

those obligations through HAR § 13-5-30(c), the TMT Project satisfies all public trust legal obligations as it is "the most equitable, reasonable, and beneficial allocation of state [trust] resources." *Waiahole*, 94 Hawai‘i at 140, 9 P.3d at 452.

364. The TMT Project provides for the development and utilization of natural resources for scientific and educational purposes for the benefit of the people of the State. It satisfies the obligations of protection and maximizing reasonable and beneficial use, and it is consistent with the constitutional, statutory, and regulatory mandates of "conservation."

ii. *The Protection of Customary and Traditional Native Hawaiian Rights*

a. *Article XII, Section 7 of the Hawai‘i Constitution and the Ka Pa‘akai Analysis*

365. The Hawai‘i Constitution also mandates that the State recognize and protect customary and traditional native Hawaiian rights. Article XII, section 7 provides:

"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."

366. To fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible under *Ka Pa‘akai*, an agency must examine and make specific findings and conclusions as to:

(1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist. *Ka Pa‘akai*, 94 Hawai‘i at 47, 7 P.3d at 1084 (footnotes omitted).

367. This analytical framework ensures that a state agency properly effectuates its "obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests," and fulfills its duty "to preserve and protect customary and traditional native Hawaiian rights to the extent feasible[.]" *Ka Pa‘akai*, 94 Hawai‘i at 46-47, 7 P.3d at 1083-84.
368. The utmost respect is afforded the Petitioners and Opposing Intervenors regarding their beliefs and practices; to the extent that they claim such practices constitute traditional and customary rights under *PASH* and its progeny, those rights are subject to regulation by the laws of the State of Hawai‘i. Haw. Const. art. XII, § 7; *State v. Pratt*, 127 Hawai‘i at 217, 277 P.2d at 311.

369. The Hawai‘i Supreme Court has confirmed that the practices that are protected by Article XII, section 7 are those "associated with the ancient way of life" that have been continued, without harm to anyone. *Kalipi*, 66 Haw. at 10, 656 P.2d at 751. In other words, to be constitutionally protected, such practices must have been "customarily and traditionally held by ancient Hawaiians." *Pele Defense Fund v. Paty*, 73 Haw. at 619, 837 P.2d at 1271.
370. Some "customary and traditional" native Hawaiian rights are codified either in Article XII, section 7 of the Hawai‘i Constitution or in HRS §§ 1-1 and 7-1. *Id.* at 618-19, 837 P.2d at 1271. Practices that are not codified in Article XII, section 7 or HRS §§ 1-1 and 7-1 will still be entitled to constitutional protection as "customary and traditional" if it is proven that those practices were established by Hawaiian usage by November 25, 1892. *PASH*, 79 Hawai‘i at 447, 903 P.3d at 1268 (citing *State v. Zimring*, 58 Haw. 106, 115 n.11, 566 P.2d 725, 732 n.11 (1977)).
371. Under Hawai‘i law, "it is the obligation of the person claiming the exercise of a native Hawaiian right to demonstrate that the right is protected." *Hanapi*, 89 Hawai‘i at 185-186, 970 P.2d at 493-494.
372. As a threshold matter, an individual claiming that his or her conduct is constitutionally protected as a native Hawaiian right has the burden of proving that he or she is a descendant of native Hawaiians who inhabited the Hawaiian islands prior to 1778. *Hanapi*, 89 Hawai‘i at 186, 970 P.2d at 494.
373. Although not all of the Petitioners and Opposing Intervenors presented specific evidence with respect to this requirement, there was no dispute that certain Petitioners (including Petitioners Ching, Neves, Pisciotta and representatives of the Flores-Case ‘Ohana), and the Opposing Intervenors, are native Hawaiian, and the Hearing Officer concludes there is sufficient evidence to find that the applicable Petitioners and the Opposing Intervenors satisfy this threshold requirement.
374. Each of the Petitioners and Opposing Intervenors are required to "establish that [his or her] claimed right is constitutionally protected as a *customary or traditional* native Hawaiian practice." *Hanapi*, 89 Hawai‘i at 185-186, 970 P.2d at 493-494 (emphasis added).
375. Under *Hanapi*, Petitioners and Opposing Intervenors had the burden to establish "an adequate foundation in the record connecting a claimed right to a *firmly rooted* traditional or customary native Hawaiian practice." *Hanapi*, 89 Hawai‘i at 187, 970 P.2d at 495 (emphasis added).
376. Thus, distinguishing between traditional and customary practices and contemporary practices is important, because while the Hawai‘i Constitution affords special protection to traditional and customary practices by native Hawaiians, Article XII, section 7 does not protect contemporary cultural practices. *Hanapi*, 89 Hawai‘i at 187, 970 P.2d at 495.
377. The BLNR, through consideration of the CDUA and through the testimony and evidence in this proceeding, conducted a thorough review and analysis of the identity and scope of

