

LATE TESTIMONY



UNIVERSITY OF HAWAII SYSTEM Legislative Testimony

Testimony Presented Before the
House Committee on Higher Education
February 3, 2009 at 2:00pm
by
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HB 1174 RELATING TO THE UNIVERSITY OF HAWAII

Chair Chang, Vice Chair Nakashima and Members of the Committee:

There is no doubt that Mauna Kea, particularly the summit region, is a special place. Mauna Kea contains an alpine environment in a tropical region, which is rare on the planet; it is one of the most culturally significant and archaeologically important places in the Hawaiian Islands; and it is recognized globally as a premier center for astronomical research. Mauna Kea is visited by those exercising traditional cultural practices, researchers in a variety of disciplines, astronomers, recreational users, educators, tourists and island residents. While each comes to visit, enjoy, and contemplate Mauna Kea in their own way, many do not realize how they, individually and collectively, may impact the mountain. The University is seeking express rule-making authority for the purpose of enabling the University to better manage these uses and activities and protect Mauna Kea's unique cultural and natural resources.

It is important to understand the land classification system and agencies responsible for managing the lands to protect the resources. For example, the upper region of Mauna Kea is zoned conservation district lands and is divided into three types of land designations. Beginning at the summit is the Mauna Kea Science Reserve (11,288 acres) and the Mauna Kea Ice Age Natural Area Reserve (3,893.5 acres). Surrounding these two parcels is the Mauna Kea Forest Reserve (52,500 acres). The Mauna Kea Science Reserve was originally classified Forest Reserve lands. In 1968 the Science Reserve was established when it was removed from the Forest Reserve by the Board of Land and Natural Resources (Land Board) and leased to the University for 65 years to be used as a scientific complex.

The Department of Land and Natural Resources (DLNR) is mandated to protect the resources on its lands and has adopted administrative rules governing the use of lands within both the Forest Reserve and the Natural Area Reserves System. There have not, however, been any administrative rules adopted to specifically cover uses within the Mauna Kea Science Reserve.

The University understands the need and accepts its responsibility to protect the resources on the lands it uses on Mauna Kea, including lands comprising the following: (1) the Mauna Kea Science Reserve, (2) Hale Pohaku, and (3) the Mauna Kea Access Road above Hale Pohaku. While the University believes it has the implied authority to promulgate rules, it nevertheless feels there is a need to eliminate any ambiguity and uncertainty regarding rule making and seeks express statutory authority to adopt administrative rules. The authority to adopt administrative rules is expected to help the University more effectively and efficiently carry out its management obligations under the Land Board's lease of the Mauna Kea lands to the University. The University has completed and submitted to the DLNR a Mauna Kea Comprehensive Management Plan (CMP) that is designed to protect and preserve the natural and cultural resources on and within the University's Mauna Kea lands. The University will be seeking the Land Board's approval for the CMP, which will require the University to carry out a variety of oversight and management functions and responsibilities. Having rule making authority will enable the University to more efficiently carry out these CMP functions and responsibilities.

Moreover, granting the University the authority to assess and collect administrative fines should enable the University to more effectively enforce such rules. In adopting such rules, the University will be required to address and resolve any conflicts with other applicable statutes or rules.

This bill also proposes to establish a Mauna Kea management special fund. This is viewed as an affirmation of the University's commitment to improving the conditions on Mauna Kea. This fund would afford the University the necessary flexibility to better carry out its management responsibilities, particularly under the CMP. The CMP clearly articulates an overall management strategy, with sufficient specific component plans, that is designed to protect Mauna Kea's unique cultural and natural resources. The CMP was developed using an integrated approach drawing upon the Hawaiian approach to managing natural and cultural resources, as well as contemporary science based management tools. The CMP also applies an adaptive management practice, which is a systematic process for continually improving management policies and practices for resource protection by learning from outcomes of past and current management activities. Just as the CMP is designed to continually evolve and improve, the University's ability to fund any measures or activities to implement such improvements needs to be assured and preserved. Having such a fund will help provide this assurance and protection. A special fund will also assist the University in accounting for and keeping track of the benefits and costs relating specifically to Mauna Kea.

Without a separate special fund dedicated to Mauna Kea, the statutes establishing one or more of the University's special or revolving funds (such as the real property and facilities fund established pursuant to HRS section 304A-2274) would need to be amended so that funds arising from all Mauna Kea related activities could be deposited and expended from the fund. Creating such a niche in an existing fund used by the

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entire University system (and not just for Mauna Kea) could pose some challenges. Part of such an amendment to other statutes would need to include the ability of the University to deposit and expend monies collected by the University as administrative fines.

The University supports passage of this bill. Thank you for your thoughtful consideration.



