

## UNDERSTANDING MAUNA KEA

### *A Primer on Cultural and Environmental Impacts*

This white paper is intended to help readers better understand the foundation of long-standing concerns about development and management on Mauna Kea.

For decades, leaders and community members in Hawai'i have recognized problems with increasingly intensive use of Mauna Kea's summit. For example, in a 1974 memorandum to the Chair of Hawai'i's Department of Land and Natural Resources, then-acting Governor George Ariyoshi wrote: "I am concerned that social pressures for more intensive use of Mauna Kea for scientific, recreational and other purposes pose a threat to the priceless qualities of that mountain."<sup>1</sup>

Governor Ariyoshi's memorandum came after three telescopes had already been constructed on Mauna Kea's summit, without first seeking the appropriate permit. He called for a more responsible management plan. Yet twenty-five years later, the State Auditor found that "management of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources."<sup>2</sup> The Auditor's 1998 evaluation reported that under the State's management "the cultural value of Mauna Kea was largely unrecognized," historic preservation was "neglected," and "efforts to protect natural resources were piecemeal."<sup>3</sup> During this period, ten additional telescopes had been constructed on the summit, alongside additional infrastructure. More recently, in 2017 the State of Hawai'i Board of Land and Natural Resources found that the development of observatories on Mauna Kea's summit has created "cumulative impacts on cultural, archaeological, and historic resources that are considered substantial, significant, and adverse."<sup>4</sup>

**The State Auditor found that the "cultural value of Mauna Kea was largely unrecognized," historic preservation was "neglected," and "efforts to protect natural resources were piecemeal" and "inadequate."**

This white paper provides a brief introduction to: (1) the history and legacy of the illegal overthrow of the Hawaiian Kingdom; (2) the cultural significance of Mauna Kea; (3) examples of cultural and environmental impacts from development on Mauna Kea; and (4) legal protections for cultural practices in Hawai'i.

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\* Prepared by the William S. Richardson School of Law Environmental Law Clinic.

<sup>1</sup> Memorandum from Acting-Governor George Ariyoshi to Bd. Land. Nat. Res. Chairman Sunao Kido (Nov. 1, 1974).

<sup>2</sup> STATE OF HAWAII AUDITOR, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, REPORT NO. 98-6 15 (Feb. 1998), available at [http://lrbhawaii.info/reports/legreports/auditor/1998/scr109\\_97.pdf](http://lrbhawaii.info/reports/legreports/auditor/1998/scr109_97.pdf) ["1998 Audit"].

<sup>3</sup> *Id.*

<sup>4</sup> *Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve*, Findings of Fact, Conclusions of Law and Decision and Order 21 (Haw. Bd. Land Nat. Res. Sep. 27, 2017) ["BLNR TMT Decision"].

## 1. HISTORICAL BACKGROUND

### *The illegal overthrow of the Kingdom of Hawai'i*

The Mauna Kea Science Reserve was created in 1968 when the Hawai'i Board of Land and Natural Resources leased all lands above 12,000 feet on Mauna Kea to the University of Hawai'i.<sup>5</sup> These lands are among approximately 1.8 million acres of “ceded” lands, described by the Hawai'i Supreme Court as “lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893.”<sup>6</sup> The “Apology Resolution,” adopted in 1993 by a substantial majority of both the U.S. Senate and House of Representatives, acknowledged that these lands were “ceded” “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.”<sup>7</sup>

The Apology Resolution described “the illegal overthrow of the Kingdom of Hawaii on January 17, 1893” and “acknowledge[d] the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people.”<sup>8</sup> It also recognized and apologized for “the participation of agents and citizens of the United States” in this overthrow, and the resulting “deprivation of the rights of Native Hawaiians to self-determination.”<sup>9</sup>

**The U.S. Congress has recognized that lands such as those atop Mauna Kea were “ceded” “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.”**

The Apology Resolution summarized key historical events leading to the illegal overthrow:

- Prior “to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion.”
- From “1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation . . . .”

