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BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAI'I

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STATE OF HAWAII

In the matter of:) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation) MEHANA KIHAI'S
District Use Application (CDUA) HA-3568) EXCEPTIONS TO
For the Thirty Meter Telescope at the Mauna) HEARING OFFICER'S
Kea Science Reserve, Ka'ohe,) FINDINGS OF FACT,
Hamakua District, Island of Hawai'i, TMK) CONCLUSIONS OF LAW, COS
(3) 4-4-015:009)
_____) Hearing Officer: Riki May Amano (Ret.)

I. INTRODUCTION

**PETITIONERS RESPONSE TO HEARING OFFICER RIKI MAY 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.

The 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.

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.

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II. GENERAL EXCEPTIONS

General Exceptions are as follows:

I 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

I take EXCEPTION to the HO's Proposed FOF/COL and D&O whole, because the HO failed to review, consider, take into account and or to rule upon Petitioners proposed FOF COL, 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 re-main 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 (here-after 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 were 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 provide 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 provide notice to the BLNR that some of the issues in the 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 an 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 overturn any of the BLNR's final decision.

Therefore the BLNR must either remand back to the HO with instructions to provide 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 Fergerstrom, 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.

DISCLAIMER

DISCLAIMERS, OBJECTIONS, RESERVATIONS AND JOINERS AND INCORPORATIONS.

These Disclaimers, Objections, Reservations, Joiners, and Incorporations are filed on behalf of Pro Se Petitioner Mehana Kihoi as a part of the RESPONSES to the Applicant's Findings of Fact, Conclusions of Law, and Proposed Decision and Order (Hereafter FOF/ COL, DECISION AND ORDER) and I INCORPORATE by reference all of these into my EXCEPTION/RESPONSES to the of HEARING OFFICER'S PROPOSED FOF/ COL, DECISION AND ORDER of JULY 26, 2017 [Doc. 783]. I take EXCEPTION to all issues addressed or contained in Hearing Officers PROPOSED FOF, COL, DECISION AND ORDER.

III. PARTIES

HO FOF 11 – Failed to consider other facts that are relevant to the interests of Mehana Kihoi.

1. Kihoi is a Native Hawaiian spiritual, religious and cultural practitioner of Mauna Kea and other neighboring areas on the island of Hawai'i. (Tr. Feb. 14, 2017 vol: 35 pg:98, 1:11 11- 20, Affidavit by Mehana Kihoi at 1 ("Exhibit 1"), Exhibit F-1, WDT pg:1 p:1).

2. She, and her daughter, are direct lineal descendants of Pa'ao and Hewa Hewa Nui, the ancestral guardians of Mauna Kea, and their traditional practices. (Exhibit F-1, WDT pg: 1 p:1).

3. Pa'ao and Hewa Hewa Nui were voyagers who received consent from ali'i to care for, and gather adze on Mauna Kea. (Exhibit F-1, WDT pg:1 p:1). Id.

4. The lands included within the Mauna Kea Science Reserve are a part of the Public Lands Trust, lands ceded by the U.S. as a condition of Statehood to be used for public trust purposes including, but not limited to, bettering the "conditions for Native Hawaiians, as defined by the Hawaiian Homes Commission Act." (UHH-CDUA at 12, Haw. Const. Art. XII, § 4).

5. Kihoi is a Native Hawaiian beneficiary as defined by the Hawaiian Homes Commission Act of 1921 with the fifty percent (50%) blood quantum. Tr. Feb. 14, 2017 vol: 35 pg:76, 11:04 23 – 10, Haw. Const. art. XII, § 2 (West, Westlaw through 2017), HHCA §§ 201(a), 207(a) (West, Westlaw through 2017) [“HHCA”], H.R. Rep. No. 102-893, at 1 (1992). (Exhibit F-1, WDT pg:1 p:1)

6. Kihoi is a beneficiary of the Public Lands Trust. Haw. Const. Art. XII, § 4. (Tr. Feb. 14, 2017, vol:35 pg:77, at 11:04 4).

7. She is dedicated to the protection and preservation of the sacredness of the summit of Mauna Kea for ancestral, religious, cultural and spiritual purposes. (Exhibit F-1, WDT pg:1 p:3, Tr. Feb. 14, 2017, vol:35 pg:118, at 1:28 21 - 1:30 3).

8. Kihoi has a close and significant relationship to Mauna Kea since birth. (Tr. Feb. 14, 2017, vol:35 pg:98, at 11:06 1 - 9, Tr. Feb. 14, 2017, vol:35 pg:109 at 1:10 3 - 10). Id.

9. Her identity, health and well-being as a Native Hawaiian are intrinsically tied to the well-being of Mauna Kea. (Exhibit F-1, WDT pg:1 p:1).

10. As a direct lineal descendant of the guardians of Mauna Kea, Kihoi’s objective is to protect traditional and customary practices not only for herself, but for her daughter and future generations of native Hawaiians and cultural practitioners. (Exhibit F-1, WDT pg:1 p:1, Exhibit F-28).

11. Kihoi engages in traditional and customary practices on Mauna Kea. Id. at 2. Among these traditional and customary practices are: malama ‘aina, offering ho’okupu (including pule, oli and materials), healing, gathering adze, building ahu, connecting with her ancestors and participating in religious ceremonies. (Exhibit 1. at 2, Exhibit F-1, WDT pg:1 p:1, Tr. Feb. 14, 2017, vol:35 pg:92, at 11:30 9 - 11:32 8, Tr. Feb. 14, 2017, vol:35 pg:98, at 1:22 16 -18).

12. Kihoi and her daughter attend monthly religious ceremonies on Mauna Kea at the proposed site of the TMT and the neighboring spaces within the Conservation District Use area. (Exhibit 1 at 2-3, Tr. Feb. 14, 2017, vol:35 pg: 98, at 1:11 11 - 20).

13. Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the existing structures on Mauna Kea. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb. 14, 2017 vol:35 pg:98, 1:22 4 - 1:26 7).

14. Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the arrests by the Department of Land and Natural Resources on April 2, 2015 and on

June 24, 2015 on Mauna Kea. Tr. Feb. 14, 2017 vol:35 pg:79, at 11:08 3 - 10, Exhibit F-11, Exhibit F-25, Exhibit F-26, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).

15. The arrests caused Kihoi and her daughter emotional distress while they asserted their rights to protect and preserve Mauna Kea. (Tr. Feb.14, 2017 vol:35 pg:79, 11:08 3 - 10, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).

16. Kihoi and her daughter suffer from extreme psychological distress in anticipation of the potential construction of the TMT. (Tr. Feb.14, 2017 vol:35 pg:98, at 11:42 9 - 11:44 24).

17. They will suffer a substantial and imminent injury should the TMT Project proceed. (Exhibit F-1, WDT pg:1 p:6, (Tr. Feb.14, 2017 vol:35 pg:77, at 11:04 5 - 10). Id.

18. The TMT is a threat to Kihoi and her daughter's well-being. (Exhibit F-24, Exhibit F-25, Exhibit F-26, Exhibit F-27, (Tr. Feb.14, 2017 vol:35 pg:98, at 1:18 18 - 1:19 5). Id.

19. Kihoi enjoys views of and from the summit of Mauna Kea and the beauty of the area. Id.

1. The interests of Kihoi in the preservation of Mauna Kea are aesthetic, cultural, environmental, recreational, religious, and customary and traditional. Id.

2. The construction of the TMT will adversely impact Kihoi and her daughter, including her ability to fulfill her responsibility that was passed down to her by her ancestors to preserve and protect the area, her ability to engage in traditional and customary practices as well as enjoy the natural beauty and quiet of the area. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb.14, 2017 vol:35 pg:92, at 11:32 22 - 2, Tr. Feb.14, 2017 vol: 35 pg:109, at 1:10 3 - 1:11 10).Id.

IV. PROCEDURAL HISTORY:

HO FOF 40 - failed to consider other facts relevant by the Hawai'i Supreme Court opinion.

But the similarity between the HO, UHH and TIO 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 given the appearance that HO already prejudged the case and that the ultimate determination of the merits had moved in predestined grooves” Cinderella, 425 F.2d at 590.

A. PRIOR CONTESTED CASE, REMAND, AND APPOINTMENT OF HEARING OFFICER

1. On April 20, 2015, Protectors of Mauna Kea delivered a petition to Governor David Ige's office with over 50,000 signatures of individuals, across the nation and statewide, in opposition to the Thirty Meter Telescope (“TMT”) demonstrating a significant change in circumstance from the initial planning efforts of the proposed project. Published By Jennifer Sinco Kelleher, Associated Press. Telescope opponents, members of Mauna Kea Hui and Mauna Kea ‘Ohana, deliver petition to governor's office, Associated Press, Honolulu, HI, April 20, 2015 available at <http://www.hawaiinewsnow.com/story/28851786/telescope-opponents-deliver-petition-to-governors-office>. (Last visited on May 25, 2017). Signers of the petition included but were not limited to, residents of Hawai‘i, both Native Hawaiians and the general public. [2]

2. On December 2, 2015, the Supreme Court of Hawai‘i held Mauna Kea Anaina Hou, et al., the petitioners in the first contested case, were entitled to a contested case hearing. Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Haw. 376, 363 P.3d 224 (2015) (“MKAH”). The court concluded BLNR violated their due process rights by granting a conditional permit to begin construction of the TMT prior to holding a contested case hearing. Id. The court vacated the permit and remanded the case to BLNR for further proceedings consistent with its opinion. Id.

B. BLNR Failed to Provide Notice and an Opportunity to be Heard for the Meeting to Discuss the Appointment of the Hearing Officer.

