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

The HO failed to have a hearing to determine standing. We take EXCEPTION to

this. Further she allowed allowed a single Party (P.U.E.O.) to determine Inc. to determine the issues to be decided and we take EXCEPTION to that as well. While we agree that some of the issues were identified (such as Native Hawaiian Rights, Public Trust Doctrine and the 8 Criteria under HAR 13-5-30) not all of the relevant issues from the previous CCH where incorporated. We believe the HO officers erred by failing to include the other relevant issues previously identified and determined (in the original CCH) to be the issues to be decided in the current CCH.

We agree that more issue could be added since more Parties were added also but we do not agree that any issues from the previous CCH should be taken away with out a clear and concise explanation. The BLNR had two ways in which to approach this CCH. The could have (1) started completely anew starting with a new Public Hearing and opportunity for people to call for a CCH or (2) just have a new hearing with the same Parties from original CCH. The BLNR instead did an hybrid version there now parties came in including Parties whose standing was not reviewed and determined such as P.U.E.O.. We are certain that most if not all of the the Pro Se Parties and Native Hawaiian Practitioners could have meet the Standing requirements but we did objected to P.U.E.O because they could not show injury in fact. We also objected to TIO coming in as a Party because there was no new CDUA that included them (there still is not one and they did not meet their burden of proving that TIO and TMT are actually the same entity). We incorporated by reference our FOF/COLs, D&O that discuss this problem in more depth. (See the online documents library DOC 069 and DOC 070, and Mauna Kea et al RESPONSES at p. 113-114)

I add the following JUDICIAL NOTICE of an ADDENDUM to Appendix A to Mauna Kea Anaina Hou et al regarding our complaints to BLNR and the OIP regarding the extraordinary cost of our transcripts and the failure of the HO or BLNRt o simply upload this TRANSCRIPTS so we all (including the Public) access then access the transcripts in the timely manner and in a way that would not over burden the Parties. We take EXCEPTION to the over all handling of the TRANSCRIPTS on the whole. First because we provided legal reason why no one should be having to pay the Reporter for copies when BLNR already paid for cop-

ies and should have simply uploaded these copies for the Parties to us to do there FOF/COL, Propsed D&O in the first place. The high costs the transcripts of the Public CCH process makes CCHs untenable for regular people to actually participate; even when the CCH process is meant to be a people's process (i.e. quasi judicial and no one need be a lawyer to participate and we are freed from the normal court of the going to court etc.). In the end even if the a person could make their case through the hearing process they could fail in the end because they simply cannot afford to purchase the transcripts necessary to complete their FOF/COLs and D&O.

In this case the transcripts at $6 per pages (a quote given during the hearing) would cost us about $72,000. This just made the CCH process unaffordable to us and to and regular citizens and this violates due process. We note also that we are not looking to make things hard for the Reportera, but explain why the process as it is set up biases the the Parties and the public (whose tax dollars are already paying for the second remanded hearing and being charged twice). We as Parties and taxpayers must pay for BLNR to purchase the transcripts and then to allow the Reporter to charge us also. This process is not Pono and we believe it violates our rights. As we said the Reporter is not so much the problem but how BLNR contracted with the Reporter that is the problem and violates our rights.

A week or so from the deadline we were contacted by the Reporter and told we could purchase the the transcripts at a lower price which we appreciated (although this was too late as the transcripts where so vast. The whole process just violates the spirit and intent of the CCH process which is meant to serve the people and tax payers.

BLNR may consider here that the OIP sent an email to the Petitioners (via Ms. Pisciotta) saying they were closing our case because "Ms. Pisciotta had apparently 'Blocked' their email because she had not responded to them in the timely manner. First I object to the "assumption" that I would "blocked" anyone form emailing me. I did not block any one from sending me email and especially OIP since we were were initiating the OIP investigation in the first place. I did however run out

of email space and could not receive email for quite some time since I did not know my quotes had been exceeded. When I finally did understand what was happening I purchased more space and then I received their email. We object and take exception to this. This new information is to be added into APP "A" see all details at end of this these EXCEPTIONS.

We object and take exception to the HO not allowing MKAH's to call rebuttal Witness (Tom Peek and Kupuna Liko Martin). Both of these witnesses had substantive information to add to the hearing that no other witnesses could have added and their testimony we relevant and material to help inform this proceeding.

SPECIFIC EXCEPTIONS

We take Exception to the HO treatment of the Parties Motions, Memo's in Opposition and other filings and we resubmit and incorporate by reference all of the files for the BLNR's Review.

There were over 600 documents filed during the course of the CCH by all Parties.

The HO did not ruled in a timely manner on the vast majority of the Petitioners filings. When the HO did rule most of the issues were not ripe for consideration they were moot. We believe the HO also rule favor in only to cases that we are aware for. We take EXCEPTION to the HO failure to rule in the timely manner. Many of the motions were dispositive and could have changed the out come of the hearing all together. We incorporated all of our filing (including Motions) by reference here for review and consideration by BLNR. We submit MKAH's Motions and other filings for BLNR's review.

MAUNA KEA ANAINA HOU MOTIONS

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS. WE HAVE RESUBMITTED MAUNA KEA ANAINA HOU MOTIONS BELOW FOR CONVENIENCE.

April 15, 2016, Mauna Kea Anaina Hou submitted a motion to disqualify Rik MayAmano titled "Petitioners Object to Selection process and to the Appointment of Hearing Officer Made Pursuant to MO 1 Dated March 31, 2016". DOC 005

June 13, 2016, Petitioners Mauna Kea Anaina Hou filed a Memorandum In Opposition to Perpetuating Unique Education Opportunities Inc.'s Motion to Intervene. DOC 069.

May 6, 2016, Mauna Kea Hui Petitioners filed Petitioners' objections regarding procurement committee and process and committee member / BLNR Board member. DOC 015

May 13, 2016, Mauna Kea Hui Petitioners filed Petitioners' motion for reconsideration of Minute Order No. 4, filed on May 6, 2016 and/or motion to strike selection process and to disqualify various members and hearing officer. DOC 017

May 31, 2016, Mauna Kea Hui Petitioners filed [Doc. 52] Petitioners' submissions and positions on record; Exhibit “A." DOC 052

June 13, 2016, Mauna Kea Anina Hou filed a Memorandum in Opposition to TIO’S Motion to be admitted as a party. DOC 070

June 16, 2016, Mauna Kea Hui Petitioners filed [Doc. 69] Petitioners' memorandum in opposition to Perpetuating Unique Educational Opportunities, Inc.'s motion to intervene, dated May 16 2016. DOC 069

July 11, 2016, Mauna Kea Anaina Hou filed Motion to Request for continuance on Submissions and Next Hearing Date. DOC 081

July 12, 2016 Mauna Kea Anaina Hou filed a Supplemental Request For Continuance. DOC 083

July 14, 2016, Mauna Kea Anaina Hou’s Reply To TIO and UH Responses. DOC 087

July 18, 2016, Mauna Kea Anaina Hou filed Motion to Strike Conservation District Use Application HA-3568 Dated September 2, 2010 and motion For Summary Judgment. DOC 094

July 18,2016 Mauna Kea Anaina Hou Filed Motion to Disqualify BLNR’S and Hearing Officer’s counsel. DOC 095

July 18, 2016, Mauna Kea Hui Petitioners filed Petitioners Mauna Kea Anaina Hou et al.'s supplemental witness list. D0C. 104

July 26, 2016, Mauna Kea Anaina Hou Filed Renewal Of Objection to H.O Selection process and H.O Appointment and (2) Supplemental Arguments on Motion to Disqualify BLNR’S and H.O counsel. DOC. 130

August 1, 2016, Position Statement on P.U.E.O Motion to Set Issues Dated July 18, 2016. DOC. 164

August 1, 2016, Email regarding P.U.E.O's joinder to UH Hilo's motions when the motions haven't been filed yet. DOC. 168

August 1, 2016, Mauna Kea Hui Petitioners filed [Doc. 165] (email) Note for the record. DOC. 165

August 10, 2016, Motion to strike Motion for Protective Order Filed by BLNR for a protective order for the Honorable David Ige, Suzanne Case, and Stanley Roehrig, filed August 8, 2016. DOC. 187

August 17, 2016, Mauna Kea Hui Petitioners filed Petitioners Mauna Kea Anaina Hou, et al.'s site visit recommendations. DOC 218

August 22, 2016, Mauna Kea Hui Petitioners filed Petitioners Mauna Kea Anaina Hou, et al.'s memorandum in opposition to motion for protective order for the Honorable David Y. Ige, Suzanne Case and Stanley Roehrig, filed on August 8, 201. DOC 233.

September 8, 2016, Request for further status conference and or consideration of proposed scheduling. DOC. 254

September 19, 2016, Petitioners response to P.U.E.O proposed motion granting P.U.E.O motion to set issues. DOC 270

September 23, 2016, Mauna Kea Hui Petitioners filed Correspondence regarding notice of contested case hearing. DOC 282.

September 26, 2016, Mauna Kea Hui Petitioners filed Petitioner Mauna Kea Anaina Hou, et al.'s objections to site visit and Minute Order No. 18. DOC 288

October 10, 2016, Mauna Kea Hui Petitioners filed Petitioners Mauna Kea Anaina Hou, et al.'s renewed motion to disqualify hearing officer. DOC 340

October 10, 2016, Mauna Kea Hui Petitioners filed Notice of withdrawal of counsel. DOC 341

October 10, 2016, Mauna Kea Hui Petitioners filed Petitioners Mauna Kea Anaina Hou and Kealoha Pisciotta, Clarence Kukauakahi Ching; Flores Case Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian-Environmental Alliance list of e-mail addresses for service of process. DOC 342

October 17, 2016, Mauna Kea Hui Petitioners filed Petitioners' Statement of Position (DOC 383) in Response to the University's Statement Re Petitioners Renewed Motion to Disqualify Hearing Officer (Doc 369).

October 17, 2016, Mauna Kea Anaina Hou, et al. filed Petitioners' Statement of Position (DOC 384) in Response to the University's Statement Re Scheduling (Doc 370).

February 24, 2017, Mauna Kea Anaina Hou, et al. filed Mauna Kea Anaina Hou, Kealoha Pisciotta and Paul K. Neves; Clarence Kukauakahi Ching; and Deborah J. Ward's joinder in Flores-Case Ohana's (1) request for witness subpoena for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii dated January 12, 2017 (uploaded January 25, 2017); and (2) Amended request for witness subpoena for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawai‘i dated and uploaded January 27, 2017. (DOC 477).

Februrary 26, 2017, MKAH submitted exhibit list and written direct testimony into evidence. (DOC 482)

March 9, 2017, MKAH and Paul Neves submitted a motion to admit first 1st supplemental exhibit list and written direct testimony into evidence. (DOC 509).

March 21, 2017, Mauna Kea Anaina Hou filed Mauna Kea Anaina Hou motion requesting time to respond to exhibit objections and related matters. (DOC 522).

March 23, 2017, Mauna Kea Anaina Hou, et al. filed Kealoha Pisciotta, Mauna Kea Anaina Hou and Paul K. Neves' motion for joinder in Temple of Lono motion to Board of Land and Natural Resources to dismiss HA-3568. (DOC 542)

April 25, 2017, Mauna Kea Anaina Hou, et al. filed Petitioners Kealoha Pisciotta, Mauna Kea Anaina Hou, and Paul K. Neves join with Temple of Lono's memorandum in support of motion for reconsideration of Minute Order 43. (DOC 561)

April 26, 2017, Mauna Kea Anaina Hou, et al. filed Mauna Kea Anaina Hou et al. joinder. (DOC 564)

April 27, 2017, Mauna Kea Anaina Hou, et al. filed Mauna Kea Anaina Hou et al. joinder and objections. (DOC 578).

April 28, 2017, Mauna Kea Anaina Hou, et al. filed Mauna Kea Anaina Hou et al. joinder. (DOC 584)

May 5, 2017, Mauna Kea Anaina Hou, et al. filed Parties' petition to the BLNR for online access to the transcripts. (DOC 622)

May 11, 2017, Mauna Kea Anaina Hou, et al. filed Parties' petition to Board for declaratory judgment and motion to vacate Minute Order 43. (DOC 629)

May 12, 2017, Mauna Kea Anaina Hou, et al. filed [Doc. 632] Memorandum in opposition re: UH-CDUA-BLNR-CC-16-002-UH joinder to TMT's opp to parties' petition to Board for online access to transcripts, et al (DOC 632).

May 20, 2017, Mauna Kea Anaina Hou et al. filed a Motion for Reconsideration and Exhibit 1, COS. (DOC 643)

MINUTE ORDERS

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONSMarch 31, 2016

Minute Order No. 1: Notice of selection of Riki May Amano as Hearing Officer on subject contested case; Exhibit 1; COS (DOC 01.)

April 8, 2016, Minute Order No. 2: Order delegating the conduct of the contested case hearing to a hearing officer, and confirming that the chairperson was authorized to engage the services of a hearing officer; COS. (DOC 03).

April 29, 2016 Minute Order 3: Order setting deadlines for responses to Hearing Officer's supplemental disclosures; COS (DOC 11)

May 6, 2016 Minute Order 4: Order regarding objections to the selection process, and regarding objections to the Hearing Officer; COS (DOC 14).

May 9, 2016, Minute Order 5: Order setting pre-hearing conference; COS (DOC 016).

May 23, 2016, Minute Order 6: Order setting response date; COS (DOC 041)

May 26, 2016, Minute Order No. 7: Order regarding 1st prehearing conference and Amano fourth supplemental disclosure; COS (DOC 044)

May 27, 2016, Minute Order 8: Order setting hearings on motions to intervene and 2nd pre-hearing conference; COS (3) (DOC 049)

June 3, 2016, Minute Order 9: (DOC 063) Order denying Petitioners' motion for reconsideration of Minute Order No. 4 (DOC 014) filed on May 6, 2016 and/or Motion to strike selection process and to disqualify various members and Hearing Officer; COS

July 9, 2016, Minute Order 11: Order regarding relocation of hearings on motions to intervene. (DOC 066)

July 12, 2016, Minute Order 12: Order denying Temple of Lono's motion for re-fund of filing fee, filed June 23, 2016; COS (DOC 082)

July 21, 2016, Minute Order 13: Order on the hearing on admission or intervention as a party; Second pre-hearing conference; COS (DOC 115)

July 22, 2016, Minute Order No. 14: Order denying Dwight J. Vicente's motion to disqualify Judge Riki May Amano (ret.); State of Hawaii lack of jurisdiction to hear the contested case hearing; COS (DOC124)

August 9, 2016, Minute Order 15: Order regarding change of location for August 12, 2016 continued hearing and 3rd pre-hearing conference; COS (DOC 185)

August 22, 2016, Minute Order 16: Order regarding third pre-hearing conference; COS (DOC 238)

August 17, 2016, Minute Order 17: Order denying motion objecting to the Hearing Officer and the Hearing Officer Selection Process; COS (DOC 245)

August 19, 2016, Minute Order No. 18: Order regarding site visit to Mauna Kea - September 26, 2016; COS (DOC 274)

September 23, 2016, Minute Order 19: (DOC 281) Order granting Perpetuating Unique Educational Opportunities, Inc.'s motion to set the issues Doc. 99; Order setting issues; COS

September 26, 2016, Minute Order No. 20: Order setting fifth pre-hearing conference; COS (DOC 289)

October 10, 2016, Minute Order No. 21, (DOC 344) Order regarding fourth pre-hearing conference; COS

October 10, 2016, Minute Order No. 22, (DOC 345) Order denying Harry Fergerstrom's (1) Motion to reconsider all motions, application, and/or request for admission or intervention as a party or other parties in this matter; and (2) Motion to strike all motions, applications, decision, etc,: Essentially making moot the entire hearing (Doc. 96); COS October 10, 2016, Minute Order No. 23, (DOC 346) Order denying Temple of Lono's motion for partial summary judgment (Doc 78); COS

October 10, 2016. Minute Order 24 Order Denying Kalikolehua Kanaele motion to exclude / remove PUEO, TMT, UH Manoa/ Hilo and all petitioners seeking for permit for TMT by circumvention of religious protections of the Hawaii Constitution, Article XI and HRS 7- 11-1107 committing desecration. (DOC 347)

October 10, 2016, Minute Order No. 25, (DOC 348) Order denying Stephanie-Malia:Tabbada's motion to vacate entire process for violation of BLNR and

University of Hawai‘i fiduciary trust, rights, responsibilities, breach of contract, etc. mandated the by the law of the land (Doc 97); COS

October 10, 2016, Minute Order No. 25, (DOC 348) Order denying Stephanie-Malia:Tabbada's motion to vacate entire process for violation of BLNR and University of Hawaii fiduciary trust, rights, responsibilities, breach of contract, etc. mandated the by the law of the land (Doc 97); COS

October 10, 2016, Minute Order No. 26, (DOC 349) Order denying Maelani Lee's motion to intervene (Doc 84); COS

October 10, 2016, Minute Order No. 27, (DOC 350) Order denying Petitioners' request for continuance on submissions and next hearing date (Doc 81) and Petitioners' supplemental request for continuance on submissions and next hearing date (Doc 82); COS

October 10, 2016 Minute Order No. 28, (DOC 351) Order denying Mehana Kihoi's motion to deny the intervention of Perpetuating Unique Educational Opportunities as a party in the contested case hearing (Doc. 98); COS

October 10, 2016, Minute Order No. 29, (DOC 352) Order denying Temple of Lono's motion to dismiss for lack of jurisdiction based on unresolved land claims (Doc 126); COS

October 10, 2016, Minute Order No. 30, (DOC 353) Order denying Kamahana Kealoha: Motion invoking Quo Warranto, respectfully, a demand of jurisdiction; Declaratory judgment on a constitutional issue / violation resubmitted 8/8/2016 (Doc 180); COSD. Conduct of the contested case.

