

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

July 25, 2014

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii

(1) Denial of Requests for Contested Case by E. Kalani Flores and Dan Purcell re: Board Action of June 13, 2014, Item D-8, Consent to Sublease under General Lease No. S-4191 to the University of Hawaii, Lessee, to TMT International Observatory LLC, Sublessee (deferred); and (2) Denial of Requests for Contested Case by Dan Purcell, Flores-Case 'Ohana, Mauna Kea Anaina Hou, Kealoha Pisciotto, Paul K. Neves, Clarence Kukauakahi Ching, and Harry Fergerstrom, and Acknowledgment and Acceptance of the Withdrawal of the Request for Contested Case filed by Office of Hawaiian Affairs re: Board Action of June 27, 2014, Item D-19, Resubmittal: Consent to Sublease under General Lease No. S-4191 to the University of Hawaii, Lessee, to TMT International Observatory LLC, Sublessee (approved as amended), Kaohe, Hamakua, Island of Hawaii, Tax Map Keys: 3rd/ 4-4-15:01 por., 09 & 12

BACKGROUND:

On June 13, 2014, the Board, at its regular meeting held pursuant to HRS chapter 92 (sunshine law), called Item D-8 of the agenda regarding the University of Hawaii's (University) request for the Board to consent to sublease under General Lease No. S-4191 to the University, Lessee, to TMT International Observatory LLC, Sublessee. After testifying, E. Kalani Flores and Dan Purcell made oral requests for a contested case. The Board deferred the matter so that the University could answer several questions regarding the sublease.

On June 27, 2014, the Board, at its regular meeting held pursuant to HRS chapter 92, called Item D-19, which was a resubmittal the matter deferred at the June 13, 2014 meeting. The Board approved the consent to sublease, but stayed the effectiveness of the consent until administrative proceedings on any contested case requests are concluded. A copy of the Board's action of June 27, 2014, Item D-19, approved as amended, is attached as Exhibit A-1.

At the June 27, 2014 meeting, the following persons made oral requests for contested cases:

Flores-Case 'Ohana
Dan Purcell
Office of Hawaiian Affairs
Kealoha Pisciotto for herself and on behalf of Clarence Kukauakahi Ching and
Paul K. Neves

E. Kalani Flores, Dan Purcell, Flores-Case 'Ohana, Mauna Kea Anaina Hou, Kealoha Pisciotto, Paul K. Neves, Clarence Kukauakahi Ching, Harry Fergerstrom and Office of Hawaiian Affairs are sometimes referred to collectively hereinafter as Petitioners.

RECEIVED PETITIONS:

On June 27, 2014, Flores-Case 'Ohana submitted a written petition for a contested case. A copy of the petition is attached as Exhibit A-2. The Flores-Case 'Ohana alleges that they are native Hawaiians who hold Mauna Kea sacred pursuant to their traditional and customary beliefs. They claim an interest in Mauna Kea from their: (a) traditional and customary practices; (b) standing as beneficiaries of the ceded lands trust; and (c) environmental interests.

On July 5, 2014, Mauna Kea Anaina Hou, Kealoha Pisciotto, Paul K. Neves, and Clarence Kukauakahi Ching submitted written petitions for a contested case. A copy of Mauna Kea Anaina Hou's and Ms. Pisciotto's petition is attached as Exhibit A-3, a copy of Mr. Neves' petition is attached as Exhibit A-4, and a copy of Mr. Ching's petition is attached as Exhibit A-5. Mauna Kea Anaina Hou, Kealoha Pisciotto, Mr. Neves, and Mr. Ching claim an interest in the Mauna Kea sublease from their: (a) traditional and customary practices; (b) the public trust doctrine; (c) the Hawaiian Homes Commission Act; (d) standing as beneficiaries of the ceded lands trust; (e) the Hawaii Environmental Policy Act; (f) the Endangered Species Act; (g) the National Historic Preservation Act; and (h) the National Environmental Policy Act.

Only July 7, 2014, Harry Fergerstrom submitted a written petition for contested case, a copy of which is attached as Exhibit A-6.¹ Mr. Fergerstrom claims an interest in the Mauna Kea sublease from his: (a) traditional and customary practices; and (b) standing as a beneficiary of the ceded lands trust.

Also on July 7, the Office of Hawaiian Affairs submitted a written petition for contested case. A copy of the petition is attached as Exhibit A-7. OHA claims an interest in the Mauna Kea sublease based on its constitutional and statutory rights to a pro rata portion of the income and proceeds from public land trust lands. Specifically, OHA challenges the amount of lease rent to be paid by the sublessee as not being "substantial" as required by the Board. OHA also claims it has an interest in ensuring the proper implementation

¹ It is not clear whether Mr. Fergerstrom, Mr. Neves, and Mr. Ching made timely oral requests, but for purposes of this submittal, staff assumes that they were made.

of the Comprehensive Management Plan and Sub-Plans for Mauna Kea. Subsequently, on July 15, 2014, OHA sent a communication to the Chairperson's Office indicating that the OHA Board of Trustees had voted to withdraw its petition for a contested case. See Exhibit A-8 attached.

Dan Purcell did not submit a written petition for contested case hearing within the time allowed by applicable rules. Mr. Purcell's oral request should be denied for that reason (in addition to the reasons discussed below).

Some of the Petitioners requested waivers of the contested case filing fee. However, there is no filing fee because the Board actions of June 13 and June 27, 2014 did not involve action on a Conservation District Use Permit.

DISCUSSION:

A. Petitioners Have No Right to a Contested Case **1. No Statute or Rule Requires a Contested Case**

A contested case hearing is one where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." Hawaii Revised Statutes (HRS) § 91-1(5). A contested case is "required by law" if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if mandated by due process.² See *Bush v. Hawaiian Homes Comm'n*, 76 Hawai'i 128, 134, 136, 870 P.2d 1272, 1278, 1280 (1994).

There is no statute or rule calling for a contested case hearing in the context of the Board's approval of a sublease of State lands (and Petitioners have cited none). Section 13-1-28, HAR, requires the Board to hold a contested case hearing only "when required by law," such as when there is a "land use" in a conservation district.³ A sublease is not a "land use" that would require a contested case hearing as the term "land use" is defined in HRS § 183C-2.⁴

² The Fourteenth Amendment to the United States Constitution provides, in part that, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Article I, section 4 of the Hawaii Constitution provides, in part that, "[n]o person shall be deprived of life, liberty or property without due process of law."

³ The Mauna Kea sublease is located in a conservation district.

⁴ HRS § 183C-2 defines "land use" to mean:

- (1) The placement or erection of any solid material on land;
- (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;
- (3) The subdivision of land; or
- (4) The construction, reconstruction, or alteration of any structure, building or facility on land.

In a recent case, Margaret Wille (Wille) requested a contested case hearing when the Board extended three pasture leases to Parker Ranch. *Wille v. Bd. of Land and Natural Res.*, Civ. No. 11-1-202K, 2013 WL 1729711, at *1 (Haw. Ct. Ap. Apr. 22, 2013), *cert. rejected* Sept. 4, 2013. The Board denied Wille's petitions for a contested case hearing. On appeal, the Intermediate Court of Appeals (ICA) affirmed the decision below, holding that Wille did not have a right to a contested case hearing and therefore, the Circuit Court did not have jurisdiction to hear her appeal. The ICA held that:

[T]here is no statutory or rule-based requirement for the BLNR [Board] to hold a hearing on the extension of Parker Ranch's Leases. None of the HRS Chapter 171 provisions on pasture leases contain any requirement for a hearing before BLNR action on a lease or lease extension. Moreover, *nothing in the remainder of HRS Chapter 171 or in the DLNR [Department of Land and Natural Resources] administrative rules* (contained in HAR Title 13) mandate a hearing on pasture leases.

Id. at *4 (emphasis added); *see also* HRS §§ 171-14, 171-15, 171-16 & 171-36.

In contrast, several sections of HRS Chapter 171 and HAR Title 13 specifically require a public hearing before the agency takes certain actions. The inclusion of particular language requiring a hearing only in specific sections of HRS Chapter 171⁵ and in HAR Title 13⁶ signifies that the requirement for a hearing was intentionally excluded from all other sections. *See In re Water Use Permit Applications*, 94 Hawai'i 97, 151, 9 P.3d 409, 463 (2000) (*Na Wai Eha*) (stating "[w]here [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion"). Nothing in HRS chapter 171 or in the Department of Land and Natural Resources administrative rules (HAR Title 13) mandates a contested case hearing or even a non-Chapter 91 public hearing in this instance.

⁵ *E.g.*, HRS §§ 171-28 (requiring the Board conduct a public hearing when leasing government-owned Hawaiian fishponds without legislative authorization); 171-58 (requiring a hearing before leasing water rights); 171-80 (before cancelling a residential leasehold); 171-41, 171-41.5 (before amending height, density, or use restriction in certain leases); and 171-95.3 (before entering or renewing any lease of public land to renewable energy producers).

⁶ *E.g.*, HAR §§ 13-184-8 (requiring the Board to hold public hearings before acting on a proposal to designate an area as a geothermal resource subzone); 13-184-11(1) (before determining whether to issue a conservation district use permit); 13-5-40 (before granting a permit, site approval, or management plan approval in a conservation district); 13-183-26 (requiring a hearing on revocations of a mining lease).

2. No Due Process Property Interest

Without a statute or rule requiring the Board to hold a contested case hearing, the remaining question is whether constitutional due process requires a contested case. *Bush*, 76 Hawai'i at 135, 870 P.2d at 1279. To establish a due process right to a contested case, the claimant must first show that "the particular interest which claimant seeks to protect by a hearing [is] 'property' within the meaning of the due process clauses of the federal and state constitutions[.]" *Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989).

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Int'l Broth. Of Painters and Allied Trades v. Befitel*, 104 Hawai'i 275, 283, 88 P.3d 647, 655 (2004) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564 (1972)). This property interest must be one for which the claimant has "a legitimate claim of entitlement" and must be "more than an abstract need or desire" or "a unilateral expectation." *Bush*, 76 Hawai'i at 136, 870 P.2d at 1280.

Article XI, section 7 of the Hawaii Constitution does not entitle the Petitioners to a contested case.⁷ *Ka Paakai O Ka Aina v. Land Use Comm'n*, 94 Hawai'i 31, 45, 7 P.3d 1068-82 (2000) ("This provision [article XII, section 7 of the Hawaii Constitution] places an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies 'the power to protect these rights and to prevent any interference with the exercise of these rights.'") These rights, however, have never been held to rise to the level of a protected property interest for the purposes of the due process provisions of either the federal or state constitutions.

Nor are Petitioners entitled to a contested case as beneficiaries of the ceded lands trust pursuant to article XII, section 4⁸ of the Hawaii Constitution. In *Wille*, the ICA recognized that "our courts have never held that an individual's status as the beneficiary of the 'public trust' constitutes a cognizable property interest warranting due process

⁷ Article XII, section 7 of the Hawaii Constitution states that:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

⁸ Article XII, section 4 of the Hawaii Constitution states that:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7 of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

protection.” *Wille*, 2013 WL 1729711, at *11; *see Keahole Def. Coal., Inc. v. Bd. of Land and Natural Res.*, 110 Hawai‘i 419, 434, 134 P.3d 585, 600 (2006) (holding that article XII, section 4 and article XVI, section 7 of the Hawaii Constitution do not mention any purpose to benefit native Hawaiians, thus an exclusive license does not constitute “property” which would entitle a potential beneficiary to due process protection).

Even if article XII, section 4 and article XII, section 7 were to provide due process protection, Petitioners are still not entitled to a contested case. Building on prior case law, the court in *State v. Pratt*, 124 Hawai‘i 329, 243 P.3d 289 (Haw. App. 2010), discussed what the Board needs to look for when asked to recognize native Hawaiian rights. A petitioner must meet the following threshold requirements to prove he is entitled to constitutional protection: (1) the person must qualify as a native Hawaiian; (2) the person must establish that the claimed right is a customary or traditional native Hawaiian practice that was established by November 25, 1892; (3) the right exercised must occur on undeveloped or less than fully developed land; and (4) the right must be reasonably exercised. *Pratt*, 124 Hawaii at 348, 243 P.3d at 308. In the recent contested case hearing involving the University’s Conservation District Use Application for a Thirty Meter Telescope at Mauna Kea, the Board found that Petitioners Mauna Kea Anaina Hou, the Flores-Case ‘Ohana, Mr. Ching, and Mr. Neves had not established that their usage of Mauna Kea was a practice that dated back to 1892.⁹ Findings of Fact, Conclusions of Law and Decision and Order Re: CDUP HA-3568, Findings of Fact 302 and Conclusion of Law 195 (April 12, 2013).

B. The Sublease Approval is a Matter of Internal Management

The Board is not required to hold a contested case when dealing with matters of internal land management. *Big Island Small Ranchers Ass’n v. State*, 60 Haw. 228, 239, 588 P.2d 430, 438 (1978) (holding that auctioning public lands for lease comes within the “custodial management of . . . property” exception to Chapter 91” and that “[t]he custodial management of the property of the state or county or any agency [is] primarily a matter of ‘internal management’ as used in this definition”); *see also Sharma v. State, Dept. of Land and Natural Res.*, 66 Haw. 632, 638-39, 673 P.2d 1030, 1034-35 (1983); *Hui Kakoo Aina Hoopulapula v. Bd. of Land and Natural Res.*, 112 Hawai‘i 28, 143 P.3d 1230 (2006) (affirming the Circuit Court’s finding that the Board was not required by law to conduct a contested case hearing where the Board’s action in granting a long-term water lease involved the custodial management of public property).

In *Sharma*, 66 Haw. at 638-639, 673 P.2d at 1034-1035, the Board canceled a lease of public lands that was in default. The lessee contended he was entitled to a contested case. The Hawaii Supreme Court held that a contested case was not required because the Board was dealing with matters of internal management, and that “the internal management of an agency necessarily includes the custodial management of public property entrusted to

⁹ Mr. Fergerstrom was not a party to the permit application contested case.

the agency.” The lands of Mauna Kea are under the Board’s custodial management.¹⁰ Whether the Board consents to the sublease is a matter of internal land management, and not subject to a contested case.

Conclusion

Pursuant to HAR § 13-1-29.1, “The board, without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.” Petitioners are not entitled to a contested case.

Finally, in order to tie up any loose ends and in order to comply with *Kilakila O Haleakala v. Bd. of Land and Nat. Resources*, 131 Hawai‘i 193, 317 P.3d 27 (2013) (request for contested case hearing must be addressed before the Board’s decision on whether to grant a permit), staff is recommending that Board find this concludes the administrative proceedings as to all contested case requests.

After consultation with the Department of the Attorney General, staff is recommending denial of the Petitioners’ requests for contested case hearings.

RECOMMENDATION:

That the Board:

- A. Deny the petitions for contested case hearing filed by E. Kalani Flores, Dan Purcell, Flores-Case ‘Ohana, Mauna Kea Anaina Hou, Kealoha Pisciotta, Paul K. Neves, Clarence Kukauakahi Ching, and Harry Fergerstrom; and

¹⁰ HRS § 171-3(a) provides in relevant part:

The department shall manage, administer, and exercise control over public lands, the water resources . . . and all other interests therein and exercise such powers of disposition thereof as may be authorized by law. The department shall also manage and administer the state parks, historical sites, forests, forest reserves . . . natural area reserves, and other functions assigned by law.

July 25, 2014

- B. Acknowledge and accept the withdrawal of the petition for contested case filed by Office of Hawaiian Affairs.

Respectfully Submitted,



Kevin E. Moore
Acting Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

EXHIBIT A-1

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

AMENDED

June 27, 2014

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii

Resubmittal: Consent to Sublease under General Lease No. S-4191 to the University of Hawaii, Lessee, to TMT International Observatory LLC, Sublessee, Kahohe, Hamakua, Island of Hawaii, Tax Map Key: 3rd/ 4-4-15: 09 por.; and

Decision-Making on Requests for Contested Case Hearing by Kalani Flores and Dan Purcell on Board Action of June 13, 2014, Item D-8 in Opposition to the Request for Consent to Sublease under General Lease No. S-4191 to the University of Hawaii, Lessee, to TMT International Observatory LLC, Sublessee, Kahohe, Hamakua, Island of Hawaii, Tax Map Key: 3rd/ 4-4-15: 09 por.

BACKGROUND:

At its meeting of June 13, 2014, Item D-8, the Board of Land and Natural Resources deferred action on the University of Hawaii's request for consent to sublease to TMT International Observatory LLC (TIO). A copy of the deferred Board action is attached as Exhibit AA. The Board deferred action to allow the University of Hawaii (UH) to address three questions and issues the Board raised during the June 13 meeting. The questions and issues are listed at page 8a of the attached submittal. UH has advised staff that it will be prepared to address these questions and issues at the Board's upcoming meeting of June 27, 2014.

Additionally, two of the members of the public present at the June 13, 2014 meeting, Kalani Flores and Dan Purcell, made an oral request for a contested case hearing before the close of the meeting. It is anticipated that Mr. Flores and Mr. Purcell will submit written petitions within the 10 days required under applicable rules.

DISCUSSION:

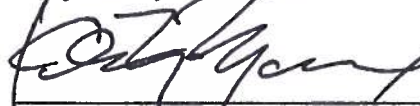
UH's request for consent to sublease to TIO is hereby resubmitted to the Board in the form of Exhibit AA attached.

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
June 27, 2014 uo

D-19
EXHIBIT A-1

As to Mr. Flores' and Mr. Purcell's requests for contested case hearing, staff incorporates by reference the analysis contained in another submittal before the Board at the June 27, 2014 meeting, Item D-5, which relates to three petitions for contested case hearings regarding UH's leases at Mauna Kea.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

Land Board Meeting: June 27, 2014; D-19: Approved as amended.

Approved as amended. The Board approved the consent to sublease, but stayed the effectiveness of the consent until administrative proceedings on any contested case requests are concluded. No action was taken on the two contested case requests made by Kalani Flores and Dan Purcell.

DEFERRED

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

June 13, 2014

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii

Consent to Sublease under General Lease No. S-4191 to the University of Hawaii,
Lessee, to TMT International Observatory LLC, Sublessee, Kaohe, Hamakua,
Island of Hawaii, Tax Map Key: 3rd/ 4-4-15: 09 por.

APPLICANT:

University of Hawaii, as Sublessor, to TMT International Observatory LLC, a Delaware
limited liability company, Tenant in Severalty, as Sublessee.

LEGAL REFERENCE:

Section 171-36(a)(6), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Kaohe situated at Hamakua, Island of Hawaii, identified
by Tax Map Key: 3rd/ 4-4-15: 09, as shown on the attached map labeled Exhibit 1.

AREA:

Lease Area: 11,215.554 acres, more or less.
Sublease Area: 5.9986 acres, more or less, for telescope site, and 2.6653 acres,
more or less, for a non-exclusive access and utility easement.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

~~APPROVED~~ ^{Deferred} BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
June 13, 2014 30

D-8

EXHIBIT AA

LEASE CHARACTER OF USE:

For a scientific complex, including without limitation thereof an observatory, and as a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex. Activities inimical to said scientific complex shall include light and dust interference to observatory operation and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

SUBLEASE CHARACTER OF USE:

Sublessee shall use the subleased premises solely to construct and operate the Thirty Meter Telescope facilities in accordance with the sublease and the Scientific Cooperation Agreement.

TERM OF LEASE:

65 years, commencing on January 1, 1968 and expiring on December 31, 2033. There are no rental reopenings under the lease.

TERM OF SUBLEASE:

Approximately 19.5 years, commencing on the date of the Board consent to the sublease and expiring on December 31, 2033.

ANNUAL RENTAL:

Gratis.

ANNUAL SUBLEASE RENTAL:

The annual rent paid under the sublease starts at \$300,000 and increases periodically pursuant to the following schedule:

<u>Year</u>	<u>Annual Rent</u>
1-3	\$300,000
4-5	\$400,000
6-7	\$600,000
8-9	\$700,000
10	\$900,000
11 and later	\$1,080,000

Rent for the initial, partial year will be prorated. Beginning January 2015, the annual lease rents shall also be adjusted for inflation in accordance with the Consumer Price Index for all Urban Consumers, U.S. City Average (not seasonally adjusted) (base year

1982-1984 - 100).

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

None. See discussion in remarks section below.

DCCA VERIFICATION:

SUBLESSOR:

Not applicable. Sublessor, as a government entity, is not required to register with the Department of Commerce and Consumer Affairs.

SUBLESSEE:

Place of business registration confirmed:	YES <u>X</u>	NO <u> </u>
Registered business name confirmed:	YES <u>X</u>	NO <u> </u>
Good standing confirmed:	YES <u>X</u>	NO <u> </u>

REMARKS:

By letter dated May 22, 2014, Donald Straney, Chancellor, University of Hawaii at Hilo, requested consent to sublease under General Lease No. S-4191 to TMT International Observatory LLC (TIO). TIO plans to construct the Thirty Meter Telescope observatory and accessory buildings near the summit of Mauna Kea. A copy of Mr. Straney's letter is attached as Exhibit 2.

Background

The Mauna Kea Science Reserve (MKSR), the largest of the University of Hawaii (UH) Management Areas, was established in 1968. The entire 11,288-acre MKSR is designated as part of the Conservation District, resource subzone. Eight optical and/or infrared observatories are currently present in the MKSR's 525-acre Astronomy Precinct; the first Mauna Kea observatories were built in the 1960s. Optical/infrared telescopes use mirrors to collect and focus visible and infrared light. Each optical/infrared observatory consists of a single telescope, except the W. M. Keck observatory which currently houses the two most powerful optical/infrared telescopes on Mauna Kea, each with a 10-meter diameter primary mirror. The MKSR also hosts three submillimeter observatories and a radio antenna.

At its meeting of November 22, 1967, Item F-31, the Board approved the issuance of a 65-year lease of the Mauna Kea summit to UH "[t]o serve as a Scientific Reserve and, specifically, as a buffer zone to prevent the intrusion of activities inimical to scientific complex, including an observatory, in the process of being located near the Mauna Kea summit". General Lease No. S-4191 dated June 21, 1968 was thereafter issued to UH with a commencement date of January 1, 1968 and a termination date of December 31, 2033.

Subsequently, UH obtained Board approval for and issued the following subleases:

Sublessee	Date of Bd Action	Character of Use	Area	EIS	CDUP Appr'd	Sublease Term
National Aeronautics and Space Administration	2/19/75, Item F-1-d	Erecting and operating infrared astronomical observatory facilities	70,650 sf	Appr'd 8/4/75	HA-653; 8/29/75, Item H-5	11/29/74-12/31/33
Canada-France-Hawaii Telescope Corporation	11/7/75, Item F-11	Erecting and managing astronomical observatory research facilities	2 acres	Appr'd 8/12/74	HA-527	12/18/75-12/31/33
Science Research Council	11/18/77, Item F-17	Erecting and managing astronomical observatory research facilities	32,000 sf	Appr'd 8/4/75	HA-653; 8/29/75, Item H-5	1/21/76-12/31/33
Science and Engineering Research Council	4/22/83, Item F-1-f	Construction and operation of a 15-meter telescope facility and appurtenant improvements	2 acres	Appr'd 1/20/83	HA-1515; 2/25/83, Item H-11	2/10/84-12/31/33
California Institute of Technology	8/26/83, Item F-1-i	Construction and operation of a 10.4 meter telescope	.75 acre	Appr'd 8/26/82	HA-1492; 12/17/82, Item H-6	12/20/83-12/31/33
California Institute of Technology	6/14/85, Item F-1-a	Construction and operation of the WM Keck 10-meter telescope observatory	2 acres	Appr'd 1/20/83	HA-1646; 8/24/84, Item H-1; HA-2509	10/30/85-12/31/33
National Astronomical Observatory of Japan	8/21/97, Item D-1	Construction and operation of the 8-meter Japan national large telescope	5.4 acres	Appr'd 1/20/83	HA-2642	6/5/92-12/31/33
Smithsonian Institution	8/21/97, Item D-2	Construction and operation of the Smithsonian submillimeter array telescope	3 acres	Appr'd 1/20/83	HA-2728	5/15/95-12/31/33
Associated Universities Inc.	8/21/97, Item D-3	Construction and operation of a very long baseline array antenna	87,500 sf	Appr'd 11/2/88	HA-2174	9/28/90-12/31/33
National Science Foundation	8/21/97, Item D-4	Construction and operation of the Gemini 8-meter telescope	2 acres	Appr'd 1/20/83	HA-2691	9/26/94-12/31/33

The rent charged for the subleases was nominal at \$1.00 for the term of the sublease, however, UH received observatory time at sublessees' facilities in exchange for issuing

the sublease.¹ For each sublease, a CDUP was secured for the telescope facility as indicated above.

At its meeting of November 9, 1978, Item H-10, the Board approved the set-aside of the Mauna Kea Ice Age Reserve (MKIAR), comprising two locations of 3,750 acres and 143.5 acres, to the Natural Area Reserve Commission. Additionally, the Board approved a CDUP for the designation of the MKIAR, as well as other locations throughout the State, as natural area reserves at its meeting of May 8, 1981, Item H-11. Governor's Executive Order No. 3101 dated November 16, 1981 effected the set-aside. However, the MKIAR was not formally taken out of General Lease No. S-4191 until the Board's action of June 13, 1997, Item D-2. A Partial Withdrawal From General Lease No. S-4191 was thereafter executed by UH and the Board on March 23, 1998.

At its meeting of September 24, 1982, Item F-4, the Board authorized the Division of Forestry and Wildlife to hold public hearings (after-the-fact) on the proposed withdrawal of approximately 13,328.054 acres from the Mauna Kea Forest Reserve, so that the withdrawn lands could be included in the lease to UH. After public hearings, the Board approved the withdrawal of the lands from the forest reserve at its meeting of March 22, 1985, Item C-2. By Governor's Executive Order No. 3710 dated August 7, 1997, lands with a net area of 11,269.554 acres (after excluding the MKIAR) were officially withdrawn from the forest reserve.