3. Despite objections by MKAH scrutinizing the selection process of the Hearing Officer, on March 31, 2016, BLNR issued a Minute Order providing notice that Riki May Amano was appointed as the Hearing Officer to oversee the contested case. March 31, 2016, Minute Order No. 1 at 001.

4. In response to MKAH's objections, BLNR issued Minute Order 2. Minute Order 2 stated that BLNR met on February 26, 2016 as a part of, and to discharge its adjudicatory

function governed by Haw. Rev. Stat § 91-9. April 8, 2016, MO 2, Haw. Rev. Stat. (“HRS”) § 91-9. To support the Chair’s decision in selecting Amano as the Hearing Officer, the Board stated the action was justified because the board had previously authorized a contested case and delegated the management of the case to a hearing officer. Id. The Board stated they discussed the issue at the February 26 meeting and delegated the conduct of the contested case hearing to a hearing officer, pursuant to Hawaii Administrative Rules (“HAR”) 13-1-32(b), and confirmed that the chairperson was authorized to engage the services of a hearing officer pursuant to law. April 8, 2016, Minute Order No. 2. at 003.

5. Prior Notice of the February 26, 2016 meeting when the Board discussed and subsequently made agreements were never made public, nor was the public offered a meaningful opportunity to be heard. April 15, 2016, MKAH Minute Order No. 005 at 4-5.

6. In response to the appointment by Minute Order 1 and the subsequent Minute Order 2 by the board, which provided justification for its action, on April 15, 2016, Richard Naiwieha Wurdeman, attorney for MKAH, et al., filed a motion objecting to the selection process of the hearing officer on the grounds that the Department of Land and Natural Resources (“DLNR”), without any authorization from the board, and before the remand by the Third Circuit, posted notice on January 29, 2016 in search of an attorney to oversee the contested case contradicting the Board’s position that an agreement was made on February 26, 2016. April 15, 2016, MKAH Minute Order No. 005 at 3.[4] Further, MKAH asserts BLNR violated the sunshine law when it held the February 26, 2016 meeting to discuss the appointment of the hearing officer without providing prior notice of the meeting to the public and an opportunity to be heard. Id.

C. The Hearing Officer Failed to Discharge Notice Requirements For Pre- Hearing Conference And Failed To Accommodate Pro Se Petitioners.

7. On May 6, 2016, the Hearing Officer filed notice to schedule the first pre-hearing conference on May 16, 2016. May 6, 2016, MO 5. Notice was not filed timely pursuant to Haw. Rev. Stat. § 91-9.5, which requires the Hearing Officer to give written notice by registered or certified mail with return receipt requested at least fifteen days before the hearing. Haw. Rev. Stat. (“HRS”) § 91-9.5 (West). May 9, 2016, Minute Order No. 5 at 016

8. The second pre-hearing conference was held on June 17, 2016 in Hilo. May 27, 2016, Minute Order No. 08. at 049. The Hearing Officer provided no guideline on expectations of the parties to prepare for the hearing. TR VOL III Titled: “Request for Admission and

Motions”. At the conference, the Hearing Officer and the parties discussed several important matters including the number of witnesses parties would call to testify, the date to schedule the site inspection, deadlines for pre-hearing motions and deadlines for subpoenas. Id. The new parties were expected to discuss or state their case including how many witnesses they would have at this hearing, when they had no previous warning or access to any motions filed and were not informed that they needed to be prepared with that information. Id. All new parties except TIO and PUEO were pro se. Id. The Hearing Officer stated she would file a minute order describing the filing procedures. TR VOL III Titled: “Request for Admission and Motions” - P 7: 4-6. That minute order was never filed or provided to the parties.

9. The remanded Contested Case Hearing was held over the course of 44 days from October 2016 to March 2017.[5]

D. The University Submitted Its 2010 Application with No Changes Despite Public Outcry.

10. In or about March 2016, the University filed its application for a Conservation Use District Permit (“CDUA”), the same application it submitted in or about September 2010, with no changes, to construct the TMT at the Mauna Kea Science Reserve (“MKRSR”), Ka’ohe Mauka, Hamakua, with Hawai’i TMK (3) 4-4-015:009. University of Hawaii Conservation Use District Application (“UH-CDUA”), Pages 1-541.

11. The University did not incorporate any information or consult with the community to address the national and statewide efforts against the project.[6]

12. James Hayes, the author of the CDUA, was not a credible witness. He testified that the entire conservation use district will have “minimal overall” damage due to the TMT. HAYES, Volume III, Page 48. Line 24. Hayes’ statements directly contradict the Federal Environment Impact Statement issued by National Environmental Policy Act (“NEPA”) which states, “the cumulative impact of 30 years of astronomy development has resulted in significant, adverse and substantial impact to the cultural and natural resources of Mauna Kea. UHH EIS 4 at 457. "Observatory construction has resulted in the moving of more than 10,000 cubic yards of material, grading and flattening of Kukahau'ula ridges, and placement of man-made structures on Kukahau'ula, affecting views to and from the summit. Ex.A005 FEIS V3 p. 3-214. The development of observatories within the Astronomy Precinct substantially altered the appearance of the summit, and the presence of observatories continues to affect the performance of the religious and cultural practices. Id. Further, when asked if UHH and TIO were in consultation with cultural practitioners, Hayes said yes but could not identify the practitioners involved in the

project. HAYES, Volume III Page 48 at Line 12. As such, Hayes stated that there was no report issued by UHH or TIO detailing the adverse impact TMT will have on Mauna Kea. Id. After questions from Pro Se Petitioner Deb Ward, Hayes confirmed the NEPA EIS statement to conclude that the cumulative impact of TMT will be adverse and significant to the project. HAYES, Volume III, Page 167 at Lines 12-20.

13. With the application, the University submitted the TMT Project Environmental Impact Statement, the same document it submitted in May 2010 with no changes at all, to support its CDUA. University of Hawaii at Hilo Environmental Impact Statement (“UHH-EIS”), Pages 1-376. The University did not consult with the community to address any concerns or information related to the national and statewide opposition to the project.

14. On April 8, 2016, TMT International Observatory, LLC (“TIO”) filed a motion to request to be admitted as a party in the contested case asserting a property interest in the proceeding. [7] April 8, 2016, TIO Minute Order No. 002 at 1.

B. FIRST PRE-HEARING CONFERENCE

HO FOF 48 - The Hearing Officer Failed to Discharge Notice Requirements For Pre-Hearing Conference And Failed To Accommodate Pro Se Petitioners.

On May 6, 2016, the Hearing Officer filed notice to schedule the first pre-hearing conference in Honolulu, Oahu, on May 16, 2016. May 6, 2016, MO 5. Notice was not filed timely pursuant to Haw. Rev. Stat. § 91-9.5, which requires the Hearing Officer to give written notice by registered or certified mail with return receipt requested at least fifteen days before the hearing. Haw. Rev. Stat. (“HRS”) § 91-9.5 (West). May 9, 2016, Minute Order No. 5 at 016.

C. STANDING

HO FOF 62 - HO violated HAR 13-1-31.1 This contested case started on May 16, 2016 (Minute Order 5) without all the parties. The STANDING PROCESS was not followed.

§13-1-31 Parties.

(a) Except as otherwise provided in section 13-1-31.1, parties to a contested

case shall be determined within a reasonable time following the ten-day period following the board meeting, the presiding officer shall notify all persons and agencies, including the applicant or alleged violator, as the case may be, who timely petitioned for the contested case hearing of the date and time for a hearing to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to the admission of any requestor as a party to the contested case. Without a hearing, an applicant or an alleged violator shall be a party.

1. Kihoi timely and properly filed a request to be admitted as a party contesting the issuance of a conservation district use permit to the Applicant. HAR § 13-1-29.
2. The interests of Kihoi and her daughter and the injury that they have and would face from the TMT project, Kihoi has standing. *Life of the Land v. Land Use Commission*, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981); *Akau v. Olohana Corp.*, 65 Haw. 383, 388, 652 P.2d 1130, 1134 (1982); *Pele Defense Fund v. Puna Geothermal Ventures*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994); *Ka Pa`akai O Ka`aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000); HAR §13-1-31(b)(2) and (c).
3. It is sufficient for standing purposes for an individual, *Simpson*, 170 F.3d 1092, 1096 (1999).
4. In addition, Kihoi has standing based on her traditional and customary practices that would be impaired by the TMT project. *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("PASH").
5. Finally, Kihoi has standing based on her constitutional rights. Hawai'i State Constitution Article XI §§ 1 and 9 and Article XII § 7.

D. PRE-HEARING PLEADINGS

Kihoi's Request to be Admitted as Party and Efforts to Exclude PUEO as a Party.

1. On May 11, 2016, Mehana Kihoi filed a request to be admitted as a party in the contested case along with twenty (20) other pro se petitioners against the Thirty Meter Telescope. May 11, 2016, Kihoi Minute Order No. 23 at 1. Kihoi asserts a property interest in the lands of Mauna Kea as a Native Hawaiian cultural practitioner. *Id.* She asserts a substantial interest in the proceeding that was clearly distinguishable from the general public; that her participation would assist the board in its decision making; and that her position was not substantially the same as any existing parties to the proceeding; and her participation would add substantially new and relevant information and would not make the proceedings inefficient and unmanageable. *Id.*

2. On May 16, 2016, Perpetuating Unique Educational Opportunities (“PUEO”) filed a motion to intervene as a party to the contested case asserting standing as Native Hawaiian cultural practitioners. May 16, 2016, PUEO Minute Order 33 at 1.

3. In response to this, on July 18, 2016, Kihoi filed a motion to exclude PUEO as a party on the basis that the Executive Director, Keahi Warfield, (“Warfield”) had a material and direct business interest to BLNR member Stantely Roehrig (“Roehrig”). July 18, 2016, Kihoi Minute Order No. 98 at 1-17.