October 10, 2016, Minute Order No. 31, (DOC 354) Order denying motion for protective order for the Honorable David Y. Ige, Suzanne Case and Stanley Roehrig (Doc 182); COS

October 10, 2016, Minute Order No. 32, (DOC 355) Order denying motion to strike motion for protective order for the Honorable David Y. Ige, Suzanne Case and Stanley Roehrig, filed on August 8, 2016 (Doc. 187); COS

October 10, 2016, Minute Order No. 33, (DOC 356) Order denying Temple of Lono's motion to dismiss out of time (Doc. 179); COS

October 11, 2016, Minute Order No. 34, (DOC 363) Order denying Kamahana Kealoha's motion demanding inventory of the so-called ceded lands containing the specific land and parcel the TIO plans to be sub-leased by UH who leases said lands from the BLNR, a survey of these lands also (Doc. 191)

October 13, 2016, Minute Order No. 35, (DOC 365) Order re: dismissal of Shelley Stephen's request to be part of Contested Case Hearing (Doc. 213)

October 14, 2016, Minute Order 36, Order voiding permit (DOC 376)

October 19, 2016, Minute Order 37, (DOC 388) Order denying motion to strike Conservation District Use Application, HA-3568, dated September 2, 2010, and/or motion for summary judgment (Doc. 94)

October 19, 2016, Minute Order 38, Order denying motion to disqualify BLNR's and Hearing Officer's counsel (Doc 95) DOC 389

October 28, 2016, Minute Order No. 39, Order denying renewed motions to disqualify Hearing Officer (DOC 340)

January 1, 2017, Minute Order 41, Order regarding date to set witnesses; COS (DOC 446)

February, 17, 2017, Minute Order No. 42: (DOC 464) Order granting Flores-Case Ohana's request for subpoena for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii (Doc. No. 452)

and denying the University of Hawai‘i at Hilo's motion to quash Flores-Case Ohana's request for Samuel Lemmo - Administrator, Office of Conservation and Coastal Lands, DLNR, State of Hawaii (Doc 444); COS

Minute Orders #43-103 were posted after the evidentiary portion of the Hearing was finished and announced closed by Hearing Officer. All Minute Orders after May 30, 2017 #57-103 were posted after FOF, COL'S and Decision and Orders were due and submitted.

MOTIONS TO INTERVENE

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

The Hearing Officer fails to mention there was no standing hearing for new parties. "All remaining applicants for intervention had standing to participate in the contested case as parties and their motions to intervene were granted."

Mauna Kea Anaina Hou (MKAH) through their council Naiwi Wurderman, filed a Memorandum in Opposition (DOC 069) to P.U.E.O'S Motion to Intervene (DOC 033) dated May 16, 2016. In MKAH'S Memorandum in Opposition, it states; "…While any of the individuals associated with P.U.E.O., Inc., i.e. Richard Ha, Jr., the apparent "Incorporator," according to the Articles of Corporation of P.U.E.O., Inc., Shadd Keahi Warfield, listed as its President, Patrick Le'o Kahaiwaiola'a, William H. Brown, and any others could have requested a contested case hearing on February 25, 2011 and then paid the related fee or received a waiver of the fee and then proceeded to the contested hearing if admitted, none of these individuals made such an effort…" (DOC 069) dated June 13, 2016.

- P.U.E.O's request is not timely. (DOC 033) dated May 16, 2016.

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

- Criteria 8 of HAR 13-5-30 states that a proposed land use will not materially detrimental to the public health, safety and welfare. It does not require that a proposed project/land use be beneficial to public welfare safety and welfare. P.U.E.O's reasoning for intervening in this case is unfounded.

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

No other motions objecting to new parties were submitted.

MAUNA KEA IS SACRED

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

In this section, on pages 75-83 of her recommendations, Hearing Officer lists a few of the statements given through live testimony of Petitioners witnesses on the sacredness of Mauna Kea. Although she cites them, she does not give the witness testimonies the full weight, credibility and or consideration based upon the preponderance of evidence standard in making her decisions and recommendations on the following eight criteria.

STANDING AND SETTING OF THE ISSUES

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS

The Hearing Officer requested that P.U.E.O set the issues for the hearing then proceeded to instruct P.U.E.O to submit a Proposed Minute Order Granting PUEO's motion to Set Issues setting forth the issues to be addressed and issues not to be addressed in the contested case hearing, as ruled upon at the hearing." TR. 8/29/16 at 83:5-19.

We take exception with the Hearing Officer requesting a new party in this contested case to set the issues - especially when their standing was being challenged. MKAH submitted a position statement (DOC 164) regarding PUEO's setting the issues and recommended some issues to be decided that were ignored.

STANDING

The UH/TIO COL 17-24 at p.159-161 finds:

HAR § 13-1-2, HAR §§ 13-1-31(b) and (c), defines "Petitioner(s)" or the one on whose behalf a petition or application is made, sets forth standards for the admission and admissibility of parties in a contested case proceeding.

Standing or *locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and the harm from the law or action challenged to support that party's participation in the case. ***See*** Wikipedia Standing (law)

Subject mater jurisdiction is defined as "the power of the a court to adjudicate a particular type of matter and provide the remedy demanded." ***See*** WEX Legal Dictionary at www.law.cornell.edu

Standing is important for to establishing not only the who the parties will be but also the issues to be decided.

The Supreme Court remanded this case back to the Third Circuit Court and then back to the Board of Land and Natural Resources concluding:

[T]his court vacates the circuit court's May 5, 2014 Decision and Order Affirming the Board of Land and Natural Resources, State of Hawai'i's Findings of Facts, Conclusions of Law and Decision and Oder Granting Conservation District Use Permit at the Mauna Kea Science Reserve Dated April 12, 2013 and final judgment thereon.

See Mauna Kea Anaina Hou *et al* v. BLNR (2015)

In considering the above conclusion, we contend, that the BLNR had at two options for fulfilling the courts conclusions. The BLNR could (1) start completely anew including holding a brand new public hearing providing an opportunity for both the original six Petitioners and new parties to come forward to call for a CCH or (2) BLNR could have started a new hearing with the original six Petitioner and the UH as the parties and to retry the original case.

After the public hearing those requesting a CCH, including the original six Petitioners and any new parties would be required to submit their written requests asserting their grievances, articulating the potential impacts and/or any remedies sought that may occur if the Board approves the action (i.e. approval of the construction of the TMT in the Mauna Kea Conservation District). ***See*** Ex A029 and A028—the original Petitioners petitions for CCH)

Thereafter during the pre hearing stages of the CCH proceeding a ***standing*** hearing should have occurred for the purposes of establishing the standing of each individual and/or group who has asked to participated in the hearing. The test for standing includes that the party's ability to demonstrate their interest in the case and show that their interest is separate and distinct from that of the general public. This specifically means that the testimony and information that the party brings will inform the decision and the decision makers so they may make and informed decision.
See Ex. Making Your Voice Count by law Professor Casey Jarmon at

"**Issues to be Decided**." In the previous CCH each party was to submit a motion proposing the issues to be decided in the case. This is reasonable because it also helps to establish the burden of proof for the various parties.

In this case, however, the HO allowed one party (PUEO group) to submit the issues to be decided. We are not sure why this was the case, perhaps she was not properly informed by the Deputy Attorney's Generals (DAGs) assigned to the case. However, we contend that besides the obvious problem of having only one person or group decide what the case is about and because this case was **not** a brand new CCH proceeding and was instead a hybrid version, the issues to be decided were previously established in the first CCH.

The HO did not adopt or include any of the previous issues for this remanded hearing (the HO did allow some questions that where included in our issues to be decided from our previously case such as questions regarding Section 106 Consultation). This prejudiced tall the Pro Se petitioners and the original grievances and remedies sought where not fully addressed in this case.
***See* Ex A029 and A028** the original six Pro Se Petitioners Petitions.

While we do concur, that the issues to be decided should have included the Public Trust Doctrine, the Kapa'akai (also Native Hawaiian Rights), and the Eight Criteria under HAR §13-5-30(c) but we submit ***all*** relevant issues that fall within the subject matter jurisdiction of this proceeding should have been properly included in this case.

Issues that where not established in the pre hearing stage and are not relevant to this proceeding should not have been allowed in for review.

UH/TIO failed to identify any issues to be decided in this case. As identified previously the PUEO group was allowed to establish the issues to be decided in this case. The *issues to be decided* that where accepted by the HO where the (1) Public Trust Doctrine, (2) Native Hawaiian Traditional and Customary cultural and religious right under **Kapa'akai**, and (3) the Eight Criteria (not necessarily in any oder.)

Native Hawaiian/Kanaka Maoli and Pro Se Petitioners (NH-KM Petitioners) filed petitions and could meet the standing requirements as Native Hawaiian Traditional and Customary cultural and religious practitioners whose cultural and religious practices and activities are protected under the State's Constitution Article XII, Section 7 and who could demonstrate an interest separate and distinct from that of the general public.

Justice Pollack writing the Concurring Opinion, joined by Justice Wilson and Justice McKenna in part quoted Chief Justice Richardson's conclusion in **Zimrig** "…the people of Hawai'i are the beneficial owners of public lands. ***See*** **Mauna Kea**

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

BURDEN OF PROOF

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS

WE OBJECT AND TAKE EXCEPTIONS TO THE **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give**

them the proper weight and consideration to make an informed fair decision.

The HO beginning at p. 201 in accessing the body of law that has become know a Native Hawaiian Rights law, including by not limited to PASH, Ka-pa'akai, Hanapi etc. misconstrues and mischaracterizes the legal theory behind it.

UH/TIO agreed that the UH as the Applicant has the burden of proof based up in the preponderance of evidence.
See UH/TIO COL 78 - 82

UH/TIO characterizes and misconstrues the laws as set forth under **Hanapi** and **Pratt** and then attempt to impermissibly shift he burden of proof from themselves onto the Pro Se Petitioners as COL 83 at p. 169 states in relevant part:

[T]hat Pro Se Petitioners have the burden of Proof on issue asserted by them. In particular, to the extent that Petitioners …are claiming to assert native Hawaiian rights based on customary and traditional practices, the burden is on them to establish that the claimed right is a constitutional native Hawaiian practice. The standards for establishing constitutional protection of practices that ate claimed to be customary and traditional are set forth *State v. Hanapi,* 89 Hawai'i 177, 186. P. .2d 485, 494 (1998) and *State v. Pratt*, 127 Hawai'i 206, 277 P.3d. 300 (2010) …."

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

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

The HO mischaracterizes, misreads the law under **Hanapi**, **Pratt,** and **Ka-pa'akai** of the reasons as stated in these Responses as well as Petitioner MKAH's FOF COL, D&O which we shall incorporate by reference.

The issues to be decided in the case **did not** include the the Pro Se Parties having to prove they met or having to meet either the the **Hanapi** or **Pratt** prong tests for this CCH proceeding.

Further the UH/TMT/TIO only now in their FOF COL, D&O attempts to argue all of the Pro Se Petitioners failed meet "their" burden under the **Hanapi** and the **Pratt** prong tests.

But even if the issues to be decided included the **Hanapi** and the **Pratt** prongs test the UH/TIO attempts to impermissibly shift he burden of away from themselves and onto the Pro Se Petitioners.

The **Hanapi case was** a criminal case and therefore doesn't apply to this case.

In fact in both the **Hanapi** and **Pratt** cases, individuals involved where being charged with criminal trespass and they asserted their Native Hawaiian Traditional and Customary cultural and religious rights as an affirmative defense against the criminal charges being made against them. This is not the situation in this instant case regarding Mauna Kea.

The Pro Se Petitioners are in no way facing any criminal charges and are therefore not defending themselves against any criminal charges thus necessitating an affirmative defense or the need to prove, either the three prong **Hanapi** test or the **Pratt** test as the UH/TIO claims.

The Pro se Petitioners are exercising and/or trying to continue to exercise their Traditional and Customary cultural and religious rights affirmed under **PASH**, other relevant Native Hawaiian rights law and protected by the State Constitution under Article XII, Section 7.

The Pro Se Petitioners are exercising, continuing to exercise and/or trying to protect their rights while simultaneously, hoping to prevent the State BLNR from categorical extinguishing those rights by destroying and desecration the environment and landscape where those Traditional and Customary cultural and religious beliefs and practices are in fact excised—on Mauna Kea.

KAPA'AKAI O KA'AINA TEST NOT MET BY BLNR

The Pro Se Petitioners Native Hawaiian traditional and customary cultural and religious rights that are challenged and threatened in two ways. First, because the State continues to abdicate, delegate and or act in excess of their authority to affirmatively to protect the "reasonable" exercise of the Native Hawaiian Traditional and Customary cultural and religious rights. They do this by unlawfully delegating this duty first to the University of Hawai'i at Manoa (UH), which then is transferred to to a set of entities under the University of Hawai'i at Hilo (UHH) including the Office Of Mauna Kea (OMKM) who then transfers the duty to a advisory group called Kahu Ku Mauna (KKM). The University of Hawai'i at Hilo (UHH) clearly transfers the responsibility of protecting constitutionally protected Native Hawaiian rights to entities that are **not** affirmatively mandated to protect those rights and resources, which belonging to the people of Hawai'i.

This 'wholesale delegation of the responsibility for protecting Native Hawaiian Traditional and Customary cultural and religious rights to the University and to other entities is specifically what the Supreme Court warned against and prohibited in **Kapa'akai**.[2]

The recent concurring opinion by Justice Pollack, joined by Justice Wilson and Justice McKeena in part, **Mauna Kea** at footnote 7, reads in relevant part:

"The **Waiahole I** court also, consistent with Hawaii's legal history, prior precedent, and the constitutional mandate, "continue[d] to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose."
See Waiahole I, 94 Hawai'i at 137, 9 P3d at 449 (citation omitted)."

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

SUBLEASE BETWEEN UHH AND TIO

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS

WE OBJECT AND TAKE EXCEPTIONS TO THE **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The HO leaves out critical information and excluded Judicial Notice regarding the fact that the Third Circuit Court invalidated BLNR's consent the the TMT Sublease. The HO also failed to take into account the fact that the life span of the TMT extend many year beyond the actually life of the GENERAL LEASE. There is no way to guarantee that that Sublease will be issues or that the General Lease extension would ever be granted. WE TAKE EXCEPTION TO THE HO leaving out critical information that is necessary for for making an informed decision. Further we TAKE EXCEPTION to the Attorney Generals (Dough Chin's) public statements claiming that the TMT can move forward as soon as the BLNR issues a CDUP. The AG's statements are irresponsible and they runs afoul of due process process and in the face of the Court role as the arbitrator of questions of law. WE OBJECT AND TAKE EXCEPTION?

The fact remains that the courts previously vacated BLNR's consent for the TMT's the Sublease and the General ends in 2033 and the life span of the TMT project is longer then the General Lease itself.

ASTRONOMY DEVELOPMENT UNDER MASTER PLAN

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

One example is shown here: In this section H.O states on pg 37 FOF 178 " Under the Master Plan, new facilities proposed within the Astronomy Precinct are to be designed to (3) avoid the scattering of facilities by clustering within the developed area,…" What she fails to mention, is, that the proposed TMT site is three-fourth's of a mile away from any other telescopes or development. She would like to believe that this whole area is developed when it is not. It is a wide open undeveloped space on the Northern Plateau.

EIGHT CRITERIA

HAR 13-5-30(C)(1): "THE PROPOSED LAND USE IS CONSISTENT WITH THE PURPOSE OF THE CONSERVATION DISTRICT"

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The purpose of a Conservation District is to designed "to conserve, protect and preserve the important natural resources of the state through appropriate management and use to promote their long term sustainability and the public health, safety and welfare" HRS 183C-1.

The Conservation District administrative rules are designed "to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare". HAR 13-5-1

The Hearing Officer omits important sections of the Conservation District Rules:

Here is an example: The rules allow only those land uses that comply with all eight criteria – that is to say, land uses that do not have a "substantial adverse impact." HAR 13-5-30(c)(4).

And; A plain reading of the *entire* relevant statute and regulation makes clear that conservation of natural resources is the purpose of conservation districts. The Conservation District is the most restrictive of the four land use classifications authorized under Hawai`i's Land Use Law, Chapter 205. The Conservation District is defined to include:

> areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept. Haw. Rev. Stat. § 205-2(e).

