**From:** Jade Young
**To:** DBEDT LUC
**Subject:** Mauna
**Date:** Tuesday, October 22, 2019 12:21:30 AM

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It's not too late to do the right thing. Respect the culture.

| | |
|---|---|
| **From:** | Sean Nagamatsu |
| **To:** | DBEDT LUC |
| **Subject:** | Testimony in SUPPORT of the Kanaheles' petition |
| **Date:** | Tuesday, October 22, 2019 12:49:48 AM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I hope you are well. I submit this testimony in SUPPORT of the Kanaheles' petition, and ask that you declare that:
(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

I grew up in Palolo Valley on O'ahu. I have the sound and the silence of my place in my na'au. Please do what you can to preserve the connection our people have to the land.

I respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Sean Nagamatsu

**From:** Joan Heller
**To:** DBEDT LUC
**Subject:** Kanahele Petition
**Date:** Tuesday, October 22, 2019 4:59:07 AM

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To Hawaii LUC,

I, Joan Heller, Kauai county resident support the Kanahele's petition regarding the TMT on Mauna Kea.
Sincerely,
Joan and Larry Heller
3820 Uakea Place
Lawai, HI 96765
myoho@hawaii.rr.com

Sent from my iPhone

| | |
|---|---|
| **From:** | Janice Jong |
| **To:** | DBEDT LUC |
| **Subject:** | Support of the Kanahele Mauna Kea Petition |
| **Date:** | Tuesday, October 22, 2019 5:00:56 AM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanahele‘s petition and ask that you declare that:

(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply to LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
(3) even if "an observatory" is allowed under the general use lease, "the successive individual approval of thirteen laboratories, other research facilities, and associated offices, parking lots, and utilities, "is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, Section 1 of the Hawaii State Constitution, you are required to,

"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."

Further Article XII, Section 7 of the Hawai‘i`s Constitution 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."

The Hawai‘i Supreme Court went on to later interpret this section of the Hawai‘i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

We live in a land governed by laws. These laws exist to protect all of us. So we ask that those laws be followed not just for ourselves but for the future generations of Hawaiians to come. So as a kupuna, I‘ve lived long enough to see many good and many bad things happen to our

aina. We stand in support of this Petition to make sure we have an aina to protect, nurture and preserve, because without our land (left as it is) we have nothing and we will no longer exist as
Hawaiians.

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Janice Y. S. Jong

**From:** Michelle Sandell
**To:** DBEDT LUC
**Subject:** email testimony: Land Use Commission hearing on TMT/astronomy, Oct 24
**Date:** Tuesday, October 22, 2019 6:29:43 AM

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To whom it may concern:

I write to deny that any rezoning of the TMT, or any of the other telescopes, as "industrial" is required. Their existence and usage on Mauna Kea is consistent with being located in a conservation district.

I have read through the Kanaheles' petition and, on a bare observation of their points, do not find sufficient justification to consider the TMT and other telescopes to violate the strictures on conservation lands (specifically, part II.C (p. 10), and part III.A (p. 11)).

Furthermore, judges on the Hawaii Supreme Court, whose knowledge of the relevant law obviously exceeds my own: they have examined the minutiae of the case already. The use of the land on Mauna Kea by astronomy, and the TMT, is consistent with conservation. To judge otherwise is inconsistent with our Supreme Court's ruling, and is unacceptable.

State law and Hawaii's Supreme Court ruling are unequivocal, and the TMT has shown more than due consideration through their plan to operate responsibly on Mauna Kea. Please reject the Kanaheles' petition outright.

Sincerely

Dr. Michelle Sandell, Hilo, Hawaii

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|---|---|
| **From:** | Eric Takasugi |
| **To:** | DBEDT LUC |
| **Subject:** | Land Use Commission hearing on TMT/astronomy |
| **Date:** | Tuesday, October 22, 2019 6:39:11 AM |

To whom it may concern,

My name is Eric Takasugi and I am a resident of Kona on the Big Island. I believe that astronomy on Maunakea, including TMT, is consistent with a conservation district. No rezoning is justified.

The Hawaii Supreme Court clearly and emphatically affirmed that astronomy is a permitted land use in a conservation district (Kilakila O' Haleakala vs. Univ. of Hawaii 2016; MKAH vs. BLNR 2018). Their decision upholding TMT's permit also clearly notes (and does not question) that the astronomy precinct resides within a conservation district. (MKAH vs. BLNR 2018) It also further clearly notes that "the use of land by TMT is consistent with conservation ...". (MKAH vs. BLNR 2018), repeatedly showing that the Supreme Court affirms that astronomy on Mauna Kea is an expressly permitted use consistent with conservation. This indicates that the proposed re-designation of astronomy facilities on Mauna Kea as "industrial" (requiring rezoning) is inconsistent with Hawaii Supreme Court rulings and thus cannot be accepted.

The law also supports the current designation of astronomy facilities as permitted on Mauna Kea. The process by which astronomy facilities are approved for Maunakea shows a rigor and care required for building in a conservation district.

The designation of astronomy facilities as permitted uses on Maunakea is clear from state law. Maunakea is in the Resource Subzone within the Conservation District. One of the permitted use in this subzone is astronomy facilities under an approved management plan (HAR 13-5-24). Land use on Maunakea undergoes a rigorous review process. DLNR requires UH to submit a CDUA for astronomy facilities on Maunakea. Residents may also request a contested case hearing to advocate for their position on the proposed land use. Before a CDUA for a major project proposed for Maunakea is submitted to DLNR, it is reviewed and evaluated through a University review process involving extensive community participation with multi-layers of review and input.

For these reasons, rezoning is not justified.

Sincerely,
Dr. Eric Takasugi
高杉勇人

**From:** Rina Marcelino
**To:** DBEDT LUC
**Subject:** Imua TMT
**Date:** Tuesday, October 22, 2019 7:18:29 AM

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***ALERT***
We need your testimony in support of TMT and astronomy again! Oct 24-25 in Hilo at Grand Naniloa!

When: 9:30 am October 24 (possibly also the 25th), Hilo, Grand Naniloa Crown Room (same place as the Contested Case Hearing)
What: The Land Use Commission hearing on TMT/astronomy.

Why: Basically protesters are claiming that all astronomy on MK is "industrial", which causes a change in zoning laws and which messes things up.

**Your Task**
SHOW UP in person on October 24: to give testimony supporting astronomy as consistent with the use of a conservation district
Send testimony by 9am October 22 to: dbedt.luc.web@hawaii.gov

To whom it may concern:

I believe that Astronomy on Maunakea, including TMT, is consistent with a conservation district. No rezoning is justified or needed for the following reasons:

- Recent Hawaii Supreme Court decisions clearly and emphatically affirm that astronomy is a permitted land use in a conservation district (Kilakila O' Haleakala vs. Univ. of Hawaii 2016; MKAH vs. BLNR 2018)

- The Hawaii Supreme Court's decision upholding TMT's permit also clearly notes (and does not question) that the astronomy precinct resides within a conservation district. (MKAH vs. BLNR 2018)

- It further clearly notes that "the use of land by TMT is consistent with conservation ...". (MKAH vs. BLNR 2018).

For these above reasons alone, the Supreme Court believes that astronomy on Mauna Kea is an expressly permitted use consistent with conservation.

Thus, the proposed re-designation of astronomy facilities on Mauna Kea as "industrial" -- requiring rezoning -- is inconsistent with Hawaii Supreme Court rulings and thus cannot be accepted.

Furthermore, the law supports the current designation of astronomy facilities as permitted on Mauna Kea; the process by which astronomy facilities are approved for Maunakea shows a rigor and care required for building in a conservation district.

- The designation of astronomy facilities as permitted uses on Maunakea is clear from state law. Maunakea is in the Resource Subzone within the Conservation District. One of the

permitted use in this subzone is astronomy facilities under an approved managemen plan (HAR 13-5-24)
- Land use on Maunakea undergoes a rigorous review process. DLNR requires UH to submit a CDUA for astronomy facilities on Maunakea.
- Residents may request a contested case hearing to advocate for their position on the proposed land use.
- Before a CDUA for a major project proposed for Maunakea is submitted to DLNR, it is reviewed and evaluated through a University review process involving extensive community participation with multi-layers of review and input.

Mahalo for your time
Imua TMT
Corrina B Marcelino

**From:** Jane P. PERRY
**To:** DBEDT LUC
**Subject:** Ku‘ulei Higashi Kanahele and Ahiena Kanahele petition
**Date:** Tuesday, October 22, 2019 8:01:45 AM

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Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

Aloha and mahalo for the opportunity to provide testimony to the state Land Use Commission and its consideration of the Ku‘ulei Higashi Kanahele and Ahiena Kanahele petition. I submit this testimony in SUPPORT of the Kanaheles’ petition based on (1) cultural and religious grounds, (2) conservation designation grounds, and (3) enforcement of aquifer protection.

(1) Cultural and religious grounds

I applaud Gov. David Ige in his words "to proceed in a way that respects the people, place and culture that makes Hawai’i unique" and his assurance that "acting as stewards of Mauna Kea" is not just words. "The state has an obligation to respect and honor the unique cultural and natural resources on this special mountain." It is undeniable that Hawaiian kia‘i of Mauna Kea have yet to sanction further trespass on their religious shrine and sanctuary, Mauna Kea, which they have, as part of their identity, pledged to protect. Respect and honor means that the State of Hawai’i stay in relationship with Mauna Kea protectors. I have made a pledge to my ancestors in Irlande that I will fiercely honor the rights of indigenous people upon whose land I am a guest. In my Celtic culture and religion, we have *anam cara*, an ancient and eternal relationship that joins me in friendship with fellow humans, with the ancestors, all living creatures, and with the Earth from which we come. It is deeply painful to me to know of the disruption of the wao akua that is Mauna Kea, for in my cultural practice, like your own, we are all human and respond with compassion and respect.

I am asking that the Land Use Commission honor your people’s traditional and customary practices on Mauna Kea, a wao akua that should be free from excessive human activity and development. The existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures.

(2) Conservation designation grounds

The Kanaheles’ petition says the research facilities and associated offices, parking lots and utilities atop Mauna Kea are inconsistent with the conservation district. The sprawling telescopes that have taken over the summit of Mauna Kea do not belong in a conservation district. The facilities at the summit have displaced habitat for the rare wekiu bug, generates noise and obstructs scenic areas and open space. The growing number of observatories has transformed the conservation district at the summit of Mauna Kea into a de facto urban district requiring a land use district boundary amendment. The University of Hawai’i needs to follow state Land Use laws. Industrialization of the summit of Mauna Kea deeply saddens me. In my Celtic cultural practices, which are rooted in an honor and stewardship of the land, we practice a daily honor to the clay that is our land because we come from the clay. I submit public testimony today to stand with the Hawaiian kia‘i to protect their earthen shrine for their cultural practices on the summit of Mauna Kea. I pray for the openness of heart that embraces the preservation of Mauna Kea’s important natural systems and habitats, maintains valued cultural, historical and natural resources, and understands that employment opportunities and economic development is based in grounded cultural and spiritual practices that come from the wao akua like Mauna Kea.

I am asking that further construction on Mauna Kea summit areas comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district, and even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses. 18-story buildings, like the TMT, are inconsistent with a conservation district designation.

(3) Enforcement of Aquifer Protection

No baseline assessment for water quality has been conducted for 4 of the 5 receiving waters (Kemole Gulch, Kuupahaa Gulch, Puupohakuloa Gulch, Pohakuloa Gulch). How can aquifer protection be monitored to know whether contamination is caused by storm runoff from the project without completion of an assessment prior to the beginning of the project? TMT can claim a stream to have been degraded prior to the start of their project, leaving no information to counter that claim, rendering any attempt at enforcement of aquifer health impotent. The TMT project is self-enforced, meaning the TMT project is supposed to report their own noncompliance. Because of the remote nature of the TMT site, it is not likely that other people (agencies or members of the public) are likely to come across potential violations -- particularly if the management rules, proposed by UH's Office of Mauna Kea Management are passed, which attempts to restrict access to Mauna Kea. Citizen enforcement, like in 2015 when protector Nancie Munroe discovered fluids leaking from construction equipment, is an important enforcement tool that is being impeded by the use of state police power and private security forces at Mauna Kea and specifically on the TMT site. Relying on a project to notify the agency of their own non-compliance is a weak and unrealistic expectation for meaningful enforcement. My experience in climate protection where I live as a guest on Ohlone territory is that enforcement vigilance is absolutely required. Our oil refineries in the San Francisco Bay, and our electricity provider, Pacific Gas and Electric, have repeatedly compromised people's health with toxic fumes and deathly fires because they self-enforce their operations. Self-enforcement scenarios gone bad is traumatic for me because it is a trigger of genocidal colonization practices which so devastated my people in Irlande. This trauma of self-enforced colonization practices is alive and well in my people today. I recognize your own past, and respect the establishment in 1961of the Land Use Commission to administer an islands-wide zoning system with the goal of "preserving and protecting Hawaii's lands and encouraging those uses to which lands are best suited."

I respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands. Mahalo for the opportunity to provide testimony.

Sincerely and with Aloha,

Jane P. Perry

Jane P. Perry, Ph.D.
Retired Teacher Researcher, University of California Berkeley Harold E. Jones Child Study Center
Settler Guest on Ohlone Territory, Oakland, CA 94618
(510) 428-2363
janepperry.com

| | |
|---|---|
| **From:** | Christina Manzano-King |
| **To:** | DBEDT LUC |
| **Subject:** | Testimony in support of the Kanaheles' petition |
| **Date:** | Tuesday, October 22, 2019 8:16:48 AM |

Aloha,

I am writing in support of the Kanaheles' petition to require that the Maunakea summit be classified as an urban district before allowing an 18-story structure to be built. A construction project of this magnitude should not be undertaken in any conservation district without extreme circumstances that absolutely require the structure to be there, and even then, the structure should be for the purposes of conservation. 13 much smaller telescopes have already been built on the summit and have been found by the DLNR and the Hawaii Supreme Court to have had "*significant cumulative adverse impacts on cultural, archaeological, and historic resources in the Mauna Kea Science Reserve*". This is inconsistent with your responsibilities under the Hawaii State constitution to "conserve and protect Hawai'i's natural beauty and all natural resources."

In order to build, TMT Corp should be able to either

1. follow the proper procedure to reclassify the proposed construction site as a de-facto urban zone or
2. justify the structure as beneficial for the conservation of the land (i.e. the presence of the structure will maintain or prevent damage to the land/ecosystem rather than degrade or pollute it.)

As the Land Use Commission, it is your responsibility to hold them to this standard.

As an early-career observational astronomer whose future in the field depends on the telescopes on Maunakea, I am well aware of the scientific benefits of building TMT. They do not outweigh our responsibility to care for the land or at the very least to respect the fact that this land is held in trust for the Hawaiian people and that the beneficiaries of the land do not want this telescope built.

--
**Christina Manzano-King**
PhD Candidate
Physics and Astronomy | UCR
she/her

| | |
|---|---|
| **From:** | Olivia Pasciuta |
| **To:** | DBEDT LUC |
| **Subject:** | Support for Protecting Mauna Kea |
| **Date:** | Tuesday, October 22, 2019 8:39:22 AM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

**I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:**

- (1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
- (2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
- 3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to,

> "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court interprets this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and

enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

****I am the only maouli wahine, practicing our Ancestral Heritage of our family and Nation. Do not let Mauna Kea be desecrated and polluted like Keauhou Bay, where my family once lived off the land and sea. Do not hunger for money and power.*

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Olivia Pasciuta

Sent from my iPad

| | |
|---|---|
| **From:** | Deborah Ward |
| **To:** | DBEDT LUC |
| **Subject:** | Sierra Club testimony re Kanahele petition |
| **Date:** | Tuesday, October 22, 2019 9:44:37 AM |
| **Attachments:** | LUC Kanahele testimony by Sierra Club 10.24.19.docx |

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Aloha e Land Use Commissioners,
Please accept this testimony for the upcoming meeting on October 24, regarding the Kanahele petition before the Commission.
Mahalo,
Deborah J Ward, Chair, Sierra Club Hawaii Island Group

Sierra Club Hawaii Island Group
P.O. Box 1137
Hilo HI 96720

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

The members of the Sierra Club submit this testimony in SUPPORT of the Kanaheles' petition.

(1) Fifty years after a general lease was issued in 1968 to the University of Hawaii to allow the construction of a single ("an observatory") on the summit of Mauna Kea, The University has built (some with after-the-fact permits) 22 structures in the summit region, in the Conservation District. There appears to be no end in sight, as a new telescope has been proposed despite the lack of mention in the Comprehensive Management Plan approved in 2009. Sadly, the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures.

The years of conflict over land use at the summit of Mauna Kea could have been avoided if only the University of Hawai'i (UH) had been honest about its intentions to urbanize this conservation district from the start. If UH had been straight-forward about its intentions to construct over a dozen industrial structures in the conservation district, and followed the proper procedures to authorize the use of the summit in this way, then it would have first sought approval from the Land Use Commission to change the boundary designation for this area from conservation to urban. If UH had followed this procedure, then the public, state agencies, UH, and all telescope development advocates would have had clear guidance on what was allowed and not allowed on the summit of Mauna Kea.

But UH did not do that. Instead UH chose to present every new telescope project as the last telescope project, making unenforceable promises to decommission deteriorating facilities and better "manage" the conflict between conservation and urbanization.

The fact is: none of the additional 12 telescopes on Mauna Kea should have been built without express authorization from the Land Use Commission. That authorization comes in the form of a district boundary amendment. There was no LUC review of the appropriateness of an urban district on the summit of Maunakea. This deprived the Kanaheles, and all other citizens, of a legally required opportunity to protect their rights. Because UH failed to properly amend the boundary designation for the summit of Mauna Kea before constructing dozens of industrial structures, we urge the Land Use Commission to find that UH improperly urbanized the summit area of Mauna Kea.

(2) We hold that the Conservation District set lands aside for special protection, and that the criteria set out under the administrative rules identify the natural and cultural resource protections set out under the constitution for a safe and healthful environment. BLNR does not have the authority to allow industrialization within the Conservation Districts, and Mauna Kea is no exception. We hold that no further construction on Mauna Kea summit areas be undertaken, because such action would need to comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district. No, in fact, Mauna Kea summit region is a National Natural Landmark, a State Historic District, a Traditional Cultural Property, and a unique ecosystem with endemic flora and fauna found nowhere else on earth. As such, Mauna Kea deserves the highest protected land use designation!

We do NOT support having Mauna Kea designated as an urban district. We DO support having any future construction proposed for Mauna Kea summit areas require an urban designation by LUC. If UH had properly followed this procedure, it would have followed mandated boundary amendment procedures, and would have ensured an opportunity for public involvement and legal scrutiny appropriate for this magnitude of change.

3) Even if "an observatory" is allowed under the general lease, "the current situation--thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," ; transportation and storage of hazardous materials; and noise from construction, air conditioners, and telescope operations--is inconsistent with allowed conservation district uses. In a "management plan" developed without the oversight or approval of BLNR or LUC, the University designated an "Astronomy Precinct" without defined boundaries, to justify increasing the land use intensity within the summit region's most vulnerable alpine ecosystem, and within the realm of wao akua, possibly the most culturally revered site in the Pacific. The "astronomy precinct "was cut out from the rest of the conservation district and targeted for intense development without approval from the only oversight agency with authority to designate such a precinct.

The Land Use Commission (LUC), has the legal authority to hear this petition and, you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law .

Sierra Club members, including Mae Mull, Nelson Ho, Deborah Ward, Fred Stone, Cory Harden, and many others have been providing testimony on EIS documents and public hearings, sitting on committees, and taking part in contested case hearings since the 1970's. Sierra Club et al prevailed in a contested case hearing regarding a proposed 4-8 outrigger expansion of the Keck telescopes, resulting in Judge Hara's order requiring the development of a Comprehensive Management plan to consider the protection and appropriate management of the Conservation District on Mauna Kea. Despite the protections set out in the state constitution, the administrative rules, and the management plans dating back to 1977 to today, and despite the Legislative Auditor's reports, dating back to 1998, and several since then, outlining the failures of management by the University and DLNR, the summit region has been transformed into an area where visual elements of wilderness have been obstructed, ecosystems have been impacted, cultural and religious actions of native practitioners have been restricted and discouraged, documented sewage spills, hazardous waste releases, and unlined cesspools continue, and the management has failed to address the legitimate concerns of the people of the island.

We respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for the ecologically vulnerable and culturally significant public trust lands of Mauna Kea.

Sincerely,

Deborah Ward

Chair, Hawaii Island Group, Sierra Club

**From:** nahele@yahoo.com
**To:** DBEDT LUC
**Subject:** I SUPPORT the Kanaheles petition,
**Date:** Tuesday, October 22, 2019 10:28:41 AM

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Aloha Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission,

**I SUPPORT the Kanaheles petition because the number of telescopes is now an entire community in itself. Further telescopes should comply with LUC boundary amendments to reclassify conservation lands into the urban district, but realistically these are inconsistent with conservation lands.**

Please protect our public trust resources and preserve our traditional and customary rights.

Mahalo,

Karen Luke
91-429 Ewa Beach Road
Ewa Beach, HI 96706

| | |
|---|---|
| **From:** | Kapela Eli |
| **To:** | DBEDT LUC |
| **Subject:** | Mauna Kea Zoning Testimony |
| **Date:** | Tuesday, October 22, 2019 10:58:53 AM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanaheles' petition, and ask that you declare that:
(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but **you have constitutional obligations to protect public trust resources and traditional and customary rights**. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, l **and use laws should be applied and enforced** equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

***As a mother of 4 children who descend from ancestors buried on the island of Hawai'i and Mauna Kea, I ask that you consider the rights and privileges of my children to preserve the burial grounds and cultural access to the sacred spaces of their ancestors. Our children should not be raised in a world where financial interests of a few supersedes the sanctity of their homeland and severs their relationship with the lineage from which they hail. My children should have a right to see their 'aina kupuna, in a pristine state, in the condition that it has been kept for hundreds of years. It is our kuleana to ensure that the legacy that we leave behind is one of aloha, malama and pono.***

***The State of Hawai'i, the University of Hawai'i and this LUC has failed to uphold the responsibility of fostering our ancestral lands so that it may sustain us culturally, physically, psychologically and spiritually. You have not upheld your responsibility to our people and our children. Use this opportunity to take the corrective actions required to return Mauna Kea to it's natural state by removing ALL structures atop its summit. Take the actions required to restore the trust of the Hawaiian people by heeding our call and preserve our rights to access, care for and nurture our sacred mauna. Take the actions required to rebuild a relationship with our people, Hawaiian or not, in order to re-establish our trust in the flawed legal systems that have ignored Hawai'i's people for so long.***

I respectfully ask that you **GRANT** the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Me ke aloha 'aina a mau loa aku,

Kapela Eli
Mother, Teacher, Constituent
Waiʻanae, Oʻahu

**From:** sheridan@greenaction.org
**To:** DBEDT LUC
**Subject:** Written Testimony-In SUPPORT of the Kanaele Petition-Sheridan Noelani Enomoto
**Date:** Tuesday, October 22, 2019 11:38:53 AM

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I, Sheridan Noelani Enomoto, submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:

- (1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
- (2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
- 3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawaiʻi State Constitution, you are required to,

"conserve and protect Hawaiʻi'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."

Further, Article XII, § 7 of the Hawaiʻi Constitution provides:

"The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa 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."

The Hawaiʻi Supreme Court went on to later interpret this section of the Hawaiʻi State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty

with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

In Health and Environmental Justice,

Sheridan Noelani Enomoto

**From:** Mahina Oshie
**To:** DBEDT LUC
**Subject:** SUPPORT of DR19-67-KANAHELE-re-Mauna-Kea
**Date:** Tuesday, October 22, 2019 11:58:32 AM

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Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:

(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.
As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai‘i State Constitution, you are required to,

"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."

Further, Article XII, § 7 of the Hawai‘i Constitution 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."

The Hawai‘i Supreme Court went on to later interpret this section of the Hawai‘i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

As a woman and Kanaka Maoli (Indigenous Hawaiian) I feel the need to speak up in support of the Kanaheles petition. There are many places in the world where a telescope can be built but there is only one place where my wao akua reside. This is a beautiful opportunity to create a precedent for righting just some of the wrongs done to Indigenous communities the world

over. Let Hawai`i lead the way in how to treat it's most marginalized peoples. Let Hawai`i show the world how to coexist successfully with an Indigenous community, the environment and the scientific community.