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Pele Def. Fund v. Paty*, 73 Haw. 578, 585–86, 837 P.2d 1247, 1254 (1992).

<sup>7</sup> Joint Resolution To Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- On “January 14, 1893, [the] United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii.”
- In “pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government.”
- Soon “thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani” issued a statement: “Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.”
- Upon investigation, “the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission.”
- In “a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an ‘act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress’, and acknowledged that by such acts the government of a peaceful and friendly people was overthrown.”
- “President Cleveland further concluded that a ‘substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair’ and called for the restoration of the Hawaiian monarchy.”
- In “the 1896 United States Presidential election, William McKinley replaced Grover Cleveland.” Thereafter, “as a consequence of the Spanish–American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii.”
- Through “the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States,” and “ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.”<sup>10</sup>

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<sup>10</sup> *Id.*

## 2. CULTURAL SIGNIFICANCE OF MAUNA KEA

### *The sacred center of Hawai'i Island*

The Apology Resolution's historical summary cannot capture the entire multi-faceted impact of the illegal overthrow on Native Hawaiians. But it did describe that:

- “[I]ndigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States.”
- The “health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land.”
- The “Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.”<sup>11</sup>

The particular cultural significance of the land at Mauna Kea's summit has been described in countless stories, testimonies, and other sources.

The 2009 Mauna Kea Management Plan begins with an introduction to this cultural background; it is provided in its entirety here as Attachment A. In short, that introduction explains Mauna Kea's stature as the “piko kapu, or sacred center, of the island.”<sup>12</sup>

**“Mauna Kea is the umbilical cord that connects Hawai'i to the heavens, and connects humans to the land.”**

Cultural practitioner and Professor of Hawaiian Studies at Hawai'i Community College, E. Kalani Flores, testified that the summit of Mauna Kea is “one of the three most sacred and significant places on Hawai'i Island,” and that the English language translation of the name “Mountain of Wakea” helps to unfurl that significance.<sup>13</sup> “Wakea (Sky Father) is personified in the atmosphere and heavenly realm that envelops Papahānaumoku (Mother Earth). As such, this mountain, unlike any other in the Pacific, pierces above the clouds into the realm of Wakea.”<sup>14</sup> Another commentator has described that “[i]n Hawaiian tradition, Hawai'i Island is the eldest child of sky father Wakea and earth mother Papahānaumoku. Mauna Kea is the umbilical cord that connects Hawai'i to the heavens, and connects humans to land.”<sup>15</sup>

<sup>11</sup> *Id.*

<sup>12</sup> MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN 1-2 (2009), *available at* <http://www.malamamaunakea.org/management/comprehensive-management-plan> [“2009 MANAGEMENT PLAN”].

<sup>13</sup> Written Direct Testimony of E. Kalani Flores 18, *available at* <https://dlnr.hawaii.gov/mk/files/2016/10/B.02a-wdt-EK-Flores.pdf> [“Flores Testimony”].

<sup>14</sup> *Id.*

<sup>15</sup> Haunani Kane, *Before building another telescope, learn from Hawaiian culture*, NEW SCIENTIST, August 3, 2019.

Professor Flores further described that:

It is for this reason that amongst the countless ancestors of Kanaka Maoli [Native Hawaiians] and numerous ali'i (chiefly) dynasties that lived in these islands, they never built any large heiau (temples) on the summit in this realm that is considered kapu. This is the reason that none of the Mauna Kea archaeological surveys have ever located a traditional manmade structure on the summit.<sup>16</sup>

This brief introduction to Mauna Kea's cultural significance provides context for the 2009 Management Plan's assertion that "[w]hile different Hawaiian families and different Hawaiian cultural practitioners may observe different protocols, all are exercised with the knowledge and understanding that Mauna Kea represents the past, the present, and the future of all that is Hawaiian."<sup>17</sup>

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<sup>16</sup> Flores Testimony, *supra* note 13, at 18.