"valued cultural, historical or natural resources" in the TMT Project application area, including the extent to which traditional and customary native Hawaiian rights are exercised in the application area. *Ka Pa 'akai*, 94 Hawai'i at 47, 7 P.3d at 1084.

378. As reflected in the TMT Project CDUA and in the testimony and documents admitted into evidence in the contested case proceeding, a detailed inventory of known and valued cultural, historical, and natural resources was taken in the application area, including the extent to which traditional and customary native Hawaiian rights may be exercised in the TMT Project area and the Astronomy Precinct. This is reflected in detail in the findings above.
379. In addition, as noted in the findings above, although Petitioners and Opposing Intervenors identified various areas in the summit region of Mauna Kea in which they engage in contemporary native Hawaiian cultural practices, they did not offer reliable, probative, substantial and credible evidence or testimony sufficient to establish that any of their cultural or religious practices – whether characterized as contemporary, or customary and traditional – were conducted at the five-acre site on which the TMT Project is proposed to be located until after the TMT Project was proposed, and in many instances, not until after the first contested case hearing in this matter.
380. Petitioners and Opposing Intervenors also did not offer reliable, probative, substantial and credible evidence or testimony sufficient to establish that any of their cultural or religious practices – whether characterized as contemporary, or customary and traditional – were conducted in the immediate vicinity of the TMT site, such as on Area E.
381. Thorough review of the evidence fails to disclose any reliable, probative, substantial evidence or testimony sufficient to establish that any native Hawaiians other than the Petitioners and Opposing Intervenors conducted any traditional or customary religious practices on or in the immediate vicinity of the TMT site, except for the construction of shrines in prehistoric times.
382. Native Hawaiians did make simple rock shrines in the general vicinity of the TMT Observatory. The closest, consisting of a single upright stone and several support stones, is 225 feet away. *See* FOF #607. Another one is 1300 feet away, another is 1600 feet away. *Id.* Construction of the project will not affect these shrines. No evidence indicates that the TMT site is particularly important for building shrines, and the TMT Project will affect only a tiny fraction of the potential shrine-building area on the mountain.
383. Two 'ahu were built on the TMT access road in 2015. *See* FOF #791, *supra*. These are not shrines. They were built as a protest against the TMT project. *Id.* The building of rock piles in the right-of-way of another person is obviously not an accepted native Hawaiian tradition and custom. Nor does it conform to the *PASH* requirement that practices be reasonable. 79 Hawai'i at 447, 903 P.2d at 1268.
384. Even assuming the Petitioners' and Opposing Intervenors' met their burden to prove that their claimed practices in areas within or outside of the five-acre TMT Project site are

"firmly rooted" traditional or customary native Hawaiian practices under *Hanapi* (and are thus entitled to constitutional protection), the Hearing Officer, through consideration of the CDUA and through the testimony and evidence in this proceeding, conducted a thorough review and analysis of the extent to which traditional and customary native Hawaiian rights will be affected or impaired by the TMT Project. *Ka Pa 'akai*, 94 Hawai'i at 47, 7 P.3d at 1084.