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Mahina Oshie

**From:** Miles Yoshioka
**To:** DBEDT LUC
**Subject:** Testimony of non support of Declaratory Order
**Date:** Tuesday, October 22, 2019 11:59:39 AM
**Attachments:** LUC testimony  Petition for Declaratory Order.pdf

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Aloha,
Thank you for the opportunity to share our organization's position on the matter. Our testimony is attached.
Sincerely,

Miles Yoshioka
Executive Officer
Hawai'I Island Chamber of Commerce
1321 Kino'ole Street
Hilo, HI 96720
Phone: 808-935-7178

# Hawai'i Island Chamber of Commerce

1321 Kino'ole Street
Hilo, Hawai'i 96720
Phone: (808) 935-7178
Fax: (808) 961-4435
E-mail: admin@hicc.biz
*www.hicc.biz*




October 22, 2019

Mr. Jonathan Scheuer, Chair
and Commissioners
Land Use Commission
235 South Beretania Street, Suite 406
Honolulu, Hawai'i 96813

Subject: Comments of the Hawai'i Island Chamber of Commerce regarding the Petition for Declaratory Order
Docket No. DR19- 67
Ku'ulei Higashi Kanahele and Ahiena Kanahele
TMK No 4-4-015:009 (por.)

Dear Chair Scheuer and Commissioners:

The Hawai'i Island Chamber of Commerce respectfully submits its testimony of **non-support** of the subject Declaratory Order. The statutes of the State of Hawai'i are clear that the Board of Land and Natural Resources (BLNR) is the authorized state agency charged with governing conservation districts including determining appropriate land uses on such lands.

The BLNR governs the use of the conservation districts through administrative rules under which a number of activities can sometimes only take place in natural resource settings which are by their nature are zoned conservation districts. Such activities include, commercial forestry; dredging, filling or construction of marine structures such as piers, marinas and harbors; mining and extraction of materials such as geothermal; construction of artificial reefs; aquaculture, and astronomy facilities. Astronomy facilities can only be located in high areas and utilize the open space above the clouds where there is considerably less turbulence and light pollution to obscure the very faint light originating from celestial bodies millions and in some cases billions of light years away. The observatories on Maunakea are not engaged in industrial operations but are conducting research by simply observing the skies with a telescope. Further, the impact of construction and operations of observatory facilities are subject to review under Environmental Impact Statement and are subject to very strict conditions pursuant to BLNR rules and permit conditions.

Prior to a review and ruling by the Hawai'i Supreme Court, the Thirty Meter Telescope (TMT) project underwent a grueling and lengthy community and public review and hearings in addition to two contested cases. The Hawai'i Supreme Court conducted its own extensive review of the TMT project and upheld the BLNR Conservation District Use Permit noting that BLNR conducted a thorough review of the project according to criteria set forth in the Conservation District rules.

The Hawai'i Island Chamber urges the Land Use Commission to not support this Declaratory Order and uphold State law that authorizes the BLNR as the recognized State agency governing Conservation Districts.

Respectfully submitted

Miles Yoshioka
Executive Officer

| | |
|---|---|
| **From:** | Jenn Shaw |
| **To:** | DBEDT LUC |
| **Subject:** | Kanaheles' Petition |
| **Date:** | Tuesday, October 22, 2019 12:06:39 PM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:

(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.
As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to,

"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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and

enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

As a native Hawaiian descendant and mother I would love the opportunities for my children to further learn about their cultural practices. I believe by protecting Hawaiian sacred land this will allow our culture to thrive.

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Jennifer Shaw

**From:** Tiara Na"puti
**To:** DBEDT LUC
**Subject:** Comment in support of Kanaheles' petition
**Date:** Tuesday, October 22, 2019 12:26:24 PM

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Resending my comment below, as I received a delivery error message after submitting earlier today.

---------- Forwarded message ---------
From: **Tiara Na'puti** <tiara.naputi@gmail.com>
Date: Tue, Oct 22, 2019 at 10:27 AM
Subject: Comment in support of Kanaheles' petition
To: <debedt.luc.web@hawaii.gov>

Håfa Adai (Greetings) Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

As an Indigenous Chamoru woman, I recognize the industrialization of the summit as devastating desecration--these kinds of activities are happening in similar and distinct ways in Guåhan/Guam and throughout the Mariana Islands. These activities affect our access to land, our connections with our ancestors, and other cultural resources--no amount of industrial development could ever replace these life giving elements and our way of cultural practice. Therefore, like so many others who have written to you and in solidarity from the Marianas, I respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:

- (1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
- (2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
- 3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights.

We know that sprawling telescopes that have taken over the summit of Mauna Kea do not belong in a conservation district. And, we know that 18-story buildings, like the TMT, are inconsistent with a conservation district designation.

We know that UH needs to follow state Land Use laws. We know that the people of Hawai'i were never given a chance to say "no" to the de facto industrial research zone atop Mauna

Kea.

The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai‘i State Constitution, you are required to,

“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.”

Further, Article XII, § 7 of the Hawai‘i Constitution 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.”

The Hawai‘i Supreme Court went on to later interpret this section of the Hawai‘i State Constitution to impose an affirmative duty “to preserve and protect traditional and customary native Hawaiian rights.” You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

Please grant the Kanaheles’ petition for declaratory orders, please support and honor the most appropriate designation for the summit area of Mauna Kea -- "conservation."

Saina Ma'åse'

Tiara Na'puti

**From:** Mike Maddux
**To:** DBEDT LUC
**Subject:** Kanahele Petition support
**Date:** Tuesday, October 22, 2019 1:36:16 PM

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Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanahele's petition, and ask that you declare that:
(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, §1 of the Hawai‘i State Constitution, you are required to,

"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."

Further, Article XII, § 7 of the Hawai‘i Constitution 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."

The Hawai‘i Supreme Court went on to later interpret this section of the Hawai‘i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

I personally have no kama aina rights but I am sympathetic to the argument that those rights have been abused and believe the evidence can no longer be ignored. Not to mention UH making a mockery of the "conservation land" code and by logic those who are tasked with protecting these lands.

I respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Me ka pono,

Mike Maddux
Hawi

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

**I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:**

- **(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;**

- **(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and**

- **(3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.**

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries.

Under Article XI, § 1 of the Hawai'i State Constitution, you are required to,

> "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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.”

The Hawai‘i Supreme Court went on to later interpret this section of the Hawai‘i State Constitution to impose an affirmative duty “to preserve and protect traditional and customary native Hawaiian rights.” You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer, the proposed project, or socio-economic status, land use laws should be applied equally and enforced. Here, the University of Hawai‘i must follow State Land Use laws. The University of Hawai‘i should be required to follow proper processes as defined by law and seek a boundary amendment.

The most important reasons are to stop all desecration of our ke Akua creations in “His” beautiful world are for the protection of our Aina, for the next generations of kanaka maoli, kane and wahine. Enough is enough! Don’t forget that all of you have a Humble commitment to “Malama Aina.”

I respectfully ask that you GRANT the petition for declaratory order and grant the Kanaheles’ petition to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Maxine Kahaulelio

| | |
|---|---|
| **From:** | manifestaloha@yahoo.com |
| **To:** | DBEDT LUC |
| **Subject:** | The Land Use Commission hearing on TMT/astronomy: Astronomy is consistent with conservation district - no need to change |
| **Date:** | Tuesday, October 22, 2019 2:56:08 PM |

Aloha

I am writing to proclaim that astronomy is consistent with use in a conservation district and no re-zoning is required to make it industrial.

Points:

- Recent Hawaii Supreme Court decisions clearly and emphatically affirm that astronomy is a permitted land use in a conservation district (Kilakila O' Haleakala vs. Univ. of Hawaii 2016; MKAH vs. BLNR 2018)

- The Hawaii Supreme Court's decision upholding TMT's permit also clearly notes (and does not question) that the astronomy precinct resides within a conservation district. (MKAH vs. BLNR 2018)

- It further clearly notes that "the use of land by TMT is consistent with conservation ...". (MKAH vs. BLNR 2018).

For these above reasons alone, the Supreme Court affirms that astronomy on Mauna Kea is an expressly permitted use consistent with conservation.

Thus, the proposed re-designation of astronomy facilities on Mauna Kea as "industrial" -- requiring rezoning -- is inconsistent with Hawaii Supreme Court rulings and thus cannot be accepted.

Furthermore, the law supports the current designation of astronomy facilities as permitted on Mauna Kea; the process by which astronomy facilities are approved for Maunakea shows a rigor and care required for building in a conservation district.

- The designation of astronomy facilities as permitted uses on Maunakea is clear from state law. Maunakea is in the Resource Subzone within the Conservation District. One of the permitted use in this subzone is astronomy facilities under an approved managemen plan (HAR 13-5-24)

- Land use on Maunakea undergoes a rigorous review process. DLNR requires UH to submit a CDUA for astronomy facilities on Maunakea.

- Residents may request a contested case hearing to advocate for their position on the proposed land use.

- Before a CDUA for a major project proposed for Maunakea is submitted to DLNR, it is reviewed and evaluated through a University review process involving extensive community participation with multi-layers of review and input.

Points:

- Recent Hawaii Supreme Court decisions clearly and emphatically affirm that astronomy is a permitted land use in a conservation district (Kilakila O' Haleakala vs. Univ. of Hawaii 2016; MKAH vs. BLNR 2018)

- The Hawaii Supreme Court's decision upholding TMT's permit also clearly notes (and does not question) that the astronomy precinct resides within a conservation district. (MKAH vs.

BLNR 2018)

- It further clearly notes that "the use of land by TMT is consistent with conservation ...". (MKAH vs. BLNR 2018).

For these above reasons alone, the Supreme Court affirms that astronomy on Mauna Kea is an expressly permitted use consistent with conservation.

Thus, the proposed re-designation of astronomy facilities on Mauna Kea as "industrial" -- requiring rezoning -- is inconsistent with Hawaii Supreme Court rulings and thus cannot be accepted.

Furthermore, the law supports the current designation of astronomy facilities as permitted on Mauna Kea; the process by which astronomy facilities are approved for Maunakea shows a rigor and care required for building in a conservation district.

- The designation of astronomy facilities as permitted uses on Maunakea is clear from state law. Maunakea is in the Resource Subzone within the Conservation District. One of the permitted use in this subzone is astronomy facilities under an approved managemen plan (HAR 13-5-24)

- Land use on Maunakea undergoes a rigorous review process. DLNR requires UH to submit a CDUA for astronomy facilities on Maunakea.

- Residents may request a contested case hearing to advocate for their position on the proposed land use.

- Before a CDUA for a major project proposed for Maunakea is submitted to DLNR, it is reviewed and evaluated through a University review process involving extensive community participation with multi-layers of review and input.

Thus, there is no need to change this to industrial zoning.

Mahalo
Katherine Roseguo
Resident and voter,
Hawaii County, East Hawai'i

Please - remember, reduce, reuse, recycle, renew, refresh, recover, restore, respect, refuse, reintegrate, rethink, revitalize, replant, replanet, regreen, refurbish, regrow, rot.

| | |
|---|---|
| **From:** | Eddie Werner |
| **To:** | DBEDT LUC |
| **Cc:** | Scheuerj001@hawaii.rr.com |
| **Subject:** | Request for a Status Hearing and An Order to Show Cause |
| **Date:** | Tuesday, October 22, 2019 3:06:18 PM |
| **Attachments:** | LUC.10.22.19.pdf |

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Aloha Chair Scheur and Land Use Commission members:

Please find my letter attached on requesting a status hearing and an order to show cause given non-compliance with the conditions, representations, and commitments of a land use commission district boundary amendment in 1971 (A71-275) for TMKs 8-7-009:025 and 8-7-021:026. Mahalo for your time and attention.

Sincerely,

Eddie Werner
89-470 Farrington Hwy
Waiʻanae HI, 96792

October 22, 2019

*Via E-mail and Certified Mail*

State of Hawai'i Land Use Commission
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawai'i 96804-2359

Re: Requesting a Status Hearing and An Order to Show Cause given Non-Compliance with Conditions, Representations, and Commitments of a Land Use Commission District Boundary Amendment in 1971 (A71-275) for TMKs: 8-7-009:025 and 8-7-021:026

*Aloha* Chair Jonathan Likeke Scheuer, Ph.D.:

I hope this message finds you well. *Mahalo* to you and the other commissioners for all your good work on the State of Hawai'i Land Use Commission (LUC). I ask that the LUC conduct a status hearing on properties currently owned by PVT Land Company, Ltd. at TMKs: 8-7-009:025 and 8-7-021:026. On September 17, 1971, the LUC approved the amendment of approximately 178.6 acres from the Agricultural District into the Urban District at Lualualei, Wai'anae, O'ahu, identified at TMKs mentioned above by petitioner Oceanview Ventures (A71-275).