<sup>17</sup> 2009 MANAGEMENT PLAN, *supra* note 12 at 1-4.

### 3. EXAMPLES OF CULTURAL AND ENVIRONMENTAL IMPACT

*“Substantial, significant, and adverse impacts” on Mauna Kea’s summit*

Cultural impacts from increasingly intense development on Mauna Kea can be classified in two categories. The first category comprises broader cultural harm resulting from altering the summit landscape. This type of damage was identified in the State’s 2009 Management Plan:

For some Hawaiians, Mauna Kea is so revered that there is no desire to ascend it, no desire to trespass on what is considered sacred space. Simply viewing the tower, the mountain, from afar, both affirms its presence, and reaffirms the sense of connection with both place and personage. For this reason, many Hawaiians feel that activities on Mauna Kea that lead to visible alterations of the landscape not only have a significant effect on the mountain itself, but also have a damaging effect on everything and everyone that is physically, genealogically, spiritually, and culturally tied to Mauna Kea.<sup>18</sup>

In the words of the State of Hawai‘i’s Board of Land and Natural Resources, the cumulative impacts from past observatory construction projects at the summit ridge area have been “substantial, significant, and adverse.”<sup>19</sup>

Development of the existing observatories also significantly modified the preexisting terrain. The tops of certain pu‘u, or cinder cones, were flattened to

accommodate the foundations for observatory facilities. Some materials removed from the pu‘u were pushed over the sides of the cinder cones, creating steeper slopes that are more susceptible to disturbance. Consequently, the existing level of cumulative impact from preexisting observatories on geology, soils, and slope stability is considered to be substantial, significant, and adverse.<sup>20</sup>

**The Board of Land and Natural Resources found that development on Mauna Kea’s summit has caused “substantial, significant, and adverse” impacts on “cultural, archaeological, and historic resources,” and also on “geology, soils, and slope stability.”**

<sup>18</sup> 2009 MANAGEMENT PLAN, *supra* note 12, at 1-4.

<sup>19</sup> BLNR TMT Decision, *supra* note 4, at 21.

<sup>20</sup> *Id.*



The second category of cultural harm is comprised of more discrete instances leading to “cumulative impacts on cultural, archaeological, and historic resources that are [also] considered substantial, significant, and adverse.”<sup>21</sup> Examples are identified in the following table.

Date	Examples of Cultural and Environmental Impacts on Mauna Kea
1968 - 1971	First three telescopes constructed <b>without submitting conservation district use applications.</b> <sup>22</sup>
1976	Discovery that contractor <b>violated land use regulations</b> by erecting an unauthorized structure on the summit. <sup>23</sup>
1977	Department of Land and Natural Resources develops the Mauna Kea Plan without heeding Hawai‘i mayor’s and community’s call for a <b>six-telescope limit.</b> <sup>24</sup>
1979	<b>Hydraulic fluid spilled</b> at site. <sup>25</sup>
1982	Biological survey discovers <b>diesel fuel spill.</b> <sup>26</sup>
1983 - 1998	“[M]aster environmental impact statement noted that the large concentration of ancient Hawaiian shrines on the northern slope can be used as the basis for postulating the existence of other unrecorded historic sites in this area. The report also notes that the actual and potential significance of this cultural/natural resource warrants further investigation and a determination of eligibility for inclusion on both the state and national historic places registers. The report recommended that a cultural resource management plan be developed as part of the Mauna Kea Science Reserve Complex Development Plan.” As of 1998, “[n]either the university nor the Department of Land and Natural Resources ever developed [a cultural resource] plan . . . .” <sup>27</sup>
1968 - 1998	“Historic preservation has been a concern since the signing of the 1968 general lease.” “While the concern for preservation previously existed, it was not addressed until the 1983 complex development master plan. However, the plan <b>did not adequately address preservation.</b> ” <sup>28</sup>

<sup>21</sup> *Id.*

<sup>22</sup> See 1998 AUDIT, *supra* note 2, at 3, 33. The applications were not submitted until 1976.

