BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In re Petition requesting a Contested Case Hearing on Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope, Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmākua, Hawai'i, TMK (3) 4-4-015:009	DLNR Docket No. HA-11-05 APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S OPENING BRIEF; CERTIFICATE OF SERVICE

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APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S OPENING BRIEF

I. INTRODUCTION

This case relates to the Conservation District Use Application (the "CDUA") for the Thirty Meter Telescope Project (the "Project") to be located in the Mauna Kea Science Reserve ("MKSR"), District of Hāmākua, Island and County of Hawai'i. The Project is opposed by petitioners Mauna Kea Anaina Hou, Paul Neves, Clarence Kukauakahi Ching, Deborah Ward, KAHEA, and E. Kalani Flores/the Flores-Case 'Ohana/Mo'oinanea (collectively, "Petitioners").

Petitioners' disputes with the Project are fundamentally backward-looking. No one would deny that the way in which astronomy development was conducted on Mauna Kea in the past would be unacceptable today. This is especially true with regard to the attention that must be given to protecting and preserving the natural and cultural resources of the mountain. Equally important is the need for extensive local community involvement in managing those resources and in planning for the future. Based largely on events that are in the past, Petitioners argue that astronomy has reached its end point on Mauna Kea, that no new telescope should be built, and that the only permissible course for the future is to dismantle and remove everything that is already there. As the University will show in this proceeding, however, Petitioners are wrong,

legally and factually. There is a place on the mountain for astronomy to continue and to flourish – but in balanced coexistence with cultural practices, environmental concerns, and recreational uses.

Unlike Petitioners, the University approached this Project by learning from the past, and looking to the future. The Project as it exists today is the refined result of years of outreach and dialogue. From the outset, the University involved all constituencies within the community to an unprecedented degree; it not only listened to the concerns, it actually heard them, and responded. Detailed sub-plans have been prepared to appropriately manage Mauna Kea's resources, and care has been taken to mitigate any impacts. The Project will contribute to the community, and to Mauna Kea itself, in unprecedented ways. It will be a great benefit, not just to the interests of astronomy, and not just to the economy, but to the people of Hawai'i.

As explained more fully below, the issue in this contested case is whether the Project satisfies the criteria set forth in Section 13-5-30(c) of the Hawaii Administrative Rules. The University will voluntarily accept the burden of proof on that issue and will establish that the Project meets, if not exceeds, all applicable criteria. Petitioners' challenges, however heart-felt, will be shown to be meritless.

Simply put, this is a situation in which the applicant has expended enormous time, effort, and resources to do everything right. If Petitioners' challenges are sufficient to defeat this Project, then the only conclusion to be drawn is that under the existing regulatory regime, it is literally impossible to build anything on Conservation District land. That radical conclusion is not good policy, and it is not, and cannot be, the law.

II. THE PROJECT AND ITS PROCEDURAL HISTORY

A. DESCRIPTION OF THE PROJECT

The Project consists of the construction, operation, and ultimate decommissioning of the Thirty Meter Telescope ("TMT") Observatory and related facilities within an area below the summit of Mauna Kea that is part of the 525-acre Astronomy Precinct in the MKSR. The proposed Observatory includes a telescope with a 98-foot (30-meter) primary mirror, the accompanying instruments to record data, the enclosing dome, the attached support and maintenance building, and parking. The Observatory is proposed for approximately 5 acres of land in what is generally referred to as the 13-North ("13N") site within "Area E."

In addition to the Observatory itself, the CDUA covers the proposed TMT Access Way, an improved road and underground utilities connecting the TMT Observatory with existing roads and utilities. It also provides for the use during construction, and eventual partial restoration, of the existing 4-acre Batch Plant Staging Area. Finally, the University proposes upgrades to the existing electrical transformers and related equipment within the Hawaii Electric Light Company substation near the mid-level Hale Pōhaku facility and to the underground electrical wires from that substation to the start of the Access Way.

B. HISTORY OF THE PROJECT

In 1968, the State of Hawai'i, through the BLNR, entered into a lease with the University that today encompasses the 11,288 acre area in the summit region of Mauna Kea known as the MKSR. The MKSR was established for use as a scientific complex, including the development of astronomy facilities.

In 1983, the University adopted the MKSR Complex Development Plan ("CDP"), which was a planning tool that the University used to estimate a physical plan for astronomy

development in the MKSR up to the year 2000. The CDP was superseded by the University's adoption of the MKSR Master Plan ("Master Plan") in 2000. The Master Plan provides a guide for development in the MKSR up to the year 2020. The Master Plan identified Area E as the preferred location for the future development of a Next Generation Large Telescope ("NGLT"). This location is considered preferred for a NGLT because it provides suitable observation conditions with minimum impact on existing facilities, Wēkiu bug habitat, archaeological/historic sites, and viewplanes. Moreover, it avoids any additional use of or building on the Kukahau'ula area of the summit.

From its inception, most of the Petitioners have participated directly in and contributed to the processes that shaped the Project. In 2008, the University, in consultation with the TMT Observatory Corporation ("TMTOC"), began exploring the possibility of developing the Project in Area E. To aid in this process, the University commenced environmental scoping activities pursuant to Haw. Rev. Stat. Chapter 343. It ran advertisements in the local papers notifying interested persons and organizations that an Environmental Impact Statement Preparation Notice/Environmental Assessment ("EISPN/EA") for the Project was forthcoming. These interested persons and organizations – specifically including Petitioners KAHEA, Mauna Kea Anaina Hou, and Paul Neves for Royal Order of Kamehameha I – were sent advance copies of the EISPN/EA.

On September 23, 2008, the University officially published the EISPN/EA for the Project. The publication was announced that day by the Office of Environmental Quality Control ("OEQC") in The Environmental Notice. This publication opened the 30-day scoping period. Public scoping meetings were also held throughout the State in October 2008.

The University commenced work on a Draft Environmental Impact Statement ("DEIS"), which was then published in The Environmental Notice on May 23, 2009. The DEIS's publication opened a 45-day comment period. Petitioners KAHEA, Mauna Kea Anaina Hou, and Paul Neves submitted comments on the DEIS. Petitioner Deborah Ward also submitted comments on behalf of Sierra Club's Hawai'i Chapter.

In 2009, the University developed a Comprehensive Management Plan ("CMP") to govern its internal management of the MKSR. The CMP contained a total of 103 management actions and associated reporting requirements that would govern the future of the MKSR. The CMP was submitted to the BLNR for approval. On April 8 and 9, 2009, the BLNR held public hearings in Hilo on the CMP, and, on April 9, 2009, approved the CMP.[1] That approval was conditioned on the University developing a Project Development and Management Framework and four sub-plans: a Natural Resources Management Plan; a Cultural Resources Management Plan; a Public Access Plan; and a Decommissioning Plan. The BLNR also required the University to submit an annual status report on the development of each sub-plan and a status report on the development of each management action. In satisfaction of those conditions, the University developed and submitted its Project Development Implementation Framework and the four sub-plans, which were approved on March 25, 2010.