During the 1971 proceedings, Oceanview Ventures went before the LUC presenting that the boundary amendment was needed in order to build affordable housing on the above-mentioned sites. Subsequently, the LUC granted the district boundary amendment for the affordable housing project to move forward and the mentioned sites were redesignated to Urban. However, after much anticipation by the community for over 45 years, there seems to be no affordable housing forthcoming at those sites. Instead, the community has suffered a construction and demolition landfill.

As such, I request the LUC to have a status hearing on this matter. If the site has not met the conditions, representations, or commitments indicated in 1971, I respectfully request the LUC to issue an Order to Show Cause pursuant to Hawaii Administrative Rules §15-15-93 and revert the mentioned parcels back to Agriculture.

*Me ke aloha,*

Eddie Werner
89-470 Farrington Hwy
Wai'anae HI, 96792
(808) 330-4810 / alohaeddiewerner@gmail.com

cc: Dan Orodenker, Executive Director Land Use Commission

**From:** Momi Wheeler
**To:** DBEDT LUC
**Subject:** In SUPPORT of the Kanahele Petition
**Date:** Tuesday, October 22, 2019 4:46:11 PM

---

Aloha e Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission,

I submit this testimony in SUPPORT of the Kanahele petition and ask that you declare that:

> (1) The existing telescopes built on Mauna Kea have created a de facto urban district outside of Land Use Commission (LUC) procedures;
>
> (2) Further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
>
> (3) Even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission, you not only have the legal authority to hear this petition before you, but you have the constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to:

> "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."

Further, Article XII, § 7 of the Hawai'i State Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is PONO, follow the law, and uphold your trust duty with respect to these culturally significant public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

I respectfully ask that you GRANT the Kanahele petition for declaratory order to ensure that

proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Aloha ‘Aina,
Momi Wheeler
Waikahekahe Nui, Hawai‘i Island

**From:** Erik Meade
**To:** DBEDT LUC
**Subject:** Testimony in SUPPORT of the Kanaheles" petition
**Date:** Tuesday, October 22, 2019 7:01:35 PM

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I submit this testimony in SUPPORT of the Kanaheles' petition.

In the light of science and exploration of the universe as promised by proponents of the Thirty Meter Telescope, after Fifty Years of Mismanaging Mauna Kea ( https://vimeo.com/247038723 ), I cannot but help be reminded of systemic failures of NASA's culture reported after the investigation of the 2003 Columbia disaster, a mere seventeen years after Challenger. Where the board noted that this repeat disaster "... has not demonstrated the characteristics of a learning organization". This misuse of conservation land is yet another step of the systemic cultural failure in the management of Mauna Kea. Please follow the law and reclassify Mauna Kea or follow the law and conserve Mauna Kea.

The Administrative Procedure Act (APA) requires that decisions take into account the most recent science and data. When it comes to conservation the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem (IPBES) has stated on page 22 of the IPBES's 2019 Global Assessment Report on Biodiversity and Ecosystem Services report ( https://www.ipbes.net/system/tdf/ipbes_7_10_add.1_en_1.pdf?file=1&type=node&id=35329 )that "Much of the world's terrestrial wild and domesticated biodiversity lies in areas traditionally managed, owned, used or occupied by indigenous peoples and local communities. In spite of efforts at all levels, although nature on indigenous lands is declining less rapidly than elsewhere, biodiversity and the knowledge associated with its management are still deteriorating" Simply put, conservation experts are the local indigenous peoples and ignoring that expertise runs counter to APA rules. Please follow the law.

Daily, many of my fellow law students and I, are distressed seeing demands to remove the protectors because of "the rule of law", when we see how little the law has been followed over the last fifty years bringing us to this point. Even more so when we see an expensive, militarized, police force (seemingly understaffed were crime is an issue) bearing down on peaceful people who simply want the justice that they were promised. Please follow the law before using the law against the peaceful protectors.

Sincerely,
Erik Meade

| | |
|---|---|
| **From:** | Audrey Allencastre |
| **To:** | DBEDT LUC |
| **Cc:** | Jenny Twelvetrees |
| **Subject:** | Testimony in Support of the Kanaheles" petition |
| **Date:** | Tuesday, October 22, 2019 5:03:35 PM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

We submit this testimony in SUPPORT of the Kanaheles' petition, and ask that you declare that: (1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of Land Use Commission ("LUC") procedures;

(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and

3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the LUC, you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to,

"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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

If only our wishes for Mauna Kea could be zapped into reality simply because of the passion of our hearts. But we understand that procedures, according to rules and the law must be followed. I am an Okinawan woman born and raised on Maui. Jenny is a haole who was born and raised in New Jersey and who has called Maui her home for as long as I have known her - puka thirty (30) years. We are not of the blood but our hearts hurt when we think of the commercialism of Mauna Kea. Pure science is magnificent. But excuse us if we say that the observatories are

commercial ventures tinged with prestige, power, and money. The real world functions that way. Here we (you and us) have an opportunity to rise and protect Mauna Kea because it is the right thing to do. How will disrupting this Wao Akua disrupt our cultural practice? As we said, we are not of the blood, but we have a strong heart connection to Mauna Kea. The Hawaiian people have lost alot. Alot. In huge chunks and then bit by bit. Loss is quick. Restoration is slow. You have the knowledge of LUC rules and how it all operates. Please open to a solution that will "save" Mauna Kea.

We respectfully ask that you GRANT the Kanaheles‘ petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Mahalo.

Sincerely,

Audrey Allencastre, Ha'iku, Maui

Jennifer Twelvetrees, Keokea, Maui

**From:** Deissery Ann Medeiros
**To:** DBEDT LUC
**Subject:** Re: TMT
**Date:** Tuesday, October 22, 2019 7:18:29 PM

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To whom it may concern,

When I initially heard about the TMT, I was not in favor of it. I thought that there had been enough construction atop Maunakea. But, as I met with its representatives at the local STEM events thrown on the Big Island, I came to support its construction. TMT has not only shown its devotion to the Big Island through its programs and scholarships - they've won every environmental assessment and legal challenge thrown their way. What does it say to the rest of the country, to the rest of the world, when they see an entity that has done everything right be treated in this manner? What business in their right mind, would want to invest their time, money and energy in our aina after seeing what's been done to the TMT?

Now, as the protests drag on and on, I wonder why our state fails to seemingly do nothing but stand by and watch. Our beautiful Mauna now looks like a homeless encampment, and I shudder to think at the damage being done by the hundreds of untrained feet wandering along its slopes.

The Big Island is the poorest state in the county, and I can't imagine what will happen if we lose the TMT. Not only do we stand to lose the quality STEM education and programs that they offer, but our schools stand to lose a significant amount of educational grants. I know that many of the protestors say that it's "not about the money," and that those of us who value an education should "move somewhere where education is a priority" but why does it have to be this way?

The scariest part about this protest is that there is no plan for afterwards. If we lose the TMT, what will the protestors do? Cheer and party? Sure. But what about afterwards when the realization sets in that we are now almost 100% dependent on tourism? What happens if/when the anticipated recession hits, and tourism slows to a trickle? What happens if/when automation takes over the jobs?

Lastly, what happens if the TMT sues the state? It'd be financially devastating. We've already paid approximately $10 million dollars towards this protest. How much more can this state afford to be financially bled? Especially if the TMT decides to sue?

I understand their anger and their frustration, and if I believed for a moment that the TMT was a bad choice, I'd be up there with them. However, they're not responsible for what happened in the past. Ending the TMT will not fix the transgressions of the past, now will it help solve our current problems.

Therefore, please open the road, and let construction of the TMT begin.

Mahalo.

| | |
|---|---|
| **From:** | Danny Wassman |
| **To:** | DBEDT LUC |
| **Cc:** | Nancy |
| **Subject:** | Testimony In Support of the Kanaheles |
| **Date:** | Tuesday, October 22, 2019 8:09:35 PM |

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

**I submit this testimony in SUPPORT of the Kanaheles petition, and ask that you declare that:**

- (1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
- (2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
- 3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to,

> "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

*It would be like if we went to Gettysburg and built a Hawaiian village right in the middle of all the graves that are there. Please Respect the lands that are sacred to us.*

I respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Sincerely,

Daniel Kalani Wassman

**From:** poiboy1964@hawaiiantel.net
**To:** DBEDT LUC
**Subject:** My Testimony- Land Commission Hearing - October 24, 2019
**Date:** Tuesday, October 22, 2019 9:56:47 PM

Aloha Land Use Commission,

The following is just one of the reasons why the observatories built, in the conservation district on Maunakea, are legally valid under Hawaii State Law and why the this petition must be rejected.

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Hawaii Administrative Rules

Title 13: Department of Land and Natural Resources

Chapter 5: Conservation District

Subchapter 3: Identified Land Uses and Required Permits

§13-5-24: Identified land uses in the resource subzone.
(a) In addition to the land uses identified in this section, all identified land uses and their associated permit or site plan approval requirements listed for the protective and limited subzones also apply to the resource subzone, unless otherwise noted.

(4) Identified land uses beginning with letter (D) require a board permit, and where indicated, a management plan.

R-3 Astronomy Facilities

(D-1) Astronomy facilities under a management plan approved simultaneously with the permit is also required.

HAR 13-5 Exhibit 1
Sub zones designations:
“H-46 Mauna Kea,” Hawaii, June 4, 1978

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HAR §13-5-24 specifically states that astronomy facilities are permitted, within the conservation district of Mauankea, as long as the required permit is obtained and a management plan is in place. There is no need to change the land classification of the “Astronomy District” from “Conservation” to “Urban”.

Malama Pono,

Kenneth Wagner
Honolulu, HI

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| | |
|---|---|
| **From:** | Joseph Camara |
| **To:** | DBEDT LUC |
| **Subject:** | Written testimony in support of Kanahele"s Petition to require land use designation change prior to further development in the Conservation District on Mauna Kea |
| **Date:** | Tuesday, October 22, 2019 11:14:26 PM |
| **Attachments:** | Joseph Kualii Lindsey Camara Land Use Commission Testimony.pdf<br>wilson-dissent2.pdf |

Aloha Chair Scheuer and Land Use Commission members,

Attached is my written testimony in support of the Kanahele's petition to require land use designation change and application of proper land use laws prior to any further development and urbanization of the Conservation District on Mauna Kea. Also attached for reference is Judge Wilson's Dissenting opinion to the BLNR's decision to grant a CDUP for the TMT. This dissenting opinion is an indispensable resource to understanding how TMT and further astronomy development on Mauna Kea is incompatible with Conservation District laws.

Me ke aloha aina,

Joseph Kualii Lindsey Camara

Joseph Kualii Lindsey Camara Land Use Commission Testimony

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in SUPPORT of the Kanaheles' petition, and ask that you declare that:
(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) even if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

Over Fifty years after a general lease was issued in 1968 to the University of Hawaii to allow the construction of a single ("an observatory") on the summit of Mauna Kea, The University has built (some with after-the-fact permits) 22 structures in the summit region, in the Conservation District. There appears to be no end in sight, as a new telescope has been proposed despite the lack of mention in the Comprehensive Management Plan approved in 2009. Sadly, the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures.

The years of conflict over land use at the summit of Mauna Kea could have been avoided if only the University of Hawai'i (UH) had been honest about its intentions to urbanize this conservation district from the start. If UH had been straight-forward about its intentions to construct over a dozen industrial structures in the conservation district and followed the proper procedures to authorize the use of the summit in this way, then it would have first sought approval from the Land Use Commission to change the boundary designation for this area from conservation to urban. If UH had followed this procedure, then the public, state agencies, UH, and all telescope development advocates would have had clear guidance on what was allowed and not allowed on the summit of Mauna Kea.

But UH did not do that. Instead UH chose to present every new telescope project as the last telescope project, making unenforceable promises to decommission deteriorating facilities and better "manage" the conflict between conservation and urbanization.

