

493. Review of the TMT Project under NHPA Section 106 was not required.
494. Neither TIO nor UH Hilo had an obligation or authority under NHPA Section 106 to independently determine whether the TMT Project or NSF's activities and funding related to the TMT Project constituted an undertaking under NHPA Section 106.
495. Neither TIO nor UH Hilo had an obligation or authority to engage in a Section 106 review of the TMT Project.
496. NHPA Section 106 is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA.
497. NEPA governs the preparation of environmental impact statements and other procedures by federal agencies to assess the environmental effects of proposed federal action. *See* 42 U.S.C. § 4331.
498. Although none of the Petitioners and Opposing Intervenors claimed in this proceeding that the TMT Project is subject to NEPA (and the Hearing Officer affirmatively concludes that the TMT Project is not subject to NEPA), the Petitioners and Opposing Intervenors claimed that the evaluation of the cumulative impacts and proposed mitigation measures of the TMT Project should be guided by the approach applied by federal agencies pursuant to NEPA. *See* Ex. B.01s.
499. Inasmuch as NEPA does not apply to the TMT Project and the preparation of the EIS and other documents related to the project, and does not apply to the analysis of the cumulative impacts and proposed mitigation measures at issue in this proceeding, NEPA (and the approach employed by federal agencies under NEPA) is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA.

## **XI. SUMMARY**

500. The BLNR approved the CMP, CRMP, NRMP, PAP, and Decommissioning Plan on April 9, 2009 and March 25, 2010. These documents are the State of Hawai'i's management documents for the UH Management Area on Mauna Kea.
501. The activities that would be carried out if the TMT Project is approved and implemented are consistent with the management actions described in the CMP and sub-plans. This provides consistency and viability of management objectives, which include ensuring the sustained use of natural resources in the Resource subzone under HAR § 13-5-13.
502. A project-specific management plan has been developed for the TMT Project that adopts the approach, goals, objectives and management strategies and actions of the CMP and sub-plans in their entirety. The TMT Management Plan implements all relevant action items and plans of the CMP and sub-plans on a site-specific basis, ensuring that the management actions called for in the CMP and sub-plans which are applicable to the TMT Project are effectively and responsibly implemented.
503. Protection of native Hawaiian practitioners' exercise of customary and traditional

practices on the summit area of Mauna Kea and within the area covered by the CDUA can be accomplished through:

- Implementation of a Cultural and Natural Resources Training Program that will require all construction managers, contractors, supervisors, construction workers, and TMT staff to be trained annually regarding the potential impact to cultural and archaeological resources and measures to prevent such impact;
- Development and implementation of an Archaeological Monitoring Plan that will be submitted to SHPD for review and approval. Such plan shall provide for the employment of an archaeologist during the construction of the TMT Project who shall be on site during construction to insure minimal disturbance to any native Hawaiian cultural sites, practices and access to historical and cultural resources;
- Development and implementation of an Archaeological Mitigation Plan pursuant to HAR § 13-284-8(a)(2). Such plan will be developed in consultation with native Hawaiian organizations, including the Office of Hawaiian Affairs;
- Employment of a cultural resource specialist to work in conjunction with the archaeological monitor at all times and in all places or situations where on-site archaeological monitoring is required;
- Regular consultation with Kahu Kū Mauna and other community groups regarding cultural resources;
- Development of exhibits regarding cultural, natural, and historic resources in coordination with OMKM and ‘Imiloa that could be used at the Mauna Kea VIS, ‘Imiloa, TMT facilities, and other appropriate locations; and
- Reduced TMT Observatory operations to minimize daytime activities on up to four days per year in observance of native Hawaiian cultural practices.

504. The protection of the natural resources of the Mauna Kea summit and the area covered by the application for the CDUP can be accomplished through:

- Implementation of a Cultural and Natural Resources Training Program that will require all construction managers, contractors, supervisors, construction workers, and TMT staff to be trained annually regarding the potential impact to cultural and archaeological resources and the measures to prevent such impact;
- Development and implementation of an Invasive Species Prevention and Control Program which will ensure: (1) all material shipments will be repacked off of the proposed TMT Project site so that only essential

packing material is used for final transportation to the TMT Project site; (2) the washing and cleaning of all materials, clothing, construction vehicles, and heavy equipment off of the TMT Project site; (3) inspection of construction materials, equipment, crates, and containers and packing materials by a full-time trained biologist selected by OMKM and approved by the DLNR to assure no invasive plants or animals are introduced to the Mauna Kea summit areas; (4) weekly monitoring of the TMT Project sites by a trained biologist for the presence of invasive species; and (5) implementation of control measures by a trained biologist selected by OMKM and approved by the DLNR;

- Monitoring of arthropods in the area of the TMT Access Way prior to, during, and for two years after construction of the Access Way;
- Implementation of a Ride-Sharing Program that will limit vehicle trips to the summit, thus reducing the amount of dust generated along the unpaved sections of the Mauna Kea Access Road and TMT Access Way;
- Development of exhibits regarding cultural, natural, and historic resources in coordination with OMKM and ‘Imiloa that could be used at the Mauna Kea VIS, ‘Imiloa, TMT facilities, and other appropriate locations;
- Procurement of a National Pollutant Discharge Elimination System permit prior to the start of construction of the TMT Project from the State of Hawai‘i Department of Health;
- Implementation and coordination of the applicable provisions of the CRMP as related to the TMT construction and operation; and
- Implementation and coordination of the applicable provisions of the PAP as related to the TMT construction and operation.

505. The TMT Management Plan, Archaeological Monitoring Plan, Construction Plan, Historical and Archaeological Site Plan, Arthropod Access Way Monitoring Plan, and all other existing plans and agreements designed to protect the natural and cultural resources of Mauna Kea shall be complied with by the permittee.

506. Based upon the evidence and testimony presented in this contested case hearing, and the files and records herein, UH Hilo has proven by a preponderance of the evidence that it meets the requirements for the granting of the CDUA for the TMT Project. HAR § 13-5-30(c).

507. The proposed land use meets the criteria for issuance of a CDUP.

508. The proposed land use reasonably protects identified native Hawaiian rights and practices.

509. Provided that the special conditions discussed above and as set forth below, and the

standard conditions set forth in HAR § 13-5-42, as modified below, are imposed:

- The proposed land use will be consistent with the purpose of the Conservation District;
  - The proposed land use will be consistent with the objectives of the Resource subzone;
  - The proposed land use will comply with provisions and guidelines contained in Chapter 205A, where applicable;
  - The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;
  - The proposed land use, including buildings, structures, and facilities, will be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
  - The existing physical and environmental aspects of the land will be reasonably preserved or improved upon, whichever is applicable;
  - Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and
  - The proposed land use will not be materially detrimental to the public health, safety, and welfare.
510. The proposed land use meets the criteria for issuance of a Conservation District Use Permit. The proposed land use also reasonably protects identified native Hawaiian rights.
511. Any proposed conclusion of law that is not specifically included above is hereby rejected.
512. If any of the above conclusions of law shall be determined to be findings of fact, it is intended that every such conclusion of law shall be construed as a finding of fact. Conversely, if any of the above findings of fact shall be determined to be conclusions of law, it is intended that every such finding of fact shall be construed as a conclusion of law.

### **DECISION AND ORDER**

Based on the foregoing findings of fact and conclusions of law, the CDUA and the TMT Management Plan are approved. A CDUP shall be issued, subject to the following conditions:

General Conditions: