



Written Testimony of Carmen Hulu Lindsey
Chair, Board of Trustees

National Science Foundation
Public Scoping Meeting
August 9, 2022

NOTICE OF INTENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT AND
INITIATE SECTION 106 CONSULTATION FOR A POTENTIAL NATIONAL SCIENCE
FOUNDATION INVESTMENT IN THE CONSTRUCTION AND OPERATION OF AN
EXTREMELY LARGE TELESCOPE LOCATED IN THE NORTHERN HEMISPHERE

August 9, 2022 6:00 p.m. Grand Naniloa Doubletree, Hilo, Hawai'i

The Office of Hawaiian Affairs (OHA) is in receipt of the recent National Science Foundation's (NSF) federal notice¹ and request for comments, pursuant to requirements under the National Environmental Policy Act (NEPA) regarding the Thirty Meter Telescope Project (TMT) proposed for funding and construction within the summit area of the Conservation District of Mauna Kea². The notice also mentions that NSF will begin formal National Historic Preservation Act (NHPA) Section 106 consultations, but does not specify when NSF intends to begin these consultations with Native Hawaiians. Aside from this testimony, OHA still reserves the right to submit additional comments, feedback and recommendations by the September 17, 2022, published deadline if needed.

Background & Standing of OHA to Engage in NSF Processes

The Office of Hawaiian Affairs (OHA) was created in 1978 at the State of Hawai'i Constitutional Convention to address historical injustices and challenges facing the Native Hawaiian community. The convention delegates envisioned, an agency that provided a form of self-determination for Native Hawaiians³ and advocated for their overall well-being.

¹ Federal Register, Vol 87, No. 137, July 19, 2022.

² Although in modern times the spelling of "Maunakea" is often spelled as a single word, it is proper and necessary to use the historical spelling of "Mauna Kea" as two words, since it is identified (1) as a proper place name [See also "Place Names of Hawai'i Revised and expanded edition by Mary Kawena Pukui, Samuel H. Elbert & Esther T, Mookini (1974)], and (2) more importantly, it is used on old maps and legal documents to identify the metes and bounds of the land under discussion. In this case, the TMT Project is being proposed for construction on the lands of the Summit of Mauna Kea identified under TMK (3) 4-4-015:009. Kaohe, Hamakua, Hawai'i on the Island of Hawai'i.

³ OHA, uses the term "Native Hawaiian" to refer to people of aboriginal descent regardless of blood quantum. In other words, "Native Hawaiian" herein includes both "native Hawaiians" (those of 50% or more, blood



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Thus, OHA was established through Article XII of the Hawai'i State Constitution, and Chapter 10 of the Hawai'i Revised Statutes (HRS) outlines OHA's duties and purposes to: better the conditions of Native Hawaiians; serve as the principal public agency responsible for the performance, development, and coordination of programs and activities for Native Hawaiians; assess the policies and practices of other agencies; and conduct advocacy efforts, including the promotion and protection of the rights of Native Hawaiians.

Governed by an elected nine-member Board of Trustees (BOT), OHA exercises power as provided by law to manage and administer the proceeds from the sale or other dispositions of lands, natural resources, minerals, and income derived from whatever sources for Native Hawaiians, including all income and proceeds from the pro rata portions of the trust referred to in section 4 of Article XII.⁴ OHA, therefore, is mandated to ensure formal processes such as those under NEPA and NHPA, that have the ability to affect the rights and resources for which Native Hawaiians have an interest, are reasonably implemented pursuant to relevant state, federal and international laws, in ***good faith***.

Brief Overview of OHA Involvement and Relevance to the Current NSF Effort

Two decades ago, OHA sued in federal court on behalf of its beneficiaries (See OHA v. Sean O'Keefe et al., Civ. No. 02-00227 SOM/BMK) challenging the proposed NASA/KECK Outriggers Telescopes Project (NASA/KECK Telescopes Project) that included as many as ten (10) more telescopes on the land surrounding the two (2) larger W. M. KECK Telescopes, also funded by NASA. OHA argued that the NASA/KECK Telescopes Project Environmental Assessment (EA) was inadequate because it failed to properly assess, among other things, the cumulative impacts of astronomy development on Mauna Kea. The federal

quantum previously defined by the U.S. Congress and overseen by the Department of Hawaiian Homelands) and "Native Hawaiians" (those of 49% or less blood quantum) as defined by state law.