<sup>23</sup> See *id.*

<sup>24</sup> See Letter from John Keppeler to Bd. Land Nat. Res. (Sep. 16, 1976) (writing on behalf of Hawai‘i mayor Herbert Matayoshi: “We strongly urge that the number of telescopes be limited to the number presently on the top of Mauna Kea.”); Memorandum from Randal Jackson to Bd. Land Nat. Res. (July 20, 1976) (summarizing community input on 1977 Mauna Kea Plan); THE MAUNA KEA PLAN (May 1977), *available at* <http://www.malamamaunakea.org/library/reference/index/refid/835-the-mauna-kea-plan-honolulu-dept-of-land-and-natural-resources>.

<sup>25</sup> See 2009 MANAGEMENT PLAN, *supra* note 12, at 6-9.

<sup>26</sup> See *id.*

<sup>27</sup> 1998 AUDIT, *supra* note 2, at 23. Bold emphases in quotations throughout this table are provided for readability and are not found in the original source material.

<sup>28</sup> *Id.* at 21.

1991	Surveyor reports that “development of the Hale [Pōhaku] substation led to some <b>damage to historic sites</b> ,” via “a number of incidents that have adversely affected the integrity and future research potential of this site . . . determined eligible for inclusion on the National Register of Historic Places.” The damage “included five pits that were dug during the substation’s construction near a lithic scatter site. A lithic scatter site refers to all the remains of stone tool manufacturing that have been intentionally left or redeposited by natural means in a particular place. Also, a large number of pipes were placed on two other lithic scatter sites.” The report also describes another lithic scatter site that was damaged due water channeled from Hale Pōhaku. The report noted that a premature survey of the powerline corridor, the subsequent selection of a final corridor, and soil testing prior to conducting an archaeological survey caused the damage. <sup>29</sup>
1995	<b>Trash</b> removed from the summit; attributed to Subaru and Keck construction projects, and public users. <sup>30</sup>
1995	Truck involved in telescope construction releases 60 gallons of fluids from fuel tank and engine spilled onto surface cinder forcing <b>excavation of contaminated area</b> . <sup>31</sup>
1996	Arthropod specialist found that telescope construction filled and cut in the Pu’u Hau Oki crater walls, damaging one of the two most important habitats of the rare Wēiku arthropod. “The Department of Land and Natural Resources later stated that it erred in approving the grading plan since the university failed to comply with the minimum <b>destruction of habitat</b> requirement as stated in the EIS.” <sup>32</sup>
1996	<b>Ethylene glycol spill</b> resulting in <b>excavation of cinder</b> . <sup>33</sup>
1998	State Auditor describes <b>onerous process for cultural access</b> : “Currently, individual Hawaiians may practice their native religion but must first go to the Institute for Astronomy for permission to access land, and then go to the Department of Land and Natural Resources and submit a Conservation District Use Application to use the land for religious practices. This process seems excessive and onerous.” <sup>34</sup>
1968 - 1998	“During the early years of telescope development, the university erected temporary equipment on the summit to study the conditions of the areas. <b>Remnants of this early period testing still exist</b> [as of 1998], including two concrete slabs located on the [Poli’ahu] site and a weather tower on the northeast shield.” <sup>35</sup>

<sup>29</sup> 1998 AUDIT, *supra* note 2, at 22.

<sup>30</sup> *See id.* at 25, 33.

<sup>31</sup> *See* 2009 MANAGEMENT PLAN, *supra* n. 12 at 6-9.

<sup>32</sup> 1998 AUDIT, *supra* note 2, at 24, 33.

<sup>33</sup> *See* 2009 MANAGEMENT PLAN, *supra* n. 12 at 6-9.

<sup>34</sup> 1998 AUDIT, *supra* note 2, at 23.

