(Harry Fergerstrom); Tr. 1/9/17 at 95:8-16, 100:19-101:7, 104:12-19, 177:17-178:5, 197:5-10 (Dr. Kahakalau). The law does not support that view.

432. Under the foregoing, to withhold approval of the TMT Project based on the Petitioners' and Opposing Intervenors' arguments that their religious beliefs and practices should hold veto power over all uses of the lands of Mauna Kea, would violate the Establishment Clause of the federal and state constitutions and is hereby rejected.

433. This does not mean that the government cannot protect a natural feature deemed sacred by native Hawaiians. The BLNR, in reviewing a CDUA, must consider the protection of cultural resources. It could be valid, on cultural grounds, to preserve the appearance of a landscape connected to important myths, legends, and traditions of native Hawaiians. The fact that some insist that the same landscape be protected for explicitly religious reasons does not disqualify it from legal protection.

434. The discussion in COL #400-433 explains the constitutional reasons why the essentially religious reasons asserted by many of the TMT opponents, which are so compelling to them, cannot be the basis for the final decision.

c. Contemporary Practices

435. As set forth above, *Ka Pa'akai* is concerned with the preservation and protection of customary and traditional native Hawaiian rights, not with contemporary cultural practices. Nonetheless, UH Hilo's extensive efforts to identify cultural practices, potential impacts on or impairment of those practices, and feasible actions to be taken to reasonably protect the native Hawaiian rights that exist, set forth above, encompass not only customary and traditional practices, but contemporary practices as well.

436. As described above, Petitioner Flores claims that the CDUA is incomplete and should be denied because it fails to identify certain "find spots." For the reasons articulated in the above findings of fact, Petitioner Flores' claims are factually unfounded and therefore do not provide a basis for the BLNR to deny the CDUA.

437. In any event, HRS § 343-2 relates to the Environmental Assessment / Environmental Impact Statement phase of a project. As described above and below, the time for any challenge to the FEIS for the TMT Project expired long ago and no challenges were made. Consequently, any argument under HRS § 343-2 would be untimely and cannot be raised now.

C. PETITIONERS' AND OPPOSING INTERVENORS' OTHER ARGUMENTS

i. Insufficient Consultation

438. A number of the Petitioners and Opposing Intervenors claimed that consultation for the TMT Project was insufficient or non-existent. The substantial evidence of the history of the TMT Project, consideration of historical, traditional and cultural resources and practices, as well as contemporary and religious practices and impacts to those practices and resources by the TMT Project supports the finding that sufficient and significant

consultation with the Petitioners, Opposing Intervenors, and the public at large occurred at several stages of the planning process and were specifically included in the FEIS and the CIA for the FEIS, as well as the CDUA. Ex. A-3/R-3 at 3-9 to 3-21; Ex. A-5/R-5, App. D; Ex. A-1/R-1 at § 4; (White) Tr. 10/24/16 at 223:17-224:20; Tr. 11/15/16 at 23:11-23.

ii. Waiver of Challenges to the FEIS

439. As noted in the findings of fact above, a number of the Petitioners and Opposing Intervenors actively participated in the HRS Chapter 343 EIS process for the TMT Project, including submitting comments on the DEIS, and consulting for the cultural impact assessment. *See supra* at FOF Section II.D.

440. The time limit for making challenges to an FEIS is set out in Haw. Rev. Stat § 343-7.

441. It is undisputed that the time for challenges to the Governor's acceptance of the FEIS for the TMT Project ended on August 7, 2010, and that neither Petitioners and Opposing Intervenors nor anyone else made a timely challenge – or, indeed, any challenge at all – to the TMT Project's FEIS.

442. The TMT Project has complied with the EIS process required under HRS Chapter 343 and HAR, Title 11, Chapter 200.

443. 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).

444. 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.

445. Having failed to timely challenge the FEIS for the TMT Project, Petitioners and Opposing Intervenors may not use this contested case proceeding to assert any such challenge, and all arguments seeking to challenge the adequacy, sufficiency, findings and/or conclusions of the FEIS are hereby rejected.

iii. Alleged Desecration

446. Opposing Intervenor Temple, and other Opposing Intervenors and Petitioners, claim that development of the TMT Project – within the Astronomy Precinct and within an established Resource subzone in the Conservation District – would constitute a violation of HRS § 711-1107. The statute provides:

> (1) A person commits the offense of desecration if the person intentionally desecrates:
>
> (a) Any public monument or structure; or

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of a person likely to observe or discover the defendant's action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both.

