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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF	) Case No. BLNR-CC-16-002
	)
A Contested Case Hearing Re Conservation;	) WILLIAM FREITAS RESPONSE
Use Application (CDUA) HA-3568 For the	) IN OPPOSITION TO UNIVERSITY
Thirty Meter Telescope at the Mauna Kea	) OF HILO AND TMT INTERNATIONAL
Science Reserve, Ka'ohe Mauka, Hamakua,	) OBSERVATORY LLC's JOINT [PROPOSED]
Hawai'i TMK(3)4-4-015:009	) FINDING OF FACTS, CONCLUSIONS OF
	) LAW AND DECISION & ORDER;
	) APPENDICES A-D.
	) MEMORANDUM IN SUPPORT
	) OF OPPOSITION TO UUH AND TIO
	) JOINT FOF, COL D & O; COS
	)
	) CERTIFICATE OF SERVICE

WILLIAM FREITAS' RESPONSE IN OPPOSITION TO UNIVERSITY OF HILO AND TMT INTERNATIONAL OBSERVATORY LLC's JOINT [PROPOSED] FINDING OF FACTS, CONCLUSIONS OF LAW AND DECISION & ORDER; APPENDICES A-D.

INTRODUCTION

In response to UH/TIO's Finding of Facts, Conclusion of Law and Decision Order and its misrepresentation of my intentions and kuleana, I, William Freitas, would like to highlight certain testimony I offered regarding my religious and spiritual practice on Mauna Kea:

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 June 13 2:54 pm

(W. Freitas FOF 186). Mr. Freitas testifies that his practices on Mauna Kea are traditional and customary.

(W. Freitas FOF 178). Mr. Freitas describes the purpose for building the ahu: "It was built to give prayers and offerings in protection and forgiveness for those who desecrated the area."

(W. Freitas FOF 179). Mr. Freitas testifies that ahu at the proposed TMT site were intended to gives prayers of protection of workers who built the access road.

(W. Freitas FOF 180). Mr. Freitas testified that oli (chants), mele (songs), and prayers were performed at Ahu o Kauakoko prior to its destruction.

(W. Freitas FOF 185). Mr. Freitas affirms that his "spiritual, religious, cultural and traditional values" will be injured by the proposed development.

After devoting myself to this process for a year and under threat, duress, and coercion, but always in good faith, I now see how UH/TIO misrepresents my position and the testimony of my witnesses. My kapu aloha is strained.

The number of blatant errors and mischaracterizations made in the Applicant's FOF/COL/DO are completely and totally egregious. With the large team of legal staff available to both parties, the fact that we could identify multiple and significant errors *must* cause the hearing officer, the BLNR, and, in the case of further judicial oversight, justices of the Court, to regard the entire UH/TIO record with doubt and suspicion. Simply stated, the UH/TIO FOF/COL/DO is not a document of integrity or an honest accounting of the record. (For the purposes of this response, the terms "UH/TIO" and "Applicant(s)" are used interchangeably, though TIO is technically the permit applicant.)

Among the serious faults of the UH/TIO FOF/COL/DO is a categorical refusal to address key testimony regard the status of living tradition in Hawai`i and on Mauna Kea in particular,

including with regard to my traditional and customary practices on the mauna. Most specifically, UH/TIO mischaracterizes my ceremonial actions at the proposed TMT site as merely political, with an implied intent only to thwart construction of the project. Such a caricature of my beliefs and practices is hurtful to me and bespeaks a failure on the part of the applicant to take ongoing traditional and customary practices seriously. Indeed, complete disregard for the religious character of the ahus I helped construct and consecrate is starkly indicative of the way the applicant and its representatives have failed to adequately assess and address traditional practices in the project area and on the mauna generally. Meaningful consultation requires open ears and eyes. How can adequate mitigation measures be proposed for that which has not been seen or heard?

The treatment of my religious practices by the applicant perpetuates an unfortunate legacy with regard to faulty, incomplete, and stale consultation measures, including as represented by the core documents upon which the CDUA relies. Until and unless these deficiencies of due diligence, due process, consultative accountability, and responsibility to the state constitution and the ideals it espouses and protects are rectified by means of a revised or supplemental EIS, this permitting process will remain a farce and a black eye on the face of this state. Fairness and the appearance of fairness, as demanded by the State Supreme Court, remain elusive in this permitting process. I urge the hearing office and the BLNR to bear witness to my struggle to be heard and to have my rights acknowledged and protected.

Let me remind you that I am open to consultation:

(W. Freitas FOF 193). When asked by Ms. Kakalia if he had been consulted by Kahuku Mauna or any other entity about religious practices and the ahu, Mr. Freitas responded that he had not.

(W. Freitas FOF 194). When asked by Ms. Kakalia if he was open to consultation regarding his religious practices and the ahu, he replied in the affirmative.

Finally, I ask you, the Hearing Officer, and BLNR personnel, to think of the keiki and the kapu aloha they are being taught through this very process:

(W. Freitas FOF 187). Mr. Freitas testifies that it is his kuleana (responsibility) to help young people on Mauna Kea understand cultural and spiritual practices.

We have the opportunity to honor their future now.

Note: All FOF and COL's referenced can be assumed to from UH/TIO's FOF/COL/DO unless otherwise stated.

RESPONSE TO

UH/TIO's PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW

I. INACCURATE AND BLATANTLY EGREGIOUS MISTAKES REGARDING WITNESS TESTIMONY: ENTIRE UH/TIO FOF/COL/DO MUST BE VIEWED WITH HEIGHTENED SCRUTINY AND SUSPICION

1. FOF 715: WRONG UH/TIO assert that Greg Johnson, a witness for me, is not "an expert in land use planning or environmental review." **This is not true. Professor Johnson has written extensively, including in peer-reviewed publications, about permitting issues around land use and environmental assessments in Hawai'i, including as they are handled by the DLNR**. For two examples (more can be found in his WDT) please see:

1.1. 2014 "Bone Deep Indigeneity: Theorizing Hawaiian Care for the State and its Broken Apparatuses." In *Performing Indigeneity*, edited by H. Glenn Penny and Laura Graham (University of Nebraska Press), 247-272. Invited and peer reviewed.

1.2. 2013 "Varieties of Hawaiian Establishment: Recognized Voices, Routinized Charisma, and Church Desecration." In *Varieties of Religious Establishment*, edited by Winnifred Sullivan and Lori Beaman (Ashgate Press), 55-71. Invited and peer reviewed.