385. As reflected in the CDUA and in the testimony and documents admitted into evidence in the contested case proceeding, UH Hilo has evaluated in great detail the extent to which valued cultural, historical, and natural resources in the application area, including traditional and customary native Hawaiian rights, will be affected or impaired by the Project.
386. Petitioners and Opposing Intervenors have not established by reliable, probative, substantial and credible evidence that their practices – whether characterized as contemporary, customary or traditional – will be adversely affected by the TMT Project, or that such practices cannot continue at the summit, Lake Waiau, or Pu'u Lili'noe, or elsewhere.
387. While Petitioners and Opposing Intervenors did introduce evidence regarding viewplanes from various sites at Mauna Kea, Petitioners and Opposing Intervenors did not make the factual showing necessary to demonstrate that any ostensible practices involving viewplanes from Mauna Kea are native Hawaiian traditional and customary practices entitled to constitutional protection, nor that the presence of the TMT Project will substantially and adversely impact those practices given the long history and presence of the other telescopes in the Astronomy Precinct and continuation of their practices in the presence of those telescopes.
388. Petitioners and Opposing Intervenors also had the burden to establish that any practices for which they seek protection have occurred on undeveloped or less than fully developed land on Mauna Kea. *Hanapi*, 89 Hawai'i at 186-87, 970 P.2d at 494-95.
389. According to Petitioners' and Opposing Intervenors' testimony, rather than being "undeveloped" or "less than fully developed," the landscape of the summit area of Mauna Kea is developed as it is "dominated by industrial land uses, including many telescope facilities and ancillary structures [including] . . . modern structures . . . heavy machinery, construction material, the clatter of telescope operations, and trafficked roads." WDT Townsend at 2; *see also* Tr. 01/12/17 at 137:1-12, 137:13-138:12. Petitioners further describe the summit as a place where "[t]he noise of observatory air conditioning, blowers, generators, associated vehicles and industrial activity is present and disturbing to recreational users who hope for the pristine silence of wilderness." WDT Ward at 2-3.
390. Evidence also supports the conclusion that at least some native Hawaiian practices are facilitated, rather than hindered, by the existence of the observatories and infrastructure on Mauna Kea. *See, e.g.*, WDT Naea Stevens at 3 (noting access to Mauna Kea facilitated through "roads maintained by the astronomy community.")

391. Petitioners and Opposing Intervenors have not met their burden to show that any of their practices – whether contemporary, or traditional and customary – occurred at the location of the TMT Project site prior to the proposal of the TMT Project and the designation of the site.
392. Since Petitioners and Opposing Intervenors have not met their burden to show that they conduct any protected traditional and customary practices at the location of the TMT Project site prior to the proposal of the TMT Project and the designation of the site, they necessarily cannot meet their burden under the third *Hanapi* factor, as they cannot establish that any of their traditional and customary practices take place at the TMT Project Site – regardless of whether the site is considered "undeveloped," "less than fully developed," or "developed."
393. Even assuming every Petitioner and Opposing Intervenor established that he or she engages in practices that are customary and traditional, and so are entitled to constitutional protection under the *Hanapi* test, the BLNR, through consideration of the CDUA and through the testimony and evidence in this proceeding, conducted a thorough review and analysis of the "feasible action, if any," to be taken by the BLNR to reasonably protect native Hawaiian rights if they are found to exist. *Ka Pa 'akai*, 94 Hawai'i at 47, 7 P.3d at 1084.
394. Article XII, section 7 confirms that ancient traditional and customary native Hawaiian rights are to be protected "subject to the right of the State to regulate such rights."
395. Under *PASH*, the State is obligated "to protect the reasonable exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible." 79 Haw. at 450 n.43, 903 P.2d at 1271 n.43. Likewise, in *Ka Pa 'akai*, the Court held that the State (and its agencies) must "preserve and protect customary and traditional native Hawaiian rights to the extent feasible." 94 Hawai'i at 47, 7 P.3d at 1084.
396. Therefore, under *Pratt*, even if a person meets all three elements of the *Hanapi* test, the rights articulated in Article XII, section 7 (protecting native Hawaiian practices) are *not* absolute and are explicitly "subject to the rights of the State to regulate such rights." *Pratt*, 127 Hawai'i 206, 277 P.3d 300. The Court observed that a common thread in Article XII, section 7 jurisprudence is a balance between "protections afforded to Native Hawaiians in the State, while also considering countervailing interests." *Id.* at 215, 277 P.3d at 309. Thus, under *Pratt*, the balancing of interests must consider the *totality* of the circumstances, including *all* of the parties' respective interests. *Id.* at 216-17, 277 P.3d at 310-11.
397. As reflected in the TMT Project CDUA and in the testimony and documents admitted into evidence in the contested case proceeding, numerous measures are designed to reasonably protect native Hawaiian rights in connection with the TMT Project, including measures relating to the design, construction and operation of the telescope to minimize the impact upon, and protect, native Hawaiian rights.
398. Approval of the CDUP for the TMT Project is consistent with and satisfies the BLNR's