In July 2009, the TMTOC Board of Directors selected Mauna Kea as the preferred site for the Project.

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[1] Mauna Kea Anaina Hou, Royal Order of Kamehameha I (by Paul Neves), Sierra Club, Hawaii Chapter (by Deborah Ward), KAHEA and Clarence Kukauakahi Ching requested a contested case hearing on the BLNR's approval of the CMP. On August 28, 2009, the Land Board denied those requests. The petitioners appealed that denial to the Circuit Court of the Third Circuit. That appeal was dismissed by the Circuit Court on February 17, 2010. The petitioners have appealed that decision.

On May 8, 2010, the OEQC published the notice of availability of Final Environmental Impact Statement ("FEIS") for the Project. The FEIS was accepted by the Governor on May 19, 2010. The period during which acceptance of the FEIS could be challenged ended on August 7, 2010. No challenges were made to the FEIS.

Because the MKSR is designated as part of the State of Hawai'i Conservation District, uses on the land are subject to the Conservation District rules (Haw. Admin. R. Chapter 13-5) and permit conditions. Before any construction work may begin in the MKSR, a Conservation District Use Permit must be obtained from the BLNR. Haw. Admin. R. § 13-5-30(b). Thus, the University submitted its CDUA to the BLNR on September 2, 2010.

In November 2010, written comments on the CDUA were submitted on behalf of KAHEA (represented by Miwa Tamanaha and Marti Townsend); Mauna Kea Anaina Hou (represented by Kealoha Pisciotta); Paul Neves (claiming to represent the Royal Order, Moku O Mamalahoa, and Heiau Mamalahoa Helu 'Elua); Sierra Club Hawai'i (represented by Deborah Ward); and Clarence Kukauakahi Ching.

On December 2 and 3, 2010, extensive public hearings relating to the CDUA were held in Hilo and Kona, respectively. Most of the Petitioners personally appeared and testified at those hearings. Mauna Kea Anaina Hou (Kealoha Pisciotta), Paul Neves, Deborah Ward, and Clarence Kukauakahi Ching offered live testimony at the Hilo hearing on December 2. Mauna Kea Anaina Hou (Kealoha Pisciotta), Deborah Ward, Clarence Kukauakahi Ching and E. Kalani Flores and his family also testified at the December 3 hearing in Kona.

At the February 25, 2011 BLNR meeting at which the CDUA for the Project was considered, testimony was offered by Petitioners KAHEA (from Miwa Tamanaha and Marti Townsend), Mauna Kea Anaina Hou (from Kealoha Pisciotta), and Clarence Kukauakahi Ching. After conclusion of the testimony from members of the public, including Petitioners, and following questioning by and discussion among Board members, the BLNR voted to grant the University's CDUA, with implementation of the CDUP conditioned on the University prevailing in any resulting contested case. Following that vote, the Board, on its own motion, directed that this contested case proceeding be held.

III. THE UNIVERSITY HAS SATISFIED THE REQUIREMENTS OF HAW. ADMIN. R. § 13-5-30(C)

A. THE ISSUE FOR DETERMINATION IN THIS CONTESTED CASE IS WHETHER THE UNIVERSITY HAS MET THE EIGHT REGULATORY CRITERIA FOR ISSUANCE OF A CONSERVATION DISTRICT USE PERMIT

The issue for resolution in any contested case hearing relating to a CDUA is whether the applicant has met the requirements for a Conservation District Use Permit. The relevant criteria are set forth in Haw. Admin. R. § 13-5-30(c). In their Pre-Hearing Conference Statement ("Pet. PHCS"), however, Petitioners inventory a long list of other matters they contend should be determined in this proceeding, with particular emphasis on alleged violations of the Hawai'i State Constitution and the public trust doctrine. As explained below, such matters are already necessarily encompassed within the BLNR's duty to consider the criteria listed in Section 13-5-30(c). These issues are not an appropriate basis for separate claims in this contested case proceeding, and the BLNR lacks jurisdiction to hear or decide such distinct claims.

B. IN ASSESSING WHETHER THE CRITERIA OF SECTION 13-5-30(C) HAVE BEEN SATISFIED, THE BLNR MUST PROTECT THE PUBLIC TRUST AND THE CUSTOMARY AND TRADITIONAL RIGHTS AND PRACTICES OF NATIVE HAWAIIANS

The public trust doctrine has been adopted in Hawaii as a "fundamental principle of constitutional law." *In re Water Use Permit Applications*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("*Waiahole*"). This doctrine is derived from Article XI, section 1 of the Hawaii Constitution, which provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii'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.

Just because the public trust doctrine exists, however, does not mean that a distinct legal claim exists for its enforcement. Rather, the public trust doctrine must be viewed in the context of the relevant statute. *See Waiahole*, 94 Hawai'i at 130-33, 9 P.3d at 442-45. In *Waiahole*, the Court found that the public trust principles, and the agency's public trust obligations, were already incorporated into the Water Code. *See id.* at 130, 9 P.3d at 442.

Similarly, in the present case, the public trust principles have been incorporated into the Conservation District statute. That law's stated purpose is "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." Haw. Rev. Stat. § 183C-1. The Conservation District rules likewise provide:

> 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 resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

Haw. Admin. R. §13-5-1. The criteria set out in Haw. Admin. R. § 13-5-30(c) clearly promote these objectives: Section 13-5-30(c)(1) requires that any proposed land use in the Conservation District be consistent with this purpose; Section 13-5-30(c)(4) requires that the proposed land use not cause substantial adverse impacts to, the existing natural resources within the surrounding area, community, or region; and Section 13-5-30(c)(8) requires that the proposed land use not be materially detrimental to the public health, safety, and welfare. Thus, the criteria set out in Haw. Admin. R. § 13-5-30(c) embody the public trust doctrine, and a thorough and diligent assessment of those criteria necessarily addresses the concerns that doctrine protects. *See Morimoto v. BLNR*, 107 Hawai'i 296, 308, 113 P.3d 172, 184 (2005) (where BLNR properly concluded that project would not cause substantial adverse impact on natural resources of project area, claim that BLNR's decision violated Article XI, section 1 and the public trust doctrine "present[s] no new arguments" and "does not implicate any error on the part of BLNR").

The Hawaii Constitution also mandates that the State recognize and protect customary and traditional native Hawaiian rights. Article XII, section 7 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.