4. Warfield is the President of PUEO and the Executive Director of Keaukaha One Youth Development (“KOYD, a 501(c)(3) non-profit organization. *Id.*

5. As Executive Director of KOYD, Warfield and Roehrig shared the same business space according to the Department of Commerce and Consumer Affairs at the time of filing the motion to exclude PUEO as a party. *Id.* At the same time, Roehrig maintained authority to approve or deny the CDUA. July 18, 2016, Kihoi Minute Order No. 98 at 1-17. On August 1, 2016, TIO filed an objection to Kihoi’s request to exclude PUEO. August 1, 2016, TIO Minute Order No. 145 at 1.

6. On October 10, 2016, the Hearing Officer issued Minute Order 28 denying Kihoi’s motion to exclude PUEO as a party despite compelling evidence demonstrating business ties between Roehrig and Warfield. October 10, 2016, Minute Order No. 327 at 1.[8]

7. On October 15, 2016, Kihoi filed a motion for reconsideration to deny the intervention of PUEO based on new and substantial information that was not available at the time the first motion was filed. The new and relevant information demonstrated a direct financial relationship between Warfield and Roehrig to which Roehrig and Warfield directly benefited from. *Id.* Roehrig received thousands of dollars in property tax savings from this relationship because KOYD leased lands from Roehrig and operated its business from those lands. October 15, 2016, Kihoi Minute Order No. 380 at 1-117.

8. Warfield admitted he was in a business relationship with Roehrig since 2011 and that Roehrig's wife was part of that relationship as well. Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 7-9. He testified that they did, in fact, receive benefits from that relationship including thousands of dollars of tax exemptions as a result of their lease agreement. Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 7-9.

9. Warfield also stated KOYD is a beneficiary of funding from TMT's Think Tank program. Tr. Feb. 15, 2017 vol. 36 pg: 220, 4:05 7-4:06 14.[9] Despite the new and relevant information, the Hearing Officer never issued a Minute Order to deny or grant Kihoi's motion for reconsideration. Instead, she allowed the case to proceed even though there was enough information in the record to cause doubt on to whether Roehrig could not be influenced as a decision maker by the business relationship.

The HO did not rule on any of Kihoi's motions in a timely manner. Specifically, Kihoi's Motion For Reconsideration to Deny the Intervention of P.U.E.O. as a Party. The HO ruled on Kihoi's Motion for Reconsideration [Doc. 683] **after** she ordered the production for the Findings of Fact, and Conclusions of Law. **233 days AFTER the Motion was filed [Doc. 380].**

E. SETTING THE ISSUES

HO FOF 71 (*identical finding UHH-TIO FOF 602) - On August 8, 2016, Kihoi filed a Joinder (DOC-195) to Harry Fergerstrom's Motion to Oppose P.U.E.O.'s Motion To Set The Issues (DOC-186). Kihoi agreed that the arguments posted by Fergerstrom and opposed to P.U.E.O.'s motion to limit the hearing to just the 8 Criteria of a Conservation District Use Permit. It failed to consider the geneological, ancestral, and spiritual connection that many descendants may have to this unique and sacred location.

F. SITE VISIT

HO FOF 81 & 82 (*identical finding UHH-TIO FOF 72 & 73) - On September 22, 2016, Kihoi visited the site for the proposed TMT with the Hearing Officer and other parties involved in the contested case. However, was not allowed to participate, due to the fact that Kihoi requested to travel in own vehicle. September 22, 2016, BLNR Minute Order No. 279. No cultural protocol was done or permitted during the site visit. Id. The site visit

to the proposed TMT site was inaccurate, incomplete, and bias. Tour vans were instructed "not to stop", and petitioners were restricted from exiting the vehicle, recording video, and taking pictures. HO did not even step out of the vehicle to survey the land. The red balloon demonstration conducted by UHH was not demonstrated at the 187 foot height which was meant to portray the height of the TMT telescope. It was clearly much shorter. When petitioners asked to see the rope in order to get an accurate, and factual measurement, they were denied. What was supposed to be a 4 hour visit, was completely rushed and ended in 1.5.

III. PROCEDURAL HISTORY: EVIDENTIARY HEARING

HO FOF 101 (*identical finding UHH-TIO FOF 92) - was based on the length of the cross-examination by all and yet the HO changed the rule to impose a 30- minute time limit on cross-examination, subject to extension of time for good cause shown. This showed a bias and a due process violation to the Petitioners and HRS 91-10 #3. Parties object to HO 30-minute time limit on cross-examination. Flores Tr. 10/31/2016: V6: P12: L12-25 and Page 13: L1-12; Ching Tr. 10/31/16; V6: P13: L15-16; Case Tr. 10/31/16: V6: P20: L6-25 and Page 21: L1-15; Mr. Freitas Tr. 10/31/16: V6: p21: 119-25 and P22: L1-25; Fergstrom Tr. 10/31/16: V6: P13: L17; Kaiama Tr. 10/31/16: V6: P13: L19-25 and P14: L1-13; Ward Tr. 10/31/16: V6: P14: L15-24; Sinkin Tr. 10/31/16: V6: P15: L1-25 and P16: L1-7; Pisciotta Tr. 10/31/16: V6: P16: L11-25 and P17: L1-4; Kanaele Tr. 10/30/16: V6: P17: L9-25 and P18: L1-4; Mr. Kealoha Tr. 10/31/16: V6: P39: L3-25.

IV. PROCEDURAL HISTORY: POST-HEARING

HO FOF 117, 118, and 120 (*identical finding UHH-TIO FOF 108, 109, & 111) – HO failed to consider the voluminous legal and factual arguments, and materials presented in the contested case hearing that the transcript was made available will trigger the 30 days to file Finding of Fact and Conclusions of Law. Parties Objected to 30 days to file Finding of Fact Conclusion of Law. Pisciotta Tr. 3/1/17: V43: P259: L12-16; C. Freitas Tr. 3/1/17: V43: P260: L10-22.

G. EDUCATIONAL AND EMPLOYMENT OPPORTUNITIES

HO FOF 297 (*identical finding UHH-TIO FOF 287) - HO failed to consider factual arguments, relevant material, and conflict of interest presented in the contested case hearing.

1. Shadd Keahi Warfield stated that he has an organization called the Keaukaha One Youth Development (KOYD). (Tr. Feb. 15, 2017 vol. 36 pg: 216, 4:01 16-17)
2. Warfield stated that he leases that property through Makana Kai. (Tr. Feb. 15, 2017 vol. 36 pg: 217, 4:01 25-4:02 1)
3. Warfield stated that the owners of Makana Kai are made up of the family members of Stanley Roehrig, Jan Roehrig and their family members. (Tr. Feb. 15, 2017 vol. 36 pg: 217, 4:02 4-6)
4. Warfield stated that he is aware that Stanley Roehrig is a current Board of Land and Natural Resources director. (Tr. Feb. 15, 2017 vol. 36 pg: 217, 4:02 7-9)
5. Warfield stated that he is aware that Stanley Roehrig may be voting on whether this CDUA is approved or not. (Tr. Feb. 15, 2017 vol. 36 pg: 217, 4:02 10-12)
6. Warfield stated that KOYD has been at this location since around 2011. (Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 4-5)
7. Warfield stated that his KOYD lease has been existing since around 2011. (Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 7-9)
8. Warfield stated that Mrs. Roehrig, Stanley Roehrig's wife was a member of KOYD. (Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 11-14)
9. Warfield stated that Mrs. Roehrig, Stanley Roehrig's wife was one of the executive directors of KOYD. (Tr. Feb. 15, 2017 vol. 36 pg: 218, 4:03 15-17)
10. Warfield stated that he is aware that Mr. and Mrs. Roehrig and Makana Kai have received tax breaks over the sum of \$70,000 as a result of their lease agreement with KOYD. (Tr. Feb. 15, 2017 vol. 36 pg: 219, 4:05 18-23)
11. Warfield stated that KOYD receives funding from the TMT Think Tank, and has been receiving this funding for two years. (Tr. Feb. 15, 2017 vol. 36 pg:220, 4:05 7-4:06 14)

H. TMT PROJECT MITIGATION MEASURES

HO FOF 341 (*identical finding UHH-TIO FOF 326) - HO failed to consider legal and factual arguments, and relevant material presented in the contested case hearing.

1. Project Manager for the TMT Telescope, Gary Sanders testified that he was not aware that the health and well being of the Native Hawaiian people are intrinsically tied to their connection to the land. Sanders is not familiar with the United States Public Law "Apology Bill", a public document stating that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land". (Tr. Jan. 3, 2017 vol. 20 pg: 217, 3:21)

2. Sanders testified that he was aware of the protests and arrests that took place on Mauna Kea in 2015. (Tr. Jan. 3, 2017 vol. 20 pg:218, 3:22 - 3:23)

3. Sanders testified that not at any time did he, or his staff ever attempt to contact or interact with any of the 57 protectors arrested on Mauna Kea to address any of their concerns. (Tr. Jan. 3, 2017 vol. 20 pg: 219, at 3:23)

4. Sanders testified that as the Project Manager for the TMT Telescope, he was not able to answer how the emotional trauma that this project has caused, would be mitigated.