<sup>35</sup> *Id.* at 25.



1999	University of Hawai'i Board of Regents received hours of "impassioned testimony about the sacredness of Mauna Kea, [Native Hawaiian] opposition to further development, and their great distrust of the university and the astronomy community." "Regent Nainoa Thompson, a native Hawaiian, said the Mauna Kea controversy reflected much bigger issues. <b>'This is really about abuse of the native people being subject to racism and disrespect,'</b> said Thompson. 'This is an opportunity for a real turning point, a defining moment. The university is the most powerful instrument to shape Hawaii's future.'" <sup>36</sup>
2000	2000 Mauna Kea Science Reserve Master Plan allows for <b>sixteen observatories</b> . <sup>37</sup>
2003	<b>Transmission oil spill</b> at Hale Pōhaku, leading to the <b>excavation and removal of cinder</b> . <sup>38</sup>
2003	Federal court finds Outrigger Observatory's <b>impact assessment "inadequate"</b> for lack of a cumulative impact analysis of the construction of the observatory in connection with all the other observatories on the summit. <sup>39</sup>
2004	<b>Diesel fuel spill</b> . <sup>40</sup>
2004	<b>Propylene glycol spill</b> , leading to <b>excavation and removal of cinder</b> . <sup>41</sup>
2004	University fined the Department of Land and Natural Resources for <b>permit violations</b> by four observatories when unapproved equipment and materials were discovered. <sup>42</sup>
1998 - 2004	<b>Sewage overflows</b> five times from 1998 to 2004. <sup>43</sup>
2005	State Auditor reports on lack of periodic and systematic inspections by Office of Coastal and Conservation lands (overseeing conservation district uses and permit conditions). "The lack of oversight by the department allows the university and its sublessees unchecked discretion on the use of Mauna Kea and <b>leaves cultural and natural resources at risk for further damage</b> ." <sup>44</sup>

<sup>36</sup> *Science vs. spirit is key Mauna Kea issue*, HONOLULU STAR-BULLETIN, June 18, 1999.

<sup>37</sup> See MAUNA KEA RESERVE MASTER PLAN IX-45 (June 16, 2000).

<sup>38</sup> See 2009 MANAGEMENT PLAN, *supra* note 12 at 6-10.

<sup>39</sup> *OHA v. O'Keefe*, Civ. No. 02-00227, slip op. at 3 (D. Haw. 2003), available at <https://dlnr.hawaii.gov/mk/files/2016/10/B-17-c-OHA-v.-OKeefe-2003-J.Mollway.pdf>.

<sup>40</sup> See 2009 MANAGEMENT PLAN, *supra* note 12 at 6-10.

<sup>41</sup> *Id.*

<sup>42</sup> FOLLOW-UP AUDIT OF MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, REPORT 05-13 23 (Dec. 2005) ["2005 AUDIT"].

<sup>43</sup> See 2009 MANAGEMENT PLAN, *supra* note 12, at 6-10.

<sup>44</sup> 2005 AUDIT, *supra* note 42, at 30.