As stated above, Haw. Admin. R. § 13-5-30(c)(4) requires that a proposed land use not cause substantial adverse impacts to the existing resources of the locality and the community. Assessing this criterion necessarily entails considering the customary and traditional rights and practices of native Hawaiians from the locality or community. A project that does not

sufficiently protect those rights and practices will not satisfy Section 13-5-30(c)(4). Therefore, as with Article XI, section 1 and the public trust doctrine, consideration of the constitutional protections articulated in Article XII, section 7 is already subsumed within BLNR's analysis of and decision regarding the eight criteria of Section 13-5-30(c).

C. THE PROJECT FULFILLS ALL OF THE APPLICABLE CRITERIA

1. The project is consistent with the purpose of the conservation district

Petitioners would have the BLNR believe that the purpose of the Conservation District is to prohibit any and all building or development on conservation lands, ever. That is wrong. As stated in DLNR's staff report on the University's CDUA: "The objective of the Conservation District is 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." Staff Report at 45 (emphasis added); *see also* Haw. Rev. Stat. § 183C-1.

As the CDUA demonstrated and the evidence establishes, the CMP and four associated sub-plans provide a framework of unprecedented comprehensiveness and strength for managing development within the MKSR. The Project will, quite simply, be far better and more thoroughly managed than any telescope in Mauna Kea's history. That management specifically and thoughtfully addresses cultural and natural resources, public access, and the ultimate decommissioning of the Project and restoration of its site. The Project will not consume significant natural resources. It will not pollute. It will not harm species of concern, or the environment generally. It will not interfere with customary and traditional cultural practices. It will not impede recreational uses. It will not threaten the public health, safety, or welfare.

The Project *will* make optimum use of the environmental factors that make Mauna Kea arguably the best place on Earth to put telescopes. Petitioners ignore this critical fact, but Mauna Kea's unique suitability for astronomy – its altitude, atmospheric clarity, distance from light pollution, etc. – is itself a precious natural resource to be protected and sustained over the long term. Moreover, the Project will be an enormous benefit to the public welfare. It will bring significant funds to Hawai'i and provide many jobs, from construction to professional. It will inject large amounts of cash into the local economy. It will contribute new programs and funds to Hawai'i Island schools. It will facilitate the management of Mauna Kea and enable the University to remain at the forefront of astronomy in research and education. For these reasons, as DLNR staff concluded, the Project is consistent with this criterion.

2. The Project is consistent with the objectives of the resource subzone

Petitioners cannot seriously dispute that the Project is consistent with the objectives of the resource subzone. Under Haw. Admin. R. § 13-5-13, the objective of the resource subzone is to develop, with proper management, areas to ensure sustained use of their natural resources. "Astronomy facilities under an approved management plan" are an expressly permitted land use in the resource subzone of the Conservation District pursuant to Haw. Admin. R. § 13-5-24.

As the CDUA demonstrated and the evidence establishes, the CMP and sub-plans are approved and are being implemented, with progress reported to BLNR. Moreover, the TMT Management Plan, which is specific to the Project, has also been approved. It includes a draft historic preservation mitigation plan, a construction plan, a historical and archaeological site plan, a maintenance plan, and an arthropod monitoring plan. Having doubly fulfilled the

"approved management plan" requirement, development of the TMT astronomy facilities is plainly consistent with this criterion, as DLNR staff concluded.

3. The Project complies with applicable provisions and guidelines contained in Haw. Rev. State. Chapter 205A

Because the entire State of Hawai'i is within the Coastal Zone Management Area, the Project site on Mauna Kea is subject to Haw. Rev. Stat. Chapter 205A. As DLNR's staff report observed, most of Chapter 205A's objectives parallel the objectives of the Conservation District, including protecting historic, scenic and open space, and recreational resources. Staff Report at 48. In this brief, those common objectives are discussed under the headings of other criteria. Chapter 205A describes additional objectives relating specifically to coastal ecosystems (including the impact of upland areas on coastal ecosystems), which are, essentially, aimed at promoting and protecting water quality. As the CDUA demonstrated and the evidence establishes, the Project satisfies all the objectives of Chapter 205A, specifically including those objectives that do not overlap with the Conservation District but are unique to 205A.

The Project will not release any wastewater into the surrounding environment; rather, it will collect and transport all wastewater off the mountain for proper disposal. Construction will result in increased impermeable surfaces at the Project site, but between the low rainfall in the area and the highly permeable nature of the surrounding ground, rainwater runoff will not reach anywhere near coastal areas. The Project will implement plans for storage and waste management, including a Spill Prevention and Response Plan, that will greatly reduce the risk of discharge of hazardous materials; such materials will be transported to waste treatment and disposal facilities off-mountain. Moreover, the alpine desert in which the Project is located is not a watershed recharge area for Mauna Kea – so even in the extremely unlikely event of a spill,

there is no reasonable prospect of adverse impact on either drinking or coastal waters. Accordingly, as DLNR staff concluded, the Project is consistent with this criterion.

4. The Project will not cause substantial adverse impacts to existing natural resources within the surrounding area, community, or region

The fourth criterion of Haw. Admin. R. § 13-5-30(c) encompasses considerations regarding cultural practices and historic resources, biological resources, viewplanes, recreational resources, water resources, and other broad environmental concerns. The Project appropriately addresses all of these concerns.

a. Cultural practices and historic resources

As the CDUA demonstrated and the evidence establishes, from its inception and throughout its development, the Project has involved sensitivity to and dialogue with the community, and particularly with native Hawaiians, to a degree unprecedented in the history of modern astronomy on Mauna Kea. This very high level of outreach and input has informed, guided, and shaped the Project in many ways. In particular, the Project has been sited in an area removed from the places of highest cultural concern on Mauna Kea's summit, including the Kukahau'ula traditional cultural property and Lake Waiau. The TMT Observatory and Access Way will not be visible from those areas or from Pu'u Lilinoe. There are no known burial sites, ahu, or other historic features on or near the Project's location, and no customary and traditional cultural practices have been documented at the Project site. Other than limiting access to the actual construction site for safety reasons and to the interior of the Observatory facilities once it is completed, the Project will not restrict anyone from any portion of the summit area. Moreover, on an ongoing basis, the Project will be required to comply with the detailed Cultural Resources Management Plan that accompanies the CMP.

