

Comments on NASA's Draft Environmental Impact Statement for the Outrigger Telescopes Project

by
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Introduction

My comments on the DEIS pertain to the sections on cultural resources and in particular, Sections 3.1.2, 4.1.1, 4.2.3 and 5.1.

My objections to the Draft EIS center on a number of terms which are central to the sections of the DEIS mentioned above. There is a Hawaiian proverb, *i ka olelo no ke ola, i ka olelo no ka make*, "in the word is life, in the word is death." Since the quality of the FEIS may determine the life or death of the preferred alternative, important terms used in the FEIS should be chosen and used with care. From a specifically legal point of view, as I noted in my earlier correspondence during the scoping process, the regulations of the Council on Environmental Quality provide, at 40 CFR § 1500.1, that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." The terms I address below are not used in the DEIS in such a way as to provide information of high quality. To ensure that the Final EIS meets the CEQ standard, the use of these terms should be adjusted to add clarity and precision. The terms to which I refer are "culture" and "cultural," "Native Hawaiian," and "oral history."

Prior Comments

In my February 16, 2004 comments during the scoping process, I recommended that NASA avoid using the words "culture" and "cultural" because these words have no broadly accepted and established meaning, or that if they must be used,

they be always accompanied by an explanation of what the term means in the context in which it is used; for example, if the reference is to religious practice, or to economic or subsistence activities like fishing, or to artistic expression like hula or chant, the EIS should make that clear. When public input is sought, those who provide it should be asked to be specific about what they might mean by "culture" and "cultural" and should be informed that without such detail, their comments may not be given significant weight.

My recommendation was clearly not accepted for the DEIS, and the result is a survey of cultural resources which, in its treatment of Native Hawaiian cultural issues, provides little in the way of useful data or professional opinions for those who must decide on the proposed action.

Culture

For an excellent review of the history, use and abuse of the term "culture" I recommend Adam Kuper's superb 1999 book *Culture: The Anthropologist's Account*. Much of the following two paragraphs is derived from this work.

The word "culture" has an extraordinary number of meanings. In 1951, two distinguished anthropologists, Alfred Kroeber and Clyde Kluckhohn published a book entitled *Culture: A Critical Review of Concepts and Definitions* in which they gathered 164 different definitions of the word "culture."¹ The term has been defined very broadly as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society,"² as "patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols,"³ as "any socially inherited element in the life of man, material and spiritual."⁴ It has been defined more narrowly as "a rather conventional ideal of individual refinement"⁵ usually with respect to the arts, music, dance and other forms of expression, as "the best that has been known and said."⁶ It has also been defined as the heritage of a group, particularly the elements traditionally emphasized by the humanists, "the spiritual possessions of a group," some of which are "intrinsically more valuable, more characteristic, more significant in a spiritual

¹ Adam Kuper, *Culture: The Anthropologist's Account* (1999) 56.

² Id.

³ Id. at 58.

⁴ Id. at 64.

⁵ Id.

⁶ Id. at 9

sense than most."⁷ It has been called "civilization in so far as it embodies a national genius."⁸ The grandest definitions almost escape any meaning at all; Max Weber defined it at one point as "the endowment of a finite segment of the meaningless infinity of events in the world with meaning and significance from the standpoint of human beings,"⁹ and as "patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols,"¹⁰ and as "a set of symbolic devices for controlling behavior, extrasomatic sources of information."¹¹

Culture also has a political side, sometimes a dark one. Concepts of culture have been used to justify Nazism and apartheid¹² and to support a wide variety of political agendas.¹³

So for the government official who must deal with a request for accommodation of cultural activity or cultural practices of an individual or a group, the word has so many meanings that it really has no meaning--no objective content--at all. It often has overtones, though, of religious practice or racial identity that implicate constitutional considerations. Because those overtones, too, are complex, emotionally charged and commonly misunderstood, the FEIS should use the triggering terms of "culture" and "cultural" only with precise and explanatory language.

The inherent problems with the terms "culture" and "cultural" are aggravated in the DEIS because the terms are sometimes used without specifying whether the reference is to ancient (precontact) Hawaiian society or to the religious or social activities of modern-day individuals or groups. These are very different. Sections 3.1.2, 4.1.1, 4.2.3 and 5.1 of the DEIS also give the impression that the precontact polytheistic religion still predominates among persons of Hawaiian ancestry. Common experience in Hawai'i suggests that this is not true. If NASA or its consultants have reason to believe otherwise, it would be helpful for the DEIS to provide some more specific data as to the numbers of people who share these beliefs and who will be affected by the proposed action.