The law provides for distinct districts, such as urban, agriculture, and conservation, because these land areas have characteristics suited to each district designation; the

activities allowed in each district are consistent with characteristics of those land areas. Conservation districts are designated to provide for public uses and purposes (i.e. protecting watershed zones, conservation, public parks, open spaces, protection of endangered indigenous and endemic species, and protection of historic resources etc.). Haw. Rev. Stat. § 205-2

UH witness Perry White gave testimony regarding criterion (1). He is the principal planner for Planning Solutions. Planning Solutions in turn works for Carlsmith Ball law firm, who is representing the UHH. Mr. White cannot make an unbiased decision about whether the proposed TMT can meet Criteria (1) nor any of the other 7 criteria in 13-5-30c. He is not a lawyer nor does he have any legal training in order to make a legal conclusion. TR V1 p104; 6-13, p139; 15-25. Perry White Witness Statement 1.

Gunther Hasinger who also testified on behalf of UHH and on Criterion 1, is not a land manager, planner, lawyer, or expert on conservation districts.
UHH Witness Statement 6 WDT.

CRITERIA 2; HAR 13-5-30(C)(2): "THE PROPOSED LAND USE IS CONSISTENT WITH THE OBJECTIVES OF THE SUBZONE OF THE LAND ON WHICH THE USE WILL OCCUR"]

Here again, the Hearing officer leaves critical out information;

For example; The Hearing Officer misstates the language of HAR 13-5-24(c). Astronomy facilities are an *identified* use, not a permitted use. They can be permitted if an only if the Applicant can show that they have met the eight criteria under HAR 13-5-30 (C).

On page 91 hearing Officer clearly minimizes the qualifications of one of KAHEA'S witnesses. H.O FOF 490 she states; …"Among the many reasons Dr. Abad *feels* (emphasis added) she is qualified to offer such an opinion are: …"

Although she cites some of her credentials, H.O clearly treats this witness less than an expert in her field and does not give her testimony the weight it deserves in making her recommendations to the board. See B08a Kehaunani Abad Phd. WDT and B08b Kehaunani Abad, Phd CV. Her live testimony was heard on January 9, 2017.

CRITERIA 3, HAR 13-5-30(C)(3): "THE PROPOSED LAND USE COMPLIES WITH THE PROVISIONS AND GUIDELINES CONTAINED IN CHAPTER 205A, HRS ENTITLED "COASTAL ZONE MANAGEMENT WHERE APPLICABLE"

In Hearing Officers FOF # 499 on pg. 93 of her recommendations, she chooses to ignore Mauna Kea Anaina Hou exhibit B0at. This exhibit clearly states that chemicals used in the washing of the mirrors and its waste water is considered hazardous waste. This is just one of many of the examples of the H.O not taking into consideration any petitioners evidence when making her recommendations.

CRITERIA 4, HAR 13-5-30(C)(4): "THE PROPOSED LAND USE WILL NOT CAUSE SUBSTANTIAL ADVERSE IMPACT TO EXISTING NATURAL RESOURCES WITHIN THE SURROUNDING AREA, COMMUNITY OR REGION. "

There are so many exclusions here in the Hearing Officers recommendations (FOF 508-897) it's hard to know where to start. First of all, H.O relies heavily on the opinions of witnesses for the the Applicant who are heavily biased. If due weight was given to other witnesses who are Hawaiian, some cultural practitioners some not, that testified extensively on how this project if built would cause adverse, substantial and significant impact to a place of worship and cultural practice that has gone on for generations, H.O couldn't have possibly come to the conclusion that there will be no substantial, adverse, and/or significant impact to the conservation

district. For instance, on pg. 96 at FOF 521, Dr. Stone talks about the TMT being a world class telescope. This has no bearing on substantial adverse impacts to this conservation district - the natural resources, cultural resources, the historic district, historic sites, the aquifer, view planes, flora/fauna, burials etc.

FOF 520 on pg. 96 H.O tries to unsuccessfully describe how the proposed TMT project would "provide significant scientific, economical, and educational benefits, which are material, substantial, and highly unique". There is no logical or rational way to read this criteria so that it pertains to these alleged benefits. This kind of assertion undermines the real conservation goals, spirit and letter of HAR13-5-30(C)4.

The Petitioners' position is: the conservation district rules do not allow for land uses that have a substantial impact. The TMT FEIS concedes that the cumulative impact of past, present, and reasonably foreseeable telescope activities is already significant, substantial, and adverse.3 Ex 309, FEIS Vol 1, p. S-8, S-9 on cumulative impact. The TMT would contribute to this existing state of substantial adverse impact. The fourth criterion, however, prohibits land uses that cause substantial adverse impact. Because the BLNR and the University have failed to address the existing substantial impact on the mountain's resource, it is improper to consider any new projects that would contribute to that substantial impact in anyway. The Applicant UHH has not put forth any credible reliable or substantive countervailing evidence to support their claims.

While all of the current facilities are in the summit region areas described as Areas A, B, and C, none are in Areas D, E and F. MP2000 p.IX-23-5. The Applicant admits that the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea (areas A, B, and C) have resulted in impacts that are considered substantial, significant and adverse. Ex.A-3 p. 3-219. The Applicant proposes to expand astronomical development (one of the world's largest tele-

scopes) into an area (E) that is far (1000 meters or ¾ mile) from the developed infrastructure, in an alpine stone desert discrete from the summit cinder cones, with flora and fauna unlike those at the summit, in a Historic District, with an Access Way impacting a Kukahau'ula, (a Traditional Cultural Property) Thus creating a significant increment of impact to an area that is not at all built upon. Ex.A-3 p. 3-219

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

> "It is our view that the effect of astronomy development on cultural resources and on the landscape of Mauna Kea has been significant and adverse. While a project such as the TMT can bring new resources into play that may mitigate certain cultural impacts…we believe the project will increase the level of impact on cultural resources, which remains significant and adverse. "Laura Thielen, Chair, DLNR Ex A-004 FEIS Vol II p 17 of 531. She also states the view plane analysis has been downplayed in the DEIS. pg 20 of 532. Also, Chairwoman Theilan cites the DEIS saying the TMT will result in a small incremental increase - she does not agree that "the impact of the project can be characterized as a "small incremental" increase. The TMT will result in a 50% increase in astronomy related personnel in the summit area, will consume over 6 acres in its construction, and will result in the movement of almost 100,000 cubic yards of lava material. This project clearly represents more than a "small incremental" increase in environmental and cultural impacts" Pg 21-22 of 531.

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

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

> The bulk of human activity has occurred on the cinder cones near the summit of Maunakea, where eight of the existing observatories are located. Human activities have had a very limited impact on the relatively extensive habitats beyond the summit cinder cones. ***Therefore, human activity has not had a significant cumulative impact on species that dwell in these other habitats, such as lichens, mosses, and vascular plants***. (emphasis added). Ex.A003 FEIS p 3-215.
>
> "Cumulative" is defined as"made up of accumulated parts; increasing by successive additions." Webster's Dictionary, 2011. This definition is consistent with HAR §11- 200-2, which defines "cumulative impact" as "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."
>
> UH/TMT's attempts to limit review of the project solely to the TMT's discrete contribution to cumulative impacts. HAR §13-5-30(c)(4) is concerned with the effects of proposed actions on natural resources and not with tracking individual contributions from different impact sources. UH/TMT's attempt to justify additional 40 incremental impacts to a district already overburdened defies logic, for cumulative impacts necessarily *results from incremental impacts*. Here again, the Hearing Officer excludes probative, credible, and reliable evidence provided by Kehau Abad (Bo8a WDT), Kehau Abad TR January 9, 2017.
>
> Instead, H.O relies only on UHH archeologists Nees UHH Witness statement 11, Amended WDT for Nees (submitted after he testified), TR December 5, 2016, and Rechtman TIO witness WDT C-11, TR December 20, 2016. Nees testified that he had gotten his Written Direct Testimony from a template Sara Collins had provided him. Sara Collins is the archeologist UHH

used in the remanded contested case hearing.

"From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse: these impacts would continue to be substantial, significant, and adverse with the consideration of the [TMT] Project and other reasonably foreseeable future actions." *(Ex A003/R-3 TMT FEIS, S-8)*.

HAR 11-200-12 states: "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 an action. In most instances, an action shall be determined to have significant impact if it: (13) Requires significant energy consumption." (HRS 11-200-12 (Significance Criteria))

The TMT will have significant power requirements. (Ex B.70 CDUA Staff Report Feb 25, 2011, p.45)

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

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

Witnesses Hansen (WDT B10a/CV B10b), (TR January 19, 2017), Ward (B17a WDT), (TR Jan 1, 2017), Abad (WDT B08a/CV B08b), (TR Jan 9, 2017), Kahakalau (WDT B06a/ CV B06b), Pisciotta who is a cultural practioner (WDT B01a), Teale who is a cultural practitioner (WDT B15a/ CV B15b), Dr. Meyers (WDT B05a/CV B05b), Peter Mills (WDT B12a/CV B12b), Flores who is a cultural practitioner (WDT B02a), and Case who is also a cultural practitioner (WDT B21a), provided probative, reliable, substantial, and credible evidence and admitted relevant exhibits to demonstrate that the TMT project would, in fact, cause, expand and add too the substantially adverse cumulative impact to existing plants, culturally historic sites, recreational sites, geologic sites, scenic areas, watersheds, ecologically significant areas, and cultural practices. This is by no means a complete list of witnesses that provided testimony and entered relevant, probative, credible, and reliable evidence to this case that was not taken into consideration. The Applicant provided no countervailing, reliable or credible evidence witnesses to justify not taking into account or over riding witnesses or evidence provided by the Petitioners in this case.

The H.O in this case cannot possibly justify giving more weight to planners, project managers, astronomers, or board of directors for TMT who have heavy biases and/or who are paid by the law firm who represents the developer than a native Hawaiian cultural practitioner who would be experiencing the adverse effects of this proposed project.

BIOLOGICAL RESOURCES

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

Among the reasons that UH/TMT had to press beyond an EA to an EIS in the environmental review process were that the project possibly 1) "[i]nvolves an irrevocable commitment or loss or destruction of any natural or cultural resource" and 2) "[s]ubstantially affects a rare, threatened or endangered species, or its habitat." (*UH Environmental Impact Statement Preparation Notice, September 23, 2008, p. iii, quoting HAR § 11-200-12.)* The FEIS addresses adverse impacts on Wëkiu bugs in a combined six acres area of the Northern Plateau and the TMT Access Way. *(Ex A003/R-3 FEIS Vol. 1, p. 3-71)*. Of particular concern is the substantial adverse impact of the TMT access road, which passes between two areas of Wekiu bug habitat, Puʻu Hauʻoki and Puʻu Poliʻahu, and considering the restricted range of Wekiu bug habitat, much of which has already been destroyed by BLNR's mismanagement, the loss of any additional habitat area cannot be anything but significant.

MITIGATION MEASURES

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

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

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

Money: The promise to pay "substantial rent" is not a mitigation measure. Not only does the claim fail to consider fair market rent, it also pits compliance

with one law against another. Pursuant to HRS 171-17 and -18, fair-market rent is required to be paid into the general fund for the private use of public lands. All telescope facilities should be paying rent to the general fund, regardless of any other requirements or pre-requisites for permission to be on Mauna Kea. It is improper for the DLNR staff to suggest that compliance with this requirement – paying fair market rent – mitigates the substantial adverse impact of the proposed TMT project "because management costs money." (Ex. B-33). The requirement to pay rent is not a management fee, it is not a fine, and it is not a rationalization for authorizing a land use that otherwise fails to comply with the basic requirements for a permit. If a proposed land use has unmitigated substantial adverse impacts, then its CDUA cannot be granted, in which case the BLNR never reaches the question of what would be fair-market rent for that land use.

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

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

NEPA AND SECTION 106

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

UH/TIO Findings at COL 386-391 p. 209 claims Petitioners waived any challenges to the Final Environmental Impact Statements (FEIS). Without waiving our rights regarding the State level FEIS, in any way, the TMT is a federal undertaking that has received substantial federal funds from the federal government (i.e. NSF). Therefore we maintain that the TMT Project meets the standards of being a undertaking that is required to follow the National Environmental Policy Act (NEPA) along with other Federal laws such as the NHPA Section 106 Consultation Process.
UH/TIO COL 427-441 at p. 214 that NHPA Section 106 Review/ National Environmental Policy Act does not apply to the either the TMT or the TIO.

The UH/TIO Condition (1) of their proposed Decision and Order states: "**UH Hilo, shall comply with all applicable statutes, ordinances and rules, regulations and conditions of the Federal, State, and County governments and applicable parts of HAR § 13-5 et seq.** (Emphasis added)
See UH/TIO Proposed Decision and Order Conditions (1) and (24) at p. 221 and 222 respectively.

As early as 2009 we requested that the TMT begin Consultation under the National Historic Preservation Act begin. MKAH has previously been recognized by the Advisory Council on Historic Preservation (ACHP) as a Native Hawaiian Organization (NGO) for the purpose of consulting regarding the Traditional Cultural Properties (TCP) of Mauna Kea sometime around 2003 during the NASA/KECK Outriggers Project.

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

"III SPECIFIC ISSUES

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

1.TMT claims no federal funding used for Project

The TMT DEIS states,
Federal rules, such as the National Environmental Policy Act (NEPA), do not apply to the Project, no Federal agency is involved in the Project, no Federal Funding is being use for the Project, and the Project does not use Federal Land."
(TMT DEIS at p. 3-105, emphasis added)

[T]he TMT project has received substantial federal funding from the National Science Foundation (NSF). NSF Award 0443999 confirms this. The NSF Award also confirms that $18 million federal tax dollars where awarded to the TMT and Giant Magellan Telescope (GMT), for "(1) The Design and development phase for a 30-meter diameter segmented-mirror, optical/infrared telescopes, the Thirty Meter Telescope (TMT)."Further confirmation of federal funding used by TMT is found at the link below, (See Executive Summary second paragraph) (http://www.noao.edu/dir/spo/ GSMT-annual-report08.pdf)."
See Ex. B.01o under Section III:

NEPA Is Required By Law

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

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

The NEPA rules state in relevant part:

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

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

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

NHPA Not The Same as NEPA

The TMT is proposing to use Mauna Kea summit lands, which are eligible for listing on the National Historic Register, yet TMT has not begun Section 106 consultations under the National Historic Preservation Act (NHPA). Again, we made formal requests in our scoping comments calling for NHPA, Section 106 Consultation to begin. The U.S. District Court (Hawai`i) affirmed,
NHPA mandates that a federal agency "shall consult… with any Native Hawaiian organization that attaches religious and cultural significance" to properties eligible for the inclusion on the National Register."
See (OHA v. NASA, Civil No. 02-00227 (SOM/BMK), 2003, p. 18 of 39)

The State Historic Preservation Office, TMT DEIS review letter dated June 26, 2009, states:
Agencies Involved: Section 2.0 states that the TMT Observatory Corporation is a private non-profit partnership. Your memo dated May 28, 2009 notes that

the National Science Foundation released the DEIS. There is no mention of the NSF in the DEIS, and we presume that is the case. If the NSF is involved, this project is subject to review under the National Historic Preservation Act, Section 106 (36 CFR 800).

TMT representatives appear to understand what federal laws require, yet continue to ignore them. (Please see TMT comments below).

"The federal government, federal agencies, they make that decision. We don't. And what triggers NEPA (National Environmental Protection Act) is a significant federal action," said Michael Bolte, director of California's Lick Observatory and member of the TMT Board of Directors.

See Ex. B.01o The request for Section 106

When asked Ed Stone of the TMT Project stated the following:

12.19.16 Edward Stone Vol 18 page26:16-25
(questions from Kealoha Pisciotta)

16 Q. Has your staff informed you that Native
17 Hawaiians attach religious and cultural significance
18 to the historic properties within the Historic
19 District of Mauna Kea?
20 A. I'm aware of that, yes.
21 Q. Are you aware that the advisory council on
22 Historic Preservation is a council that is made up of
23 presidential appointees and it is a federal agency
24 responsible for ensuring federal agencies and/or
25 federal undertakings comply with the National

12.19.16 Edward Stone Vol 18 page27:1-25
(questions from Kealoha Pisciotta)

1 Historic Preservation Act?
2 MR. ING: Objection, Your Honor, this is
3 beyond the scope and lacks foundation.
4 HEARINGS OFFICER AMANO: Could you set the
5 foundation and also perhaps tell me where we're going
6 with this?

MS. PISCIOTTA: Well, the CDUA requires that all county, state and federal requirements and laws be met and followed. So we believe it's relevant, and we believe that he's the witness who can talk about it because he is Executive Director of TMT, and so really the buck has to stop with someone and I think it's him.
HEARINGS OFFICER AMANO: All right. So could you then set the foundation? In other words, you have to establish that he knows about that.
MS. PISCIOTTA: Sure, let me try.
Q. Are you aware that the NASA Keck Observatory did complete Historic Preservation and National Environmental Policy Act review processes?
A. I'm sorry, what is the question?
Q. Are you aware that the TMT -- oh, sorry -- that the NASA and Keck, for example, did have to comply with the National Environmental Policy Act and the Historic Preservation Act review processes?