The University has also taken great care to ensure that the Project has been developed and will be implemented in accordance with the analytical framework prescribed by the Hawai'i Supreme Court in *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000). As will be shown, all valued cultural, historic, and natural resources were identified in detail in the CDUA, including the extent to which traditional and customary native Hawaiian rights are exercised in the Project area. The CDUA quantified any potential effects on or impairments of those resources by the Project, and the feasible actions to reasonably protect those rights and practices are being taken. By locating the Project away from the most culturally sensitive sites in the summit area, the University has overwhelmingly eliminated conflict with the actual exercise of traditional and customary native Hawaiian rights; the few potential effects on such practices have been identified; and feasible steps have been taken to reasonably protect those rights. As a result, as DLNR staff concluded, any impact the Project may have will be less than significant.

b. Biological resources

As the CDUA demonstrated and the evidence establishes, the Project will involve only extremely minimal impacts on biological resources, which are reasonably mitigated. The Access Way will displace roughly 0.2 acres of alpine cinder cone habitat of the wēkiu bug, which is a species of concern. Wēkiu bugs were found only in low abundance in this small area, which is not considered critical. The disturbance has been limited to the greatest extent possible by using the alignment of existing roads, reducing the Access Way from two lanes to one in the relevant area, and paving this portion of the way to reduce dust. The much larger critical wēkiu bug habitat will remain contiguous and undisturbed. Although Petitioners suggest other biological

resources are threatened, they are wrong; the species they mention do not, in fact, reside in or near the Project location, or are widely located throughout other areas besides the Project site.

In addition to the design of the Access Way described above, the Project entails numerous other mitigation measures designed to reduce impact on biological resources. An invasive species program will be implemented. A ride-sharing program will reduce traffic, dust, and noise. And an arthropod monitoring program will be performed before, during, and two years after construction in the portion of the Access Way crossing alpine cinder cone habitat. As DLNR staff concluded, there will be no significant impact on biological resources.

c. Viewplanes

As the CDUA demonstrated and the evidence establishes, as a result of intensive planning and design efforts, the Project's effect on viewplanes will not be significant. The Project is not proposed to be built on a bare mountain top. Rather, it is being added to an astronomy precinct already populated by observatories. The current observatories are visible from 43 percent of the Big Island's area; the Project will increase that only slightly, to 44.2 percent. In other words, although it will add a visual element to the northern plateau of the Mauna Kea summit area, it will be only one of many similar visual elements. Significantly, it will not block or substantially obstruct the views and viewplanes of the mountain. It will not be visible from the most culturally sensitive areas, i.e, the summit of Mauna Kea, Lake Waiau, and Pu'u Lilinoe. The portions of the summit region from which it will be visible – the northern plateau and the northern ridge of Kukahau'ula – are where most of the other observatories are already located.

Although the TMT Observatory will be the largest telescope on Mauna Kea, it has been designed to have the lowest focal ratio possible, resulting in the smallest dome possible to accommodate a mirror of its size. Thus, although its mirror (30 meters in diameter) is vastly larger than those of other observatories, TMT's dome height (roughly 180 feet above finished grade) is barely taller than existing observatories like Gemini (151 feet) and Subaru (141 feet), which have mirrors that are 10 and 8 meters in diameter, respectively. Moreover, because the TMT Observatory has been sited lower on the mountain than the other existing large observatories, it will not affect viewplanes vertically. Further, the Observatory's exterior has been designed to minimize its visual impact, with the dome's reflective aluminum-like coating less visible at all times except sunrise and sunset; and its support facility will use materials and natural colors designed to blend with the surrounding landscape. For these reasons, and as DLNR staff concluded, the Project will not have a significant effect on viewplanes or aesthetic resources.

d. Recreational resources

As the CDUA demonstrated and the evidence establishes, the Project will have no significant impact on recreational resources. The main recreational activities on Mauna Kea are hiking, stargazing, and snow play. The Project is not located near any active recreation area and should not affect any of these activities.

e. Water resources, wastewater, solid waste and hazardous waste

As described above, the Project's numerous protective measures addressing waste and water issues ensure that there will be no significant impact.

f. The Project's cumulative impacts on Mauna Kea's natural and cultural resources are not significant

As the FEIS for the Project observed, the existing observatories on Mauna Kea have already had significant impacts on natural and cultural resources. These significant impacts will remain significant with or without TMT. However, the Project does not result in any new significant impact – either by virtue of the Project itself or by its cumulative effect when combined with the other observatories. Moreover, the Project's impact is substantially mitigated by several factors. Unlike the other observatories, its location is removed from the Kukahau'ula summit and the other most culturally sensitive areas. It is remote from sites of traditional and customary cultural practices, from historical sites, from critical species habitat, and from recreational areas. It has been located and designed to reduce its impacts. It will operate under a strong management regime that addresses and respects the interests of all constituencies. For all these reasons, and as DLNR staff concluded, the Project adds only incremental impacts to an area that has already undergone significant effects, and its cumulative impacts are not significant.

5. The Project is compatible with the locality and surrounding area, appropriate to the physical conditions and capabilities of the specific parcel or parcels

The Project is proposed to be located in the Astronomy Precinct within the MKSR. Astronomy facilities under an approved management plan are an expressly permitted land use in the resource subzone of the Conservation District pursuant to Haw. Admin. R. § 13-5-24. The Astronomy Precinct already contains numerous observatories. Plainly, the TMT Project is compatible with these existing land uses.

The Project, however, sets a new standard for seeking and achieving compatibility with not just the physical locality as required by this criterion, but with all interests and

constituencies. The Project's location was chosen to remove it from areas of greatest cultural sensitivity and practice, to avoid disturbance of biological and recreational resources, and to minimize its visual impacts. Accordingly, as DLNR staff concluded, the Project is a compatible use for this location.

6. The Project preserves or improves upon the existing physical and environmental aspect of the land, such as natural beauty and open space characteristics

Petitioners contend that this criterion is not satisfied because the Project adds a structure to a location where nothing currently exists; that, they say, does not preserve or improve upon existing natural beauty and open space characteristics. Petitioners' interpretation of Haw. Admin. R. § 13-5-30(c)(6) cannot be correct. If it were, then literally nothing could ever be built in any Conservation District. To make sense, this criterion must assess a project in the context of its surrounding environment, including the development that has already occurred.

The Project describes an observatory to be built in a location within the Conservation District specifically contemplated by the Hawaii Administrative Rules to be appropriate for observatories. It will be one observatory among many predecessors, but it is noteworthy for its physical removal from traditional cultural properties and its conscious efforts to minimize its impacts on the surrounding environment. As DLNR staff concluded, when viewed from the perspective of the whole summit region, the physical and environmental aspects will at least be preserved, and, in some respects, will be improved upon.

In addition, it is anticipated that, over time, existing telescopes on the Kukahau'ula summit will be decommissioned and removed. The Office of Mauna Kea Management envisions that, over time, there may be fewer telescopes than exist today. The reduction in the number of

telescopes will improve upon the physical and environmental aspects of the region by reducing the presence of the structures, physically and visually, from the most culturally sensitive sites on Mauna Kea. For all these reasons, and as DLNR staff concluded, this criterion is satisfied.

7. There will be no subdivision of the land for the Project

The Project does not involve the subdivision of land. Accordingly, this criterion is not at issue in this proceeding.