2. **FOF 716. WRONG** According to UH/TIO, "Prof. Johnson was present on Mauna Kea on June 22, 2015 when the first two ahu on the TMT Project site were installed in the middle of the access roadway to the TMT Project site." **Professor Johnson was not on Mauna Kea on June 22, 2015; he states in his WDT that he was on Mauna Kea on the evening of June 23rd and did not visit the summit on that trip.**

3. **FOF 716. WRONG** According to UH/TIO, when referring to testimony of Professor Johnson, they state that he "confirms and corroborates the evidence that no prior ahu or religious practice occurred at that specific location prior to its designation as the TMT Project site." **Professor Johnson did not testify that "no religious practice previously took place at site."**

4. **FOF 716. WRONG AND MISCONSTRUED** The FOF states with regard to Professor Johnson**: "**He also testified that members of the native Hawaiian community disagree about the status and meaning of the ahu, as some of the stones came from the Kona shoreline, and not from the surrounding summit area, thus breaking protocol. Ex. T-1 at 5." □

4a. **Mr. Freitas testified that the stones came from Kanaloa not from Kona Vol.44, p.261:1-4.**

4b. **The argument advanced by UH/TIO completely inverts Professor Johnson's analysis. He argued that internal disputes of this nature, *the example of stone provinance included*, are precisely the kinds of struggles that animate tradition and are evidence to him as a scholar of religion of the living quality of the tradition. His discussion reads:**

> "I should note here a point about internal division in the Native Hawaiian community regarding the ahu. Some members of the community have expressed disagreement about the status and meaning of the ahu. To cite one example, I have heard some practitioners

> express anxiety about the fact that the pohaku (stones) for one of the ahu came from the Kona shoreline, far from the realm of the summit, thus confusing an important ritual distinction. As a scholar of religion, I understand such internal tensions to be parallel to those...that configure the terrain of all religions. Simply put, the status of the stones would not have been debated had the matter not been *significant*. Indeed, I take such disputes to be evidence of the religious and traditional status of the ahu. Stones, like bread and wine, tend not to rise to the level of debate unless it really matters." **See Johnson WDT at p. 5.**

5. **FOF 717. MISCONSTRUED AND INACCURATE** From UH/TIO: "Prof. Johnson argues that the presence of new ahu constructed on the TMT Project site, after the site was known and the project heavily opposed, triggers a requirement for a new EIS. Tr. 2/16/17 at 17:4-17, 28:3-21; 53:14-18. This argument, however, is unsupported under Hawai'i law and would produce an absurd result. The purposes of HRS Chapters 343 and 6E are to inventory existing conditions at the time that the studies are done. To provide protection to these new structures placed after the project site is known and in direct and obvious protest of that project would allow persons who oppose a proposed project to stop it simply by placing a stone in the area or initiating a new practice that incorporates recognized traditional practices from other areas on the island." **Professor Johnson pointed to the ahu as examples of customary and traditional practices not addressed by the EIS and related documents, particularly in the context of heightened religious activity in Hawai`i over the past several decades and on Mauna Kea in particular. As addressed below, Professor Johnson's point was to argue that such practices stand in continuity with a long history of such practices in Hawai`i wherein religions sensibilities are catalyzed and acted upon in the context of threats to sacred sites. It is precisely through the actions on Mauna Kea described by Professor Johnson, including those engaged in the spirit of kapu aloha, that Hawaiian religious life is expressed and**

maintained in the contemporary moment. If such a perspective is regarded as absurd, then the State of Hawai`i should abandon the pretense of affording Hawaiian traditions the protections that its own constitutional demands.

6. **FOF 718. WRONG** From UH/TIO: "While Prof. Johnson opined that requiring a permit to build an ahu might be considered offensive to some from a religious perspective, he agreed the State has a right to regulate cultural practices." **This is not what Professor Johnson opined. He testified that the state "*stipulates*" that it has this right. 94:14-15**

7. FOF 719-720. MISCONSTRUED From UH/TIO**: "**While initially failing to answer the question directly, Prof. Johnson did concede that protesters standing in the access road for the purpose of blocking traffic do pose a safety and health risk. **Professor Johnson answered a general question about safety in roads per se (Tr. 02/16/17 at 94:7-11) and but then contextualized the particular actions that day by referring to the Protectors' religious motivations for standing in that road at that time. The health and safety concerns must be balanced with reasons Intervenors would be in the road, including a felt sacred duty to protect the mauna (92:11-15).**

8. **FOF: 722. WRONG** According to UH/TIO, Prof. Johnson's testimony concerning the TMT Project's adverse impacts on religious practitioners is not fully credible. Prof. Johnson was not aware of the dispute surrounding the TMT Project until the fall of 2014, and there is no evidence he conducted or reviewed any peer reviewed studies concerning impacts to native Hawaiian practitioners on the mountain. Ex. T-1 at 3 **This FOF is completely inaccurate. Professor Johnson testified regarding his ongoing research concerning Mauna Kea that was and continues to be sponsored by several entities. Results include numerous academic lectures,**

including for the American Academy of Religion, and the peer reviewed chapter, "Materalising and Performing Hawaiian Religion(s) on Mauna Kea," in Greg Johnson and Siv Ellen Kraft, editors, *The Handbook of Indigenous Religion(s)* (Leiden: Brill Publishers, 2017). Other related publications are active and currently under peer review.

9. **FOF: 723. WRONG** UH/TIO assert that Professor Johnson's testimony concerning the protests that took place in June 2015 appeared to show his personal bias against the TMT Project. **In fact, Professor Johnson testified that he was not opposed to the project. See W. Freitas FOF 4-15.**

10. **FOF: 728 MISCONSTRUED** UH/TIO misquotes Mr. Fujiyoshi's response to the opinion poll that Mr. Ashida asked questions about**: He did NOT say that he was unaware of this poll (Tr.44 page 139:14; Tr. 44 page 141:1). On redirect by Mr. Feitas, Mr. Fujiyoshi was asked whether he thought the poll was inaccurate because it was online and he answered, "Yes." (Tr.44 at 178)**

11. **FOF 817 MISLEADING AND/OR WRONG** UHH/TIO combined and misconstrued the cross-examination of witnesses Mr. Perry White and Mr. Tom Nance by William Freitas. UH/TIO state "William Freitas claimed that chemicals from Mauna Kea were leaching into the water source at Kiholo Bay, however, he admitted to not seeing a water study confirming the identity of the aquifer feeding Kiholo Bay. He admitted that his claim of contamination came only from his own "logic." Tr. 3/2/17 at 254:20-258:15, 278:3-279:25. Such speculative and

unverifiable opinion is insufficient to overcome or rebut the testimony of Nance." **The fact is** I **testified that Kiholo was a special place mainly because of my Hawaiian name (Freitas WDT) given by my uncle "Jack Paulo" and the knowledge of the fresh waters that flow from Mauna Kea to Kiholo that he gathered and I tasted. TR. 3/2/17 255:1-5"** UHH/TIO's witness Mr. Perry White attested to Kiholo being a special place, with a view of Mauna Kea and his knowledge of the waters that flow from the mauna to Kiholo, water that is vital to feed the "limu" that Native Hawaiians gather. Tr. 10/25/16 at 24:20-25, 26:1-5, 26:25, 27:1-3, 27:15-18. **UHH/TIO's witness Mr. Nance attested to not knowing where lava tubes, aqueducts, cracks and crevices would be in or around the proposed TMT site where water seeps into the ground. Tr. 12/13/16 at 124:10-12 Upon cross-examination by Ms. Pisciotta, Mr. Nance testified that he does not have a Ph.D. in Hydrology.** Tr. 12/13/16 Cross-examination by Ms. Ward demonstrated that Mr. Nance was to be paid by Carlsmith to review the EIS and to testify to his opinion. This opinion must be regarded with suspicion and caution, as his experience is primarily in building water wells with an engineering degree and he stated that he has "no" affiliation to the USGS (United States Geographic Survey) pertaining to their report on high level groundwater on Mauna Kea. Tr. 12/13/16 at 129:1-5