12.19.16 Edward Stone Vol 18 page28:1-25
(questions from Kealoha Pisciotta)

A. I don't remember.
Q. Do you remember that the court had stated that your EA and finding of no significant impact was incorrect?
MR. ING: Objection, Your Honor, beyond the scope of his direct.
MS PISCIOTTA: It's really not because he was in charge of the Keck Observatories during the period in which this lawsuit occurred. And he also was in charge of the -- he was in the lawsuit, so I think he should know NASA, Sean O'Keefe (phonetic) and University of California and Caltech were involved as well.
So I'm just trying to establish that he knows. It's in 2003 -- that's part of his testimony that he was this person in 2003 and CARA does oversee Keck Observatories, and that was their project?

HEARINGS OFFICER AMANO: Mr. Ing.
MR. ING: The Keck project is not at issue here. If she wants to ask with regard to NSF and the Historic Preservation Council, she can ask those questions of him with regard to the TMT project. That's what I'm objecting to. She is asking the issues with regard to the Keck project.
MS. PISICOTTA: He objected to the earlier

12.19.16 Edward Stone Vol 18 page29:1-25
(questions from Kealoha Pisciotta)

question, so I'm trying to lay foundation. He should be aware of because he's been involved in the exact same processes regarding federal review which is on of the requirements of the CDUP that they have to be in compliance with federal as well as state and county.
HEARINGS OFFICER AMANO: How does that tie to TMT?
MS. PISCIOTTA: Because TMT has not conducted those same federal level review that he had to go through earlier.
HEARINGS OFFICER AMANO: I'll overrule the objection, allow you to lay your foundation, please.
Q. (By Ms. Pisciotta): Are you aware that the TMT has not conducted either the federal level environmental review or Historic Preservation review process?
A. Yes.
Are you aware that the federal review process would include compliance with National Environmental Policy Act?
A. Federal government is not involved in the way that in fact requires that review.
A. And they're not -- okay. I'm going to quote something for you and then ask you another

12.19.16 Edward Stone Vol 18 page30:1-25

(questions from Kealoha Pisciotta)

question.
The National Historic Preservation Act as
amended in 1992 defines an undertaking which means
project activity or program, funded in whole or in
part under the direct or indirect jurisdiction of
federal agency, including those carried out on behalf
of the federal agency or those carried out with
federal assistance. Then it goes on for little bit
more.
Are you aware of that, what the definition
after undertaking?
A. There has been -- this is something the NSF
would determine, and they have not determined that
they have that role, as I understand it.
Q. But it doesn't have to necessarily be NSF,
it's whoever receives federal funds.
A. Well, the federal funds have to come from
organizations like NSF that determine whether or not
this is something that is required.
Q. That's correct.
So are you aware that the TMT has received
federal funding and federal assistance in the form of
National Science Foundation funding?
A. We have, but not for purposes covered by
those laws, as I understand it.

12.19.16 Edward Stone Vol 18 page31:1-25
(questions from Kealoha Pisciotta)

Q. Do you know what those purposes are?
A. The purposes of what the funding we have
had has been for community outreach to national U.S.
community and to developing a plan for possible
future federal contributions, but they're not in fact
involved in funding the design or construction of
TMT.
Q. I'm going to put something on the
projector. I have to turn it on.
MR. ING: If these are exhibits, I would

like to have them identified first all. If they're not exhibits, then they shouldn't be shown to the witness.
MS. PISCIOTTA: yeah, they're exhibits, it's already been shown before. This one is NSF grant for $18 million, and it's a cooperative agreement, and it is the design and development of the giant segmented mirror that is -- I'm trying to go read which one it is.
MR. ING: What is the exhibit number?
MS. PISCIOTTA: B.01b. It's in there already, but you can put it up? Thank you.
Q. Are you familiar with that exhibit?
A. Yes.
Q. So are you familiar with that $18 million?

12.19.16 Edward Stone Vol 18 page32:1-25
(questions from Kealoha Pisciotta)

A. Yes.
Q. So would you -- and would you identify what that 18 million is for?
A. That's for the studies that were going on at the time. These were pre -- the period where we were actually designing the telescope and had -- and at that time NSF was involved in some of the site testing in South America, which is part of that 18 million dollars, for instance.
But NSF, it's up to them to determine what laws they have to follow with respect to these things. They did not determine that this required an EIS or anything like that.
Q. Okay. I'm going to show you another one. And this is -- we don't have it uploaded yet, but we have copies for everyone. We're going to identify it as B.01q.
HEARINGS OFFICER AMANO: Could you give a copy to Mr. Ing, first, please?
MS PISCIOTTA: Yeah. Excuse me, I'm sorry, just taking a moment here

22 MR. ING: You Honor, I thought there were
23 copies for each of the parties.
24 MS. PISCIOTTA: I'm sorry?
25 MR. ING: I object to the use of the

12.19.16 Edward Stone Vol 18 page33:1-2, 20-25 (questions from Kealoha Pisciotta)

1 witness -- I don't have a copy of the exhibit and
2 they will be asking questions from it.
x.20 HEARINGS OFFICER AMANO: Yes. So you've
21 hand B.01q and you've identified and intend to have
22 uploaded -- a copy has been given to this witness as
23 well as Mr. Ing and Mr. Ing is sharing with Mr.
24 Lui-Kwan.
25 Q. (By Ms. Pisciotta): Just a simple

12.19.16 Edward Stone Vol 18 page34:1-25 (questions from Kealoha Pisciotta)

1 question.
2 This one specifically is for 1 million
3 dollars, and I guess you and Mr. Michael Bolte and
4 Gary Sanders, I believe, were the proponents of this
5 grant; is that correct?
6 A. Yes.
7 Q. Are you aware of any other grants that NSF
8 has awarded to the TMT?
9 A. No, these are the two.
10 Q. Were any others?
11 A. No. To TMT?
12 Q. Yes.
13 A. No, nothing comes to mind.
14 Q. Nothing for the STEM program?
15 A. STEM program, I'm not aware, I don't --
16 Q. Anyway, so I'll get on with the questions.
17 You were saying that your testimony was
18 that NSF needed to be the one to trigger it, but it
19 also says that the one who gets federal funds is also
20 responsible for federal compliance.
21 I'm going to read an excerpt from Exhibit

A-11, which is Cultural Resource Management Plan for University of Hawai'i. I'm going to read first from page 1-29, I'll read it for you.
The National Historic Preservation Act

12.19.16 Edward Stone Vol 18 page35:1-25
(questions from Kealoha Pisciotta)

first passed in 1966 and subsequently amended covers the treatment of historic properties on federal lands under federal control and/or affected by federal funded activities or undertakings. The National Historic Preservation Act governs the identification and treatment of properties by public and private entities in order to ensure that, quote, the historical and cultural foundation of the nation should be preserved as a living part of the our community life and development in order to give a sense of orientation to the American people, unquote.
And then on page 1-3, I will read this part for you.
Section 106 of the National historic Preservation Act governs how federal agencies proposing or funding an undertaking must proceed in order to -- in order to ensure the appropriate treatment of historic properties affected by the undertaking. There is a federal statute listing the 16U.S.C. 470F, the head of any federal agency having direct or indirect jurisdiction of a proposed federal or federally assisted undertaking in any state, and head of federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any

12.19.16 Edward Stone Vol 18 page36:1-25
(questions from Kealoha Pisciotta)

federal funds on the undertaking or prior to the issuance of any license or approval -- as the case may be taken into account the effects of the undertaking on any district, site, building,

structure or object that is included or is eligible for the inclusion in the National Register. The head of such federal agency shall afforded by counsel [SIC: should be "Council"] on historic preservation establish under Title 2 of this act a reasonable opportunity to comment with regard to such an undertaking. It states, given this definition, it is clear that the activities within the UH management area that are carried out with federal funding, for example, from National Science Foundation or National Aeronautics and Space Administration are covered by Section 106 National Historic Preservation Act. In addition, any activities that require federal permit license or approval from the U.S.S Fish and Wildlife under the Endangered Species Act also come under Section 106 in National historic Preservation Act. So my question, Mr. Stone, is have you talked to the National Science Foundation regarding either doing a federal Environmental Impact Statement or a Federal Level Section 106 consultation?

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(questions from Kealoha Pisciotta)

A. It's my understanding it's not required.
Q. Okay. Because you have read these rules?
A. No, that's what I'm told. I'm not an expert on all those rules, but that's what I've been told.
Q. Who is telling you this?
A. They lawyers.
Q. Oh, the lawyers?
A. Yes.
Q. All right. So in the past Yale University has paid money, I believe, in the amount of 14 million to acquire time on the Keck Observatory. Are you aware of that?
A. I'm aware of that, but I was not involved.
Q. Have you or TIO or TMT Corporation

16 negotiated any state -- negotiated with the state or
17 BLNR for percentage of any proceeds that might come
18 in from other places for use of the TMT?
19 A. I don't have any knowledge of these
20 details. I have not been involved.
21 Q. Will TMT look to patent any of the
22 technologies that they might produce on the TMT
23 telescope?
24 A. Patent?
25 Q. Yes.

FURTHERMORE, **THERE IS NO QUESTION THAT TMT HAS RECEIVED FUNDING FROM NATIONAL SCIENCE FOUNDATION, THE PROPOSED PROJECT IS IN AN AREA ELIGIBLE FOR LISTING ON THE NATIONAL HISTORIC REGISTER, AND IS IN AN AREA DESIGNATED A NATIONAL NATURAL LANDMARK.**

Hearing Officer states in FOF 569 "Consultation under NHPA Section 106 was not required nor allowed for the TMT Project because 1) the proposed TMT Project does not have the potential to cause effects o federally protected historic properties…" and "..will not use federal funding" H.O has only listed one (1) grant received from the NSF for $250,000. There are more; Exhibit B01b National Science Foundation Award Abstract to the TMT Corp #0443999 for $18,000,000.00 / Exhibit B01aq NSF Award #1347767 for $713,181.00.

The TMT also submitted a proposal for partnership with the National Science Foundation. Exhibit B17a

The TMT is proposing to use Mauna Kea summit lands, which are eligible for listing on the National Historic Register, yet TMT has not begun Section 106 consultations under the National Historic Preservation Act (NHPA). Again, we made formal requests in our scoping com-

ments calling for NHPA, Section 106 Consultation to begin. The U.S. District Court (Hawai`i) affirmed,

> NHPA mandates that a federal agency "shall consult… with any Native Hawaiian organization that attaches religious and cultural significance" to properties eligible for the inclusion on the National Register." (OHA v. NASA, Civil No. 02-00227 (SOM/BMK), 2003, p. 18 of 39). Pg 5-6 MKAH Exhibit B01o.
>
> And:

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

Agencies Involved: Section 2.0 states that the TMT Observatory Corporation is a private non-profit partnership. Your memo dated May 28, 2009 notes that the National Science Foundation released the DEIS. There is no mention of the NSF in the DEIS, and we presume that is the case. If the NSF is involved, this project is subject to review under the National Historic Preservation Act, Section 106 (36 CFR 800). Pg 6 MKAH Exhibit B01o.

> The DEIS and draft archeological Assessment for Area E (Appendix E) does not address impacts to the Mauna Kea Summit Historic District.
>
> Generally a historic district is defined as a historic property that '…possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development. The Mauna Kea Summit as a "cultural landscape" has been determined eligible for the National and State Register of Historic Places under multiple criteria including cultural significance to the native Hawaiian People (cf. letter of D. Hibbard to R. Evans, September 12, 1991). As a result, archaeologists with DLNR-SHPD have referred the summit region of Mauna Kea as a "ritual landscape," with all

of the individual parts contributing to the integrity of the whole summit region. (pers. comm. P. McCoy and H. McEldowney; Group 70 meetings of September 10, 1998). *Id* Citing McCoy and McEldowney).

THE NATIONAL REGISTER OF HISTORIC PLACES

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The National Register of Historic Places is barely touched upon by the H.O in her recommendations. Hearing Officer also states in (FOF 666 and 667) that Bulletin 38 (MKAH Exhibit B01p) is not applicable because "[t]he TMT is a federal project.." The exhibit she cites to in FOF 666 is incorrect. The correct Exhibit number so B01p.

Mauna Kea is eligible for listing on the National Register of Historic Places. This is what makes Bulletin 38 relevant here in this case.

"A traditional cultural property, then, can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." (*MKAH B.01/ p. 1)*

The National Register of Historic Places contains a wide range of historic property types, reflecting the diversity of the nation's history and culture. "...groups of buildings, structures or sites forming historic districts; landscapes; and individual objects are all included" in the Register. *(MKAH B.01/ p 1)*

"One kind of cultural significance a property may possess, and that may make it eligible for inclusion in the Register, is traditional cultural significance. "Traditional" in this context refers to those beliefs, customs, and practices of a living community of people that have been passed down through the generations, usually orally or through practice." (MKAH B.01/ p. 1)

"A historic property, then, is significance derived from the role the property plays in a community's historically rooted beliefs, "customs, and practices." (MKAH B.01/ p. 1)

"Traditional cultural values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group's sense of identity and self respect". (*MKAH B.01/ p. 2*

"Traditional cultural properties are often hard to recognize. A traditional ceremonial location may look like merely a mountaintop, a lake, or a stretch of river..." (*MKAH B.01/p.2)*

"Properties to which traditional cultural value is ascribed often take on this kind of vital significance, so that any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them." (MKAHB.01/p.2)

" In the 1980 amendments to the National Historic Preservation Act, the Secretary of the Interior, with the American Folklife Center, was directed to study means of: preserving and conserving the intangible elements of our

cultural heritage such as arts, skills, folklife, and folkways." (*MKAHB.01/p.2)*

Ethnocentrism (emphasis added) is a means of viewing the world and the people in it only from the point of view of one's own culture and being unable to sympathize with the feelings, attitudes, and beliefs of someone who is a member of a different culture. It is particularly important to understand, and seek to avoid, ethnocentrism in the evaluation of traditional cultural properties. Bulletin 38. (*MKAH B.01p/ p. 4)*

The authors of the archeological analysis for the FEIS failed to take into account intangible aspects of the cultural significance of the proposed project that is in the historic district. (*Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27, p 36:22-25, p37 1-6)*.

The Applicant does not provide any countervailing evidence to any of Dr. Abads' credible, reliable substantive testimony.

MAUNA KEA IS A NATIONAL NATURAL LANDMARK

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WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

This designation by the Department of the Interior was left out and not considered in the Hearing Officers recommendations.

Mauna Kea was listed as a National Natural Landmark in 1972. One of the reasons given for placing the mountain on this register by the National Park Service is that Mauna Kea is the "Most majestic expression of shield volcanism in the Hawaiian Archipelago, if not the world." Ex A-009 CMP Appendix 4, p.9

"Few sites posses [sic] better credentials to justify their national significance than does Mauna Kea." Ex. A-003 FEIS, p. 3-106, Mauna Kea NNL program.

The objectives of the NNL program are fourfold: to encourage the preservation of sites illustrating the geological and ecological character of the United States; to enhance the scientific and educational value of the sites thus preserved; to strengthen public appreciation of natural history; to foster a greater concern for the conservation of the nation's natural heritage. Laura Thielen, Chair, DLNR EX. A-004 FEIS Vol II p 19 of 531.

The Mauna Kea National Natural Landmark is held in trust by the State of Hawai`i, and its 83,900 acre boundary incorporates the lands within the conservation district, including the Mauna Kea Science Reserve, Ice Age Natural Area Reserve and the Mauna Kea Forest Reserve. EX A-004 (TMT EIS Vol. II), p.3-6.

"... The National Park Service is concerned about the deleterious effects its (the TMT) (parenthesis added) construction will have on the nationally recognized resources of Mauna Kea National Natural Landmark.." EX A004/R-4 FEIS Vol 2 May 8, 2010 p3 of 531.

" The National Park Service contends that the permanent destruction of any surface geologic structures within the Mauna Kea NNL is significant and that it denigrates from it's overall status as a national natural landmark.." EX A004/R-4 FEIS Vol 2 May 8, 2010 p5 of 531 last paragraph.

"[A]side from the aforementioned suggestions and additional recommendations for mitigation, the review of the DEIS has brought to our attention the incremental addition with resultant impacts of ten observatories to Mauna Kea since its establishment as a national natural landmark in 1972. Realizing that additional observatories may be a consideration in the future, the National park Service intends to review the current NNL designation and at the very least may consider removal of the 525 - acre Astronomy precinct from the current Mauna Kea National natural Landmark designation" EX A004/R-4 FEIS Vol 2 May 8, 2010 p6 of 531 3rd paragraph from top.

MAUNA KEA IS A HISTORIC DISTRICT

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WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

"Area E" is in an undeveloped area within a Mauna Kea Historic District. *Ex R-3 FEIS VOL 1 p2-3 Figure 2-4 under Project Description*.

