



July 25, 2024

VIA U.S. MAIL & EMAIL

To: Honorable Sethuraman Panchanathan, Director  
National Science Foundation  
2415 Eisenhower Avenue  
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PROTECTING

NATIVE HAWAIIAN

CUSTOMARY & TRADITIONAL

RIGHTS AND OUR FRAGILE

ENVIRONMENT

Subject: **An Open Letter to the National Science Foundation**

Aloha e Director Panchanathan,

KAHEA: The Hawaiian-Environmental Alliance (KAHEA) is a nonprofit organized in 2000 that has been working to protect Mauna Kea from improper development for nearly as long.

We are amongst hundreds of others awaiting participation in your formal environmental impact and cultural consultation processes. At your May 2024 meeting, we learned interim decisions about whether to fund Thirty-Meter Telescope (“TMT”) construction on Mauna Kea will be made in the coming months. Please allow us to offer the following summary of reasons that constructing TMT on Mauna Kea is a losing proposition and should not receive NSF funding.

**1. TMT support is waning, even amongst its members.**

At its May 15, 2024 meeting,<sup>1</sup> the University of California (“UC”) Regents balked at the UC Observatories’ statement: the “Regents may need to take an action to approve additional funding and resources towards the pre-construction and construction of the [TMT].” That is, TMT does not currently have the ability to sustain itself even as it also solicits NSF funding. Soon, TMT will need to again ask UC for more funds just to keep its basic operations going and meet NSF criteria. Some UC Regents said they will oppose further funding under these present circumstances.

China joined the TMT International Observatory (“TIO”) in 2009. However, for the past year at least, China has not been listed as a TIO member. We understand China quietly exited due to “technical issues”. It remains to be seen how much material support they took with them.

The waning support of its members puts TMT in a precarious position, relying on the National Science Foundation (“NSF”) to make up at least \$1.6 billion of a \$3.6 billion price tag.<sup>2</sup> This would take up 80% of NSF’s entire funding for major projects and still leave TMT in need of a significant influx at the same time that existing partners are

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*KAHEA: the Hawaiian-Environmental Alliance is a non-profit 501(c)3 working to protect the unique natural and cultural resources of the Hawaiian islands. KAHEA translates to English as "the call."*

wavering in their support.

## **2. United Nations admonishes Canada for violating Kānaka Maoli consent to the TMT**

In a 2021 statement,<sup>3</sup> the Canadian Astronomical Society (CASCA) stated they would not support TMT unless Native Hawaiians gave their consent in accord with their 2020 Long Range plan.<sup>4</sup>

On April 26, 2024, the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD) published a letter<sup>5</sup> to the Government of Canada, addressing it as a State Party that signed the International Convention on the Elimination of All Forms of Racial Discrimination, raising Canada astronomy's violations of international human rights. Canadian support for TMT may irreparably harm Native Hawaiian communities, particularly by failing to ensure their free, prior, and informed consent related to Mauna Kea. CERD found this may breach Canada's obligation to the International Covenant on the Elimination of All Forms of Racial Discrimination.

CERD's letter was written in response to petitioners KAHEA, Ziibiing Lab, and the Transnational Law and Racial Justice Network's July 17, 2023 request under Early Warning and Advance Notice Procedures.<sup>6</sup>

NSF's own Section 106 consultations should abide by Article 18 of the UN Declaration of the Rights of Indigenous Peoples, which requires free, prior, and informed consent, as recommended by the Advisory Council on Historic Preservation.<sup>7</sup> In May 2019,<sup>8</sup> CERD sought for the U.S. to explain steps it had taken towards "the suspension of the Thirty Meter Telescope project until free, prior and informed consent is obtained from Native Hawaiians indigenous peoples, following an adequate discharge of the duty to consult." NSF should take these steps.

## **3. New Mauna Kea "authority" beleaguered by poor decisions and lawsuits**

In an apparent attempt to garner Hawaiian "consent", a Hawai'i legislator assembled the Maunakea Stewardship and Oversight Authority<sup>9</sup> ("MKSOA") to take over State management of Mauna Kea. Since then, MKSOA tried, and failed, to exempt itself<sup>10</sup> from Hawaii's open Sunshine meeting requirement during this last legislative session. Then, they hired a controversial executive director, most well-known for being at the helm of the Hokuia development disaster<sup>11</sup> (aka 1250 Oceanside Partners) on Hawai'i island, which desecrated at least seven burial sites, including 70 sets of remains, and polluted marine waters north of Kealahou Bay.