2005	State Auditor reports that a “cultural management plan, recommended in the [2000] master plan, also has not been completed. The cultural plan could apply to individual users and specify controls for protecting designated area. Without planned protections and commitments to implement plans, <b>irreversible damage to Mauna Kea’s historic and cultural resources is likely to continue.</b> ” <sup>45</sup>
2005	State Auditor reports that “[i]mplementation of an incomplete historic preservation plan leaves historic sites at risk. It is imperative that the department’s historic preservation division support the Office of Mauna Kea Management’s completion of the plan. This work is needed to protect the quickly changing cultural and historic landscape and <b>rescue historic sites from continuing damage.</b> ” <sup>46</sup>
2005	“At present, the division and department have <b>no management plan</b> specifically for the Mauna Kea Ice Age Natural Area Reserve,” which includes the historic adze quarry site. “[A] management plan specific to Mauna Kea would identify the division’s resource needs to provide better protection of the historic sites and landmarks located within the reserve.” <sup>47</sup>
2008	Hale Pōhaku <b>sewage spill</b> of about 500-1000 gallons. <sup>48</sup>
2009	Hawai‘i legislature adopts law clarifying the University’s authority to enact rules governing management of Mauna Kea lands. As of 2014, <b>no rules</b> adopted. <sup>49</sup>
2015	UH Board of Regents receive <b>1,010 testimonies in opposition</b> to Thirty-Meter Telescope at a meeting in Hilo. <sup>50</sup>
2015	Kia‘i (protectors) <b>arrested</b> for TMT demonstrations. <sup>51</sup>
2015	Mauna Kea Support Service employee <b>bulldozes ahu</b> (altar) alongside Mauna Kea summit road. <sup>52</sup>
2015	Court invalidates Department of Land and Natural Resources Emergency Rule that <b>restricted right to protest</b> between 10 pm and 4 am. <sup>53</sup>

<sup>45</sup> *Id.* at 31.

<sup>46</sup> *Id.* at 32.

<sup>47</sup> *Id.* at 32.

<sup>48</sup> See 2009 Management Plan, *supra* note 12, at 6-10.

<sup>49</sup> FOLLOW-UP AUDIT OF MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, REPORT 14-07 17 (2014).

<sup>50</sup> See ‘Ōiwi, Timeline of Events, <http://oiwi.tv/maunakea/>.

<sup>51</sup> See *id.*

<sup>52</sup> See *TMT Protesters Distraught After Mauna Kea Altar Bulldozed*, Hawaii News Now, Sept. 15, 2015, <https://www.hawaiinewsnow.com/story/30031692/tmt-protesters-distraught-after-mauna-kea-altar-bulldozed/>.

<sup>53</sup> See *Court throws out emergency restrictions for Mauna Kea*, Hawaii News Now, Oct. 9, 2015, <https://www.hawaiinewsnow.com/story/30229910/circuit-court-grants-partial-motion-invalidating-mauna-kea-emergency-rule/>.

2019	Department of Land and Natural Resources <b>dismantles several symbolic structures</b> . “The failure to consult with the Native Hawaiian community and OHA prevented government officials from fully understanding the mana imbued over years into these structures. The absence of these cultural structures has deprived the Mauna of an important contemporary Native Hawaiian cultural presence on this sacred place beset with foreign activities.” <sup>54</sup>
2019	Kia’i (protectors) <b>arrested</b> for TMT demonstrations.
2019	Despite commitment to “permanently” decommission three telescopes “as soon as reasonably possible,” <sup>55</sup> Mauna Kea Management Board rejects Hōkū Ke’a telescope’s Notice of Intent to Decommission after a <b>four-year delay</b> , and University of Hawai’i Board of Regents instead proposed to <b>fast-track the development of a replacement telescope</b> at Hale Pōhaku or elsewhere on Mauna Kea. <sup>56</sup>

<sup>54</sup> Office of Hawaiian Affairs Statement on Mauna Kea (June 20, 2019), *available at* <https://www.oha.org/news/oha-statement-on-mauna-kea/>.

<sup>55</sup> See BLNR TMT Decision, *supra* note 4, at 267.

<sup>56</sup> See University of Hawai’i Board of Regents Resolution 19-03 to Act on Items Relating to Maunakea Management, *available at* [https://www.hawaii.edu/offices/bor/regular/materials/201910170930/BOR\\_Meeting\\_of\\_\\_10\\_17\\_19\\_\\_Materials\\_\\_FOR\\_UPLOAD.pdf](https://www.hawaii.edu/offices/bor/regular/materials/201910170930/BOR_Meeting_of__10_17_19__Materials__FOR_UPLOAD.pdf).