In late 2013, UH sought the mutual cancellation of General Lease No. S-4191 and the issuance of a new 65-year direct lease to UH for the MKIAR. The Board heard considerable testimony on this request at its meeting of November 8, 2013, Item D-5, before losing quorum. At the Board meeting of December 13, 2013, Item D-15, UH committed to doing an environmental impact statement prior to the Board rendering a decision on its request for a new lease. The Board therefore deferred action on UH's request.

At the Board meeting of May 23, 2014, Item D-6, UH reported on the early termination of the United Kingdom Infrared Telescope operated by the Science and Technology Facilities Council (the third item listed in the table above). UH explained that it will take over operation of the observatory and be responsible for its eventual decommissioning. The sublessee gave UH \$2.5 million to cover decommissioning expenses.

Thirty Meter Telescope

At its meeting of February 25, 2011, Item K-1, the Board approved CDUP HA-3568 for the Thirty Meter Telescope while simultaneously ordering on the Board's own motion the holding of a contested case proceeding and the appointment of a hearing officer, Item K-2. A contested case followed with the Board approving the Findings of Fact, Conclusions

¹ The Board additionally approved some short-term dispositions which have expired by their terms and are not listed in this table.

of Law, and Decision and Order on April 12, 2013. Excerpts of this lengthy document are attached as Exhibit 3. Petitioners in the contested case appealed the Board's decision to the Circuit Court of the Third Circuit. On May 5, 2014, the Circuit Court affirmed the Board's Findings of Fact, Conclusions of Law, and Decision and Order. See Exhibit 4 attached. Final Judgment was entered on the same day. See Exhibit 5 attached.

Proposed sublessee TIO plans to construct and operate an optical/infrared telescope facility known as the Thirty Meter Telescope (TMT). According to the Final Environmental Impact Statement that was published in the Office of Environmental Quality Control's The Environmental Notice on May 6, 2010, TMT will be located at the 13,150-foot elevation of Mauna Kea. Further:

The TMT Observatory will consist of the telescope, adaptive optics (AO) system, and instruments all contained in a dome; support building; and parking area. These facilities will all be clustered within an approximately 5-acre site. The primary component of the telescope is the 98-foot (30-meter) segmented primary mirror, with 492 individual mirror segments that will function as a single mirror. The focal ratio (f) of the telescope will be $f/1.0$, which translates to a shorter telescope and allows for a smaller dome size relative to a telescope with a larger focal ratio. The dome housing the telescope will be a Calotte-type enclosure with a total height of 180 feet, will appear rounded and smooth, and will have an aluminum-like exterior coating. The support building will be attached to the dome and have an area of roughly 18,000 square feet. A small visitor viewing platform and visitor restrooms are included in the design.

The TMT facilities will include additional equipment and infrastructure such as instruments, electrical conductors, cableways and tunnels; driveways; power, telephone and communications conduits and lines and access roads. See the proposed Sublease and Non-Exclusive Easement Agreement Between TMT International Observatory LLC and the University of Hawaii, a copy of which is attached as Exhibit 6.

HRS Section 171-36 and various Board policies adopted pursuant to that authority allow the Board to collect sandwich profits in certain sublease situations. Pursuant to the Board's policy adopted at its meeting of January 26, 2001, Item D-8, for lessees paying less than fair market rent, if the lessee subleases unimproved lands, "the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. . . ."

In this case, however, UH cites to Act 132, Session Laws of Hawaii 2009 (Act 132), which created a special fund for revenues generated on the Mauna Kea leases premises. Act 132 states in relevant part:

There is established the Mauna Kea lands management special fund, into which shall be deposited: . . . (2) All net rents from leases, licenses, and

permits, including fees and charges for the use of land and facilities within the Mauna Kea lands;

Moreover, the Board included a condition in its April 12, 2013 Decision and Order that:

TMT will pay a "substantial" amount for sublease rent. The rent would be deposited into the Mauna Kea Land Fund, and only used for management of Mauna Kea.

See Exhibit 3, page 125.

At the Board meeting of February 25, 2011, Item K-1, there was discussion about what a substantial sublease rent would be, and the range of \$1-2 million per year was suggested. The proposed sublease attached as Exhibit 6 indicates that by year 11 of the sublease, rent will be \$1,080,000 per year. UH therefore takes the position that the sublease rent meets the substantiality requirement of CDUP HA-3568 as approved by the Board's Decision and Order. In light of the foregoing, staff is recommending that the Board not participate in the sublease rent or make any adjustment to rent under General Lease No. S-4191.

There are no rent re-openings provided for in General Lease No. S-4191, and therefore there are no outstanding rent re-opening issues. UH is compliant with the terms and conditions of General Lease No. S-4191.

No agency comments were solicited as the TMT project has already been through environmental impact statement, conservation district use permit, contested case and judicial review proceedings, and received Board approval of the project.

TIO is aware that General Lease No. S-4191 is presently set to expire on December 31, 2033. The proposed sublease between UH and TIO obligates UH to use best efforts to pursue the mutual cancellation of General Lease No. S-4191 and the issuance of a new 65-year direct lease to UH for the MKSR. If UH obtains a new 65-year lease, the proposed sublease grants TIO the right to an automatic extension of its sublease for a term not exceeding 65 years from its effective date.

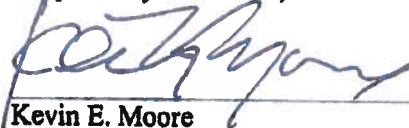
RECOMMENDATION:

That the Board consent to the sublease under General Lease No. S-4191 between the University of Hawaii, as Sublessor, and TMT International Observatory LLC, as Sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:

1. The Lessee shall submit construction plans of the Sublessee's improvements to the Land Division for the Chairperson's approval prior to constructing any improvements on the demised premises;


2. Sublessee shall comply with all the conditions of Conservation District Use Permit No. HA-3568, as approved by the Board of Land and Natural Resources' Findings of Fact, Conclusions of Law, and Decision and Order issued on April 12, 2013;
3. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
4. Review and approval by the Department of the Attorney General; and
5. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson

Land Board Meeting: June 13, 2014; D-8: Deferred. See attached page.

Land Board Meeting: June 13, 2014; D-8: Deferred.

Deferred to allow the University of Hawaii to address certain questions and issues raised during the public testimony portion of the Land Board meeting. UH is asked to respond to the following questions and issues:

- 1. Explain how the sublease rent schedule proposed for the TIO sublease meets the “substantial sublease rent” requirement of CDUP HA-5668. In order to comply with the “substantial sublease rents” requirement: (a) should an appraisal be performed by UH in accordance with HRS 171-17; and (b) whether compensation paid for telescope viewing times at other observatories located elsewhere ought be considered?**
- 2. Respond to the June 4, 2014 letter from the National Council on Historic Preservation questioning whether UH complied with the section 106 consultation requirements of the National Historic Preservation Act.**
- 3. Whether the prohibition on options to renew leases contained in HRS 171-36 prohibits UH from entering into this proposed sublease with TIO?**

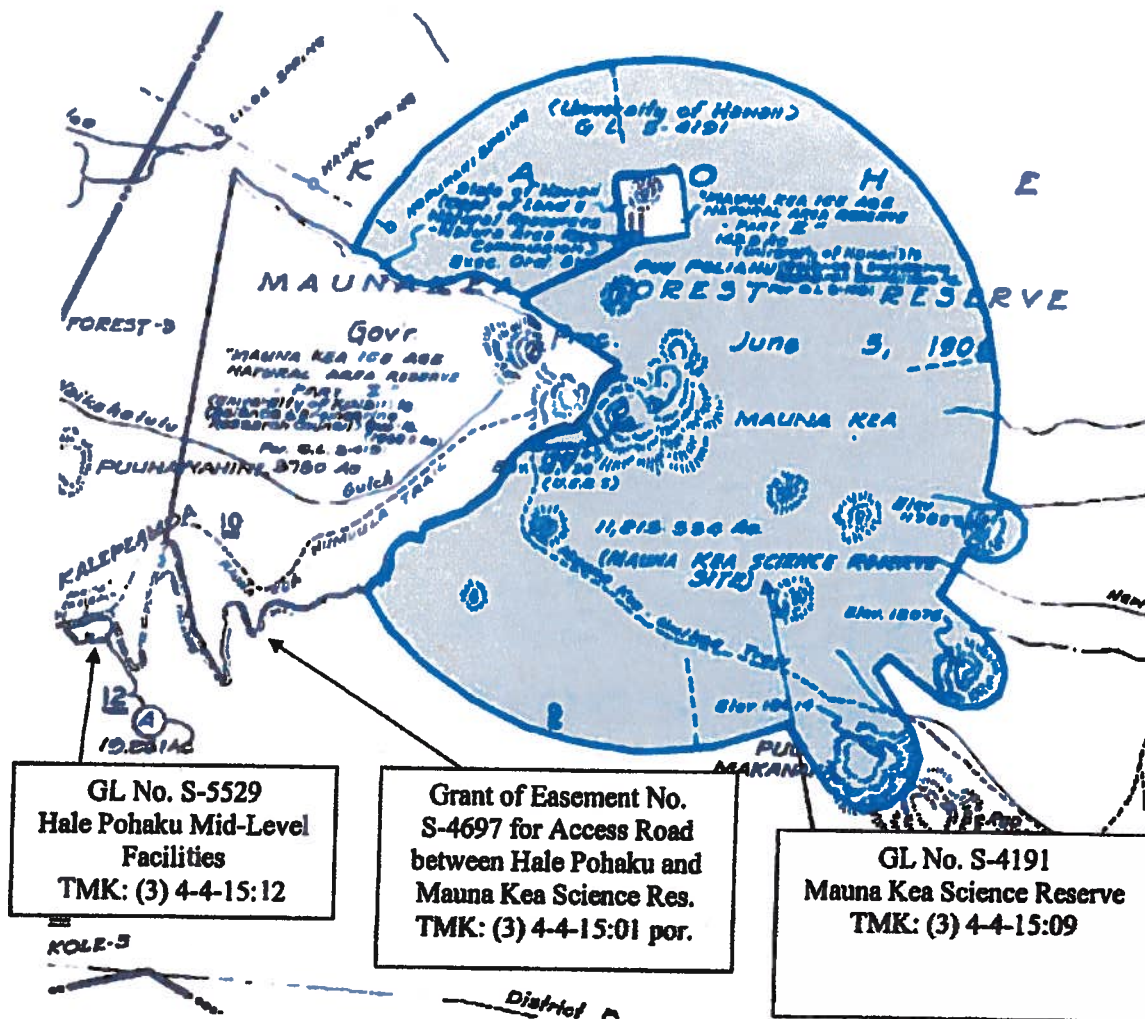
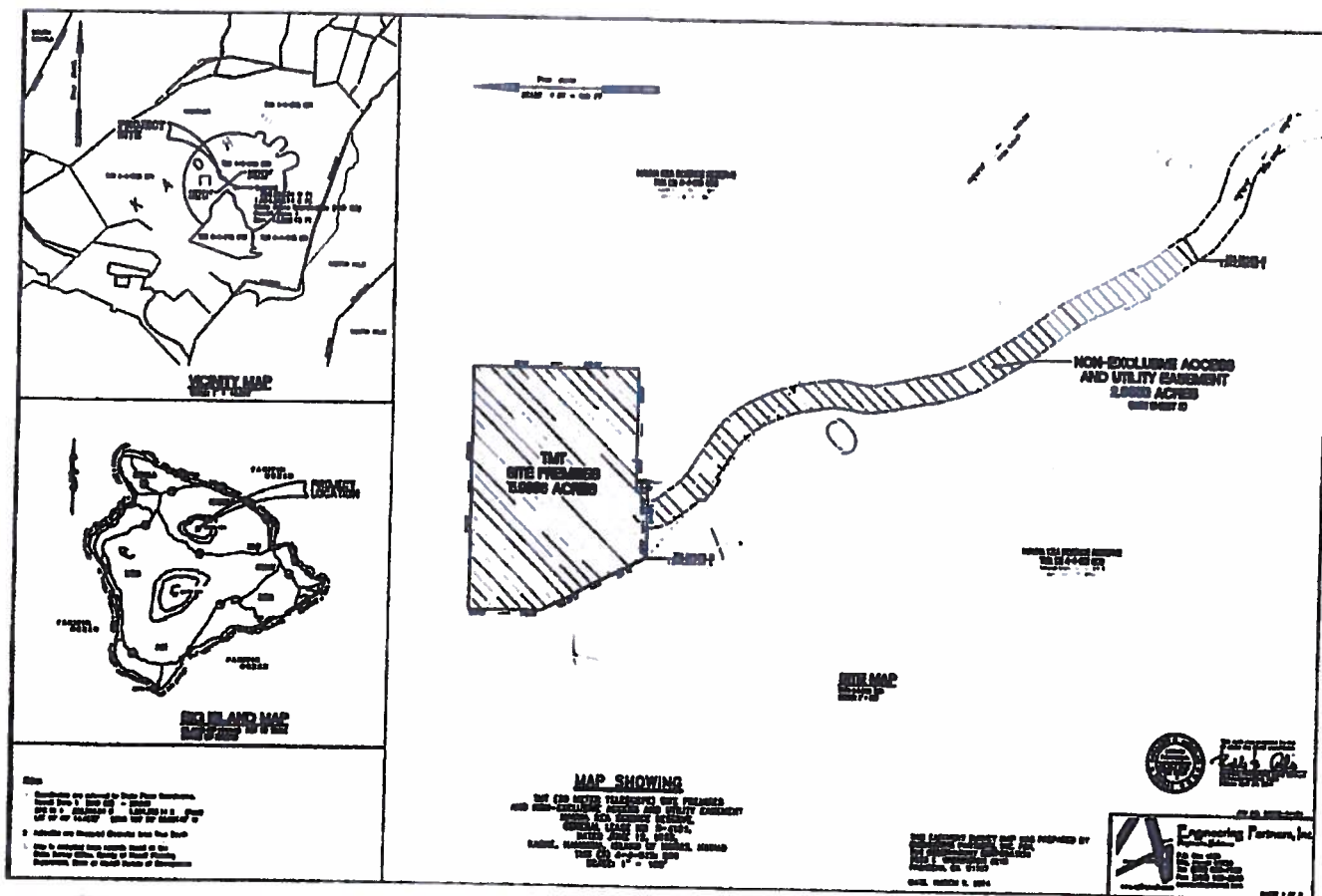
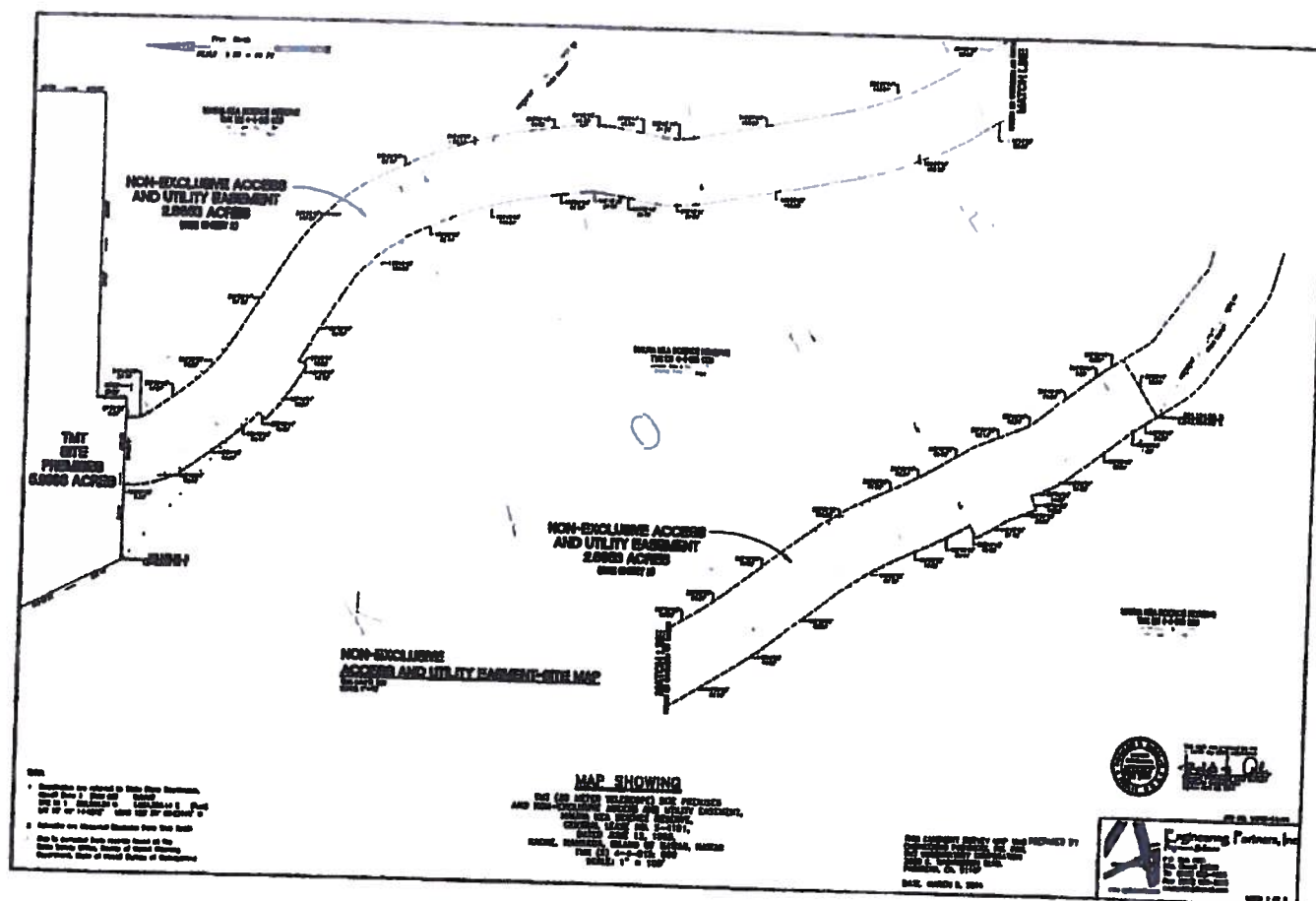


EXHIBIT 1







UNIVERSITY
of HAWAI'I
HILO

Office of the Chancellor

May 22, 2014

William J. Aila, Chairperson
Attn: Russell Y. Tsuji, Land Division Administrator
Department of Land and Natural Resources
P.O. Box 621
1151 Punchbowl Street
Honolulu, Hawai'i 96809-0621

Subject: Application for Consent to Sublease; Approval of Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and University of Hawai'i; General Lease No. S-4191; Lessee: University of Hawai'i; TMK 3/4-4-015:09 (port.); Ahupua'a of Kaohe, District of Hamakua, Island, County and State of Hawai'i

Dear Chairman Aila:

The University of Hawai'i at Hilo ("UH Hilo") respectfully requests the approval and consent of the Board of Land and Natural Resources ("BLNR") to sublease a 8.7 acre portion of the Mauna Kea Science Reserve ("MKSR") to the TMT International Observatory LLC ("TIO") to be used for the construction and operation of the Thirty Meter Telescope ("TMT"). The MKSR is located on the summit of Mauna Kea on the Island of Hawai'i and covers approximately 11,288 acres within the State's Conservation District Resource subzone. The University of Hawai'i (UH/the University) presently holds the lease to the MKSR pursuant to General Lease No. S-4191 issued by the BLNR in 1968 for the term of 65 years ending on December 31, 2033. UH also leases the Hale Pōhaku Mid-Level Facilities ("Hale Pōhaku") covering an area of just over 19 acres with a termination date of February 27, 2041. These two properties, together with the Mauna Kea Observatory Access Road corridor, collectively constitute the UH Management Areas within the ahupua'a of Kaohe in the district of Hamakua. The UH currently has pending before BLNR a request to terminate its current leases for the UH Management Areas and concurrently enter into new 65 year leases with the State of Hawai'i on terms and conditions updated to conform to current management and stewardship standards. Action on that request has been deferred until after completion of an environmental review pursuant to Chapter 343 of the Hawai'i Revised Statutes ("HRS").

Background Information

The BLNR approved the Conservation District Use Application submitted by the UH for the construction and operation of the TMT project on April 12, 2013 (the "CDUP"). The CDUP requires the payment of a "substantial amount" of sublease rent for the TMT, to be used solely for the management of lands within the UH Management Areas of Mauna Kea. The CDUP also requires compliance with mitigation measures described in the Conservation District Use Application submitted to the Department of Land and Natural Resources on September 2, 2010 and the Final Environmental Impact Statement ("FEIS") accepted by the

EXHIBIT 2

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Governor on May 19, 2010 for the TMT project. The FEIS anticipated and expressly included the proposed sublease of these lands for the TMT project.

Act 132

In 2009, the State Legislature passed Act 132 which authorized the UH to charge fees for the sublease and use of lands within the UH Management Areas provided that (1) the fees be established at an open public meeting subject to HRS Chapter 92, (2) the subleases comply with all statutory requirements in the disposition of ceded lands, and (3) any proceeds collected, including all fees and sublease rents, be deposited in the Mauna Kea Lands Management Special Fund established by HRS § 304A-2170 for the sole purpose of managing the lands, facilities and resources within the UH Management Areas of Mauna Kea. At an open public meeting on February 20, 2014, the Board of Regents of the University of Hawai'i approved the fees negotiated with TIO for sublease rents set forth in the attached copy of the Sublease and Non-Exclusive Easement Agreement between TMT International Observatory LLC and University of Hawai'i (the "Sublease").

The Sublease

The Sublease covers an area of approximately 8.7 acres within the Astronomy Precinct on the northern plateau below the Mauna Kea summit. It provides for substantial rent of \$1,080,000 per year beginning in year 11 of the Sublease term, when the TMT will be commissioned and in operation, and a phase-in of the full rental amount over the construction period, as follows:

Year	Annual Rent	Milestone
1-3	\$300,000	Civil construction
4-5	\$400,000	Enclosure
6-7	\$600,000	Telescope Structure
8-9	\$700,000	Instruments and Mirrors
10	\$900,000	Commissioning
11 and later	\$1,080,000	Operations

Rents will be adjusted annually for inflation.

The term of the Sublease will expire on December 31, 2033, the termination date of the Master Lease. The Sublease requires the University to use its best efforts to complete the process currently underway to obtain mutual cancellation of the current master lease and concurrent issuance of a new master lease for the MKSR for a term of 65 years, as submitted by the UH in its request to the BLNR in November, 2013. Upon successful completion of that process, the Sublease provides that its term will automatically be extended to 65 years after its effective date, or upon expiration or termination of the new master lease, whichever first occurs.

The Sublease also contains provisions expressly requiring TIO to conform to current community-based management and stewardship standards for Mauna Kea. The TMT project will be the first project constructed under the new paradigm established by the 2000 Master Plan, the Comprehensive Management Plan and its subplans (the Natural Resources Management Plan, Cultural Resources

William J. Aila, Chairperson
Russell Y. Tsuji, Land Administrator
May 22, 2014
Page 3

Management Plan, Decommissioning Plan, and Public Access Plan) approved by BLNR (collectively, the "CMP"), and Act 132 (SLH 2009) adopted by the State Legislature which formally establishes a mechanism for sublease rents and fees for the use of Mauna Kea lands to be devoted to management and stewardship of the mountain. The Sublease expressly recognizes that customary and traditional rights are protected by the State Constitution and is further subject to the right of Native Hawaiians to exercise protected traditional and customary practices as provided in the CMP consistent with the laws of the State of Hawai'i.

Concurrently with execution of the Sublease, the University and TIO will enter into a Scientific Cooperation Agreement ("SCA"), which addresses scientific cooperation between the University and TIO. Under the SCA, TIO will be solely responsible for design, construction, and operation of the TMT and for the costs thereof. After the TMT is completed and commissioned, the University will be entitled to 7.5% of the scientific observing time of the telescope. The University will also be entitled to appoint one member to the TIO Board, who will have non-voting observer status, and to be represented on the TIO Science Advisory Committee. The University's research and education program will benefit substantially from the University's access and involvement in the TMT.

Please find attached the completed application form for the UH's request for consent to sublease a portion of the MKSR. We appreciate the assistance and cooperation of the Department of Land and Natural Resources in this request for approval of consent for the sublease to TIO; our staff looks forward to working with your Land Division and the BLNR to process the subject request. Please feel free to contact me at 808-974-7444 or by email at dstraney@hawaii.edu if you have any questions or require additional information regarding this request.

Sincerely,



Donald O. Straney
Chancellor
University of Hawai'i at Hilo

cc: Dr. David Lassner, Interim President, UH
Mr. John C. Holzman, Chair, UH Board of Regents
Dr. Henry T. Yang, Chairman, TMT International Observatory LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

2013 APR 12 P 3:11

In re Petitions Requesting a Contested
Case Hearing Re Conservation District Use
Permit (CDUP) HA-3568 for the Thirty
Meter Telescope at the Mauna Kea Science
Reserve, Ka'ohe Mauka, Hamakua District,
Island of Hawai'i, TMK (3) 4-4-015:009

DLNR Docket No. HA-11-11-000
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
DECISION AND ORDER;
CERTIFICATE OF SERVICE

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

This contested case hearing involves Conservation District Use Application ("CDUA") HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve. The following Findings of Fact, ("FOF"), Conclusions of Law ("COL"), and Decision and Order are based on the records maintained by the Department of Land and Natural Resources on CDUA HA-3568 and the witness testimonies and exhibits presented and accepted into evidence.

If any statement denominated a COL is more properly considered a FOF, then it should be treated as a FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

Any proposed finding of fact submitted by the parties which is not specifically incorporated above is rejected for one or more of the following reasons:

1. They are repetitious or similar to the Board of Land and Natural Resources' own findings of fact or conclusions of law or decision and order, and/or
2. They are not supported by the reliable and/or probative evidence, and/or
3. They are in whole or in part not supported by and/or are contrary to the facts or law, and/or
4. They are immaterial, superfluous, and/or irrelevant to the material facts, issues, and/or law of this case.

