

To: Sam Lemmo, Administrator
Department of Land and Natural Resources
Office of Conservation and Coastal Lands
P.O. Box 621
Honolulu, Hawai'i 96809

From: Mauna Kea Anaina Hou, et al
c/o Ms. Kealoha Pisciotta
P.O. Box 5864
Hilo, Hawai'i 96720
808.968.7660

DATE: November 22, 2010

RE: The University of Hawai'i and the Thirty Meter Telescope Observatory Corporation's Conservation District Use Application (CDUA HA-3568)

**Testimony in Opposition
To the TMT Project Conservation District Use Application**

Submitted by
Mauna Kea Anaina Hou, The Royal Order of Kamehameha I,
Sierra Club and Clarence Kukauakahi Ching

Aloha

Mauna Kea Anaina Hou, represented by Ms. Kealoha Pisciotta, The Royal Order of Kamehameha I, Moku o Mamalahoa, Heiau Mamalahoa Helu Elua, represented by Ali'i Sir Paul K. Neves K.G.C.K. Kalaimoku, Sierra Club represented by Ms. Deborah J. Ward, and individual Native Hawaiian Practitioner Clarence Kukauakahi Ching, are dedicated to preserving and protecting Native Hawaiian Traditional and Customary cultural and religious rights and the natural resources of Mauna Kea.

Mauna Kea Anaina Hou, The Royal Order of Kamehameha I, Sierra Club and individual practitioner Clarence Kukauakahi Ching have been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We also participated in successful litigation in both federal and state courts against the University (UH) and State of Hawai'i

(BLNR), The University of California (UC), Caltech, and NASA.

We are opposed to the TMT project and the Conservation District Use Application (CDUA) submitted to BLNR for approval. There is no legal justification for more development on Mauna Kea, therefore there is no justification for considering this CDUA document for this project. The Mauna Kea conservation district is still in need of a genuine Comprehensive Management Plan (CMP) that ensures the protection of all the cultural and natural resources of Mauna Kea.

JUDICIAL NOTICE: The University of Hawai'i's CMP is currently under review by the Intermediate Court of Appeals (ICA). We are Plaintiff's in the case before the ICA, challenging the adequacy and legality of the UH CMP. All final decision made by BLNR are subject to judicial review including the BLNR recent approval of the UH CMP. Submitting a CDUA knowing the ICA is reviewing the CMP burdens and prejudices the public and the parties defending their case in the ICA. This is improper and we therefore request that our rights be reserved to further comment on the TMT CDUA.

We must formally request that BLNR deny this CDUA until the ICA has rendered a verdict of the legal question before the court. To ignore judicial review is to violate the people's due process rights. We must also make a formal request for a contested case hearing on the TMT CDUA prior to the approval of the TMT CDUA as BLNR's regulations require.

We submit for the record the following objections to the TMT CDUA:

OBJECTIONS

1. The TMT will, in fact, desecrate Mauna Kea

We object and take exception to the recent public assertion made by the TMT staff and Board members claiming the TMT project will not desecrate Mauna Kea. The TMT staff do not have the expertise to make such claims. Uneducated claims prior to a comprehensive review are foregone conclusions that courts have repeatedly rejected.

Furthermore, Mauna Kea's cultural and religious significance is well documented in oral and written historical archives, as well as in legislative and court records. Since "time immemorial," Mauna Kea has been and continues to be held in reverence by the Hawaiian people as a Wahi Pana and Wahi Kapu. Mauna Kea is revered in the same way that other religions revere churches, temples, synagogues, and mosques.

The upper regions of Mauna Kea reside in Wao Akua, the realm of the Akua-Creator. It is the burial ground of the most sacred of our ancestors. It is considered the Temple of the Supreme Being and is acknowledged as such in many oral and written histories throughout Polynesia. It is home of Na Akua (the Divine Deities), Na 'Aumakua (the Divine Ancestors), and the meeting place of Papa (Earth Mother) and Wakea (Sky Father) who are considered to be the progenitors of the Hawaiian People. It is where the Sky and Earth separated to form the Great-Expanse-of-Space and the Heavenly Realms. Lake Waiau is considered (among other things) to be the doorway into the Po (i.e., the mystical realm of the ancestors). Mauna Kea in every respect represents the zenith of the Native Hawaiian people's ancestral ties to the process of creation itself.

The ceremonies and practices on Mauna Kea (practiced nowhere else) formed the basis of the navigational knowledge that allowed Hawaiians to navigate over ten million square miles of the Pacific Ocean millennia before modern science and before Captain Cook ever set eyes on Hawai'i Nei. Hawaiian navigation is both a cultural and scientific contribution, not only to Hawai'i but also to the world and the global knowledge base.