and UH Hilo's obligations under Article XII, section 7 to recognize and protect customary and traditional native Hawaiian rights to the extent feasible. *Ka Pa 'akai*, 94 Hawai'i at 47, 7 P.3d at 1084; *Hanapi*, 89 Hawai'i at 187, 970 P.2d at 495.

399. Even if every Petitioner and Intervenor had satisfied his or her burden of establishing a customary and traditional practice, and even if any of their practices relating to Mauna Kea are deemed to be traditional and customary practices entitled to constitutional protection, considering the totality of the facts and circumstances relating to Petitioners' and Opposing Intervenor's asserted practices, and then balancing the interests of *all* parties as described in detail in the Criterion Four section of the Findings of Fact above, the TMT Project preserves and protects the reasonable exercise of Petitioners' and Opposing Intervenor's practices to the extent feasible in compliance with Article XII, section 7 of the Hawai'i Constitution. *See supra* at FOF Section III.D.

b. Religious Freedom / Religious Establishment

400. The word "sacred" has been used to describe Mauna Kea.
401. For all the reasons given in these findings of fact and conclusions of law, Mauna Kea is worthy of extraordinary respect, care, and attention. The word "sacred" can be used to describe Mauna Kea in this sense. This does not raise any legal questions about the constitutional treatment of religion.
402. The common meaning of the word "sacred" is essentially spiritual and religious. Clearly, many of the parties and witnesses have used "sacred" in this sense – as a place where deities reside, where the landscape is considered as a church, and as a place where one can feel a deep bond or connection to the land, to ancestors, and to the universe.
403. While the government must respect the absolute right of people to hold these beliefs, a government body issuing a formal document like these findings of fact, conclusions of law, and decision and order cannot declare that a site is or is not sacred in the spiritual sense. Sacred in this sense is a matter of belief; it cannot be objectively judged. The government can acknowledge and respect that many people *believe* a site to be sacred.
404. Belief in an area's religious sacredness does not make development of that area an unconstitutional infringement of religion, and does not give the believer a legal right to stop the development. *See Dedman v. BLNR*, 69 Haw. 255, 261-62, 740 P.2d 28, 32-33 (1987); *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *see also PASH*, 79 Hawai'i at 447 n.38, 903 P.2d at 1268 n.38 (citing *Lyng* for this proposition).
405. Constitutional protection means protection against *unreasonable interference* with religious practices; such protection does *not* prevent the government from taking actions that offend religious *beliefs*. *See Dedman*, 69 Haw. at 260-61, 740 P.2d at 31-32 (noting that analysis focuses on unconstitutional infringement of religious *practices* even where the legitimacy and sincerity of religious *beliefs* is undisputed).
406. To determine if there is an unconstitutional infringement of religious rights, the inquiry focuses on *practices* rather than *beliefs*:

[I]t is necessary to examine whether or not the *activity* interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free *exercise* of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious *practices*, and whether or not the state had a compelling interest in the regulation which justified such a burden.

Dedman, 69 Haw. at 260, 740 P.2d at 32 (citations omitted; emphasis added). "[T]he United States Supreme Court has 'long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.'" *Id.* (citations omitted).