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**H.B. 1174 Mauna Kea
Room 309, 2:00 pm
February 3, 2009**

Aloha Chairman Chang and members of the House Committee on Higher Education,

KAHEA strongly opposes the passage of HB 1174 to grant the University of Hawaii authority over the ecologically significant and culturally sacred lands of Mauna Kea. The University must not be granted wider authority over Mauna Kea because:

- Mauna Kea lands leased by the University are "ceded" lands. Granting this authority to the University will violate the Supreme Court's ruling in *OHA v. HCDCH*.
- Mauna Kea lands are public trust lands that must be managed by the landlord (Board of Land and Natural Resources), not the University, who is a mere lease-holder. State law requires that public trust lands be leased at fair market value for the benefit of the people of Hawaii, not the lease-holder.
- The University's activities on Mauna Kea have exploited, destroyed, and desecrated irreplaceable natural and cultural resources on the summit.
- The University will use this authority to limit public access to the summit, regulate when and how Hawaiians worship on the summit, and expand telescope construction on the summit.

HB 1174 seeks to transferred ceded lands out of the public lands trust

With this bill, the Lingle Administration is seeking to transfer ceded land protected by the public lands trust from the state Department of Land and Natural Resources to the University of Hawaii. This is exact same type of land transferred deemed illegal by the Hawaii Supreme Court in January 2008 in *OHA v. HCDCH*.

The "Mauna Kea lands" identified in this bill are all ceded lands. Ceded lands are the lands improperly taken from the Hawaiian Kingdom during the overthrow of 1893 and transferred to the State of Hawaii at statehood on the condition that these lands were held in trust. "As a condition of its admission into the Union, the State of Hawaii agreed to hold certain lands granted to the State by the United States in a public land trust for five purposes." (*OHA v. HCDCH*, citing Admission Act of March 18, 1959).

The Hawaii Supreme Court held in *OHA v. HCDCH* that, because ceded lands are held in trust for the Hawaiian people and because the state and federal governments have both expressed a commitment to reconcile the injustice of the overthrow, "ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people. Without an



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injunction, the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will, as discussed more fully infra, undoubtedly have a negative impact on the contemplated reconciliation efforts." (OHA v. HCDCH)

According to current state law, ceded lands are managed and administered by the Department of Land and Natural Resources. See, HRS sec. 171-3. This is the exact same type of agency-to-agency transferred deemed illegal by the Supreme Court in OHA v. HCDCH and therefore should not be allowed by the state Legislature.

As required by HRS sec. 171-3, management of ceded lands is the responsibility of the state's land manager, the Department of Land and Natural Resources (DLNR). The DLNR is the landlord and is responsible for managing and overseeing all ceded lands and all conservation lands in the State. Yet, this bill proposes to transfer the responsibility of managing the ceded lands of Mauna Kea from DLNR to the University by granting the University "authority to manage and control public activities on the Mauna Kea lands." To so, however, would create the same type of agency-to-agency transfer deemed illegal by the Supreme Court in OHA v. HCDCH. It would also violate the prohibition against the "wholesale delegation" of agency authority to a third party, as articulated in Kapa`akai v. LUC.

Thus the Legislature cannot transfer the responsibility for the ceded and conservation lands of Mauna Kea to a third party, especially a developer as such the University, without violating the law.

The University profits from Mauna Kea at the public's expense

For 30 years foreign countries and corporations using Mauna Kea have been allowed to paid only \$1.00 per year in lease rent to the State. The University and the foreign entities that own and operate telescopes atop Mauna Kea have failed to pay "fair market" rent to the State, as required by HRS sec. 171. This means state taxpayers have been subsidizing foreign government investments on our public lands.

The University, as well as the foreign countries and corporations on Mauna Kea, owe the state taxpayers 30 years of back-rent for violating HRS 171. Unfortunately, HB1174 does not require compliance with state law, back-rent or bring relief to the taxpayers during this economic crisis. Surprisingly, during this time of debilitating economic crisis, this is instead proposing to establish a special fund that would allow the University to pocket all of the profits from the use of Mauna Kea lands, bypassing the general fund altogether. The University is literally seeking the Legislature's approval to rob the people of Hawaii.

For 30 years, the University has failed to pay the fair market rent to the State for its subleases to foreign countries and corporations that own telescopes atop Mauna Kea, as required by HRS



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sec. 171. This means the University owes the people of Hawaii back rent for the numerous telescope and support structures on the sacred summit.

Unfortunately, the University has never accounted for the profits it has gained from its destructive use of Mauna Kea. According to a report to the UH Board of Regents in 1994, however, the University enjoyed at least \$60 million annually in benefits from its use of Mauna Kea. In 2001, the University admitted to the Legislature that the work conducted on Mauna Kea earned \$8 million a year just from the patent-lease contracts with defense contractors like Raytheon.

Surprisingly, during this time of debilitating economic crisis, the University is not paying this back-rent to the State. Instead in this bill it is proposing to establish a special fund that would allow it to pocket all of the profits from the use of Mauna Kea lands, bypassing the general fund altogether. The University is literally seeking the Legislature's approval to rob the people of Hawaii.