Because of the unique elevation and conditions at the summit of Mauna Kea, there are a number of traditional and customary cultural and religious practices conducted on Mauna Kea that are conducted nowhere else on earth. Mauna Kea is also home to some of the most unique, rare and fragile plant and animal species in the world. These include the U`au (dark rumped petrel), Palila bird, Wēkiu bug, and Silversword. Many of the species found on Mauna Kea are considered threatened and/or endangered. They are also found only on Mauna Kea and nowhere else on earth.

The summit lands are designated conservation lands not only because of their unique cultural, historic, geological, and climatic features, but also because they are watershed lands. Mauna Kea is the principle aquifer for the island of Hawai'i. If these waters are contaminated, they can no longer be used for ceremonies, healing, and/or for drinking.

Mauna Kea's highly protected status as a National Landmark, a National Historic District, and a State Conservation District are because of these unique, rare and fragile features. These natural resources are part of the public trust recognized in Hawai'i's Admission Act, the Hawai'i State Constitution, and in the judicially recognized public trust duties and responsibilities of the State. By comparison, the development of astronomy facilities, however valuable they may be in their own right, are not afforded this level of reverence and protection by our society. Unlike the summit district and the practices related to it, construction of astronomy facilities is not mentioned in any state statute or the constitution. It is not a

protected public trust activity.

2. The Intermediate Court of Appeals is reviewing the Mauna Kea case

Again, the Mauna Kea case challenging the adequacy and legality of the University's CMP is pending in the Intermediate Court Appeals. We provide the following JUDICIAL NOTICE. The UH CMP may be overturn so the TMT project should not be moving forward and the BLNR should not be processing a telescope project CDUA for Mauna Kea until the court has rendered a verdict in the case, as this ignores the judicial process, violates due process and prejudices the parties.

3. BLNR has not fulfilled the court order issued by Judge Hara

Judge Hara's decision and order found the following:

- (1) Pursuant to 183C of Hawai'i Revived Statutes, the purpose of the State's Conservation Districts is conservation;
- (2) The resource that needs to be conserved is the entire summit area of Mauna Kea and not just the development area;
- (3) The UH 2000 Master Plan is NOT, (A), an approved plan pursuant to BLNR rules and regulations and (B), is Not a comprehensive plan as contemplated by the rules and regulations.
- (4) BLNR erred in issuing a permit to the NASA Outrigger Telescope Project, allowing piecemeal development proposals without having completed a Comprehensive Management Plan for the entire summit of Mauna Kea.

Unless and until Judge Hara's ruling is overturned, it is a matter of law that must be followed. Judge Hara ordered the BLNR to prepare and approve a Comprehensive Management Plan and the UH CMP is being challenged in the ICA, and may be overturned. The TMT should not be moving forward in contravention of the law. **We incorporate by reference** the state case Mauna Kea et al., v. BLNR, Civil No. 04-1-397, into the record.

4. BLNR must comply with Hawai'i Supreme Court orders and instructions

BLNR has a non-transferable fiduciary duty to protect Native Hawaiian rights and resources. The Supreme Court of Hawai'i has provided all state agencies with instructions to fulfill their duty. Expressly barring delegation of their duties to a sub-entity like the UH or a third party like Ku'iwalu. **The TMT should not be moving in contravention of the State Supreme Court orders and instructions.**

We incorporate by reference the Hawai'i Supreme Court case *Kapa`akai O Ka Aina v. Land Use Commission*, 94 Hawai'i 1,7 P. 3rd 1068 (2000), to be fully integrated into the record.¹ (see also relevant section in the following footnotes).

5. The TMT will have significant, adverse and substantial impact on the cultural and natural resources of Mauna Kea

In 2003, a federal lawsuit involving UC-Caltech and NASA compelled NASA to complete the first EIS ever conducted on Mauna Kea since 1968; and found "the cumulative impact the past, present and reasonably foreseeable astronomy developments have resulted in significant, adverse and substantial impacts to the cultural and natural resources of Mauna Kea."

We incorporated by reference the entire NASA Federal Environmental Impact Statement (EIS) and accompanying court records *OHA v. Sean O'Keefe, Civil. No. 02-00227 SOM/BMK filed July 15, 2003* to be integrated into any and all TMT environmental review documents

Furthermore, BLNR may not issue permits to projects that have adverse and significant impact to the natural and cultural resources. BLNR rules and regulations prohibit the approval of development projects in Conservation Districts that have "adverse and significant" impacts to the cultural and natural resources.

BLNR rules under **HAR §13-5-30(c)(4)** clearly state:

The proposed land use will not cause substantial adverse impacts to existing natural resources within the surrounding area, community or region etc.

The TMT should not be moving forward if the State could never legally grant a permit to build in the conservation district.