407. Thus, a person claiming a violation of the constitutional right to free exercise of religion must "show the coercive effect of the [law] as it operates against him in the *practice* of his religion." *Id.* (brackets in original, emphasis added, citations omitted). To demonstrate that a project will result in an unconstitutional infringement of rights, a petitioner must show a "substantial burden" on his or her religious practices. *Id.* at 261, 740 P.2d at 33.
408. Moreover, even if proposed governmental action would adversely affect claimants' religious practices, the right of free exercise of religion is not violated unless the affected individuals would "be coerced by the Government's action into violating their religious beliefs" or the governmental action would "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng*, 485 U.S. at 449.
409. Petitioners and Opposing Intervenors claim broadly that their beliefs should give them veto power over any proposed land use on Mauna Kea. *See* Tr. 1/11/17 at 232, 239-240 (B. Pualani Case); Tr. 1/23/17 at 15-25 (Michael Lee); Tr. 1/23/17 at 213- 16, 230-31 (Harry Fergerstrom); (Flores) Tr. 1/30/17 at 173-74 (E. Kalani Flores); Tr. 2/13/17 at 37 (Kealoha Pisciotta); Tr. 1/9/17 at 95, 100-101 (Dr. Kahakalau); Tr. 2/27/17 at 42-43 (Tajon). The law does not support that view.
410. The constitutional right to free exercise of religion "must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452. "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* Giving any objector the power to stop a project based upon his or her personal beliefs would violate the establishment clauses of both the federal and state Constitutions. *See* U.S. Const. amend. 1; Haw. Const. art. I, § 4.
411. As the United States Supreme Court has held, native religious practitioners may well feel that they require "an unobstructed view" and that they "must be surrounded by *undisturbed* naturalness" – but "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Lyng*, 485 U.S. at 453 (emphasis in original). "Whatever rights [native practitioners] may have to the use of the

area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* (emphasis in original, citation omitted).

412. According to the evidence adduced in this proceeding, the Petitioners and Opposing Intervenors have not demonstrated a need to conduct or participate in religious ceremonies on or near the proposed TMT Project site; they have not identified practices that will be substantially interfered with; and the BLNR's approval of the TMT Project will not threaten practitioners with sanctions if they engage in religiously motivated conduct. Moreover, except for actual construction areas while the Project is being built (and, once it is completed, the TMT Observatory site), Petitioners, Opposing Intervenors, and everyone else will have continued access to the summit area of Mauna Kea, for religious practices and for any other permitted activity.
413. In addition, the evidence demonstrates that for all of the Petitioners and Opposing Intervenors, telescopes and related infrastructure have existed on Mauna Kea for the entirety of their adult lives – if not the entirety of their lives – and the Petitioners and Opposing Intervenors have continued to exercise their religious practices in the presence of these facilities. The evidence presented also supports the conclusion that at least some of these religious and cultural practices would not be practiced but for the observatories being built and the construction and maintenance of the Mauna Kea Observatory Access Road. *See, e.g.*, (Nees) Tr. 12/05/16 at 63:5-15 (K. Ching testifying that kūpuna his age would rather have the road continue as it is so that they can drive up to the top of Pu‘u Poli‘ahu because they cannot walk up there)(WDT, William Brown, testifying that the road facilitates use of the summit by cultural practitioners).
414. Therefore, while the Petitioners' and Opposing Intervenors' believe in the sacredness and religious aspects of Mauna Kea, there is no proof of "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Dedman*, 69 Haw. at 261-62, 740 P.2d at 33 (citation omitted).
415. To withhold approval of the TMT Project "based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another." *Id.* at 262, 740 P.2d at 33.
416. Under these circumstances, as a matter of law, BLNR's approval of the Project does not and will not unreasonably interfere with Petitioners' and Opposing Intervenors' exercise of religious freedoms.
417. Petitioners' and Opposing Intervenors' religious practices also implicate the establishment clauses of the United States and Hawai'i constitutions.
418. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof." (Emphasis added.)
419. The Establishment Clause of Article 1, Section 4 of the Hawai'i Constitution provides that "[n]o law shall be enacted respecting an *establishment of religion*, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the

people peaceably to assemble and to petition the government for a redress of grievances."