⁴ Hawai'i State Constitution, Article XII, Section 4, PUBLIC TRUST: The lands granted to the State of Hawai'i by Section 5(b) of the Admissions Act and pursuant to Article XVI, Section 7, of the State Constitution, shall be held by the State as a public trust for native Hawaiians and the general public. Further, Article XII Section 7, of the State Constitution provides that, "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."



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court agreed with OHA, finding that NASA's EA was in fact, inadequate and that NASA/KECK must compete a more in-depth and rigorous Federal Environmental Impact Statement (FEIS). NASA did follow the courts order by completing a FEIS for the NASA/KECK Telescopes Project.

OHA, however, did not need to challenge the adequacy of the NASA FEIS, as a separate but concurrent Third Circuit case was filed against the State's Board of the Land and Natural Resources (BLNR) where the court overturned the NASA Conservation District Use Permit (CDUP) for the NASA/KECK Telescopes Project, in favor of the Plaintiffs and Native Hawaiians. In the end, NASA did not pursue the original NASA/KECK project permitting and the NASA/KECK Outrigger Telescopes Project was never built on the summit of Mauna Kea. What is relevant to the discussion at hand and the current NSF effort is that the federal court in OHA v. O'Keefe affirmed the following:

"The Ninth Circuit has held that 'an EA may be deficient if it fails to include a cumulative impacts analysis or to tier to an EIS that has conducted such an analysis... **Cumulative impact is defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or nonfederal) or person undertakes such other actions. Cumulative impacts can result from other individually minor but collectively significant actions taking place over a period of time.**' 40 C.F.R. § 1508.7."
(Emphasis added)

Notably, prior to abandoning the process, the NASA/KECK Telescopes Project **FEIS found that there is a substantial adverse cumulative impact occurring on Mauna Kea. These FEIS findings identified nearly twenty (20) years ago are of great concern.** First because cumulative impacts are valuable and necessary, the review of the TMT will valuably be ***additive*** to the previously determined NASA/KECK Telescopes Project cumulative impact studies. Because the previous NASA/KECK NEPA FEIS and NHPA Section 106 Consultations with Native Hawaiians is the only Federal review processes that has ever occurred on Mauna Kea since construction of observatories began in 1968, OHA believes that the past FEIS and Section 106 findings **must be included** in the current Cumulative Impact analysis. As such, the NASA/KECK FEIS and NHPA comments, should



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be included in NSF's own FEIS and NHPA Sections 106 Consultation efforts and activities with Native Hawaiians.

Overall Summary of Considerations

OHA's written testimony herein highlights OHA's considerations and expectations, including that NSF should address the: (1) Implications of NEPA and NHPA Processes on Mauna Kea Activities, Including Astronomy, on Ceded Lands and Public Land Trust Obligations to Native Hawaiians; (2) Impact of the Implementation of the Newly Created Mauna Kea Stewardship and Oversight Authority to Governance of Mauna Kea Lands and Activities, Including Voluntary Delay of the Formal Environmental Comment Period under NEPA as well as the NHPA Section 106 Consultation; (3) Implementation of NSF's NEPA and NHPA Processes Should Include Impacts of Prior Erroneous Processes on Native Hawaiian Practitioners, Beneficiaries and Communities; (4) Unresolved, Uncompensated and Possibly Impermissible, Transfer of the Mauna Kea Access Road to the State of Hawai'i, by the Department of Hawaiian Homelands, Without Consultation with Hawaiian Homes Commission Act Beneficiaries by either the State of Hawai'i or the U.S. Department of the Interior; (5) Status of General Lease S-4191 and the Associated Sub-Leases of the Individual Telescopes and/or Observatories; (6) Challenge to the Conservation District Use Permit; (7) Status of the National Pollutant Discharge and Elimination Systems Permit, Under the Clean Water Act, Including Documentation of Studies and Waste and Sewage Systems; (8) Financial Implications of Construction and Operations Funding of TMT in the Cumulative Assessment Analysis; (9) Implications on Iwi Kupuna; and (10) Broader and More Significant Community Engagement and Consultation Efforts. Aside from this testimony, OHA reserves the right to provide further comments, feedback, considerations and recommendations by the September 17, 2022 published deadline if needed.