EXHIBIT 3

TABLE OF CONTENTS

	Page
<u>FINDINGS OF FACT</u>	2
I. INTRODUCTION	2
A. <u>The Parties</u>	2
B. <u>Procedural History</u>	3
1. <u>The Petitions for Contested Case Hearing</u>	4
2. <u>Selection of the Hearing Officer</u>	6
3. <u>The Scheduling of the Pre-Hearing Conference</u>	6
4. <u>Standing</u>	6
5. <u>Pre-Hearing Conference Statements and the Pre-Hearing Conference</u>	9
6. <u>Motions</u>	10
C. <u>The Site Visit</u>	11
D. <u>Conduct of the Contested Case Hearing</u>	12
E. <u>Evidentiary Dispute</u>	14
II. THE DEVELOPMENT OF MODERN ASTRONOMY ON MAUNA KEA	16
A. <u>The General Lease and the MKSR</u>	16
B. <u>The Previous Development of Modern Astronomy Facilities on Mauna Kea</u>	17
C. <u>The development of the 2000 Master Plan and the Office of Mauna Kea Management</u>	19
D. <u>The Keck Outrigger Project</u>	21
E. <u>The Development of the Comprehensive Management Plan and Its Sub-Plans</u>	21
F. <u>Astronomy Development Under the Master Plan</u>	24
G. <u>BLNR Ongoing Supervision and Management</u>	27

	Page
III. THE PROPOSED PROJECT	27
A. <u>The Procedural History of the TMT Project</u>	27
B. <u>Project Description</u>	29
C. <u>The Unique Conditions that Make Mauna Kea a Premier Location for Astronomical Observatories</u>	33
D. <u>The Scientific Value of the TMT Observatory</u>	34
E. <u>TMT Project Construction Activities</u>	34
F. <u>TMT Observatory Operation</u>	35
G. <u>Educational and Employment Activities</u>	35
1. <u>Community Benefits Package</u>	35
2. <u>Workforce Pipeline Program</u>	36
H. <u>TMT Project Mitigation Measures</u>	37
I. <u>TMT Project Decommissioning</u>	39
J. <u>Funding</u>	40
IV. SECTION 13-5-30, HAWAII ADMINISTRATIVE RULES	41
A. <u>The Proposed Activity is Consistent with the Purpose of the Conservation District</u>	41
B. <u>The Proposed Activity Is Consistent with the Objective of the Resource Subzone</u>	43
C. <u>The Project Complies with Chapter 205A, Hawaii Revised Statutes</u>	45
D. <u>The Proposed Land Use Will Not Cause Substantial Adverse Impact to Existing Natural Resources Within The Surrounding Area, Community, or Region</u>	47

	Page
1. <u>Biologic Resources</u>	47
2. <u>Archaeologic/Historical Resources</u>	52
3. <u>Cultural Resources and Practices</u>	58
4. <u>Visual and Aesthetic Resources</u>	67
5. <u>Hydrolog and Water Resources</u>	69
6. <u>Hazardous Waste, Solid Waste, and Wastewater</u>	72
 E. <u>The Project is Compatible with the Locality and Surrounding Areas and Is Appropriate to the Physical Conditions and Capabilities of the Parcel</u>	 74
 F. <u>The Project Preserves the Natural Beauty and Open Space Characteristics of the Physical and Environmental Aspects of the Land</u>	 75
 G. <u>The TMT Project Does Not Result in a Subdivision of Land Increasing the Intensity of Land Uses in the Conservation District</u>	 78
 H. <u>The Proposed Land Use Will Not Be Materially Detrimental to the Public Health, Safety, and Welfare</u>	 79
 <u>CONCLUSIONS OF LAW</u>	 82
I. <u>JURISDICTION AND STANDING</u>	82
II. <u>LEGAL FRAMEWORK</u>	83
A. <u>Burden of Proof</u>	83
B. <u>Constitutional Authority</u>	84
C. <u>Statute and Administrative Rules</u>	85
D. <u>Case Law</u>	87
1. <u>PASH</u>	87
2. <u>Ka Pa'akai</u>	88
3. <u>Hanapi</u>	88
4. <u>Morimoto</u>	89
E. <u>BLNR Decisions</u>	89

F.	<u>Waiver of Challenges to Environmental Impact Statement</u>	90
III.	DISCUSSION AND CONCLUSIONS	91
A.	<u>The TMT Project Satisfies the Right Criteria of Haw. Admin. R. § 13-5-30(c)</u>	91
	1. <u>The TMT Project Satisfies the First Criterion</u>	91
	2. <u>The TMT Project Satisfies the Second Criterion</u>	92
	3. <u>The TMT Project Satisfies the Third Criterion</u>	94
	4. <u>The TMT Project Satisfies the Fourth Criterion</u>	94
	5. <u>The TMT Project Satisfies the Fifth Criterion</u>	98
	6. <u>The TMT Project Satisfies the Sixth Criterion</u>	99
	7. <u>The TMT Project Satisfies the Seventh Criterion</u>	102
	8. <u>The TMT Project Satisfies the Eighth Criterion</u>	103
B.	<u>The TMT Project Satisfies the Public Trust Doctrine, and Customary and Traditional Native Hawaiian Rights Are Appropriately Protected</u>	104
	1. <u>The Public Trust Doctrine</u>	104
	2. <u>The Protection of Customary and Traditional Native Hawaiian Rights</u>	108
	3. <u>Religious Freedom</u>	111
	4. <u>Ka Pa'akai</u>	113
	5. <u>Contemporary Practices</u>	114
C.	<u>Petitioners' Other Arguments</u>	115
	1. <u>Petitioners Have Received Due Process</u>	115
	2. <u>The General Lease</u>	116
	3. <u>Sublease Rent</u>	117
	4. <u>"Find Spots" and the CDUA</u>	118
D.	<u>Summary</u>	118
	DECISION AND ORDER.....	121

FINDINGS OF FACT

I. INTRODUCTION

A. The Parties

1. The University of Hawai'i ("University" or "UH") was established as the state university of the State of Hawai'i and constitutes a body corporate. (Haw. Rev. Stat. § 304-2.) The University has ten campuses statewide, one of which is the University of Hawai'i at Hilo ("UHH"). UHH is the applicant for the Conservation District Use Permit for the Thirty Meter Telescope project ("TMT Project") that is proposed to be built within the Mauna Kea Science Reserve ("MKSr") in the summit region of Mauna Kea on Hawai'i Island.
2. Petitioner KAHEA: The Hawaiian Environmental Alliance ("KAHEA") is a nonprofit Hawai'i environmental organization. In the contested case proceedings in this matter, KAHEA was represented by Marti Townsend, who is identified on KAHEA's web site as the organization's "Program Director/Staff Attorney." See <http://kahea.org/about/staff>.
3. Petitioner Mauna Kea Anaina Hou ("MKAH") is an unincorporated association. In the contested case proceedings in this matter, MKAH was represented by Kealoha Pisciotta, who is the current president of MKAH and is a native Hawaiian cultural practitioner. During the contested case hearing, Ms. Pisciotta also advised that she is the new president of KAHEA. Tr. 9/26/11 at 45.
4. Petitioner Clarence Kukauakahi Ching ("Ching") is a Hawaiian cultural practitioner.
5. Petitioner Flores-Case 'Ohana ("Flores-Case 'Ohana") is an unincorporated association consisting of E. Kalani Flores ("Flores") and B. Pualani Case ("Case"), who are native Hawaiian cultural practitioners.
6. Petitioner Deborah Ward ("Ward") is a recreational user of Mauna Kea lands.
7. Petitioner Paul K. Neves ("Neves") is a native Hawaiian cultural practitioner. As described below, Mr. Neves originally filed his petition in this matter on behalf of both himself as an individual and the Royal Order of Kamehameha I, Moku o Mamalahoa, Mauna Kea Committee ("ROOK I"), but subsequently withdrew his petition on behalf of ROOK I. Mr. Neves sought and was granted standing solely in his individual capacity. At the contested case hearing, Mr. Neves stated that he was representing himself and his two hula halau. However, Mr. Neves's participation in this contested case proceeding is solely as an individual and is not in any representative capacity.

Archaeological Site Plan, Maintenance Plan, and Arthropod Monitoring Plan, are incorporated as conditions of this permit;

- 8. The TMT Project will comply with any terms and conditions outlined in the Comprehensive Management Plan and associated sub-plans;**
- 9. The TMT Management Plan is approved, including all specific management actions articulated in the TMT Management Plan including, Cultural Resources Management, Natural Resources Management, Education & Outreach, Astronomical Resources, Permitting and Enforcement, Infrastructure and Maintenance, Construction Guidelines, Site Recycling, Decommissioning, Demolition & Restoration, Future Land Uses, and Monitoring, Evaluation & Updates. These management actions and their associated mitigation measures and the implementation of the recommendation contained in these plans (for example, the incorporation of a Decommissioning Funding Plan in any sublease) are incorporated as conditions of this permit;**
- 10. The following additional conditions shall be implemented by OMKM and TMT:**
 - Ensuring that employees attend mandatory cultural and natural resources training;**
 - Working with the 'Imiloa Astronomy Center and OMKM to develop informational exhibits for visitors regarding the natural, cultural and archaeological resources of Mauna Kea;**
 - Funding the re-naturalization of the closed access road on Pu'u Poll'ahu, partially re-naturalizing of the batch plant staging area after construction has been completed, and camouflaging the utility pull boxes in certain locations to reduce the visual impact from the summit area;**
 - Implementing an invasive species control program;**
 - Working with OMKM to develop and implement a habitat restoration study;**
 - Implementing the "Zero Waste Management" policy;**
 - Filling employment opportunities locally to the greatest extent possible;**
 - Mandating that employees traveling beyond Hale Pōhaku take part in a ride-sharing program using project vehicles;**

- Using energy savings devices such as solar hot water systems, photovoltaic power systems, energy efficient light fixtures, and the use of Energy Star rated appliances;
- Providing \$1 million annually, adjusted for inflation, for "Community Benefits Package" which will commence with construction and continue through the term of the sublease. The package will be administered via The Hawai'i Island New Knowledge (THINK) Fund Board of Advisors; and
- Partnering with other institutions to implement a Workforce Pipeline Program, headed by at least one full-time position through the Community Outreach office, to prepare local residents for jobs in science, engineering, and technical fields;
- The University will ensure that the survey of the power line corridor easement complies with DLNR standards and is in accordance with the conditions contained in the grant of easement (including the Mauna Kea Ice Age Natural Area Reserve) that was approved by the BLNR in August 1985. The University will provide copies of the survey to DOFAW;
- OMKM will consult with the U.S. Fish and Wildlife Service and experts who are advising OMKM, including representatives from the DLNR, on surveys of the wēkiu bug and invertebrates regarding surveys along the utility corridor, including Pu'u Hau Kea and the pu'u west of the Parking Area 1;
- The construction contractor will be required to minimize the visual changes to land within the utility line right-of-way during utility upgrades. Any disturbance outside of the easement area of the construction corridor will be restored to the extent possible;
- UHH will present a plan for handling recreational parking during construction to the OCCL for review and approval prior to beginning construction;
- Following construction, TMT shall keep their area clean and free of trash or unattended tools and equipment, unless authorized by OMKM and OCCL;
- The Archaeological Monitoring Plan will be submitted to the State Historic Preservation Division for review and approval prior to the onset of construction; and

- TMT will pay a "substantial" amount for sublease rent. The rent would be deposited into the Manna Kea Land Fund, and only used for management of Mauna Kea.
11. UHH will notify OCCL of the date of the twice-annual inspections of the project site and allow Department staff to attend if available;
 12. UHH will provide OCCL and BLNR a copy of TMT's annual report to OMKM;
 13. UHH will allow BLNR to name a DLNR representative to participate in the five-year management review process;
 14. When provided or required, potable water supply and sanitation facilities shall have the approval of the Department of Health and the county Board of Water Supply;
 15. UHH understands and agrees that this permit does not convey any vested rights or exclusive privilege;
 16. In issuing this permit, the Department and Board have relied on the information and data that UHH has provided in connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Department may, in addition, institute appropriate legal proceedings;
 17. Where any interference, nuisance, or harm may be caused, or hazard established by the use, UHH shall be required to take the measures necessary to minimize or eliminate the interference, nuisance, harm, or hazard;
 18. Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact the State Historic Preservation Division (692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary; the Applicant will also notify the Office of Hawaiian Affairs at the same time;
 19. During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
 20. No construction work shall be initiated until the Applicant demonstrates compliance with all preconstruction conditions and mitigation measures

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RECEIVED
CIRCUIT COURT
STATE OF HAWAII

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capacity as Chairperson of the Board of Land and
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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

**MAUNA KEA ANAINA HOU; CLARENCE
KUKAUAKAHI CHING; FLORES-CASE
'OHANA; DEBORAH J. WARD; PAUL K.
NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic
non-profit corporation,**

Appellants,

vs.

**CIVIL NO. 13-1-0349
(AGENCY APPEAL)**

**DECISION AND ORDER AFFIRMING
BOARD OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII'S
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER
GRANTING CONSERVATION
DISTRICT USE PERMIT FOR THE**

I hereby certify that this is a full, true and correct
copy of the original on file in this office.

6826-1091-2014


Clerk, Third Circuit Court, State of Hawaii

EXHIBIT 4

**BOARD OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII;
DEPARTMENT OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII;
WILLIAM AILA, JR., in his official capacity
as Chair of the Board of Land and Natural
Resources and Director of the Department of
Land and Natural Resources, and the
UNIVERSITY OF HAWAI'I AT HILO,**

Appellees.

**THIRTY METER TELESCOPE AT THE
MAUNA KEA SCIENCE RESERVE
DATED APRIL 12, 2013**

**HEARING DATES: December 13, 2013 and
February 20, 2014**

I. INTRODUCTION

This case is an appeal of the April 12, 2013 Board of Land and Natural Resources ("BLNR" or "Board") Findings of Fact ("FOF"), Conclusions of Law ("COL") and Decision and Order ("Decision and Order") granting the Conservation District Use Permit ("CDUP") for the University of Hawai'i at Hilo's ("UHH") Thirty Meter Telescope Project (the "Project") to be located in the Mauna Kea Science Reserve. Appellants Mauna Kea Anaina Hou ("MKAH"), Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance ("KAHEA") (collectively, "Appellants") filed their Notice of Appeal on May 13, 2013. Initial briefing was completed on November 19, 2013, and oral arguments were heard on December 13, 2013. Later on December 13, 2013, the Hawai'i Supreme Court rendered its decision in *Kilakila 'O Haleakala v. Board of Land and Natural Resources*, 131 Hawai'i 193, 317 P.3d 27 (2013). The parties notified the Court of the decision, and Appellees requested supplemental briefing to address whether that case had any impact on the present action. On December 19, 2013, the Court granted the request for supplemental briefing. On January 2, 2014, the TMT Observatory Corporation filed a Motion for Leave to File Brief as Amicus Curiae, which the Court subsequently granted. The parties submitted supplemental briefs on January 21, 2014, and additional oral arguments were heard on February 20, 2014. Richard N. Wurdeman, Esq. appeared for Appellants MKAH, Ching, Flores-Case 'Ohana, Ward, Neves, and KAHEA. David M. Louie, Esq., Daniel A. Morris, Esq., and Julie H. China, Esq. appeared for Appellees BLNR and William J. Aila, Jr. Jay S. Handlin, Esq. and Ian L. Sandison, Esq. appeared for Appellee UHH.

Based on the record on appeal, the briefs submitted, arguments of counsel, and applicable law, the Court finds as follows:

II. DESCRIPTION OF THE PROJECT

1. On September 2, 2010, UHH submitted the Conservation District Use Application ("CDUA") for the Project to the Department of Land and Natural Resources. FOF 9.

2. In November 2010, written comments on the CDUA were submitted by MKAH (by Kealoha Pisciotta), KAHEA, Mr. Neves (claiming to represent the Royal Order of Kamehameha I ("ROOK I")), Sierra Club Hawai'i (by Ms. Ward), and Mr. Ching. FOF 10.

3. On December 2 and 3, 2010, the DLNR held public informational hearings on UHH's CDUA in Hilo and Kona, respectively. MKAH (Ms. Pisciotta), Mr. Neves, Ms. Ward, and Mr. Ching offered live testimony at the Hilo hearing. MKAH (Ms. Pisciotta), Ms. Ward, Mr. Ching, and Mr. Flores and his family testified at the Kona hearing. FOF 11.

4. The BLNR held a public hearing on UHH's CDUA on February 25, 2011. At that hearing, there was extensive public testimony, including from MKAH (Ms. Pisciotta), KAHEA, and Mr. Ching. Members of the Board and its Chairperson directed numerous questions to the representatives of UHH. At the conclusion of the comments and questions, the Board rendered a preliminary ruling, voting unanimously to grant CDUP HA-3568 for the Project. Essentially simultaneously, on its own motion, the Board directed that a contested case be held; provided a date for interested parties to petition to participate in a contested case; and expressly conditioned implementation of the CDUP upon UHH prevailing in any resulting contested case. FOF 15.

5. On February 23, 2011, E. Kalani Flores submitted a written petition for a contested case hearing on behalf of himself, B. Pualani Case, and their two daughters, Hawane Rios and Kapulei Flores. FOF 26. Hawane Rios and Kapulei Flores were later withdrawn as potential parties to the contested case. FOF 51. Thus, for purposes of the underlying proceeding and this appeal, the Flores-Case 'Ohana is an unincorporated association consisting of Mr. Flores

and Ms. Case. FOF 5.

6. On March 7, 2011: Ms. Pisciotta submitted a written petition for a contested case hearing on behalf of MKAH, an unincorporated association, FOF 3, 18; Ms. Martha Townsend submitted a written petition for a contested case hearing on behalf of KAHEA, a nonprofit Hawaii environmental organization, FOF 2, 20; Mr. Neves, a native Hawaiian cultural practitioner, submitted a written petition for a contested case hearing on behalf of himself and on behalf of ROOK I (the petition for ROOK I was subsequently withdrawn), FOF 7, 23; and Mr. Ching, a native Hawaiian cultural practitioner, and Ms. Ward, a recreational user of Mauna Kea land, also submitted written petitions for a contested case hearing on behalf of themselves as individuals, FOF 4, 6, 22, 25.

7. On April 7, 2011, Paul Aoki, Esq. was selected as the Hearing Officer. FOF 31. After a hearing on standing, the Hearing Officer issued an order admitting Mr. Ching, KAHEA, MKAH, Ms. Ward, Mr. Neves, and the Flores-Case 'Ohana as parties to the contested case. FOF 52.

8. The contested case proceeding included a site visit to the Mauna Kea Science Reserve on August 11, 2011, and evidentiary hearings on August 15, 16, 17, 18, and 25, 2011 and September 26 and 30, 2011. FOF 76, 81. Following the hearing, each side submitted proposed findings of fact and conclusions of law, comments on the other side's proposed findings and conclusions, and briefs responding to the comments. The Hearing Officer deliberated and then rendered his Proposed Findings of Fact, Conclusions of Law and Decision and Order on November 30, 2012. *See* ROA, Vol 5, Doc. 108. On January 9, 2013, the parties submitted exceptions to the Proposed Findings of Fact, Conclusions of Law and Decision and Order, and on January 23, 2013, the parties filed responses to one another's exceptions. *See*

ROA, Vol. 5, Docs. 112 - 116. On April 12, 2013, the BLNR issued its Findings of Fact, Conclusions of Law and Decision and Order.

III. STANDARD OF REVIEW

1. Hawai'i Revised Statutes ("HRS") § 91-14(g) sets forth the standard of review for an agency appeal:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. "Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." *Paul's Elec. Serv. v. Befitel*, 104 Hawai'i 412, 416, 91 P.3d 494, 498 (2004) (citations omitted).

3. An agency's conclusions of law "are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law." *Ka Pa'akai O Ka 'Aina v. Land Use Comm'n*, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (citations and internal quotation marks omitted). When reviewed under HRS § 91-14(g)(5), an agency's findings of fact "are not

clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made." *Brescia v. N. Shore Ohana*, 115 Hawai'i 477, 491-92, 168 P.3d 929, 943-44 (2007) (citation omitted).

4. Mixed questions of fact and law are reviewed under the clearly erroneous standard. *In re Walola O Molokai, Inc.*, 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004). Where mixed questions are presented, "deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Dole Hawai'i Division-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (citation omitted).

IV. DISCUSSION

A. THE BLNR'S APPROVAL OF CDUP HA-3568 PRIOR TO THE CONTESTED CASE HEARING DOES NOT WARRANT REVERSAL

1. The Court finds that the Hawai'i Supreme Court's discussion, analysis, and holding in *Kilakila* is dispositive of whether the preliminary approval of the CDUP in this case was appropriate. The *Kilakila* case addressed the specific question of:

whether a circuit court has jurisdiction over an HRS § 91-14 appeal when an agency makes a final decision on a given matter – in this case, an application for a conservation district use permit – without either granting or denying an interested party's request for a contested case hearing on the matter.

Kilakila, 131 Hawai'i at 195, 317 P.3d at 29.

2. In *Kilakila*, the BLNR approved a conservation district use permit after a public board meeting without granting or denying the appellant's request for a contested case hearing. *Kilakila 'O Haleakala ("KOH")* appealed to the circuit court. The circuit court dismissed the appeal for lack of jurisdiction because a contested case hearing had not been held. The circuit

court also determined that the appeal was moot because the BLNR subsequently granted a contested case hearing. A consequence of this decision was that construction under the conservation district use permit was allowed.

3. In reversing the circuit court's decision, the Hawai'i Supreme Court concluded in *Kilakila* that:

[b]ecause BLNR voted to grant the permit without having held a contested case hearing as requested by KOH prior to taking that vote, BLNR effectively rendered a final decision and order within the meaning of HRS § 91-14, and KOH at that point had the right to appeal to circuit court.

Id. at 196, 317 P.3d at 30. Thus, the focus of *Kilakila* was the issue of finality of the BLNR decision and order. If the decision and order were final, then KOH had the right to appeal it to the circuit court.

4. Of particular concern to the Hawai'i Supreme Court in *Kilakila* was the fact that unless KOH had the right to appeal, it would not have had the opportunity to seek effective relief. This is evident in the context of the Hawai'i Supreme Court's discussion of mootness.

Here, the Hawai'i Supreme Court stated:

Crucially, the BLNR had neither stayed nor revoked the permit, not even when KOH appealed or BLNR granted KOH a contested case hearing on the already issued permit. Because the permit remains in effect despite BLNR's failure to hold a contested case hearing before voting to grant the permit, UH can still build on Haleakala and KOH can still seek effective relief against UH. Consequently, we agree with KOH's position and conclude that this case is not moot.

Id. at 199, 317 P.3d at 33.

5. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that the present case is distinguishable from *Kilakila*. In this case, the BLNR granted a contested case hearing essentially simultaneously with the preliminary grant of the CDUP. The continued viability of the preliminary grant of the CDUP depended upon a final grant of the

permit after a contested case hearing. Unless and until there was a final grant of the CDUP after a contested case hearing, construction under the CDUP was not to occur. Thus, in the March 3, 2011 conditional CDUP, Condition 21 imposed by the BLNR stated: "If the contested case proceeding is initiated, no construction shall occur until a *final decision* is rendered by the Board in favor of the applicant or the proceeding is otherwise dismissed." ROA, Vol. 2, Doc. 14 (emphasis added). By stating that its "final decision" would come only after conclusion of the contested case hearing, the Board made clear that its February 25, 2011 vote on the CDUP was a preliminary ruling.

6. In this case, the preliminary grant of the CDUP did not have such a legal consequence that a contested case hearing was required prior to this action being taken. The BLNR contemplated and did actually afford a contested case hearing prior to the entry of a final decision and order. Moreover, Appellants were not prejudiced during the pendency of the contested case hearing because construction under the CDUP was prohibited.

7. In summary, in *Kilakila*, the Hawai'i Supreme Court determined that a final decision and order was entered because the BLNR voted to grant the permit while deferring decision on the request for a contested case hearing, and did not stay the permit, even when the objectors immediately sought to appeal. In this case, by contrast, after preliminarily granting the CDUP, the BLNR immediately ordered that a contested case hearing be held, stayed the permit, and only entered its final decision and order after the contested case hearing had been concluded; and, after the preliminary vote on the permit, there was no immediate request for an appeal.

8. Further, the preliminary grant of the CDUP did not alter the burden of proof placed on UHH under Hawaii Administrative Rules ("HAR") § 13-5-30(c). See COL 29.

9. The Court's finding that the *Kilakila* decision has no impact on the BLNR's

approval of the CDUP for the Thirty Meter Telescope Project is further supported by the Hawai'i Supreme Court's recent decisions in *Blake v. County of Kaua'i Planning Comm'n*, 131 Hawai'i 123, 315 P.3d 749 (2013), and *Kellberg v. Yuen*, 131 Hawai'i 513, 319 P.3d 432 (2014).

10. In *Blake*, which was decided on December 19, 2013, the Hawai'i Supreme Court found two considerations to be paramount in determining whether an agency action was "final": (1) whether the agency's decision reflected its "definitive position" on the matter being challenged, *i.e.*, "the consummation of the agency's decision-making process, rather than merely . . . a tentative or interlocutory" determination; and (2) whether the agency's actions allowed construction to commence. *Blake*, 131 Hawai'i at 133-35 & n.9, 315 P.3d 759-61 & n.9. Then, in *Kellberg*, decided on January 22, 2014, the Hawai'i Supreme Court found that a final agency decision is one that is "decisive" and "conclusive," "not to be altered or undone"; it "connotes a state of being final, settled or complete." *Kellberg*, 131 Hawai'i at ___, 319 P.3d at 447.

11. These decisions confirm that the BLNR's February 25, 2011 vote on the CDUP was not a final decision. The facts recited above show that the preliminary grant of the CDUP was interlocutory and construction was not allowed to proceed until, if ever, a final decision in favor of the Project was rendered. Condition 21 imposed by the BLNR made plain that the initial CDUP could be altered or undone by the outcome of the contested case hearing, and so the preliminary ruling was not conclusive. Under *Kilakila*, *Blake*, and *Kellberg*, the preliminary grant of the CDUP was not a final agency action.

12. For all of the reasons stated herein, the Court finds that *Kilakila* does not apply to the BLNR's February 25, 2011 vote, and that reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.