5. Sanders testified that he was not aware of the substantial, and adverse impacts this project is having on Native Hawaiian Communities. (Tr. Jan. 3, 2017 vol. 20 pg: 215, at 2:18)

6. As Project Manager for the TMT Telescope, Gary Sanders could not answer if he believed that with the construction of the TMT Telescope, that Native Hawaiian would not be injured. (Tr. Jan. 3, 2017 vol. 20 pg: 218, 3:21 - 3:22)

7. Prof. Kalani Flores agreed that none of the mitigations measures being proposed in the CDUA will reduce the harm to him as a cultural practitioner. (Tr. Jan. 30, 2017 vol: 32 pg: 94, 18-5)

8. Prof. Flores testified that his perspective on the matter as an educator and a professor - - for over 30 years as an educator and particularly education in the Hawaiian Studies programs and education with Hawaiian students as well, that the mitigation measures of the TMT Project are a blatant community bribe. They are offering money to destroy. (Tr. Jan. 30, 2017 vol: 32 pg: 156, 13-22)

Even with the implementation of mitigation measures, the TMT project would continue to have a substantial impact on a cultural site and traditional and customary practices. This conclusion is based on the following:

- a. There is no nexus between the actual harm (adverse impacts to a cultural site and to traditional and customary practices) and the mitigation measures. The cultural harm caused by the actual presence of the massive TMT structure is not compensated by providing substitute resources. The Community Benefit Package (CBP) and the \$1 million in funding is an external and separate measure that does not minimize the actual and adverse harm that will be occur at the proposed site. UHH EIS at 147.
- b. The National Park Service expressed its concerned about the deleterious impacts the TMT will have on the national resources of MSRK. UHH EIS at 15.
- c. There is no evidence of any nexus between the off-site measures that provide benefits to certain members of the public and the adverse impact to a cultural site and to traditional and customary practices.
- d. There is no evidence that measures such as providing funding to schools or organizations would actually mitigate the harm that the TMT would cause to an impact that would be less than substantial.
- e. The Applicant has submitted no credible evidence that the mitigation measures would result in no substantive impact to a cultural site or to traditional and customary practices.
- f. The Applicant failed to provide any witnesses in the contested case hearing with any experience or training in impacts to and mitigation of traditional and customary practices or cultural resources.

I. MAUNA KEA IS SACRED

HO FOF 394 - HO failed to include relevant facts and material from Hawane Rios's written testimony. **WDT ex. F-5**

Written Direct Testimony of Hawane Rios

‘O wau no Hawane. ‘O Mauna a Wakea ku‘u mauna, ‘o Kohokohau ku‘u kahawai, a ‘o Pu‘ukapu, Waimea ku‘u ‘aina kulaiwi.

My name is Hawane Rios, my mountain is Mauna Kea, my river is Kohokohau, and the land that raised me is Pu‘ukapu, Waimea on the island of Hawai‘i. I am a descendant of Kanaka Maoli (Native Hawaiians) who inhabited the Hawaiian Islands prior to 1778 as established through my genealogical lines of ‘Umihulumakaokalanikia‘imauna‘o‘awini and Ka‘a‘ikaulakaleikauilahamakanoe Naweluokekikipa‘a. My ancestors come from the ‘Awini Valley of the Kohala Mountains connecting me and my bloodline to a lineage of indigenous peoples rooted in honoring the land, waterways, and all living beings. The practice of aloha ‘aina – to love and care for the land - was passed down by these same ancestors through the generations to my mother and then to me. It is a practice of our

people to know where we come from, remember the creation story of our land and people, and understand how our family genealogies connect to it. I offer this part of our genealogical creation story here to create a space of better understanding as to why I stand to protect Mauna a Wakea from further destruction and desecration that would be inflicted by the proposed Thirty Meter Telescope.

Born to Wakea, the infinite incredible expanse of the universe and Papawalinu‘u, the deep womb of the earth, is Mauna a Wakea. Born to Wakea and Papahanaumoku, the mother of our islands, is Ho‘ohokukalani, the Goddess of the star realm. Born to Wakea and Ho‘ohokukalani is Haloanakalaukapalili, a still born being buried at the east end of the house. From that burial grew the first food of the Kanaka Maoli people of Hawai‘i, the kalo. Born to Wakea and Ho‘ohokukalani is a second child named Haloa, the first kanaka (Hawaiian). From Haloa comes the Kanaka Maoli (Hawaiian) people. The transcendental interconnectedness that dances between the creation of Mauna a Wakea and the movement to protect Mauna a Wakea exists in the beat of my very heart. When I say, “We Are Mauna Kea”, I am bringing forth an ancient knowledge that teaches that we, as Kanaka Maoli, are made of the same force that created this mountain and that we, as Kanaka Maoli, are descendants of this mountain. I was raised to honor and respect those who came before me and that is precisely what I am doing as I stand to protect my ancestor, Mauna a Wakea.

This genealogy was taught to me by my elders with the intention to always remember my birthright and responsibility to uphold the tradition of caring for the earth in a good way. My upbringing is rooted in the traditional dances, chants, and ceremony of my ancestors. I am a Kanaka Maoli (Native Hawaiian) cultural practitioner who continues to exercise my traditional and customary practices on Mauna a Wakea. These traditional and customary Kanaka Maoli (Native Hawaiian) practices, including pilgrimages to the top of Mauna a Wakea, pre-date 1892 as evidenced through ‘ike kupuna, cultural sites, oral traditions, indigenous knowledge, and several reports. I am only including this information in my testimony because I have to. I am deeply offended that according to this court system, I have to prove the legitimacy of my bloodline and my cultural practices on my ancestral mountain in my own homelands. The Kanaka Maoli people are a living a people. We survived the illegal annexation of our Kingdom, the Great Mahele, the ban of our language and dance and many more painful atrocities that continue to oppress us today. Despite all of that, we are still here and our culture, beliefs, traditions and ceremonies remain intrinsic to the very fabric of who we are as Indigenous people of Hawai‘i.

My connection to Mauna a Wakea is grounded in ceremony. My family and I have spent many years making our way to the mountain to lay our prayers and offerings down and to

ask for guidance through messages from the higher spirit beings. These ceremonies have deepened my relationship with the spirit realm and has strengthened my gift of sight as a medium, a gift that many in my family line have carried with them for generations. Here I will share some of the messages I have received in ceremony at the proposed Thirty Meter Telescope Site. While in prayerful mediumship I was told by a powerful ancestral being of the mountain that the lands of the northern plateau are portals to very ancient celestial knowledge. I was shown how the shrines and upright stones found on the northern plateau are connected energetically to one another and line up with certain constellations and ocean currents during particular times of the year. The ancestral guardian shared that this place is an ancestral school of navigation and training of the highest level taught by ancient celestial beings. This portal still exists however I was told that if the Thirty Meter Telescope was built then the connection and access to this ancient school of celestial knowledge would be severed permanently. I hold these messages sacred with profound respect and reverence for this spirit realm.

The ceremony has guided my advocacy work for the Protect Mauna Kea movement and my life work as a musician. This work has taken me to the far reaches of the world to stand in solidarity with many movements rising up to protect the rights of the earth. Through these travels, I have shared time and space with different indigenous peoples speaking of the devastating realities of Intergenerational Trauma that was passed down by the people in our respective lineages that experienced the immense suffering of war, violence, rape, forced displacement, and colonization. The trauma that I carry in my DNA has come to the surface time and time again since my family and I entered into Thirty Meter Telescope contested case hearing on behalf of the spirit realm in 2011, through the Protect Mauna Kea movement these past few years, and up until now. The constant questioning and belittling of my spiritual connection to Mauna a Wakea, my beliefs, traditions, and cultural practices in the court system, by the Astronomy community and University community has been wearing on my emotional, physical, and spiritual well being. The pain in me recognizes the pain in my own people and the people from around the world that are dedicating and risking their lives to protect what is left of the clean air, land, ocean, and water.

I felt the immensity of that pain on April 2, 2015 when the first 31 arrests of peaceful protectors occurred. I remember running up the Mauna Kea Access Road passing by my fellow protectors standing arm in arm in lines as far up to the summit as they could go. My heart pounded as the police chased us up the mountain to the proposed Thirty Meter Telescope site. When we got to the summit, we took our line and began to chant.

In that moment, I felt a current of strength, pride, and honor while simultaneously feeling this sense of profound sadness, anxiety, and fear as the police made their way toward us. I

can still feel the waves of tears that flowed down my face as my family and comrades were arrested and taken down the mountain in State vehicles. It was on that day that the reality set in that we would literally have to lay our bodies down to protect and defend our mountain.

I was reminded of the truth of that reality on September 9, 2015 when I was arrested in prayer in a ceremonial circle of women on Mauna a W!kea. At that time the Hawai'i State Board of Land and Natural Resources declared Emergency Rules that prohibited people from being in restricted areas on the mountain between 10:00 pm and 4:00 am which included the land across from Hale Pohaku that had become the gathering grounds of the 24/7 vigil of the movement. On that evening I was notified that DLNR not only planned to do a sweep of the "restricted areas" but also planned to take down the traditional prayer house, Hale Ku Kia'i Mauna, that holds the wooden figures that represent significant and important deities and ceremonial offerings. As a woman raised in ceremony, I knew I needed to be there to protect this place regardless of these rules that were so blatantly targeting the people of the movement.

When I reached Hale Pohaku my feet immediately took me to the hill that holds offerings of pohaku (rocks) from all of the main islands in the Hawaiian Chain. I began to chant a prayer of clearing and cleansing with my eyes closed and for the first time in the duration of the Protect Mauna Kea Movement I felt total peace and compassion flow into my heart. My eyes opened to see hundreds of spirit beings of the mountain coming over the slopes. I could feel the mountain breathing and releasing the energy of heaviness and tension and emitting a breath of healing calmness. I heard a voice come to tell me to trust the wisdom of the mountain and to let that powerful energy guide the peace and compassion I felt so deeply through this prayer.

Upon closing the prayer ceremonies on the hill we decided to go to our vehicles to continue our prayer vigil because the temperature started to drop quickly. After some time passed we met in prayer in front of Hale Ku Kia'i Mauna. We stood in a circle and began a chant that summoned our Gods and Goddesses to come from above and below and from the uplands and lowlands to grant us guidance and protection. It was in the middle of this very sacred and powerful chant that the DLNR officers forced us apart and began arresting us. This was one of the most offensive and traumatic experiences of my life. Our ceremony and prayer was disrespected and mistreated by these officers and this system that allows and encourages this behavior. Our rights as native people were violated. According to the United Nations Declaration on the rights of Indigenous Peoples Article 12, "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs, and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects..."