Western contact brought dramatic, radical change to the Hawaiian islands and Hawaiians were as much agents as victims of these changes. Hawai'i's early kings and chiefs accomplished a near miracle in maintaining their nation's independence while guiding and shaping the chaotic forces which focused on the islands. It was Hawai'i's own native leaders who dispensed with the "old religion" of polytheism and human sacrifice even before the arrival of Christian missionaries in 1820.¹⁴ A generation later, it was Hawai'i's

⁷ Id. at 65.

⁸ Id.

⁹ Id. at 35.

¹⁰ Id. at 58.

¹¹ Id. at 98.

¹² Id. at xii-xiii

¹³ See Jeffrey Tobin, *Cultural Construction and Native Nationalism: Report from the Hawaiian Front*, *Boundary 2* 21:111-133 (Spring 1994); Roger M. Keesing, *Creating the Past: Custom and Identity in the Contemporary Pacific*, *The Contemporary Pacific*, Vol. 1, Nos. 1 & 2, Spring & Fall, 1989 19-42

¹⁴ 1 KUYKENDALL, *THE HAWAIIAN KINGDOM* (1938) pp. 65-70.

own native leaders, drawing upon but not surrendering to their Western advisors, who replaced ancient forms of governance, land management, land ownership and many aspects of economic life with Western models.¹⁵ By the time it passed into history, the Hawaiian kingdom was a constitutional monarchy in the Western style, with a racially mixed legislature, judiciary and Cabinet governing a multi-racial nation which was fully accepted as an equal in Western diplomatic circles and boasted a literate citizenry well-educated in Western as well as Hawaiian ways.¹⁶

One other vital influence on Hawaiian history since Western contact was an early and continued practice of intermarriage by Hawaiians with all the ethnic and racial groups which have made Hawai'i their home over the last two hundred years and more. Intermarriage brought a multitude of cultural influences into the cultures of Hawaiians and new arrivals alike.¹⁷

Indeed, "Native Hawaiians," as a group defined by race or ancestry,¹⁸ cannot fairly be said to share today *any* common language, religion, economic regime, form of self-government or other unique group-identifying features except those of the United States and the State of Hawai'i as a whole; "they" are fully and completely integrated into the larger social and economic life of the state of Hawai'i and the nation. They hold positions of power and respect at all levels of society including business, government and the arts; for example, in the past several years, Hawai'i has had a Native Hawaiian Governor (John Waihee), a Native Hawaiian state supreme court chief justice (William S. Richardson), a U.S. Senator (Daniel Akaka) and numerous state officials and members of the state legislature.

So whatever form or forms the precontact Hawaiian "culture" took before Captain James Cook arrived in 1778, it cannot be said that it persists today as it existed either at Western contact or at any time before that.

There are, of course, specific areas of Hawai'i's modern artistic and governmental life which are associated with Hawaiian history and persons of Hawaiian ancestry, such as hula, chant, taro cultivation and the protection of historic sites. It is no doubt true that some Native Hawaiians, racially defined, engage in some or all of these activities, although as noted above, since "Native Hawaiians" are found throughout the society of the state and nation at all economic, social, educational and occupational levels, their "cultural practices" vary widely. Certainly, the "cultural practices" even of those seeking to recapture the remote past do not include such "practices" of ancient Hawaiian society as the draconian *kapu* system or human sacrifice; these were abandoned at the insistence of the Hawaiian rulers shortly *before* the arrival of Christian missionaries in 1820. Equally important is that fact that persons who are not of Hawaiian ancestry also engage in hula,

¹⁵ See generally 1 KUYKENDALL, THE HAWAIIAN KINGDOM (1938), pp. 227-334; Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1998) 112-117.

¹⁶ See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967).

¹⁷ ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII (2nd Ed. 1989), 33, 38-42.

¹⁸ See the discussion of the term "Native Hawaiian" in the following section of these comments.

chant, taro cultivation and historic preservation and similar activities and on the other hand, many persons of Hawaiian ancestry do not engage in them.

Thus to the extent that there is a set of beliefs, values and practices which might be called "Hawaiian" today, it is not a thing of precontact Hawai'i, but a radically evolved blend of old and new, with the new predominating, and it is ignored by many persons of Hawaiian ancestry and embraced by many who have no Hawaiian ancestry at all.