420. Petitioners' and Opposing Intervenors' arguments that their religious beliefs and practices require that the CDUA for the TMT Project be denied, and that nothing be built on Mauna Kea to "protect" and further the Petitioners' and Opposing Intervenors' religious practices essentially requires the State to recognize an exclusive religious servitude over public land in violation of the establishment clauses of the state and federal constitutions.
421. Here, the Free Exercise Clause is limited by the Establishment Clause: Petitioners and Opposing Intervenors cannot use the Free Exercise Clause to create a *religious servitude* over state land where the University seeks to build the TMT Project; creating that religious servitude would violate the Establishment Clause. *See Lyng*, 485 U.S. at 476 ("Should respondents or any other group seek to force the Government to protect their religious practices from the interference of private parties, *such a demand would implicate* not only *the concerns* of the Free Exercise Clause, but also those *of the Establishment Clause* as well.") (Brennan, dissenting) (emphasis added).
422. As the Hawai'i Supreme Court observed in *Dedman*, "[t]o invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another. . . . 'The First amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromises necessary in communal life.'" *Dedman*, 69 Haw. at 262, 740 P.2d at 33 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).
423. Similarly, in *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, the Hawai'i Supreme Court noted that "[t]he Temple cannot force the City to zone according to its religious conclusion that a particular plot of land is 'holy ground.'" 87 Hawai'i 217, 248, 953 P.2d 1315, 1346 (1998).
424. Hawai'i jurisprudence on the Establishment Clause is consistent with the findings and rationale in other jurisdictions that preferential government treatment for "sacred sites" is a violation of the Establishment Clause. *See Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncrasies, religious as well as secular, to the compromise necessary in communal life."); *Inupiat Cmty. v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982) (observing "that the relief sought by the Inupiat creates serious Establishment Clause problems" and explaining that "a free-exercise claim cannot be pushed to the point of awarding exclusive rights to a public area"); *Crow v. Gullet*, 541 F. Supp. 785, 794 (D. S.D. 1982) (noting that "the government risks being hauled into court by others who claim that the same rights of the general public are being unduly burdened, or that state government has become 'excessively entangled' with religion").
425. As set forth above, Petitioners and Opposing Intervenors assert that the TMT Project should not be placed in any part of the summit area of Mauna Kea or the Astronomy

- Precinct because it is a sacred site according to their beliefs. *See, e.g.*, (Prof. Fujikane) Tr. 1/11/17 at 81:1-83:2; Tr. 1/23/17 at 24:25-25:8 (Michael Lee); Tr. 1/23/17 at 213:5-216:15, 230:5-231:10 (Harry Fergerstrom); (Flores) Tr. 1/30/17 at 173:4-180:21 (E. Kalani Flores); WDT Pisciotta at 9, 16; Tr. 2/15/17 at 97:5-98:6 (Aloua); Tr. 2/27/17 at 208:8- 210:21 (Kakalia).
426. For example, Case goes to the summit of Mauna Kea to pray. She likens it to a church, a temple, or a sacred place. The TMT Project would have an impact on her cultural practices no matter where the TMT Project was located in the Astronomy Precinct or the Mauna Kea Science Reserve. Tr. 1/11/17 at 231:17 – 232:23; *see also Id.* at 239:4-240:22.
427. When asked whether the telescopes are clean enough for the summit of Mauna Kea, Kanaele responded "No, because the summit of Mauna Kea... should be wao akua, a place where only the akua and the elements are..." "[B]uildings and activity of men should stay down at Wao Kanaka." (Kanaele) Tr. 1/24/17 at 158:16 – 159:1.
428. Dr. Kahakalau, another Hawaiian elder called by Petitioners also affirmed the religious beliefs of certain native Hawaiians. "[B]uilding a TMT on Mauna Kea does not follow our value system.... [A] Hawaiian Mauna Kea is clearly sacred. It is clearly the realm of akua. It is clearly a place that is reserved for the akua." "[W]e leave the wao akua to our deities." Tr. 1/9/17 at 34:6-35:7. Dr. Kahakalau goes on to say that "The Mauna is sacred." "[T]he wao akua, the places where the Gods reside, are considered sacred areas." "It is as sacred as any cathedral, as any temple, as any other sacred place in the world... So it is a place that needs to be undisturbed, that needs to remain in the state that it was created." Tr. 1/09/17 at 38:20-39:18; *see also Id.* at 125:8-22, 173:14-174:5, 195:8-17.
429. Prof. Osorio, called as a witness by Petitioners, also opposed the TMT Project because of the religious beliefs of native Hawaiians. "[B]ecause our people look at this place as sacred, and they have based practices and rituals on that place and are appealing to the state to exercise forbearance in the building of this..." The religious servitude that Prof. Osorio argues for is the whole mountain of Mauna Kea, not just the summit. Tr. 1/12/17 at 138:20 – 139:12.
430. Petitioners' legal filings also emphasize the religious nature of their claims. "Beloved Mauna a Wakea is a temple. It is a holy site...protected by Poli'ahu and other deities and ancestors." Kahea's Exceptions to the Hearing Officer's Findings of Fact, Conclusions of Law, and Decision and Order at 4. "Mauna Kea is revered in the same way that other religions revere their churches, temples, synagogues, and mosques...It is considered the Temple of the Supreme Being..." Petitioners K. Pisciotta, Mauna Kea Anaina Hou, D. Ward, P. Neves, K. Kanaele, L. Sleightholm, B. Kealoha, C. Freitas, Mehana Kihoi Exceptions/Responses to Proposed Findings of Fact, Conclusions of Law, Decision and Order, Executive Summary at 1.
431. In fact, certain Petitioners and Opposing Intervenors assert that they should be able to control who accesses the summit, according to their beliefs. Tr. 1/23/17 at 233:7 - 234:9