B. THE FOF AND COL RELATING TO THE CRITERIA SET FORTH UNDER HAR § 13-5-30(c) DO NOT WARRANT REVERSAL

1. HAR § 13-5-30(c) (2011) sets forth the eight criteria to be applied by the BLNR in evaluating the merits of a proposed land use in the conservation district.

2. The clear inference from Appellants' arguments is that Appellants' premise is that the use of conservation district land for astronomy facilities inherently violates the eight criteria identified in HAR § 13-5-30(c). However, HAR § 13-5-24(c) makes clear that astronomy facilities under an approved management plan are appropriate in the Resource subzone, which is where the Project is to be located. Accordingly, the Court finds that Appellants' premise that use of conservation district land for astronomy facilities inherently violates Section 13-5-30(c) lacks merit.

3. As stated in their Opening Brief (at 11-27), Appellants have asserted that "The Reliable, Probative and Substantial Evidence Does Not Support a Decision that" each of the eight criteria in Section 13-5-30(c) is satisfied. In other words, Appellants have challenged the BLNR's findings on the eight criteria as being clearly erroneous. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that the BLNR's findings are amply supported by the reliable, probative, and substantial evidence, and are not clearly erroneous; the Court further finds that Appellants' challenges to the BLNR's FOF and COL with respect to the eight criteria are unfounded and that reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.

C. THE FOF AND COL RELATING TO NATIVE HAWAIIAN CUSTOMARY AND TRADITIONAL PRACTICES DO NOT WARRANT REVERSAL

1. In the contested case hearing, at Appellants' request, the parties stipulated that Appellants Neves, Ching, Flores, Case, and Pisciotta would be recognized as expert witnesses on their cultural practices regarding Mauna Kea. Appellants now argue that this stipulation

somehow resulted in their providing insufficient evidence of traditional and customary native Hawaiian cultural practices. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that Appellants were afforded the full opportunity to provide their written direct testimonies prior to the stipulation, and were also afforded an opportunity to provide oral summaries of their testimonies after the stipulation. Appellants also appear to argue that it was assumed, based on the stipulation, that certain expert opinion testimony would be deemed conclusive. However, clearly, the presentation of expert opinion testimony is not conclusive; as with any testimony, the factfinder may accept or reject it. *See Miyamoto v. Lum*, 104 Hawai'i 1, 16, 84 P.3d 509, 524 (2004). The Court, therefore, rejects Appellants' arguments.

2. Having reviewed the record on appeal and the BLNR's FOF and COL relating to native Hawaiian cultural practices and resources, the Court finds that the BLNR's findings and conclusions relating to native Hawaiian customary and traditional practices were not clearly erroneous, and that reversal of the Decision and Order is not warranted under the standards set forth under HRS § 91-14(g).

D. THE CDUP IS SUBJECT TO A SUFFICIENT MANAGEMENT PLAN

1. HAR § 13-5-24(c) R-3 (D-1) (2011) allows for a land use of "[a]stronomy facilities under a management plan approved simultaneously with the permit."

2. Under HAR § 13-5-2 (2011), a "management plan" is defined as a "project or site based plan to protect and conserve natural and cultural resources." The Court finds that HAR § 13-5-2 does not require that the "management plan" be a "comprehensive plan," as argued by Appellants.

3. The TMT Management Plan not only relates to the Project, but also incorporates components of the Mauna Kea Comprehensive Management Plan and its four subplans. The

Court finds that the TMT Management Plan and the plans that it incorporates are clearly sufficient for the TMT Project.

4. Having reviewed the record on appeal and the BLNR's FOF and COL relating to the TMT Management Plan, the Court finds that reversal of the Decision and Order is not warranted under the standards set forth under HRS § 91-14(g).

E. NONE OF APPELLANTS' OTHER ARGUMENTS WARRANTS REVERSAL

All other arguments not expressly addressed herein have been considered and the Court finds, based upon a review of the record on appeal and the BLNR's FOF and COL, and applying the standards of review set forth above, that such arguments do not warrant reversal of the Decision and Order under the standards set forth under HRS § 91-14(g).

V. DECISION AND ORDER

Based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that the Board of Land and Natural Resources's Findings of Fact, Conclusions of Law and Decision and Order dated April 12, 2013 is AFFIRMED.

DATED: Hilo, Hawai'i, May 5, 2014.

GREG K. NAKAMURA (Seal)

JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

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Attorney for Appellants
Mauna Kea Anaina Hou; Clarence Kukauakahi Ching;
Flores-Case 'Ohana; Deborah J. Ward; Paul K. Neves; and
KAHEA: The Hawaiian Environmental Alliance, a domestic
non-profit corporation

FILED

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THIRD CIRCUIT COURT
STATE OF HAWAII

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Board of Land and Natural Resources; Department of Land and
Natural Resources; William J. Aila, Jr., in his official
capacity as Chairperson of the Board of Land and
Natural Resources

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

**MAUNA KEA ANAINA HOU; CLARENCE
KUKAUAKAHI CHING; FLORES-CASE
'OHANA; DEBORAH J. WARD; PAUL K.
NEVES; and KAHEA: THE HAWAIIAN
ENVIRONMENTAL ALLIANCE, a domestic
non-profit corporation,**

Appellants,

vs.

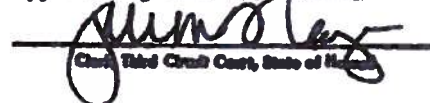
**CIVIL NO. 13-1-0349
(AGENCY APPEAL)**

FINAL JUDGMENT

4851-1053-1354 2

EXHIBIT 5

I hereby certify that this is a full, true and correct
copy of the original on file in this office.


Clerk, Third Circuit Court, State of Hawaii

BOARD OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII;
DEPARTMENT OF LAND AND NATURAL
RESOURCES, STATE OF HAWAII;
WILLIAM AILA, JR., in his official capacity
as Chair of the Board of Land and Natural
Resources and Director of the Department of
Land and Natural Resources, and the
UNIVERSITY OF HAWAI'I AT HILO,

Appellees.

FINAL JUDGMENT

All claims filed by Appellants Mauna Kea Anaina Hou, Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit corporation ("Appellants"), against Appellees Board of Land and Natural Resources, Department of Land and Natural Resources, William J. Aila, Jr., in his official capacity as Chairperson of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, and the University of Hawai'i at Hilo ("Appellees") were resolved in Appellees' favor by the Decision and Order Affirming Board of Land and Natural Resources, State of Hawaii's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve dated April 12, 2013, filed herein on May 5, 2014.

Now, therefore, pursuant to Rule 58 and, to the extent applicable, Rule 72(k) of the Hawai'i Rules of Civil Procedure, Judgment is hereby entered in favor of Appellees as to all claims in Appellants' Notice of Appeal, filed *ex officio* on May 13, 2013.

This Judgment resolves all claims as to all parties. There are no further claims or parties remaining in this matter.

DATED: Hilo, Hawai'i, May 5, 2014.

GREG K. NAKAMURA
JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

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Attorney for Appellants
Mauna Kea Anaina Hou; Clarence Kukauakahi Ching;
Flores-Case 'Ohana; Deborah J. Ward; Paul K. Neves; and
KAHEA: The Hawaiian Environmental Alliance, a domestic
non-profit corporation

In the Circuit Court of the Third Circuit, State of Hawai'i
Mauna Kea Anaina Hou, et al. vs. Board of Land and Natural Resources, et al
Civil No. 13-1-0349 (Hilo)
FINAL JUDGMENT

**SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT
BETWEEN
TMT INTERNATIONAL OBSERVATORY LLC
AND
THE UNIVERSITY OF HAWAII**

THIS SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT (this "Sublease") is made and entered into on this _____ day of _____, 2014, effective as of _____, 2014 (the "Effective Date"), by and between TMT International Observatory LLC, a Delaware limited liability company ("Sublessee"), and the University of Hawaii, a public body corporate and the public university of the State of Hawaii ("Sublessor").

RECITALS

This Sublease is entered into with reference to the following:

A. Sublessor leases certain lands located on and around the summit of Mauna Kea, Island of Hawaii from the State of Hawaii, Board of Land and Natural Resources ("Lessor") pursuant to General Lease No. S-4191, dated June 21, 1968 (the "Master Lease"), a copy of which is attached hereto as Exhibit A and incorporated herein by reference.

B. Sublessee desires to sublease a portion of said lands, as more fully described below, for the purpose of constructing and operating an optical/infrared telescope facility known as the Thirty Meter Telescope ("TMT") in the manner described in, and accordance with, this Sublease and that certain Scientific Cooperation Agreement Between Sublessee and Sublessor Concerning the Design, Construction and Operation of the Thirty Meter Telescope on Mauna Kea, Hawaii (the "Scientific Cooperation Agreement") executed simultaneously herewith and to be effective on the same Effective Date indicated above. The TMT facilities will include, but are not limited to, the TMT telescope and enclosure; the support building (the space necessary to support scientific observers and technical personnel while at the summit); together with instruments, electrical conductors, cableways and tunnels; driveways and parking lots; power, telephone and communications conduits and lines; and access roads within the border of the Subleased Premises (as defined in Section 1 below) ("TMT Facilities"). "TMT Facilities" does not include any facilities outside the Subleased Premises.

C. The Master Lease provides that Sublessor may not enter into a sublease without the prior written consent of the Lessor. Prior written consent to this Sublease has been obtained pursuant to that certain Consent to Sublease Under General Lease No. S-4191 dated _____, 2014, a copy of which is attached hereto as Exhibit B and incorporated herein by reference.

D. In 2000, Sublessor adopted the Mauna Kea Science Reserve Master Plan, which establishes the management structures for Sublessor's stewardship of the areas it

manages on Mauna Kea. In 2009 and 2010, Sublessor adopted, and Lessor approved, the Mauna Kea Comprehensive Management Plan ("CMP") and its subplans: the Cultural Resources Plan, Natural Resources Management Plan, Public Access Plan, and Decommissioning Plan. These plans commit Sublessor to exercise responsible stewardship of Mauna Kea and to ensure that astronomical activities are conducted in a manner that respects the cultural significance of Mauna Kea, protects the environment, and is responsive to the needs and concerns of Native Hawaiians and the public.

E. In May 2010, Sublessor completed an Environmental Impact Statement for the TMT. In September 2010, Sublessor filed an Application for a Conservation District Use Permit to construct the TMT. The permit was approved in April 2013. Sublessee is now seeking a long term sublease to build and operate the TMT.

F. Sublessor has submitted a request to the Lessor for the mutual cancellation of the current Master Lease and issuance of a new master lease for a term of sixty-five (65) years from issuance. Sublessee desires to continue operation of the TMT Facilities beyond 2033. It is desirable for management and planning purposes, including appropriate stewardship of Mauna Kea, to address the potential continued operation of the TMT Facilities beyond 2033 in this Sublease.

AGREEMENT

Now, therefore, in consideration of the foregoing and of the mutual promises and agreements set forth herein, Sublessor and Sublessee agree as follows:

1. **Subleased Premises.** Sublessor does hereby sublease to Sublessee, and Sublessee does hereby sublease from Sublessor, the parcel of land shown and described in **Exhibits C-1** and **C-2** attached hereto and incorporated herein by reference (the "Subleased Premises"), constituting a portion of the land leased by Sublessor under the Master Lease.

2. **Non-Exclusive Easements.** Sublessee shall have the right of access to and egress from the Subleased Premises over and across the Mauna Kea Science Reserve, utilizing the common entrances and rights of way, together with others entitled thereto, under such rules and regulations as may be established by and amended from time to time by Sublessor. Sublessee shall also have the rights to (i) utilize and construct in, grade, fill, and perform work approved by Lessor and Sublessor in the easement area shown and described in **Exhibits C-1** and **C-3** attached hereto and incorporated herein by reference (the "Easement Area"), (ii) utilize and construct in and perform work approved by Lessor and Sublessor and consistent with the TMT Access Way Agreement dated September 13, 2012, by and among Sublessor, the Smithsonian Institution Astrophysical Observatory, and the TMT Observatory Corporation, in the spur road from the Mauna Kea Observatory Access Road to the Subleased Premises, (iii) install and utilize power and communications conduits and lines from a central handhole or handholes in the Mauna Kea summit area to the Subleased Premises, and (iv) utilize and access the Batch Plant staging area as authorized by the TMT CDUP (as defined in Section 4 below).

3. **Survey/Site Specific Description.** The site shown in Exhibit C-1 hereto has been surveyed. The area covered by the Subleased Premises is specifically described in the metes and bounds description in Exhibit C-2 hereto. The area covered by the Easement Area is specifically described in the metes and bounds description in Exhibit C-3 hereto.

4. **Use of Subleased Premises.** Sublessee shall use the Subleased Premises solely to construct and operate the TMT Facilities in accordance with this Sublease and the Scientific Cooperation Agreement. The construction and operation of the Subleased Premises shall be conducted in strict compliance with the terms and conditions of Conservation District Use Permit HA-3568 approved by the Lessor on April 12, 2013 (the "TMT CDUP"), including performance of all mitigation conditions set forth therein, and any amended or subsequent Conservation District Use Permit. Sublessee shall not at any time during the term of this Sublease construct, place, maintain, or install on the Subleased Premises any other building, structure, or improvement without the prior written approval of Sublessor and Lessor and upon such conditions as Sublessor or Lessor may impose. For purposes of the foregoing sentence, any other "improvement" means improvements that are not specified in or contemplated by the TMT CDUP and not contained within the building envelop of TMT observatory plans approved in accordance with Section 37 below. For the avoidance of doubt, the addition of any instruments, equipment or any other additions that are fully contained within the observatory structure or buildings shall not require the prior written approval of Sublessor or Lessor, provided that such additions are otherwise in compliance with the terms of this Sublease and the Master Lease.

5. **Management and Stewardship Obligations.** This Sublease shall be subject to the following:

a. The Subleased Premises are within the State Land Use Conservation District and all uses shall comply with the applicable rules and regulations of the State Conservation District, including but not limited to Hawaii Revised Statutes ("HRS") Chapter 183C and Hawaii Administrative Rules ("HAR") Chapter 13-5.

b. Sublessee shall comply with applicable State rules and regulations related to historic preservation including but not limited to HRS Chapter 6E, and HAR Chapters 13-197, 13-198, 13-275 through 13-284 and 13-300, and any applicable amendments of or supplements to such historic preservation regulations.

c. Sublessor shall exercise management jurisdiction over the Subleased Premises pursuant to management plans approved by the Lessor, including the CMP and its subplans, the Natural Resources Management Plan, Cultural Resources Management Plan, Decommissioning Plan, and Public Access Plan, the TMT Management Plan, and any amendments of or supplements to management plans approved by the Lessor for lands that include the Subleased Premises. Sublessee acknowledges that it has reviewed and is familiar with the CMP and subplans. Sublessor shall keep Sublessee informed regarding any future amendments or supplements thereto, and shall promptly provide copies of such documents to Sublessee.

d. All public and commercial activities in the areas of Mauna Kea managed by Sublessor, including recreational activities, shall be governed by administrative rules promulgated pursuant to the authority granted Sublessor by Act 132 (SLH 2009), following consultation with DLNR, the Office of Hawaiian Affairs, and the public in accordance therewith.

e. The Constitution of the State of Hawaii mandates the protection of recognized customary and traditional native Hawaiian rights subject to State regulation. This Sublease shall be subject to the right of Native Hawaiians to exercise protected traditional and customary practices as provided in the CMP and consistent with the laws of the State of Hawaii.

f. Sublessor has established a management structure to manage the lands of which the Subleased Premises are a part, which structure includes the Office of Mauna Kea Management at the University of Hawaii at Hilo, the volunteer community-based Mauna Kea Management Board and the Kahu Kū Mauna advisory council on Hawaiian cultural matters.

6. Operation of the TMT Facilities. Neither Sublessee nor any successor or assign shall operate the TMT Facilities for purposes of research without a valid and effective Scientific Cooperation Agreement with Sublessor. The TMT Facilities may be operated in the absence of a valid and effective Scientific Cooperation Agreement only when necessary to ensure the safety of personnel or of the TMT Facilities.

7. Rent. In consideration for the use of the Subleased Premises, Sublessee shall pay to Sublessor annual rents based on calendar years during the term of this Sublease as set forth below. The annual rent during the construction period is based on the incremental value of the major milestones achieved during the construction of the TMT Facilities. The milestones are set forth below and generally span approximately two (2) year periods. The annual rents shall be paid based upon the specified calendar years below regardless of whether the respective milestone is achieved.

<u>Year</u>	<u>Annual Rent</u>	<u>Milestone</u>
1-3	\$300,000	Civil construction
4-5	\$400,000	Enclosure
6-7	\$600,000	Telescope Structure
8-9	\$700,000	Instruments and Mirrors
10	\$900,000	Commissioning
11 and later	\$1,080,000	Operations

Rent shall be paid in advance, in equal semi-annual installments, on or before January 31 and July 31, of each calendar year during the term of this Sublease. The first installment of rent for the initial, partial year (which will be prorated) shall be due within 30 days of the date of execution of this Sublease. Beginning in January of 2015, and in January of each year thereafter, the annual rental amount for the year shall be based on the initial annual rental amount adjusted for the annual rate of inflation recorded for subsequent years in

accordance with the Consumer Price Index for all Urban Consumers, U.S. City Average (not seasonally adjusted) (base year 1982-1984 - 100) ("CPI"), published by the United States Department of Labor, Bureau of Labor Statistics. The calculation shall be made by comparing the CPI last published for the date nearest to the Effective Date (the "Base Index") with the CPI last published for the date nearest to the current anniversary date (the "Current Index"). If the Current Index has increased or decreased over the Base Index, then the amount subject to adjustment shall be set for the ensuing year by multiplying the initial annual rental amount by a fraction, the numerator of which is the Current Index and the denominator of which is the Base Index. If the base of the CPI changes from the 1982-84 base (100), the CPI shall, thereafter, be adjusted to the 1982-84 base (100) before the computation indicated above is made. If the CPI Index is at any time no longer published, a comparable index generally accepted and employed by the real estate profession shall be used.

Sublessor shall receive, deposit, and apply the rents received hereunder in accordance with the laws of the State of Hawaii, including, without limitation, Section 304A-2170 of the Hawaii Revised Statutes, as amended from time to time. Such deposit shall be net of the funds required by law to be transferred or paid to the Office of Hawaiian Affairs. Sublessor shall be responsible for paying over to the Office of Hawaiian Affairs its ratable share of the rents received in accordance with the laws of the State of Hawaii.

8. **Master Lease: Order of Precedence.** The rights granted to Sublessee pursuant to this Sublease are subject to the terms and conditions of the Master Lease, as the same may be amended. In the event of any conflict between the terms of this Sublease and the Master Lease, the Master Lease shall be controlling. In the event of any conflict between the terms of this Sublease and the Scientific Cooperation Agreement, this Sublease shall be controlling. Sublessee shall comply with the terms and conditions of the Master Lease at all times. If Sublessee causes a breach or default of any term, covenant, restriction, or condition of the Master Lease, and this breach or default shall continue for a period of more than forty-five (45) days after delivery by the Sublessor of a written notice of breach or default and demand for cure (plus any additional period as the Lessor may allow for good cause), then Sublessor may, subject to the provisions of Section 171-21 of the Hawaii Revised Statutes, at once re-enter the Subleased Premises, or any part, and upon or without the entry, at its option, terminate this Sublease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of the Sublessor, all buildings and improvements shall remain and become the property of the Sublessor or shall be removed by Sublessee in accordance with the Site Decommissioning Plan at Sublessee's sole cost and expense; furthermore, Sublessor shall retain all rent paid in advance to be applied to any damages.

9. **Term and Termination.** The term of this Sublease shall begin on the Effective Date and shall expire on December 31, 2033, unless extended or sooner terminated as provided herein.

a. **Mutual Cancellation of Master Lease and Concurrent Issuance of New Master Lease.**

(1) Sublessor shall use its best efforts to continue to and shall diligently pursue and take all actions necessary or advisable to complete the process currently underway with Lessor to obtain mutual cancellation of the current Master Lease subject to and concurrent with issuance of a new master lease (the "New Master Lease"), for a term of sixty-five (65) years and on terms and conditions materially consistent with the form of lease document submitted to the Lessor for consideration at its meeting of November 8, 2013. In the foregoing sentence, such "actions" shall include, without limitation, continuing to prepare and process an Environmental Impact Statement for the New Master Lease and such "terms and conditions" shall include, without limitation, that the New Master Lease shall include the provisions stating that "The lease shall be subject to all existing subleases entered into by the Lessee and approved by the Lessor pursuant to General Lease No. S-4191 dated June 21, 1968", and "Should this lease be rendered or declared invalid, illegal, or unenforceable by a court of competent jurisdiction, such invalidation shall cause, without further action, General Lease No. S-4191 dated June 21, 1968 to be revived in its entirety for the duration of the term therein, unless and until the parties subsequently agree otherwise".

(2) If the New Master Lease is approved and duly executed by Lessor and Sublessor, Sublessor shall promptly provide a copy of the New Master Lease to Sublessee. Effective as of the effective date of the New Master Lease, the following shall apply:

i) The provisions of this Sublease shall continue, whether by extension, issuance of a new sublease, or otherwise, provided that any continuance shall be in accordance with the terms herein as a sublease under the New Master Lease (including, without limitation, the rents set forth herein);

ii) The New Master Lease shall become the Master Lease for all purposes of this Sublease or any new sublease, and all references to the Master Lease in this Sublease or any new sublease shall thereafter refer to the New Master Lease; and

iii) The term of this Sublease shall automatically be extended, and shall thereafter expire sixty-five (65) years after the Effective Date, or upon expiration or termination of the New Master Lease, whichever shall first occur.

(3) If the New Master Lease is approved, but the term is not for sixty-five (65) years or the terms and conditions thereof are not materially consistent with the form of lease document submitted to the Lessor for consideration at its meeting of November 8, 2013, Sections 9.a.(2)i, ii, and iii) above shall apply unless Sublessee, at its sole option, provides a notice of termination to Sublessor in accordance with Section 9.d. below within one hundred twenty (120) days after Sublessee's receipt of the New Master Lease from Sublessor. Sublessor further agrees to diligently negotiate in good faith with Sublessee regarding mutually acceptable amendments to this Sublease during such one hundred twenty (120) day period and to promptly and diligently pursue approval by the Lessor of such amendments.

(4) If the New Master Lease is approved on terms and conditions materially consistent with the form of lease document submitted to the Lessor for consideration at its meeting of November 8, 2013 or is otherwise acceptable to Sublessee in Sublessee's sole judgment, Sublessor agrees to execute an amendment to this Sublease to reflect compliance with Sections 9.a.(2)i), ii), and iii) above or a new sublease on the same material terms and conditions as set forth in this Sublease (including, without limitation, the rents set forth herein) and reflecting compliance with Sections 9.a.(2)i), ii), and iii) above.

(5) Sublessee acknowledges that the Lessor has sole authority to determine whether to approve and enter into the New Master Lease, pursuant to and in accordance with Hawaii law, that no such approval has been granted as of the date of this Sublease, and that no prior commitment to issue such approval has been or can be made.

b. Failure to Obtain New Master Lease. If the New Master Lease is not approved by Lessor or if Sublessor otherwise fails to obtain a New Master Lease that automatically extends the term of this Sublease in accordance with of Sections 9.a.(3) or 9.a.(4) above, Sublessor agrees to use its best efforts to and will immediately and diligently pursue another means of acquiring sufficient rights to continue to lease the Subleased Premises to Sublessee on substantially the same terms and conditions herein, but for an additional term extending to, on or about March 31, 2079. If a subsequent master lease is approved and duly executed by Lessor and Sublessor, Sublessor shall promptly provide a copy of such subsequent master lease to Sublessee and, at Sublessee's sole option: (I) the provisions of Sections 9.a.(2)i), ii), and iii) above shall apply as if the subsequent master lease is the "New Master Lease" referred to in Section 9.a. above and Sublessor shall execute an amendment to this Sublease to reflect compliance with Sections 9.a.(2)i), ii), and iii) above or a new sublease on the same material terms and conditions as set forth in this Sublease (including, without limitation, the rents set forth herein) and reflecting compliance with Sections 9.a.(2)i), ii), and iii) above, or (II) Sublessor shall diligently negotiate in good faith a new sublease with Sublessee, if so desired by Sublessee, on the same material terms and conditions as set forth in this Sublease (including, without limitation, the rents set forth herein and compliance with the Master Lease then in effect) or on such other terms and conditions as may be mutually agreeable to Sublessor and Sublessee, with a term ending on or after March 31, 2079.

c. Option to Extend Term. Notwithstanding the foregoing in Sections 9.a. and 9.b. above, Sublessee shall have an option to extend the term of this Sublease beyond December 31, 2033 if Sublessor acquires rights to sublease the Subleased Premises to Sublessee, whether under the New Master Lease or other master lease, and such extension shall be coterminous with such New Master Lease or other master lease, but in no event shall the term of this Sublease extend beyond March 31, 2079. Such option shall expire on December 31, 2033 and Sublessee shall have sole discretion regarding whether or not to exercise such option.

d. Termination Without Cause. Sublessee shall have the right to terminate this Sublease at any time upon six (6) months prior written notice to Sublessor.

e. **Termination for Breach.** This Sublease may be terminated for breach as provided in, and in accordance with, Sections 8 above or 25 below.

f. **Non-use and Abandonment.** If the Sublessee shall, at any time for a continuous period of eleven (11) months, fail or cease to use, or abandon the Subleased Premises, this Sublease shall cease and terminate. Sublessor shall provide written notice to Sublessee within thirty (30) days after the sixth (6th) month of such eleven (11) month period and shall allow Sublessee three (3) months to cure any such purported abandonment.

10. **Effect of Termination or Expiration: Decommissioning.** Upon termination or expiration of this Sublease, Sublessee shall, at Sublessor's sole option and at Sublessee's sole cost and expense either (a) surrender the Subleased Premises with all improvements existing or constructed thereon, or (b) decommission and remove the TMT Facilities and restore the land in accordance with the CMP and the Decommissioning Plan for Mauna Kea Observatories, A Sub-Plan of the Mauna Kea Comprehensive Management Plan (dated January, 2010 and approved by Lessor in March, 2010) ("Decommissioning Plan"), and any amended, supplemental, or successor plans adopted by Sublessor with the approval of the Lessor.

a. **Decommissioning Funding Plan.** Sublessee shall develop and periodically update a Decommissioning Funding Plan as described in, and in accordance with, the Decommissioning Plan, to provide assurance to Sublessor that sufficient funds will be available to carry out deconstruction and site restoration activities upon termination or expiration of this Sublease. The Decommissioning Funding Plan shall include one or more financial assurance mechanisms as described in the Decommissioning Plan. Sublessee shall provide the Initial Decommissioning Funding Plan on or before the execution date of this Sublease as set forth above. Sublessee shall submit an updated Decommissioning Funding Plan to Sublessor for Sublessor's review and approval as provided in the CMP, and shall provide such information and documents as Sublessor may reasonably request from time to time to verify the availability and adequacy of funding to meet Sublessee's decommissioning and restoration obligations. If, at any time during the term of this Sublease, Sublessor reasonably determines that the Decommissioning Funding Plan is insufficient, Sublessee shall consult with Sublessor and shall negotiate in good faith to determine the amount of such additional funding and provide such additional funding assurance mechanisms.

b. **Site Decommissioning Plan.** Upon expiration or termination of this Sublease or any extended sublease, decommissioning, including site restoration, shall be carried out in strict compliance with a Site Decommissioning Plan developed and approved in accordance with the Decommissioning Plan ("Decommissioning Obligations").

c. **Delivery of Possession.** Except as otherwise provided herein, upon expiration or termination of this Sublease or any extended sublease and completion of Sublessee's Decommissioning Obligations, Sublessee shall peaceably deliver to Sublessor possession of the Subleased Premises in a clean and orderly condition.

d. Payment of Decommissioning Costs of Sublessor or Lessor. Sublessee shall promptly pay on demand any reasonable and necessary costs incurred by Sublessor or Lessor to remedy any failure on the part of Sublessee to fully and timely perform its Decommissioning Obligations.

e. Survival. The obligations of Sublessee under this Section 10, the rights and obligations of Sublessor and Sublessee under Sections 9.a., 9.b., and 9.c. above, and the obligations of Sublessee under Section 11 below shall survive expiration or termination of this Sublease.

f. Termination Without Decommissioning: Assumption of Decommissioning Obligations by Sublessor. If this Sublease expires or is terminated prior to the expiration of the Master Lease and at a time when the TMT Facilities have remaining useful life, at Sublessor's sole option Sublessee shall be relieved of its Decommissioning Obligations and permitted to surrender its subleasehold interest in the Subleased Premises without removal of the TMT Facilities on such terms as may be mutually agreed in writing by Sublessor and Sublessee, which may include payment to Sublessor of an amount to be held in reserve for future decommissioning in exchange for Sublessor's assumption of the Decommissioning Obligations.

11. Indemnity. Sublessee shall indemnify, defend, and hold harmless Lessor, Sublessor, and their officers, agents, employees, and other persons acting on their behalf, from and against any claim or demand for loss, liability, or damages (including, but not limited to, reasonable attorneys' fees and claims for property damage, personal injury, or death, based upon any accident, fire, or other incident on or about the Subleased Premises) to the extent arising or resulting from: (1) any act or omission on the part of Sublessee relating to Sublessee's use, occupancy, maintenance, or enjoyment of the Subleased Premises; (2) any failure on the part of Sublessee to properly maintain the Subleased Premises, and areas adjacent thereto in Sublessee's use and control, including any accident, fire, or nuisance, arising from or caused by any failure on the part of Sublessee to maintain the Subleased Premises in a safe condition; or (3) Sublessee's non-observance or non-performance of any of the terms, covenants, and conditions of this Sublease or the Master Lease or the rules, regulations, ordinances and laws of the Federal, State, or County governments. Sublessee further agrees to indemnify, defend, and hold harmless Lessor and Sublessor from any damages or claims arising from the release of "hazardous material" (as defined in Section 31 below) on the Subleased Premises occurring while Sublessee is in possession, or elsewhere if caused by Sublessee or any person acting under Sublessee.

12. Insurance. Sublessee shall, at its own cost and expense, maintain the following insurance. Such insurance shall be subject to the reasonable approval of Sublessor and Lessor and, except as to any property insurance, shall name Sublessor and Lessor as additional insureds. Sublessee shall deliver executed certificates thereof to Sublessor on or before the Effective Date of this Sublease and thereafter within a reasonable time prior to the expiration of the term of each such policy. As often as any such policy shall expire or terminate, renewal or additional policies shall be procured and maintained by Sublessee in like manner to like extent. If Sublessee has only provided

Sublessor with certificates evidencing the policies required to be carried by Sublessee under this Sublease, Sublessee agrees to deliver executed copies of all such required policies to Sublessor within ten (10) days of Sublessor's written request for the same.

a. **Property Insurance.** Sublessee shall at its own expense and at all times during the term of this Sublease keep Sublessee's property, including but not limited to the TMT Facilities, insured against (i) all of the risks covered by a standard ISO Commercial Property Special Causes of Loss Form (or equivalent) which shall be in an amount equal to the full replacement cost of such property and shall not have a deductible in excess of Two Hundred and Fifty Thousand Dollars (\$250,000), and (ii) such other hazards or risks which a reasonably prudent telescope operator on Mauna Kea would insure against. Sublessee hereby waives any and all rights of subrogation which it may have against Lessor and/or Sublessor, except to the extent of available insurance. In case the property required to be insured above or any part thereof shall be destroyed or damaged by fire or such other casualty required to be insured against, then and as often as the same shall happen, the proceeds of such insurance shall be paid to Sublessee to be used by Sublessee to promptly repair and restore any damage to such property.

b. **Liability Insurance.** Sublessee shall procure at Sublessee's expense and keep in force during the term of this Sublease and any extension thereof, the following insurance:

i) **General Liability Insurance.** Commercial general liability insurance (including coverage for liability caused by the fault of Sublessee, products-completed operations liability, personal and advertising injuries and coverage for contractual liability to the extent provided by ISO Form CGL #00-01-04-13 (or equivalent) covering Sublessee and naming as additional insureds: (i) Sublessor, (ii) Lessor, (iii) Sublessor's and Lessor's managers, officers, agents and employees, and (iv) such other parties as Sublessor may specify, insuring against liability arising out of the use, occupancy or maintenance of the Subleased Premises and areas appurtenant thereto by Sublessee with limits of not be less than One Million Dollars (\$1,000,000) for property damage, and Five Million Dollars (\$5,000,000) for injuries and deaths in any one occurrence or a combined single limit of Five Million Dollars (\$5,000,000) per occurrence and deductibles of no more than Two Hundred and Fifty Thousand Dollars (\$250,000). Such insurance shall be primary and shall not limit the liability of the Sublessee under Section 11 above.

ii) **Auto Liability Insurance.** Auto liability insurance covering all automobiles used by Sublessee in connection with its operations in the Subleased Premises with limits of not less than Five Hundred Thousand Dollars (\$500,000) for property damage, and Five Million Dollars (\$5,000,000) for injuries or deaths in any one occurrence or a combined single limit of Five Million Dollars (\$5,000,000) per occurrence, with deductibles of no more than Five Thousand Dollars (\$5,000) per occurrence and naming Sublessor and Lessor as additional insureds.

iii) **Pollution Liability Insurance.** Pollution liability insurance in the amount of not less than Five Million Dollars (\$5,000,000) and with deductibles of no

more than Two Hundred and Fifty Thousand Dollars (\$250,000) per occurrence and naming Sublessor and Lessor as additional insureds. Such insurance shall cover bodily injury, property damage, and environmental damage, including clean up and defense and remediation costs, for occurrences that arise from the occupancy or use of the Subleased Premises during the term of this Sublease by Sublessee.

c. General Insurance Requirements.

i) Sublessee shall use its best efforts to obtain the following terms in each policy of commercial property insurance and general liability insurance required in Sections 12.a. and 12.b. above to the extent that such terms are reasonably available in the commercial marketplace:

a) a provision that the liability of the insurer thereunder shall not be affected by, and that the insurer shall not claim, any right of set-off, counterclaim, apportionment, proration, or contribution by reason of, any other insurance obtained by or for Sublessor, Lessor, Sublessee, or any person claiming by, through, or under any of them; and

b) no provision relieving the insurer from liability for loss occurring while the hazard to buildings and personal property is increased, whether or not within the knowledge or control of, or because of any breach of warranty or condition or any other act or neglect by Sublessor, Lessor, Sublessee, or any person claiming by, through, or under any of them.

ii) Each policy of commercial property insurance and general liability insurance required in Sections 12.a. and 12.b. above shall:

a) be written by an insurance company rated A- or better, Class size VIII or better, by the Best's Key Rating Guide, based upon the rating system in effect on the date this Sublease is signed. In the event that Best's changes its rating system or ceases to provide ratings at some later date, then such insurance company shall have a rating from Best (or some other comparable rating service if Best's ceases to provide ratings) comparable to the "A- or better, Class VIII or better" requirement of the immediately preceding sentence; and

b) be specifically endorsed to provide that they are primary policies, not contributing with and not in excess of any coverage that Sublessor and/or Lessor may carry, notwithstanding anything to the contrary contained in any policies obtained by Sublessor and/or Lessor.

In addition, Sublessor shall request that each such policy be specifically endorsed to provide that such policy may not be cancelled except upon the insurer giving at least thirty (30) days' prior written notice thereof (ten (10) days in the case of nonpayment of premium) to Sublessor, Lessor, Sublessee, and other person having an interest in the property who has requested such notice of the insurer.

13. Taxes, Assessments, etc. Sublessee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description as to which the Subleased Premises or any part, or any improvements, or the Lessor, Sublessor, or Sublessee, are now or may be assessed or become liable by authority of law during the term of this Sublease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Sublessee shall be required to pay only those installments, together with interest, which becomes due and payable during the term of this Sublease.

14. Utility Services. Sublessee shall be responsible for obtaining any utility services and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which the Subleased Premises or any part, or any improvements, or the Lessor, Sublessor, or Sublessee may become liable for during the term, whether assessed to or payable by the Lessor, Sublessor, or Sublessee.

15. Covenant against discrimination. The use and enjoyment of the Subleased Premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

16. Sanitation. Sublessee shall keep the Subleased Premises and improvements in a strictly clean, sanitary and orderly condition.

17. Waste and Unlawful, Improper or Offensive Use of Subleased Premises. Sublessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the Subleased Premises or any part, nor, without the prior written consent of the Lessor and Sublessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

18. Compliance with Laws. Sublessee shall comply with all applicable requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the Subleased Premises, now in force or which may be in force.

19. Inspection of Subleased Premises. Upon reasonable notice by Sublessor to Sublessee, Sublessee shall permit the Lessor, Sublessor, and their respective agents, at all reasonable times during the Sublease term, to enter the Subleased Premises and examine the state of its repair and condition.

20. Improvements. Sublessee shall not at any time during the term of this Sublease construct, place, maintain and install on the premises any building, structure or improvement of any kind and description except with the prior written approval of the Lessor and the Sublessor and upon those conditions as the Lessor or Sublessor may impose, unless otherwise provided in this Sublease. Construction of the TMT Facilities in accordance with Section 4 above is authorized. Except as otherwise provided in this

Sublease, Sublessee shall own all improvements constructed by and installed by Sublessee on the Subleased Premises.

21. **Repairs to Improvements.** Sublessee shall, at its own expense, keep, repair, and maintain all buildings and improvements now existing or hereafter constructed or installed on the Subleased Premises in good order, condition and repair, reasonable wear and tear excepted.

22. **Liens.** Sublessee shall not commit or suffer any act or neglect which results in the Subleased Premises, any improvement, the leasehold estate of the Sublessor, or the subleasehold estate of the Sublessee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this Sublease, and shall indemnify, defend, and hold the Lessor and Sublessor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses.

23. **Assignments, etc.** Sublessee shall not sublease, subrent, transfer, assign, or permit any other person to exclusively occupy the Subleased Premises or any portion or transfer or assign this Sublease or any interest therein, either voluntarily or by operation of law, without the prior written approval of the Lessor and the Sublessor.

24. **Costs of Litigation.** Sublessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or paid by the Lessor or Sublessor (i) in enforcing the covenants and agreements of the Master Lease or this Sublease with respect to Sublessee, (ii) in recovering possession of the Subleased Premises, or (iii) in the collection of delinquent rental, taxes, and any and all other charges.

25. **Breach.** Time is of the essence in this Sublease and if the Sublessee shall become bankrupt, or if this Sublease and Subleased Premises shall be attached or taken by operation of law, or if Sublessee shall fail to observe and perform any of the material covenants, terms, and conditions contained in this Sublease and on its part to be observed and performed (other than a failure that causes a breach of the Master Lease, in which case Sublessor and Sublessee hereby agree that Section 8 above applies), and this failure shall continue for a period of more than sixty (60) days after delivery by the Sublessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Sublessee at its last known address and to each holder of record having a security interest in the premises, then Sublessor may, subject to the provisions of Section 171-21 of the Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, terminate this Sublease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of Sublessor, all buildings and improvements shall remain and become the property of the Sublessor or shall be removed by Sublessee in accordance with Section 10 above; furthermore, Sublessor shall retain all rent paid in advance to be applied to any damages.

26. **Condemnation.** If at any time, during the term of this Sublease, any portion of the Subleased Premises should be condemned, or required for public purposes by any

government authority, the rental shall be reduced in proportion to the value of the portion of the Subleased Premises condemned. Sublessee shall be entitled to receive from the condemning authority the proportionate value of the Sublessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the Sublease; provided, that the Sublessee may, in the alternative, remove and relocate its improvements to the remainder of the lands occupied by Sublessee. Sublessee shall not by reason of the condemnation be entitled to any claim against the Lessor or Sublessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor or Sublessor. The foregoing rights of the Sublessee shall not be exclusive of any other to which Sublessee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the Subleased Premises were leased, Sublessee shall have the option to surrender this lease and be discharged and relieved from any further liability; provided, that Sublessee shall remove the permanent improvements constructed, erected and placed by it within any reasonable period allowed by the Lessor and Sublessor, in accordance with Section 10 above.

27. **Right to Enter.** The Lessor, Sublessor, or the County of Hawaii and their agents or representatives shall have the right to enter and cross any portion of the Subleased Premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, the Lessor, Sublessor, or the County of Hawaii shall not interfere unreasonably with the Sublessee or Sublessee's use and enjoyment of the Subleased Premises.

28. **Extension of Time.** Notwithstanding any provision contained in this Sublease, when applicable, Sublessor may for good cause shown, allow additional time beyond the time or times specified in this Sublease for the Sublessee to comply, observe, and perform any of the Sublease terms, conditions, and covenants.

29. **Quiet Enjoyment.** Sublessor covenants and agrees with Sublessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Sublessee to be observed and performed, the Sublessee shall and may have, hold, possess, and enjoy the premises for the term of this Sublease, without hindrance or interruption by the Lessor, Sublessor or any other person or persons lawfully claiming by, through, or under the Lessor or Sublessor.

30. **Non-warranty.** Neither the Lessor nor Sublessor warrants the conditions of the Subleased Premises, as the same are being subleased as is.

31. **Hazardous Materials.** Sublessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Sublessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary

course of Sublessee's business where the Sublessee has provided Sublessor with a list that contains the identity of such materials used or stored by Sublessee in the ordinary course of its business and in compliance with all applicable federal and state regulations; provided, that if Sublessor disapproves in writing any such materials, the disapproved materials shall not be brought onto the Subleased Premises. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Sublessee, then the Sublessee shall be responsible for the reasonable costs thereof. In addition, Sublessee shall execute affidavits, representations and the like from time to time at Lessor's or Sublessor's request concerning Sublessee's best knowledge and belief regarding the presence of hazardous materials on the Subleased Premises placed or released by Sublessee.

For the purpose of this Sublease, "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

32. Hawaii Law. This Sublease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

33. Exhibits - Incorporation in Sublease. All exhibits referred to herein are attached to this Sublease and hereby are deemed incorporated by reference.

34. Headings. The section headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this Sublease.

35. Partial Invalidity. If any term, provision, covenant or condition of this Sublease should be held to be invalid, void or unenforceable, the remainder of this Sublease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

36. Withdrawal. If and to the extent that Lessor exercises its power of withdrawal under the Master Lease to withdraw any portion of the Subleased Premises for public uses or purposes upon giving reasonable notice and without compensation except as otherwise provided in the Master Lease, HRS Chapter 171, the New Master Lease, or other master lease between Sublessor and Lessor that includes the Subleased Premises, then Sublessor shall have the right to withdraw these same portions of the Subleased Premises during the term of this Sublease upon giving reasonable notice to Sublessee and subject to the Sublessee's claim for any compensation provided under the Master Lease, HRS Chapter 171, the New Master Lease, or other master lease between Sublessor and Lessor that includes the Subleased Premises for any permanent improvement constructed upon the Subleased Premises that is destroyed or made unusable in the process of the withdrawal or

taking. Upon such withdrawal, or upon the taking which causes any portion of the Subleased Premises to become unusable for the specific use or uses for which it was subleased, the rent shall be reduced in proportion to the value of the land withdrawn or made unusable, and to the extent permitted in the Master Lease, HRS Chapter 171, the New Master Lease, or other master lease between Sublessor and Lessor that includes the Subleased Premises, if any permanent improvement constructed upon the land by Sublessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value shall be paid based upon the unexpired term of the lease (which value shall also include the cost of decommissioning such improvements including site restoration as required in the Decommissioning Plan).

37. **Building Construction.** All building construction shall be in full compliance with all applicable laws, rules and regulations of the federal, state, and county governments and in accordance with plans and specifications submitted to and approved by the Sublessor and the Chairman of the Board of Land and Natural Resources prior to commencement of construction.

38. **Clearances.** Sublessee shall be responsible for obtaining all necessary federal, state or county clearances.

39. **Time of Essence.** Time is of the essence in all provisions of this Sublease.

40. **Written Notice.** All notices shall be in writing and shall be deemed to have been delivered on the date sent if sent by certified mail (return receipt requested) or recognized courier (with delivery confirmation) or transmitted by facsimile (with written confirmation of transmission) and in each case with a copy sent by email on the same date as follows:

Sublessor:

**Chancellor
University of Hawaii at Hilo
200 West Kawili Street
Hilo, Hawaii 96720-4091
Telephone: (808) 932-7348
Facsimile: (808) 932-7338
Email: dstraney@hawaii.edu**

Sublessee:

**Project Manager (during construction) or Observatory Director (after first
light; contact information for Observatory Director to be delivered to
Sublessor by written notice following construction)
TMT International Observatory LLC
1111 South Arroyo Parkway, Suite 200
Pasadena, CA 91105**

Telephone: (626) 395-2997
Facsimile: (626) 296-1887
Email: sanders@tmt.org

With a copy to:

Ann Martin
General Counsel
TMT Observatory Corporation
Telephone: (626) 395-1646
Facsimile: (626) 395-6841
Email: ann.martin@caltech.edu

41. **Dispute Resolution.** Any dispute relating to or arising as a result of or in connection with this Sublease, if not resolved by negotiation, shall be submitted first to non-binding mediation with Dispute Prevention & Resolution, Inc. and if such mediation is not concluded within six (6) months after submission, then shall be decided in legal or equitable proceedings in accordance with Hawaii law in any court having jurisdiction in the State of Hawaii. Such mediation shall take place in the County of Honolulu, State of Hawaii. Each party shall bear its own costs and fees for such mediation and the fees and expenses of the mediator shall be borne by the parties equally.

42. **Historic preservation.** In the event any historic properties or burial sites, as defined in Section 6E-2 of the Hawaii Revised Statutes, are found on the Subleased Premises, Sublessee and Sublessee's agents, employees and representatives shall immediately stop all land utilization and/or work and contact the Historic Preservation Office in compliance with Hawaii Revised Statutes Chapter 6E.

43. **Removal of Trash.** Sublessee shall be responsible for the removal of all illegally dumped trash upon the premises within ninety (90) days from the date of execution of this Sublease and shall so notify the Sublessor in writing at the end of ninety (90) days.

44. **Phase I Environmental Site Assessment.** Prior to termination or revocation of this Sublease, Sublessee shall conduct a Phase I environmental site assessment of the Subleased Premises and conduct a complete abatement and disposal of any such sites, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Failure to comply with the provisions of this Section 44 shall not extend the term of this Sublease or automatically prevent termination or revocation of the lease. Sublessor, at its sole option, may refuse to approve termination, unless this evaluation and abatement provision has been performed. In addition or in the alternative, Sublessor may, at its sole option if Sublessee does not do so, arrange for performance of the provisions of this Section 44, all costs and expenses of such performance to be charged to and paid by Sublessee.

[Remainder of page intentionally left blank; signature page follows.]

IN WITNESS WHEREOF, Sublessor and Sublessee have executed this Sublease as of the date first written above.

SUBLESSOR:

SUBLESSEE:

FOR THE UNIVERSITY OF HAWAI'I:

**FOR TMT INTERNATIONAL
OBSERVATORY LLC:**

By _____
Name: David Lassner
Title: Interim President
Date: _____

By _____
Name: Edward C. Stone
Title: Executive Director
Date: _____

By _____
Name: Howard Todo
Title: Vice-President for Budget and
Finance
Date: _____

By _____
Name: Donald Straney
Title: Chancellor, University
of Hawai'i at Hilo
Date: _____

Approved as to form:

By _____
Name: Lawrence S. Okinaga, Carlsmith Ball LLP
Title: Special General Counsel
Date: _____

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

The attached document: **SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAII**, dated _____, 2014 which consists of _____ pages (including this page), was executed by **DAVID LASSNER AND HOWARD TODO** and on this ____ day of _____, 2014 in the First Judicial Circuit of the State of Hawaii, personally known/proved to me on the basis of satisfactory evidence to be the persons, who personally appeared before me and being by me duly sworn or affirmed, did say that they are the **INTERIM PRESIDENT** and **VICE-PRESIDENT FOR BUDGET AND FINANCE**, respectively, of the **UNIVERSITY OF HAWAII**, and that such persons executed the foregoing instrument as the free act and deed of such persons, and if applicable in the capacities shown, having been duly authorized to execute such instrument in such capacities.

se 1)

[Notary Signature]

Printed Name: Notary Name

My commission expires: _____

STATE OF HAWAII)
) ss.
COUNTY OF HAWAII)

The attached document: **SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAII**, dated _____, 2014 which consists of _____ pages (including this page), was executed by **DONALD STRANEY** on this ____ day of _____, 2014 in the Third Judicial Circuit of the State of Hawaii, personally known/proved to me on the basis of satisfactory evidence to be the person, who personally appeared before me and being by me duly sworn or affirmed, did say that he is the **CHANCELLOR of UNIVERSITY OF HAWAI'I AT HILO**, and that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

(rotary stamp or seal)

[Notary Signature]

Printed Name: Notary Name

My commission expires: _____

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

The attached document: **SUBLEASE AND NON-EXCLUSIVE EASEMENT AGREEMENT BETWEEN TMT INTERNATIONAL OBSERVATORY LLC AND THE UNIVERSITY OF HAWAII**, dated _____, 2014 which consists of _____ pages (including this page), was executed by **EDWARD C. STONE** on this ____ day of _____, 2014, personally known/proved to me on the basis of satisfactory evidence to be the person, who personally appeared before me and being by me duly sworn or affirmed, did say that he is the **EXECUTIVE DIRECTOR** of **TMT INTERNATIONAL OBSERVATORY LLC** and that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

(notary stamp or seal)

[Notary Signature]

Printed Name: Notary Name

My commission expires: _____

Exhibit A to Sublease

Master Lease (General Lease No. S-4191)

GENERAL LEASE NO. S-4191

THIS INDENTURE OF LEASE, made this 21st day of December, 1968, by and between the STATE OF HAWAII, by its Board of Land and Natural Resources, pursuant to the provisions of Section 103A-90(b), Revised Laws of Hawaii 1955, as amended, hereinafter referred to as the "LESSOR", and the UNIVERSITY OF HAWAII, a body corporate, whose post office address is 2444 Dole Street, Honolulu, City and County of Honolulu, State of Hawaii, hereinafter referred to as the "LESSEE",

WITNESSETH THAT:

FOR and in consideration of the mutual promises and agreements contained herein, the Lessor does hereby demise and lease unto the said Lessee and the said Lessee does hereby rent and lease from the Lessor, all of that certain parcel of land situate at Kaoha, Hamakua, County and Island of Hawaii, State of Hawaii, and more particularly described in Exhibit "A", hereto attached and made a part hereof.

TO HAVE AND TO HOLD, all and singular the said premises, herein mentioned and described, unto the said Lessee, for and during the term of sixty-five (65) years, to commence from the 1st day of JANUARY, 1969, and to terminate on the 31st day of December, 2033.

DEPARTMENT OF LAND AND NATURAL RESOURCES
HONOLULU, HAWAII

EXHIBIT A

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Water Rights. All surface and ground waters appurtenant to the demised premises, together with the right to enter and to capture, divert or impound water; provided, that the Lessor shall exercise such rights in such manner as not to interfere unreasonably with the Lessee's use of the demised premises; provided, further, that the Lessee shall have the right to use the waters of Lake Waiau for any purpose necessary or incidental to the use permitted by this lease on the following conditions:

- a. No drilling or disturbance of Lake Waiau's bottom, banks or areas adjacent thereto shall be permitted;
- b. No activity shall be permitted which will result in the pollution of the waters of Lake Waiau;
- c. Lessee shall not take or divert any of the waters arising from springs which furnish the water supply for Pohakuloa, and no alterations to said springs shall be made by Lessee.

2. Access. All rights to cross the demised premises for inspection or for any government purposes.

3. Hunting and Recreation Rights. All hunting and recreation rights on the demised lands, to be implemented pursuant to rules and regulations issued by said Board in discharging its fish and game or state parks responsibilities; provided, however, that such hunting and recreation activities shall be coordinated with the activities of the Lessee on the demised lands; and provided, further, that such hunting and recreation activities shall be limited to day-light hours only.

4. Right to use Demised Lands. The right for itself, and its successors, lessees, grantees and permittees, to use any portion of the lands demised and the right to grant to others rights and privileges affecting said land; provided, however, that, except as otherwise provided herein, no such use shall be permitted or rights and privileges granted affecting said lands, except upon mutual determination by the parties hereto that such use or grant will not unreasonably interfere with the Lessee's use of the demised premises; provided, further, that such agreement shall not be arbitrarily or capriciously withheld.

THE LESSEE, IN CONSIDERATION OF THE PREMISES, COVENANTS WITH THE LESSOR AS FOLLOWS:

1. Surrender. The Lessee shall, at the expiration or sooner termination of this lease, peaceably and quietly surrender and deliver possession of the demised premises to the Lessor in good order and condition, reasonable wear and tear excepted.

2. Maintenance of the Premises. The Lessee shall keep the demised premises and improvements in a clean, sanitary and orderly condition.

3. Waste. The Lessee shall not make, permit or suffer, any waste, strip, spoil, nuisance or unlawful, improper or offensive use of the demised premises.

4. Specified Use. The land hereby leased shall be used by the Lessee as a scientific complex, including without limitation thereof an observatory, and as a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex.

Activities inimical to said scientific complex shall include light and dust interference to observatory operation

Rev. 11/11
~~During hours of business~~ and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

5. Assignments. The Lessee shall not sublease, sub-rent, assign or transfer this lease or any rights thereunder without the prior written approval of the Board of Land and Natural Resources.

6. Improvements. The Lessee shall have the right during the existence of this lease to construct and erect buildings, structures and other improvements upon the demised premises; provided, that plans for construction and plot plans of improvements shall be submitted to the Chairman of the Board of Land and Natural Resources for review and approval prior to commencement of construction. The improvements shall be and remain the property of the Lessee, and shall be removed or disposed of by the Lessee at the expiration or sooner termination of this lease; provided, that with the approval of the Chairman such improvements may be abandoned in place. The Lessee shall, during the term of this lease, properly maintain, repair and keep all improvements in good condition.

7. Termination by the Lessee. The Lessee may terminate this lease at any time by giving thirty (30) days' notice in writing to the Lessor.

8. Termination by the Lessor. In the event that (1) the Lessee fails to comply with any of the terms and conditions of this lease, or (2) the lessee abandons or fails to use the demised lands for the use specified under paragraph 4 of these covenants for a period of two years, the Lessor may terminate this lease by giving six months' notice in writing to the Lessee.

9. Non-Discrimination. The Lessee covenants that the use and enjoyment of the premises shall not be in support of any

policy which discriminates against anyone based upon race, creed, color or national origin.

10. General Liability. The Lessee shall at all times, with respect to the demised premises, use due care for safety, and the Lessee shall be liable for any loss, liability, claim or demand for property damage, personal injury or death arising out of any injury, death or damage on the demised premises caused by or resulting from any negligent activities, operations or omissions of the Lessee on or in connection with the demised premises, subject to the laws of the State of Hawaii governing such liability.

11. Laws, Rules and Regulations, etc. The Lessee shall observe and comply with Regulation 4 of the Department of Land and Natural Resources and with all other laws, ordinances, rules and regulations of the federal, state, municipal or county governments affecting the demised lands or improvements.

12. Objects of Antiquity. The Lessee shall not appropriate, damage, remove, excavate, disfigure, deface or destroy any object of antiquity, prehistoric ruin or monument of historical value.

13. Undesirable Plants. In order to prevent the introduction of undesirable plant species in the area, the Lessee shall not plant any trees, shrubs, flowers or other plants in the leased area except those approved for such planting by the Chairman.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be duly executed this 27 / 4

day of June, 1968, and the UNIVERSITY OF
HAWAII, by its and
has caused these presents to be duly executed this
day of , 1968, effective as of the day and
year first above written.

STATE OF HAWAII

By: *James T. Lee*
Chairman and Member
Board of Land and
Natural Resources

And By: *Memoru Nijoy*
Member
Board of Land and
Natural Resources

UNIVERSITY OF HAWAII

By: *Robert W. Smith*
Its Acting President

And By: *Paul L. Smith*
Its

APPROVED AS TO FORM:

Deputy Attorney General
Dated:

Proved by:

EXHIBIT "A"

MAUNA KEA SCIENCE RESERVE

Kaohs, Hamakua, Island of Hawaii, Hawaii

Being a portion of the Government Land of Kaohs

Beginning at a point on the south boundary of this parcel of land, the coordinates of said point of beginning referred to Government Survey Triangulation Station "SUMMIT 1955" being 12,325.95 feet South and 471.84 feet West, as shown on Government Survey Registered Map 2789, thence running by azimuths measured clockwise from True South:-

1. Along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 135° 00' 18,667.62 feet;
2. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, still on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 225° 00' 18,667.62 feet;
3. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, still on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 281° 18' 04.6" 5173.56 feet;
4. 207° 49' 06.5" 841.83 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
5. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 1200.00 feet, the chord azimuth and distance being: 297° 49' 06.5" 2400.00 feet;

6. 27° 49' 06.5" 841.83 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
7. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 306° 59' 47.4" 1824.16 feet;
8. 227° 29' 00.9" 2805.06 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
9. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 1500.00 feet, the chord azimuth and distance being: 317° 29' 00.9" 3000.00 feet;
10. 47° 29' 00.9" 2805.06 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
11. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 13200.00 feet, the chord azimuth and distance being: 325° 31' 55.2" 701.87 feet;
12. 245° 46' 12.7" 2760.45 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
13. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 2000.00 feet, the chord azimuth and distance being: 335° 46' 12.7" 4000.00 feet;
14. 65° 46' 12.7" 2760.45 feet along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909;
15. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 5, 1909, on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 352° 14' 32.9" 3563.30 feet;

16. Thence along Mauna Kea Forest Reserve, Governor's Proclamation dated June 3, 1909, still on a curve to the right with a radius of 13,200.00 feet, the chord azimuth and distance being: 48° 00' 18,667.62 feet to the point of beginning and containing an AREA OF 13,321.054 ACRES.

EXCEPTING and RESERVING to the State of Hawaii and to all others entitled thereto, the Mauna Kea-Munakula and Mauna Kea-Mukoa Trails, and all other existing trails within the above-described parcel of land, together with rights of access over and across said trails.

ALSO, EXCEPTING and RESERVING to the State of Hawaii, its successors and assigns, the waters and all riparian and other rights in and to all the streams within the above-described parcel of land.

Exhibit B to Sublease

Consent to Sublease Under General Lease No. S-4191

(attached)

CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191

CONSENT is hereby given by the STATE OF HAWAII, by its Board of Land and Natural Resources, Lessor under unrecorded General Lease No. S-4191 dated June 21, 1968, leased to the University of Hawaii, a public body corporate, as Lessee, to the attached Sublease and Non-Exclusive Easement Agreement ("Sublease") dated _____, 2014, from the UNIVERSITY OF HAWAII, a public body corporate, as "Sublessor," to TMT INTERNATIONAL OBSERVATORY LLC, a Delaware limited liability company, as "Sublessee"; SUBJECT, HOWEVER, to the provisions of Section 171-21, Hawaii Revised Statutes, as amended, relating to the rights of holder of security interests, PROVIDED, FURTHER, that nothing contained herein shall change, modify, waive or amend the provisions, terms, conditions and covenants or the duties and obligations of the Lessee or Sublessee under General Lease S-4191.

IT IS UNDERSTOOD that except as provided herein, should there be any conflict between the terms of General Lease No. S-4191 and the terms of the Sublease, the former shall control; and that no further sublease or assignment of any interest of the premises or any portion thereof shall be made without the prior written consent of the Board of Land and Natural Resources.

IT IS FURTHER UNDERSTOOD AND AGREED by the STATE OF HAWAII, by its Board of Land and National Resources, that in the event said General Lease No. S-4191 is surrendered or defaulted upon by Lessee, UNIVERSITY OF HAWAII, prior to the expiration of the term thereof, the Sublease shall remain in full force and effect for the remainder of the term thereof, and Sublessee, TMT INTERNATIONAL OBSERVATORY LLC, shall be allowed its continued right to quiet enjoyment of the demised premises, upon and subject to the terms, conditions and covenants of General Lease No. S-4191. For the avoidance of doubt, for purposes of the immediately preceding sentence, a "surrender" by Lessee, UNIVERSITY OF HAWAII, does not include a mutual cancellation of said General Lease No. S-4191 and concurrent issuance of a New Master Lease (as defined in Section 9.a. of the Sublease) on terms that are acceptable to Sublessee or other master lease on terms that are acceptable to Sublessee, TMT INTERNATIONAL OBSERVATORY LLC, as contemplated by Section 9 of the Sublease.

FURTHERMORE, Lessee hereby acknowledges that the Lessor's consent to sublease under General Lease No. S-4191 does not release the Lessee of any and all responsibilities, obligations, liabilities, and claims respecting or arising under or out of said General Lease prior to the effective date of this consent.

DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P. O. Box 621
Honolulu, Hawaii 96809

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board and Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be fully executed on this ____ day of _____, 2014.

STATE OF HAWAII

Approved by the Board
of Land and Natural
Resources at its
meeting held on
_____, 2014

By _____
Chairperson and Member
Board of Land and
Natural Resources

LESSOR

UNIVERSITY OF HAWAII, a public body
corporate

By _____
DAVID LASSNER
Its Interim President

By _____
HOWARD TODO
Its Vice-President for Budget and Finance

By _____
DONALD STRANEY
Chancellor, University of Hawai'i at Hilo

LESSEE

APPROVED AS TO FORM:

Deputy Attorney General
Dated: _____

DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P O Box 621
Honolulu, Hawaii 96809

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this _____ day of _____, 2014, before me personally appeared **DAVID LASSNER, HOWARD TODO and DONALD STRANEY** personally known, who, being by me duly sworn or affirmed, did say that they are the Interim President of the University of Hawai'i, the Vice-President for Budget and Finance of the University of Hawai'i, and the Chancellor of the University of Hawai'i at Hilo, respectively, and that the foregoing instrument was signed in the capacity shown, having been duly authorized to execute such instrument on behalf of the University of Hawai'i, a public body corporate, by authority of its Board of Regents, and that said **DAVID LASSNER, HOWARD TODO and DONALD STRANEY** acknowledged the foregoing instrument as the free act and deed of said University.

Name: _____

Notary Public, State of Hawaii

My commission expires: _____

(Notary Stamp or Seal)

NOTARY CERTIFICATION STATEMENT	
Document Identification or Description: CONSENT TO SUBLEASE OF GENERAL LEASE NO. S-4191	
Document Date: _____	
No. of Pages: _____	
Jurisdiction (in which notarial act is performed): Third Judicial Circuit of the State of Hawaii	
Signature of Notary	Date of Notarization and Certification Statement
(Notary Stamp or Seal)	
Printed Name of Notary	

Exhibit C-1 to Sublease

Subleased Premises and Easement Area

(attached)

Exhibit C-2 to Sublease

Legal Description of Subleased Premises

(attached)

DESCRIPTION

TMT SITE PREMISES

All of that certain parcel of land being a portion of the Government Land of Kaohe, being also a portion of Mauna Kea Science Reserve covered by General Lease S-4191 to the University of Hawaii Situate at Kaohe, Hamakua, Island of Hawaii, Hawaii

Beginning at the southwest corner of this parcel of land referred to the Hawaii State Plane Coordinate System, Zone 1 (NAD83) 362.519.00 feet North and 1,646,660.00 feet East and the direct azimuth and distance from the Government Survey Triangulation Station "SUMMIT 1955" being 129° 52' 08"; 6,166.86 feet and running by azimuths measured clockwise from True South:

1. 152° 35' 33" 304.14 feet along the remainder of the Government Land of Kaohe and the remainder of Mauna Kea Science Reserved covered by General Lease S-4191 to the University of Hawaii;
2. 180° 00' 00" 190.00 feet same;
3. 270° 00' 00" 630.00 feet along same;
4. 0° 00' 00" 430.00 feet along same;
5. 90° 00' 00" 320.00 feet along same;
6. 0° 00' 00" 30.00 feet along same;
7. 90° 00' 00" 170.00 feet along the same to the point of beginning and containing an area of 5.9986 acres, more or less.



Description Prepared By:
Engineering Partners Inc.

Ronaldo B. Aurelio
RONALDO B. AURELIO
Licensed Professional Land Surveyor
Certificate Number 7564
Expires April 30, 2014

Hilo, Hawaii, March 10, 2014

Exhibit C-3 to Sublease

Legal Description of Easement Area

(attached)

DESCRIPTION

NON-EXCLUSIVE ACCESS AND UTILITY EASEMENT

All of that certain parcel of land being a portion of the Government land of Kaohe, being also a portion of Mauna Kea Science Reserve covered by General Lease S-4191 to the University of Hawaii
Situate at Kaohe, Hamakua, Island of Hawaii, Hawaii

Beginning at the southwest corner of this parcel of land referred to the Hawaii State Plane Coordinate System, Zone 1 (NAD83) 361,104.89 feet North and 1,647,460.58 feet East and the direct azimuth and distance from the Government Survey Triangulation Station "SUMMIT 1955" being 122° 50' 16"; 4,680.47 feet and running by azimuths measured clockwise from True South:

1. 147° 03' 17" 30.07 feet along the remainder of the Government Land of Kaohe and the remainder of Mauna Kea Science Reserved covered by General Lease S-4191 to the University of Hawaii;

Thence along the same on a curve to the left with a radius of 15.00 feet, the chord azimuth and distance being:

2. 144° 25' 01" 1.38 feet;
3. 141° 46' 45" 73.94 feet along same;

Thence along the same on a curve to the right with a radius of 135.00 feet, the chord azimuth and distance being:

4. 149° 50' 37" 37.88 feet;
5. 157° 54' 28" 14.29 feet along same;
6. 67° 54' 28" 15.00 feet along same;
7. 157° 54' 28" 32.04 feet along same;
8. 148° 47' 42" 37.18 feet along same;
9. 238° 47' 42" 15.00 feet along same;

Thence along the same on a curve to the right with a radius of 435.00 feet, the chord azimuth and distance being;

10. 152° 25' 35" 55.11 feet;
11. 156° 03' 28" 17.62 feet along same;

Thence along the same on a curve to the left with a radius of 365.00 feet, the chord azimuth and distance being;

12. 149° 09' 32" 87.69 feet;
13. 142° 15' 36" 89.55 feet along same;

Thence along the same on a curve to the right with a radius of 435.00 feet, the chord azimuth and distance being;

14. 145° 06' 28" 43.22 feet;
15. 147° 57' 20" 86.90 feet along same;

Thence along the same on a curve to the right with a radius of 435.00 feet, the chord azimuth and distance being;

16. 158° 27' 14" 158.52 feet;
17. 168° 57' 08" 156.20 feet along same;

Thence along the same on a curve to the right with a radius of 155.00 feet, the chord azimuth and distance being;

18. 179° 43' 11" 57.92 feet;
19. 190° 29' 14" 45.76 feet along same;

Thence along the same on a curve to the left with a radius of 85.00 feet, the chord azimuth and distance being;

20. 181° 19' 15" 22.08 feet;

21. 172° 09' 16" 43.65 feet along same;
Thence along the same on a curve to the left with a radius of 365.00 feet, the chord azimuth and distance being;
22. 163° 49' 06" 105.84 feet;
23. 155° 28' 55" 25.44 feet along same;
Thence along the same on a curve to the left with a radius of 185.00 feet, the chord azimuth and distance being;
24. 138° 43' 43" 106.65 feet;
25. 121° 58' 31" 82.07 feet along same;
26. 31° 58' 31" 10.00 feet along same;
27. 121° 58' 31" 15.18 feet along same;
Thence along the same on a curve to the right with a radius of 275.00 feet, the chord azimuth and distance being;
28. 127° 44' 21" 55.24 feet;
29. 223° 30' 11" 10.00 feet along same;
Thence along the same on a curve to the right with a radius of 265.00 feet, the chord azimuth and distance being;
30. 138° 12' 29" 43.47 feet;
31. 142° 54' 46" 47.07 feet along same;
Thence along the same on a curve to the right with a radius of 105.00 feet, the chord azimuth and distance being;
32. 162° 13' 04" 69.43 feet;
33. 181° 31' 22" 1.83 feet along same;
34. 270° 00' 00" 70.02 feet along the TM1 Building Site Easement;

35. 1° 31' 22" 3.69 feet along the remainder of the Government Land of Kahohe and the remainder of Mauna Kea Science Reserved covered by General Lease S-4191 to the University of Hawaii:
- Thence along the same on a curve to the left with a radius of 35.00 feet, the chord azimuth and distance being:
36. 342° 13' 04" 23.14 feet;
37. 322° 54' 46" 47.07 feet along same;
- Thence along the same on a curve to the left with a radius of 195.00 feet, the chord azimuth and distance being:
38. 312° 26' 39" 70.86 feet;
39. 301° 58' 31" 97.25 feet along same;
- Thence along the same on a curve to the right with a radius of 255.00 feet, the chord azimuth and distance being:
40. 318° 43' 43" 147.01 feet;
41. 335° 28' 55" 25.44 feet along same;
- Thence along the same on a curve to the right with a radius of 435.00 feet, the chord azimuth and distance being:
42. 343° 49' 06" 123.13 feet;
43. 352° 09' 16" 43.65 feet along same;
- Thence along the same on a curve to the right with a radius of 155.00 feet, the chord azimuth and distance being:
44. 1° 19' 15" 49.38 feet;
45. 10° 29' 14" 45.76 feet along same;

EXHIBIT A-2



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
LAND DIVISION

2014 JUL -3 AM 9:58

PETITION FOR A CONTESTED CASE HEARING

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Flores-Case 'Ohana	2. Contact Person E. Kalani Flores	
3. Address	4. City Kamuela	5. State and ZIP HI 96743
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested June 27, 2014 BLNR Meeting Agenda Item No. D-19 - Resubmittal: Consent to Sublease under General Lease No. S-4191 to the University of Hawai'i, Lessee, to TMT International Observatory LLC, Sublessee, Ka'ohe, Hämākua, Island of Hawai'i, Tax Map Key: (3) 4-4-015: 009 por.	
18. Board Action Date June 27, 2014	19. Item No. D-19
20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action <p>Members of the Flores-Case 'Ohana ("Petitioner") are identified as Kanaka Maoli/Native Hawaiian cultural practitioners who hold Mauna Kea sacred pursuant to traditional and customary beliefs. Mauna Kea, traditionally known as Mauna a Wakea, has long been regarded as the most sacred place on the island by Native Hawaiians of the past and still remembered and cherished by Hawaiians today. Mauna Kea is considered a temple and a site of pilgrimage as confirmed by the several hundred shrines found on the mountain. It has been and continues to be used as a place to conduct traditional, customary, and religious practices.</p> <p>The Petitioner has substantial interest and connections to Mauna a Wakea. Petitioner has traditional and customary practices at the areas on Mauna Kea covered under the Master Lease and proposed Sublease.</p> <p>The proposed Sublease area is referred to as ceded lands under Section 5(b) of the Hawai'i Admissions Act; thus, Petitioner has an interest in the proposed lease areas as a beneficiary of the public lands trust and ceded lands. Petitioner is personally affected by the disposition and use of ceded lands. Petitioner has standing to enforce the State of Hawai'i's duty to manage these public lands consistent with the highest fiduciary duties and in compliance with Federal and State laws.</p> <p>Petitioner's interests stem from their: (a) traditional and customary practices; (b) standing as a beneficiary of the public lands trust and ceded lands; and (c) environmental interests.</p>	
21. Any Disagreement Petitioner May Have with an Application before the Board <p>The Board of Land & Natural Resources (BLNR) and Department of Land & Natural Resources (DLNR) have not fulfilled their statutory responsibilities and fiduciary duties to protect the interests, lands, resources, and rights of the public, beneficiaries, and Native Hawaiians associated with Mauna Kea by relying primarily upon the submittals and testimony of the Lessee (University of Hawaii) regarding this agenda item. The DLNR failed to solicit any agency comments regarding this Sublease. In addition, the DLNR has subsequently failed to actually investigate the deficiencies and violations in the proposed Sublease terms and conditions that were noted during the testimony presented at the BLNR June 13, 2014 meeting. Likewise, the State Department of the Attorney General has failed to provide any legal opinions regarding these same matters so that the BLNR can make appropriate decisions regarding this matter.</p> <p>Various terms and conditions of the proposed Sublease are in violation of Hawaii Revised Statutes as well as constitute a breach of the State's high fiduciary duties to the public lands trust (also referred to as ceded lands) pursuant to Article XII, Section 4 of the Constitution of the State of Hawaii. The BLNR has failed to determine the fair market value of the proposed lease rent and the necessity for periodic rent openings in long-term leases to assure the State a fair return as required by HRS §171-17 and §171-33.</p> <p>Various terms and conditions of the proposed Sublease removes the oversight of the Lessor pertaining to significant provisions and relinquishes it to the Sublessor. In addition, The DLNR has failed to include terms and conditions in the proposed Sublease as recommended by the Hawaii State</p>	

Auditor.

Various terms and conditions of the proposed Sublease are in violation of Act 132.

An independent Ka Pa'akai analysis has not been completed to assess the impacts of the proposed Sublease would have on customary and traditional practices as stipulated in the State Supreme Court decision rendered in Ka Pa'akai O Ka 'Āina v. Land Use Commission, 94 Hawai'i 31, 47, 7 P.3d 1068, 1084 (2000).

The proposed Sublease should NOT be approved until a final ruling regarding the CDUP HA-3568 has been rendered in the appeal process in the Hawaii State Intermediate Court of Appeals and State Supreme Court as there are terms in the proposed Sublease that make reference to this CDUP.

The proposed Sublease should NOT be approved until Section 106 and consultation with Native Hawaiians regarding the TMT Observatory project has been completed as required by federal law as outlined in the National Historic Preservation Act.

Among other objections, Petitioner objects to the proposed Sublease as it will adversely affect their traditional and customary practices and their cultural and environmental interests. DLNR has failed to independently investigate and protect Native Hawaiian practices in the Sublease area pursuant to Ka Pa'akai O Ka 'Āina v. Land Use Commission, 94 Hawai'i 31, 47, 7 P.3d 1068, 1084 (2000).

A sublease should NOT be issued for a project that extends beyond the life of the existing Master Lease that terminates in 2033. It is common knowledge that the life of the TMT Observatory is more than 50 years and would extend over 30 years beyond 2033. The matter regarding a New Master Lease should be resolved first and the associated EIS should be completed before this Sublease is approved.

This Sublease should NOT be approved until a final ruling regarding the CDUP HA-3568 has been rendered in the appeal process in the Hawaii State Intermediate Court of Appeals and State Supreme Court as there are terms in the proposed Sublease that make reference to this CDUP.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

The BLNR should (a) grant this request for a contested case hearing and allow a HRS chapter 91 contested case hearing to proceed; and (b) deny the approval of the above reference agenda item.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

The proposed Sublease will adversely affect a sacred and culturally and environmentally sensitive site, constitutionally protected gathering practices, and native Hawaiians' and the general public's right to a share of revenue generated by the University.

The contested case hearing will be the only way to identify crucial facts and reasonable alternatives that the DLNR has failed to identify or analyze in accordance with governing law related to the public trust and constitutional provisions. The hearing will serve the public interest by allowing full consideration of the rights and obligations established by Haw. Const., Art. XII, § 4 and the Hawai'i Supreme Court's Ka Pa'akai O Ka 'Āina v. Land Use Commission decision, which requires the BLNR to independently identify and consider Native Hawaiian traditional and customary practices and analyze the Applicant's impact on those practices and cultural resources prior to

decisionmaking. Enforcing the rights of Native Hawaiians attempting to preserve their traditional and customary practice is a public trust purpose in and of itself and is necessarily in the public interest.

Petitioner's participation in a contested case hearing will enable the BLNR to engage in the analysis required under the Hawai'i Constitution, Ka Pa'akai, and other governing constitutional, statutory and regulatory criteria, all of which would serve the public interest.

As respected cultural practitioners in the Hawaiian community, Petitioner represents a quintessential traditional and customary practitioners whose rights this Board must acknowledge by allowing his participation in the requested contested case hearing.

In addition, deficiencies and violations in the proposed Sublease terms and conditions would be clearly identified and addressed.

Further, Petitioner is a beneficiary of the public lands trust and ceded lands and thus shares the public's interest in the proper management of ceded lands.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Petitioner has a clear interest in the property distinguishable from that of the general public and has a substantial interest in this matter.

The Flores-Case 'Ohana continues to exercise traditional and customary Native Hawaiian cultural, spiritual, and religious practices connected to Mauna a Wakea, including traditional and customary pilgrimages to the summit and to Lake Waiau, as well as ceremonies at ahu situated at Pu'u Huhuhulu, Hale Pohaku, surrounding areas on the mountain, and on the summit.

The BLNR previously held a contested case hearing for CDUA HA-3568 pertaining to the Thirty Meter Telescope Observatory, in which the Flores-Case 'Ohana was granted standing as an unincorporated association consisting of E. Kalani Flores and B. Pualani Case, who are native Hawaiian cultural practitioners.

E. Kalani Flores and B. Pualani Case were previously qualified as experts to their cultural practices related to Mauna Kea in the contested case hearing for CDUA HA-3568. In addition, E. Kalani Flores, was also qualified as an expert in the area of Hawaiian cultural traditions through his knowledge, skills, experience, training, and education in this subject matter.

☐ Check this box if Petitioner is submitting supporting documents with this form.

☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

E. Kalani Flores
Petitioner or Representative (Print Name)

E. Kalani Flores
Signature

6/27/14
Date

EXHIBIT A-3

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

INTRODUCTION

We the undersigned file the following written Petition for a Contested Case Hearing pursuant to Hawaii Administrative Rule (HAR) Section 13-1-29. We recorded our oral request for a contested case hearing at the June 27, 2014 BLNR hearing prior to the close of the public hearing at which the matter was scheduled for disposition.

We the undersigned, also wish to make a request to the Chairman, Mr. William Aila to have our filing fee of \$100.00 waived. I make this request because of financial hardship. I, Kealoha Pisciotto a Petitioner and President of Mauna Kea Anaina Hou, make this request because I have suffered a stroke and have not been able return to my work as a Cultural Monitor at Pohakuloa and this Contested Case hearing is a hardship to both my health and financial resources at this time.

In addition and for convenience this Petition (total of 11 pages including the cover) has been sent via email to Ms. Ku'ulei N. Moses the Land Board Secretary (at Kuulei.N.Moses@hawaii.gov) on July 5, 2014 and sent via US Postal Service on Saturday on July 5, 2014 (as Friday was the 4th of July holiday). It was mailed to the Board of Land and Natural Resources, at 1151 Punchbowl Street, #130, Honolulu, HI 96813.

RECEIVED
LAND DIVISION
2014 JUL -8 AM 9:49
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

1. **Name:** Mauna Kea Anaina Hou

2. **Contact:** Kealoha Pisciotta

3. **Address:**

4. **City:** Hilo

5. **State/Zip:** Hawai'i, 96720

6. **Email:**

7. **Phone:**

8. **Fax:** None

9 -16. **Attorney:** Pro Se

17. **Board Action Being Contested:**

Resubmittal: Consent to Sublease under General Lease S-4191 to the University of Hawai'i, Lessee, TMT International Observatory LLC Telescope formerly known as the TMT Corporation (TMT), Sublessee, Mauna Kea Conservation District Ka'ohe, Hamakua District Hawai'i Island, Tax May Key: (3) 4-4-015:009 por.,

18. **Board Action Date:** Friday, June 27, 2014

19. **Item No.:** Land Division, D-19

20. **Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action:**

Mauna Kea resides on the States Conservation District of Ka'ohe, Hamakua District Hawai'i Island, and lands under question in the immediate case is under Tax May Key: (3) 4-4-015:009 por., Ka'ohe, Hamakua District Hawai'i Island, Tax May Key: (3) 4-4-015:009 por.,

Mauna Kea Anaina Hou (MKAH) is an unincorporated association of individuals (Hawaiian and non-Hawaiian) throughout the islands of Hawaii. MKAH is dedicated to protecting, preserving and perpetuating Native Hawaiian traditional and customary cultural, historic and religious practices, access and site (landscape) protection.

MKAH Members have been actively involved in protecting Mauna Kea's natural and cultural resources since the late 1980s. Kealoha Pisciotta, President of Mauna Kea Anaina Hou, continues to exercise her traditional and customary Hawaiian cultural and religious practices on Mauna Kea. Ms. Pisciotta and other MKAH members have family and genealogical ties to Mauna Kea.

BLNR granted MKAH standing in the previous Contested Case Hearings that includes but are not limited to the case on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. MKAH was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).

MKAH Members exercise and will continue to exercise their traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. Many MKAH members are native Hawaiian, as defined in the Hawaii Admission Act, Section 4. These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, erecting 'ahu and lele for ceremonies, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies (Polohiwa ceremonies), and conducting temple worship, in, among, and around the Mauna Kea summit area, Ice Age Natural Area Reserve, and Science Reserve. MKAH members enjoy constitutionally protected traditional and customary native Hawaiian rights.

MKAH has an interest in the Mauna Kea lands under review by the BLNR relating to the approval of the Subleasing of the Mauna Kea Conservation District lands under General Lease S-4191 to the TMT formerly known as the TMT Corporation that are separate from those of the general public. MKAH can and will provide information to assist decision-making on the Subleasing of the Mauna Kea lands. To manage and expedite the Contested Case Hearing, MKAH will work jointly with other parties who share common interests to organize and make a single presentation addressing but not limited to the following:

Rights protected under Section 5(f) of the Hawaii Admission Act, 42 USC § 1983, 40 C.F.R. § 1508.27(b), Hawaii Const. Art. XI, secs. 1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343.

Traditional and Customary Practices. More specifically, Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246,

1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. In effect, the exercise of such rights is a public trust purpose.

The proposed disposition of lands and water within the Mauna Kea summit, Ice Age Natural Area Reserve and Science Reserve areas of Mauna Kea threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes are derived from HRS § 1-1. These rights include, but are not limited to:

- the gathering of ice, snow, water, raw materials for adz making;
- depositing of the "piko" or umbilical cord in Lake Waiau;
- traditional astronomy, cosmology, and navigation;
- continued burial practices;
- solstice and equinox (Polohiwa) ceremonies;
- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- the exercise of other rights for religious, cultural, and subsistence purposes.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to the observatory projects. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

Hawaiian Homes Commission Act. In addition, pursuant to Section 221 of the Act, these same beneficiaries have a right to sufficient water to support homesteading. Certain members of Petitioner Mauna Kea Anaina Hou are also beneficiaries of the trust created by the Hawaiian Homes Commission Act ("Act"). The ground water beneath the

summit of Mauna Kea is both an actual sources of drinking water for the Pohakuloa Military Training Ground and Mauna Kea State Park. In addition, it is a potential source of water for future homesteading for areas of Pi'ihonua and Humu'ula, in which the Department of Hawaiian Home Lands has title to over 59,000 acres of pastoral homesteading land.

Ceded Lands Trust Revenues. Petitioners are also beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As beneficiaries of this trust, they have a right to reasonable revenues from the lease of public lands subject to the provisions of the trust.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawaii and the TMT failed to prepare an adequate FEA/FEIS, despite the significant cumulative effects of the proposed TMT expansion and the Pohakuloa training expansions (up the slopes of the Mauna Kea Conservation District). The TMT Corporation has received substantial federal funding for this project constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). State law requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

The *Wekiu* and other threatened and endangered speice of Mauna Kea. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b). While the *Wekiu* insect is not listed as endangered nor threatened under the Endangered Species Act, this board nonetheless has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit.

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT is required to consult with native Hawaiian

groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the “intangible aspects” of the property. National Register Bulletin 38-“Guidelines for evaluating and documenting Traditional Cultural Properties” establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

National Environmental Policy Act. Under NEPA regulations, “an agency must prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” The UH and/or the TMT International Observatory LLC (TMT) formerly known as the TMT Corporation project proposal has received significant funding and anticipates more federal funding from the National Science Foundation, but has not completed a federal environmental impact statement. The regulations promulgated by the Council on Environmental Quality (federal and state adopted) established the following nonexclusive criteria for determining when a full EIS is required:

- “Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial,” 40 C.F.R. § 1508.27(b)(1);
- “Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*,” id. § 1508.27(b)(3);
- “The degree to which the effects on the quality of the human environment are likely to be *highly controversial*,” id. § 1508.27(b)(4);
- “The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks,” id. § 1508.27(b)(5);
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- “Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts,” id. § 1508.27(b)(7);
- “The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources,” id. § 1508.27(b)(8);

- Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b)(10).

21. Any Disagreement Petitioner Seeks or Deems Itself Entitled To:

The BLNR made many errors in approving the UH/TMT request for a Sublease on June 27, 2014 prior to holding the requested contested case hearings, thus violating the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS § 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine:

- 1.) Whether BLNR erred by approving the UH/TMT prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
- 2.) Whether the BLNR should have approved the Sublease to construct the large TMT facility on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
- 3.) Whether the BLNR erred in approving the UH/TMT Sublease without first insuring the TMT has fulfilled all the requirements and conditions and all state and federal laws as is set for in the TMT CDUP.
- 4.) Whether the BLNR erred by approving the UH/TMT with an insufficient management plan, as required by HAR 13-5-24.
- 5.) Whether the BLNR erred by approving the UH/TMT Sublease prior to the courts review of the TMT CDUP that is under review in the Intermediate Court of Appeals.
- 6.) Whether the members of the BLNR erred by approving UH/TMT Sublease and thus violating their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.
- 7.) Whether the BLNR is violating state and federal laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
- 8.) Whether the BLNR should approve the Sublease for the TMT Project proposed for the Mauna Kea Conservation District when the UH/TMT has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the

maintenance of those sites, and the ability to continue religious practices without interference of view planes and other forms of disturbance and interference to Practitioners at these sites.

- 9.) Whether the BLNR must comply with the requirements of Hawaii Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT to prepare and circulate for public review and comment a Federal Environmental Impact Statement (FEIS), including a cumulative impact assessment, prior to any approval of any Sublease for the Mauna Kea Conservation District.
- 10.) Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals that hold Mauna Kea as a sacred cultural and religious place or a wahi kapu and wahi pana.

BLNR's improper approval of the UH/TMT Subleases will harm our rights, duties, and privileges, as protected by law. These include but are not limited to:

Traditional and Customary Rights of Hawaiians. The approval of this Sublease is an abridgement and denial of constitutionally protected rights enumerated above at paragraph 8 and held by Petitioners as native Hawaiians. In the past, the Mauna Kea Support Services (MKSS) staff at the summit has denied members of Petitioners access for exercise of religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000' level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners access to the lake or upper regions of the summit area.

Desecration and Destruction of Cultural Sites. In addition, members of the Petitioners Mauna Kea Anaina Hou, and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a family shrine of Mauna Kea Anaina Hou on at least three separate occasions. In total the family shrine has been desecrated and removed on at least seven separate occasions—the original stone and second stone (from the family of Auntie Lolani Luahine) has been removed and is still missing.

Public Trust Doctrine. The operations of the observatory and the planned expansion threaten the current and future water quality of the dike-confined ground water beneath the Mauna Kea summit. This is a resource which Petitioners have an interest in protecting. The BLNR should not be approving the Sublease until and unless the UH/TMT studies the impacts of its past operations on that water resource and makes adequate provision for its future enhancement and protection

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope. Petitioners have members who are eligible beneficiaries of the Hawaiian homestead program and are users of the Mauna Kea State Park.

Ceded Lands Trust Revenue. The Board of Land and Natural Resource's disposition of public lands are subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a proper appraisal and for less than fair-market value is a breach of trust and statutory duties owed to native Hawaiian beneficiaries of the trusts created by this Act, the BLNR and the UH have foregone substantial revenues that the observatories could have generated for the trust. All members are beneficiaries of the trust. Some of the members of Mauna Kea Anaina Hou, are Native Hawaiian beneficiaries of the trust.

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals that are found on the slopes of Mauna Kea and in some cases only on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this species would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. Petitioners have an interest in this protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT has not complied with the National Environmental Policy Act. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT to submit a state environmental assessment without adequate review and comment by the public. In order to give the Board all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts in the area of the Mauna Kea Conservation District.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to:

We believe that the Board violated petitioner due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioners and we seek the BLNR to invalidate, deny or revoke (as this case may require) the Sublease to be vacated and the TMT CDUP vacated also since the condition of the CDUP require that all pertinent state and federal laws be followed and if they are not followed then the permit must be vacated/revoked.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest:

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioners access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

The construction of the TMT will result in continued desecration of the cultural and natural resources of the summit area and underlying ground water resource. Moreover, the issuance of water permits or long term licenses that would allow the continued diversion of water from Lake Waiau within the Mauna Kea Ice Age Natural Area Reserve areas will interfere with the exercise of these traditional and customary rights.

The BLNR failed to adequately assess the effects that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

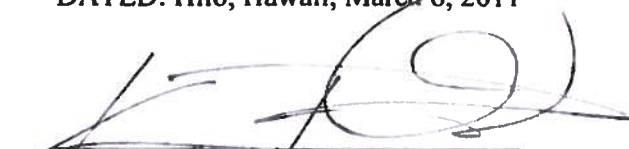
This contested case hearing will serve the public's interest by providing the BLNR with the information it needs to fully and properly implement the conservation district protections that they are obligated to uphold.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to be A Party under section 13-1-31, HAR.


Mauna Kea Anaina Hou, has been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We were granted standing by BLNR allowing us to participate in previous contested case hearings relating to observatory expansion. We were also granted standing by the Third Circuit Court, in our appeal of the BLNR's approval of the KECK-NASA Outrigger Telescopes Project. We prevailed over the DLNR and UH at the Third Circuit Court, reversing the BLNR's approval of the KECK/NASA CDUA. We participated and prevailed in a federal court where the court found KECK/NASA in breach of the National Environmental Policy Act.

Furthermore, we have participated in every phase of formal decision-making regarding the UH/TMT CDUA and Sublease and have information to assist the Board member to make informed decisions.

DATED: Hilo, Hawaii, March 6, 2011



Kealoha Pisciotto, President
Mauna Kea Anaina Hou



Kealoha Pisciotto, Individually

DATED: Hilo, Hawaii, March 6, 2011

EXHIBIT A-4

PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

INTRODUCTION

I, Paul K. Neves file the following written Petition for a Contested Case Hearing pursuant to Hawaii Administrative Rule (HAR) Section 13-1-29. Ms. Kealoha Pisciotta recorded an oral request for a contested case hearing on my behalf (as I was out of the country) at the June 27, 2014 BLNR hearing prior to the close of the public hearing at which the matter was scheduled for disposition.

I, Paul K. Neves, also wish to make a request to the Chairman, Mr. William Aila to have my filing fee of \$100.00 waived. I make this request because of financial hardship. I, Paul K. Neves a Petitioner make this request because my health is already compromised and this Contested Case hearing is a hardship to both my health and my family at this time. I support my family including two children in College at this time.

I give Ms. Kealoha Pisciotta permission to sign here for me in my absence.

In addition and for convenience this Petition (total of 12 pages including the cover) has been sent via email to Ms. Ku'ulei N. Moses the Land Board Secretary (at Kuulei.N.Moses@hawaii.gov) on July 5, 2014 and sent via US Postal Service on Saturday on July 5, 2014 (as Friday was the 4th of July holiday). It was mailed to the Board of Land and Natural Resources, at 1151 Punchbowl Street, #130, Honolulu, HI 96813.

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

1. Name: Kumu Hula Paul K. Neves

2. Address:

3. Attorney: Pro Se

4. Address: N/A

5. City: Hilo

6. State/Zip: Hawai'i, 96720

7. Phone:

8. FAX: None

9-16 Attorney: No I am Pro Se

17. Board Action Being Contested:

Resubmittal: Consent to Sublease under General Lease S-4191 to the University of Hawai'i, Lessee, TMT International Observatory LLC Telescope formerly known as the TMT Corporation (TMT), Sublease, Mauna Kea Conservation District Ka'ohe, Hamakua District Hawai'i Island, Tax Map Key: (3) 4-4-015:009 por.,

18. Board Action Date: Friday, June 27, 2014

19. Item No.: Land Division, D-19

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action:

I, Paul K. Neves, am a Kumu Hula and am Ali'i Noeau of the Royal Order of Kamehameha I. I am an individual that continues to exercise traditional and customary Hawaiian cultural and religious practices and I have family and genealogical ties to Mauna Kea and Haleakala. I was granted standing to participate in previous Contested Case hearings by BLNR including but not limited to a previous Contested Case Hearing

regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. I as a member of ROOKI was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

I participate in many traditional and customary native Hawaiian practices within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas. I have maintained and continue temple ceremony within the above land areas, including Pu'u Wekiu of Mauna Kea. I helped to erected a ceremonial platform on the Pu'u Wekiu many years ago and have hae to replace it on several separate occasions after it was desecrated and destroyed.

I am a native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. Our Native Hawaiian rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, erecting 'ahu and Lele for ceremonies, performing solstice and equinox ceremonies (Polohiwa ceremonies), and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, I enjoy constitutionally protected traditional and customary native Hawaiian rights.

I as an individual and a Kumu have an interest in the Mauna Kea lands under review by the BLNR relating to the approval of the UH and the TMT International Observatory LLC (TMT) Sublease request that are separate and distinct from those interests held by the general public and can provide relevant information to help decision-making regarding the UH/TMT Sublease. In order to help expedite the contested case hearing process, I am willing to will work jointly with other parties who share common interests to organize and make a single presentation addressing but not limited to the following:.

Rights protected under Section 5(f) of the Hawaii Admission Act, 42 USC § 1983, 40 C.F.R. § 1508.27(b), Hawaii Const. Art. XI, secs. 1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343.

Traditional and Customary Practices. More specifically, Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access

Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa`akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. In effect, the exercise of such rights is a public trust purpose.

The proposed disposition of lands and water within the Mauna Kea summit, Ice Age Natural Area Reserve and Science Reserve areas of Mauna Kea threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes are derived from HRS § 1-1. These rights include, but are not limited to:

- the gathering of ice, snow, water, raw materials for adz making;
- depositing of the "piko" or umbilical cord in Lake Waiau;
- traditional astronomy, cosmology, and navigation;
- continued burial practices;
- solstice and equinox (Polohiwa) ceremonies;
- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- the exercise of other rights for religious, cultural, and subsistence purposes.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power

to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to the observatory projects. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

Hawaiian Homes Commission Act. In addition, pursuant to Section 221 of the Act, these same beneficiaries have a right to sufficient water to support homesteading. I am a beneficiaries of the trust created by the Hawaiian Homes Commission Act ("Act"). The ground water beneath the summit of Mauna Kea is both an actual sources of drinking water for the Pohakuloa Military Training Ground and Mauna Kea State Park. In addition, it is a potential source of water for future homesteading for areas of Pi'ihonua and Humu'ula, in which the Department of Hawaiian Home Lands has title to over 59,000 acres of pastoral homesteading land.

Ceded Lands Trust Revenues. Petitioners are also beneficiaries of the trust established pursuant to Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As a beneficiaries of this trust, I have a right to judicial review of actions of the trustee that result in waste of or deprivation of income from the assets. As beneficiaries of this trust, they have a right to reasonable revenues from the lease of public lands subject to the provisions of the trust.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawaii and the TMT failed to prepare an adequate FEA/FEIS, despite the significant cumulative effects of the proposed TMT expansion and the Pohakuloa training expansions (up the slopes of the Mauna Kea Conservation District). The TMT Corporation has received substantial federal funding for this project constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). State law requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

The *Wekiu* and other threatened and endangered speice of Mauna Kea. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines

needs protection because of “[t]he present or threatened destruction, modification, or curtailment of its habitat or range.” HRS § 195D-4(b). While the *Wekiu* insect is not listed as endangered or threatened under the Endangered Species Act, this board nonetheless has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit.

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT is required to consult with native Hawaiian groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the “intangible aspects” of the property. National Register Bulletin 38-“Guidelines for evaluating and documenting Traditional Cultural Properties” establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

National Environmental Policy Act. Under NEPA regulations, “an agency must prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” The UH and/or the TMT project proposal has received significant funding and anticipates more federal funding from the National Science Foundation, but has not completed a federal environmental impact statement. The regulations promulgated by the Council on Environmental Quality (federal and state adopted) established the following nonexclusive criteria for determining when a full EIS is required:

- “Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial,” 40 C.F.R. § 1508.27(b)(1);
- “Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*,” *id.* § 1508.27(b)(3);
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I believe that the Board violated petitioners due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioners and we seek the BLNR to invalidate, deny or revoke (as this case may require) the Sublease to be vacated and the TMT CDUP vacated also since the condition of the CDUP require that all pertinent state and federal laws be followed and if they are not the permit must be vacated/revoked.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest:

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioners access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

The construction of the TMT will result in continued desecration of the cultural and natural resources of the summit area and underlying ground water resource. Moreover, the issuance of water permits or long term licenses that would allow the continued diversion of water from Lake Waiau within the Mauna Kea Ice Age Natural Area Reserve areas will interfere with the exercise of these traditional and customary rights.

The BLNR failed to adequately assess the effects that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws

governing land uses in the conservation district are meant to protect these resources and those who rely on them.

This contested case hearing will serve the public's interest by providing the BLNR with the information it needs to fully and properly implement the conservation district protections that they are obligated to uphold.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to be A Party under section 13-1-31, HAR.

I, Paul K. Neves exercise, have exercised, or desire to exercise my traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve areas. Most members of the Petitioner are native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. These rights include the exercise of traditional and customary practices related to the use of Lake Waiau and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, I Paul K. Neves enjoy constitutionally protected traditional and customary native Hawaiian rights.

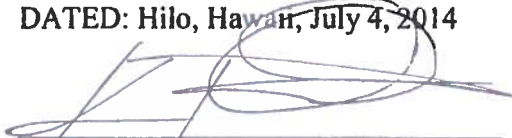
I have been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. We successfully promoted two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. We were granted standing by BLNR allowing us to participate in previous CCH's relating to observatory expansion. We were also granted standing by the Third Circuit appealing BLNR's final approval of the KECK-NASA Outrigger Telescopes Project, where we prevailed with the court finally reversing the KECK/NASA CDUA.

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioners access to these cultural sites and even destroyed these sites. Their operations may have resulted in the pollution of the ground water source.

The construction of the TMT will result in continued desecration of the cultural resources of the summit area and underlying ground water resource. Moreover, the issuance of water permits or long term licenses that would allow the continued diversion of water

from Lake Waiau within the Mauna Kea Ice Age Natural Area Reserve areas will interfere with the exercise of these traditional and customary rights.

DATED: Hilo, Hawaii, July 4, 2014



Kealoha Pisciotto on behalf of Kumu Hula Paul K. Neves

EXHIBIT A-5

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

INTRODUCTION

I, Clarence Kukauakahi Ching, the undersigned file the following written Petition for a Contested Case Hearing pursuant to Hawaii Administrative Rule (HAR) Section 13-1-29. My testimony and request for a contested case hearing was included in the testimony and request made and recorded orally by Petitioner Kealoha Pisciotta, at the June 27, 2014 BLNR hearing prior to the close of the hearing at which the matter was preserved for disposition.

Because I do not have a printer – Kealoha Pisciotta is doing the printing for me and I hereby authorize her to sign this document on my behalf.

I, the undersigned, also wish to request waiver of my filing fee of \$100.00 for filing this contested case hearing petition.. I make this request because of financial hardship as my entire livelihood is derived through Social Security at the rate of \$720 per month.

In addition and for convenience this Petition (total of 10 pages including the cover) has been sent via email to Ms. Ku`ulei N. Moses the Land Board Secretary (at Kuulei.N.Moses@hawaii.gov) on Saturday, July 5, 2014 and sent via US Postal Service on Saturday, July 5, 2014 (as Friday was the 4th of July holiday). It was mailed to the Board of Land and Natural Resources, at 1151 Punchbowl Street, #130, Honolulu, HI 96813.

PETITION FOR A CONTESTED CASE HEARING
BOARD OF LAND AND NATURAL RESOURCES

1. Name: Clarence Kukauakahi Ching

2. Address:

3. City: Kamuela

4. State/Zip: Hawai'i, 96743

5. Email:

6. Phone:

7. Fax: None

8 -16. Attorney: Pro Se

17. Board Action Being Contested:

Resubmittal: Consent to Sublease under General Lease S-4191 to the University of Hawai'i, Lessee, TMT International Observatory LLC Telescope formerly known as the TMT Corporation (TMT), Sublease, Mauna Kea Conservation District Ka'ohe, Hamakua District Hawai'i Island, Tax May Key: (3) 4-4-015:009 por.,

18. Board Action Date: Friday, June 27, 2014

19. Item No.: Land Division, D-19

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action:

Mauna Kea resides on the States Conservation District of Ka'ohe, Hamakua District Hawai'i Island, and lands under question in the immediate case is under Tax May Key: (3) 4-4-015:009 por., Ka'ohe, Hamakua District Hawai'i Island, Tax May Key: (3) 4-4-015:009 por.,

I, Clarence Kukauakahi Ching, file this petition for contested case hearing as an individual Hawaiian cultural practitioner. Being a descendent of 'Umi A Liloa, I have family and genealogical ties to Mauna Kea. I am also a graduate of Kamehameha Schools (Class of 1954). I was an Office of Hawaiian Affairs Trustee from 1986 to 1990. I am a Hawaiian Subject, and participate in state administrative hearings under duress. I have been involved in traditional and customary Native Hawaiian cultural, religious and spiritual practice on Mauna Kea since the mid 1980's. I have traversed the trails leading to, over and around Mauna Kea. I am a member of the kalai wa'a (canoe building) community, with special ties to Keanakako'i (adze quarry) found atop Mauna Kea. I work with and gather traditional wood, fiber, and stone material related to kalai wa'a (canoe building) and other cultural works. I also collect sacred waters from various sources, including the springs at Houpo O Kane on Mauna Kea and Lake Waiau, for ritual and medicinal purposes. I have spent years working for the protection of and the

propagation of endemic (to Hawai'i and Mauna Kea) plant species.

Over the past 14 years I have led Huaka'i I Na 'Aina Mauna, a group of Hawaiian cultural and environmental hikers, across the island east-west and north-south from sea level to the summits of Mauna Kea, Mauna Loa, Hualalai and Kilauea, around the summits and back to sea level. On Huaka'i, we conduct traditional and customary cultural, spiritual and religious rites and ceremonies at all locations including on Mauna Kea - at Lake Waiau, the springs, at Pu'uLilinoe, Pu'uKanakaleonui - literally all over the 'aina where we hike.

I have been actively involved in natural and cultural resources protection of Mauna Kea since the 1980's and I continue to exercise traditional and customary Hawaiian cultural, spiritual and religious practices. Furthermore, I have been granted standing by BLNR in previous contested case hearings that include but is not limited to the case regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. I was also a Plaintiff in the Third Circuit Court agency appeal of the final decision made by the BLNR regarding CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

I have exercised, exercise, and desire to continue to exercise traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas, in fact, over the entirety of Mauna Kea and the the entire Hawai'i island. These rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making and other crafts, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, I, along with other Hawaiian cultural practitioners enjoy constitutionally protected traditional and customary native Hawaiian rights.

I have an interest in the Mauna Kea lands under review by BLNR relating to the Sublease to TMT interests that is separate from and different from interests commonly held by the general public and can provide relevant information to help decision-making regarding the TMT Subleasing. In order to help expedite the contested case hearing process, I am willing to work with any other parties, so that where common and shared interests exist between the parties, we will to file jointly and make a single presentation addressing but not limited to the following:

Rights protected under Section 5(f) of the Hawaii Admission Act, 42 USC § 1983, 40 C.F.R. § 1508.27(b), Hawaii Const. Art. XI, secs. 1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343.

Traditional and Customary Practices. More specifically, Article XII, section 7 of the Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa'akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. In effect, the exercise of such rights is a public trust purpose.

The proposed disposition of lands and water within the Mauna Kea summit, Ice Age Natural Area Reserve and Science Reserve areas of Mauna Kea threatens the exercise of these rights by Petitioners. Petitioners right to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes are derived from HRS § 1-1. These rights include, but are not limited to:

- the gathering of ice, snow, water, raw materials for adz making;
- depositing of the "piko" or umbilical cord in Lake Waiau;
- traditional astronomy, cosmology, and navigation;
- continued burial practices;
- solstice and equinox (Polohiwa) ceremonies;
- rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- the exercise of other rights for religious, cultural, and subsistence purposes.

Public Trust Doctrine. Sections 1 and 7 of Article XI of the Hawaii Constitution recognize the application of the public trust doctrine to all natural and water resources without exception or distinction and require that the State protect all water resources for the benefit of its people. In Hawaii, this doctrine was originally established to preserve the rights of native tenants during the transition to a western system of private property, but in the context of preserving water quality, it also protects the general public. HRS § 174C-66 places jurisdiction over water quality issues in the Department of Health. However, given the jurisdiction of this board over conservation districts, it is critical for this board to assure that its actions do not contravene the Health Department's power to preserve water quality in the water sources lying beneath the Mauna Kea summit area. Petitioner has an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to the observatory projects. Petitioner is informed and believes that there is a substantial threat of such pollution, especially from the use of mercury and other toxic substances emanating from the observatories within the summit and slopes area of the Mauna Kea Conservation District.

Ceded Lands Trust Revenues. Petitioner is also a beneficiary of the trust established pursuant to Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As a beneficiary of this trust, Petitioner has a right to judicial review of actions of the trustee that results in waste of or deprivation of income from the assets. As beneficiary of this trust, I have a right to enforce reasonable revenues from the lease of public lands subject to the provisions of the trust.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation district. The University of Hawaii and the TMT failed to prepare an adequate FEA/FEIS, despite the significant cumulative effects of the proposed TMT expansion and the Pohakuloa training uses (up the slopes of Mauna Kea and into the Conservation District). The TMT Corporation has received substantial federal funding for this project constituting a federal undertaking under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA as amended). State law requires that where both federal and state statutes come into play the two bodies must work together to ensure compliance of both.

The *Wekiu* and other threatened and endangered speice of Mauna Kea. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5th Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b). While the *Wekiu* insect is not listed as endangered nor threatened under the Endangered Species Act, this board nonetheless has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit.

National Historic Preservation Act (NHPA). Section 106 of the NHPA requires all federal agencies or those private entities that have received substantial federal funds constituting a federal under taking, expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. UH and the TMT is required to consult with native Hawaiian groups to give them the opportunity to define their concerns relating to impacts to the Traditional Cultural Properties including *inter alia*, the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties. No Section 106 Consultation has occurred regarding the proposed TMT project.

National Environmental Policy Act. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The UH and/or the TMT International Observatory LLC (TMT) formerly known

as the TMT Corporation project proposal has received significant funding and anticipates more federal funding from the National Science Foundation, but has not completed a federal environmental impact statement. The regulations promulgated by the Council on Environmental Quality (federal and state adopted) established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);

- Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b)(10).

21. Any Disagreement Petitioner Seeks or Deems Itself Entitled To:

The BLNR made many errors in approving the UH/TMT request for a Sublease on June 27, 2014 prior to agreeing to hold the requested contested case hearings, thus violating the Admissions Act, the State Constitution the National Environmental Policy Act, HRS § 91, HRS § 171, HRS § 183C, HRS § 205, HRS § 343, HAR § 13-1, HAR § 13-5, and possibly other requirements. Specifically, the contested case hearing should determine:

1. Whether BLNR erred by approving the UH/TMT prior to identifying the petitioner legal rights, duties and privileges and granting the petitioners timely request for a contested case hearing.
2. Whether the BLNR should have approved the Sublease to construct the large TMT facility on Mauna Kea before assuring that they have first identified, assessed and protected the constitutionally-based traditional and customary native Hawaiian rights exercised on Mauna Kea.
3. Whether the BLNR erred in approving the UH/TMT Sublease without first insuring the TMT has fulfilled all the requirements and conditions and all state and federal laws as is set for in the TMT CDUP.
4. Whether the BLNR erred by approving the UH/TMT with an insufficient management plan, as required by HAR 13-5-24.
5. Whether the BLNR erred by approving the UH/TMT Sublease prior to the courts review of the TMT CDUP that is under review in the Intermediate Court of Appeals.
6. Whether the members of the BLNR erred by approving UH/TMT Sublease and thus violating their fiduciary duties pursuant to Section 5(f) of the Hawaii Admission Act and their statutory duty pursuant to HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less than their independently appraised fair-market value.

7. Whether the BLNR is violating state and federal laws protecting species facing possible extinction even if not designated endangered or threatened, by failing to follow the proper procedures and apply proper standards for the protection of those species.
8. Whether the BLNR should approve the Sublease for the TMT Project proposed for the Mauna Kea Conservation District when the UH/TMT has violated Petitioners constitutionally protected traditional and customary native Hawaiian rights that include, but are not limited to, unfettered access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices without interference of view planes and other forms of disturbance and interference to Practitioners at these sites.
9. Whether the BLNR must comply with the requirements of Hawaii Environmental Policy Act and the National Environmental Policy Act requiring the UH/TMT to prepare and circulate for public review and comment a Federal Environmental Impact Statement (FEIS), including a cumulative impact assessment, prior to any approval of any Sublease for the Mauna Kea Conservation District.
- 10.) Whether BLNR is violating the NHPA by failing to ensure that Traditional, Cultural Properties were fully assessed and included in the federal EA/EIS and Section 106 Consultations and failing to adequately consult with Hawaiian cultural groups and individuals that hold Mauna Kea as a sacred cultural and religious place or a wahi kapu and wahi pana.

BLNR's improper approval of the UH/TMT Subleases will harm our rights, duties, and privileges, as protected by law. These include but are not limited to:

Traditional and Customary Rights of Hawaiians. The approval of this Sublease is an abridgement and denial of constitutionally protected rights enumerated above at paragraph 8 and held by Petitioner as a native Hawaiian. In the past, the Mauna Kea Support Services (MKSS) staff at the summit has denied members of Petitioner's class access for exercise of religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000' level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners access to the lake or upper regions of the summit area.

Desecration and Destruction of Cultural Sites. In addition, members of the Petitioners Mauna Kea Anaina Hou, and other petitioners desire to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000' level to Pu'u Wekiu. These sites have been both desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. Two of the observatory tour guides have removed, desecrated and destroyed a

family shrine of Mauna Kea Anaina Hou on at least three separate occasions. In total the family shrine has been desecrated and removed on at least seven separate occasions—the original stone and second stone (from the family of Auntie Iolani Luahine) has been removed and is still missing.

Public Trust Doctrine. The operations of the observatory and the planned expansion threaten the current and future water quality of the dike-confined ground water beneath the Mauna Kea summit. This is a resource which Petitioners have an interest in protecting. The BLNR should not be approving the Sublease until and unless the UH/TMT studies the impacts of its past operations on that water resource and makes adequate provision for its future enhancement and protection

Water Supplies. This degradation of the water supply will also threaten future potential water supplies for the potential homesteads that will be developed on the eastern slopes of Mauna Kea and the current Mauna Kea State Park on its southwestern slope. Petitioner qualifies as a successor to eligible beneficiaries of the Hawaiian homestead program and is a user of Mauna Kea State Park.

The Flora and Fauna. The insect known as the *Wekiu* along with numerous other rare, threatened and endangered plants and animals that are found on the slopes of Mauna Kea and in some cases only on Mauna Kea. The failure to adequately assess and determine the effects of the observatory expansion on this species would violate state law requiring board action to assure its survival. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of these rare, threatened and endangered species irrespective of their formal status. Petitioner has an interest in this protection, based on my cultural and religious beliefs, which requires preservation and conservation of all the resources of the Mauna Kea summit area.

Environmental Impact and Historic Preservation Review. Applicant(s) UH/TMT has not complied with the National Environmental Policy Act. There are likely to be significant environmental impacts, especially if cumulative impacts over the past two decades are reviewed. A full EIS must be completed under both NEPA and HEPA. It was legally insufficient for UH/TMT to submit a state environmental assessment without adequate review and comment by the public. In order to give the Board all the information on potential harm to the unique resources of Mauna Kea, the UH/TMT needs to comply with all procedures for a comprehensive EIS addressing all impacts of the observatory operations, including the cumulative impacts of the proposed expansion and other impacts in the area of the Mauna Kea Conservation District.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to:

I believe that the Board has violated petitioner's due process rights by approving the CDUA prior to establishing the legal rights, duties and privileges of the petitioner and I seek BLNR to invalidate, deny or revoke (as this case may require) the Sublease and to vacate the TMT CDUP since the condition of the CDUP requires that all pertinent state and federal laws be followed and if not, the permit may be revoked.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest:

The operations of the observatories on the summit have resulted in the continued physical destruction of the sacred landscape which is used for solstice and equinox ceremonies as alignment markers and represent the divine bodily forms of the goddess Poliahu (and other deities). Agents of the University of Hawaii have denied Petitioner access to these cultural sites. Their operations may have resulted in the pollution of the natural environment.

The construction of the TMT will result in continued desecration of the cultural and natural resources of the summit area and underlying ground water resource. Moreover, the issuance of water permits or long term licenses that would allow the continued diversion of water from Lake Waiau within the Mauna Kea Ice Age Natural Area Reserve areas will interfere with the exercise of these traditional and customary rights.

The BLNR failed to adequately assess the effects that the desecration caused by the TMT will have the rights, duties and privileges of Native Hawaiians, cultural practitioners, and those who rely on the resources of the Mauna Kea conservation district. The laws governing land uses in the conservation district are meant to protect these resources and those who rely on them.

This contested case hearing will serve the public's interest by providing the BLNR with the information it needs to fully and properly implement the conservation district protections that they are obligated to uphold.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to be A Party under section 13-1-31, HAR.

I have been actively involved in legislative and legal action for the protection and conservation of Mauna Kea since 1995. I have successfully supported two legislative audits that reviewed 30 years of mismanagement on Mauna Kea at the hands of the Department of Land and Natural Resources and the University of Hawai'i. The State Auditor found that the cultural and natural resources of Mauna Kea have suffered at the expense of unregulated astronomy development. I was granted standing by BLNR allowing me to participate in previous contested case hearings relating to observatory expansion. I was also granted standing by the Third Circuit Court, in the appeal of BLNR's approval of the KECK-NASA Outrigger Telescopes Project. We prevailed over the DLNR and UH at the Third Circuit Court, reversing the BLNR's approval of the KECK/NASA CDUA. I participated and prevailed in a federal court where the court found KECK/NASA in breach of the National Environmental Policy Act.

Furthermore, I have participated in every phase of formal decision-making regarding the UH/TMT CDUA and Sublease and have information to assist the Board member to make informed decisions.

DATED: Hilo, Hawaii, July 5, 2014

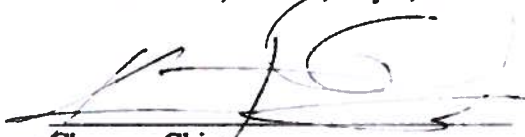

Clarence Ching,
by Kealoha Pisiotta, as authorized

EXHIBIT A-6

RECEIVED

JUL - 7 2014

DLNR/APO



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED
2014 JUL - 7 AM 11:01

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
4. Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Harry Fergerstrom	2. Contact Person	
3. Address	4. City Kulistown	5. State and ZIP Hawaii 96760
6. Email	7. Phone	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

RECEIVED

JUL - 7 2014

DLNR/APO

JUL - 7 2014

DLNR/APO

C. SUBJECT MATTER	
17. Board Action Being Contested Consent to Sublease under General Lease No. S-4191 to the University of Hawaii, Lessee, to TMT International Observatory LLC Sublessee, Ka'ohē, Hamakua, Island of Hawaii, Tax Map Key: (3) 4-4-015:009 por	
18. Board Action Date June 27, 2014	19. Item No. D-19
20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action Petitioner is a pre-contact native Hawaiian Religious Practitioner. The summit of Mauna Kea is considered the most sacred area and the abode of the Gods. The summit of Mauna Kea has numerous site used for various practices that are Religious, Traditional and Customary. The entire summit was considered KAPU and not entered less it was for specific purposes and escorted by either Priest or a High Alii.	
21. Any Disagreement Petitioner May Have with an Application before the Board Among other objections, Petitioner objects to the proposed leases as they adversely effect his practices and interferes with the ambiance of this sacred area. Mauna Kea is reverenced as the Piko of the Kanaka Maoli People. The proposed lease areas are on ceded lands as well as in a conservation district. Petitioner believes that DLNR has breached it fiduciary responsibilities to protect the trust corpus by allowing third party leases to multinational, foreign for profit corporations that are not part of the defined beneficiaries of the Ceded Lands Trust.	
22. Any Relief Petitioner Seeks or Deems Itself Entitled to Petitioner believes that the application for sublease should be denied, or at minimum allowed to go thru a contested case. Petitioner believes that DLNR should not be entertaining an extension to the General Lease No. S-4191 and allow the termination of said lease to allow the return of Mauna Kea to it pristine conditions as agreed upon for the start. Petitioner further believes that the PASH decision should be reviewed with respect to "view Planes"	
23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest The contested case hearing will be the instrument to determine and identify crucial facts and reasonable alternatives that DLNR has failed to identify in accordance with laws related to the Ceded Lands Trust, The fiduciary responsibilities to protect the trust corpus, and allow for a complete consideration as to article XII sec. 4 and 7 of the State Constitution. Further it will allow for clarity as to 1st amendment rights, Religious Freedom Act and Religious Restroation.	
24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR Petitioner Fergstrom has long been involved with the protection of religious values and sacred sites. As a practitioner of pre-contact native religion, petitioner frequents the summit and other areas of Mauna Kea for guidance, prayer and consultation with the Gods. Petitioner was previously granted standing during the contested case with the KECK outriggers.	

- ☐ Check this box if Petitioner is submitting supporting documents with this form.
- ☐ Check this box if Petitioner will submit additional supporting documents after filing this form.

Harry Fergstrom
 Petitioner or Representative (Print Name)

Harry Fergstrom
 Signature

July 1, 2014
 Date

EXHIBIT A-7



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

2014 JUL -7 PM 1:10

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

1. File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808)587-1496, Fax: (808) 587-0390

2. DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
3. If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
4. Pursuant to § 13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Office of Hawaiian Affairs	2. Contact Person Ernest Kimoto	
3. Address 560 Nimitz Highway, Suite 200	4. City Honolulu	5. State and ZIP Hawaii'i 96817
6. Email erniek@oha.org	7. Phone 594 1954	8. Fax 594 0420

B. ATTORNEY (if Represented)		
9. Attorney Name Sherry Broder	10. Firm Name Law Offices of Sherry P. Broder	
11. Address Seven Waterfront Plaza, Ste. 400, 500 Ala Moana Blvd.	12. City Honolulu	13. State and ZIP Hawaii'i 96813
14. Email sherrybroder@sherrybroder.com	15. Phone (808) 531-1411	16. Fax (808) 543-2010

C. SUBJECT MATTER

17. Board Action Being Contested

Approval of June 27, 2014 Board of Land and Natural Resources ("BLNR") Agenda Item D-19 staff recommendation as amended: Consent to Sublease under General Lease No. S-4191 to the University of Hawai'i, Lessee, to TMT International Observatory LLC, Sublessee, Ka'ohe, Hāmākua, Island of Hawai'i, Tax Map Key: (3) 4-4-015:009 Por.

18. Board Action Date

June 27, 2014

9. Item No.

D-19

20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action

With respect to revenues generated from the lease or development of public lands, OHA has an interest and claim based on its constitutional and statutory rights to a pro rata portion of the income and proceeds from the public land trust lands, which it holds on behalf of the Native Hawaiian beneficiaries to the trust.

Hawai'i's constitution established OHA's right to receive a portion of the revenues generated from the public land trust, of which the State of Hawai'i, through its agencies, acts as a trustee. Act 178, Session Laws of Hawai'i 2006, established the State's interim determination of OHA's pro rata portion of the public land trust revenue to be \$15.1 million. Executive Order 06-06 ("EO 06-06") requires state agencies to transfer 20 percent of their gross revenues generated from the use of public land trust lands under their control to OHA.

The subject area constitutes "ceded" lands, acquired through the illegal overthrow of the Kingdom of Hawai'i, to which Native Hawaiians have never relinquished their claims. Also, the 8.7 acres of land covered under the Sublease approved by the BLNR in its contested action are public land trust lands classified under section 5(b) of the Hawai'i Admissions Act. Accordingly, as state entities tasked with the administration, use and development of these lands, both the University of Hawai'i ("UH") and the BLNR hold fiduciary duties to "use reasonable skill and care to make . . . productive" the subleased area, and to ensure that benefits flowing from the use and development of these lands are distributed impartially to all trust beneficiaries, including Native Hawaiians and the general public. The failure of UH and BLNR to properly carry out their fiduciary obligations in subleasing the subject area impacts OHA's constitutional and statutory interest in its pro rata share of revenues generated from these lands.

It is clear that UH has not acted with reasonable skill and care in proposing the rent schedule contained in the approved sublease to TMT International Observatory LLC (TIO). Given the unique quality and character of these lands, it appears he proposed rent is not "substantial" or even a meaningful and equitable rent. The BLNR and UH have also managed the Mauna Kea lands in a manner unfairly detrimental to OHA's Native Hawaiian public land trust beneficiaries and the proposed sublease does not maximize OHA's potential pro rata share of public land trust revenue despite conveying substantial benefit to UH and the sublessee. UH is therefore failing in its fiduciary duties to the beneficiaries of the public land trust by proposing the sublease as submitted, and the BLNR is breaching its independent fiduciary

duties to OHA's beneficiaries (as well as other public land trust beneficiaries, including the general public) by approving the sublease without additional inquiry or analysis. BLNR's fiduciary obligations require the inclusion of lease terms and conditions that provide for adequate compensation for the use of Mauna Kea lands.

Additionally, as the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians (Haw. Const. Art. XII, § 5), OHA has an interest in the proper implementation of the Comprehensive Master Plan and Comprehensive Master Plan Sub-Plans for Mauna Kea (hereinafter "Comprehensive Master Plan" or "CMP"), which is sacred to the Native Hawaiian people. OHA has substantive obligations to protect the cultural and natural resources of Hawai'i for the agency's beneficiaries. HRS § 10-3 requires OHA to serve as the principal public agency in the State of Hawai'i responsible for the performance, development and coordination of programs and activities relating to native Hawaiians and Hawaiians; assess the policies and practices of other agencies impacting native Hawaiians and Hawaiians; and conduct advocacy efforts for native Hawaiians and Hawaiians. OHA therefore has an interest in the proper management of the culturally, environmentally, and financially valuable lands on Mauna Kea.

Many Native Hawaiians consider Mauna Kea to be a place of deep cultural significance, as it is a cultural piko that connects the island-child of Hawai'i to the heavens, as an "abode of the gods" and as a leina, from which souls leap into the spirit world. Mauna Kea is also home to numerous cultural sites—including among other things ahu, kuahu, an adze quarry and Lake Waiau--and to many indigenous and endangered flora and fauna, all of which continue to support a range of Native Hawaiian traditional and customary practices. Neither BLNR nor UH has provided any basis upon which OHA can conclude that sufficient funds are being charged to cover the management required of this sacred and culturally significant site.

21. Any Disagreement Petitioner May Have with an Application before the Board

The UH has violated its fiduciary duties to realize a reasonable rate of earnings for use of this area and to charge a substantial rent, and the BLNR has failed in its fiduciary duties to use its authority pursuant to HRS 171-36 to require the inclusion of terms and conditions in the sublease that provide for a reasonable rate of earnings for the use of this area and charge a substantial rent.

The UH has violated its fiduciary duties to require adequate funding for implementation of the CMP, and the BLNR has failed in its fiduciary duties to use its authority to require the inclusion of sublease terms and conditions that provide for adequate funding for implementation of the comprehensive management PLAN.

The current yearly rent proposed to be charged after 10 years is just 1/1300th (0.0769%) of the one billion dollar investment by TIO, and given that the TMT will be one of the most powerful telescopes in the world, the proposed rent is clearly not a reasonable rate of return and does not meet the standard of a substantial rent required by the conservation district use permit (CDUP). In addition, there will be no percentage assessed for the payment of telescope time

which clearly violates the requirement of a reasonable rate of return and does not meet the standard of a substantial rent required by the CDUP and state laws and regulations.

The proposed rent is based on insufficient data. In determining the proposed rent, UH utilized the figures that it expends today on implementation of the CMP. However, there are many functions that are listed in the CMP that have not yet been undertaken or implemented. There are no measurements or assessments as to whether the current implementation meets the standards set forth in the CMP and whether it is meeting its goals. There should be a calculation based on the cost estimate using established methods and valid data of future management of Mauna Kea, which includes consideration of the additional burdens that the TMT will place on the implementation of the CMP. Utilizing a pro rata share based solely on the acreage covered by the TMT sublease is an incorrect and inappropriate approach to determining the share that the TIO should pay for implementation of the CMP.

22. Any Relief Petitioner Seeks or Deems Itself Entitled to

The BLNR should (a) grant this request for a contested case hearing and allow a HRS chapter 91 contested case hearing to proceed; and (b) deny the application for the above referenced agenda item.

23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest

The proposed sublease does not charge a reasonable rate of earnings and does not charge a substantial rent for use of this area, and as a result UH and BLNR have violated their fiduciary duties to OHA with respect to its pro rata share of revenue generated by the applicant on public land trust lands and to the general public which also has an interest in the public land trust revenue.

UH and the BLNR have also violated their fiduciary duties owed to Native Hawaiians and the general public to ensure adequate levels of management for the culturally, environmentally and financially valuable lands on Mauna Kea. These lands are sacred to the Native Hawaiian people and irreplaceable.

Many Native Hawaiians consider Mauna Kea to be a place of deep cultural significance, as it is a cultural piko that connects the island-child of Hawai'i to the heavens, as an "abode of the gods," and as a leina, from which souls leap into the spirit world. Mauna Kea is also home to numerous cultural sites—including among other things ahu, kūahu, an adze quarry, and Lake Waiau—and to many indigenous and endangered flora and fauna, all of which continue to support a range of Native Hawaiian traditional and customary practices. Neither the BLNR nor UH has provided any basis upon which OHA can conclude that sufficient funds are being charged to cover the management required of this sacred and culturally significant site.

A contested case hearing will be the only way to identify critical and crucial facts that DLNR has failed to identify or analyze in accordance with governing law related to the public land trust, OHA's pro rata share of the public land trust revenues and the proper funding for full implementation of the Mauna Kea Comprehensive Management Plan. The hearing will serve

the public interest by allowing full consideration of OHA's right to receive a portion of the revenues generated from the public land trust and the rights of the general public in these revenues and the amounts needed for proper funding so that there can be reasonable, fair and complete implementation of the Mauna Kea CMP.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Petitioner has substantial interests in this matter. Petitioner has an entitlement to a pro rata share of the revenues of the public land trust which is a clear property interest distinguishable from that of the general public. Petitioner is a government agency whose jurisdiction includes the land at issue pursuant to HRS Chapter 304A Part IV(O).

☐ Check this box if Petitioner is submitting supporting documents with this form.

☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

Ernest Kimoto

Petitioner or Representative (Print Name)



Signature

July 7, 2014

Date

EXHIBIT A-8



Fw: cancellation of contested case request
Bin C Li to: Russell Y Tsuji, Kevin E Moore

07/15/2014 03:40 PM

FYI.

----- Forwarded by Bin C Li/DLNR/StateHiUS on 07/15/2014 03:39 PM -----

From: Wayne Tanaka <waynet@oha.org>
To: "bin.c.li@hawaii.gov" <bin.c.li@hawaii.gov>,
Cc: Sterling Wong <sterlingw@oha.org>
Date: 07/15/2014 02:58 PM
Subject: cancellation of contested case request

Aloha e Bin,

This e-mail is to let you know that pursuant to a Board of Trustees vote this afternoon, the Office of Hawaiian Affairs is withdrawing its request for a contested case hearing over the BLNR's June 27, 2014 approval of a sublease between the University of Hawai'i and the TMT International Observatory. Per our discussion, a letter from our CEO will be delivered to your office shortly.

Thank you,

Wayne Tanaka

Public Policy Advocate

Office of Hawaiian Affairs

(808)594-1945

waynet@oha.org

EXHIBIT A-8



**STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS**

737 IWILEI ROAD, SUITE 200
HONOLULU, HAWAII 96817

July 15, 2014

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 'i 96813

Re: Withdrawal of the Office of Hawaiian Affairs' Petition for a Contested Case Hearing Regarding the BLNR Approval of a Sublease Between the University of Hawaii'i and TMT International Observatory


Aloha mai e Administrative Proceedings Office:

Pursuant to the Office of Hawaiian Affairs' (OHA) Board of Trustees action on July 15, 2014, OHA is hereby **withdrawing** its July 7, 2014 written petition for a contested case hearing regarding the Board of Land and Natural Resources' (BLNR) approval of the staff recommendation as amended in the BLNR's June 27, 2014 meeting Agenda Item D-19: Consent to Sublease under General Lease No. S-4191 to the University of Hawaii'i, Lessee, to TMT International Observatory LLC, Sublessee, Ka'ohe, Hāmākua, Island of Hawaii'i, Tax Map Key: (3) 4-4-015:009 Por.

Thank you very much for your consideration of this matter.

'O wau iho nō me ka 'oia'i'o,

A handwritten signature in black ink, appearing to read "Kamana'o pono M. Crabbe", followed by a horizontal line.

 Kamana'o pono M. Crabbe, Ph.D.
Ka Pouhana, Chief Executive Officer

KMC;wt