The Office of Hawaiian Affairs ("OHA"), an entity charged with advocating for Native Hawaiians and protecting their resources, filed a lawsuit<sup>12</sup> against the constitutionality and legality of MKSOA on January 17, 2024. OHA points out the formation of MKSOA breaches multiple fiduciary and contractual duties of the State and harms Hawaiian beneficiaries. This is in addition to OHA's ongoing lawsuit from 2017<sup>13</sup> against the state for mismanagement of Mauna Kea.

According to a March 2024 news article,<sup>14</sup> "The Clock is Ticking for Maunakea Authority," "UH currently leases the summit land from the state, with that lease set to expire in 2033. Upon the creation of the MKSOA, UH ceased work toward renewing the master lease or any of the subleases held by the various Maunakea observatories." The TMT lacks assurances of a general lease or sublease to utilize Mauna Kea.

#### **4. Pending challenge to permit to use Mauna Kea conservation lands**

Issued in 2017, the University of Hawaii's ("UH") permit to construct the TMT on Mauna Kea conservation district lands required UH to initiate construction within two years or go back to the Board to explain why it couldn't do so. In 2019, UH got an administrative extension. In 2021, the former Department of Land and Natural Resources (DLNR) chair quietly signed off on a letter saying the TMT had started construction in July 2019. This assertion is absurd. Mauna Kea garnered international attention, rallied hundreds of thousands of people, and all around the central issue - that NO construction of the TMT would occur on the mauna.

Longtime Mauna Kea protectors learned of the DLNR chair's action and raised this to the full Board of Land and Natural Resources ("Land Board"). They filed a petition to reopen hearings and for declaratory orders<sup>15</sup> stating UH had not started TMT construction and if they want more time, they have to explain why to the whole board at a public hearing. The Land Board heard oral arguments in November 2023<sup>16</sup> and is expected to render a decision soon.

#### **5. Court rules State unlawfully controlled Mauna Kea Access Road for TMT**

On May 30, 2024, the Hawai'i supreme court unanimously ruled the State unlawfully asserted control over the Mauna Kea Access Road,<sup>17</sup> including when it arrested Mauna Kea protectors in 2019. In fact, the State doesn't own the road at all -- rather these lands are part of the Hawaiian Home Commission Act trust. Many trust beneficiaries, all of whom are Native Hawaiian, are longtime protectors of Mauna Kea -- this is certainly true of the Hawai'i Island plaintiffs who brought the lawsuit.

The case is now at trial to determine damages the State owes for its unlawful and uncompensated use and control of the Access Road land. This also means the Hawaiian Homes Commission controls the Mauna Kea Access Road, so any TMT construction access must be further negotiated.

#### **6. Multiple challenges await any TMT stormwater permitting**

In 2014, TMT applied for a National Pollutant Discharge Elimination System (NPDES) permit from the Hawai'i Department of Health (DOH). In 2021, multiple parties, including Hui Wai Ola and the Flores-Case 'Ohana, sought a contested case on any NPDES permit issuance. Both groups of cultural practitioners raised issues related to potential harms to cultural practices threatened by runoff and improper investigations, the unique sensitivity of Mauna Kea to pollution, incorrect information presented in the application, and impacts of proposed mitigation measures themselves.

With these compliance issues and challenges unresolved, on June 3, 2022 TIO filed notice of cessation of its NPDES permit. In response, DOH issued a statement: "Since TMT filed a Notice of Cessation, it will not be allowed to conduct further construction unless a new permit is issued."<sup>18</sup> This means any proposed construction of the TMT will have to restart the entire process, which began in 2014, and will additionally face challenges in contested cases due to TIO's heretofore failure to address these challenges.

#### **7. Unwavering resistance to construction on Hawaii's sacred summits**

Though developers may insist they are "softening" Hawaiian communities on TMT

construction, the ongoing actions of community leaders who represent the Lāhui have already said “No.” This is a “NO” to development on all of Hawaii’s sacred summits. Nearly half a million people<sup>19</sup> have petitioned to stop TMT construction on Mauna Kea.

As the NSF knows, hundreds of entities and individuals have requested Section 106 consultation in recent years and as far back as 2009 when TMT was first proposed.