These “emergency rules” were later determined invalid by Judge Ibarra because they were improperly implemented. Despite this ruling, the depression and heartache I felt thereafter was profoundly painful and damaging to my health and wellbeing. I experienced symptoms of Post Traumatic Stress Disorder such as intense anxiety, negativity, and overwhelm. It is still difficult for me to go back to this memory and recall the details of that night without feeling emotional.

The mountain, the ceremony, and the prayer have guided my journey in healing the pain and the trauma that I have experienced. The teachings from the spirit realm and from my elders have helped me to navigate my way in this world that needs reminding that we as human beings are not separate from the earth. I have been taught that whatever we do onto the earth we do onto ourselves and that the health of the land is a direct reflection of the health of the people. I want to see the healing of Mauna a W!kea reflect the healing of my people. I want the generations to come to know that we did everything we could to bring honor and dignity to our sacred mountain. I want to see Mauna a W!kea, our most precious watershed, clean and healthy to sustain us for years to come. That is why I chose to give everything I have down to my last breath to the protection of Mauna a Wakea.

I, Hawane Rios, am hereby writing this testimony in protest of the building of the Thirty Meter Telescope as it would significantly and adversely impact our sacred Mauna a Wakea, Kanaka Maoli, access to ‘ike kupuna, my well-being and health.

Ku Kia‘i Mauna!

IV. HAWAI‘I ADMINISTRATIVE RULE § 13-5-30(C): THE EIGHT CRITERIA

CRITERION ONE, HAR § 13-5-30(C)(1): "THE PROPOSED LAND USE IS NOT CONSISTENT WITH THE PURPOSE OF THE CONSERVATION DISTRICT[.] 83

CRITERION TWO, HAR § 13-5-30(C)(2): "THE PROPOSED LAND USE IS NOT CONSISTENT WITH THE OBJECTIVES OF THE SUBZONE OF THE LAND ON WHICH THE USE WILL OCCUR[.] 88

CRITERION THREE, HAR § 13-5-30(C)(3): "THE PROPOSED LAND USE DOES NOT COMPLY WITH PROVISIONS AND GUIDELINES CONTAINED IN CHAPTER 205A, HRS, ENTITLED ‘COASTAL ZONE MANAGEMENT’, WHERE APPLICABLE[.] 92

CRITERION FOUR, HAR § 13-5-30(C)(4): "THE PROPOSED LAND USE WILL CAUSE SUBSTANTIAL ADVERSE IMPACT TO EXISTING NATURAL RESOURCES WITHIN THE SURROUNDING AREA, COMMUNITY, OR REGION[.]

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J. ARCHEOLOGICAL AND HISTORIC RESOURCES

HO FOF 663 - (*identical finding UHH-TIO FOF 603) - This is another example of the HO accepting inaccurate and/or misleading information and her failure to exercise due diligence to substantiate and authenticate these findings originally asserted by UHH-TIO. This finding is inaccurate, misleading and mischaracterizes the testimony of Ms. Hawane Rios. This finding attempts to discredit Ms. Rios' ability to use 'ike kupuna to connect and receive information by asserting that this information was not "tangible, logical, scientific, or admissible evidence". These types of comments demonstrate UHH-TIO's systematic attempts to disregard Native Hawaiian cultural practitioners and their relevant and material 'ike kupuna, indigenous knowledge, ancestral insight, and cultural information associated with Mauna Kea. It's the very reason that UHH-TIO and their contracted archaeological firms contrive absurd conclusions and inaccurate statements about the functions and significance of the cultural sites on the northern plateau and in the vicinity of the proposed TMT site. It has been well established by Mary Kawena Pukui, noted scholar, educator, dancer, and composer, that 'ike kupuna could be received through individuals termed "haka", an individual chosen by the spirit, or spirits, to serve as a "speaking-mouth." It is said that in the old days there was no lineage, or 'ohana, which did not have someone who served as a channel of communication. There are several kinds of "possession" (noho), in which gods (akua) or guardian spirits ('aumakua) speak to the family through the haka. There is also another type of mediumship known as noho or dwelling. Ex. B.21c at 1 - 2. Ms. Rios also testified that through her abilities as a haka, it has been shared that the ahu within the vicinity of the proposed TMT site and on the northern plateau are directly connected to the ancestral beings who delivered the message and that these shrines and sites are interconnected. The proposed TMT site would cause destruction to some of these sites. If the TMT were to be built, there the interconnectedness of the ahu to our ceremony would be severed. Tr. 2/15/17 at 150 – 153. Ex. F-5 at 2. The HO's Recommendations have duplicated a pattern initiated by UHH-TIO' joint document of disregarding material and relevant evidence as noted in the following written direct testimony of Ms. Rios. UHH-TIO or any other party failed to provide any witness or evidence to dispute any of this information.

K. Cultural Resources and Practices

HO FOF 684 (*identical finding UHH-TIO FOF 624)- HO failed to consider legal and factual arguments, and relevant material presented in the contested case hearing.

The entire summit region of Mauna Kea is considered a significant traditional cultural site. Comprehensive Management Plan for University of Hawaii (“CMP”) at page 5.

The summit area of Mauna Kea, is a natural prehistoric resource that is significant to the creation of Native Hawaiians, their history and culture. CMP at 15.

A number of traditional cultural practices are conducted on Mauna Kea. Including the Area E location of the TMT Observatory. Id.

The traditional cultural practices conducted within the project area require silence and solace.

The traditional cultural practices conducted within the project area also require uninterrupted view planes and sacred space. Id.

HO FOF 802 - HO failed to include relevant facts and material from Mehana Kihoi’s written testimony. **WDT ex. F-1**

Written Testimony of Mehana Kihoi

I am Mehana Kihoi, I am a Native Hawaiian cultural and spiritual practitioner. I am a Native Hawaiian beneficiary as defined by the Hawaiian Homes Commission Act of 1921, and a beneficiary of the Ceded Lands Trust under Section 5(f) of the Admissions Act. I am a descendant of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778 as established through my genealogical lines of Pa’ao and Hewa Hewa Nui. My ancestors and subsequent generations, gathered adze only found on Mauna Kea, to build their voyaging canoes. My ancestors honored Mauna Kea as a place of spiritual worship, where they would offer their deepest prayers to our creators Papa and Wakea.

I have a spiritual, cultural, psychological, physical, close and significant relationship to Mauna Kea that is tied to my identity as a Native Hawaiian. The health and well-being of Mauna Kea are tied directly to my own health and well-being because of my close and significant relationship to the land there. Mauna Kea is my spiritual place where I connect to my ancestors and my creators Papa and Wakea. Mauna Kea is where I achieve my highest level of spirituality. Mauna Kea is a sacred place.

My ancestors were stewards of Mauna Kea and ensured that these sacred lands remained untouched because of its importance to the creation of Native Hawaiians. I empower my own child by teaching her the spiritual practices at Mauna Kea so that one day she may carry these traditions to her children, and future generations. Having a direct ancestral connection to Mauna Kea, I am an active steward of this land to ensure there is no more further desecration of this land because it is tied to my spiritual and cultural identity, health and well-being as a Native Hawaiian.

I am an indigenous native Hawaiian woman, a mother, and a victim of domestic violence. Many years ago, I experienced physical and emotional trauma that left me with 5 broken parts of my face, and deep psychological & emotional pain. Pain that could never have been healed thru pharmaceutical drugs or western therapy. The Mauna is who healed me. The Mauna is where I go to, to ask my ancestors for guidance and strength. The Mauna is who gave me the courage to trust again.

I am Mehana Kihoi, and any further desecration of this sacred site will cause irreparable harm not only to myself but to my child who continues the same cultural practices that were passed on to me. As a victim of trauma, Mauna Kea saved my life and strengthened my identity as a Native Hawaiian because of my spiritual and cultural connection to this sacred place. Mauna Kea is my church and place of worship. Further desecration of this land will cause me an imminent injury because of my strong ancestral and cultural ties to these lands. The existing telescopes on Mauna Kea, and the State of Hawaii and the University of Hawaii's poor management of Mauna Kea have caused me to have an injury because of their failure to honor the customary and traditional practices of this area. My imminent injury is connected to the University of Hawaii's application for a Conservation District Use Permit to request approval to construct a Thirty Meter Telescope that will cause further desecration of Mauna Kea because the proposed construction will forever change the uniqueness and spiritual landscape of this sacred place.

If the permit is granted, the TMT will threaten the continuance of my traditional and customary rights in the respective area. I will suffer a severe cultural, spiritual, psychological and physical injury that will cause irreparable harm to who I am as a Native Hawaiian, my cultural identity and my spirituality as a Native Hawaiian.

‘O hanau ka Mauna a Wakea,
‘O pu‘u a‘e ka Mauna a Wakea.
‘O Wakea ke kane, ‘o Papa, ‘o Walinu‘u ka wahine.
Hanau Ho‘ohoku, he wahine,
Hanau Haloa, he ali‘i,

Hanau ka Mauna, he keiki Mauna na Wakea.

HO FOF 803 (*identical finding UHH-TIO FOF 744) - HO failed to consider legal and factual arguments, and relevant material presented in the contested case hearing.

Kihoi testified (Tr. Feb. 14, 2017, vol:35 pg:89, at 11:25 - 11:26) that after experiencing years of grief, in 2012, she was called to go to the Mauna. Her Kupuna let her know that it was okay to come. This came just 2 months before the BLNR hearing for the last contested case. She believes it was her opportunity to receive the kahea, to feel the place and the energy, and to accept it so that she could prepare to stand.

Kihoi testified (Tr. Feb. 14, 2017, vol:35 pg:108, at 1:10 - 1:12) that for 33 years she has conducted cultural practices directly tied to Mauna Kea. She clarifies that statement by saying, not all were directly on Mauna Kea because Mauna Kea, as she was born and raised to understand her entire life, was sacred. So sacred that she did not just go up for any reason. Kihoi believes that when you honor and acknowledge and honor that understanding your entire life, and you simply do not go up there out of reverence to that place and the sacredness of that area, that that is a cultural practice. Kihoi also testified that while she has been able to conduct certain practices in certain areas, she would be unable to conduct her practices in the Area E where the TMT is proposed to be built, due to the irreparable harm, injury, and trauma she suffers from this project.

Kihoi testified (Tr. Feb. 14, 2017, vol:35 pg:116, at 1:22 - 1:24) that being raised as a young child to understand her spiritual connection to Mauna Kea, that when she must conduct her cultural practices amongst telescopes and observatories, it makes her feel like she is closed in. Her spirit is restricted when she can hear the machinery and the sounds the telescopes make. She feels restricted, and it's not a welcoming feeling. The Northern Plateau in Area E, where it is undisturbed, is where she can practice and say her prayers a lot more freely.

HO FOF 804 (*identical finding UHH-TIO FOF 745) - HO failed to consider legal and factual arguments, and relevant material presented in the contested case hearing.

Similar to daughter Mehana Kihoi, Sarah Kihoi testified (Tr. Feb. 14, 2017, vol:35 pg: 168, at 2:20 - 2:42) that Mauna Kea is sacred, and that when something is sacred, she would not go there for no reason. S. Kihoi also testified that she had visited the summit of Mauna Kea and offered ho'okupu at the lele, years before the protectors efforts in 2015. The experiences she has of Mauna Kea are extensive, deep, and genealogical.

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

CRITERION SIX, 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[.]

HAR § 13-5-30(C)(7), CRITERION SEVEN: "SUBDIVISION OF LAND WILL BE UTILIZED TO INCREASE THE INTENSITY OF LAND USES IN THE CONSERVATION DISTRICT...

CRITERION EIGHT, HAR § 13-5-30(C)(8): "THE PROPOSED LAND USE WILL NOT BE MATERIALLY DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE 181

L. THE TMT PROJECT DOES NOT SATISFY THE EIGHT CRITERIA OF HAR § 13- 5-30(C) 216

i. The TMT Project DOES NOT SATISFY the First Criterion

ii. The TMT Project DOES NOT SATISFY the Second Criterion

iii. The TMT Project DOES NOT SATISFY the Third Criterion

iv. The TMT Project DOES NOT SATISFY the Fourth Criterion

v. The TMT Project DOES NOT SATISFY the Fifth Criterion

vi. The TMT Project DOES NOT SATISFY the Sixth Criterion

vii. The TMT Project DOES NOT SATISFY the Seventh Criterion

viii. The TMT Project DOES NOT SATISFY the Eighth Criterion

HO COL 277, 278, 296 & 297 (*identical finding UHH-TIO COL 273, 274, 292 & 293)
- HO states that the The TMT Project will not be materially detrimental to the public health, safety, and welfare, in satisfaction of HAR § 13-5-30(c)(8). However, many witnesses testified on the significant amount of irreparable harm, trauma, and injury, that would occur should the TMT project proceed. HO failed to consider legal and factual arguments, and relevant material presented in the contested case hearing.

Leina'ala Sleightholm testified that the injury coming from this proposed project isn't just because the placement on a pristine place, but the process leading up to it as well." (Tr. Feb.14, 2017 vol: 35 pg: 32, 9:42 10-14)

Sleightholm agreed that she would consider the trauma she felt being arrested while in pule and protecting the Mauna, an adversarial health effect. (Tr. Feb.14, 2017 vol: 35 pg: 43, 10:02 21-25)

Sleightholm also agreed that it was a spiritual threat that led her to protect the Mauna. (Tr. Feb.14, 2017 vol: 35 pg: 44, 10:03 6-9)

And when asked how she felt after being arrested on April 2, 2015, Leina'ala Sleightholm stated that she felt violated, and like her body was desecrated. (Tr. Feb. 14, 2017 vol: 35 pg: 55, 10:19 19-2)

Ruth Aloua testified that injury goes on even if the TMT wasn't put up there, and having the TMT there would be an insult to injury. (Tr. Feb. 15, 2017 vol. 36 pg: 43, 9:55 18-25)

Aloua testified that her arrests on Mauna Kea were oppressive, offensive and brutal attacks that have caused her trauma (Ex.F4 at 2)

Aloua testified that her arrests on Mauna Kea have created fear of law enforcement officers and concern for personal safety during ceremony (Ex.F4 at 2)

Aloua agreed that she felt that there was a threat to her ohana because of the sacredness of the Mauna. (Tr. Feb. 14, 2017 vol. 35 pg: 222, 4:11 3-6)

HO failed to include relevant facts and material from Ruth Aloua's written testimony.
WDT ex. F-4

Written Direct Testimony of Ruth Aloua

My name is Ruth Aloua and I am a Kanaka Maoli (Native Hawaiian) from Kailua-Kona. I received my Bachelor of Arts in Anthropology from the University of Hawai'i at Hilo in 2011. Three years later in 2014 I graduated from Simon Fraser University in British Columbia, Canada with a Master of Arts in Archaeology. I have worked as an archaeologist for private firms and the National Park Service. The knowledge that I gained through these experiences is implemented through community organizing and through the restoration of Kaloko Fishpond where I am a kia'i loko (fishpond guardian). When not in the fishpond or attending community meetings, I spend my time farming as an organic farmer growing a wide range of produce and raising pasture animals. My knowledge and skills range from familiarity with archaeological and anthropological practices, policies, management plans, and agencies at the county, state, and federal level, agriculture and aquaculture food production, to place-based knowledge grounded in the people, place, and culture of the Kona District.

I submit this testimony at the request of Mehana Kihoi as an expert witness. This letter describes how the arrests on Mauna a Wakea affected me spiritually, physically, and emotionally. My letter will never be able to fully convey the deep pain that lives within my heart and the shock of what has happened to me. It is a western way to convey such private emotions in public documents like so with people who belittle and are naive of our people and cultural ways.

The arrest on April 2, 2016 left me in shock and disbelief that I was arrested for attempting to stop the desecration of our sacred mountain. I remember lifting prayers as the officers approached myself and the brothers and sisters trying to protect our mountain. As they approached, we chanted and locked our arms together with love for our mountain. One-by-one, the officers ripped us apart and were most aggressive to our men. They forcefully grabbed one of my brothers, Lakea, pulling him from us and screamed at him calling him "haole" yelling, talking down to him. The officer then grabbed Lakea from behind his neck and forcefully pulled his head forward to his face before pulling him away. The exertion of this force uncorrected by fellow officers made me feel helpless for interfering would be seen as resistance of arrest. Each of us were pulled apart and lugged to stand and and wait to be walked to the vehicles. I cried,

chanting as I felt deep sorrow in my gut sick with the mistreatment of my dear brother and sisters who were standing to protect our elder. How could we stand-by and watch as machines would be readied to harm a family member? Doing nothing was not an option.

The arrest on September 9, 2015 was by far the most oppressive, offensive, and brutal attack that I have experienced in my life when the prayer circle was interrupted by Department of Land and Natural Resource officers. I remember holding hands with the other women and hearing footsteps and voices approaching followed by bright lights. While speaking in prayer I felt the officers forcefully rip our hands a part before the prayer was finished. Never before in my life had I experienced this type of trauma.

This arrest has left a spiritual wound within me that I still work on healing today. When entering into ceremonial spaces I feel afraid for my physical safety. During ceremonies, I close my eyes with total trust that those who are around me will respect my personal space seeing that I am in worship. However, after the actions of the officers, now I fear for my personal safety while in ceremony. Rather than being in fear of the general public, I am afraid of law enforcement officers and the type of actions that they will take towards myself and others around me. This has made it difficult for me to open myself fully in ceremony because I feel afraid for my personal safety and the safety of those around me.

I am also afraid that the mana (divine power) of the words, thoughts, and intentions that are lifted will be harmed by the presence and actions of those who are not intended to be in the ceremony. The night of the arrest, the cameras and digital cameras recorded a sacred circle that should have never been recorded without being asked first. The sacred prayer we were lifting was shared on news stations and the internet. I did not have this fear before the arrest. Now, I feel like I must have a guard to protect my mana from being harmed while in ceremony.

Emotionally, after being arrested, I found myself pulling inward away from loved ones confused at the disregard that the officers had for my spirituality and practice. This removed me from relationships making it difficult to communicate the harm that I had experienced. The thought of the arrest led and still does lead me to tears. How is it that as a native person of this land I was arrested while practicing my culture in my own homelands? Sadly, this is a question and harsh reality for myself and the other women. While praying on the most sacred temple of our people where our ancestors prayed we were violently interrupted. This was an act of violence.

My charges for both arrests were dismissed by the court system. Despite the dropped charges, the State of Hawai'i, University of Hawai'i, Department of Land and Natural Resources, and Office of Mauna Kea Management have never apologized for their

wrongful acts. This adds to the pain that I still feel as a native person in Hawai'i knowing that such behavior is condoned by management authorities and government officials.