The DEIS also implies a coherence of belief and attitudes among Native Hawaiians. This is inconsistent with the views of other knowledgeable observers. For example, the following statements by George S. Kanahale, a Hawaiian scholar and businessman, highlight the difficulty of identifying what is and is not "Hawaiian culture" today:

These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.

Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporaneous Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties. In short, they are as diverse in their individual and collective character as any other ethnic population.¹⁹

Mr. Kanahale's observations support the point made above that the "culture" of today's Native Hawaiians is not unique to them, but is fundamentally the "culture" of the State of Hawai'i and the United States. Persons of Hawaiian ancestry do not, as a group or as several groups, exist apart from the larger community of the state and nation.²⁰

¹⁹ George Kanahale, *The New Hawaiians*, 29 SOCIAL PROCESS IN HAWAII 21 (1982),

²⁰ In his introduction to Eleanor Nordyke's comprehensive study of Hawai'i's various ethnic groups (see footnote 17 above), Robert C. Schmitt, Hawai'i's former State Statistician, noted an "erosion in the availability, quality, and meaningfulness of some of our most important [data] series." He observed:

Budget cuts have forced drastic reductions in sample sizes used in the decennial censuses, the HHSP [Hawai'i Health Surveillance Program], and HVB [Hawai'i Visitors Bureau] Basic Data Survey. The 1950 census was the only such effort in the twentieth century to collect comprehensive data on race mixture, and in 1970 the Bureau of the Census deleted the category of "Part Hawaiian," which had appeared in all seventeen official enumerations from 1849 through 1960. As a result, the 1970 census was comparable neither to its predecessors nor to the birth, death, marriage, divorce, and related statistics regularly compiled by various state agencies. Further definitional changes occurred in 1980, with still others in prospect for 1990.

NASA should therefore conclude, and the FEIS should reflect, that as to "Native Hawaiians," "they" are "us"--Americans, like all the other varied Americans in the state and the nation, mostly with mixed racial or ethnic backgrounds and sharing in the freedom and diversity of lifestyles guaranteed under the U.S. Constitution. NASA should find, and the FEIS should reflect, consistent with the U.S. Supreme Court's decision in *Adarand*

These cutbacks in statistical programs occurred at the very time that Hawai'i's population dynamics were becoming ever more complex, further complicating a situation that was already badly tangled twenty years earlier. **Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820's, but prior to World War II most of these unions and their issue could be conveniently classified as "Part Hawaiian."** For the past half century, however, all groups have participated in such heterogeneous mating. As a consequence, according the State Department of Health, 46.5 percent of the resident marriages occurring in Hawai'i in 1986 were interracial, and 60.6 percent of the babies born to civilian couples of known race that year were of mixed race. Based on tabulations from the HHSP, fully 31.2 percent of all persons living in households were of mixed parentage--19.9 percent Part Hawaiian and 11.3 percent of other origins. Yet neither the 1970 nor 1980 censuses provided any indication of such developments.

These statistical gaps, in combination with the growing complexity of demographic events, have seriously handicapped Hawai'i's demographers. **Even such a fundamental (and ostensibly simple) question as "Which groups are growing, which are declining, and by how much?" can no longer be answered, even in the most approximate terms: shifting and often arbitrary racial definitions have rendered decennial census tabulations almost useless, and annual data from the HHSP, now our sole source of population estimates by detailed race, have been marred by high sampling variation and unexplainable (and sometimes unreasonable) fluctuations in group totals.** Calculation of accurate birth, death, and other rates has consequently become exceedingly problematic. These difficulties are especially daunting in a work like the present one, which relies to an uncommon degree on accurate, consistent, and meaningful ethnic statistics. It is a tribute to Eleanor Nordyke's skill and perseverance that, in the face of such intractable underlying data, she has been able to fashion any kind of reasonable and defensible conclusions.

The importance of this analysis is underscored by the irresistible impact of the changes now sweeping Hawai'i. **Not only are the state's once-distinctive ethnic groups--under the influence of pervasive intermarriage--turning into a racial chop suey, but even those maintaining a fair degree of endogamy are becoming indistinguishable from their neighbors, as their third, fourth, and fifth generations succumb to cultural "haolefication."** These trends, plus the growing irrelevance of ethnic statistics, suggests that this may be our last chance to capture the significant differences among Hawai'i's people. When these differences can no longer be charted, either because the population has become biologically and culturally homogenized or because government no longer collects meaningful data, Hawai'i's value as a social laboratory will vanish.