Regarding a water study in the area of Kiholo, UH counsel, Mr. Manaut, asked me if I had read the water study report. I answered that I had ancestral knowledge of the origins of the waters that flow from Mauna Kea to Kiholo Bay. TIO counsel, Mr. Ing, cross-examined me referring to Freitas WDT T-3 which was "not" introduced as the WDT I would be testifying on. He proceeded to cross on the wrong WDT referring to "tons of mercury" that have already contaminated Mauna Kea. Tr. 3/2/17 at 254:24-25, 256:1-25, 257:1-25, 258:1-15. **In gathering**

the facts, UH/TIO have collaboratively misconstrued FOF's in an effort to impugn the credibility of witnesses such as myself and combined their testimony to imply that I concluded that the waters of Mauna Kea are contaminating Kiholo Bay. This a blatant misarticulation of facts and False accusations on the part of UH/TIO. Never under oath did I Testify to what UH/TIO has cited in FOF 817. I, William Freitas, testified to my experience of Kiholo before any development, and to my ancestral knowledge of the fresh waters that flow into the area of Kiholo from Mauna Kea. I have tasted the fresh waters of Kiholo. I have viewed Mauna Kea when no Observatories were built on it. I live and protect My Mauna A Wakea now in this time.

II. ***FOUNDATIONAL DOCUMENTS TO PERMITTING PROCESS ARE STALE AND MUST BE UPDATED***

1. ***CDUA relies on stale research as represented by the FEIS and CMP***

1a. **As recognized by UH/TIO (COL 90, 126-7), the Applicant has the burden of proof in establishing that they meet the eight criteria of HAR § 13-5-30(c).**

1b. **The Applicant has a duty, set forth directly by the State Supreme Court of Hawai'i in *Kapa'akai O Ka'Aina v. Land Use Comm'n* (Supreme Court of Hawai'i September 11, 2000, Decided NO. 21124, NO. 21162) to take seriously the traditional and customary practices of Native Hawaiians**:

> On appeal, the court vacated the decision. In making its administrative findings, appellee failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible. By failing to make such findings appellee abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to the party seeking the petition. Therefore, the court remanded the matter to allow appellee to discharge its duty to consider the effect of the proposed development on the legitimate customary and traditional practices of native Hawaiians. [94 Haw. 31, *31; 7 P.3d 1068, **1068; 2000 Haw. LEXIS 302, ***1]

I, William Freitas, in both my own testimony (Freitas WDT) and in my cross examination of the many other religious and spiritual practitioners who testified in this contested case hearing, revealed the much larger scope and extent of such practices than the FEIS accounts for in 2010. This range and scope of practices is not accounted for or addressed by the CDUA; instead it is summarily dismissed and relegated to "a few practitioners," without any solid research to make this finding.

1c. **In order to meet the mandated statutory requirements with regard to the protections afforded traditional and customary practice, the CDUA relies on data from the FEIS. This data, in turn, is utterly stale.** UH/TIO assert that the FEIS stands as reliable and current. From **COL 390**: "Petitioners and Opposing Intervenors have not credibly shown any intervening changed environmental circumstances here, and there are no facts in the record suggesting any such materially changed circumstances exist." **See my testimony cited here in the introduction for evidence of the many environmental, material, traditional and customary practices that have changed since the FEIS was approved.** The cumulative testimony of the many Petitioners and Intervenors in the contested case hearing is further evidence the Hearing Officer and BLNR must consider in evaluating the integrity of the FEIS.

It must be pointed out, however, that the purpose of the hearing has been precisely to evaluate the integrity of the permitting process, including the documents upon which it relies. According to *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015), the purpose of the hearing is to provide a "rigorous adversarial process" regarding the CDUA permit for the TMT project (p.4). The Court remanded for a new contested case hearing precisely because this process had not occurred: "the permit itself was

issued before evidence was taken and subject to adversarial testing before a neutral hearing officer" (p.5). In other words, the purpose of the contested case hearing is to adjudicate the integrity of the permit and the procedural mandates regarding it. The hearing itself is not the proper venue for creating a new Cultural Management Plan or for assessing the depth and scope of Cultural Resources; the Hearing Officer is not a cultural anthropologist, nor did any of the parties who examined witnesses have such training. **The need for updated meaningful consultation was certainly revealed by the scope of traditional and customary practices and ahus on the mauna as testified to throughout the contested case hearing, but the hearing record does not and cannot stand in for a proper cultural consultation study.**

1d. **WRONG AND MISLEADING** Applicants state that the time period for challenging the validity of the FEIS ended on August 7, 2010. (**COL 388**) However, UH/TIO also acknowledge that "[*a*]*bsent intervening changed environmental circumstances,*" one is not allowed a challenge to this document. (**COL 389**; emphasis added). Applicants cite a federal case to make this assertion:

> Absent intervening changed environmental circumstances, no one is allowed a "second chance at administrative and judicial review when they failed to timely appeal the original" EIS. See Oregon Natural Res. Council v. U.S. Forest Serv., 834 F.2d 842, 847 (9th Cir. 1987).

The central point to be made here is that Hawai'i state law does consider cultural practices to be "environmental circumstances" and it is my contention and that of my witness Professor Johnson that "religious life on the mountain has been catalyzed, magnified, and otherwise intensified since the time of the CDUA. This is true of religious activity on the mountain in general and it is specifically true of religious practices at the

proposed TMT site itself. These reasons...warrant review and revision of the CDUA and the accompanying EIS, with particular attention to consultation with affected practitioners and those they serve." (Freitas FOF 47)

1e. This contested case hearing ***in toto***, and my testimony about spiritual and religious practices on Mauna Kea specifically, have definitively demonstrated that **environmental circumstances have in fact changed since the EIS was completed in 2010**, particularly as regards traditional and customary practices. Traditional and customary practices are, by law and statute, recognized in Hawai'i as "environmental" factors to be considered in an EIS. According to HRS §343-2 "Definitions:"

> "Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and *cultural practices of the community and State*, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects. (emphasis added)

1f. **The remedy the hearing officer must provide is, at minimum, a supplemental EIS to address the changed environmental circumstances that have occurred since the original EIS document was completed in 2010.** (emphases in the following citations are added)

> 1.f.1 Regarding this statuatory requirement see: http://oeqc2.doh.hawaii.gov/OEQC_Guidance/2012-GUIDE-to-the-Implementation-and-Practice-of-the-HEPA.pdf
>
> **4.1.3 Supplemental Environmental Impact Statements**
> ...HEPA says that acceptance of an EIS satisfies the requirements of this chapter and no further EIS shall be required for that action, HRS 343‐5(g). The Hawaii Supreme Court has held, however, that a supplemental EIS is required where there have been substantive changes in environmental effects. *Unite Here! Local 5 v. City and County of Honolulu and Kuilima Resort*. The criteria when a supplemental EIS needs to be prepared, namely, when there are changes in size, scope, location, intensity, use or timing, are set forth in Section 11‐200‐26, HAR.