On November 11, 2023, the Hawai’i Historic Places review board voted unanimously to list Mauna Kea on the State Register of Historic Places as a Historic District and Traditional Cultural Property (TCP). On May 23, 2024, Hawaii’s State Historic Preservation Division submitted its nomination<sup>20</sup> of Mauna Kea for inclusion on the National Register of Historic Places as a TCP. The public comment period on the nomination recently closed and over 1,600 people sent testimony in support of the designation. The movement to protect sacred sites is growing, and not only for Mauna Kea.

We appreciate your time and attention to these new reasons you should not fund TMT construction on Mauna Kea. NSF has the opportunity to support many new innovations and discoveries. Imagine what else could be done with \$1.6 billion! We ask NSF to select those opportunities that truly advance peace and prosperity amongst our communities. TMT construction on Mauna Kea does not advance these aims.

Me ke aloha,

2024 KAHEA Board & Staff

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<sup>1</sup> May 15, 2024 UC Regents meeting, <https://www.youtube.com/live/1tjp4W1Ale4?si=m4m4wVMOpHkrIVL6>

<sup>2</sup> *Science* magazine: <https://www.science.org/content/article/nsf-board-approves-funding-just-one-two-proposed-giant-telescopes>

<sup>3</sup> CASCA statement reproduced on “X”: <https://x.com/SciBry/status/1392204012666163204?s=20>

<sup>4</sup> Kanaeokana article: <https://kanaeokana.net/noconsent>

<sup>5</sup> CERD letter April 26, 2024 [https://drive.google.com/file/d/1p3R30AzQSPFo3IyhzM-K5GPjWdiR-mua/view?usp=drive\\_link](https://drive.google.com/file/d/1p3R30AzQSPFo3IyhzM-K5GPjWdiR-mua/view?usp=drive_link)

<sup>6</sup> See the request here: <https://www.ziibiinglab.org/data/#cerd>.

<sup>7</sup> ACHP guidance on Section 106 and the UN Declaration on the Rights of Indigenous Peoples: <http://www.achp.gov/sites/default/files/guidance/2018-06/Section106andtheUNDRIPIntersectionsandCommonIssuesArticle18andSection10622Nov2013.pdf>

<sup>8</sup> May 2019 CERD letter: [http://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/ALE/USA/8932&Lang=en](http://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/ALE/USA/8932&Lang=en)

<sup>9</sup> KAHEA blog on MKSOA: <https://kahea.org/remember-the-maunakea-stewardship-and-oversight-authority>

<sup>10</sup> KAHEA blog on MKSOA Sunshine meeting exemption bill: <https://kahea.org/why-the-mksoa-shouldn2019t-be-allowed-to-have-private-201cho-oponopono201d-meetings>

<sup>11</sup> *Honolulu Star Bulletin* article: <https://archives.starbulletin.com/2000/10/31/news/story12.html>

<sup>12</sup> OHA news release: <https://www.oha.org/news/oha-lawsuit-seeks-repeal-of-the-mauna-kea-stewardship-and-oversight-authority/>

<sup>13</sup> OHA’s <https://www.oha.org/wp-content/uploads/001-2024-01-17-CMPS-Complaint-for-Declaratory-Judgement-and-Injunctive-Relief-OHA-10008.pdf>

<sup>14</sup> *Hawai’i Tribune Herald* article: <https://www.hawaiiitribune-herald.com/2024/03/06/hawaii-news/the-clock-is-ticking-for-maunakea-authority/>

<sup>15</sup> DLNR contested case docket for Mauna Kea Hui’s Motion for Hearing or Alternatively for Declaratory Orders, <https://dlnr.hawaii.gov/occl/tmt/>

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<sup>16</sup> BLNR November 2023 oral arguments recording: <https://www.youtube.com/watch?v=pEl6GQr6X4o>

<sup>17</sup> Native Hawaiian Legal Corporations' press release: <https://nativehawaiianlegalcorp.org/mkardecision/>

<sup>18</sup> DOH Notice of Cessation of Permit: <http://health.hawaii.gov/news/files/2022/06/22-071-Thirty-Meter-Telescope-International-Observatory-files-Notice-of-Cessation-for-NPDES-permit.pdf>

<sup>19</sup> Link to petition: <https://www.change.org/p/gordon-and-betty-moore-foundation-no-construction-of-the-tmt-telescope-on-mauna-kea>

<sup>20</sup> National Park Service, Pending List May 25, 2024, [www.nps.gov/subjects/nationalregister/pending-list-2024-05-25.htm](http://www.nps.gov/subjects/nationalregister/pending-list-2024-05-25.htm)