447. The Petitioners' and Opposing Intervenors' claims that development of the TMT Project constitutes "desecration" under HRS § 711-1107 is meritless.

448. The BLNR does not have jurisdiction to adjudicate violations of the Hawai‘i Penal Code. Hawai‘i law is very clear that administrative agencies have only those powers expressly granted by statute. *Morgan v. Planning Dep't*, 104 Hawai‘i 173, 184, 86 P.3d 982, 993 (2004). Nothing in the Hawai‘i Penal Code or the BLNR's enabling statutes provides the BLNR with jurisdiction over criminal offenses. Instead, HRS § 603-21.5 confers upon the circuit courts of the State of Hawai‘i jurisdiction over all "criminal offenses cognizable under the laws of the State," except for those offenses "otherwise expressly provided." On the basis of the foregoing, the alleged desecration claims fail.

449. Even if the desecration claim could be considered on its merits, there is simply no evidence whatsoever of a violation, and the claim fails as a matter of law.

450. HRS § 711-1107 lists the types of activities that constitute desecration as "defacing, damaging, polluting, *or otherwise physically mistreating*" a site. *Id.* (emphasis added).

451. Under the established principle of statutory construction, *ejusdem generis*, "where general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated in the preceding specific words." *Singleton v. Liquor Comm'n, Cty. of Hawai‘i*, 111 Haw. 234, 243 n.14, 140 P.3d 1014, 1023 n.14 (2006) (quoting *Peterson v. Hawai`i Elec. Light Co.*, 85 Hawai‘i 322, 328, 944 P.2d 1265, 1271 (1997) (citing *Richardson v. City & County of Honolulu*, 76 Hawai‘i 46, 74, 868 P.2d 1193, 1201 (1994)).

452. Stated another way, "Under this established rule of statutory construction [*ejusdem generis*], where words of general description follow the enumeration of certain things, those words are restricted in their meaning to objects of like kind and character with those specified." *Richardson v. City & Cnty. of Honolulu*, 76 Haw. 46, 74, 868 P.2d 1193, 1221 (1994) (Klein, J., dissenting) (quoting *Jones v. Hawaiian Elec. Co., Inc.*, 64 Haw. 289, 294, 639 P.2d 1103, 1108 (1982)).

453. Thus, the general clause in HRS § 711-1107(2) that desecration requires conduct of "otherwise physically *mistreating*" a site makes it clear that the more specific listed conduct of "defacing, damaging, [and] polluting" must be motivated by the ill-intent of

"mistreatment" and/or be unauthorized.

454. This ill-intent of mistreatment requires "conscious object to engage in certain conduct or cause a certain result." Commentary to HRS § 702-206(1).

455. Accordingly, the *mens rea* for the crime of desecration necessarily requires a specific intent to mistreat a protected site. HRS § 711-1107(2).

456. Thus, this situation is clearly distinguishable from the intent and types of conduct that desecration statutes are designed to address. *See e.g., Pistorino & Co., Inc. v. U.S.*, 82 Cust. Ct. 168 (1979) (discussing desecration in the context of statues as objects of veneration); *American Atheists, Inc. v. Port Authority of New York and New Jersey*, 760 F.3d 227, 240 (2d Cir. 2014) (discussing desecration within the context of whether or not the display of a cross at Ground Zero is simply as an artifact that tells the story of 9/11 or as an "object of veneration"); *R. B. Tyler Company v. Kinser*, 346 S.W.2d 306 (Ky. Ct. App. 1961) (discussing alleged desecration of a grave).

457. There is no evidence in this matter that an entity or "person" involved in this proceeding has the specific ill-intent to mistreat Mauna Kea through defacing, damaging or polluting the mountain through the development of the TMT Project, and the Hearing Officer specifically finds that the University and TIO have no such intent.