8. The Project will not be materially detrimental to the public health, safety, and welfare

DLNR staff observed that it had seen no evidence that the Project will be detrimental to public health, safety, and welfare. That is because there is no such evidence. As the CDUA demonstrated and the evidence establishes, the Project has been carefully planned to address health and safety concerns to the maximum extent possible. Wastewater and hazardous waste will be collected, removed from the mountain, and taken to appropriate treatment and/or disposal facilities. Management strategies will be in place for handling hazardous materials with extreme care and in accordance with all applicable regulations, and plans will be in effect to prevent spill incidents and also to contain and remediate such events if, despite all precautions, they occur.

As for the public welfare, as DLNR staff concluded, the Project will be a benefit rather than a detriment. It will result in near-term and long-term economic gains from construction contracts, new jobs, and research grants. It will yield educational benefits, keeping Hawai'i's schools at the forefront of astronomy. And it will contribute to the greater good of human knowledge. This criterion is clearly satisfied.

IV. PETITIONERS' ARGUMENTS ARE MERITLESS

In their Pre-Hearing Conference Statement, Petitioners assert a variety of legal arguments and positions regarding their challenge to the Project and relating to the conduct of the contested case proceeding. That document repeatedly makes clear, however, that Petitioners have so far only offered "examples" of their views; they have not yet articulated *all* the issues they intend to raise in the contested case. *See, e.g.,* Pet. PHCS at 3 ("For example, ..."; "As one example, ..."). When Petitioners file their testimony and their brief on June 28, they should be required to identify *all* of the grounds on which they challenge the Project. Meanwhile, the arguments and positions Petitioners have asserted to date are unfounded, as explained below.

A. THE UNIVERSITY HAS SATISFIED THE REQUIREMENTS FOR A CONSERVATION DISTRICT USE PERMIT FOR ASTRONOMY FACILITIES IN THIS SUBZONE

Petitioners do not assert that the BLNR lacks statutory or regulatory authority to approve management plans, either in general or specifically for Mauna Kea and/or the Project. Nor can Petitioners claim that an astronomical observatory is forbidden in the resource subzone of the Conservation District; Haw. Admin. R. § 13-5-24 plainly states that "[a]stronomy facilities under an approved management plan" are permitted in the resource subzone. Nonetheless, in their Pre-Hearing Conference Statement, Petitioners assert that "[a] comprehensive management plan, as defined by [the] Third Circuit Court, has not been approved for the management of the Mauna Kea Conservation District." Pet. PHCS at 3. Petitioners concede the existence of both the Comprehensive Management Plan and the TMT Management Plan; they simply assert without support that neither of those documents is sufficiently "comprehensive."

Petitioners are foreclosed from challenging the sufficiency of the CMP in this proceeding. That challenge was already decided against them by Judge Hara, who denied their

request for a contested case on this issue. Any attempt by them to relitigate the issue in the current proceeding is barred by collateral estoppel. Although they have appealed the Third Circuit's decision, there has been no stay of the final judgment, which was entered on February 17, 2010. Accordingly, the CMP is an approved plan for the State's comprehensive management of the MKSR. Indeed, because Petitioners cannot challenge that approval in this proceeding, the existence of an approved management plan should be deemed an uncontested fact herein.

Because the TMT Management Plan is a part of the CDUA, Petitioners can challenge its sufficiency in this contested case. However, any such challenge would be pointless for two reasons. First, Petitioners have no basis to fault the TMT Management Plan on its merits. Second, even if they were to discern some shortcoming in that Plan, their inability to attack the CMP renders any assault on the TMT-specific Plan pointless.

B. THE BLNR'S CONSIDERATION AND DISPOSITION OF THE CDUA IS ENTIRELY CONSISTENT WITH *KA PA'AKAI O KA 'AINA V. LAND USE COMMISSION*

The State and its agencies have an affirmative duty "to preserve and protect traditional and customary native Hawaiian rights." *Ka Pa'akai*, 94 Hawai'i at 45, 7 P.3d at 1082. In *Ka Pa'akai*, cultural practitioners challenged an approval by the State Land Use Commission ("LUC") of a developer's petition to reclassify 1,000 acres of Conservation District land situated within the ahupua'a of Ka'upulehu in West Hawai'i. *Id.* at 34, 7 P.3d at 1071. One of the conditions of the LUC approval called for the developer, at a future date, to prepare and implement a resource management plan that would manage traditional cultural practices within the conceptual framework developed by the landowner. *Id.* at 36-37, 7 P.3d at 1073-74.

The Court held that the LUC had an obligation to independently assess the impact of the proposed reclassification on native Hawaiian traditional and customary practices. *See id.* at 44, 7 P.3d at 1081. The LUC could not delegate its responsibility for the preservation and protection of native Hawaiian rights to a private entity. The Court concluded that "[t]he power and responsibility to determine the effects on customary and traditional native Hawaiian practices and the means to protect such practices may not validly be delegated by [the agency] to a private petitioner who, unlike a public body, is not subject to public accountability." *Id.* at 52, 7 P.3d at 1089. The Petitioners in this proceeding contend that "the BLNR improperly delegated its responsibility to manage the conservation district to UH." Pet. PHCS at 3. They are wrong.

1. There Has Been No Delegation Here at All, Much Less an Unlawful Delegation

The facts of the present matter bear no resemblance to the situation in *Ka Pa'akai*. Here, the BLNR conducted a detailed independent review and analysis of the Project's impact on customary and traditional rights and practices, *prior to* approving the CDUA. Moreover, the Project is not permitted to move forward until after the contested case has been concluded and the BLNR has reviewed the hearing officer's recommendations and made its own decision; thus, BLNR and no one else will have ultimate responsibility for assessing what effects the Project may have on customary and traditional native Hawaiian rights and practices, and whether any such effects have been appropriately mitigated. The BLNR has not delegated these responsibilities to any other party. Further, the BLNR retains supervisory and ultimate management control over the University's leased areas and over any decisions that might have an impact on native Hawaiian traditional and customary practices. The BLNR has reviewed and approved the CMP and the corresponding sub-plans. It retains ultimate authority to enforce

compliance with these plans. It also can enforce, and has enforced, compliance with approved CDUPs. The BLNR has not unlawfully delegated its authority to any other party.

2. In any Event, as an Arm of the State, the University is not a Private Party, Unlike the Developer in *Ka Pa'akai*

The University is a State entity. *See* Haw. Rev. Stat. § 304A-101; Haw. Rev. Stat. § 304A-103. It is not a private developer, as was the case in *Ka Pa'akai*. It is not, in the words of the *Ka Pa'akai* Court, "a private petitioner who, unlike a public body, is not subject to public accountability." *Id.* at 52, 7 P.3d at 1089. The University is unquestionably subject to public scrutiny and accountability. As shown above, there has been no delegation – but under any circumstances, the concerns that underlay the decision in *Ka Pa'akai* are simply not present here.

