



Board of Regents <bor@hawaii.edu>

Testimony in opposition to TMT on Mauna Kea

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To: bor@hawaii.edu

Please see my testimony attached.

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*Beyond right and wrong there is a field.
I will meet you there.*

--- Rumi

*Amor fati: let that be my love henceforth!
I do not want to wage war against what is ugly.*

--- Nietzsche



Opposition Statement Mauna Kea UH OHA FINAL.docx

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To the Board of Regents of the University of Hawai‘i and the Board of Trustees of the Office of Hawaiian Affairs:

I. IMMEDIATE ACTION NEEDED

I respectfully urge you to immediately STOP ALL telescope construction activities at the Mauna Kea Conservation District. I urge you to STOP all arrests for those who stand peacefully to protect Mauna Kea.

If construction proceeds, I will suffer an injury based on my strong religious and cultural relationship to this sacred site. Mauna Kea is sacred because it is connected to the creation of Native Hawaiians. It is the meeting place of Papa, Earth Mother and Wākea, Sky Father, who are the parents of the entire human race and the birthplace of humanity, where heaven and earth meet. The cultural significance of this site contains thousands of years of history that supports the well-being of Native Hawaiians and this state.

~~I urge the Board of Trustees of the Office of Hawaiian Affairs to support the protection of Mauna Kea. I ask OHA Trustees to stop further desecration of this site and to urge the Board of Land and Natural Resources (BLNR) to uphold its high fiduciary duty to protect the Public Land Trust in favor of Native Hawaiian beneficiaries, considering the strong spiritual and religious relationship Native Hawaiians have to Mauna Kea.~~

I ask you to support efforts to void the Conservation District Use Permit (CDUP HA-3568) and Thirty Meter Telescope (TMT) Sublease issued by the BLNR/UH for the TMT, and any related permits allowing construction to proceed. These permits violate the Public Trust, the Hawai‘i State Constitution and state regulatory laws.

There are several ongoing legal appeals regarding this project; one of the cases is now before the Intermediate Court of Appeals. While Governor Ige recently requested a time extension to delay the project, the TMT International Observatory LLC will move forward with construction once the extension has ended. Two other appeals pertaining to the TMT Sublease are still pending in the Third Circuit Court. Construction must STOP to allow these cases to be properly adjudicated and for the public to be properly heard.

To date, over 43,000 people have signed a petition urging Governor Ige to stop the construction of TMT.¹ The State arrested thirty-one individuals as well. More individuals have volunteered to be arrested to protect this sacred site.

Thousands statewide, both Native Hawaiians and the general public, oppose the TMT by protesting in their own communities. Many more have committed to begin protests should an adverse decision be made to continue construction.

This issue requires immediate action. I respectfully ask you TO STOP THE FURTHER desecration of Mauna Kea immediately.

¹ See https://www.change.org/p/governor-david-y-ige-stop-tmt-construction-and-arrests-of-mauna-kea-protectors?recruiter=270466896&utm_source=share_petition&utm_medium=email&utm_campaign=share_email_response. (last visited on April 13, 2015)

I. LEGAL VIOLATIONS

- a. **Under Article XI, §§ 1 and 7, and Article 12, § 7, of the Hawai'i State Constitution and § 5(f) of the Admissions Act, BLNR violated the Public Trust when it prioritized private development over the interests of beneficiaries and the protection of customary and traditional rights.**

Mauna Kea Conservation District is public land held in trust for the general public and Native Hawaiians. HAW. CONST. ART. XII, § 4, Admissions Act § 5(f). These lands are not for private use but for public trust purposes including the “betterment of conditions of native Hawaiians.” Admissions Act § 5(f). Thus, “*native Hawaiian beneficiaries* of the ceded lands trust have a ‘right to bring suit under the Hawai'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust.’” OHA v. HCDCH, 117 Hawai'i at 194, 177 (2009).

As primary guardian of public lands, BLNR has an “affirmative duty” to protect and conserve these lands for “the benefit of present and future generations.” HAW. CONST. ART. XI, § 1. The constitution demands accountability and transparency in the management of this natural resource.

As such, BLNR must “administer the trust solely in the interest of the beneficiaries.” Pele Def. Fund v. Paty, 73 Haw. 578, 605 (1992) (“PDF”). In doing this, “it must use reasonable skill and care to make trust property productive, or simply to act as ordinary and prudent person would in dealing with his own property.” HAW. CONST. ART. XI, § 7, PDF at 605.