Rules and laws that govern development in Conservation District in Hawaii are being bent, broken and redefined in attempting to permit the construction of the Thirty Meter Telescope (TMT). This is clearly articulated in Judge Wilson's Dissenting Opinion to the BLNR's Decision and Order for the Contested Case for CDUA HA 3568 in which he presents and explains the "Degradation Principle", an attempt to justify overdevelopment of the conservation district. An excerpt from page 3 of his dissenting opinion reads:

*"BLNR concludes that the degradation to the summit area has been so substantially adverse that the addition of TMT would have no substantial adverse effect. Thus, while conceding that Mauna Kea receives constitutional and statutory protection commensurate with its unchallenged position as the citadel of the Hawaiian cultural pantheon, the BLNR applies what can be described as a degradation principle to cast off cultural or environmental protection by establishing that prior degradation of the resource—to a level of damage causing a substantial adverse impact—extinguishes the legal protection afforded to natural resources in the conservation district. The degradation principle ignores the unequivocal mandate contained in Hawai'i Administrative Rules (HAR) § 13-5-30(c)(4) prohibiting a Conservation District Use Permit (CDUP) for a land use that would cause a substantial adverse impact to*

*existing natural resources. The BLNR substitutes a new standard for evaluating the impacts of proposed land uses, a standard that removes the protection to conservation land afforded by HAR § 13-5-30(c)(4).*

To give clarity to what Judge Wilson is referring to, BLNR's Conclusion of Law 198 on page 221 is part of how BLNR claims that the TMT development satisfies HAR § 13-5-30(c)(4):

*''Mauna Kea is unlike these examples. TMT opponents who emphasize Mauna Kea's cultural and religious significance and natural beauty basically contend that a large building such as the TMT would detract from the spiritual and aesthetic experience of the mountain in its natural state. This perspective envisions Mauna Kea as a natural landscape, free of large buildings. But the summit of Mauna Kea ceased to be a natural landscape over forty years ago, when the first large observatory, the 80' high UH 2.2 meter telescope was completed in 1970. The 125' high CFHT followed in 1979, the 100' high JCMT in 1987, the 111' high Keck I and II observatories were completed in 1992 and 1996, respectively, and the 151' Gemini and 141' Subaru observatories were completed in 1999. (Dates of completion from Ex. A-3/R-3, vol. 1, p. 3-151; dome heights from Id., p. 3-81.) Large observatories have been a major visual element on the summit for decades. A 13th observatory – the 7th over 100' in height – would not change that. This is exactly like Kilakila, where the "level of impacts on natural resources would be substantially the same even in the absence" of the new observatory''*

HAR § 13-5-30(c)(5) states: 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. In trying to justify the TMT development BLNR and UH attempt to define the surrounding areas as the existing telescopes on Mauna Kea and not the pristine environment that existed prior to astronomy development. This portrayal of the TMT "fitting in" with the surrounding landscape attempts to classify TMT impacts as incremental, instead of being viewed as the latest and greatest portion of the cumulative impact of astronomy development on Mauna Kea. Conclusion 231 on page 226 states:

*"The proposed location of the TMT Project is in relatively close proximity to the eleven other previously developed facilities for astronomy within the Astronomy Precinct, which is the only area now designated for astronomical facilities on Mauna Kea."*

BLNR is well aware of the urbanization and industrialization of the conservation district of Mauna Kea and in in fact using it as justification for further development. It has stretched the interpretations of conservation district laws to an unprecedented extent in an attempt to justify further development on Mauna Kea. These assertions and conclusions threaten to undermine the protections of all conservation district laws in Hawaii.

As the Land Use Commission (LUC), you not only have the legal authority to hear this petition before you, but you have constitutional obligations to protect public trust resources and traditional and customary rights. The LUC has the unique authority to declare what uses are appropriate in which districts, and to also reclassify lands from one district to another or to amend district boundaries. Under Article XI, § 1 of the Hawai'i State Constitution, you are required to "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."

Further, Article XII, § 7 of the Hawai'i Constitution 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."

The Hawai'i Supreme Court went on to later interpret this section of the Hawai'i State Constitution to impose an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." You have the opportunity to do what is pono, follow the law, and uphold your trust duty with respect to these public trust lands.

Regardless of the developer or the proposed project, land use laws should be applied and enforced equally. Here, the University of Hawai'i must follow State Land Use laws. The University of Hawai'i should be required to follow proper processes as defined by law and seek a boundary amendment.

I respectfully ask that you GRANT the Kanaheles' petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of public trust lands.

Me ke aloha aina,

Joseph Kualii Lindsey Camara

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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IN THE MATTER OF CONTESTED CASE HEARING RE
CONSERVATION DISTRICT USE APPLICATION (CDUA) HA-3568
FOR THE THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE RESERVE,
KAʻOHE MAUKA, HĀMĀKUA, HAWAIʻI, TMK (3) 404015:009

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SCOT-17-0000777, SCOT-17-0000811, and SCOT-17-0000812

APPEAL FROM THE BOARD OF LAND AND NATURAL RESOURCES
(BLNR-CC-16-002 (Agency Appeal))

NOVEMBER 9, 2018

DISSENTING OPINION BY WILSON, J.

## I. Introduction

The degradation principle. The Board of Land and Natural Resources (BLNR) grounds its analysis on the proposition that cultural and natural resources protected by the Constitution of the State of Hawaiʻi and its enabling laws lose legal protection where degradation of the resource is of sufficient severity as to constitute a substantial adverse

impact. Because the area affected by the Thirty Meter Telescope Project (TMT or TMT project) was previously subjected to a substantial adverse impact, the BLNR finds that the proposed TMT project could not have a substantial adverse impact on the existing natural resources. [BLNR Decision and Order, p. 219, COL 180] Under this analysis, the cumulative negative impacts from development of prior telescopes caused a substantial adverse impact; [BLNR Decision and Order, p. 220, COL 183] therefore, TMT could not be the cause of a substantial adverse impact. As stated by the BLNR, TMT could not "create a tipping point where impacts became significant." [BLNR Decision and Order, p. 222, COL 200] Thus, addition of another telescope—TMT—could not be the cause of a substantial adverse impact on the existing resources because the tipping point of a substantial adverse impact had previously been reached.

Appellants object to the principle advanced by the BLNR that "without the TMT Project, the cumulative effect of astronomical development and other uses in the summit area of Mauna Kea have previously resulted in impacts that are substantial, significant and adverse" [BLNR Decision and Order, p. 220, COL 183] and, therefore, "[t]he level of impacts on natural resources within the Astronomy Precinct of the [Mauna Kea Science Reserve (MKSR)] would be substantially the same even in the absence of the TMT Project[.]" [BLNR Decision and order,

p. 221 , COL 195] In other words, BLNR concludes that the degradation to the summit area has been so substantially adverse that the addition of TMT would have no substantial adverse effect. Thus, while conceding that Mauna Kea receives constitutional and statutory protection commensurate with its unchallenged position as the citadel of the Hawaiian cultural pantheon, the BLNR applies what can be described as a degradation principle to cast off cultural or environmental protection by establishing that prior degradation of the resource—to a level of damage causing a substantial adverse impact—extinguishes the legal protection afforded to natural resources in the conservation district. The degradation principle ignores the unequivocal mandate contained in Hawaiʻi Administrative Rules (HAR) § 13-5-30(c)(4) prohibiting a Conservation District Use Permit (CDUP) for a land use that would cause a substantial adverse impact to existing natural resources. The BLNR substitutes a new standard for evaluating the impacts of proposed land uses, a standard that removes the protection to conservation land afforded by HAR § 13-5-30(c)(4). Using the fact that the resource has already suffered a substantial adverse impact, the BLNR concludes that further land uses could not be the cause of substantial adverse impact. Under this new principle of natural resource law, one of the most sacred resources of the Hawaiian culture loses its

protection because it has previously undergone substantial adverse impact from prior development of telescopes. The degradation principle portends environmental and cultural damage to cherished natural and cultural resources. It dilutes or reverses the foundational dual objectives of environmental law—namely, to conserve what exists (or is left) and to repair environmental damage; it perpetuates the concept that the passage of time and the degradation of natural resources can justify unacceptable environmental and cultural damage.[1]

---

[1] The duty to preserve and rehabilitate in perpetuity a resource such as Kahoʻolawe that has, over time, been severely degraded by government action is a duty potentially undermined or extinguished under the new degradation principle. See Hawaiʻi Revised Statutes (HRS) § 6K-3(a)(3) (1993) (requiring Kahoʻolawe to be preserved and rehabilitated). The principle is directly contrary to the purpose of the federal National Environmental Policy Act, which notes the obligation of government to protect and restore the environment:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and

(continued . . .)

It is noteworthy that the party responsible for the substantial adverse impact to this protected resource is the State of Hawaiʻi (State). It is uncontested that the State authorized previous construction within the Astronomy Precinct of the MKSR that created a substantial adverse impact. Thus, the party that caused the substantial adverse impact is empowered by the degradation principle to increase the damage. Now the most extensive construction project yet proposed for the Astronomy Precinct—a 180-foot building 600 feet below the summit ridge of Mauna Kea—is deemed to have no substantial adverse impact due to extensive degradation from prior development of telescopes in the summit area. The degradation principle renders inconsequential the failure of the State to meet its constitutional duty to protect natural and cultural resources for future generations. It renders illusory the public trust duty enshrined in the Constitution of the State of Hawaiʻi and

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(. . . continued)

> maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b) (2012).

heretofore in the decisions of this court to protect such resources. And its policy of condoning continued destruction of natural resources once the resource value has been substantially adversely impacted is contrary to accepted norms of the environmental rule of law.

## II. The BLNR and the Majority Fail to Comply with the Requirement of HAR § 13-5-30(c)(4) that the Impact of the Thirty Meter Telescope upon the Existing Adversely Impacted Cultural Resource Be Considered

HAR § 13-5-30(c)(4) prohibits a proposed land use in the conservation district that will cause a substantial adverse impact to existing natural resources: "In evaluating the merits of a proposed land use, . . . [t]he proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region." Because "natural resources" includes cultural resources,[2] land use cannot occur in the conservation district if it causes a substantial adverse impact to existing cultural resources. HAR § 13-5-30(c)(4) sets the standard to evaluate whether the proposed land use project should be permitted. Under this standard, the impact of the proposed land use must be considered with an

[2] "Natural resource" as defined by the version of HAR § 13-5-2 in effect when Appellees submitted their Conservation District Use Application included "resources such as plants, aquatic life and wildlife, cultural, historic, and archaeological sites, and minerals."

understanding of the condition of the existing natural resources. If the land use will cause a substantial adverse impact to the existing natural resources, it is prohibited. The degradation principle violates HAR § 13-5-30(c)(4) by removing the requirement to consider the effect of a proposed land use on the existing natural resource. The degradation principle reverses the requirement that the impact of the new land use be considered; instead, the degradation principle requires that the impact not be considered once the existing resource has suffered a substantial adverse impact. Consideration of the impacts of a proposed land use becomes irrelevant because the existing resource is already substantially degraded [3].

It is undisputed that the relevant area of the TMT project has suffered a substantial adverse impact to cultural resources due to the construction of twelve[4] telescopes: "[T]he

[3] The Majority states that the "BLNR does not have license to endlessly approve permits for construction in conservation districts, based purely on the rationale that every additional facility is purely incremental. It cannot be the case that the presence of one facility necessarily renders all additional facilities as an 'incremental' addition." Majority Opinion at 55 (quoting Kilakila ʻO Haleakalā v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 404, 382 P.3d 195, 216 (2016)). However, the increment with the greatest impact of all telescopes, TMT, is deemed to not cause a substantial adverse impact because prior increments of telescope construction cumulatively caused a substantial adverse impact.