In 1999, during the preparation of the 2000 Master Plan, SHPD proposed that the cultural landscape on the top of Maunakea be recognized as the Mauna Kea Summit Region Historic District. The district is listed as SIHP #

50-10-23-26869. Nearly the entire MKSR is within the roughly 17,820-acre Mauna Kea Summit Region Historic District. The TMT Observatory Project 13N site, the Access Way, and the Batch Plant Staging Area are all within the Mauna Kea Summit Region Historic District. The boundaries of the district generally coincide with the extent of the glacial moraines and crest of the relatively pronounced change in slope that creates the impression of a summit plateau surrounding the cinder cones at or near the summit (Figure 3-1). The district encompasses a concentration of historic properties, including most of the 263 summarized in Table 3-3, that are historically, culturally, and visually linked within the context of their setting and environment. The spiritual and sacred quality of Maunakea is related to this context and the link between the Historic Properties and their setting and environment. Although the Mauna Kea Summit Historic District is only officially designated as a Historic District at the State level, it has been stated by SHPD that it is eligible for inclusion in the National Register of Historic Places (NRHP) as a district; however, no official application for such inclusion has been submitted. All of the Historic Properties discussed in this section are within the Historic District and are considered contributing properties. Based on recent archaeological field work, it has been proposed that the Historic District be expanded to include the entire MKSR. (PSCI, 2010a). FEIS Vol. 1 Ex. R- 3 Sec 3.3 p. 3-42 2nd para.

The proposed TMT site is located within and is an integral part of a Historic District: Pursuant to HRS Chapter 6E-2, "Historic Property" means any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old. *FEIS Vol 1 Ex. R-3 Archaeological/ Historic Resources, p 3-4.*

"Historic Districts" are geographically definable areas possessing a significant concentration, linkage, or continuity of contributing properties - sites, buildings, structures, or objects united by past events or aesthetically by

plan or physical development. Contributing properties add to the historic architectural qualities, historic associations, or archaeological values for which a district is significant because it was present during the period of significance, and possesses historic integrity reflecting its character at that time or is capable of yielding important information about the period." FEIS Vol 1 Ex. R-3 Sec. 3.3 Archaeological/ Historic Resources, p 3-4.

"*Within the historic district, the effect of a project on the historic district as a whole needs to be assessed as well as the project's effect on individual historic properties located within or immediately adjacent to the project area. The effect of a project on the historic district must be addressed even if no individual historic properties are found within or immediately adjacent to the project area.*" (emphasis added) "Effects on a district would consider the visual impact of a facility on the surrounding landscape (i.e., the various land forms creating the setting and context of the multiple historic properties encompassed by the district) and on those individual historic properties which contribute to the significance of the district....." *FEIS Vol. 1 Ex. R-3 Sec. 3.3 p 3-49 3rd and 4th par.*

There was no regional archaeological analysis done for the Proposed TMT project. (*Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27 p31:7-15)*

There were no analysis on how building the Thirty Meter Telescope in"Area E" which sits in the context of the ring of shrines would impact the sacred area. (Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27 p 32:7-11)

Within the MKSR there are 263 historic properties, most of them shrines, but also burials. The majority of the Mauna Kea Science Reserve and these his-

toric properties are located within the summit region Historic District. (FEIS Vol 1 Executive Summary p. S-3).

"The potential of the proposed action to introduce elements which *may alter the setting* in which cultural practices take place." (*Ex. B.12a at 2 citing B.12c (OEQC Guidelines at 13)*

UH archaeologists used an"etic"perspective(non cultural or out side the culture)as opposed to "emic (from within the culture) as required by law. (*Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27 p 41:1-18)*

VISUAL AND AESTHETIC RESOURCES

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

Hearing Officer FOF's #834-882. There are many omissions in this section and the Hearing Officer provides no countervailing credible evidence that cultural practitioners will not be adversely affected. None of the petitioners who are Native Hawaiian Practitioners were given any weight to their testimony or to any of their witnesses testimony.

IT IS CLEAR THAT VEIW PLANES ARE IMPORTANT CULTURAL FEATURES

Many of the Pu`u [cinder cones], associated burials and kinolau;

The TMT DEIS fails to address the cumulative impacts to the kinolau (bodily forms of the deities) such those impacts to the image of Poliahu seen from the east side of the island.
See Ex. B.23 the photo image of Poliahu.

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

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

Mountain landscape in navigational traditions;
The TMT DEIS fails to evaluate the cumulative impacts on the ritual landscape including impacts on solstice, equinox ceremonies and other ceremonies relating to navigation.
We wish also to state our objections to the TMT DEIS hearing presentations. The TMT hired people to give a presentation suggesting that modern astronomy is nothing more than and extension of what our ancestors accomplished. This is an unreasonable assertion. The two disciplines may not be reasonably compared; it is like comparing apples and oranges. Our ancestors may not have done what Plato did, but what they did accomplish was amazing. It is righteous to give credit where it is due.

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

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

be properly credited for this. Mauna Kea is the land of our history and knowledge—and it requires maximum protection.
See Ex B.01.o Request for Section 106, Section Cultural Impacts #1,2,3)

The mountain landscape in navigational traditions: Hawaiian Navigational, it is noted that while none of the archival historical literature has made specific references to the sites or features that where recorded as being associated with navigational practices and customs, the gods and deities associated with Mauna Kea have celestial body forms and some were evoked for navigational practices.
See Ex. B.37 MP, App. I, p.29

Mauna Kea is actually the fulcrum of such ceremonies, because the Mauna sets the ultimate relationship to all other sacred sites for such ceremonies, as Mauna Kea is the highest point and from there you can see all else.
See Ex B.01a K. Pisciotta,WDT, p. 5

[T]housands of years ago our navigators and star people developed a system that allowed our ancient people to circumnavigate the globe and to people the tiniest islands scattered across the largest ocean on earth, the Pacific Ocean. We did this before the birth of Christ and at a time when no one on earth was doing a similar method of ocean voyaging…they did develop a system of advanced mathematics that allowed them to understand and determine that the earth was round and to a concept of a celestial equator. If this were not the case they could not have found the tiny little islands across a vast ocean with any accuracy at all. If your measurements are off by only a few degrees you will get lost at sea, because even tiny discrepancies in measurement on the sky translate to hundreds of miles on the ocean.
See Ex B.01a K. Pisciotta, WDT, p. 5

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

they are dependent on the landscape and that is why the landscape of Mauna Kea needs to be protected and preserved.
See Ex B.01a K. Pisciotta,, WDT, p. 5

These ceremonies are about tracking the motion of the sun across the sky throughout the year and were used by our people and most of the ancient people around the world to keep track of the year. The po`e kahiko (ancient Hawaiian people) are not alone in these ceremonies for keeping track of the motions of the celestial bodies and their relationship to the observers on earth. The Celtic Shaman, Egyptian Priests, Mayan Priests, Chinese, Arab and Middle Eastern astronomers and holy people all performed the ceremonies similar to those we perform on Mauna Kea.
See Ex B.01aK. Pisciotta, WDT, 6

Tracking the sun is for growing and harvesting. But more important is the need to track the annual time in the context of a much greater time frame known as the precession, which is the 26,000 year cycle (although some used slightly different time frames).
See Ex B.01a K. Pisciotta, ,WDT, 6

This cycle is the measure of the wobble of the earth's axis, and the time it takes for the wobble to make a complete cycle. The wobble was important to keep track of because relative to earth the pole stars appear to change over time. If the pole stars change it drastically impacts navigation. If the poles are changing then over time our knowledge must change to reflect these changes or we will get lost, and for us especially that means getting lost at sea. Ex C-1 K. Pisciotta, June 28, 2011, WDT, 5The idea that so many ancient people understood this concept is amazing in and of itself. It would take about 70 years for a single person to realize that such a motion was actually happening and another great leap of consciousness to understand it would take about 26,000 years for the precession cycle to be completed. How the ancient peoples of the world came to this understanding is amazing. I learned about this from my Kupuna first, and then did some of my own research. ***See*** Ex B.01a K. Pisciotta, WDT, p. 6.

The ceremonies I just described are specifically dependent upon our ability to observe and track the motion of the sun and other celestial bodies in order to find our way and to determine when and how to perform certain things for the care of the land and sea. Our traditional resource management models are dependent on these ceremonies. Our ancient knowledge relating to our rela-

tionship to our other Pacific people are also a part of this knowledge. And lastly our sacred prophesies are based in this knowledge.
See Ex B.01a K. Pisciotta, WDT, p. 6

But more important is the need to track the annual time in the context of a much greater time frame known as the precession, which is the 26,000 year cycle (although some used slightly different time frames). This cycle is the measure of the wobble of the earth's axis, and the time it takes for the wobble to make a complete cycle. The wobble was important to keep track of because relative to earth the pole stars appear to change over time. If the pole stars change it drastically impacts navigation. If the poles are changing then over time our knowledge must change to reflect these changes or we will get lost, and for us especially that means getting lost at sea.
See Ex B.01a K. Pisciotta, WDT, p. 5

Our traditional resource management models are dependent on these ceremonies. Our ancient knowledge relating to our relationship to our other Pacific peoples are also a part of this knowledge. And lastly our sacred prophesies are based in this knowledge. Ex C-1 K. Pisciotta, June 28, 2011, WDT, p. 6We refer to the summer solstice ceremonies as "Ke Ala Polohiwa a Kane", Winter as "Ke Ala Polohiwa a Kanaloa, spring equinox as "Ke Ala`ula a Kane", and autumnal equinox as "Ke Ala Ma`awe`ula a Kanaloa" ***Id.***

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

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

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

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

"Ke Ala Ma'awe`ula a Kanaloa" (The Autumnal Equinox--"The Red Track or Tentacle") of Kanaloa) occurring in September.

See Ex B.01a K. Pisciotta, WDT, p. 6-7

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

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

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

Exhibit B.01w is a picture of the Southern Sky from Mauna Kea. At the left is the glow of the lava from Kilauea volcano. In the sky at the center is the Southern Cross. The Snow covered peak in the center is the true summit of Mauna Kea, the highest point in the Pacific. At the right, the dome of the 8-meter Gemini North Telescope is under construction - found in the Atlas of Hawai`i, 3rd Ed. Edited by Juvik and Juvik, Chief Cartographer Thomas R. Paradise, at Photograph by Mr. R.J. Wainscoat, copyright 1997, p. 98. Ex B.01a K. Pisciotta, WDT, p. 7,The Summit Access Road was built with government funds and is a public road ("non-exclusive road easement").
See Ex. B.42 CMP MKPAP, p. 1-4

2.13.17 Kealoha Pisciotta Vol 34 page48:9-25
(questions from Ku Ching)

9 Q. So what is the extent of the breadth of
10 your activities on the mountain when yoůre doing 11 your cultural practices?
12 A. All over, from Půu Poľahu to the lake,
13 to Kukukåula [SIC: should be Kukahaůula] to Půu Weiku [SIC: Should be Wekiu] to Půu Haůoki, the edge
14 of Půu Kukahaůula looking towards the whole
15 archipelago including Haleakala.
16 Q. Would your interest go further than
17 Haleakala and Maui?
18 A. Yes, because part of the practice is the
19 alignments connecting Mauna Kea to the other heiau 20 across the archipelago, all the way down to
21 Motumanamana in the northwest Hawaiian island in 22 Papahanaumokuakea National Monument.
23 Q. So it would include the island of Kauåi
24 also, right?
25 A. yes, Půu Poľahu -- I mean Poľahu Heiau

2.13.17 Kealoha Pisciotta Vol 34 page49:1-25
(questions from Ku Ching)
1 on Kauåi as well.
2 Q. So there is a relationship between Poľahu
3 Heiau on Kauåi and on Mauna Kea; is that true?
4 A. Yes.
5 Q. Could you tell us about that relationship,
6 if you know?
7 A. Well, I went there one time, having seen
8 the heiau on some website, and I didn't understand
9 why it would be on Kaua'i originally.
10 Now I have a much better understanding.
11 And so I traveled to Kaua'i and I went to the heiau,
12 and I actually measured the alignments of that heiau
13 and its construction and their alignments back
14 directly to Mauna Kea. They connect directly.
15 Q. I see.
16 Now, everyone knows that if you're looking
17 towards Kaua'i and Poli'ahu Heiau, that the curvature
18 of the earth sort of says that you do not really see

it, it's below the horizon.
Have you ever been able to see Poli'ahu
Heiau from Mauna Kea?
A. I actually have seen Kaua'i, but how I know
they're directly aligned is because when you do the
alignments connecting the solstice alignments from
Mauna Kea that radiates out and across the

2.13.17 Kealoha Pisciotta Vol 34 page50:1-10, 25
(questions from Ku Ching)

archipelago, they are directly lined up with the
north, south, and west directions. That's how we
know they're aligned in that way as they are in
Motumanamana.
Q. In the EIS, the cultural EIS and all of
that, they discuss the three principal spiritual
7 places on Mauna Kea from which Hawaiians are supposed
to be doing their practices.
Do you limit yourself to those three
places, if at all?

A. Oh, no. I'm sorry, I do not limit my…

Please see also the following Exhibits:

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

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

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

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

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

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

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

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

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

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

When we look out the plateau where the TMT is proposing to site their project—it is not just that it will not be blocking our eyes (depending on where we are looking from) but it will be the most coronal feature in our eyes and therefore the most feature in our customary and traditional view plane. It is the this view plane that we use to look and hone the high mains down the island chain. For me an my Ohana-that view is significant -the view of Haleakala-it is the view and the practice of honoring our ancestors, our akua residing in the high lewa. It is our way of honoring the motions of the heavens-which is also honoring the movements of the kupuna and the Akua. we can partitions our beliefs. ***Id.***

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

Further,

The UH archaeologists used an"etic"perspective(non cultural or out side the culture) as opposed to "emic (from within the culture) as required by law. (*Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27 p 41:1-18)*

Generally a historic district is defined as a historic property that '…possesses a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united historically or aesthetically by plan or physical development. The Mauna Kea Summit as a "cultural landscape" has been determined eligible for the National and State Register of Historic Places under multiple criteria including cultural significance to the native Hawaiian People (cf. letter of D. Hibbard to R. Evans, September 12, 1991). As a result, archaeologists with DLNR-SHPD have referred the summit region of Mauna Kea as a "ritual landscape," with all of the individual parts contributing to the integrity of the whole summit region. (pers. comm. P. McCoy and H. McEldowney; Group 70 meetings of September 10, 1998). *Id* Citing McCoy and McEldowney).

Chairwoman Laura Theilan states in her comment in the DEIS; "It is our view that the effect of astronomy development on cultural resources and on the landscape of Mauna Kea has been significant and adverse. While a project such as the TMT can bring new resources into play that may mitigate certain cultural impacts…we believe the project will increase the level of impact on cultural resources, which remains significant and adverse. "Laura Thielen, Chair, DLNR Ex A-004 FEIS Vol II p 17 of 531. She also states the view plane analysis has been downplayed in the DEIS. pg 20 of 532. Also, Chairwoman Theilan cites the DEIS saying the TMT will result in a small incremental increase - she does not agree that "the impact of the project can be characterized as a "small incremental" increase. The TMT will result in a 50% increase in astronomy related personnel in the summit area, will consume over 6 acres in its construction, and will result in the movement of almost 100,000 cubic yards of lava material. This project clearly represents more than a "small incremental" increase in environmental and cultural impacts" Pg 21-22 of 531.

There was no regional archaeological analysis done for the Proposed TMT project. (*Tr. Jan. 19, 2017, Kehaulani Abad, Ph.D, Vol 27 p31:7-15)*.

FOF #842 in particular is just patently false. The Northern Plateau is an undeveloped area (area E) where there are no structures, facilities or telescopes. Exhibit A003 FEIS VOL I pg. 2-8, pg. 2-10 Fig 2-3, pg. 2-11 figure 2-3, pg. 2-13 figure 2-4. Exhibit A007 OCCL Staff Report pg. 7, Exhibit A-008 Exhibits to OCCL Staff report pgs. 82-84.

The proposed site for the TMT Observatory is a roughly 5-acre area at the end of a four-wheel drive road at an elevation of 13,150 feet on the Northern Plateau of Mauna Kea. (Ex R-3/B.32 FEIS, Vol. 1 p. 2-10)

Roughly 6.2 acres of previously undisturbed land will be disturbed by the TMT Observatory and Access Way. (Ex R-3/B.32 FEIS Section 3.2 Cultural Resources Page 3-26)

There are no current developments on the Northern Plateau. (Ex B.70 CDUA Staff Report Feb 25, 2011, p.7

TMT is is being proposed for an area on the North Plateau of Mauna Kea that has not hosted permanent facilities or developments. It is opening up a new area. (Ex B.70 CDUA Staff Report Feb 25, 2011, p 59)

The TMT's footprint will be a minimum of 8.5 acres on a pristine plateau. (Ex B.70 CDUA Staff Report, p.K-1)

The Applicant proposes to expand astronomical development (one of the world's largest telescopes) into an area (E) that is far (1000 meters or ¾ mile) from the developed infrastructure, in an alpine stone desert discrete from the summit cinder cones, with flora and fauna unlike those at the summit, in a Historic District, with an Access Way impacting a Kukahau'ula, (a Traditional Cultural Property) Thus creating a significant increment of impact to an area that is not at all built upon. FEIS VOL I Ex.A-3 p. 3-219

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

The Access Way will also result in a visual impact, particularly from a cultural perspective, where the access way occurs within the Kukahu`ula Historic Property. *(Ex. R-3/B.32, (TMT FEIS Section 3.2 Cultural Resources), p.3-32)*

When people come to view the sunset, including those of us doing ceremonies, the TMT will be a dominant feature in that view plane, including ours as we honor the sun as it sets. *(Ex B.01a WDT, p.7. K. Pisciotta, Oct 11, 2016)*

TMT is very big and there is no question is will be the most dominant feature in the open space and view planes from Mauna Kea. *(Ex B.01a K. Pisciotta, dated June 28, 2011, re-submitted October 11, 2016, WDT, p. 7)*

Most of our practices rely on some kind of view plane, because they are about the relationship between Papa and Wakea (our relationship with and to the earth and the celestial bodies and heavens). *(Ex B.01a dated June 28, 2011, re-submitted October 11, 2016, K. Pisciotta, WDT, p.5)*

The University has not used traditional methods to assess the viewshed impacts. The University claims the view planes or viewsheds will not be affected. This is not true. *(Ex B.01a K. Pisciotta, October 11, 2016, WDT, p. 5)*

The TMT Observatory will impact the view plane in certain portions of the Pu‘u Kukahau‘ula State Historic Property (SIHP # 50-10-23-21438) and the Mauna Kea Summit Region Historic District (SIHP # 50-10-23-26869). *(Ex. R-5/B.34, TMT FEIS, p. G-62)*

The TMT observatory and appurtenances will be visible to the west and north of the Pu‘u Kukahau‘ula State Historic Property. *(Ex. R-5/B.34, TMT FEIS, p. G-57)*

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

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

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

This viewplane is from the Mauna Kea summit towards Haleakala on Maui. *(Tr. 01/31/2017, Paul Neves, Vol. 33 p. 244:22-24; p. 245:12-16)*

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

pede upon the viewplanes and degrade the natural beauty cherished by visitors, residents, and recreational users.