Hawane Rios testified that when she was arrested on Sept. 9, 2015, and ripped apart from the prayer circle she was in, she felt like she had spun out of her body. Like her soul, and spirit, were so 'eha and felt so much pain. Every single part of her felt the pain of being disrespected in that way, where her right to pray, her rights to be on her Mauna, because she is a kanaka maoli, were violated. (Tr. Feb. 15, 2017 vol. 36 pg: 129, 1:34 3-15)

Rios stated that she and others are hurt and traumatized by events that have occurred through the Protect Mauna Kea movement. (Tr. Feb 15, 2017 vol.36 pg:134, 1:43 3-10)

Rios stated that the trauma she has experienced has affected her life physically, spiritually, emotionally and mentally. She is working on healing these emotions with healing through forgiveness and love. (Tr. Feb 15, 2017 vol.36 at 136-138, 1:47 2-12)

Rios also stated that the trauma and pain that would be caused by the TMT project if built is unfathomable. She stands today because she does not want our children, fellow kia'i, and supporters around the world to feel that immense pain and trauma. (Tr. Feb 15, 2017 vol.36 pg:185, 2:59 2-8)

It shall be stated for the record that all 3 women were found innocent and dropped from all 5 of their combined arrest charges.

Dr. Maile Tauali'i holds a doctorate in Health Services, with expertise in public health informatics, epidemiology, genetics and Indigenous health, and is an expert in health for Native Hawaiians. Taulii Written Direct Testimony at 1 ("Exhibit 2"). Taulii testified that desecration of a sacred place such as Mauna Kea can create emotional or spiritual harm leading to physical manifestations harm to the body. (Tr. Jan. 24, 2017 vol: 29 pg: 30, 9:32 15-19). Thus, when desecration occurs, the people impacted are not able to follow their beliefs. Exhibit 2 at 1. Taulii contends this, in turn, affects their cultural identity, and causes the link between the sacred space and the people to become disrupted. Id. As such, when this link is strained or broken, health is affected. Id. By not being able to fulfill stewardship/covenant it breaks or harms that connection/relationship. Id.

Dr. Taulii's research shows that the desecration and subsequent link that is strained or lost between the individual and the sacred space manifests into physical diseases such as diabetes, obesity, heart disease, high blood pressure and stress. Id. at 1-2.

Dr. Tauali'i testified that there is an elevated harm due to when you are unable or prohibited to practice your religion, faith, and spiritual practices harms the body in many physical ways as well as mental ways. (Tr. Jan. 24, 2017 vol: 29 pg: 18, at 9:17)

Dr. Tauali'i testified that people have experienced and expressed that over my dead body, that they will allow for this telescope to be built, and people have passed. She would say that that internalization, the physical, and getting to the science of it -- and not digress-- the cortisol, which is the chemical reaction when one feels that that responsibility or that privilege is being attacked, when they feel threatened, the body physically releases a chemical that can cause major heart damage and just physical damage in the body. She testified that those who are tighter, closer, more involved, directly related, feel that responsibility, will feel some of the worst effects of this telescope. (Tr. Jan. 24, 2017 vol: 29 pg: 20, 9:20 - 9:21)

Dr. Tauali'i testified that many visitors come to Hawai'i and talk about the land speaking to them. So whether you are kama'aina and have blood running in your veins that connects you to this place, or you can just witness the beauty and the sacredness of this space, that when you see those spaces harmed and those places are held sacred to you, that many people, whether native or non native, feel physical harm as a result of the disconnect and the desecration of those places that they hold sacred and special. (Tr. Jan. 24, 2017 vol: 29 pg: 25, at 9:26)

Dr. Tauali'i testified that the 10,000 people who marched through Waikiki for the protection of Mauna Kea, that many did not get a chance and will not get a chance to visit the mountain, yet still feel the effects, and still do report feeling the effects of the building of the telescope. (Tr. Jan. 24, 2017 vol: 29 pg: 30, 9:31 - 9:32)

Dr. Tauali'i testified that her data shows specifically that those who are practitioners as well as those who hold sacred the mountain as well as those who support native hawaiians have connection to place will feel and have reported feeling ill health effects as a result of the building of the telescope. (Tr. Jan. 24, 2017 vol: 29 pg: 31, at 9:32)

Dr. Tauali'i testified that she has not seen any studies that report on the public health relating to the building of the TMT. Tauali'i stated that this is something that we have to look into before we can decide that it's not going to be detrimental, because her research, although it hasn't been published, begins to start to ask that question before we can determine that its not going to harm people, because her research shows that it does. (Tr. Jan. 24, 2017 vol: 29 pg: 48, at 9:57)

Dr. Tauali'i testified that there are impacts to the health and well being on both sides. Those who are enforcing and those who are protecting, that the burden of being in that stressful situation of being conflicted is what we're dealing with in many cases, and that it has incredibly harmful effects. (Tr. Jan. 24, 2017 vol: 29 pg: 60 at 10:18)

Dr. Tauali'i testified that if the TMT project were to continue, that that harm would be irreparable. (Tr. Jan. 24, 2017 vol: 29 pg: 71 at 10:36)

Dr. Tauali'i testified that when it comes to Criteria no. 8, "the proposed land use will not be materially detrimental to the public health, safety, and welfare", that the TMT Project, through her research, does the exact opposite. The TMT will be materially detrimental to the public health, safety, and welfare. (Tr. Jan. 24, 2017 vol: 29 pg: 116 at 11:56 - 11:57)

Deborah Ward testified that if the TMT is permitted and allowed to be built, she personally will be injured. (Tr. Jan. 31, 2017 vol: 33 pg: 57 at 19 - 22)

Mehana Kihoi testified that if the TMT is permitted, it will inflict injury upon her. It scares her to think about the magnitude of injury that would result if the project continues. She already suffers from an irreparable injury from this project. (Tr. Feb. 14, 2017 vol: 33 pg: 98, 11:42 - 11:43)

Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the existing structures on Mauna Kea. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb. 14, 2017 vol: 35 pg:98, 1:22 4 - 1:26 7).

Kihoi and her daughter have suffered cultural, psychological and physical injuries due to the arrests by the Department of Land and Natural Resources on April 2, 2015 and on June 24, 2015 on Mauna Kea. Tr. Feb. 14, 2017 vol:35 pg:79, at 11:08 3 - 10, Exhibit F-11, Exhibit F-25, Exhibit F-26, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).

The arrests caused Kihoi and her daughter emotional distress while they asserted their rights to protect and preserve Mauna Kea. (Tr. Feb.14, 2017 vol:35 pg:79, 11:08 3 - 10, Tr. Feb. 14, 2017 vol:35 pg:83, at 11:15 21 - 11:18 16).

Kihoi and her daughter suffer from extreme psychological distress in anticipation of the potential construction of the TMT. (Tr. Feb.14, 2017 vol:35 pg:98, at 11:42 9 - 11:44 24).

They will suffer a substantial and imminent injury should the TMT Project proceed. (Exhibit F-1, WDT pg:1 p:6, (Tr. Feb.14, 2017 vol:35 pg:77, at 11:04 5 - 10). Id.

The TMT is a threat to Kihoi and her daughter's well-being. (Exhibit F-24, Exhibit F-25, Exhibit F-26, Exhibit F-27, (Tr. Feb.14, 2017 vol:35 pg:98, at 1:18 18 - 1:19 5). Id.

The construction of the TMT will adversely impact Kihoi and her daughter, including her ability to fulfill her responsibility that was passed down to her by her ancestors to preserve and protect the area, her ability to engage in traditional and customary practices as well as enjoy the natural beauty and quiet of the area. (Exhibit F-1, WDT pg:1 p:5, Tr. Feb.14, 2017 vol:35 pg:92, at 11:32 22 - 2, Tr. Feb.14, 2017 vol: 35 pg:109, at 1:10 3 - 1:11 10).Id.

Kihoi's daughter, Tahlia, who has been actively involved in actions to protect Mauna Kea from any further desecration since 2013, testified that "4 years later, and I have seen the many sacrifices my mom and Aunties and Uncle's have to make to protect our 'aina. I feel that when they are protecting the 'aina, they are protecting me. And if TMT were to be built, the life of the land would be destroyed. And I would feel destroyed. I hope that others will see how special Mauna Kea is and that she should be protected. This picture is a reminder for not only me, but for you to never give up for what you believe is Pono. And protecting our Mauna is what is PONO". Ex. F-27

Kihoi testified that Mauna Kea is her church and place of worship, and that further desecration of this land will cause her an imminent injury because of my strong ancestral and cultural ties to the land. The existing telescopes on Mauna Kea, and the State of Hawaii and the University of Hawaii's poor management of Mauna Kea have caused her to have an injury because of their failure to honor the customary and traditional practices of this area. Her imminent injury is connected to the University of Hawaii's application for a Conservation District Use Permit to request approval to construct a Thirty Meter Telescope that will cause further desecration of Mauna Kea because the proposed construction will forever change the uniqueness and spiritual landscape of this sacred place. If the permit is granted, the TMT will threaten the continuance of her traditional and customary rights in the respective area. She will suffer a severe cultural, spiritual, psychological and physical injury that will cause irreparable harm to who she is as a Native Hawaiian, her cultural identity and her spirituality as a Native Hawaiian. Ex. F-1.