1.f.2 From **HAR 11-200-26**:

HAR Title 11, Chapter 200 EIS Rules

SUBCHAPTER 2

"***Supplemental statement" means an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things***. [Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-2, 343-6)

SUBCHAPTER 6

DETERMINATION OF SIGNIFICANCE

§11-200-9 Assessment of agency actions and applicant actions. (a) For agency actions, except those actions exempt from the preparation of an environmental assessment pursuant to section 343-5, HRS, or section 11-200-8, the proposing agency shall:
(1) Seek, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county's general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise ***as well as those citizen groups and individuals which the proposing agency reasonably believes to be affected;***

§11-200-12 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider ***the sum of effects on the quality of the environment***, and ***shall evaluate the overall and cumulative effects of an action***.

(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. **In most instances, an action shall be determined to have a significant effect on the environment if it:**

(1)***Involves an irrevocable commitment to loss or destruction of any natural or cultural resource***
(4) ***Substantially affects the economic welfare, social welfare, and cultural practices of the community*** or State;
(5) ***Substantially affects public health***;
[Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-2, 343-6)

SUBCHAPTER 10

SUPPLEMENTAL STATEMENTS

§11-200-26 General provisions. **A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, *among other things*.** A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for

that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things. **If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter.** As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter. [Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-5, 343-6)

While Applicants argue that they did disclose and anticipate significant individual impacts to "those who hold the opinion that any disturbance of Maunakea by someone other than a Native Hawaiian is significant and unmitigatible," they did not account for the cumulative effect of the proposed telescope development on traditional and customary religious practitioners (both in its extended construction phase and its operational duration) and the communities they serve, nor did they make any effort to document the development of such practices and religious sites over the last SEVEN YEARS since the FEIS was approved.

1g. **MISLEADING While UH/TIO make passing reference to yearly updates from Pacific Consulting Services Inc. (FOF 594), nowhere are these updates reflected in the the FEIS (specifically in the the Cultural Resources Management Plan, one of its four sub-plans). Instead, the most recent data regarding traditional and customary practice is treated with only minimal attention in the Archeological Inventory Survey of 2010**. The type of assessment done by PCSI was focused on archeological data and conducted by an archeologist (Collins WDT), not a cultural anthropologist with training in ethnography. **The in-depth data the FEIS employs relating to traditional and customary practice was**

collected beginning over 20 years ago: “This work was undertaken as a part of ongoing archival and oral historical research conducted by Kumu Pono Associates LLC, since 1996, and builds upon the accounts published by Maly in 1997, 1999, 2002, and 2003.” (Maly, KPA Study HiMK67-OMKM (033005b) p.v)

Maly’s report, commissioned by Stephanie Nagata on behalf of the University of Hawai‘i-Office of Mauna Kea Management, formed the basis for the Cultural Resources Management Plan for the OMKM (see page 42 describing Maly’s interviews with 22 informants and cultural practitioners for his oral history (1999)). **The FEIS summary of Potential Environmental Impacts, as well as the mitigation measures directed toward reducing them to below significant levels, was based on this outdated--if historically rich--research.**

1h. **It should be noted that Kepa Maly became concerned about how his research was being used as the basis for a draft EIS**. In Kepa Maly’s “LETTER OF PROTEST TO GROUP 70 INTERNATIONAL,” a cultural consultation group, (October 14, 1999) Maly asserts:

> The lack of cultural-historical information in the draft "master plan/development plan update," specifically, ***the cursory manner in which you have addressed the information documented in the oral historical study lacks sensitivity and integrity*** (I have seen drafts 1 & 2, I understand that a third draft is out). People are desperately trying to understand the traditions and on-going cultural-spiritual significance of Mauna Kea....In the past, every client that I have worked with always provided me with a copy of the resulting EIS/EA – involving me in the EIS development phases to ensure that the documentation was accurately represented; and asked me to participate in any agency/public review meetings. The goal being to provide a summary of the documentation reported and answer questions that might be raised about the work I did. Instead, I only recently learned that you took the same cultural component of the "master plan/development plan update" and incorporated it into your "draft EIS." Further more [sic], I am being called and told that you have been meeting with Hawaiians and other interested groups, presenting your version of the research I prepared...In closing, **I *think back to the MKAC meeting of December 1, 1998, in which Pua Kanahele looked directly at you and the co-chairs, and asked "Why did you ask us here? You’ve already made up your minds about what you are going to do."*** I can’t help but think that she had

> a depth of vision that eluded me. I naively believed that you would approach this process with cultural sensitivity, integrity, and compassion. The above observations, along with the recent flack about disclosure of burial sites on Mauna Kea (via the web) have dismissed any room for sensitivity, integrity, and compassion in this process. (http://www.envirowatch.org/MKletter.htm)(emphases added)

In summary, the author of the research that forms the basis for the cultural component of the FEIS calls into question the misrepresentation of his data from the very outset of its public release in the context of management and development of the Mauna Kea Science Reserve. Thus, a new ethnographic study must be conducted to accurately reflect both the foundational cultural study initially done by Maly and to reflect the ongoing traditional and customary practices occurring on the mountain today.

1i. **FOF 624** UH/TIO assert that there are no known customary and traditional practices in Area E where the applicants are seeking a permit to build the Thirty Meter Telescope. **WRONG AND NEGLIGENT As this contested case demonstrated, a preponderance of testimony from cultural, religious, and spiritual practitioners revealed a set of robust traditional and customary practices in and around the proposed TMT site, as well as practices on the summit, mountain, and island that would be significantly affected by the construction and operation of the TMT project. A new and revised EIS must be conducted with recognized ethnographic methods and consultative best practices to document the scope, location, and type of traditional and customary practice on the Mauna Kea, including the mountain generally, the summit, and the proposed TMT site specifically.**

1j. **FOF 594. MISLEADING AND/OR WRONG** According to UH/TIO, PCSI conducts ongoing monitoring at archeological and historic sites on UHH managed lands by "returning to the sites once a year." Further, "the entire MKSR is surveyed once every five

years." **If this were true, some form of supplemental EIS statement would have been incorporated into the FEIS, as circumstances regarding traditional and customary practices and the cultural landscape (including ahus) have changed in the SEVEN YEARS since the FEIS was approved.**