Robert C. Schmitt, *Introduction to ELEANOR NORDYKE, THE PEOPLING OF HAWAI'I* xvi-xvii (1989). (Bolding added.)

Constructors v. Federico Pena,²¹ that each person of Hawaiian ancestry deserves the same respectful consideration of requests for accommodation of personal religious, social and aesthetic preferences, as any American of any race--but not more.

Native Hawaiian

It must be noted that all the definitions of "Native Hawaiian" in Federal law (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act and other acts pertinent to this EIS) and the definitions of "Hawaiian" and "native Hawaiian" in the law of the state of Hawai'i are based on racial classifications, or as the U. S. Supreme Court put it in its decision in *Rice v. Cayetano*²², ancestry used as a proxy for race.

The consequence of this is most apparent when a Federal or state agency considers giving special privileges or benefits to persons of Hawaiian ancestry based on that ancestry. The Supreme Court has not wholly prohibited race-conscious legislation, but it has accepted it only reluctantly, and only in circumstances of grave necessity. Such legislation is subject to "strict scrutiny;" that is, it must be justified by a "compelling interest" and be "narrowly tailored" in duration and effect to achieve its purpose.²³

Beyond the issue of race, affording special privileges to any person or entity based solely on the duration of residence or the accident of birth raises constitutional issues of due process, the privileges and immunities clause (*see Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518 (1999); *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309 (1982)), and the anti-nobility clauses (see, e.g., Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense And Titles Of Nobility*, 8 S. Cal. Interdisciplinary L.J. 577, 609 (1999) ("We should remember that the nobility clauses were adopted because the founders were concerned not only about the bestowal of titles but also about an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank, and political, cultural and economic privilege.")). The DEIS plainly offers special consideration only to one "culture"--one inextricably entwined with a racial classification. Unequal treatment based on ancestry risks constitutional challenge, and on a more fundamental human level, draws a stark racial line between the various groups with an interest in Mauna Kea.

At the end of these comments I have appended a political cartoon by Daryl Cagle. It deserves careful consideration before any decision is taken which would allocate governmental favor on the basis of race or ancestry.

²¹ 515 U.S. 200 (1995).

²² 528 U.S. 495 (2000).

²³ *See Adarand Constructors v. Federico Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995)

Oral History

It would appear that the descriptions of modern-day "Native Hawaiian culture" in the DEIS are drawn largely, and perhaps entirely, from the oral histories collected by Mr. Kepa Maly. The DEIS does not document the reliability of this information as a basis for decision-making by NASA or any other federal or state agency. It should be noted that Mr. Maly is listed on the Malama Mauna Kea web site²⁴ as a member of the Hawaiian Culture Committee of that organization. That site's description makes clear that the Committee is an advocacy organization for "the Hawaiian culture" as something distinct from, and perhaps opposed to, Western scientific culture.²⁵ The DEIS should disclose this and explain NASA's determination that Mr. Maly's role as an advocate presents no conflict with the objectivity which must necessarily underlie his role in the gathering, evaluation and presentation of cultural resource information for the DEIS.

There are other reasons to question oral histories. One of the most compelling comes from one of Hawai'i's earliest native historians, David Malo, who lived from about 1793 until 1853 and whose work "Hawaiian Antiquities"²⁶ is one of the very few contemporary records of Hawaiian society just before and after the arrival of Captain Cook in 1778. In the very first chapter of that work, Malo offers the following observations on the reliability of oral tradition:

4. Memory was the only means possessed by our ancestors of preserving historical knowledge; it served them in place of books and chronicles.
5. No doubt this fact explains the vagueness and uncertainty of the more ancient traditions, of which some are handed down correctly, but the great mass incorrectly. It is likely there is greater accuracy and less error in the traditions of a later date.
6. Faults of memory in part explain the contradictions that appear in the ancient traditions, for we know by experience that "the heart is the most deceitful of all things."
7. When traditions are carried in the memory it leads to contradictory versions. One set think the way they heard the story is the true version; another set thinks theirs is the truth; a third set very likely purposely falsify. Thus it comes to pass that the traditions are split up and made worthless.
8. The same cause no doubt produced contradictions in the genealogies (moo-kauhau). The initial ancestor in one genealogy differed from that in another, the advocate of each genealogy claiming his own version to be the correct one. This