C. THE PROJECT DOES NOT RESULT IN ANY VIOLATION OF THE PUBLIC TRUST DOCTRINE, OF PROTECTED TRADITIONAL AND CUSTOMARY PRACTICES AND RIGHTS, OR OF PROTECTED RELIGIOUS FREEDOM

1. The Project Does Not Violate the Public Trust Doctrine

As explained above, the BLNR's obligations with respect to the public trust doctrine are included within its analysis of the criteria in Haw. Admin. R. § 13-5-30(c). Accordingly, in assessing whether the Project satisfies those criteria, the BLNR must satisfy its obligations "both to 'protect' natural resources *and* to promote their 'use and development.'" *Waiahole*, 94 Hawai'i at 138-39, 9 P.3d at 450-51 (emphasis in original). By conditioning use and development on resource conservation, Article XI, section 1 does not preclude use, but merely requires that all uses promote the best economic and social interests of the people of this State. *Id.* at 141, 9 P.3d at 453. "The result ... is controlled development of resources, rather than no development." *Id.* at 141, 9 P.3d at 453 (ellipses in original). This requires a balancing of competing uses on a case-by-case basis. *See id.* at 142, 9 P.3d at 454.

In addition, the public trust doctrine requires the State and its agencies to "take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.* at 143, 9 P.3d at 455. It must consider the cumulative impact of the existing uses and implement reasonable measures to mitigate such impact. *Id.* "In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *Id.*

The Project is entirely consistent with the public trust doctrine. As explained above, it represents controlled development that promotes the best economic and social interests of the State. It serves important purposes, both educational and economic, as it advances Hawai'i's prominence as a leader in the field of astronomy, in both a national and a global context. The Project has been designed and located with an unprecedented degree of sensitivity to both community and environmental concerns, and, as described above and as demonstrated in the CDUA and FEIS, its impacts will be mitigated to the fullest extent possible. Moreover, the Project's construction, operation, and ultimate decommissioning will all take place within a comprehensive management framework that places environmental and community concerns at the forefront. To date, the BLNR has independently reviewed and analyzed any impacts and the proposed mitigation measures, and it will continue that independent review and analysis as it reviews and acts upon the recommendations of the hearing officer in this contested case. It has been and will continue to be open in its decision-making processes. For all these reasons, the Project is entirely consistent with the public trust doctrine.

2. The Project Does Not Unreasonably Interfere With Petitioners' Traditional and Customary Practices

As explained above, BLNR's obligations with respect to traditional and customary practices and rights are part and parcel of its assessment of the criteria in Haw. Admin. R. § 13-5-30(c). Article XII, section 7 of the Constitution obligates the State and its agencies "to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians *to the extent feasible* under the Hawai'i Constitution and relevant statutes." *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 437, 903 P.3d 1246, 1258 (1995) ("*PASH*") (emphasis added). This is determined by "balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." *Id.* at 440, 903 P.3d at 1261 (citation omitted). Ancient Hawaiian usage, however, must be based on actual traditional practice that has been continued in a particular area, and not based on assumption or conjecture. *Id.* at 449, 903 P.2d 1246 (citation omitted). Hawaiian usage must have been in practice by November 25, 1892 to fall within the protection of Hawaii law. *Id.* at 447, 903 P.3d at 1268. Furthermore, Article XII, section 7 "accords an ample basis for regulatory efforts by the State. In other words, the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed." *PASH*, 79 Haw. at 451, 903 P.3d at 1272 (citations omitted).

As explained in the CDUA and as stated above, access to the Project site, whether for traditional and customary practices or otherwise, will only be restricted for safety reasons – specifically, during construction. Other than the interior of the Observatory, such restrictions would be temporary and would be limited to the immediate vicinity of the construction work,

which represents only a tiny portion of the summit area and, in any event, is remote from the most culturally sensitive sites. Under such circumstances, it is reasonable for the University to regulate access. The Project, therefore, does not propose to interfere unreasonably with Petitioners' traditional and customary practices.

3. The Project Does Not Unreasonably Interfere with Petitioners' Religious Practices

Petitioners contend that the Project violates their "[p]rotected [r]eligious [f]reedoms." Pet. PHCS at 4. They assert:

> Mauna Kea is recognized by many as a religious temple and sacred site. State and federal law protect the reasonable practice of religious beliefs from infringement. The TMT proposal represents a significant interference with religious practices historically and currently practiced in the temple of Mauna Kea. Construction of the TMT on pristine land in the Mauna Kea Conservation District will create a physical and/or spiritual disturbance, which threatens to sever[] the connection between mankind and akua, and between humanity and the environment.

Id. Respectfully, Petitioners fundamentally misunderstand the "State and federal law" on which they seek to rely. The University does not doubt the sincerity of Petitioners' beliefs – but, as a matter of law, those beliefs do not provide a basis for disapproving the Project.

Under both State and federal law, it is well established that *belief* in an area's religious sacredness does not make development of that area an unconstitutional infringement of religion, and does not give the believer a legal right to stop the development. Thus, in *Dedman v. BLNR*, 69 Haw. 255, 740 P.2d 28 (1987), the Hawai'i Supreme Court held that "Pele practitioners" who believed that construction of geothermal plants on the island of Hawai'i would desecrate the goddess by "digging into the ground and ... robbing her of vital heat" had no constitutional basis for challenging the BLNR's decision to approve the project. *Id.* at 261, 740 P.2d at 32.

Likewise, in *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the United States Supreme Court held that Native American religious practitioners had no constitutional right to exclude all other uses, including timber harvesting, from sacred areas of public lands. *See also PASH*, 79 Haw. at 447 n.38, 903 P.2d at 1268 n.38 (citing *Lyng* for this proposition). Constitutional rights protect against unreasonable interference with religious *practices*; those rights do not protect against offenses to religious *beliefs*.

Thus, to determine if there has been an unconstitutional infringement of religious rights, the inquiry focuses on practices rather than beliefs:

> [I]t is necessary to examine whether or not the *activity* interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief, whether or not the parties' free *exercise* of religion had been burdened by the regulation, the extent or impact of the regulation on the parties' religious *practices*, and whether or not the state had a compelling interest in the regulation which justified such a burden.