1k. **FOF 549. MISLEADING/AND OR WRONG; UH/TIO PROVIDE FURTHER EVIDENCE THROUGH THEIR OWN WITNESS TESTIMONY OF THE DEMONSTRATED NEED FOR A NEW EIS** According to UHH/TIO: "William Freitas asserts that there were two stones near the ground breaking site that were dislodged. Mr. Rechtman testifies the stones were not in the area that was bulldozed...The stones are not near SIHP 21448 or SIHP 16172 or find spots 2005.08 or 2005.06...The stones were in the vicinity of the boundary of the TMT project site; The TMT site is indicated by a large block in the middle of the pink area on the map identified as figure 2 in Ex. C-12 and Ex. C-12 at 3." **Mr. Freitas questioned Mr. Rechtman as to his knowledge of standard archaeological procedures by asking who was responsible for reporting the two upright stones located in the project site for geological testing. Mr. Freitas also questioned the witness as to what happened to the two upright stones and if they were removed.** Mr. Rechtman testified that he was not on site when a "woman archaeologist monitor" reported that two upright stones had been dislodged. Mr. Rechtman could not remember the "archaeological monitors name." **Mr. Rechtman could not identify if the "two upright stones" were traditional cultural practices, even though UHH/TIO's Ex. C-12 shows a picture of offerings placed at one of the stones.** Mr. Rechtman testified that his cultural monitor reported to him that the OMKM's cultural and construction monitor Mr. Wally Ishibashi dislodged the two cultural upright stones. Tr. 12/20/16 155:1-25 156:1-25 157:1-2

The facts are clear that Mr. Rechtman, as a lead archaeologist with a cultural monitor on site, and OMKM's cultural and construction monitor for geotech drilling,

Mr.Ishibashi, did not follow the procedural protocols demanded of them by law to protect and accurately report cultural properties. The CMP, therefore, does not reflect the Native Hawaiian practices on the site, as it should according to HRS 106 and Article 12, section 7 of the Hawaii State Constitution, including the protection the latter provides for traditional and customary religious rights of Native Hawaiians. Furthermore, the damage caused should be considered desecration to a cultural property under HRS 711-1107. Mr. Rechtman testified that when doing an archaeological survey of a site, his procedure is a "surface survey"; this means that a cursory visual inspection can result in a finding of "no" cultural properties or "Iwi" which then can then deem the site clear of any cultural properties. Mr. Rechtman testified that he wouldn't be able to determine if there are "Iwi" on the TMT site if a surface inspection does not reveal it. Tr. 12/20/16 145:14-23 **Thus, Mr. Rechtman's testimony gives conclusive evidence that the integrity of the Archaeological Survey Inventory must be questioned. In particular, the proposed TMT project area must be reevaluated more thoroughly and with greater accuracy than a cursory visual inspection can provide for such traditional practices as burials, spreading of ashes, placing of piko or placenta, and other cultural ceremonial practices.** What has been determined by Mr. Rechtman's testimony is that the **SIHP site 21449 and SIHP site 16172** have been found to be "not significant;" this finding was based on prior "evidence" provided by archaeologist Mr. Pat McCoy who actually dug up "one" of these so called "Natural Terraces" (Fig. 16 Ex. C-12) and found nothing. **That this purported "finding" was relied upon by Mr. Rechtman and Ms. Glennon to make a determination for thousands of these terraces, which can be or have been "Destroyed" by this TMT proposed development is nothing short of a heart-breaking travesty**. **I, William Freitas, am a "Pohaku Kane" and have knowledge given to me by my kupuna, mother, auntie's, uncle's and families who live these traditions of spiritual cultural**

practices. “Burials of Iwi” are always “Huna” or hidden, and knowledge of these practices is conveyed to the family of a district or area--to have knowledge of, to give Honor to, in spiritual prayer and through offerings. This is a “Fact” in the History of the Culture of Native Hawaiians and our religious spiritual practices in this contested case, as testified to by Dr. Ku Kahakalau, Dr. Kalani Flores, Dr. Manulani Aluli-Meyer, Dr. Maile Taualii, Dr. Jonathan Osorio, Dr. Tammy Noelani Perreira, Dr. Joseph Keawe Aimoku Kaholokula, Dr. Noelani Goodyear-Kaopua, Dr. Mililani Trask, Ms. Pualani Case,Mr. Michael Lee, Ms. Hawane Rios, Ms. Ruth-Rebeccalynne Aloua, Ms. Piciotta, Ms. Tiffany Kakalia, Mr. Nelson Ho, Mr. Keahi Tajon, Mr. Paul Neves, Ms. Debbra Ward, Ms. Mehana Kihoi, Ms. Leinaala Sleightholm, Ms. Cindy Freitas, Mr. Sarah Kihoi, Kahuna Frank Nobriga, Mr. Joseph Camara, Mr. Kalkolehua Kanahele, Mr. Wiremu Carroll, Mr. Ronald Fujiyoshi, Ms. Wilma Holi, Mr. Hank Fergerstrom, Ms. Susan Rosier, Ms. Nancy Monroe, and Ms. Ward. I have witnessed these people in prayer and reverence in various places, and therewith witness Mr. Greg Johnson. A new EIS must consult with religious and spiritual practitioners today in order to meet the rigorous and principled definition of meaningful consultation.

2. FOF 598; COL 732 MISLEADING AND WRONG UH/TIO repeatedly dismiss the ahu built on the TMT site as a “political action.” I am a religious and spiritual practitioner and my practice on Mauna Kea has certainly been affected by the TMT project, but my spiritual calling to the Mauna has been passed to me from my ancestors. My practice is a living tradition. My witness, Professor Johnson, addressed this issue--the inseparability of traditional practices from the contexts in which they are expressed--in his WDT and during his testimony and cross-examination. Broadly, his argument also challenges the artificial

separation of traditional and contemporary practices, a distinction that UH/TIO advances in an attempt to relieve the CDUA of needing to address my traditional practices. I am *both* contemporary and traditional, as are my practices.

2a. **Here I would like to contextualize my position by quoting from Professor Johnson's WDT (4-5), which I then follow with FOFs from my own testimony:**

> Tradition is not a thing; it is a *process*. Living tradition draws upon the past but is necessarily constituted in the present. How could it be otherwise? This is not to dismiss the relevance of the past when assessing tradition, but to note that the past is most usefully understood as a *model* for present-day actions rather than as a set of rigidly codified practices and beliefs…
>
> Living traditions are necessarily of this world, not only with reference to time but also with regard to context. The constituent parts of traditions cannot be disarticulated from on-the-ground circumstances. This means traditional practices take place—always and everywhere—in moments configured by political and legal realities. The history of humanity affords scholars of religion no exceptions to this rule. Thus tradition cannot be analyzed or meaningfully described without historical, cultural, geographic, political, and legal contextualization. Likewise, in order to be protected—as the State of Hawai`i Constitution demands (XII, sec. 7)—tradition must be recognized and protected in *specific* places, times, and jurisdictions. It is not enough for a state to profess to protect traditions in general; insofar as traditions do not exist in the abstract, neither does protection of them exist in the abstract, aside from mere gesture.
>
> Here a note on strife and tradition is warranted. For reasons outlined above, traditions frequently find expression in moments of conflict. Traditions, especially in their religious capacities, articulate ultimate concerns and deep values. These concerns and values rise to the surface when threatened. This dynamic is broadly true of all religions…. Therefore, the tendency of some scholars and courts alike to seek "pure" tradition outside of political contexts is misguided.
>
> In addition, and of profound importance to the instant case, it is mistaken to regard activities as non-traditional if they take place in moments of conflict. The fact that a religious structure, for example, is built in a moment of crisis does not diminish its standing as religious. Nor, for that matter, does tension within a community diminish the potentially religious quality of the community's actions and beliefs, no matter how divided. Indeed, internal strife is the very engine of religious traditions—people fight over the terms of their own traditions precisely because they care so deeply about them.
>
> Traditional Hawaiian religious practices should be understood in a similar manner, in the past and present. As is well known, many heiau and ahu were historically constructed in

> moments of struggle, frequently in anticipation of a battle or in commemoration of one (see, for example, Valerio Valeri, *Kingship and Sacrifice: Ritual and Society in Ancient Hawaii*, translated by Paula Wissing, The University of Chicago Press, 1985). In such moments, ancestors, deities, and other forces were called upon to assist the people. Aspects of Hawaiian religious life today follow this pattern. Tradition is manifest in action when catalyzed by circumstances, most especially when the very ground of tradition itself is threatened. Sacred places—e.g., places regarded as having ties to oral traditions, healing, burial, and worship practices—thus receive focused attention when threatened. In Hawai`i, as in many indigenous contexts, sacred places are often left unto themselves out of deference to their power and sanctity. If threatened, however, the opposite dynamic is triggered as practitioners exercise their kuleana (responsibility) to care for the sacred.
>
> This is how I understand expressions of living tradition on Mauna Kea today and it is the framework for my expert opinion that the ahu (altars) constructed on the TMT site in the days immediately prior to the mass protest of June 24, 2015, are expressions of living Hawaiian tradition and deserve protection as such. Acting in a manner fully consistent with historical traditions, a group of Native Hawaiian traditional practitioners constructed two ahu and conducted ceremonies at them. Subsequently, these same practitioners, and especially William Freitas, have taken on the responsibility to care for these religious sites through ministering to them with regular offerings and ceremony. In this way tradition has been sustained on Mauna Kea. What may appear to some as mere political opportunism is in fact an expression of deeply held traditional beliefs—evidence of sincere religious action in a moment of crisis.

2b. **Freitas FOF 158** Mr. Freitas states that he continues to live with traditional customary cultural religious and spiritual practices of his Native Hawaiian ancestral people. He engages in practices shown to him by his Mom, Aunties, Uncles and Kupuna, including Hawaiian families that live these traditions and share with him hands on knowledge passed to them from generation to generation. He has witnessed Mauna a Wākea, pure as his ancestors saw it!

2c. **Freitas FOF 159** Mr. Freitas testified, " I learned things growing up in Kona, I learned about-- I watched my mom. My mom-- my mother was very versed in the ways of our kupuna, what you can do and what you cannot do. And she taught me a lot of things that needed to be done prior to stepping into areas. In fact, she always said, do not go in those areas. I was

always warned, do not go in those areas because I was too young to know. And I respected those things."

2d. **Freitas FOF 165-7** Mr. Freitas continues to practice the traditions of his kupuna (elders). Mr. Freitas is a spiritual/religious practitioner. Specifically, Mr. Freitas is a Pohaku Kane (specialist in rockwork), a calling that began at the age of five.

2e. **Freitas FOF 168** Mr. Freitas's connection to pohaku has remained strong through his life, including several instances in recent years that eventually connected him with his current religious practices on Mauna Kea in which he focuses on helping young people in the practice of Kapu Aloha.

2f. **Freitas FOF 169** William Freitas identified himself as a Pohaku Kane (Stone mason) who has been guided through "pohaku" to Mauna A Wakea by opportunities and events up to 2015, such as, (Exhibit T-3.j1 and T-3.j2) SIHP 21220 Ku'ula Stone (Fishing Shrine) for the Kipapa Ohana in Kona, in the area of Pahoehoe, known today as Magic Sands.

2g. **FOF 625 FOF 629 MISLEADING and MISCONSTRUED** The UH/TIO argues that Mr. Freitas' recent practices on the summit are not legitimate because they have developed together with his opposition to the TMT project. This is an impoverished understanding of how religious practices find continuity with past traditional forms of religious expression in times of crisis.

2h. **FOF 630, FOF 631, FOF 732 WRONG AND MISCONSTRUED** According to the UH/TIO, the construction of ahu on the summit area of Mauna Kea that I participated in was strictly motivated by political commitments and cannot be considered "a reasonable exercise of customarily and traditionally exercised rights" (FOF 631). **The following sections (2i-2s) are**

my response to these incorrect and misconstrued claims, emphasizing my spiritual and religious motivations for building the ahu and worshipping at them.

2i. **Freitas FOF 181** Mr. Freitas testified being involved in the construction of two ahu on the proposed TMT site on June 22nd and 23rd, 2015.

2j. **Freitas FOF 182** Mr. Freitas testified that traditional cultural protocols were invoked and practiced in construction of ahu on TMT proposed site.

2k. **Freitas FOF 188** Mr. Freitas testifies to the religious character and purpose of the ahu at the proposed TMT site: "And that is the real purpose. We didn't just build those things. The purpose was for the spirituality."

2l. **Freitas FOF 189** Mr. Freitas testifies that prayer at ahu is an example of Kapu Aloha.

2m. **Freitas FOF 190** Mr. Freitas affirms that Kapu Aloha is a central tenet of traditional Hawaiian religious practice.

2n. **Freitas FOF 191** Mr. Freitas testifies that his religious practices on Mauna Kea were not "made up" in order to thwart the TMT development.

2o. **Freitas FOF 197** Mr. Freitas testified that "Ahu Ku Kia'i E Lua" was constructed out of intense necessity for prayers and offerings due to the continued effort of the DLNR, UHH, and TMT to desecrate sacred ground. See Exhibit T-3.b photo of "Ahu Ku Kia'i e lua."

2p. **Freitas FOF 198** Mr. Freitas identifies and describes the necessity of establishing a place for worship with prayers and offerings in traditional customary religious and spiritual practice to a sacred area that would be further desecrated in the proposed site of TMT by the construction of the telescope.

2q. **Freitas FOF 262** Dr. Kahakalau testified that “those 'ahu were and continue to be constructed by Hawaiian practitioners in places that are very cautiously selected, no just a haphazard, but really with intense pule and with searching for truth and for light and for understanding and being driven by a kuleana to build that 'ahu, that comes from an ancestral guidance is what I would call it.”

2r. **Freitas FOF 263-265** Dr. Kahakalau continues: “When we build 'ahu, we are very, very selective. We don't just build 'ahu everywhere. And certain places people asked us to put 'ahu where we don't build 'ahu, because we don't feel it's the right spot to build them...So it's really something that as a practitioner you're taken very, very serious, and when you make the 'ahu, every rock is asked if it wants to come and be part of the 'ahu. When we built our school, we asked every pohaku that was part of the paia, you know, if it wanted to come because we gathered it from Mauna Kea, and we feel that that's how we need to treat those rocks, those pohaku...So the rocks are asked if they want to come. The person who builds it has to be very pono, clean inside and out so the cleansing ceremonies before you build an 'ahu, here is a kapu, I guess is the best way to put, when you build that 'ahu and throughout the life of that 'ahu there is kuleana, once you build that 'ahu, to malama it in every way.”