458. It is illogical that the University and TIO can be found to have the requisite specific intent to "mistreat" Mauna Kea by the development of the TMT Project, where it is undisputed that the project has been proposed for the Astronomy Precinct within the Resource subzone of the Conservation District, in which by law, "astronomy facilities" are expressly permitted – and in fact currently exist.

459. Moreover, this entire process relating to the CDUA for the development of the TMT Project, which has involved numerous and extensive studies, the preparation of the application, numerous consultations, review and analysis by the DLNR staff, and this contested case hearing itself, completely negates any argument that the University and TIO could have the requisite specific ill-intent to "mistreat" Mauna Kea. To the contrary, the participation by the University and TIO in the preparation and consideration of the CDUA and their participation in this proceeding demonstrates the complete opposite: an intent and commitment to participate in a legal process designed to carefully consider the merits of the development of the TMT Project consistent with the eight criteria set forth in HAR § 13-5-30(c) as they apply to the Astronomy Precinct within the Resource subzone of the Conservation District on Mauna Kea.

460. To hold that HRS § 711-1107 applies to a land use expressly contemplated by law, and to a legal proceeding to consider the merits of that land use, would effectively eviscerate all land use controls and regulations, including HAR § 13-5-30(c).

461. The foregoing sufficiently addresses Petitioners' and Opposing Intervenors' claims of alleged desecration, without the need to make any findings or conclusions regarding any other element of the statute, including whether the summit of Mauna Kea meets any of the definitions under HRS § 711-1107(1)(a), (b) or (c). Petitioners' and Opposing

Intervenors' alleged claims are not within BLNR's jurisdiction, are unsupported by any evidence, and are therefore rejected.

iv. Vacatur of Consent to Sublease

462. The Petitioners and Opposing Intervenors sought the dismissal of TIO as a party in this proceeding due to the Third Circuit Court's decision in a separate matter to vacate the consent to the sublease for the TMT Project. *See* Order Granting in Part and Denying in Part Appellees State of Hawai'i, Board of Land and Natural Resources, Department of Land and Natural Resources, and Chairperson Suzanne D. Case's Motion for Stay of Proceedings, or in the Alternative for the Court to Issue its Decision on Appeal, Filed October 25, 2016; Vacating Consent to Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and The University of Hawai'i Under General Lease No. S-4191; and Remanding Matter to the Board of Land and Natural Resources, Filed January 6, 2017 in *E. Kalani Flores v. Board of Land and Natural Resources, et al.*, Civil No. 14-1-00324, In the Circuit Court of the Third Circuit, State of Hawai'i ("**Flores Appeal**").

463. The Petitioners and Opposing Intervenors argued that TIO lacked standing because TIO no longer had a property interest due to the vacatur of the consent to the Sublease. *See* Temple of Lono's Motion to Dismiss TIO as Intervenor or, Alternatively, Stay this Proceeding [DOC-427] and Mr. Harry Fergerstrom's Motion to Remove TMT/TIO as a Party, for Lack of Standing, Including Any and All Submissions into the Evidentiary Library [DOC-429].

464. The circuit court considered a legal issue – whether a contested case hearing was necessary prior to the BLNR's consent to the Sublease – which is not an issue to be decided in the current contested case hearing on the CDUA. As explained below, the vacatur of the consent to Sublease does not affect the propriety of TIO's participation in this contested case because it would have standing even without being a sublessee. To the extent that a decision to consent to the Sublease depends upon a full evaluation of the environmental, cultural, economic, social and other effects of the TMT Project, those issues are fully considered in the current contested case hearing. A diverse set of parties, including the party opposing the consent to Sublease, have had a full opportunity to present evidence on these issues.

465. The motions to dismiss were properly denied and TIO is a proper party in this proceeding based on TIO's initial motion to intervene.

466. TIO was admitted as a party to this proceeding pursuant to HAR § 13-1-31(c):

> "Other persons who can show a substantial interest in the matter. . . The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. . . "
>
> HAR § 13-1-31(c).

467. "After full consideration of the record, arguments, representations, motions, [and] applications," TIO's motion to intervene as a party was granted "due to TIO's substantial interest in the subject matter and because TIO's participation will substantially assist the Hearing Officer in her decision making." Minute Order No. 13 (July 21, 2016) at 4 [Doc. 115]. The order granting TIO's intervention did not reference, much less rely upon, the existence or validity of the Sublease, as it was not material to the Hearing Officer's decision to admit TIO as a party under HAR § 13-1-31(c).