[4] The Astronomy Precinct of the MKSR "currently has eight optical / infrared observatories, three submillimeter observatories and a radio telescope." [BLNR Decision and Order p. 219, COL 179] Eight of these facilities became operational between 1970 and 1992; four became operational between 1996 and 2002. [BLNR Decision and

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cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have previously resulted in impacts that are substantial, significant and adverse." [BLNR Decision and Order p. 220, COL 183] Understandably, the proscription against imposition of a substantial adverse impact upon conservation district land contained in HAR § 13-5-30(c)(4) must be applied in light of the purpose of the chapter of which it is a part. See Kilakila, 138 Hawaiʻi at 405, 382 P.3d at 217. The purpose of HAR Title 13, Chapter 5 is to conserve, protect and preserve the important natural and cultural resources of the State of Hawaiʻi in the conservation district: "The purpose of this chapter is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare." HAR § 13-5-1. To effectuate the protection of cultural resources in the conservation district mandated in HAR Chapter 13-5, HAR § 13-5-30(c)(4) was adopted to prohibit land use that will cause a substantial adverse impact on cultural

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Order p. 21, FOF 134] HAR § 13-5-30(c)(4), the rule protecting natural resources from substantial adverse impacts, was adopted in 1994.

resources. The legislative history, the record of legislative intent preceding HAR § 13-5-30(c)(4), is an unequivocal expression of intent to protect conservation land from the consequences of the degradation principle. Rather than promote further degradation of conservation land that, in its "existing" condition, has been substantially adversely impacted, i.e., degraded, the Hawaiʻi State Legislature (legislature) created a management framework that protects against further degradation. The companion statute that authorized the implementation of HAR § 13-5-30(c)(4) is HRS Chapter 183C. Its purpose is to conserve, protect, and preserve natural and cultural resources in the conservation district—not to establish a process permitting the degradation of such a resource once the resource has been substantially adversely impacted:

> The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature 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 (2011). The adoption of HAR § 13-5-30(c)(4) in 1994 was intended to implement the purpose of HRS Chapter 183C, namely "clarify[ing] the department's jurisdictional and management responsibilities within the State conservation district." H. Stand. Comm. Rep. No. 491, in 1994 House Journal, at 1057. To clarify the responsibility of the State to

conserve, protect, and preserve natural resources, mandatory language prohibiting land use that causes substantial adverse impact on natural resources, including cultural resources, was codified.[5] The legislative history of HRS § 183C-1 and HAR § 13-5-30(c)(4) contains no discussion of or allusion to the degradation principle; instead, its import is to provide more clear protection for Hawaii's natural resources by preventing further damage to conservation land already subjected to substantial adverse impacts.[6]

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[5] HAR § 13-5-30(b) provides that, "[u]nless provided in this chapter, land uses shall not be undertaken in the conservation district." (Emphasis added). HAR § 13-5-30(c) provides that, "[i]n evaluating the merits of a proposed land use, the department or board shall apply the following criteria." (Emphasis added). We have interpreted this language to mean that a proposed land use is "prohibit[ed]" if it violates HAR § 13-5-30(c)(4), the fourth of these criteria. Majority Opinion at 54. As noted, consistent with the clarification of the State's duty to protect cultural resources, the 1994 passage of HAR § 13-5-30(c)(4) specifically defined natural resources to include cultural resources.

[6] HAR § 13-5-30(c)(4) protects natural resources in the conservation district from any land use that causes a substantial adverse impact. HAR § 13-5-30(c)(4) does not allow this protection to be balanced against any competing interest, such as economic value from the proposed land use. If the proposed land use will cause a substantial adverse impact to the existing cultural resource, no amount of compensation or economic benefit is legally capable of justifying the impact. This is in contrast to other Hawai'i resource management regimes, such as the Coastal Zone Management statute, which explicitly requires a balancing test:

> No development shall be approved unless the authority [designated by the county] has first found . . . [t]hat the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests.

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As noted, the BLNR's decision reverses the standard of protection in HAR § 13-5-30(c)(4) requiring evaluation of the impacts of TMT on existing natural resources. The new "reversed" standard ignores the fact that the existing resource has been substantially adversely impacted. The degradation principle eliminates the analytical requirement of HAR § 13-5-30(c)(4) that a determination be made as to whether the proposed land use will have a substantial adverse impact on the resource as it exists. Instead, the degradation principle provides that, once the resource has been substantially adversely impacted, the impact of the proposed land use cannot cause a substantial adverse impact. In this way, the BLNR omits the requirement of HAR § 13-5-30(c)(4) that, regardless of whether the existing resource has previously sustained substantial adverse impact, the impacts of the construction of TMT on existing resources must be considered to determine whether TMT will cause a substantial adverse impact. The BLNR's decision directly contradicts this court's holding in Kilakila that required the

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HRS § 205A-26(2)(A) (2017). Unlike the Coastal Zone Management regulatory regime, under HAR § 13-5-30(c)(4), economic benefit is not available as a justification for a project that will cause a substantial adverse impact on natural resources in the conservation district. A change of the land use classification to a designation other than conservation land would be necessary.

proposed land use to be considered in the context of "existing natural resources within the surrounding area, community, or region." HAR § 13-5-30(c)(4); see 138 Hawaiʻi at 403, 382 P.3d at 215 (considering the impacts of a telescope in the context of the cultural resources of the site on which it was proposed to be located).

Thus, the BLNR and the Majority acknowledge past telescope projects have had a substantial adverse impact on cultural resources,[7] specifically that the cumulative effect of

[7] The BLNR described these impacts as being substantial, significant, and adverse:

> At the summit ridge, the existing observatories obscure portions of the 360-degree panoramic view from the summit area. Overall, the existing level of the cumulative visual impact from past observatory construction projects at the summit ridge area has been considered to be substantial, significant, and adverse.
>
> Development of the existing observatories also significantly modified the preexisting terrain. The tops of certain puʻu, or cinder cones, were flattened to accommodate the foundations for observatory facilities. Some materials removed from the puʻu were pushed over the sides of the cinder cones, creating steeper slopes that are more susceptible to disturbance. Consequently, the existing level of cumulative impact from preexisting observatories on geology, soils, and slope stability is considered to be substantial, significant, and adverse.

[BLNR Decision and Order, p. 21-22, FOF 136-37 (internal numbering and exhibits omitted)] The United Kingdom Infrared Telescope, specifically, was constructed on the summit ridge, which the BLNR described as "a more sensitive cultural area." [BLNR Decision and Order, p. 31, FOF 182] It found that the United Kingdom Infrared Telescope and the James Clark Maxwell Telescope obstruct views to the west, and the 2.2-meter telescope and NASA Infrared Telescope Facility obstruct views to the north. [BLNR Decision and Order, p. 157, FOF 854]

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astronomical development on Mauna Kea and other uses of the summit area "have already resulted in substantial, significant and adverse impacts[.]" Majority Opinion at 55. Yet, based on the fact that the condition of the existing resource has already

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The Majority's conclusion that TMT will not have a substantial adverse impact on existing natural resources comes with little explanation, other than to make clear that it is relying upon the reasoning of the BLNR in its Decision and Order. Majority Opinion at 59 (accepting the BLNR's finding that "the TMT project will not cause substantial adverse impact to the existing natural resources within the surrounding area, community, or region under HAR § 13-5-30(c)(4)").

Though the Majority accepts the BLNR's conclusion of no substantial adverse impact, it provides no explanation as to how the BLNR reached its conclusion. It does not discuss the BLNR's proposition that the substantial adverse impacts already imposed on the cultural resources mean that TMT could not be the cause of a substantial adverse impact. Instead, the Majority begs the question. It states as a premise that TMT does not cause a substantial impact and restates the premise as its conclusion. Thus, the Majority avoids an analysis of whether TMT causes a substantial adverse impact to the existing natural resources. The Majority lists resources that the BLNR concluded will not be affected, including cultural resources, and states that because they are not substantially adversely impacted, the BLNR was correct in concluding there is no substantial adverse impact:

> Because (1) the TMT will not cause substantial adverse impact to existing plants, aquatic life and wildlife, cultural, historic, and archaeological sites, minerals, recreational sites, geologic sites, scenic areas, ecologically significant areas, and watersheds, (2) the abandoned Poliʻahu Road will be restored, (3) five telescopes will be decommissioned, and (4) mitigation and other measures will be adopted, the BLNR did not clearly err in concluding that the TMT will not have a substantial adverse impact to existing natural resources within the surrounding area, community, or region, as prohibited by HAR § 13-5-30(c)(4).

Majority Opinion at 59-60. Most of the Majority's opinion regarding HAR § 13-5-30(c)(4) is spent discussing the mitigation measures. The focus on mitigation by the BLNR and the Majority supports the conclusion that the project will cause a substantial adverse impact.

reached the point of substantial adverse impact, the proposed land use escapes scrutiny as to whether it will cause a substantial adverse impact; the "tipping point" beyond which impacts become substantial has already been reached due to the cumulative impacts of prior telescope development. The TMT project cannot, therefore, be the tipping point to cause a substantial adverse impact. The signature purpose of HAR § 13-5-30(c)(4), to prevent land use that will cause a substantial adverse impact to natural resources in the conservation district, is extinguished. Without the protection afforded by HAR § 13-5-30(c)(4) and HRS § 183C-1, the way is open to a conclusion fraught with illogic: the construction of a telescope the magnitude of TMT will not cause a substantial adverse impact to a natural resource of undisputed significant cultural value—notwithstanding that the resource has already been substantially adversely impacted by construction of twelve existing buildings of lesser size. The real severity of the impact to the resource is made apparent by the effort of the BLNR and the Majority to mitigate the project's effects with conditions that—though ineffective—support that Mauna Kea will be substantially adversely impacted when TMT is constructed.[8]

[8] Although the Majority concludes that, in its degraded condition, the existing resource will not be substantially adversely impacted by the TMT project, it takes a contradictory position

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implying acknowledgment that TMT will cause a substantial adverse impact that must be mitigated. The Majority seeks to mitigate the damage TMT will cause. It relies upon the University of Hawai'i at Hilo's (University) agreement to decommission three telescopes, the Very Long Baseline Array antenna, and one additional observatory. The Majority presumes that the impact from TMT will become less than substantial once the mitigation measures are complete. However, HAR § 13-5-30(c)(4) prohibits land use in the conservation district where the land use will cause a substantial adverse impact. Thus, restoration of cultural resources to a condition that is not substantially adversely impacted must occur before a Conservation District Use Permit is granted.

Moreover, the mitigation measures adopted by the BLNR and the Majority do not constitute reasonable mitigation measures. They are illusory. Three of the telescopes have no required date of decommissioning. Instead, removal is relegated to an undefined point in the future when it is "reasonably possible" to remove them. These aspirational measures appear in Special Conditions 10 and 11 of the permit:

> The University will decommission three telescopes permanently, as soon as reasonably possible, and no new observatories will be constructed on those sites. This commitment will be legally binding on the University and shall be included in any lease renewal or extension proposed by the University for Mauna Kea;
>
> . . . [C]onsistent with the Decommissioning Plan, at least two additional facilities will be permanently decommissioned by December 31, 2033, including the Very Long Baseline Array antenna and at least one additional observatory.

[BLNR Decision and Order p. 267, DO 10-11 (internal numbering omitted)] If the University fails to decommission the five telescopes, the BLNR would be authorized, but not required, to revoke the permit for TMT. See HAR § 13-5-44. Given that the BLNR speculates that the time it would take for TMT to become operational is a reasonable amount of time in which to decommission three telescopes, [BLNR Decision and Order, p.31, FOF 179] it seems highly unlikely that the BLNR would revoke the TMT permit after this reasonable amount of time has passed—that is, when TMT becomes operational. Even if the permit were revoked due to a failure to decommission the other telescopes, it is not clear that there would be adequate funding to decommission TMT before 2033. [BLNR Decision and Order, p.67, FOF 360] These conditions are little more than aspirational goals, as their enforcement would depend on action taken

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The degradation principle is antithetical to the intent expressed in HAR Chapter 13-5 to provide protection to natural resources in the conservation district. It causes cultural resources protected from substantial adverse impact to lose protection once they are substantially impacted in an adverse manner. The import of this method of rejecting the protection afforded to conservation land is the authorization of degradation of resources with utmost cultural and environmental importance. And so it has happened in the instant case.

## III. The Degradation Principle Violates Norms of Environmental Law

Norms of environmental law support the legislature's intent to protect natural resources on conservation land—notwithstanding that it has been previously subjected to a substantial adverse impact. The degradation principle, on the other hand, violates norms of environmental law. It allows further environmental and cultural damage to occur in a region

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by the very entity presently granting the permit—the BLNR. And the term "as soon as reasonably possible" is vague enough as to be effectively unenforceable. These supposed conditions are ineffective as mitigation measures because their failure can occur at any time up to the completion of the construction of TMT, at which time they are highly unlikely to be put into effect. Rather than mitigating the adverse impact of TMT, they will permit further degradation of the resource that, in its existing condition, has already been substantially adversely impacted.

of great cultural significance because the cultural resource has been previously substantially degraded and compromised. This justification for acceleration of damage to a protected resource runs contrary to the intent embodied in Article XII, section 7 and Article XI, section 9 of the Constitution of the State of Hawaiʻi (Hawaiʻi Constitution) to protect cultural and environmental rights. The degradation principle also contravenes international law that protects the outstanding value of cultural and natural resources, notwithstanding degradation to the resource. These norms include intergenerational equity, polluter pays, and non-regression.