2s. **FOF 732**. **WRONG AND MISUNDERSTOOD** UH/TIO assert: “The two ahu built and installed by W. Freitas and others on the access road in and near Area E in 2015 were placed for political or protest reasons to halt the TMT Project, and were not placed in accordance with any recognized traditional practice performed by W. Freitas or others at the locations of the two ahu within Area E. Specifically, they wrote, W. Freitas . . . “had not been on the area where the two ahu were placed prior to 2015.”

2.s.1 In the cross-examination of Mr. Freitas' witness Mr. Fujiyoshi by Ms. Kihoi, his answer to the question, **"Do you believe that a person's spiritual connection to Mauna Kea should be measured by how long. (sic) That person has been physically familiar with this area?"** was**: "No. I think one's faith is by the depth of your commitment. And commitment cannot be just measured in terms of number of times that you have performed a ritual.**" Tr. 3/2/17 vol. 44 at 129.

2.s.2 Mr. Fujiyoshi's answer to the question by Ms. Kihoi, "**Do you believe that a spiritual connection to Mauna Kea can be felt even if one has never physically visited the mountain?**" was "**Of course. I think we have heard much discussion that the mountain was so sacred that people who believed that wouldn't go up there. But it doesn't mean that they didn't believe the mountain was sacred. They believe that the depth was so great that they would respect that and not go up there.**" Tr. 3/2/17 vol. 44 at 129.

2.s.3 The commitment of Mr. Freitas can be seen in his experience as a cultural practitioner, his sincerity as witnessed during the entire contested case hearing, and his continuing care of the ahus he supervised building even after they were constructed. The depth of the faith in the sacredness of Mauna Kea can be seen in the numbers and dedication of the Hawaiian cultural practitioners who have participated in this contested case hearing as petitioners, intervenors, witnesses and observers, as well as the number of protectors on Mauna Kea from the day of the ground-breaking ceremony until the present.

3. COL 938 MISCONSTRUED The Applicant states: **"**The eighth criterion of Haw. Admin. R. § 13-5-30 only states that a proposed land use should not be materially detrimental to the public health, safety, and welfare. It does not require that a proposed land use be affirmatively beneficial to public health, safety, or welfare." **While the Applicant may not have to prove that the project will provide benefits, it is their burden to demonstrate that the project will cause no harm.** In **COL 939**, they state: **"**The preponderance of the evidence showed that the TMT Project will not be materially detrimental to the public health, safety, and welfare."

1. **It is entirely unclear how UH/TIO can reach this conclusion. While they go to extensive lengths to delegitimize research that has been conducted on possible deleterious health effects of the project on Native Hawaiians as testified to by at least six witnesses (COL 942, COL 949, COL 951, COL 954, COL 955, COL 956), ultimately UH/TIO point to the need for more extensive, well-funded, peer-reviewed research. They present no studies of their own beyond a highly selective phone opinion poll (COL 728). As they bear the burden of proof, it is incumbent upon them to update this part of the CDUA to ensure they can meet the requirements of the eighth criterion of Haw. Admin. R. § 13-5-30 This dearth of data needs to be rectified before the permit can be approved, as it is the burden of the Applicant to prove the project will not cause significant harm.**

4. Mitigation measures cannot therefore address levels of impact because the scope, location, and type of traditional and customary practices on Mauna Kea, including in and around the summit area and TMT site, are undocumented and unknown.

4a. **COL 305** The Applicant recognizes that "[t]he use of mitigation measures is a universally recognized and widely adopted means of lessening otherwise adverse impacts in land use projects."

4b. Mitigation measures cannot address practices and ahus which are not documented or understood. This is precisely why the only mitigation measure offered by UH/TIO to benefit the religious and spiritual practitioners represented in this hearing (and the many others who could not attend the hearings regularly, whether due to the necessity of taking half a year or more off from their jobs to be present at hearings or to travel the distance necessary to attend) is *four daytime shutdowns of the telescope*. This is a paltry and insufficient mitigation measure and certainly is not based on any solid research concerning what mitigation measures, if any, could benefit practitioners such as myself.

4c. **WRONG COL 457-459** The failure of the CDUA and CMP to properly understand or respect traditional and customary practices like those I regularly engage in is precisely why their proposed mitigation measures do not achieve what the Applicant claims. In **COL 458**, UH/TIO state:

> Mitigation measures accepted in the approved TMT FEIS may be considered as part of the CDUA approval process. On the basis of the evidence presented, those measures are reasonable and accurate efforts to mitigate and lessen any cultural impacts in the Mauna Kea summit area as a whole which benefits would not otherwise exist without the TMT Project.

In **COL 459**, they assert:

> The approved and unchallenged FEIS for the TMT Project identifies several mitigation measures, both direct and indirect, that are aimed at ameliorating potential impacts on the environment and cultural practices. These measures mitigate the Project's potential impacts on the environment and cultural practices so that the TMT Project will not create a substantial adverse impact to these areas.

The mitigation measures directed toward ameliorating the impact on "environment and cultural practices" include "cultural and community outreach." A "[t]raining Program will be implemented to educate employees to understand, respect, and honor Maunakeas cultural landscape and cultural practices," and the telescope facility will be "furnished with items to provide a sense of place and acknowledge the cultural sensitivity and spiritual attributes of Maunakea." (FEIS pg S-12) Training employees and providing "sensitive" furnishings (what could these possibly be?) are in no way directed at reducing the level of impact on religious and spiritual practitioners the TMT project to "below significant."

4d. ***NOTE DISCREPANCY:*** **COL 457, CDUA, FEIS Pg. S-12 Perhaps aware of the paucity of mitigation measures proposed in the CDUA, in their FOF/COL/DO, the UH/TIO add a measure to their Conclusions of Law mitigation measure list that does not appear in the original CDUA or FEIS: "consultation with cultural practitioners." I have testified under oath that no one has offered to consult with me about my religious and spiritual practices on Mauna Kea, particularly in the Summit area. In sum, the mitigation measures do not contemplate what kinds of mitigation would be possible or necessary because they are based on stale, outdated and incomplete studies of religious and cultural life on the mauna today.**

SUMMARY DECISION ORDER BASED ON RESPONSE

(COL 363). **WRONG, DECEPTIVE, and DISSIMULATING**. This Response document began with a list of wrong and misleading findings of fact and conclusions of law set forth by

UH/TIO. In the COL quoted below, UH/TIO provide a condensed summation of their position regarding the Petitioner and Intervenors' legitimate and sincere testimony. UH/TIO's perfunctory dismissal of their legal mandates under the State Constitution of Hawai'i and statutory requirements reveals their disregard for the law. While UH/TIO may claim that Intervenors demonstrated a lack of respect for legal authority during the June 2015 protests, this hearing made clear that the focus of our efforts during those days was not to break the law but to: 1. Hold state authorities accountable for upholding their duty to allow Native Hawaiians and others for whom Mauna Kea is sacred to be heard; 2. To ensure that our due process rights protected; and 3. To protect of beloved and sacred Mauna A Wakea.