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

WATER RESOURCES/ HAZARDOUS WASTE

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

Applicants did not provide any credible evidence that Mirror washing wastewater is not a hazardous waste but nonetheless, Hearing Officer relies on that position. Mirror washing wastewater is considered hazardous waste. MKAH Exhibit B01at. This exhibit also describes the Gemini telescope as a "large generator of hazardous waste".

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

Applicant claims that witness Kanehele provided only anecdotal evidence to substantiate her testimony regarding Hawaiian understanding of Mauna Kea

water, citing Mr Nance's expertise. However, Mr Nance stated that he has no traditional Hawaiian cultural background. Tr.12.13.16 V16 at 179 Mr Nance stated that he has not conducted any studies, nor has he tested ground or surface waters on Mauna Kea for hazardous material or sewage. Tr.12.13.16 V16 at 155:24-5

Mr Nance provided no data, but stated that he has not tested the water in the substrate for permafrost at the TMT site, he has not conducted percolation tests at the TMT site, he has no knowledge of the amount of waste deposited into the substrate by telescopes presently in use. Nance Tr.12.13.16 V16 p. 143:2-10, V16 at 144:7-20

CRITERIA 5, HAR 13-5-30(C)(5): "THE PROPOSED LAND USE INCLUDING BUILDINGS, STRUCTURES, AND FACILITIES, SHALL BE COMPATABLE WITH THE LOCALITY AND SURROUNDING AREAS, APPROPRIATE TO THE PHYSICAL CONDITIONS AND CAPABILITIES OF THE SPECIFIC PARCEL OR PARCELS[.]

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The Applicant proposes to expand astronomical development (one of the world's largest telescopes) into an area (E) that is far (1000 meters or ¾ mile) from the developed infrastructure, in an alpine stone desert discrete from the summit cinder cones, with flora and fauna unlike those at the summit, in a

Historic District, with an Access Way impacting a Kukahau'ula, (a Traditional Cultural Property) Thus creating a significant increment of impact to an area that is not at all built upon. FEIS VOL I Ex.A-3 p. 3-219

The Northern Plateau is an undeveloped area (area E) where there are no structures, facilities or telescopes. Exhibit A003 FEIS VOL I pg. 2-8, pg. 2-10 Fig 2-3, pg. 2-11 figure 2-3, pg. 2-13 figure 2-4. Exhibit A007 OCCL Staff Report pg. 7, Exhibit A-008 Exhibits to OCCL Staff report pgs. 82-84.

CRITERIA 6, HAR 13-5-30(C)(6): "THE EXISTING PHYSICAL AND ENVIRONMENTAL ASPECTS OF THE LAND SUCH AS NATURAL BEAUTY AND OPEN SPACE CHARACTERISTICS WILL BE PRESERVED OR IMPROVED UPON, WHICHEVER IS APPLICABLE[.]"

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

In FOF numbers 921- 955 the Hearing Officer does not explain what evidence demonstrates that the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics will be preserved and or improved upon by the TMT Project by a 18 story, 136 foot diameter, 5 acre structure.

The The Hearing Officer attempts to try and make the purposes of the conservation district fit into a resource sub zone rather than the resource sub

zone fitting into the purposes of a Conservation District. as the Temple of Lono puts it; “The Applicant UH/TIO filed a Conservation District Use Application (CDUA), not a resource subzone use application. By its very nature, the context for such an application is the purpose and goals of the Conservation District, not the purpose and goals of the resource subzone within the Conservation District.” Temple of Lono Responses to UH/TIO FOF COL DO. H.O goes along with this type of reasoning without considering any of the petitioner witness credible , substantive, and reliable testimony or evidence.

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

The proposed TMT would intrude upon the currently unobstructed view of Haleakala Mountain as well as the primary view of the setting sun from the mountain. It will also obstruct view planes used for traditional and cultural spiritual and religious Native Hawaiian practice. If the TMT were built, it would interfere with this alignment directly. Tr. 01/31/2017, Paul Neves, Vol. 33 p 185:7-12.

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

CRITERIA 7 HAR 13-5-30(C)(7): "SUBDIVISION OF LAND WILL NOT BE UTILIZED TO INCREASE THE INTENSITY OF LAND USE IN THE CONSERVATION DISTRICT"

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

Hearing Officer FOF 956-965. Here again H.O does not take into consideration the reliable substantive and credible evidence put forth by Petitioners in this case. For instance;

According the Conservation District rules, HAR 13-5-2(c)(6) Definitions, "subdivision" means a division of a parcel into more than one parcel. This definition is consistent with Black's Law Dictionary, where "subdivision" is defined as "(1) The division of a thing into smaller parts ….Such a division, in and of itself, is not prohibited by the rules. However, where such a division of land is undertaken in order to "intensify land uses" on a given parcel of land, it is forbidden under HAR 13-5-30(c)(7). Exhibit A003 FEIS VI pg. 2-10, figure 2-3.
Pg. 2-11, figure 2-3.

While it is true that the University has not officially requested permission to subdivide the Mauna Kea conservation district in this CDUA, the Applicant's actions on Mauna Kea have resulted in the de facto subdivision of this land for the purpose of intensifying land uses undertaken there. This improper, de facto subdivision takes two forms: 1) Astronomy Precinct, 2) Subleases to telescope operators. The Astronomy Precinct, as Ms. Nagata confirmed, was subdivided from the remainder of the "UH managed lands" in order to focus future telescope construction in a 500-acre area of the conservation district. In addition, the TMT would operate on a

sublease, which as other similar subleases indicate, effectively result in the division of the Mauna Kea Science Reserve into a many separate parcels under the control of different telescope operators.

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

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

BLACK'S LAW DICTIONARY, 7th ed, (2000) at 1155.

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

The Applicant contends that a completely separate law exempts the University from the requirements of this law. The Applicant offers no reason to look outside the four corners of HAR 13-5 or HRS 183C for guidance in the interpretation of the conservation district rules. HAR 13-5-30(c)(7) is not ambiguous or unclear, as such there is no reason to refer to other statutes for interpretation, especially where that interpretation contradicts the plain meaning of the rule in question. Because there is no reason to reference Hawaii's Uniform Land Sales Practices Act, the Applicant's reliance on the government exception is misplaced. There is no exception to HAR 13-5-30(c)(7).

The metes and bounds description for the TMT sublease contains the following
DESCRIPTION

TMT SITE PREMISES

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

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

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

Description Prepared By:
Engineering Partners Inc.

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

description: Hilo, Hawaii, March 10, 2014

The Hearing Officer has clearly disregarded and failed to considered the credible, substantive, reliable evidence provided by the petitioners in this case.

CRITERIA 8, HAR13-5-30(C)(8): "THE PROPOSED LAND USE SHOULD NOT BE MATERIALLY DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE".

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

Hearing Officer FOF 966-1016 provide no countering evidence to petitioners extensive exhibits and testimony for this criteria.

H.O states the fact that Criteria 8 does not require that a proposed land use be affirmatively beneficial to public health, safety, and welfare.

Dr. Abad states that health is not only about land and water quality but includes peoples psychological, spiritual and emotional health. TR Jan 19, 2017V27 pg. 14-25.

Dr. Taualii's experience is extensive; She holds a doctorate in Health Services, with expertise in public health informatics, epidemiology, genetics and Indigenous health, she submitted her testimony as a leading expert in health for Native Hawaiians. "The research of myself and my colleagues

demonstrate three key findings: 1) desecrating sacred spaces impacts cultural identity and health, 2) participation in traditional practices are protective factors against distress, and 3) health disparities of Native Hawaiians cannot be explained by standard determinants of health (e.g. poverty or low education) and that causes, such as forced assimilation are causal factors in poor health outcomes". B.04a WDT

Dr. Taualii's "opinion" is based on her extensive educational background as a Dr. in Health Services and Informatics, she holds a certificate in Public Health Genetics, a MPH in Social Behavioral Sciences, and a BA in American Indian Studies. She is the author of numerous publications, articles and technical reports and has served on editorial review boards. Her theories are supported by extensive empirical data. Applicant UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge it. Therefore, by failing to challenge petitioners/opposing intervenors witnesses, evidence and testimonies UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. WDT B04b, TR Jan 24, 2017 Dr. Taual'i.

Dr. Meyers; Applicant failed to bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Dr. Meyer's testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Meyers WDT B10a, TR Jan 26, 2017 Dr. Meyers.

Dr. Kaholokula is the Chair and Professor of Native Hawaiian Health at the John A. Burns School of Medicine, University of Hawaii at Manoa. He holds a PhD in clinical psychology, completed a clinical health psychology post-doctoral fellowship at Tripler Army Medical Center, and holds a license to practice in Hawaii. He has over 20 years of clinical and research experience regarding issues of Native Hawaiian health, to include mental and physical health. He has over 50 scientific publications specific to Native Hawaiian and Pacific Islander health in national and international peer-reviewed journals and provided numerous keynotes, talks, consultations on Native Hawaiian and Pacific Islander health nationally and internationally. He sits on several boards of organizations whose mission is focused on

either Native Hawaiians or public health issues to include Queen's Health Systems and Papa Ola Lokahi Native Hawaiian Health Board. He is also a member of a Native Hawaiian cultural group known as Halemua o Kualii and has been involved in various Hawaiian cultural practices (e.g., hula and lua) throughout his life. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Dr. Kaholokula's testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex F-7b, Ex O-11 CV, TR Feb 23, 2017.

Over the past 20 years Ms. Perreira has worked professionally, in Hawaii rural communities, in the field of community mental health as a mentor, teacher, counselor, consultant and now clinical psychologist. Her particular interests and expertise is in individual, family, community and national trauma exposure, identification of symptoms, diagnosis and treatment of discrete and complex traumas associated with physical, emotional, psychological, spiritual and medical conditions or disorders. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Ms. Perreira testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. TR Feb 23, 2017, EX O-14 WDT.

Laulani Teale is a Kanaka Maoli traditional practitioner and advanced student of many customary practices, such as laau lapaau and hooponopono. She also holds a Master's degree in Public Health, and has worked in peacemaking and comunity health development professionally for 16 years. Much of her work focuses on health issues affecting Kanaka Maoli. UH/TIO did not bring any countervailing information, witnesses, evidence, or testimony to dispute or challenge Ms. Teale's testimony. Therefore, by failing to challenge petitioners/intervenors witness, evidence and testimony, UH/TIO has defaulted. The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed. Ex B.15a WDT, Ex B.15b.

Noelani Goodyear Kaopua (TR V39, Ex J-3) and Dr. Kahakalau (TR V23 Ex B.06a, B.06b) as well as the petitioners /opposing intervenors themselves (cultural practitioners who are experiencing the harm). Therefore, by failing to challenge the petitioners/intervenors witnesses, evidence and testimony, UH/TIO has defaulted.

The preponderance of the evidence submitted by the petitioners/opposing intervenors is undisputed.

The above mentioned witness testimonies were not taken into consideration by the Hearings officer in order to make an informed recommendation. These statements by the H.O in her FOF/COL D&O do not hold water, are not credible, reliable or based on any evidence cited.

H.O's FOF 981 referenced Ex I-1 as a public opinion survey which could not be found in P.U.E.O'S list of exhibits.

PUBLIC TRUST DOCTRINE

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The HO misconstrues and mischaracterizes the Public Trust Doctrine.

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

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

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

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

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

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

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

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

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

- Private commercial use is not a public trust purpose.

- Retention of waters in their natural state does not constitute waste. Rather, a public trust interest exists in maintaining a free-flowing stream for its own sake.

- The Water Commission "inevitably must weigh competing public and private water uses on a case-by-case basis" but any balancing must "begin with a presumption in favor of public use, access, and enjoyment."

- Domestic uses and the exercise of Native Hawaiian and traditional and customary rights are public trust purposes.

PRECAUTIONARY PRINCIPLE

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

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

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

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

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

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

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

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

And,

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

Article XI, under the WATER RESOURCES section provides;

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

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

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

Public Trust Doctrine is the Law of the Land

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

The Hawai'i Supreme Court has repeatedly held that an agency's discretionary authority is "circumscribed" by the Public Trust Doctrine. (Kelly v. 1250 Oceanside Ptnrs, 111 Hawai'i 205, 230, 140 P.3d 985, 1010 (2006). See also, In re Water Permits, 94 Hawai'i 97, 133, 9 P.3d 409, 445 (2000), In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui, 116 Hawai'i 481, 508, 174 P.3d 320, 347 (2007)). An entity seeking to use public trust resources for other than their intended use must demonstrate that the proposed use does not harm that public resource or the public's interest in that resource, especially for Native Hawaiians. (In re Water Permits, 94 Hawai'i at 136-7, 9 P.3d at 448-49.

The recent Supreme Court in <u>MKAH</u> (2015), held;
<u>Waiahole I</u> was an explicit acknowledgment of by this court that the public trust doctrine, as incorporated into the Hawai'i Constitution, necessitates "a balancing process" between the constitutional requirements of protection and conservation of public trust resources, on the one hand, and the development and utilization of those resources, on the other. (Id. At 142, 9 P.3d at 454.) ***This balancing process,***

however, exists in a framework demanding that "any balancing between public and private purpose [must] begin with a presumption in favor of public use, access and enjoyment." (Id.) The burden of showing that the requisite balance has been properly evaluated "in light of the purposes protected by the trust" rest on "those seeking or approving such uses." (Id.) **(Emphasis added).**

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

The Ninth Circuit later clarified that Native Hawaiians can bring suit as §5(f) beneficiaries under federal law. (Day v. Apoliona, 496 F.3d 1027, 1032 (9th Cir. 2007) ("[W]e twice explicitly held that because it creates a trust, §5(f) also creates a right enforceable under 42 U.S.C.S. § 1983 (LEXIS Pub. L. 112-18 through 2011) by the trust's beneficiaries.")) The Supreme Court of Hawai'i further clarified that "a private implied right of action . . . to enforce the terms of the §5(f) trust under Hawai'i law" exists under State Constitutional Protections in Haw. Const. Art. XII, § 4." Pele Defense Fund v. Paty, 73 Haw. 578; 837 P.2d 1247 (1992). In Pele, the Court reviewed a number of cases in which Hawai'i citizen beneficiaries sued to enforce their rights as beneficiaries of public trust lands. (Id. at 604-07; citing, Kapiolani Park Preservation Society v. City & County of Honolulu, 69 Haw. 569, 751 P.2d 1022 (1988) (public trust beneficiaries were held to be able to bring suit to prevent a government agency from disposing of trust lands) and Natatorium Preservation Committee v. Edelstein, 55 Haw. 55, 515 P.2d 621 (1973), ("citizens can bring suit for an injunction against the government agencies charged with the

management of public lands when those agencies seek to dispose of the public lands in violation of the statutes governing their management and disposition.)

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

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

UH/TMT witnesses did not present any conclusive evidence or witness testimony that demonstrated they have met their burden to prove the water is safe and will be protected into the future. In fact their witnesses in some case testified to disagreeing with the historical holdings of the Supreme Court of Hawai'i and specifically about the public trust doctrine.

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

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

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

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

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

CONTINUITY OF HISTORY, USE, PRACTICE AND CULTURAL ATTACHMENT

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The HO starting at p. 239, claims that *Kapakai* is concerned with the preservation and protections of customary and traditional native Hawaiians rights, not with contemporary cultural practices. The HO despite assertions that the UH/TMT/TIO did identify cultural practices, the potential impacts on or the impairment of those practices, and the reasonable actions to be taken to reasonably protect the native Hawaiian rights that exist, set forth above, encompass not only customary and traditional practice, but the contemporary practices as well.