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1. Implications of Mauna Kea Activities, Including Astronomy, on Ceded Lands and Public Land Trust Obligations to Native Hawaiians

State lands on Mauna Kea are ceded⁵ lands and a part of the public land trust⁶. NSF's federal notice and request for comments, pursuant to requirements under the National Environmental Policy Act (NEPA) regarding the Thirty Meter Telescope Project (TMT) proposed for funding and construction within the summit area of the Conservation District of Mauna Kea, **must understand** that such activities on Mauna Kea become a part of the historic fiduciary trust responsibilities of the federal and state governments.

Mauna Kea summit lands are Crown and Government lands that are often referred to as "Ceded Lands". The NSF notice incorrectly identifies only Department of Hawaiian Homelands (DHHL) lands as ceded lands to be included in the NSF FEIS and NHPA analysis and consultations. While the 'Aina Mauna lands include DHHL lands, NSF NEPA and NHPA processes must identify all the lands in the area of impact. The summit lands reside in what is referred to as the Wao Akua or realm of the Akua (Divine Deities). The entire traditional and historic district of Kaohe encompasses the district of Hamakua, up to the summit of Mauna Kea, down and across the plains of Pohakuloa and then up to the summit of Mauna Loa. Pohakuloa lands and impacts should be included in the NHPA analysis because they are closely connected. The lands are connected traditionally and culturally and have significant Native Hawaiian consultation responsibilities.

2. Impact of the Implementation of the Newly Created Mauna Kea Stewardship and Oversight Authority to Governance of Mauna Kea Lands and Activities, Including

⁵ Note the term "ceded" is used to reference the classification of the lands in discussion and does not imply an acceptance of the illegal overthrow of the Hawaiian monarchy in 1893, the subsequent United States actions of annexation, the territorial government and statehood. This testimony acknowledges that the lands were ceded without the consent of or compensation to the Native Hawaiian people of Hawai'i or other sovereign government (P.L. 103-15019)

⁶ The terms of statehood considered the plight of the Hawaiian people, specifically in the Admission Act of 1959. Section 5(f) of the Act refers to the crown and government lands of the Hawaiian Kingdom, which had been designated "ceded" to the Republic of Hawai'i, and then to the United States. The Act conveyed these lands to the new State of Hawai'i with the caveat that revenues were to constitute a trust for five purposes. One of these was the betterment of the conditions of Native Hawaiians.



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Voluntary Delay of the Formal Environmental Comment Period under NEPA as well as the NHPA Section 106 Consultation

During the 2022 Hawai'i State Legislature session, House Bill 2024 HD1 SD2 CD1 was signed into law as Act 255 (2022)⁷, which established the Mauna Kea Stewardship and Oversight Authority (MKSOA). While governance constructs and powers and responsibilities were articulated in Act 255, OHA has concerns regarding the implementation of the newly created MKSOA and its implicit, unintended, and/or explicit impacts to the governance and operations of a broad range of activities (e.g., access, land leasing, astronomy, cultural practices, stewardship) on and associated with Mauna Kea. Greater clarity is needed regarding the transfer of, jurisdiction and control of Mauna Kea lands from the BLNR to the University of Hawai'i and the newly created MKSOA.

Also, OHA is in receipt of United State Congressmen Kai Kahele's (Hawai'i Congressional District 2) recent letter requesting that the NSF consider "delaying" to a later date formal environmental review regarding the Thirty Meter Telescope (TMT) because the Mauna Kea Stewardship and Oversight Authority is not yet organized, and it will not be for quite some time.⁸

OHA believes that a voluntary delay of the formal environmental comment period under NEPA as well as the NHPA Section 106 consultation with Native Hawaiians is necessary until the impacts of the implementation of the MKSOA is known to impacted stakeholders, including the NSF.

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⁷ https://www.capitol.hawaii.gov/session2022/bills/GM1358_.PDF

⁸ Congressmen Kai Kahele's, July 19, 2022, Letter addressed to Honorable Panchanathan, Director, National Science Foundation.



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3. Implementation of NSF’s NEPA and NHPA Processes, Should Include Impacts of Prior Erroneous Processes on Native Hawaiian Practitioners, Beneficiaries and Communities

NEPA and NHPA processes include assessments and considerations of impacts of federal projects and undertakings, and should include process impacts on practitioners, beneficiaries and communities. For example, the kia’i (guardians, protectors), Native Hawaiian beneficiaries and advocacy communities (collectively, Kia’i) were aware of multiple process errors related to TMT and forced to take swift action to prevent irreparable harm to their sacred mountain when such erroneous processes were allowed to continue. The Kia’i felt they had to protect Mauna Kea because TMT had not followed the law and its related processes. In so doing, Kia’i faced threats of physical harm, arrests, and detainment. From 2015 to 2019, approximately 68 Native Hawaiians Beneficiaries (including OHA Trustees), suffered demonization by politicians, had their liberty seized, and had to endure three years awaiting court trials.

Consequently, in July 2019, the OHA BOT approved a resolution explicitly authorizing OHA’s Administration to take action to advocate for the rights, safety, and well-being of beneficiaries engaging in peaceful protest of the decades-long mismanagement of Maunakea⁹, perpetuating Native Hawaiian traditional and customary practices, and exercising their rights to freedom of speech and assembly.

Similarly, with the 2019 Mauna Kea Access Road (MKAR) closure, the Department of Land and Natural Resources (DLNR), Division of Conservation and Resource Enforcement (DOCARE) officers arguably exacerbated the situation by staking out the MKAR in a way that compelled Kupuna (elders) and Kia’i to sit down on the road in front to protect the Mauna from being destroyed or desecrated by bulldozers. The Kia’i did this in tradition of Kapu Aloha – peace and non-violence. What must be acknowledged is that when the DOCARE Officers were ordered by the Governor and Attorney General’s office to close the MKAR, they were also preventing Native Hawaiians access to Mauna Kea to exercise their constitutionally protected traditional and customary rights.

OHA expects NSF’s NEPA and NHPA processes to include prior erroneous process(es) impacts, actions and inactions on Native Hawaiian practitioners, beneficiaries, and communities in this public scoping process.

⁹ The use of “Maunakea” in the resolution was an intentional descriptor choice (vs. Mauna Kea); and both uses (Maunakea, Mauna Kea) are considered appropriate in the context in which it is used.



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4. **Unresolved, Uncompensated and Possibly Impermissible, Transfer of the Mauna Kea Access Road to the State of Hawai'i, by the Department of Hawaiian Homelands, Without Consultation with Hawaiian Homes Commission Act Beneficiaries by Either the State of Hawai'i or the U.S. Department of the Interior**