²⁴ http://www.malamamaunakea.org/site/hawaiianculture.php?article_id=14

²⁵ "The Hawaiian Culture committee has defined its objectives to include: developing Hawaiian programs that educate and preserve the Hawaiian culture; making Hawaiian program recommendations to the MKMB [the University of Hawai'i Hilo Mauna Kea Management Board] and assisting in implementation; integrating the foundation of Hawaiian culture into scientific education; and establishing a marriage between Hawaiian and Western scientific culture. (Philosophically, this committee agrees that since Hawaiian culture forms the foundation of these islands, Western culture should assimilate into Hawaiian culture.)"

²⁶ David Malo, *Hawaiian Antiquities* (Nathaniel Emerson, trans., 1951)

cause also operated in the same way in producing contradictions in the oral traditions; one party received the tradition in one way, another party received it in another way.

9. In regard to the worship of the gods, different people had different gods, and both the worship and the articles tabued differed the one from the other. Each man did what seemed to him right, thus causing disagreement and confusion..

10. The genealogies have many separate lines, each one different from the other, but running into each other. Some of the genealogies begin with Kumu-lipo as the initial point; others with Pali-ku; others with Lolo; still others with Pu-anue; and others with Ka-po-hihi. This is not like the genealogy from Adam, which is one unbroken line without any stems.²⁷

This candid discussion of the fallibility of oral tradition casts doubt on the descriptions of "Native Hawaiian culture" in Sections 3.1.2, 4.1.1, 4.2.3 and 5.1 of the DEIS, which offer a picture of a single system of beliefs, practices and attitudes uniformly accepted throughout the range of persons of Hawaiian ancestry living today. According to Malo, the beliefs, practices and traditions of persons of Hawaiian ancestry varied widely even before Western contact.²⁸ It is hardly likely that there is any greater uniformity of beliefs, practices and attitudes today, not only because of the vastly greater range of lifestyles and attitudes among persons of Hawaiian ancestry²⁹ but because of the many other systems of values and beliefs represented in Hawai'i's contemporary society.³⁰

Similar doubt arises when the DEIS is examined in light of the work of such academics as Jocelyn S. Linnekin³¹ and Roger M. Keesing,³² who explain how tradition and culture are not static but are redefined and even reinvented by each generation to meet social, political and other needs. The FEIS should explain how and why its static and simplistic view of "Native Hawaiian culture" is valid, or it should abandon that view altogether.

²⁷ Id. at 1-2.

²⁸ Malo's observations are supported by the descriptions of Hawaiian legends in Martha Beckwith's study of Hawaiian mythology which reflect, for example, the variations in the genealogies of the Hawaiian chiefly families. MARTHA BECKWITH, HAWAIIAN MYTHOLOGY 293-313 (1970).

²⁹ See George Kanahale's description of modern Hawaiians at footnote 19 above.

³⁰ See generally LAWRENCE FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961) and ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII (2nd Ed. 1989)

³¹ See, e.g., Jocelyn S. Linnekin, *Defining Tradition: Variations on the Hawaiian Identity*, 10 American Ethnologist No. 2, 241-252 (May 1983); JOCELYN LINNEKIN, CHILDREN OF THE LAND: EXCHANGE AND STATUS IN A HAWAIIAN COMMUNITY (1985).

³² Roger M. Keesing, *Creating the Past: Custom and Identity in the Contemporary Pacific*, 1 THE CONTEMPORARY PACIFIC 19-42 (Vol. 1, Nos. 1 & 2, Spring & Fall, 1989)

Conclusion

The balancing of social forces which NASA and others must undertake in the course of developing Mauna Kea is a difficult task. It demands the best possible analysis of the legitimate claims of the various interested parties and individuals, and the most sensitive appreciation of the human desires and emotions involved. The DEIS description of the complex social and political tensions associated with "cultural resources" falls short of providing the thoughtful, comprehensive and balanced scholarship which is required. That deficiency should be corrected in the FEIS.

I enclose an item which may be of interest. It is an article by Scott Whitney from the September 2001 Honolulu Magazine. It illustrates in popular terms what Roger Keesing and Jocelyn Linnekin seem to be saying in a scholarly context. It concerns the term "ohana." It is a useful reminder of the value of disciplined skepticism.

Aloha,

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