468. Given the foregoing, the Circuit Court's Order in the Flores Appeal did not change the basis for the admission of TIO as a party to this proceeding. TIO, as the developer of the TMT Project, continued to have a "substantial interest" in the subject matter of this contested case hearing even after the entry of the Circuit Court's Order: the consideration of the CDUA for the TMT Project on Mauna Kea.

469. There was also no reasonable dispute that TIO's participation assisted the Hearing Officer in the decision on the CDUA. TIO was in a unique position to provide detailed evidence to the Hearing Officer regarding plans for the TMT Project, including the telescope's physical characteristics, the substantial public and scientific benefits of the project, TIO's mitigation plans and other facts that are relevant and material to the criteria that the Hearing Officer must consider pursuant to HAR § 13-5- 30(c) for issuance of the CDUP.

470. Accordingly, the motions to dismiss TIO were properly denied notwithstanding the vacatur of the consent to the Sublease in the Flores Appeal.

v. UH Hilo Authority to Execute CDUA

471. Petitioners and Opposing Intervenors sought to strike the CDUA under the premise that since HAR § 13-5-31(b) provides that applications for CDUPs require the signature of the "landowner" (and in the case of state and public lands, "the State of Hawai`i or government entity with management control over the parcel shall sign as landowner") and the University is the lessee of the MKSR, UH Hilo could not have day-to-day management over the land, and thus only the President of the University had the authority to sign the CDUA. *See* Petitioners' Motion to Strike Conservation District Use Application, HA-3568, dated September 2, 2010, and/or Motion for Summary Judgment, filed July 18, 2016 [Doc. 94] ("**Motion to Strike CDUA**").

472. Under HRS § 304A-101, the University is an organization consisting of multiple campuses, including UH Hilo.

473. Under University policy and practice, the University may delegate day-to-day management to specific campuses, and in 2000, the University formally delegated management control of MKSR to UH Hilo. *See generally*, WDT Nagata at 2-3; Tr. 12/8/18 at 27:6-39:19; Ex. A-48.

474. Accordingly, as a matter of law, UH Hilo is the proper signatory to the CDUA pursuant to HAR § 13-5-31(b), so Petitioners' motion to strike the CDUA was properly denied.

vi. CDUA Reference to TMT Corporation and TIO

475. Petitioners and Opposing Intervenors argued that the CDUA should be voided because it references the TMT Corporation rather than TIO.

476. Mr. Ching offered his opinions regarding, *inter alia,* TMT Corporation and TIO, and the alleged affect that the different entities had on the CDUA. Ex. B. 19a (Ching WDT) and B. 19d (Ching Supplemental WDT). The effect of the change in these entities is a question of law and Mr. Ching's opinions, as opposed to any factual elements in his testimony, are given no weight.

477. As Petitioners and Opposing Intervenors acknowledged, UH Hilo, not TIO, is the CDUA Applicant.

478. It is undisputed that under any sublease for the MKSR, UH Hilo and any sublessee must comply with all terms of the CDUP.

479. Accordingly, although it is undisputed that TMT Corporation and TIO are different legal entities, that fact does not affect the validity of the CDUA.

480. TMT Corporation and TIO are different entities for the purposes of corporation law, but it was always contemplated that TMT's interests, assets and personnel would be transferred to TIO once a CDUP had been obtained and construction was to commence. That transfer took effect after the conclusion of the prior contested case hearing.

481. Therefore, UH Hilo, as the applicant of the CDUA, was not required to resubmit the CDUA, reapply, or otherwise amend the CDUA to reflect the creation of TIO or the change from TMT Corporation to TIO.

vii. NHPA Section 106 Review / National Environmental Policy Act

482. A number of the Petitioners and Opposing Intervenors claimed that TIO and UH Hilo had an obligation under NHPA Section 106 to independently determine whether the TMT Project or the National Science Foundation's activities and funding related to the TMT Project constituted an undertaking under NHPA Section 106, and that a Section 106 review of the TMT Project was required.