Contrary to this mandate and the recent public outcry, BLNR failed to meet its trust obligations under the ceded lands trust. BLNR ignored these high fiduciary duties by approving the Conservation District Use Permit (CDUP) without proper consideration of the beneficiaries themselves or the detrimental impact the project would have on this sacred site. Instead, TMT attempts to confuse the public by their Environment Impact Statement, which was conducted by UH-Hilo, who stands to benefit directly by the TMT project.

While the EIS recognizes that “traditional knowledge” of Mauna Kea is of “profound importance in Hawaiian culture,”² it does nothing to address the constitutional mandate to protect Native Hawaiian cultural rights secured by Article XII, section 7, of the Hawai'i State Constitution. HAW. CONST. ART. XI, §7. As such, the EIS identifies that “Mauna Kea is the cultural connection or piko (umbilical cord) to Papa and Wākea, the deities who created Native Hawaiians,” but yet, again it confuses the public to put Astronomy on equal footing as cultural rights. The EIS states, “For the astronomical, community Mauna Kea is the scientific umbilical cord to the mysteries of the universe.” The Astronomy community DOES NOT have protected rights under the Constitution. Agency actions, such as this, fly in the face of the State Constitution and the unique laws of this state.

² See http://www.malamamaunakea.org/uploads/management/plans/TMT_FEIS_voll.pdf (last visited on April 13, 2015).

As such, BLNR failed to act with a sense of fiduciary responsibility to the beneficiaries in the management of these lands. PDF at 605. Public trust purposes such as the “betterment of conditions of Native Hawaiians” and the constitutional mandate to protect traditional rights are the PRIORITY under the law; commercial development use has no priority at all. HAW. CONST. ART. XI, §7, Admissions Act § 5(f). Therefore, these laws collectively provide adequate protection to shield Mauna Kea from further development because of the cultural significance this site has to the identity of Native Hawaiians.

Despite these Constitutional protections, BLNR violated the Constitution by arbitrarily granting a CDUP that would effectively destroy the perpetuation and customary practice of Native Hawaiian culture. By granting a CDUP without properly assessing the cultural impact of the TMT mega telescope, BLNR and UH violated the law by prioritizing corporate development over public trust purposes. An enormous telescope is NOT a public trust purpose and does not have the same constitutional protections as customary and traditional rights.

The decision to grant a CDUP was improper because BLNR and UH did not engage in sufficient, diligent, open and transparent discussions with the public. Instead, BLNR and UH bullied beneficiaries into an agreement they never asked for. This argument is well supported by the 40,000 individuals who signed the petition urging Governor Ige to stop the development of TMT and the mass protests statewide that happened over the last two weeks.³ The recent public outcry in opposition of TMT is material and sufficient enough for the State of Hawai'i to criticize the process by which the CDUP was granted. Did the BLNR do enough to inform beneficiaries and receive proper feedback? I think not! If construction resumes, beneficiaries face severe and irreparable harm by the desecration of this unique and historic site.

b. The State must void the CDUP because the TMT will adversely impact customary and traditional rights.

The TMT project cannot legally meet the criteria for construction (i.e. Land Use). The proposed land use will cause substantial adverse and detrimental impact to Mauna Kea. HAR §13-5-30. The unique characteristics of this sacred site will NOT be preserved and the land use will be materially detrimental to the public health, safety and welfare. *Id.* The size of the project will FOREVER change the natural landscape of Mauna Kea. Once construction resumes, the land beneath it will FOREVER be lost for Native Hawaiians to pay tribute to their deities. They can no longer practice customary and traditional rights such as piko burial, one of many practices of Native Hawaiians. This is important because it links a child to his or her ancestors.

Both the UH/TMT Corporation and BLNR admit the TMT project will cause adverse, significant and substantial impact to the cultural and natural resources of Mauna Kea, yet they do nothing to rectify the issue. BLNR acted improperly in issuing both the CDUP and the Consent to Begin.

I respectfully urge you to STOP the development of TMT and to uphold the mandates of the Constitution to protect and perpetuate beneficiaries and traditional and customary Native Hawaiian rights.

³ *Id.*