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

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

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

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

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

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

This 'wholesale delegation of the responsibility for protecting Native Hawaiian Traditional and Customary cultural and religious rights to the University and to other entities is specifically what the Supreme Court warned against and prohibited in **Kapa'akai**.[4]

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

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

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

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

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

Based on the evaluation of the findings of the present cultural impact assessment study made in reference to (a) the known content of the traditional Hawaiian culture and (b) the National Register Criteria as clarified by the National Register Bulletin No. 38, it is believed that with the exceptions noted above, most of the Native Hawaiian cultural practices, feature and beliefs as identified as being currently associated with the Mauna Kea Science Reserve Master Plan Project area can be considered to be culturally and historically significant. **Most if not all of the identified practices and beliefs would seemed to qualify as traditional and customary practices within the meaning of the Hawai`i State Constitution,** while the principle *pu`u* and the shallow lake with adjacent *pu`u* would seem to satisfy the criteria for being regarded as a legitimate traditional and cultural property. **Finally, none of the identified practice and beliefs would seem to represent strictly contemporary cultural practice or beliefs lacking some measure of traditional connection.** (Emphasis added) ***Id.*** **P. 45**

PASH, KAPA'AKAI AND BLNR's UNLAWFUL DELEGATION OF AUTHORITY

On December 2, 2015, the Hawai'i Supreme Court entered its decision in Mauna Kea Anaina You v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d. 224 (2015) ("MKAH (2016")). In the Concurring Opinion ("Concurring")

the Justices identified and clarified three specific "provisions" and "guarantees" established in the Constitution that "forge the right to a contested case hearing and establish procedure essential to safeguard the rights protected by the constitutions in such cases…". Those provisions and guarantees identified were (1) Traditional Hawaiian Rights under Article XII, Section 7, (2) The Public Trust Doctrine and (3) Constitutional Responsibilities of an Agency.

Regarding Native Hawaiian Rights found under the Article XII, Section 7, we believe the BLNR has improperly delegated its authority and responsibility to protect Native Hawaiian rights by relying on the UH/TMT and there representatives such as OMKM to oversee, manage and decide and determine what rights are to be upheld and what are not and what rights are to be regulated and so on and so forth on the ground. OMKM can decide who has access to the summit and who does not and when. The University personel have been directly involved in blocking access to Kealoha Pisciota and other Members of MKAH ands the MKHUI on many occasions, the latest of which occurred on the winter solstice during last CCH (December 22, 2016). OMKM staff is implicated in
numerous acts of desecration, including but not limited to the destruction and desecration of Kealoha Pisciotta's family shrine (Ahu). Her families ashes scattered and desecrated and burial places desecrated. The her family stone (Ahu) was taken to the Hilo Dump (where it was later recovered and taken back up to the MK), since that time it has been taken never to be returned. When given another stone by the Family of Aunty Ioane Luahine that stone was also taken and has never been returned. A small Ahu build at Kealoha's family area by Kumu Paul K. Neves, Keomailani Von Gogh of MKAH, and Kealoha Pisciotta has also been dismantled and destroyed. To date, anything placed on or near this site is taken down and destroyed. The irony here also is Kealoha's site is in the Natural Area Reserve (NAR) which is not even the in the University's jurisdiction. This act and continued actions are deeply disturbing and hurtful to Ms. Pisciotta.

There is a legal term for what has happened that is, we believe called continued injury, but is has a much deeper ramification then the legal implications, and that is after all these years since her family ahu was first taken in 1998, there has never been a rational explanation for its removal and desecration in the first place. It bothered nbc one. The question is why do our spiritual things even the smallest pohaku so disturbs anyone enough to take offense enough to take a ceremonial thing to the dump? How do our religious practices challenge or offend anyone, let alone the observatories and UH/OMKM personnel? This action is so contrary to Aloha!

Please see Exhibits

B.01v (Kealoha's pohaku or ahu at her family site on Mauna Kea),
B.01y (Ltr from Marc Smith DLNR Archaeologist describing the location of Ms. Pisciotta's pohaku to be in the NARS and confirming she had not disturbed anything of historic value in the NARS),
B.01x (letter for the then interim Director of the Institute for As tronomy (IfA) who used to be the entity oversee MK, apologizing to Ms. Pisciotta and affirming it such an incident would not happen again, which has not been followed because it has been taken many times since this letter, B.01ak, B.01al, B.01am (all pictures of the ceremonial Lele (platform put up by the Royal Order of Kamehameha I (ROOK I) used for ceremonies and to lay offerings —it is on Pu'u Wekiu)). The ROOK I Lele has been desecration and destroyed on numerous occasions. Like Ms. Pisciotta's family area and pohaku, the Lele continues to be taken down. So there is no Lele up on the summit now. The Lele was put up so the people could make offerings. When it is not up there is no place for the people to lay their offerings.

SACRED ANCESTORS

"Mauna Kea is the burial ground of our highest born and most sacred ancestors." B.01q MKAH/NEVES Temple Report 2001, p. 9

The UH at the 11th hour submitted a burial treatment plan (BTP) at the end of the hearing (it is in evidence as well). The BTP is dubious at best because the it was submitted *after* the majority of the Protector witnessed had already crossed the UH/TMT witnesses. Ms. Pisciotta had asked Ms. Nagata, if there was a burial treatment plan but it was not in evidence at the time so she could not inquire further about it. She did ask Ms. Nagata if OMKM had interviewed any members of MKAH or herself regarding their knowledge of burials relating to Mauna Kea and Ms Nagata had answered in the negative. In 2011 for the first CCH there was no burial treatment plan. While there is one now we believe it is inadequate because the OMKM did not take into account the known cultural or lineal descendants such as Ms. Pisciotta, Mr. Neves, Mr. Ching and Mr. Kaliko Kanaele and many others who have voiced their concern over the decades for the sacred burials of Mauna Kea. The did not even try to reach out of contact any of us. Our original CCH Petitions identify us as being cultural and lineal descendants of Mauna Kea.

The record if filled with other acts of disrespect and desecration to numerous site build and cared for by of the Kia'i (Earth/Mauna Protectors). See also William

Frietas testimony/exhibits on such desecration and destruction of the Ahu he built. We join with his statements regarding such desecration and destruction. We also join with the Florese Case Ohana regarding the destruction of Ahu. We join with all the Petitioners regarding the impacts such desecration has on the NH or Kanaka Maoli peoples.

BLNR Fails To Uphold Legal Obligations

It is our position that the fundamental policy issue underlying the improper development of the Mauna Kea conservation district is BLNR's wholesale abdication of its responsibility for managing these precious lands. BLNR has allowed telescope construction to desecrate an area they recognize as a Native Hawaiian traditional cultural property, destroy significant habitat for rare and unique speices, and potentially contaminate five aquifers on Hawai'i Island. Demonstrating that history repeats itself, the BLNR is considering the TMT construction permit, even though it admits:

"[i]t is our view that the effect of astronomy development on cultural resources and on the landscape of Mauna Kea has been significant and adverse. While a project such as TMT can bring new resources into play that may mitigate certain cultural impacts and even benefit native Hawaiians, we believe that the project will increase the level of impact on cultural resources, which remains to be significant and adverse." (BLNR Chairwoman Laura Thielen, Ex. BA004/R-4, FEIS Vol.2, p.17).

Instead of regulating (that is, limiting) these astronomically destructive projects, the BLNR entertains the fundraising opportunities provided by this destruction and weighs the mitigative value of native art on the walls of an industrial structure in the middle of a natural temple. BLNR has repeatedly abandoned, delegated, and/or exceeded its authority and fiduciary obligations to oversee, regulate and properly manage the conservation district of Mauna Kea by authorizing the over-development of the district and allowing the University to assert their claims of jurisdiction over it. This is unacceptable. (Emphasis added)

A. CDUA Approval Would Be Abuse of Discretion

While UH/TMT has the burden to prove their proposed land use is consistent with all eight CDUP criteria, the BLNR's role is to evaluate whether the applicant has actually met the requirements or not, with particular consideration of the proposed project's impacts on Native Hawaiian traditional, cultural, and religious practices (see Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission, 79 Hawai'i 425 (1995) [hereafter, PASH] and Kapa`akai O Ka 'Aina v. Land Use Commission, 94 Hawai'i 1,7 P. 3d 1068 (2000))[hereafter Kapa'akai]. UH/TMT's admissions that the TMT will have a significant, adverse impact on cultural and natural resources should lead the BLNR to deny the TMT-CDUA. (Emphasis added)

The BLNR cannot approve the TMT-CDUA without abusing its authority because the law prohibits approval of permit applications that fail to meet the eight criteria for conservation district use permits. The TMT cannot even satisfy one, much less all eight of the criteria. The DLNR staff surmised that, "[i]t appears likely that the construction of this very large observatory will have a significant and adverse impact on this important cultural landscape" (Ex A004/R-4 FEIS Vol.2, p. 17)(Emphasis added) and "impacts that are significant will remain significant with or without the TMT" (Ex. A007, B.03aa, Staff Recommendations, p. 59). Despite this, the staff recommends approval. This is because the staff recommendation to approve the CDUA is based on an inappropriate interpretation of HAR §13- 5-30(c). If approved, the staff recommendation would allow UH/TMT to pay to degrade the natural resources BLNR is mandated to protect, to "balance" destruction of those resources with promises of more accountable management, and to cynically assert that the summit regions of Mauna Kea have suffered such adversity already that any additional adverse impacts will not be 'significant.'

The DLNR staff recommendations to approve the TMT CDUA is one example in the agency's failures to follow the laws and regulations that protect the Mauna Kea conservation district. Where "an agency [has] exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations," the courts have held the agency responsible for "abuse of discretion." United States v. Carpenter, 5256 F.3d 1237, 1241 (9th Cir. 2008) quoting, Guadamuz v. Bowen, 859 F.2d 762, 767 (9th Cir. 1988); see also Ness Inv. Corp. v. U.S. Dep't of Agric., 512 F.2d 706, 714 (9th Cir. 1975) (holding that discretionary agency actions are reviewable where the claim alleges "that an agency . . . abused its discretion by exceeding its legal au-

thority or by failing to comply with its own regulations"). An Agency's actions demonstrate an abuse of discretion where they "'clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Sierra Club v. D.O.T., 115 Haw. 299, 317 (Haw. 2007) quoting State v. Sacoco, 45 Haw. 288, 292 (1961). Agency actions deemed "[a]rbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion" are overturned by courts as illegal. HRS §91-14(g)(6)(2011). (Emphasis added)

The criteria for conservation district permits should not be so broadly interpreted to allow the *dedication* of proceeds to be a means of making resource destruction into an appropriate use of conservation lands. The DLNR staff thus erred by concluding that the TMT's "strong management framework" and its potential role in Hawai`i's economic development as support for their decision to approve the CDUA. (Ex. A007m B.03aa/R-7 Staff Recommendations, p. 45). Approving the TMT-CDUA on these terms would be an abuse of BLNR's discretion.

B. BLNR Improperly Delegated Authority in CMP

The BLNR may not abdicate nor delegate their fiduciary duty to oversee and manage the public lands trust nor the conservation lands of Hawai'i. Yet, the BLNR has and continues to improperly delegate its oversight and management responsibilities for the Mauna Kea conservation district to the University, its lessee and the primary advocate for telescope construction.[5]

1. Kapa`akai Standard Protects Against Improper Delegation

The Supreme Court has ruled that state agencies cannot delegate their authority and responsibility to third parties. See, Ka Pa'akai O Ka `Aina v. Land Use Commission, 94 Haw. 31 (2000). In Ka Pa'akai, the Supreme Court found that the Land Use Commission (LUC) had violated its statutory and constitutional obligations when it approved a request to reclassify land without completing its own inde-

[5] OMKM is delegated the task of "implement[ing] the CMP and subplans." CDUA, p. 3-13. DLNR staff recommended that OMKM "conduct twice-annual inspections of the TMT Project juste for evidence of CDUP and TMT Management Plan violations." (Ex A007, B.03aa/R-7 Staff Recommendations, p. 63).

pendent assessment of the impact to traditional cultural and natural resources and feasible actions to reasonably protect those resources. Id. The Supreme Court rejected the LUC's claim that it had delegated the authority to prepare a management to the developer:

The power and responsibility to determine the effects on customary and traditional Native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner who, unlike a public body, is not subject to public accountability... . [I]nsofar as the LUC allowed [the private developer] to direct the manner in which customary and traditional Native Hawaiian practices would be preserved and protected by the proposed development -- prior to any specific findings and conclusions by the LUC as the effect of the proposed reclassification on such practices -- the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect Native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority. Ka Pa'akai, 94 Haw. at 22-23.

- "reasonably preserve and perpetuate cultural resources such as archaeological sites, the coastal trails, areas of fishing, opihi, and limu gathering, salt gathering, and general recreation in the proposed areas."

- "provide for resource management,"

- "ensure public access to the coastal areas," "perpetuate [fishing, limu, opihi, and salt gathering] on and makai of the property,"

Kapa`akai, 94 Haw. at 37.

The Supreme Court overruled the LUC's decision because the LUC had illegally granted KD broad authority to "preserve and protect any gathering and access rights of Native Hawaiians." Id. at 39. The Court held,

"[a]llowing a petitioner to make such after-the-fact determinations may leave practitioners of customary and traditional uses unprotected from possible arbitrary and self- serving actions on the petitioners' part. After all, once a project begins, the pre- project cultural resources and practices become a thing of the past." Id. at 52.

We submit that the BLNR would commit the LUC's same fatal error by seeking to delegate broad authority over Hawaiian cultural resources to UH, the primary developer of the Mauna Kea conservation district.

2. BLNR has sole legal obligation to manage conservation lands

In this case, there is no dispute that the Mauna Kea summit area is designated a conservation district. Per Haw. Const. Art. XI, §2, HRS. §§205-2(e), 183C-2, 183C-3, and 171-3 (2010), and HAR §13-5, the sole entity authorized to manage conservation districts is the Board of Land and Natural Resources. These articles, statutes, and regulations do not grant BLNR the authority to delegate its responsibilities to an entity outside of the Department. Without specific authorization to delegate its legal mandates, the BLNR remains the sole entity responsible for the management of multiple land uses for the protection of the natural and cultural resources in a conservation district.

The University contends that is has a right to manage its own areas because it holds a long-term lease to the Mauna Kea Science Reserve. This is true, but only in terms of the areas within the telescope facilities. The University has yet to demonstrate any areas in the Mauna Kea conservation district that they can call their own, aside from those within the observatories themselves. The fact that the University has a long-term lease does not grant them private property interest or any expectation of exclusivity. Mauna Kea lands are public lands and conservation lands and the laws assigns BLNR the sole obligation to oversee and management them on behalf of the general public and Native Hawaiians. If this were not the case, the University would not need to apply for a conservation district use permit. Thus, the BLNR is the only entity with jurisdiction over the Mauna Kea conservation district. For the BLNR to delegate any authority to the University is improper.

The University also contends there is no unlawful delegation here because the University is a state agency. This argument fails. The fact that the developer in this situation also happens to be another state agency is irrelevant. Under the Court's ruling in Ka Pa'akai, the responsible agency cannot delegate authority to any entity that does not share its same statutory and constitutional obligations. The BLNR is the only agency with the legal obligation to management conservation districts and ceded lands.

By comparison, nothing in the Constitution, Haw. Rev. Stat. §§205 or 183C identify natural resource conservation as one of the purposes of the University of Hawaii System. The University's constitutional mandate is public education. See, Haw. Const. Art. X, §5, HRS §304A. Even with the recent amendments to Haw. Rev. Stat. §304A(2009), the University is not empowered to manage conservation resources. See, Act 132, SLH 2009. The University seeks to overcome this limitation by forming multiple intermediary entities between the BLNR and UH Board of Regents (e.g. Office of Mauna Kea Management, Mauna Kea Management Advisory Board, Kahu K& Mauna), but this is nothing more than puppetry, for all of these entities ultimately answer to the UH Board of Regents. None of these entities have any authority greater than that bestowed by that board.

Moreover, in this situation, as we outlined above in section II(B)(3), the University's actual interests in the mountain are more aligned with Kaupulehu Development, the developer in the Ka Pa'akai case, than with any state agency fulfilling statutory and constitutional obligations to protect public trust lands and manage conservation areas. The University profits from the exploitation of the Mauna Kea conservation district. Its pursuit of excellence in astronomy is in direct conflict with the purpose of the conservation district. Thus, the BLNR should heed the Court's concern that "self-serving" implementation of a developer-controlled management plan could destroy important natural and cultural resources because "once a project begins, the pre- project cultural resources and practices become a thing of the past." Kapa`akai, 94 Haw. at 52, 7 P.3d at 1089. If BLNR does not act to protect the cultural and natural resources of the Mauna Kea conservation district, they will be lost.

3. BLNR Failed to Satisfy the Three-Part Kapa`akai Standard

The Supreme Court's ruling in Kapa`akai specifically directs agencies confronted with a decision that might affect the traditional and customary practices of Native Hawaiians to assess:

"(1) the identity and scope of "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;
(2) the extent to which those resources --including traditional and customary native Hawaiian rights -- will be affected or impaired by the proposed action; and

(3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist."
Id. at 47, 1084.