483. Petitioners and Opposing Intervenors are incorrect that NHPA Section 106 applies to this matter.

484. NHPA Section 106 is codified in the United States Code ("**U.S.C.**"), Title 54, Section 306108.

485. The implementing regulations for NHPA Section 106 are found in the Code of Federal Regulations ("**CFR**"), Title 36, Part 800, entitled "Protection of Historic Properties."

486. NHPA Section 106, 54 U.S.C. § 306108, titled "Effect of undertaking on historic property[,]" provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

487. NHPA Section 106 "requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings." 36 CFR § 800.1.

488. The term "undertaking" as used in NHPA Section 106 means:

> ...a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –
>
> (1) those carried out by or on behalf of the Federal agency;
>
> (2) those carried out with Federal assistance;
>
> (3) those requiring a Federal permit, license, or approval; and
>
> (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.
>
> 54 U.S.C. § 300320; 36 CFR § 800.16(y).

489. The term "Council" as used in NHPA Section 106 means the Advisory Council on Historic Preservation ("**ACHP**"). *See* 54 U.S.C. § 300303.

490. Review under NHPA Section 106 is required when there is an "undertaking" by a Federal agency that may affect historic properties. "The agency official shall determine whether the proposed Federal action is an undertaking." 36 CFR § 800.3(a). "It is the statutory obligation of the Federal agency to fulfill the requirements of section 106." *Id.* at § 800.2(a).

491. The NSF is a Federal agency under NHPA Section 106. *See* 54 U.S.C. §300301; 5 U.S.C. § 551. NSF concluded that its activities and funding related to the TMT Project did not constitute an "undertaking" requiring review under NHPA Section 106. *See* Exhibits A-124; A-125; and A-126.

492. In reviewing NSF's conclusions relating to NHPA Section 106, the ACHP "[saw] no basis for objecting to NSF's conclusions." Ex. A-125; *see also* Ex. A-126 (relating to NSF's conclusion that "there is no basis for NSF to engage in consultations with the project proponent with regard to Section 106 implications").

493. Review of the TMT Project under NHPA Section 106 was not required.

494. Neither TIO nor UH Hilo had an obligation or authority under NHPA Section 106 to independently determine whether the TMT Project or NSF's activities and funding related to the TMT Project constituted an undertaking under NHPA Section 106.

495. Neither TIO nor UH Hilo had an obligation or authority to engage in a Section 106 review of the TMT Project.

496. NHPA Section 106 is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA.

497. NEPA governs the preparation of environmental impact statements and other procedures by federal agencies to assess the environmental effects of proposed federal action. *See* 42 U.S.C. § 4331.

498. Although none of the Petitioners and Opposing Intervenors claimed in this proceeding that the TMT Project is subject to NEPA (and the Hearing Officer affirmatively concludes that the TMT Project is not subject to NEPA), the Petitioners and Opposing Intervenors claimed that the evaluation of the cumulative impacts and proposed mitigation measures of the TMT Project should be guided by the approach applied by federal agencies pursuant to NEPA. *See* Ex. B.01s.

499. Inasmuch as NEPA does not apply to the TMT Project and the preparation of the EIS and other documents related to the project, and does not apply to the analysis of the cumulative impacts and proposed mitigation measures at issue in this proceeding, NEPA (and the approach employed by federal agencies under NEPA) is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA.

XI. SUMMARY

500. The BLNR approved the CMP, CRMP, NRMP, PAP, and Decommissioning Plan on April 9, 2009 and March 25, 2010. These documents are the State of Hawai‘i's management documents for the UH Management Area on Mauna Kea.

501. The activities that would be carried out if the TMT Project is approved and implemented are consistent with the management actions described in the CMP and sub-plans. This provides consistency and viability of management objectives, which include ensuring the sustained use of natural resources in the Resource subzone under HAR § 13-5-13.

502. A project-specific management plan has been developed for the TMT Project that adopts the approach, goals, objectives and management strategies and actions of the CMP and sub-plans in their entirety. The TMT Management Plan implements all relevant action items and plans of the CMP and sub-plans on a site-specific basis, ensuring that the management actions called for in the CMP and sub-plans which are applicable to the TMT Project are effectively and responsibly implemented.

503. Protection of native Hawaiian practitioners' exercise of customary and traditional