Prof. of Religious Studies, Dr. Greg Johnson testified that the health and well being of the Native Hawaiian people are intrinsically tied to the feelings and attachments to the land. (Tr. Feb. 16, 2017 vol: 37 pg: 54, 10:38 - 10:39)

Dr. Johnson testified that a person who has a spiritual connection to Mauna Kea, who has never physically visited the mountain, can still feel injury and emotional trauma if the mountain is harmed. (Tr. Feb. 16, 2017 vol: 37 pg: 58, 10:45 - 10:46)

Dr. Johnson testified that though one may be able to conduct certain cultural practices amongst the present observatories on Mauna Kea, the TMT would be adding further injury. (Tr. Feb. 16, 2017 vol: 37 pg: 5, at 10:46)

Dr. Johnson testified that Mauna Kea, as a church to Native Hawaiians, may have a similar significance as the Vatican may have to Roman Catholics. (Tr. Feb. 16, 2017 vol: 37 pg: 60, at 10:49)

Dr. Johnson testified that a number of non-native Hawaiians express religious reverence for Mauna Kea, so clearly to the members of the Native Hawaiian community there would be injury, and he believes non-native Hawaiian members would be also injured. (Tr. Feb. 16, 2017 vol: 37 pg: 61, 10:50 - 10:51)

Dr. Johnson testified that should the TMT proceed, be constructed, and Native Hawaiians and non-native Hawaiians are injured irreparably, that this injury will be felt and passed down through generations. Johnson states that, it is very clear in indigenous communities that land based religions that face harm, that those injuries ramify through generations in very clear immeasurable ways. (Tr. Feb. 16, 2017 vol: 37 pg: 62, 10:51 - 10:52)

Dr. Joseph Keawe'aimoku Kaholokula confirmed Dr. Maile Tualii's research and stated that the quality of the health of Native Hawaiians, is also determined by the quality of the health of the land because of their historical responsibility, and cultural responsibility under aloha 'aina and malama 'aina (or the familial relationship Native Hawaiians have to land to care for). Tr. Feb. 23, 2017, vol: 40 pg: 118, at 8 – 19.

Kaholokula stated that Native Hawaiians are intrinsically tied to land and are obligated as descendants of the 'aina (land) to protect it in perpetuity. Tr. Feb. 23, 2017, vol: 40 pg: 118, at 19-21. Thus, Dr. Kaholokula stated that if Native Hawaiians are not able to express these spiritual, physical, and other aspects of well-being in caring for land, the non-expression can threaten their physical and mental health. Tr. Feb. 23, 2017, vol: 40 pg: 120, at 1 – 3.

Kaholokula contended that Mauna Kea is a symbol to recognize Native Hawaiian ancestry and the strong identity to heritage, culture, practice and spirituality. (Tr. Feb. 23, 2017, vol: 40 pg: 121, at 2 – 7, 13-15). Further, Kaholokula contends that the mitigation measures offered by UHH is causing more distress to Native Hawaiians. Id. As such, he concludes that the proposed land use, will be materially detrimental to the public health,

safety and welfare of, and in particular, the Hawaiian community. Tr. Feb. 23, 2017, vol: 40 pg: 126, at 14 - 19.

IDENTIFIED IN HAR § 13-5-30.

The proposed TMT will be materially detrimental to the public health, safety, and welfare. HAR § 13-5-30(c)(8). The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria.

a. The purpose of the conservation district is 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 and HAR § 13-5-1; see also *Curtis v. Board of Appeals*, 90 Hawai'i 384, 396 (1999); H. Stand. Comm. Rep. No. 395, 1961 House Journal 855 and S. Stand Comm Rep. No. 937, 1961 Senate Journal 883.

b. The conservation district rules define “natural resource” to include cultural sites. HAR § 13-5-2.

c. Land in the conservation district is intended to tolerate the least degree of development. *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 170 n.3 (1981). See also, HRS chapter 205 and HRS § 205-2(a)(1) and HRS § 205-2(e). The conservation district was intended for low-impact uses such as “farming, flower gardening, operation of nurseries or orchards, growth of commercial timber, grazing, recreational or hunting pursuits, or residential uses.” HRS § 183C-4(d). d. Rather than conserving, protecting and preserving natural beauty, scenic vistas, quietness and a cultural site, the Applicant’s proposal adversely affects them in significant ways.

d. Based on the testimony presented, the Applicant cannot meet the eighth criteria because it has failed to account for the injuries that have and will occur should the TMT proceed. No evidence provided thus far have accounted for these injuries.

e. Kihoi and others like her have suffered injuries already due to the current state of Mauna Kea, the arrests and the potential construction of the TMT.

17. The Applicant has not met its burden of proving by a preponderance of the evidence that its project is consistent with HAR § 13-5-30(c).

M. THE TMT PROJECT DOES NOT SATISFY THE PUBLIC TRUST DOCTRINE, AND CUSTOMARY AND TRADITIONAL NATIVE HAWAIIAN RIGHTS ARE APPROPRIATELY PROTECTED

i. The Public Trust Doctrine

HO COL 305 (*identical finding UHH-TIO COL 301) - HO failed to consider legal and factual arguments, and materials presented in the contested case hearing relevant to the Public Trust Doctrine and Native Hawaiian Rights.

1. “The scope of Hawai‘i’s Public Trust Doctrine is set forth in Article XI, section 1 of the Hawai‘i Constitution and provides: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.” *Morgan v. Planning Dept., County of Kaua‘i*, 104 Hawai‘i 173, 184 n. 12, 86 P.3d 982, 993 n.12 (2004).

2. Natural beauty is a public trust resource. *Morgan*, 104 Hawai‘i at 181, 6 P. 3d at 990; *Wai‘ahole*, 94 Hawai‘i at 136-137, 9 P.3d at 448-449; Hawai‘i State Constitution, Article XI § 1; Cf. *National Audubon Soc’y v. Superior Ct. of Alpine Cty*, 658 P.2d 709, 719 (Calif. 1983); *Muench v. Public Service Commission*, 53 N.W. 2d 514, 520 (Wisconsin 1952), affirmed on rehearing 55 N.W. 2d 40 (1952).

3. The public trust doctrine requires that cumulative impacts be considered. *Kelly v. 1250 Oceanside Ptnrs*, 111 Hawai‘i 205, 227, 140 P.3d 985, 1008 (2006). *Wai‘ahole*, 94 Hawai‘i at 143, 9 P.3d at 455 (“Specifically, the public trust compels the state duly to consider the cumulative impact. . .”).

4. “The state also bears an affirmative duty . . . to protect public trust uses whenever feasible.” *Wai‘ahole*, 94 Hawai‘i at 141, 9 P.3d at 453; *State v. Central Vt. Ry.*, 571 A.2d 1128, 1132 (Vermont 1989)(“[T]he state’s power to supervise trust property in perpetuity is coupled with the ineluctable duty to exercise this power.”). This duty requires that the state affirmatively act to ensure that public trust resources are not impaired. *Wai‘ahole* at 139, 9 P.3d at 451; *Orion Corp. v. State*, 747 P.2d 1062, 1073 (Wash. 1987). Under the public trust, the state has both the authority and the duty to preserve the rights of present and future generations in the public trust resources of the state. *Wai‘ahole* at 141, 9 P.3d at 453.

5. The balancing of uses “must conform to article XI, section 1’s mandate of ‘conservation.’” *Wai‘ahole*, 94 Hawai‘i at 428 n.43, 9 P.3d at 454 n.43

6. A developer has no right to use public land to impair public trust resources. *King v. Oahu Railway & Land Co.*, 11 Haw. 717, 725 (1899).

7. Given the impacts of the project on public trust resources, approval of the TMT would violate the Board of Land and Natural Resources' duties pursuant to the public trust doctrine.

ii. The Protection of Customary and Traditional Native Hawaiian Rights

1. Article XII § 7 of the Hawai'i Constitution provides that: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

2. Article XII § 7 of the Hawai'i Constitution requires the "State and its agencies to preserve and protect customary and traditional practices of native Hawaiians." *Ka Pa'akai O Ka'aina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068, 1082 (2000). The Board of Land and Natural Resources is under "an affirmative duty" to "protect these rights and to prevent any interference with the exercise of these rights." *Id.*

3. "[T]he ancient usage of lands practiced by Hawaiians did, in fact, carry over into the new system of property rights established through the Land Commission." *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995). "[T]he right of each ahupua'a tenant to exercise traditional and customary practices remains intact. . ." *Id.* at 450, 903 P.2d at 1271.

4. The applicant for a permit is obligated to demonstrate affirmatively that the proposed use will not affect Native Hawaiian rights. *Wai'ola* at 442, 83 P.3d at 705; *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui*, 116 Hawai'i 481, 509, 174 P.3d 320, 348 (2007).

5. The most feasible means of protecting the traditional and customary practices exercised on Mauna Kea would be to deny the conservation district use application for the ATST.

CONCLUSION

I, Mehana Kihoi, hereby incorporate the Proposed Findings of Fact and Conclusions of Law (2011-2013 and 2015-2017 CCHs) RESPONSES AND EXCEPTIONS, into this document, my Proposed Findings of Fact, and Conclusions of Law, by reference, as follows:

Kealoha Piciotta and Mauna Kea Anaina Hou; Clarence Kukauakahi Ching; Flores-Case 'Ohana; Deborah J Ward; Paul K. Neves; Harry Fergerstrom; Cindy Freitas; C.M. Kaho'okahi Kanuha; Joseph Kaulii Lindsey Camara; J. Leina'ala Sleightholm; Lanny Alan Sinkin Rep., for Temple of Lono; Kalikolehua Kanaele; Stephanie-Malia: Tabbada; Tiffnie Kakalia; Glen Kila; Dwight J. Vincent; Brannon Kamahana Kealoha; William Freitas; Dexter K. Kaiama, Yuklin Aluli, Counsel for Kahea.

I OBJECT AND TAKE EXCEPTIONS TO Hearing Officer Riki May Amano 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.

I reassert my 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 entire record, the Thirty Meter Telescopes Conservation District Use Permit should be **DENIED**.

DATED: August 21, 2017
at Honaunau, Hawai'i Island so-called "State of Hawai'i"

Ku Kia'i Mauna,



Mehana Kihoi

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-02
Document title:

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced document was served upon the following parties by the means indicated on October 10, 2016:

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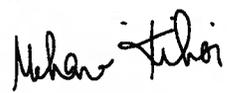
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Name:
Date: August 21, 2017