The Mauna Kea Access Road (MKAR) is an approximately six-mile long paved roadway that leads from the Daniel K. Inouye Highway to a Visitor Information Station located on Mauna Kea. Activating NSF NEPA and NHPA activities renew OHA and community concerns regarding the ownership and control of 65 acres of land in the Hawaiian Homes Land Trust (HHLT or Trust) in the Mauna Kea area including the State's unresolved, uncompensated, and possibly impermissible use of Trust lands. Mauna Kea is a mountain sacred to many Native Hawaiians but nevertheless is used by the University of Hawai'i for the construction and operation of large-scale industrial telescope facilities. The University of Hawai'i's mismanagement of this significant mountain is well documented and ongoing. Not surprisingly, the MKAR, which was constructed by the State of Hawai'i between the 1960s - 1970's and is located almost entirely in the HHLT, triggered renewed beneficiary scrutiny of the State's ongoing pattern of disregard for native Hawaiian and Hawaiian interests and concerns regarding Mauna Kea. It is unclear whether the State obtained the consent of the Hawaiian Homes Commission (HHC) before commencing construction of the MKAR, which has been used continuously and without compensation to the Trust. The circumstances surrounding the MKAR has in many ways now become emblematic of decades-long concerns regarding the improper and uncompensated use of Trust lands, including for roads and highways. Given the renewed and growing outcry over the MKAR and similarly situated lands, OHA strongly believes the U.S. Department of the Interior (DOI) must be included in the discussions between the State and the HHC to appropriately carry out its oversight role.

MKAR issues are unresolved and involve state and federal trust responsibilities, another reason to delay NSF NEPA and NHPA processes.



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5. Status of General Lease S-4191 and the Associated Sub-Leases of the Individual Telescopes and/or Observatories

As it currently stands, the General Lease for the Conservation District lands of Mauna Kea is set to expire in 2033. In recent media coverage on May 6, 2022, the University of the Hawai'i President David Lassner wrote to the Hawaii Tribune Herald saying "...the UH will pause all sublease negotiations with current observatories ... and halt work towards a new master lease post-2033 and an associated environmental review."¹⁰ The Chair of the BLNR was also quoted in the same article, "The Department of Land and Natural Resources, had stronger words for the bill... issuing a statement... that the measure as written is significantly flawed and could be worst for Maunakea than the current state of affairs."¹¹ DLNR went on to say "...the bill does not provide for the lands' current Conservation District regulations to continue, which could in theory allow the Authority to freely develop anywhere within those lands..."¹²

As NSF is moving forward with NEPA and NHPA processes, OHA highlights the significant underlying uncertainty(ies) of General Lease S-4191 and its profound impact on NSF's intentions.

6. Challenge to the Conservation District Use Permit

It is OHA's understanding that the Conservation District Use Permit (CDUP) for the TMT is being challenged by Native Hawaiian beneficiaries and community members. They filed a Motion to reopen the TMT contested case hearing on May 24, 2021. The challenge came because the original CDUP allotted only 2 years for construction to begin. BLNR was **allowed** to issue a single extension but was not allowed to issue a second extension (for 2019-2021) without approval of the full BLNR Board; instead, it was signed only by the BLNR Chair. Further University of Hawai'i at Hilo (UHH), Board of Regents (BOR) was required to notify the Department in writing when construction activities were initiated and also when completed. The Chair of the BLNR signed off on

¹⁰ Hawai'i Tribune Herald (HTH), "UH pumps breaks on astronomy leases", May 6, 2022.

¹¹ *Id.* HTH

¹² *Id.* HTH



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the UHH's false claim that actual construction of the TMT had begun prior to the two-year deadline.

7. Status of the National Pollutant Discharge and Elimination Systems Permit, Under the Clean Water Act, Including Documentation of Studies and Waste and Sewage Systems

NSF's NEPA and NHPA processes should include a listing of all the hazardous material and human waste that is generated by each of the observatories as a part of the Cumulative Impact analysis consistent with what is required under the National Pollutant Discharge and Elimination Systems (NPDES) permit under the Clean Water Act (CWA). No comprehensive hydrological studies have been done on Mauna Kea that included this information. The information must include what hazardous waste and sewage systems are used (i.e., septic tank, leech fields or other systems), and documentation of exactly what their handling and disposal methods are for each. If any discharge from observatories have or do occur, then OHA expects clear and concise information documented and included in both NEPA and NHPA documents for review and comment. A proper assessment of cumulative impacts cannot be done any other way. This is especially important because Mauna Kea is sacred and an important source of drinking water for Hawai'i Island. The waters of Mauna Kea are harvested and collected for cultural and religious ceremonies and lastly, we must not forget that no human can live without clean water – water is life!