### A. Cultural and Environmental Rights Embodied in the Hawaiʻi Constitution

The degradation principle contravenes provisions of the Hawaiʻi Constitution that protect cultural and environmental rights. Article XII, section 7 affirms and protects the rights of Native Hawaiians to engage in traditional and customary practices. Under Article XI, section 9, every person holds a substantive "right to a clean and healthful environment[.]" Contrary to Article XII, section 7, and Article XI, section 9, the degradation principle teaches that once a natural resource in the conservation district is degraded to the degree that it has suffered a substantial adverse impact, it is no longer

worthy of protection; it bares insufficient worth to protect the resource from additional proposed development.

This court has held that "'[t]he right to a clean and healthful environment' is a substantive right guaranteed to each person by Article XI, section 9 of the Hawaiʻi Constitution[.]" In re Application of Maui Elec. Co., 141 Hawaiʻi 249, 261, 408 P.3d 1, 13 (2017) (quoting Haw. Const. art. XI, § 9). Article XI, section 9 provides:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

In Maui Electric, this court classified this right as "a property interest protected by due process." Maui Elec., at 261, 408 P.3d at 13. The right to a clean and healthy environment is enumerated in laws relating to the environment including, for example, those that prohibit a proposed land use in a conservation district when it will "cause [a] substantial adverse impact to existing natural resources[.]" HAR § 13-5-30(c)(4). The degradation principle undermines the right to a clean and healthy environment because it allows unimpeded destruction of the environment once a determination is made that the natural resource protected from substantial adverse impacts within the conservation district has been subject to

"substantial, significant and adverse" impacts from development. Majority Opinion at 55. Similarly, the degradation principle vitiates the right to practice Native Hawaiian traditional and customary practices embodied in Article XII, section 7 of the Hawaiʻi Constitution[9] whenever the cultural practices have been subjected to a substantial adverse impact in the conservation district.

**B. Intergenerational Equity**

The State holds Hawaii's natural resources in trust "[f]or the benefit of present and future generations[.]"[10] Haw. Const. art. XI, § 1. This court has consistently emphasized the

[9] "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa 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." Haw. Const. art. XII, § 7; see, e.g., In re Waiʻola O Molokaʻi Inc., 103 Hawaiʻi 401, 409, 83 P.3d 664, 672 (2004) (holding that the Commission on Water Resource Management "failed to discharge its public trust duty to protect native Hawaiians' traditional and customary gathering rights, as guaranteed by . . . [A]rticle XII, section 7 of the Hawaiʻi Constitution"); Kalipi v. Hawaiian Tr. Co., 66 Haw. 1, 4, 656 P.2d 745, 748 (1982) (recognizing this court's obligation to protect and enforce the rights of Native Hawaiians to exercise traditional and customary practices embodied in Article XII, section 7 of the Hawaiʻi Constitution).

[10] See, e.g., In re ʻĪao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawaiʻi 228, 276, 287 P.3d 129, 177 (2012); Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 222-23, 140 P.3d 985, 1002-03 (2006); In re Waiʻola O Molokaʻi, 103 Hawaiʻi at 429–31, 83 P.3d at 692–94; In re Water Use Permit Applications (Waiāhole I), 94 Hawaiʻi 97, 113, 129-32, 138-39, 141, 189, 9 P.3d 409, 425, 441-44, 450-51, 453, 501 (2000); Robinson v. Ariyoshi, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982).

responsibility held by the State to ensure that the rights of future generations are preserved. E.g., Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauaʻi, 133 Hawaiʻi 141, 172, 324 P.3d 951, 982 (2014) ("The public trust is, therefore, the duty and authority to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses."); Kelly, 111 Hawaiʻi at 221–23, 140 P.3d at 1001–03 (discussing this court's adoption of the public trust doctrine and the principle of intergenerational equity embodied therein); Waiāhole I, 94 Hawaiʻi at 141, 9 P.3d at 453 ("Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state."); Robinson, 65 Haw. at 674, 658 P.2d at 310 (recognizing the State's concomitant duty to protect water for future generations and ensure that water is "put to reasonable and beneficial uses").[11]

[11] U.S. courts have recognized that the federal government owes a public trust duty to present and future generations. In Juliana v. United States, the U.S. District Court for the District of Oregon ruled that a group of young environmental activists between the ages of eight and nineteen (plaintiffs) had standing to assert substantive due process and public trust claims against the U.S. government based on its failure to adopt adequate measures to decrease the country's reliance on fossil fuels and reduce carbon emissions. Juliana v. United States, 217 F.Supp.3d 1224, 1233, 1267 (D. Or. 2016), motion to certify appeal denied, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017). The plaintiffs argued that the U.S. government has "known for over fifty years that carbon dioxide ("$CO_2$") produced by burning fossil fuels were destabilizing the climate system

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The BLNR promotes an analysis that requires it to ignore the impacts to future land uses arising from the cumulative effect of twelve telescopes built over the last fifty years in the MKSR. Future generations do not receive the benefit of protection of the cultural resource in the future because past substantial adverse impacts render it unnecessary to determine future impacts from TMT. In Unite Here! Local 5 v. City & Cty. of Honolulu, 123 Hawaiʻi 150, 231 P.3d 423 (2010) this court rejected a similar decision to ignore impacts of a proposed land use. In Unite Here!, this court emphasized the importance of considering future impacts from proposed development decisions. The case arose from a proposed expansion of Kuilima Resort at Turtle Bay (Kuilima) on the North Shore of Oʻahu. Unite Here!, 123 Hawaiʻi at 154, 231 P.3d at 427. In 1985, Kuilima submitted an environmental impact statement (EIS) to the Department of Land Utilization. Id. The EIS identified various adverse impacts of the development including "drainage, traffic, dust generation, water consumption, marsh drainage input, loss of agricultural uses, construction noise, air

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in a way that would 'significantly endanger plaintiffs, with the damage persisting for millennia.'" Id. at 1233. The court granted the plaintiffs standing because they established that the "youth and future generations" would suffer harm "in a concrete and personal way." Id. at 1224, 1267.

quality, and sold waste disposal." Id. at 155, 231 P.3d at 428. Over the course of the next twenty years, the project encountered several delays. Id. at 157, 231 P.3d at 430. In 2005—twenty years after the permit was granted—Kuilima submitted a Site Development Division Master Application Form and contended there was no basis for a supplemental EIS (SEIS) to assess changes to the surrounding area. Id. at 154, 159, 231 P.3d at 427, 432. The Department of Planning and Permitting agreed; it ruled that no SEIS was required because "[n]o time frame for development was either implied or imposed by the City Council as part of its [original] approval." Id. at 159, 231 P.3d at 432. Kuilima was allowed to proceed without conducting a SEIS.

Despite the fact that twenty years had passed since the initial project proposal, the circuit court affirmed the Department of Planning and Permitting's decision. Id. at 166-67, 231 P.3d at 439-40. It ruled "that a SEIS is required only when there is a substantive project change and . . . that, as a matter of law, the timing of the project had not substantively changed." Id. This meant that absent a substantial change in the proposal itself, the original "EIS would remain valid in perpetuity and no SEIS could ever be required[.]" Unite Here! Local 5 v. City & Cty. of Honolulu, 120 Hawaiʻi 457, 472, 209

P.3d 1271, 1286 (App. 2009) (Nakamura, J., dissenting), vacated, 123 Hawaiʻi 150, 231 P.3d 423 (2010).

This court reversed the ICA's decision. The court found it significant that substantial, cumulative changes in the area occurred between 1985 and 2005. Unite Here!, 123 Hawaiʻi at 179, 231 P.3d at 452. This included a dramatic increase in traffic and the introduction of endangered and threatened species in the area, including the monk seal and green sea turtle. Id. The court held that the timing of the project had substantively changed and this change had a significant effect on the project. Id. at 180, 231 P.3d at 453. The passage of twenty years created "an 'essentially different action'" than the one proposed, necessitating an SEIS. Id. at 178, 231 P.3d at 451. In Unite Here!, this court contemplated "changes in the project area and its impact on the surrounding communities[.]" Id. In doing so, we considered the impacts of the proposed development on the rights and interests of future generations. Rather than freeze the analysis of the impacts by considering only a period twenty years in the past, this court recognized that the interests of subsequent generations required that the impacts on the resource be considered at the time the construction was to occur.

The BLNR would return to the proposition rejected in Unite Here! that a project need not take into consideration the

impacts of the proposed land use on the resource as it presently exists. The degradation principle removes the need to consider the impacts of TMT on the existing resource; once the existing cultural resource has been substantially adversely impacted, it is unnecessary to consider whether a future land use would cause a substantial adverse impact. In this way the BLNR ignores the rights of future generations to the protections specifically afforded them by the rule adopted in 1994, which mandates that "the proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region." HAR § 13-5-30(c)(4). The legislature did not intend that the rights of future generations to the protection of Mauna Kea be ignored by disregarding the impact of the TMT project on a resource already substantially adversely impacted by the construction of twelve telescopes.

Application of the degradation principle disregards the rights of future generations. It creates a threshold condition of damage—substantial adverse impact—that, once met, renders the resource available for future degradation. In so doing, the degradation principle presumes there is no natural resource value left to protect. The actions of prior and present generations extinguish the chance for future generations to protect the environmental and cultural heritage that once enjoyed legal protection. Future generations are left with the

proposition enshrined in the degradation principle that incremental degradation to "the highest mountain peak in the Hawaiian Islands" and one that "is of profound importance in Hawaiian culture" justifies significant future degradation if the degradation attains a substantial adverse degree. Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res. (Mauna Kea I), 136 Hawaiʻi 376, 399, 363 P.3d 224, 247 (2015).[12]

[12] Intergenerational equity is a tenet of international law. Principle 3 of the Rio Declaration on Environment and Development prescribes the boundaries of intergenerational equity: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Rio Declaration on Environment and Development, princ. 3, June 14, 1992, 31 I.L.M. 874, U.N. Doc. A/CONF.151/26. The International Court of Justice (ICJ) recognized intergenerational equity as early as 1996. In Legality of the Threat or Use of Nuclear Weapons, the ICJ noted "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn." Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 241, ¶ 29. The Supreme Court of the Republic of the Philippines recognized the rights of future generations in Juan Antonio, et al. v. Fulgencio S. Factoran, Jr., G.R. No. 101083, 224 S.C.R.A. 792 (S.C. July 30, 1993) (Phil.). In the Juan Antonio case, the petitioners asserted claims to prevent mass deforestation based on the rights of "their generation as well as generations unborn." Juan Antonio, 224 S.C.R.A. at 798. The court's decision arose from the principle of intergenerational equity:

> We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land,

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**C. Polluter Pays Principle**

The polluter pays principle seeks to deter environmental degradation by imposing liability on the polluter. See Joslyn Mfg. Co. v. Koppers Co., 40 F.3d 750, 762 (5th Cir. 1994). Polluters must pay for the cost of restoring the value of the site damaged by their own activities and those impacted by the damage. Courts in the United States have applied polluter pays to remedy harm to the environment. E.g., United States v. Capital Tax Corp., 545 F.3d 525, 530 (7th Cir. 2008) (recognizing that the government can recover damages from responsible parties to clean up hazardous waste because "the 'polluter pays'" under Title 42, Sections 9606(a) and 9604(a) of the United States Code); Joslyn Mfg. Co., 40 F.3d at 762 (ordering the polluter to pay the cost of restoring a

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> waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.

Id. at 798-99. See also Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 1, 11 (India) (recognizing that intergenerational equity is a cornerstone of the customary international law principle of sustainable development). Thus, intergenerational equity ensures accountability between the generations of mankind.

contaminated site and denying the polluter's "scheme under which it could defray part of its clean-up cost by passing the contaminated property through a series of innocent landowners and then, when the contamination is discovered, demanding contribution from each"); see also Fla. Const. art. II, § 7(b) (incorporating the polluter pays principle to protect the Everglades Agricultural Area by holding those who cause pollution "primarily responsible for paying the costs of the abatement of that pollution").