We incorporate by reference the relevant section of BLNR rules and regulations,

¹ In *Kapa`akai O Ka Aina v. Land Use Commission*, 94 Hawaii 1,7 P. 3rd 1068 (2000), the court made two critical rulings. In *Kapa`akai*, the Land Use Commission (LUC) failed to meet its duty to protect native Hawaiian traditional and customary practices when the LUC reclassified land from Conservation to Urban without independently assessing: (1) identity and scope of the 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary rights are exercised in the petition area; (2) the extent to which those resources---including traditional and customary native Hawaiian rights---will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist (*Kapa`akai v. LUC*, 94 Haw. 1, 15). Second, the Supreme Court expressly **rejected** the claim by the private Ka`upulehu Development Company ("KD") that the LUC's duties had been fulfilled by the private developer's Resources Management Plan which attempted to address native Hawaiian cultural and religious practices. The Court rejected the LUC's purported "delegation" authority:

[T]his wholesale delegation of responsibility for the preservation and protection of native Hawaiian rights to KD, a private entity, however, was improper and missed the point...We hold that, insofar as the LUC allowed KD to direct the manner in which customary and traditional native Hawaiian practices would be preserved and protected by the proposed development---the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority. (*Kapa`akai v. LUC*, 94 Haw. 1, 19)

including HAR §13-5-30, to be integrated into any and all TMT environmental review documents.² (See relevant sections in following footnotes).

6. The University and International observatories are in material breach of the General Lease

First, fair market rent has NOT been collected for the private, commercial use of public trust lands on Mauna Kea. The entire summit of Mauna Kea is section 5(f) public trust lands which is held "in trust" by the state for the Native Hawaiians and the general public. Hawai'i Admissions Act, section 5(f) and Haw. Rev. Stats §§171-17 and -18 require the state to collect fair market value lease rent and to deposit the funds from the use of section 5(f) lands in the public lands trust fund.

While public lands are often set aside to public agencies for their own use at no cost, any subsequent transfer of an interest to third parties outside the Hawai'i government is subject to the fiduciary obligation to obtain fair market rent. Current lease agreements between UH, DLNR, and the foreign governments and corporations that operate telescopes on the summit seek only one dollar (\$1.00) per year in rent. This is unlawful and constitutes a breach of the general lease.

We incorporate by reference Haw. Rev. Statutes 171-17 and -18 and related public trust documents cited into the record.

Secondly, the legal limits on the number and size of the observatories have already been exceeded. In the 1980's BLNR prepared and approved the 1983-85 management plan which limited the number of telescope allowed in Mauna Kea's Conservation District to thirteen (13), that is eleven (11) major and two (2) minor telescope facilities. There is no new plan that extends the telescope limits beyond the 13 established that has been adopted by BLNR.

The 1983-85 BLNR plan limited not just the number of facilities but the size of each facility. No telescope could exceed 125 feet in height and diameter. The telescope limits were established based on the best available science relating to the protection of the natural and cultural resources. The BLNR has categorically allowed UH to violate the telescope limits with the construction of the Gemini

² In evaluating the merits of a proposed land use, the department of the board shall apply the following criteria: (1)The proposed land use is **consistent with the purpose of the Conservation district**;(2) The proposed land **use is consistent with the objectives of the sub-zone of the land on which the use will occur**;(3) The proposed land use **complies with the provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management," where applicable**;(4) The proposed land use will **not cause substantial adverse impacts to existing natural resources within the surrounding area, community or region**;(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**;(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**;(7) The subdivision of land **will not be utilized to increase the intensity of land uses in the conservation district**; and(8) The proposed land use **will not be materially detrimental to the public health, safety and welfare**.

North Telescope, Very Large Array (VLBA) and the Smithsonian Telescope Array (consisting of over 24 telescope pads and support buildings spread over a half mile area). The TMT will also violate these limits. The TMT should not be moving forward if it will exceed legal limits on the telescopes allowed on Mauna Kea.

We incorporate by reference the 1983-85 Mauna Kea Science Reserve Complex Development Plan documents into the record.

7. Complying with State and Federal Law

The TMT has not conducted federal level environmental or historic preservation reviews, as required by law. At the TMT Public EA/EIS Scoping meetings held in Keaukaha, on Hawai`i Island, TMT representatives expressly stated that the TMT would only be conducting a state level EA/EIS pursuant to HRS Chapter 343. The reasons offered for this were that the TMT project had no public funds associated with the project. The TMT claims are not true. The TMT project has in fact received substantial federal funds from the National Science Foundation; constituting a major federal undertaking pursuant to National Environmental Policy Act (NEPA) and the National Historic Preservation Act. Please see NSF website. The TMT therefore must complete a federal EIS and Section 106 for the TMT project.