(Harry Fergerstrom); Tr. 1/9/17 at 95:8-16, 100:19-101:7, 104:12-19, 177:17-178:5, 197:5-10 (Dr. Kahakalau). The law does not support that view.

432. Under the foregoing, to withhold approval of the TMT Project based on the Petitioners' and Opposing Intervenors' arguments that their religious beliefs and practices should hold veto power over all uses of the lands of Mauna Kea, would violate the Establishment Clause of the federal and state constitutions and is hereby rejected.
433. This does not mean that the government cannot protect a natural feature deemed sacred by native Hawaiians. The BLNR, in reviewing a CDUA, must consider the protection of cultural resources. It could be valid, on cultural grounds, to preserve the appearance of a landscape connected to important myths, legends, and traditions of native Hawaiians. The fact that some insist that the same landscape be protected for explicitly religious reasons does not disqualify it from legal protection.
434. The discussion in COL #400-433 explains the constitutional reasons why the essentially religious reasons asserted by many of the TMT opponents, which are so compelling to them, cannot be the basis for the final decision.

c. Contemporary Practices

435. As set forth above, *Ka Pa 'akai* is concerned with the preservation and protection of customary and traditional native Hawaiian rights, not with contemporary cultural practices. Nonetheless, UH Hilo's extensive efforts to identify cultural practices, potential impacts on or impairment of those practices, and feasible actions to be taken to reasonably protect the native Hawaiian rights that exist, set forth above, encompass not only customary and traditional practices, but contemporary practices as well.
436. As described above, Petitioner Flores claims that the CDUA is incomplete and should be denied because it fails to identify certain "find spots." For the reasons articulated in the above findings of fact, Petitioner Flores' claims are factually unfounded and therefore do not provide a basis for the BLNR to deny the CDUA.
437. In any event, HRS § 343-2 relates to the Environmental Assessment / Environmental Impact Statement phase of a project. As described above and below, the time for any challenge to the FEIS for the TMT Project expired long ago and no challenges were made. Consequently, any argument under HRS § 343-2 would be untimely and cannot be raised now.

C. PETITIONERS' AND OPPOSING INTERVENORS' OTHER ARGUMENTS

i. Insufficient Consultation

438. A number of the Petitioners and Opposing Intervenors claimed that consultation for the TMT Project was insufficient or non-existent. The substantial evidence of the history of the TMT Project, consideration of historical, traditional and cultural resources and practices, as well as contemporary and religious practices and impacts to those practices and resources by the TMT Project supports the finding that sufficient and significant