#### 4. INTRODUCTION TO TRADITIONAL AND CUSTOMARY RIGHTS

*How the law seeks to protect and promote cultural practices*

Hawai'i Supreme Court Chief Justice William S. Richardson once explained the important role of Native Hawaiian traditional and customary rights in Hawai'i's laws:

Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court, reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of the Hawai'i Supreme Court beginning after Statehood. Thus, during my tenure on the Court, we made a conscious effort to look to Hawaiian custom and tradition in deciding our cases—and consistent with Hawaiian practice, our court held that the beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.<sup>57</sup>

The Hawai'i Constitution mandates that the State “shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes” by “descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.”<sup>58</sup> The Hawai'i Supreme Court has explained that “[s]ome customary and traditional native Hawaiian rights are codified either in [this section] of the Hawai'i Constitution or in” Hawai'i's statutes.<sup>59</sup> Additional traditional and customary practices, not specifically enumerated in the Constitution or statutes, are also protected.<sup>60</sup> However, the extent of this protection has been pared back by courts. To enjoy protection, a traditional and customary right must be exercised on “undeveloped or less than fully developed property.”<sup>61</sup>

<sup>57</sup> Melody Kapiliāloha MacKenzie, *Ka Lama Kū o ka No'eau: The Standing Torch of Wisdom*, 14 U. HAW. LAW REV. 1, 6-7 (2009) (quoting Chief Justice Richardson).

<sup>58</sup> Haw. Const. art. XII, § 7 (“The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”).

<sup>59</sup> *State v. Hanapi*, 89 Haw. 177, 186, 970 P.2d 485, 494 (1998).

<sup>60</sup> *See, e.g., id.*

<sup>61</sup> *Id.* at 185-188, 977 P.2d at 494-495 (internal quotations and citations omitted). For a more detailed primer on traditional and customary rights, see David M. Forman and Susan K. Serrano, *Ho'OHANA AKU, A HO'OLA AKU: A LEGAL PRIMER FOR TRADITIONAL AND CUSTOMARY RIGHTS IN HAWAI'I*, available at

For this reason, land use and development decisions implicate extremely important considerations about the effect of those decisions on traditional and customary practices. In 2000, the Hawai'i legislature explained that the

failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further [found] that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.<sup>62</sup>

Thus, environmental impact statements and land use decisions are now required to assess “impacts to local cultural practices, together with measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.”<sup>63</sup> This process should include steps taken to:

- “Identify and consult with individuals and organizations with expertise concerning the types of cultural resources, practices, and beliefs found within the broad geographical area, e.g., a district or ahupua'a”;
- “Identify and consult with individuals and organizations with knowledge of the area potentially affected by the proposed action”;
- “Receive information from or conduct ethnographic interviews and oral histories with persons having knowledge of the potentially affected area”;
- Conduct ethnographic, historical, anthropological, sociological, and other culturally related documentary research”;
- “Identify and describe the cultural resources, practices, and beliefs located within the potentially affected area”; and
- “Assess the impact of the proposed action, alternatives to the proposed action, and mitigation measures on the cultural resources, practices, and beliefs identified.”<sup>64</sup>

**The Hawai'i legislature found that failing to carefully consider cultural impacts before developing land “resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture.”**

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<https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/content/Programs%2CClinics%2CInstitutes/Ho%27ohana%20Aku%20Final.pdf>

<sup>62</sup> H.B. 2895, 20th Leg., Reg. Sess. (2000).

<sup>63</sup> *Native Hawaiian Law: A Treatise* 807 (Melody Kapilialoha MacKenzie et al. eds., 2015).

<sup>64</sup> *Id.* at 808 (citing Office of Environmental Quality Control guidelines).

Applied to the most recent efforts to construct an additional telescope atop Mauna Kea, this legal framework helps to unearth some of the reasons why Mauna Kea’s protectors believe that the legal process has—once again—failed to properly protect against cultural and environmental harms.