"Polluter pays" is also a principle of international law. A prominent example of its application occurred in the Trail Smelter Arbitration spanning the late 1930s and early 1040s. See Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (Perm. Ct. Arb. 1938 and 1941). A trail smelter owned by a Canadian corporation emitted noxious sulphur dioxide fumes that drifted and harmed crops in the United States. Id. at 1917, 1965. The Permanent Court of Arbitration[13] held Canada

[13] The Permanent Court of Arbitration is an intergovernmental organization with 121 contracting parties (states) located in the Hague. Permanent Court of Arbitration, https://pca-cpa.org/en/home/ (https://perma.cc/B2V9-TCC9) (last visited Nov. 7, 2018). It was formally established through the Convention for the Pacific Settlement of International Disputes in 1899, arising out of a need for a forum to conduct dispute resolution among states. Id.

financially responsible for the damage and accorded compensation to the United States:

> [U]nder the principles of international law, as well as the law of the United Sates, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence . . . . Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter.

Id. Therefore, the polluter was liable for the environmental and economic harm caused by its pollution. Similarly, in the seminal case Vellore Citizens Welfare Forum v. Union of India & Ors., the Supreme Court of India recognized the polluter pays principle as a tenet of sustainable development—a principle of customary international law. AIR 1996 SC 1, 11-13, 22 (India). A citizens' group challenged tanneries that were releasing untreated effluent into surrounding waterways and land. Id. at 1. The court defined polluter pays:

> [T]he absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation . . . . [P]olluter is liable to pay the cost to the individual sufferers as well as the cost of restoring the environmental degradation.

Id. at 12. The court ordered the formation of an official authority to implement the polluter pays principle to determine

the costs of repaying victims and restoring the environment. Id. at 22.[14]

The Judicial Committee of the Privy Council, reviewing an appeal from Trinidad and Tobago,[15] recently applied the polluter pays principle to address water pollution regulations:

> The Polluter Pays Principle . . . is now firmly established as a basic principle of international and domestic environmental laws. It is designed to achieve the "internalization of environmental costs", by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large.

Fishermen & Friends of the Sea v. the Minister of Planning, Hous. & Env't [2017] UKPC 37 ¶ 2 (appeal taken from Trinidad and

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[14] In the absence of an express statutory or constitutional mandate, the court integrated international norms into domestic law. It noted that when customary international law does not directly contradict domestic law, it is inherently incorporated into domestic law:

> In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays p[r]inciple are part of the environmental law of the country.
>
> Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficultly in accepting them as part of the domestic law. It is almost accepted proposition of law that the rule of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.

Vellore Citizens, AIR 1996 SC at 13. Therefore, the court incorporated the polluter pays principle into its analysis.

[15] Lord Carnwath, assigned from the Supreme Court of England, authored the opinion of the Council.

Tobago).[16] In Fishermen and Friends, a non-profit organization challenged a regulation promulgated by the Minister of Planning, Housing and the Environment that prescribed fixed fee amounts for cases of pollution or environmental degradation. Id. ¶¶ 6-7. The regulation was promulgated under the National Environmental Policy which codifies the polluter pays principle. Id. ¶ 5. Section 2.3(b) of the National Environmental Policy mandates that money collected from polluters "will be used to correct environmental damage." Id. The regulation was challenged as inadequate because it imposed a flat fee on all polluters as opposed to a fee based on actual damage:

> "As a result of the flat fee model which has been selected, no fees collected are being used to correct environmental damage. This also has a consequential effect in respect of proportionality, as there is no ability to tailor the fee to meet the degree of damage which might be caused by different permittees. The costs associated with rectifying environmental damage will obviously vary according to the pollution load, pollutant profile, sensitivity of receiving environment and toxicity."

Id. ¶ 38. Under this reasoning, the court found that the regulation did not adequately incorporate the polluter pays principle and failed to comply with the National Environmental

[16] In 2001, the Minister of Planning, Housing and the Environment promulgated the Water Pollution Rules and the Water Pollution (Fees) Regulations. Fishermen & Friends, ¶¶ 15-16. The Rules and Regulations established a permitting system whereby permittees that were releasing water pollutants above permissible levels were required to pay a "prescribed fee." Id. ¶ 15. "The fee did not vary according to the type or amount of the pollution permitted" and therefore did not apply polluter pays. Id. ¶ 16.

Policy. Id. ¶¶ 43, 45, 53. The court enforced the polluter pays principle to ensure that polluters are held accountable for the actual harm caused by their development.

The Majority recognizes that the University is responsible for the substantial adverse impacts caused by its development in the summit area of Mauna Kea.[17] It is the "polluter" that caused cultural harm. Under the Majority's opinion, the polluter pays principle is reversed. The polluter is permitted to benefit from degradation so adverse that the removal of five telescopes—identified by the BLNR and the Majority—would be necessary to mitigate the substantial adverse impact upon cultural resources. The protection of conservation land for future generations afforded by the polluter pays principle is lost.

**D. Non-regression Principle**

The principle of non-regression imposes an affirmative obligation to not regress, or backslide, from existing levels of legal protection. This principle is generally applied in the context of cultural and social rights, and environmental law. The Clean Water Act,[18] for example, mandates a "general

[17] The University began operating observatories on Mauna Kea in 1968.

[18] Clean Water Act, 33. U.S.C. § 1362 (2014).

prohibition on backsliding[.]"[19] Cmtys. for a Better Env't v. State Water Res. Control Bd., 34 Cal. Rptr. 3d 396, 406 (Cal. Ct. App. 2005), as modified (Sept. 27, 2005). It ensures that "subsequent permit effluent limits that are comparable to earlier ones are not allowed to 'backslide,' i.e., be less stringent." Id.

Nations have included the principle of non-regression in treaties and domestic legislation. For example, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters between Latin America and the Caribbean, adopted in March 2018, provides that the parties shall be guided by the principle of non-regression. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean art. 3(c), March 4, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en z (https://perma.cc/AVK7-5YGM). The European Parliament (Parliament) also applies the non-

[19] The U.S. District Court for the Northern District of California has recognized that the Clean Air Act also implements a non-regression policy. WildEarth Guardians v. Jackson, 870 F.Supp.2d 847, 850 (N.D. Cal. 2012), aff'd sub nom. WildEarth Guardians v. McCarthy, 772 F.3d 1179 (9th Cir. 2014) ("In 1977, Congress further amended the Clean Air Act to add requirements designed to ensure not only that certain air quality standards were attained, but also that the air quality in areas which met the standards would not degrade or backslide.").

regression principle to natural resources. Its significance as a principle of environmental protection was a central feature of the Parliament's commitment to sustainable development. The Parliament specifically adopted a resolution that "calls for the recognition of the principle of non-regression in the context of environmental protection as well as fundamental rights[.]" Resolution of 29 September 2011 on Developing a Common EU Position Ahead of the United Nations Conference on Sustainable Development (Rio+20), PARL. EUR. DOC. P7_TA(2011)0430 (2011). The principle of non-regression was applied by the United Nations General Assembly in 2012. G.A. Res 66/288, ¶ 20, annex, The Future We Want (July 27, 2012). General Assembly Resolution 66/288 recognizes that "it is critical that we do not backtrack from our commitment to the outcome of the United Nations Conference on Environment and Development." Id. (emphasis added).

Notwithstanding prevailing international norms disfavoring backsliding on legal protection of the environment, the analysis of the BLNR and the Majority does so. The purpose of HAR § 13-5-1 is "to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and

welfare." Therefore, the natural and cultural resources in conservation districts have a baseline level of protection from usage that causes a substantial adverse impact.

The degradation principle peels away this protection. It allows further degradation based on damage cumulatively caused by prior impacts. The BLNR's analysis regresses to a former stage of the law—when the conservation district was not protected by the proscription codified in HAR § 13-5-30(c)(4)—that conservation land may be subjected to usage that causes a "substantial, significant and adverse" impact on cultural resources. Prior to 1994, development decisions in the conservation district did not have to account for "conserving, protecting, and preserving the important natural and cultural resources of the State[.]" HAR § 13-5-1. The BLNR's decision encourages regression by reversing protections for critical natural resources in the conservation district. It employs an analysis that renders TMT invisible: "Even without the TMT, the cumulative effect of astronomical development and other uses in the summit area of Mauna Kea have resulted in impacts that are substantial, significant and adverse." Majority Opinion at 55 (emphasis added). The BLNR and the Majority enhance regression by ignoring the impact of TMT. But viewed under the correct standard contained in HAR § 13-5-30(c)(4), TMT is not invisible. The principle of non-regression made explicit in HAR § 13-5-

30(c)(4) requires that the effects of a 180-foot high structure, dug 21 feet into the earth, 600 feet below the summit of Mauna Kea, be considered. The degradation principle treats any further development on the cultural resource as inconsequential because the cultural resource has already been substantially adversely impacted. As applied to the proposed project, the degradation principle adopts a regressive approach to managing environmental and cultural resources in the conservation district that violates HAR § 13-5-30(c)(4).

## IV. Conclusion

The degradation principle ascribes to the legislature the intent that conservation land lose its protection under the Hawaiʻi Constitution and the laws of the State of Hawaiʻi whenever it has been subjected to a substantial adverse impact. HAR § 13-5-30(c)(4) is a direct refutation of such regressive treatment of conservation land. Instead, the legislature intended—consistent with its constitutional duty to future generations—to conserve, protect, and preserve "the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability." HRS § 183C-1. Appellees' Conservation District Use Application proposes a land use that cannot be permitted if it causes a substantial adverse impact on cultural resources. HAR § 13-5-30(c)(4). The degradation principle substitutes a contrary

standard that relieves the permittee of the burden to prove no substantial adverse impact—if the resource is already substantially adversely impacted. Correctly applied—and consistent with the clear intent of Hawaii's legislature and norms of environmental law—HAR § 13-5-30(c)(4) requires that the impacts of TMT be assessed with full recognition that the existing resource has already received cumulative impacts that amount to a substantial adverse impact. In light of the correct standard, whether TMT will have a substantial adverse impact where there already is a substantial adverse impact becomes straightforward. The substantial adverse impacts to cultural resources presently existing in the Astronomy Precinct of Mauna Kea combined with the impacts from TMT—a proposed land use that eclipses all other telescopes in magnitude—would constitute an impact on existing cultural resources that is substantial and adverse. Accordingly, the Conservation District Use Application for TMT must be denied.

/s/ Michael D. Wilson

Dear Chair Scheuer, Vice Chair Cabral, and members of the Land Use Commission:

I submit this testimony in **STRONG SUPPORT** of the Kanahele's petition.

The Land Use Commission (LUC) has a constitutional obligation to protect our public trust resources and the traditional and customary rights of Native Hawaiians, equally.

Under Article XI, § 1 of the Hawai'i State Constitution, the LUC is required to "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."

Under Article XII, § 7 of the Hawai'i Constitution 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." Additionally, the Hawai'i Supreme Court has interpreted this section of the Hawai'i State Constitution to impose an **affirmative duty** for the state "to preserve and protect traditional and customary native Hawaiian rights." Here, the LUC has an opportunity to do what is legally required and uphold its duty, as a state entity, to protect the rights of Native Hawaiians.

The LUC has the unique authority to declare what uses are appropriate in which districts, and to reclassify lands from one district to another or to amend district boundaries. Here, the University of Hawai'i must follow our state land use laws and should absolutely be required to follow the proper processes as defined by law and seek a boundary amendment.

I ask that you declare the following:
(1) the existing telescopes built on Mauna Kea have created a de facto urban district outside of LUC procedures;
(2) further construction on Mauna Kea summit areas must comply with LUC boundary amendment procedures to reclassify conservation lands into the urban district; and
3) if "an observatory" is allowed under the general lease, "the successive, individual approval of thirteen scientific laboratories, other research facilities, and associated offices, parking lots, and utilities," is inconsistent with conservation district uses.

I ask the members of the Land Use Commission to GRANT the Kanahele's petition for declaratory order to ensure that proper land use procedures are followed for perhaps the most culturally significant of all public trust lands.

Please take this opportunity to not only do what is legally necessary, but also what is right for our community.

Respectfully,

Ashley B. Kaono