Please see

<http://www.bigislandvideonews.com/maunakea/20081020dawson.htm>, for TMT representative comments cited above.

The University of Hawai`i (UH) has also recently received substantial federal funds for the astronomy under the University Affiliated Research Center (UARC), constituting a major federal undertaking. The University therefore is acting in a federal capacity and must comply with all federal law, including NEPA and NHPA.

The National Science Foundation has given the TMT Corporation substantial federal fund constituting a federal undertaking.

State law under **HRS §343-5(2) (f)** clearly states;

Whenever an action is subject to both the National Environmental Policy Act of 1969(Public Law 91-190) and the requirements of this chapter...agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

8. The Life Of The TMT Extends 23 Years Beyond The General Lease

The TMT application and EIS claims the TMT will begin seven years of construction in 2011 and will have an expected design life of 50 years at which time it will be decommissioned. The General Lease issued by the State to the University in 1968 ends in the year 2033. If the life of the TMT is 50 years, it means the TMT is

requesting the use of Mauna Kea 23 years beyond the term of the lease. The General Lease requires that in the year 2033 all facilities must be decommissioned and the land must be returned to its original state.

We object to any telescope to continue its existence beyond the 2033 lease termination.

We incorporate by reference the Mauna Kea Science Reserve General Lease No.S-4191 into the record.

9. The TMT is big but it's not the biggest...actually

The TMT is big but it will not be the biggest telescope on earth, as the TMT claims. The world's biggest telescope is called the European Extremely Large Telescope (E-ELT) that is being built in Cerro Armazones, Chile. The E-ELT is substantially bigger than the TMT, coming in at a stunning 42 meters as compared to the TMT's mere 30 meters. That is a big difference in size and seeing capability. The E-ELT is scheduled to be collecting first light by the year 2018. The TMT is supposed to obtain first light in 2018 also, that means the TMT will out matched before it even opens.

Arguably, the TMT is not technically necessary since the E-ELT is already moving ahead. The TMT proponents argue the TMT is needed because it will provide northern sky coverage that the E-ELT cannot. What does it matter what hemisphere the test for telescope size is actually conducted? There is no rational reason to destroy the sacred and delicate landscape of Mauna Kea for a redundant project, such as the TMT. The tests for size can be accomplished by the larger E-ELT.

Extinction is a real possibility for a number of species living on Mauna Kea that can be found nowhere else on earth. Extinction is an unacceptable risk in this day and age. Extinction is forever! It's hard to rationalize the astronomer's claim that the TMT will help discover the origins of life while they continue to argue for compromising the endangered life forms here on Mauna Kea ...here on planet earth.

CONCLUSION

The people of Hawai'i have been actively opposing more development and destruction on Mauna Kea since the lease was first issued in 1968. People marched at the State Capitol in the 70's and 80's to show they did not want astronomy to take over the mountain. We are only the latest individuals and organizations that have been engaged in the struggle. We have been engaged in legal battles since the UC-Caltech announced that they would be building the four (4) – six (6) Outrigger Telescopes in 1995. To be clear, while it may seem like the TMT are "new people"

to the issue, in actuality the TMT is fully backed by UC and CalTech, which are same institutions that proposed the previous improperly approved telescope project.

We have spent all of these years turning out to testify, bringing our Kupuna out to the hearings, who were too frail to come out--one hearing after another. We did this because our Kupuna told us it was the aloha thing to do, since they believed, if the scientist understood how important Mauna Kea was to the people they would understand why no more development is the better thing to do. Eventually we were forced to file lawsuits in federal and state courts—which the people won (our Kupuna won). But our Kupuna also told us that litigation is the path to be taken when dialog fails.

We spent over 3 hours explaining what we have outlined here to both Mr. Chameau, President of Caltech and Mr. Yang, Chairman of the TMT Board. We have spent this time in the spirit of our Kupuna, hoping they would see the delicate nature of Mauna Kea and would wish not to further aggravate these problems. It is clear that our good faith dialog has fallen on deaf ears once again.

We will continue to stand firm in our work to protect the sacred things of Mauna Kea. We will honor our Kupuna who kept these things so that we might live. The sacred things are that bless us and give us life today. We will stand by our Kupuna who have always raised the standard of Aloha. Aloha Mauna Kea and Aloha Ke 'Akua, Na 'Akua, Na 'Aumakua!

In Aloha we remain,

Ali`i Sir Paul K. Neves of the Royal Order of Kamehameha I, Moku o Mamalahoa
Heiau Mamalahoa Helu Elua

Ms. Kealoha Pisciotta of Mauna Kea Anaina Hou

Mr. Clarence Kukauakahi Ching, individual Hawaiian Practitioner

Ms. Deborah J. Ward of Sierra Club, Moku Loa Group