The Board of Land and Natural Resources unambiguously concluded that the cumulative impact of development on Mauna Kea has been “substantial, significant, and adverse.”<sup>65</sup> Under Hawai‘i’s rules governing conservation districts such as the lands atop Mauna Kea, no permit for construction should be granted “for a land use that would cause a substantial adverse impact to existing natural resources.”<sup>66</sup> Associate Justice Michael Wilson of the Hawai‘i Supreme Court, in dissent, described the Board’s decision to nonetheless grant a permit as the “degradation principle.”

Because the area affected by the Thirty Meter Telescope Project (TMT or TMT project) was previously subjected to a substantial adverse impact, the BLNR finds that the proposed TMT project could not have a substantial adverse impact on the existing natural resources. Under this analysis, the cumulative negative impacts from development of prior telescopes caused a substantial adverse impact; therefore, TMT could not be the cause of a substantial adverse impact. As stated by the BLNR, TMT could not “create a tipping point where impacts became significant.” Thus, addition of another telescope—TMT—could not be the cause of a substantial adverse impact on the existing resources because the tipping point of a substantial adverse impact had previously been reached.<sup>67</sup>

The type of logical conflict identified by Justice Wilson arises in other portions of the Hawai‘i Supreme Court’s decision approving TMT. For example, the Court noted that the “BLNR also analyzed Native Hawaiian cultural resources in the vicinity of the TMT Observatory and the Access Way. Native Hawaiians had erected ahu in the general vicinity of the TMT Observatory site. The closest, consisting of a single upright stone and several support stones, is 225 feet away, another is 1300 feet away.”<sup>68</sup> This analysis discounts the perspective of cultural practitioners like Professor Flores, who testified that the extraordinary sacred nature of Mauna Kea is exactly why archaeological surveys did

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<sup>65</sup> BLNR TMT Decision, *supra* note 4, at 21.

<sup>66</sup> *In re Conservation Dist. Use Application HA-3568*, 143 Haw. 379, 422, 431 P.3d 752, 795, *as amended* (Nov. 5, 2018), *as amended* (Nov. 30, 2018), *reconsideration denied*, 143 Haw. 327, 430 P.3d 425 (2018), and *reconsideration denied sub nom. Matter of Contested Case Hearing re Conservation Dist. Use Application (CDUA) HA-3568*, 143 Haw. 328, 430 P.3d 426 (2018) (Wilson, J., dissenting).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 328, 430 P.3d at 426.



not identify substantial manmade structures in the summit area.<sup>69</sup>

Decisions about Mauna Kea should be made with a more holistic consideration of the legacy of the illegal overthrow of the Hawaiian Kingdom, the special cultural significance of Mauna Kea, the decades-long history of substantial adverse cultural and environmental impacts on the summit, and the need to meaningfully animate legal mandates to protect and promote Native Hawaiian cultural practices. A narrower consideration of what type of development is “legal” on Mauna Kea does not suffice.

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<sup>69</sup> See *supra* note 16. See also 2009 MANAGEMENT PLAN, *supra* note 12, at 1-4 (“In the *mamao* relatively few pre-Contact archaeological features exist; perhaps indicative of the highly restrictive nature of this spatial division. The features that do exist may reflect activity associated with the highest ranking members of Hawaiian society. It is within the *mamao* where the Astronomy Precinct (encompassing most of the observatories) is situated and where much of the mountain’s visitor activity is focused.”). In the larger area encompassed by the Mauna Kea Science Reserve, at least 263 archaeological sites have been identified, including “two traditional cultural properties (Kūkahau‘ula and Pu‘u Līlīnoe) that were given Statewide Inventory of Historic Places (SIHP) site designations by [State Historic Preservation Division] in 1999.” ARCHAEOLOGICAL INVENTORY SURVEY OF THE MAUNA KEA SCIENCE RESERVE (August 2010), available at <https://dlnr.hawaii.gov/mk/files/2017/01/B.62-FAIS-MKSR-Vol.1.pdf>.