Dedman, 69 Haw. at 260, 740 P.2d at 32 (citations omitted, emphasis added). In *Dedman*, the petitioners claimed that construction of the geothermal plants would interfere with their ritual practices, and would disable them from training young Hawaiians in traditional beliefs and practices (such as chant and hula). *Id.* The Court, however, ruled that to demonstrate the project had an unlawful coercive effect, the petitioners had to show a "substantial burden" on their religious practices. *Id.* at 261, 740 P.2d at 33. Because the petitioners had not conducted or participated in religious ceremonies on the specific location at issue, and the BLNR's approval of the geothermal project did not threaten them with sanctions if they engaged in religiously motivated conduct, they failed to show "the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 261-262, 740 P.2d at 33

(citation omitted). The Court concluded: "To invalidate the Board's actions based on the mere assertion of harm to religious practices would contravene the fundamental purpose of preventing the state from fostering support of one religion over another." *Id.*

Likewise here, Petitioners cannot show a substantial burden to their religious practices. The Project has purposely been located in an area removed from the most culturally sensitive locations in the summit region, and is sited in a place where no religious or traditional and customary cultural practices are documented. Moreover, except for actual construction areas while the Project is being built (and, once it is completed, the interior of the TMT Observatory), Petitioners and everyone else will have continued access to the area, for religious practices and for any other activity. Under these circumstances, as a matter of law, BLNR's approval of the Project does not and will not unreasonably interfere with Petitioners' religious freedoms.

Finally, Petitioners criticize the University for locating the Project on "pristine land." Pet. PHCS at 4. Having sited the Project away from the Kukahau'ula summit area out of respect for its cultural and religious significance, the University cannot legitimately be faulted for selecting a "pristine" location that is not culturally sensitive and that has not historically been used for customary and traditional practices.

D. PETITIONERS' "CONTRACTUAL" ARGUMENTS ARE BEYOND THE SCOPE OF THIS PROCEEDING

Petitioners contend that "[t]he TMT proposal raises basic issues of contract law"; that "[b]asic [c]ontractual [r]equirements" are "[n]ot [s]atisfied"; and that these supposed "issues" should be addressed in this contested case proceeding. Pet. PHCS at 4-5. Specifically, Petitioners say TMTOC should be a party to this proceeding, and that the terms of its sublease with the University should be addressed herein. *Id.* at 5. Petitioners are wrong in all respects.

1. Petitioners Are Challenging Matters of Internal Management which, by Law, Are Not Properly the Subject of a Contested Case

Not all matters involving land are subject to Chapter 91. Matters of internal agency management, and particularly management of leases, are not governed by Chapter 91 and are not properly the subject of a contested case "where no 'private rights of or procedures available to the public' are affected." *Sharma v. DLNR*, 66 Haw. 632, 637, 673 P.2d 1030, 1034 (1983) (citations omitted).

Some land use approvals or permits determine the rights, duties, or privileges of specific parties; those are appropriately the subject of contested case proceedings. *See, e.g., E & J Lounge Operating Co. v. Liquor Comm'n of City & County of Honolulu*, 118 Hawai'i 320, 330, 189 P.3d 432, 442 (2008). By contrast, where the BLNR is acting as a landlord and exercising powers granted to it under Haw. Rev. Stat. Chapter 171 to carry out the custodial management of public property, it has the same rights as any prudent landlord to act with respect to such matters as the granting and termination of leases and subleases. And because such matters "concern[] the internal management of the agency," it may do so *without* holding any hearing. *Sharma*, 66 Haw. at 639-41, 673 P.2d at 1034-36 (lessee of public land had no right to contested case when DLNR terminated lease pursuant to Haw. Rev. Stat. § 171-39). This reasoning has been extended to all provisions of Chapter 171. *Big Island Small Ranchers Ass'n v. State*, 60 Haw. 228, 588 P.2d 430 (1978).

With respect to public lands, the BLNR has authority over lease provisions generally under Haw. Rev. Stat. § 171-35, and over lease restrictions, including restrictions on alienation such as sub-leasing, under Haw. Rev. Stat. § 171-36. Accordingly, under *Sharma* and *Big Island Small Ranchers Ass'n*, the BLNR's decisions regarding the types of lease and sublease issues

asserted by Petitioners constitute classic "internal management" matters that are not subject to Chapter 91 and so do not require a contested case hearing. As explained below, Petitioners' "contractual" issues relate to unfinished agreements and so are not ripe for decision – but even when the contracts are finalized and signed, no contested case will be required.

2. No Sublease Has Yet Been Negotiated, So These Claims Are Not Ripe

TMTOC applied to the University through the CMP project review process to develop the Project; and, through that process, the University approved the Project. TMTOC will be required to negotiate a sublease with the University to develop the Project. That sublease has not yet been negotiated, and its terms are not within the scope of the University's application or the CDUP. Consequently, Petitioners' "contractual" claims are not ripe for review.

Under the ripeness doctrine, courts and agencies should avoid making premature adjudications by refraining from entangling themselves in abstract disagreements. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Voluntary Ass'n of Religious Leaders, Churches & Orgs. v. Waihee*, 800 F. Supp. 882, 885 (D. Haw. 1992). Claims are ripe "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). Here, the facts underlying Petitioners' "contractual" theories are not fully developed. Until that factual development is complete, the BLNR cannot even know what it is being asked to adjudicate. Any decision about a sublease that has not been negotiated yet would be an improper advisory opinion.

E. EXPERT WITNESSES

In their Pre-Hearing Conference Statement, Petitioners completely misstate the legal standards for qualification and testimony of expert witnesses in contested case proceedings. Citing *Price v. Zoning Bd. of Appeals*, 77 Haw. 168, 176, 883 P.2d 629, 637 (1994), Petitioners observe, unremarkably, that hearsay evidence is admissible in administrative hearings. Pet. PHCS at 6. But they then take an enormous, unsupported leap and assert that, in administrative proceedings, "witnesses are not categorized as expert or lay"; that "in a contested case hearing, it makes no sense to designate any witness as an 'expert'"; that "Hawai'i Rules of Evidence Rules 702 – 706 are unnecessary to allow a person to provide opinions"; and that "it is inappropriate for any witness in a contested case to be designated as an expert." Pet. PHCS at 6-7.

Petitioners could not be more wrong. The only case they cite on this issue, *Price*, says no such thing. Whether hearsay evidence is admissible has nothing to do with whether witnesses must be qualified before they can testify as experts and offer opinions. In fact, Petitioners' position is squarely refuted by a case they themselves cite repeatedly throughout their Pre-Hearing Conference Statement. Nine separate times, Petitioners rely on *In re Water Use Permit Applications*, 94 Hawai'i 97, 9 P.3d 409 (2000) ("*Waiahole*"). *See* Pet. PHCS at 8-11. However, when it does not serve their purposes, Petitioners simply ignore this case's plain holding.