In the words of the UH/TIO:

> According to the evidence adduced in this proceeding, the Petitioners and Opposing Intervenors have not demonstrated a need to conduct or participate in religious ceremonies on the proposed TMT Project site; they have not identified practices that will be substantially interfered with; and the BLNR's approval of the TMT Project will not threaten practitioners with sanctions if they engage in religiously motivated conduct. Moreover, except for actual construction areas while the Project is being built (and, once it is completed, the TMT Observatory site), Petitioners, Opposing Intervenors, and everyone else will have continued access to the summit area of Mauna Kea, for religious practices and for any other permitted activity.

This entire paragraph fairly sums up the utter paucity of the Applicant's understanding of traditional and customary practice on Mauna Kea and their complete failure to address the resulting harm this project will cause. Additionally, they make promises and assurances that they have no intention of upholding, as shown by the Emergency Rules BLNR enacted without due consultation with Petitioners, Intervenors, and religious and spiritual practitioners at the time.

Now I turn to the putative legal basis of UH/TIO's position, with particular attention to two of the cases they rely upon, *Lyng* and *Kilakila*. Regarding the former, the jurisdiction of this contested case is the State of Hawai`i. It is therefore odd and alarming that the UH/TIO FOF/COL/DO relies on a tired, worn, and embarrassing federal decision (*Lyng v. Northwest Indian Cemetery Protective Association***,** 485 U.S. 439 (1988)) in its attempt to deflect attention away from the necessity of the applicant and the BLNR taking Native Hawaiian customary and traditional claims seriously. *Lyng* is widely regarded as reactionary, short-sighted, and completely out-of-step with principles of fairness concerning indigenous religious claims (see, *inter alia*, W. Echohawk, *In the Courts of the Conquerer: The Ten Worst Indian Law Cases Ever Decided*). Justice Brennan, joined by Marshall and Blackmun, could see how misguided the decision was on constitutional grounds and how hastily and summarily it dismissed native claims that were clearly articulated in the EIS documents of the case. He wrote,

> Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent…[B]y defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve -- and the Constitution demands -- more than this.

He concludes,

> Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions, ante at 454 (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment. I dissent. (447)

In the wake of *Lyng*, at least in those jurisdictions that sincerely honor the presence and rights of their native communities, this faulty jurisprudence has been supplanted by the *United Nations Declaration on the Rights of Indigenous Peoples* and by state- and county-level instruments. Fortunately, Hawai`i has mechanisms, instruments, and cherished ideals as articulated through numerous decisions that are far better than *Lyng* for assessing the present contested case. Your Honor, by addressing this case in the light of Hawai`i law, you have an opportunity to honor Native Hawaiian customary and traditional rights in a way that responds to the tarnished legacy of *Lyng* and that will illustrate how forward-thinking Hawai`i is in protecting the place and rights of Native Hawaiians.

In the effort of achieving fairness and the appearance thereof, it will be a mistake to invoke, as UH/TIO has, the State Supreme Court's ruling in *Kilakila* (KILAKILA 'O HALEAKALĀ, Petitioner/Appellant-Appellant, v. BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAI'I, Respondents/Appellees-Appellees. Supreme Court of Hawai'i. SCWC-13-0003065 Decided: October 06, 2016). Relying on a *Lyng*-style justification, the Court in *Kilakila* affirmed the CDUA, notwithstanding the clarity of the FEIS in stating that traditional and customary rights would been violated. It needs to be pointed out that the facts in *Kilakila* are different from those in the instant case and, additionally, that the nature and scope of traditional and customary practices on the respective mauna are different. One cannot substitute the ruling in one telescope case for a ruling in the other. To do so, or even to argue that *Kilakila* governs considerations with regard to Mauna Kea, requires first that traditional and customary rights be

assessed adequately through proper consultation measures. Short of that, the Hearing Officer simply does not have at her disposal an adequate factual record by means of which to apply the ruling of *Kilakila* to this contested permit.

Insofar as *Kilakila* is parallel to this case, I draw the Hearing Officer's attention to the dissenting opinion of Justice Wilson.

> The strength of the law resides in its fair application. Fair application of the law justifies faith in judicial decision-making. The decision in this case as to whether a $298 million dollar telescope providing unique benefits to scientific knowledge should be built in a location sacred to the Hawaiian community is one of great consequence deserving a fair decision—a decision arising from a process of fairness that the parties and our community can trust. The conservation district use permit (CDUP) sought by the University of Hawai'i Institute for Astronomy (UHIfA) is subject to decision-making based on evidence presented at a contested case hearing—an adjudicative proceeding. A hallmark of due process to which all parties are entitled in this case is an impartial decision-maker who receives evidence subject to public view—an impartial decision-maker equally accessible to all parties, whose decision is based on the evidence and law, with no regard to which party may be the most powerful politically or economically.
>
> … [T]he Board granted the CDUP notwithstanding the conclusion of the Final Environmental Impact Statement that construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources.

Justice Wilson continues:

> ***The absence of a reasonably clear factual analysis explaining the Board's departure from the conclusion of the Final Environmental Impact Statement also constitutes a basis for remand with instructions to provide such a rationale***. (emphasis added)

And concludes in his concurring opinion:

> ***... [T]he failure of the Board of Land and Natural Resources to supply with reasonable clarity a factual analysis in support of its departure from the finding of the FEIS that the construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources require that the conservation district use permit be vacated.*** (emphasis added)

In conclusion, it is profoundly unfortunate that the current state of First Amendment jurisprudence, including construals of *Lyng*, as noted above, does not allow for meaningful protection of indigenous religious sites *per se*. However, it is a testament to the State of Hawai`i that it has shown an enlightened way forward on such humanitarian issues by means of its constitutional provisions, land use laws, and administrative procedures that are designed to recognize and accommodate traditional and customary practices. It is my hope that the Hearing Officer and the BLNR will make good on the promises embedded in these legal instruments and in doing so enable me and my community to feel that justice and fairness have prevailed in this context.

Immediate and unambiguous relief could be achieved through denial of the permit, which is what I strongly urge. If you, honorable Judge Amano, insist on these remedies, then I, William Freitas, will feel heard and seen as a living traditional practitioner whose rights have been acknowledged. I could then live pono, and say from my na`au that I am no longer under threat, duress, and coercion.

A weaker but legally mandated remedy would be for the hearing officer to recommend that the BLNR demand a revised or supplemental EIS from the Applicant, together with a revised and resubmitted CDUA. This path would entail new consultative efforts, including ethnographic studies and direct consultation with the petitioners and intervenors, myself included. This would satisfy, at minimum, the State Supreme Court's mandate that the hearing properly adjudicate the permitting process.

Kailua-Kona William Freitas Pro Se Intervenor