NSF should be aware of the NPDES permit requirements under the CWA, in continuing with NEPA and NHPA processes.

8. Financial Implications of Construction and Operations Funding of TMT in the Cumulative Assessment Analysis

According to a recent Associated Press (AP) news release, the 2022 cost of construction of the TMT is now at \$2.65 billion dollars.¹³ If the NSF is considering funding a portion of the costs of construction of TMT (\$850 million dollars), approximately 32%, there is still a significant financial short fall.

¹³ Associated Press, "US environmental study launched for Thirty Meter Telescope", July 19, 2022



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As a part of the federal NEPA cumulative impact assessment, OHA expects NSF will include detailed information regarding the lease and sublease rent paid by the observatories, including an up-to-date accounting of the international TMT Partners actual dedicated financial contributions, the current cost of construction and operations of TMT, and financing, including applicable construction bonds.

9. Implications on Iwi Kupuna

The 'Aina Mauna lands, including Mauna Kea and areas within Pohakuloa, are known to be burial grounds and therefore home to some of our most sacred and revered ancestors. The sacred realms are specifically demarcated by cultural landforms and human made markers establishing what archeologist refer to as a 'sacred precinct' at the highest areas of the summit regions of Mauna Kea. Its sanctity prescribes how it is culturally and spiritually treated. For example, it was forbidden for warriors or war parties to traverse beyond the tree line because the tree line is a natural marker indicating the sacred realms of the Heavens and Pu'uhonua (a sanctuary). The land above the tree line therefore is considered too sacred for the mundane affairs of man to transpire within this realm.

NSF must be aware of provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) as the NEPA and NHPA processes continue; and OHA expects broad engagement and compliance with NAGPRA provisions.

10. Broader and More Significant Community Engagement and Consultation Efforts

There is no question that Native Hawaiians living on Hawai'i Island have deeply held religious and cultural attachments to the sacred and ritual land scape of Mauna Kea. Mauna Kea is held in reverence and is significant to Native Hawaiians who do not live on Hawai'i but rather live across the Ko Pae 'Aina and Moku Honu (the United States). This was clearly evident during the 2015 and 2019 stands on Mauna Kea which were national and international in scope, nature and participation. Mauna Kea's importance to the Native Hawaiian people has been recorded in the modern and historical times. It has also been recorded in administrative hearings (i.e., state held contested case hearings), federal and state court cases, and in all forms of national and international engagement and advocacy, changed by social media forever.



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Notably, the Advisory Council on Historic Preservation (ACHP) handbook specifically references Section 106 Consultation relating the Mauna Kea:

“Native Hawaiian organizations that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make **“a reasonable and good faith”** effort to identify **each and every** such Native Hawaiian organization and invite them to be consulting parties in the Section 106 review process. **This includes Native Hawaiian organizations that live nearby as well as those that no longer reside in or near the project area but that, for example, may still have ancestral ties to that area. It is also possible that a Native Hawaiian organization attaches religious and cultural significance to a historic property on another island. For example, Mauna Kea, on the island of Hawai’i, is widely regarded as a place of religious and cultural significance to many individual Native Hawaiians and Native Hawaiian organizations throughout the State of Hawai’i. Accordingly, a proposed undertaking that might affect Mauna Kea could necessitate consultation with Native Hawaiian organizations throughout the state.”** (*Emphasis added*)

Therefore, NSF must consider reaching out to Native Hawaiian individuals and Native Hawaiian organizations (NHOs) in a more significant and broader way to reach Native Hawaiians throughout the State of Hawai’i, nationally and internationally.

Mahalo for the opportunity to testify. OHA still reserves the right to provide further comments during this public scoping process by the September 17, 2022 deadline. We further extend an invitation to NSF to meet with the OHA prior to the published deadline.