In *Waiahole*, KSBE argued that the Commission on Water Resource Management "erred by refusing to qualify one of KSBE's witnesses, Barbara Ankersmit (Ankersmit), as an expert and by striking her testimony." *Id.* at 183, 9 P.3d at 495. In considering that challenge, the

Hawai'i Supreme Court stated that it "review[s] determinations of expert qualifications under the abuse of discretion standard." *Id.* (citations omitted). The Court then explained:

> *Hawai'i Rules of Evidence (HRE) Rule 702 (1993) provides for the qualification of an expert "by knowledge, skill, experience, training, or education."* KSBE proffered Ankersmit as a "public opinion" expert. Ankersmit testified regarding her extensive experience in the field of public opinion polling, spanning 23 years and "over 2000" surveys for various private and government organizations. The objecting party presented no specific rebuttal to her qualifications. Based on the record, we hold that the Commission abused its discretion by declining to qualify Ankersmit as an expert.

Id. (emphasis added).[3]

In other words, one of the main authorities on which Petitioners rely holds clearly that in contested cases, expert witnesses must be qualified under Haw. R. Evid. 702, and if an expert is not so qualified, his or her testimony is properly excluded. Applying this standard, if Petitioners intend to offer witnesses as "experts", they must demonstrate those witnesses' qualifications under the Rule 702 standard: "by knowledge, skill, experience, training, or education."

Perhaps knowing their main argument is wrong, Petitioners assert a fallback position: "Nonetheless, in an abundance of caution and to preserve its [sic] rights, the petitioners hereby designate *all* their witnesses as experts." Pet. PHCS at 7 (emphasis added). This unprecedented tactic must be rejected. Petitioners' Pre-Hearing Conference Statement identifies no fewer than 23 individuals, 8 groups, and 2 deities as witnesses for the contested case. *Id.* at 5-6. Besides being absurd on its face, designating all of these as "experts" would necessarily result in enormous duplication and render the hearing unmanageable. In their submissions on June 28,

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[3] Despite finding Ankersmit to have been qualified, the Court ruled the Commission had not erred in excluding her testimony as irrelevant because "current public opinion" was not "a relevant consideration in the comprehensive, long-term regulatory process implemented by the Commission." *Id.*

Petitioners should be required to make a legitimate, precise, limited designation, identifying as "experts" only those witnesses they truly believe are qualified to testify as such.

If, however, Petitioners continue to insist that all of their witnesses are experts, they must live with the consequences of that choice. Petitioners cannot be permitted to do an end run around Rule 702 and the Supreme Court's decision in *Waiahole* by having unqualified lay witnesses offer opinion testimony that is properly the province of qualified experts. In their witness statements, Petitioners should be required to offer sufficient evidence to qualify each designated "expert" witness as an expert. And, the testimony of every witness designated as an expert whom Petitioners fail to so qualify should be stricken in its entirety.

V. THE BURDEN OF PROOF

A. THE UNIVERSITY HAS ALREADY VOLUNTARILY AGREED TO BEAR THE BURDEN OF PROOF

Although a compelling argument could be made that, by requesting this proceeding, Petitioners should bear the burden of persuasion, as stated above, the University will voluntarily accept the burden of proof.

With regard to permit applications, the Conservation District rules provide that "[t]he applicant shall have the burden of demonstrating that a proposed land use is consistent with" the criteria set forth in Haw. Admin. R. § 13-5-30(c). As the party proposing a land use in the Conservation District, the University is clearly the "applicant" in this matter.

However, the Hawaii Administrative Procedures Act also states that, "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." Haw. Rev. Stat. § 91-10(5). Section 13-1-35(k) of the Hawaii Administrative Rules similarly provides:

> The party initiating the proceeding and, in the case of proceedings on alleged violations of law, the department, shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The quantum of proof shall be a preponderance of the evidence.

A "proceeding" is further defined as:

> the board's consideration of the relevant facts and applicable law and action thereon with respect to a particular subject within the board's jurisdiction, initiated by a filing or submittal or request or a board's notice or order, and shall include but not be limited to:
>
> * * *
>
> (3) Petitions or applications for the granting or declaring of any right, privilege, authority, or relief under or from any provision of law or any rule or requirement made pursuant to authority granted by law ....

Haw. Admin. R. § 13-1-2. It could be argued that Petitioners are the ones initiating this contested case proceeding. However, the broad definition of "proceeding" quoted above could encompass a CDUA, as it is an application for the granting of a right or privilege to use land in the Conservation District. *See* Haw. Admin. R. § 13-5-30(b). Based on this definition, the University agrees that it will carry the initial burden of proof in showing that its CDUA has met the criteria listed in Haw. Admin. R. § 13-5-30(c).

However, to the extent that Petitioners contend additional issues should be addressed outside of those set forth in Haw. Admin. R. § 13-5-30(c), before any such extraneous matters are considered, Petitioners should be required to carry and satisfy the burden of proof to show that these issues should be considered in this matter and that they would have an effect on the BLNR's decision whether to grant the University's CDUA.

B. THE BURDEN OF PROOF IN THIS PROCEEDING IS PREPONDERANCE OF THE EVIDENCE

As quoted above, the quantum of proof in the contested case is preponderance of the evidence. Haw. Rev. Stat. § 91-10(5); Haw. Admin. R. § 13-5-30(b).

C. THE PUBLIC TRUST DOCTRINE AND THE CONSTITUTION DO NOT AFFECT THE BURDEN OF PROOF

In their Pre-Hearing Conference Statement, Petitioners confuse the burden of proof – *i.e.*, the quantum of proof required to prevail – with substantive issues they contend may be asserted in the contested case. Pet. PHCS at 7-9. Thus, after stating that the University must prove the Project is consistent with the criteria in Haw. Admin. R. § 13-5-30(c), Petitioners assert that "[t]his burden is compounded by the duties imposed by the public trust doctrine," Pet. PHCS at 8. Petitioners' formulation is doubly misguided. As explained above, the concerns of the public trust doctrine and Article XI, section 1 are subsumed within the BLNR's analysis of Section 13-5-30(c). Those are not discrete issues in this proceeding, and they do not carry some special burden of proof. The burden of proof remains preponderance of the evidence. *See* Haw. Admin. R. § 91-10(5); Haw. Admin. R. § 13-5-30(b).

VI. CONCLUSION

For the reasons set forth herein, and as will be demonstrated by the evidence presented at the hearing of this matter, all criteria for issuance of the Conservation District Use Permit have been satisfied, and Petitioners' objections lack merit. The Board of Land and Natural Resources appropriately approved the Project's CDUP, and should allow the Project to proceed.

DATED: Honolulu, Hawai'i, May 31, 2011.

IAN L. SANDISON
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UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

In re Petition requesting a Contested Case Hearing on Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope, Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmākua, Hawai'i, TMK (3) 4-4-015:009	DLNR File No. HA-11-05 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the APPLICANT UNIVERSITY OF HAWAI'I AT HILO'S OPENING BRIEF dated May 31, 2011 was duly served on the following, as indicated below on May 31, 2011:

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