The record in this case is replete with examples of how the BLNR has failed to conduct this type of detailed assessment, opting instead to rely on promises from the developer that the traditional and customary practices of Native Hawaiians will be protected through "after-the-fact" decisions by the developer through the developer-controlled management plan(s).

This is exactly the same mistakes made by the LUC in the Kapa`akai case. Without specifically identifying the valued resources and related rights, the extent to which they may be harmed, and feasible actions necessary to protect them, the LUC relied on promises from the developer that its management plan would protect all traditional and customary practices of Native Hawaiians will be protected.

Please review Ms. Stephanie Nagata, the head of Office of Mauna Kea Management (OMKM), oral testimony—cross by Ms. Kealoha Pisciotta at Vol 14, p. 99-153, 159-173.

And also;

the following oral testimony of Mr. Wallace Ishibashi the Senior Advisor of Office Of Mauna Kea Management (hereafter OMKM):

Kealoha Pisciotta Cross of Mr. Ishibashi at Vol. 9, p. 112-118 and p. 125-128:1-23. Here is an example of Mr. Ishibashi's testimony:

MS. PISCIOTTA: It is C-2, the definition.
HEARINGS OFFICER AMANO: Pardon me, it's not – it's 2, just 2, under "desecrate," right?
Ms. Pisciotta: Right, right.
HEARINGS OFFICER AMANO: Then your next question is?
Ms. Pisciotta: Actually, let me start with

one, first.
The first definition is a person commits the offense of desecration if the person intentionally desecrates.
Number 2 is the definition of desecrate which I just read earlier. And you can see it up there.
Okay.
So earlier, would you consider, for example, the incident with my family at Pohaku an act of desecration?
HEARINGS OFFICER AMANO: You are not asking for a legal opinion, right?
Ms. Pisciotta: No, but just on his understanding of what desecration is.
HEARINGS OFFICER AMANO: Mr. Lui Kwan?
Mr. Lui Kwan: I still don't see the relevance

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of what his opinion will have, especially if he's not qualified and he's not giving a legal opinion on the meaning of desecration or the offense.
Ms. Pisciotta: I think this is important because desecration is some of the questions that I think are relevant in this contested case hearing.
HEARINGS OFFICER AMANO: It might be relevant. But it might not be to this witness.
Ms. Pisciotta: Maybe not. If not this witness, I'm not sure who. So he's the senior advisor relating to things cultural, and so I want to know if he has an understanding about what at least the state law defines as desecration or not.
Mr. Lui Kwan: I would say there is a lack of foundation as to whether or not this witness was involved in the removal of the ahu or the determination of whether or not there was an offense committed as a result of that.
Ms. Pisciotta: I'm not accusing him of having

anything to do with that.
HEARINGS OFFICER AMANO: I'm going to let you ask your question, so please ask it clearly, so the witness understands it and he can answer it truthfully.
Q Okay. So my question was in the particular case that you heard about my

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ahu, about my family place, would you consider that an act of desecration?
A I'm not sure if your ahu was permitted or not, that's the question first because you guys will never like the answer coming from my office, OMKM, because we follow state laws.
And so there is a permitting process necessary in order to build an ahu. So to answer that question, I'm going to have a hard time because I'm not sure of the history, if the ahu was permitted or not.
Q What law are you stating requiring a permit?
A Any time you're going to move any type of rocks on the mountain, you got to get one permit if you're going to build structures or ahus or any type of structure on the summit.
So it is just my understanding of the DLNR rules.
Q But can you site to me those rules or where those rules come from?
A No, just my understanding.
Q That is your understanding?
A Yes.
Q

Mr. Ishibashi seems to be describing the definition of "Land Use" under HAR 13-5-2 which states as follows":

"Land use" means:

(1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;

(2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;

(3) The subdivision of land; or

(4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

For purposes of this chapter, harvesting and removing does not include the taking of aquatic life or wildlife that is regulated by state fishing and hunting laws nor the gathering of natural resources for personal, non-commercial use or pursuant to Article 12, Section 7 of the Hawaii State Constitution or section 7-1, HRS, relating to certain traditional and customary Hawaiian practices. (Emphasis added)

If the "Land Use" definition is not the what Mr. Ishibashi is referring to, than we are not sure what law(s) he is referring to. But if Mr. Ishibashi, is referring to the rules under HAR 13-5-2, then he has not been properly informed about the exemption for continued exercise of NH cultural and religious practices under the BLNR "Land Use" definition cited above. The Master Plan 2000, Cultural Impact Assessment did identify the placement and erection of such Ahu (or kuahu such as stone alters) as a constitutionally protected activity that has already been identified as a reasonably protected right under the Hawai'i's Constitution and if it is not a reasonably protected activity then the BLNR, the UH/TMT and OMKM representatives have the burden to prove that such a protected practice is unreasonable. (Please see Ex A048, App. N PHRI Inc CIA,1999, at p.43)

BLNR must demonstrate that they can in fact transfer their authority to the UHH and OMKM to regulate, limit and exclude NH and the general public from accessing Mauna Kea and the from limiting the over all access, use and enjoyment of the the public lands of Mauna Kea. BLNR has the burden to demonstrate that the UH has the police authority and the expectation of exclusivity to close NH and from the accessing the Summit to conduced ceremonies and the continue their

practice on the undeveloped or less then fully developed lands of Mauna Kea.

We content that we as practitioners fulfill the specific purposes as laid out in PASH and the body of law, commonly referred to as Native Hawaiian Rights laws. It is our understand that these rights are not exclusive rights but rather rights that evolved over thousands of years and long before the US had a presence in Hawai'i. The State by codifying these rights and practices in the Constitution, did so to recognized and support the survival of Hawaiian cultural in a quickly changing world.

Neither the UHH nor the OMKM representatives where able to define or defend their exclusive claims over the MK Access road. They could not define how or why the "RANGERS" were called such when they had no regulatory or police power to block public and NH practitioners. Nor could they explain why NH an dthe publics access could be hindered while the UH, OMKM and International Astronomy personal were permitted up the access road. They also could not cite to and direct us to any laws that gave them permission to destroy any cultural sites. We submit they UHH, OMKM and another UH representatives have no authority to regulate the public activities on Mauna Kea. The UH is a lease holder but they does not grant them any expectation of exclusivity on Mauna Kea.

In our *Temple Report* compiled by MKAH and Royal Order of Kamehameha I (MKAH/ROOKI, see Ex B.01q, p. 19-30) we held that "state holders" such as the International and National Astronomy Observatories (also as third parties leaseholders) should be included in the discussions but the "right-holders" such as NH and the General public (those for whom the the laws are written to protect) should have a vote as to what happens to the land and resources of Hawai'i. The UH for over 50 years has maintained an environment of exclusivity that has lead to the degradation and destruction of the land and cultural sites. This has primarily occurred because BLNR has abdicated its fiduciary duty and authority to the UH, an entity in a conflict of interest and not legally mandated with the authority to protect NH cultural and religious access, practices and use on public lands.

RENT AND OTHER TRUST OBLIGATIONS

Violations of Surety, Lease, and Obligations to Public and Native Hawaiian Beneficiaries

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

The Native Hawaiians and the general public are the two named beneficiaries of the public trust established in the Hawaii Admissions Act. Section 5(f), of the Act, includes support programs "for the betterment of the conditions of native Hawaiians." As both public and Native Hawaiian beneficiaries of this trust, Petitioners have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As beneficiaries of this trust, they have a right to reasonable revenues from the lease of public lands subject to the provisions of the trust.

Section 171-17 and -18, HRS, require the DLNR to assess and collect fair market lease rent, to be deposited in the Public Trust Land Fund.

HRS 171-17 (a) The appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board; provided that the upset price or upset rental shall be determined by disinterested appraisal whenever prudent management so dictates. No such lands shall be sold or leased for a sum less than the value fixed by appraisal; provided that for any sale or lease at public auction, the board may establish the upset sale or rental price at less than the appraisal value set by an employee of the board and the land may be sold or leased at that price. The board shall be reimbursed by the purchaser or lessee for the cost of any appraisal required to be made by a disinterested appraiser or appraisers contracted for by the board. (a) Have the appraisal of public lands for sale or lease at public auction for the determination of the upset price may be performed by an employee of the board of land and natural resources qualified

to appraise lands, or by one but not more than three disinterested appraisers whose services shall be contracted for by the board.

HRS 171-18. All funds derived from the sale or lease or other disposition of public lands shall be appropriated by the laws of the State; provided that all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act and later conveyed to the State under section 5(e) shall be held as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

There are at least 13 leases for telescope structures on the public lands of Mauna Kea. These sub-leases are made between the State, UH and foreign and non-state governments and corporations that have no such protection under the relevant sections of the Admissions Act, including Section 5(f) of the Act.

The leases are signed by a representative of DLNR, a representative of the University, and representatives of the telescope owners/operators. Ex. B-7.

The annual lease rent paid by of the existing telescope owners/operators is either $1 or less. Exhibit B-2, B-3, B-4, B-5, B-6, and B-7.

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

The University may not extend their public trust lands privilege to non-state and foreign government and or corporations.

As is evidenced in the sub-lease agreements the University is not assessing and collecting fair market lease rent and depositing it into the Public Trust Lands Fund for public purposes pursuant to HRS 171.

As is evidenced in the sub-lease agreements the DLNR is not assessing and collecting fair market lease rent and depositing it into the Public Trust Lands Fund for public purposes pursuant to HRS 171.

It is undisputed that fair market lease rent has not been collected by DLNR for the use of the public lands of Mauna Kea for astronomy related activities, commercial tours, and other revenue generating uses.

BLNR is required to assess and collect fair market lease rent to be deposited into the Public Trust Lands Fund to be used for specified public uses, regardless of the fact that the University under HRS 304, may also charge users rent.

DLNR's 1977 management plan for the Mauna Kea Conservation District required that no application shall have final approval without the applicant having first filed with the board adequate security equal to the amount of the contract to construct the telescope facilities, support facilities and to cover any direct or indirect costs attributed to the project.

Although the TMT Observatory Corporation has alluded to pay an un-specified amount of "substantial rent," the University is actually the Applicant on this CDUA, and the UHH has not provided at security deposit.

Moreover HRS 171, requires all lease rent for the use of public trust lands to be based on the fair market value. This means rent is not based on what the Applicant or the TMT Corporation is willing to pay.

Neither the CMP nor the CDUA ensure that either the general public or Native Hawaiian beneficiaries receives their constitutionally guaranteed portion of all money generated from the use of former crown and government lands of which Mauna Kea is a part as is provide under the law (HRS 171).

The BLNR, has a fiduciary duty to protect the interests of its beneficiaries.

Ed Stone of the TIO Corporation LLC had this to say a bout Patents and lease rent to be paid to the state pursuant to HRS 171-17, -18 or not:

10 Q. All right. So in the past Yale University
11 has paid money, I believe, in the amount of 14
12 million to acquire time on the Keck Observatory. Are
13 you aware of that?

A. I'm aware of that, but I was not involved.
Q. Have you or TIO or TMT Corporation
negotiated any state -- negotiated with the state or
BLNR for percentage of any proceeds that might come
in from other places for use of the TMT?
A. I don't have any knowledge of these
details. I have not been involved.
Q. Will TMT look to patent any of the
technologies that they might produce on the TMT
telescope?
A. Patent?
Q. Yes.

12.19.16 Edward Stone Vol 18 page38:1-9
(questions from Kealoha Pisciotta)

A. I assume -- I don't know. I don't know
that we have patented anything, but certainly as a
corporation we could do so as LLC.
Q. And then if that were true, would you then
negotiate with the state for a share of those
proceeds since it will be being used on ceded lands?
MR. ING: Objection, You honor, calls for
speculation, lacks foundation.
HEARINGS OFFICER AMANO: Sustained.

DISCUSSION re proceeds from patents and Yale University $14 million in telescope time

12.19.16 Edward Stone Vol 18 page39:17-25
(questions from Kealoha Pisciotta)

Q. (By Ms. Pisciotta): Is the TIO or TMT
paying fair market rent, lease rent for the use of
the lands on Mauna Kea?
A. We have agreed to funding, and to go to
about a million dollars per year in about eight or
ten years, as I recall, that's part of the agreement,
part of it, yes, sublease.
Q. So how did you determine the million
dollars?

p. 40 - 51
DISCUSSION re market lease rent for use of ceded lands, partner percentages of funding of 1.4 billion cost of TMT, governments of foreign countries participation, India, China, Japan; whether University of California would be public funding; where the rent money goes (OMKM, OHA); who at TMT pays the bill;

DESECRATION AND THE CIVIL RIGHTS AND HUMAN RIGHTS OF PETITIONERS

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

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

Our Responses are are follow:

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

The Supreme Court stated:
"Opponents including Native Hawaiians who stated that the summit areas was sacred in Native Hawaiian cultural and that the construction of the eighteen-one-half-story high observatory would be a desecration. "
See **MKAH** at p.2.

and

"An example of concerns raised can be found in a letter, which was submitted to the Board during the course of the public hearings, from petitioner Mauna Kea Anaina You, the Royal Order of Kamehameha, Sierra Club and petitioner Clarence Kukauakahi Ching. The letter emphasized that "Mauna Kea is considered the Temple of the Supreme Being [,] the home of Na Aka (the Divine Deities), Na 'Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (Sky Father). Additionally, the letter states that "[t]he ceremonies and practices on Mauna Kea are practices no where else [] and formed the basis of the navigational knowledge that allowed Hawaiians to navigates over 10 millions square miles of the Pacific."
See **MKAH** Concurring Opinion by Justice Pollack, join by Justice Wilson and Justice McKenna in part, *foot note* 5 at p. 11

DESECRATION IS AGAINST THE LAW IN HAWAI'I

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

See **2.28.17 Mililani Trask Vol 42 page 227:17-25**
(questions from Kaliko Kanaele)
17 Q. (By Mr. Kanaele): Does HAR 13-5 override 18 HRS 711?
19 A. No. No, it doesn't.
20 Q. Do you think after hearing the HRS 7-1121 (sic), is that a sufficient protection for sacred 22 sites or districts?
23 A. You know, the language of our state
24 desecration law is sufficient. What we don't have is
25 anyone who has the integrity to invoke it

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

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

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

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

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

We submit, that the State and the UH representatives who attempted to close the Mauna Kea access road (a public road and neither owned not controlled by the University or they representatives) the Office of Mauna Kea Management (OMKM) used both State and Country enforcement officers to not only infringed upon on the rights of Native Hawaiian and other supporters but further acted in conspiratorial ways to use state police power against the citizens and people of Hawai'i (including subjects of the Hawaiian Kingdom of any ethnicity). The states Attorney General, the Deputy Attorney Generals. the County Prosecutor and University and TMT representatives have been show to have had detailed conversations to how to deal with the "protestors".

On Civil Assistance <u>not</u> Disobedience

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

We have great respect for Mahatma Gandhi and for his gifts of wisdom to help the people resist the onslaught of Industrial Revolution and the oppression that followed, such as the acts of resistance/civil disobedience in the face of unjust laws

meant to oppress. However in this instant case, the laws were on our side, in that the courts were in fact in the middle of reviewing the question whether or not BLNR erred in issuing a CDUP for the TMT project prior to conducting a CCH.

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

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

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

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

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

(a) Any public monument or structure; or

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.

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

COMMENTARY ON §711-1107

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

SUPPLEMENTAL COMMENTARY ON §711-1107

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

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§711-1107 Commentary:

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

RELIGIOUS FREEDOM

We incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

United States Constitution:

The Bill of Rights, First Amendment to the United States Constitution provides as follows: Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment makes the Bill of Rights applicable to the states and provides for the equal protection of the laws:

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

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000b et seq., ("RFRA") is a U.S. federal law which provides in essence a reinstatement of relevant part: the *Sherbert* Test, which was set forth by *Sherbert v. Verner*, and *Wisconsin v. Yoder* – cases which required constitutionally mandated strict scrutiny standard be used

when determining whether the Free Exercise Clause of the First Amendment to the United States Constitution, guaranteeing religious freedom, has been violated. Congress stated in its findings of RFRA that a religiously neutral law can burden a religion just as much as one that was intended to interfere with religion, RFRA however protects so that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." In the instant case BLNR would only be permitted to regulate —-in "furtherance of a compelling government interest" and in a manner that is the least restrictive way to further the governmental interest.

CONCLUSION

WE incorporate by reference also all of the Parties named above ANY AND ALL FILINGS INCLUDING PROPOSE FOF/COL, D&O (2011-2013 AND 2015-2017 CCHs), RESPONSES AND EXCEPTIONS.

WE OBJECT AND TAKE EXCEPTIONS TO **HO excluding the reliable, substantial, probative and credible evidence and therefore fails to give them the proper weight and consideration to make an informed fair decision.**

WE reassert our PROPOSED DECISION AND ORDER. Based on the Findings of Facts and Conclusions of Law as provided by all of the Pro Se Parties and on the whole record, the Thirty Meter Telescopes Conservation District Use Permit should be DENIED.

DATED:: August 21, 2017

CERTIFICATE OF SERVICE

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

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