



Board of Regents <bor@hawaii.edu>

STOP TMT DEVELOPMENT ON MAUNAKEA

Toelii Maile Peko <tmpeko8@gmail.com>

Tue, Apr 14, 2015 at 9:03 PM

To: bor@hawaii.edu

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.

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.