The University desecrates and destroys Mauna Kea

Multiple reports, audits, and lawsuits have confirmed that the University's telescope activities have violated the law and continue to destroy the natural and cultural resources of Mauna Kea. Mauna Kea lands are designated conservation and water shed lands for the purpose of conservation of cultural and natural resources, not telescope construction.

Mauna Kea's Hawaiian alpine desert is unlike any other place in the world. It is home to many Hawaiian endemic species - some are found only on Mauna Kea! This includes: 11 species of insects, such as the Wekiu bug; endangered birds, Palila (Hawaiian Honeycreeper) and Uau (Hawaiian Petrel); and the rare plant, Ahinahina (Mauna Kea Silversword). The construction of so many telescopes in such a fragile environment destroys rare habitat and speeds the introduction of invasive species. The Wekiu bug, which lives only on the high elevation cinder cones of Mauna Kea, has lost 90% of its habitat to telescope development.

Most recently, the Third circuit court affirmed that DLNR rules and regulations do require DLNR to complete a comprehensive management plan for the conservation of the entire summit of Mauna Kea. This ruling followed a court-ordered federal environmental impact statement (EIS) in 2005, which confirmed that the impacts of the telescope industry on the delicate cultural and natural resources of Mauna Kea have been "substantial, adverse and significant" all conditions that generally bar the Board of Land and Natural Resources from issuing any permits for construction in a conservation district.

Furthermore, in multiple reviews of the University's activities on the summit, the Hawaii State Auditor found that the University's management and the DLNR's oversight of Mauna Kea has been "inadequate to ensure the protection of natural resources, and neglected ...the cultural value of Mauna Kea." Their report further stated that the University's Institute for Astronomy

HO'OKAHU NO KA 'ĀINA A ME NA KĀNAKA

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“focused primarily on the development of Mauna Kea and tied the benefits gained to its research program,” and that its focus on telescope construction has been “at the expense of neglecting the site’s natural resources.”

The University seeks to limit public access and expand destructive activities

Through this proposed legislation and its own version of a comprehensive management plan, the University is seeking to undermine the management of the ceded lands and conservation district on Mauna Kea, while consolidating its control over the summit. The primary purpose of managing the conservation district on the sacred summit of Mauna Kea must be the protection of the natural and cultural resources found on these ceded lands.

Unfortunately, as outlined in its management plan, the University will not be protecting the natural and cultural resources of the mountain. The plan does not control telescope construction in any way. Instead, it proposes to limit public access, charge user fees, and dictate whether and how Hawaiians worship on the summit. The proposal includes blocking the only road to the summit; this road is a public road built with tax-payer funds. Given the University's track record of harm and desecration on the summit, the Legislature should not grant the University any authority to manage or regulate the sacred summit of Mauna Kea.

Mahalo,



Marti Townsend
Program Director

LATE TESTIMONY



HB 1174 RELATING TO THE UNIVERSITY OF HAWAII House Committee on Higher Education

February 3, 2009
Room: 309

2:00 p.m.

The Office of Hawaiian Affairs (OHA) opposes HB 1174, which would transfer to the University of Hawai'i the authority to adopt administrative rules for the management of Mauna Kea. It should be noted that the University of Hawai'i does not hold the fee-simple title to the Mauna Kea lands. The university only leases these lands from the Department of Land and Natural Resources (DLNR). Contrary to what HB1174 indicates, the university does not and should not have the authority to adopt administrative rules for lands that it leases. This bill would set a dangerous precedent, blurring the boundaries between lessor and lessee, and confusing the responsibilities of the different agencies of our state government.

Mauna Kea falls within the state's conservation district. While the university's management of Mauna Kea may have improved recently, it has historically mismanaged the mountain, which is sacred to Native Hawaiians. The university also does not have the expertise to manage this important natural and cultural resource, and OHA is concerned that the bill would remove the oversight responsibilities for Mauna Kea from the DLNR (particularly the Office of Conservation and Coastal Lands), an agency with a wealth of resource protection experience.

OHA respectfully reminds the Legislature that these are Ceded Lands. The university only pays DLNR \$1 in lease rent for the entire mountain top. While this is accepted practice among state agencies, it is perhaps more notable that the university currently does not charge the telescope operators atop Mauna Kea fair market value for use of the mountain, but instead accepts use of those facilities by academics as payment.

Thus, the use of this invaluable, sacred, public trust land and the "improvements" upon it has yet to be valued by or for anyone but the university. Education is only one of the five mandated uses of public trust, ceded lands. This bill would further deprive the DLNR and OHA of critical revenue that should be used to fulfill our respective mandates. OHA is concerned that if this bill passes, the university would be granted more

authority to continue to charge below market value for use of the sacred mountain, to the detriment of Native Hawaiians and the broader public, and only to their own benefit.

Therefore, OHA urges the Committee to HOLD HB 1174. Thank you for the opportunity to testify.