



### HCR41/HR33

## CONVENING A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR A GOVERNANCE AND MANAGEMENT STRUCTURE FOR MAUNAKEA

Ke Kōmike Hale o ka Wai a me ka ‘Āina  
Ke Kōmike Hale o ka Ho‘okolokolo a me ke Kuleana Hawai‘i

Pepeluali 25, 2021

9:00 a.m.

Lumi 430/325

The Ad Hoc Committee on Maunakea of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** regarding HCR41/HR33, which seeks to convene a working group to develop recommendations for a new governance and management structure for Maunakea that collaboratively engages stakeholders, including the Native Hawaiian community, by building on the findings of the Maunakea Comprehensive Management Plan (CMP) “independent evaluation” report completed on December 31, 2020 by Ku‘iwalu. OHA expresses (1) its appreciation for the reflection of longstanding concerns regarding mismanagement and mistrust in the University of Hawai‘i’s (UH’s) control over this singularly sacred mountain; (2) ongoing concerns regarding the objectivity of the CMP “independent evaluation” report, which may counsel against its use as a starting point for the Task Force’s work; and (3) concerns and suggestions regarding the composition of the proposed working group.

First, OHA emphasizes that Maunakea’s lands, resources, and sites are of significant value to Native Hawaiians. Maunakea serves as a physical connection to Native Hawaiian ancestral understandings of creation, and sacred akua (divine ancestral energies) are known to inhabit the remote summit, physically manifesting as various pu‘u or features such as Lake Waiau. Responsible and culturally-sensitive management to protect this sacred mauna is accordingly of great concern to the Native Hawaiian community, and for several years OHA has repeatedly expressed the need for meaningful consultation with Native Hawaiians in the management of this sacred space and to remedy the long history of mistrust and poor stewardship arising from UH’s tenancy of the mountain. **OHA therefore appreciates that this resolution recognizes the need for better management of the mauna, as well as the fact that genuine Native Hawaiian consultation has been significantly lacking; OHA also agrees that the “mismanagement, mistrust, and polarization” arising from UH’s actions and inaction must be reconciled.**

Furthermore, OHA **appreciates** the resolution’s recognition of the fiduciary obligations held by the state as a trustee of the lands on Maunakea. OHA notes that both the public trust doctrine and the Public Land Trust impose such obligations on the State, to protect, maintain, and regulate the use of its trust lands. OHA also reiterates that **the Maunakea lands at issue are also part of the “ceded” lands corpus,<sup>i</sup> and that the State**

also holds moral obligations of the highest responsibility and trust when dealing with Maunakea, as “ceded” lands to which Native Hawaiians maintain unrelinquished claims.

**Second, OHA highlights the existence of a potential conflict of interest in Ku‘iwalu’s role as an “independent” evaluator for the CMP that Ku‘iwalu itself helped to create.** As such, OHA questions whether this “independent evaluation” by Ku‘iwalu is indeed a good starting point for the proposed working group to base its recommendations on, where an unbiased and fair evaluation of the CMP is questionable; OHA notes that there may be other management and governance models based on international and indigenous perspectives that might serve as a better foundation for the group’s work. For background, on August 14, 2020, in response to a May 15, 2020 letter from Ku‘iwalu, OHA submitted a detailed letter expressing concerns with Ku‘iwalu’s role in conducting an evaluation of the CMP and reiterating various comments OHA has made over the years concerning UH’s mismanagement of Maunakea, including the inadequacies of both the CMP as well as its implementation. **For more of OHA’s concerns regarding this “independent evaluation” report, please find attached OHA’s same August 14, 2020 letter and its attachments, originally submitted to Ku‘iwalu, for your review.**<sup>ii</sup>

Third, OHA expresses concerns and offers recommendations regarding the proposed composition of the working group under HCR41/HR33. OHA **appreciates** that one representative from the Office of Hawaiian Affairs is included in the composition of the working group as well as the seven representatives to be nominated by “Native Hawaiian groups, organizations, or communities.” However, in light of the recognized historical neglect of Native Hawaiian concerns over Maunakea, **OHA respectfully submits that the working group should consist of more than just a bare majority of Native Hawaiian voices, and should specifically include Native Hawaiians who have demonstrated kuleana regarding Maunakea,** such as lineal descendants and cultural practitioners from Hawai‘i Island who have sought to ensure better management and care of this sacred place.

OHA also notes that a supermajority of the members of this working group (11 out of 15) would be appointed by a single individual. Particularly given the mistrust and polarization over Maunakea’s management, as specifically recognized in this resolution, ensuring that working group members are appointed by a more diverse range of individuals may be necessary to ensure that its conclusions and recommendations are not perceived as biased or unduly influenced. **Minimally, OHA recommends that the Native Hawaiian representatives be appointed by independent groups, such as the Royal Order of Kamehameha, dedicated to addressing Native Hawaiian community concerns.**

As always, OHA appreciates being included and heeded in any discussions regarding our sacred and beloved Maunakea, and urges the Committees to seriously consider our concerns and adopt our suggestions if HCR41/HR33 is moved forward.

Mahalo nui loa for the opportunity to testify on this important matter.

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<sup>i</sup> See generally Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, Office of Hawaiian Affairs vs. State of Hawai'i, et al., Civ. No. 17-1-1823-11 (JPC) (1st Cir. Ct.), filed Nov. 7, 2017, available at <https://www.oha.org/maunakea/>.

<sup>ii</sup> To summarize, the four main points from OHA's attached letter to Ku'iwalu are as follows:

1. Maunakea's lands, resources, and sites are of the utmost importance traditionally, culturally, and spiritually to Native Hawaiians; abstractly the mauna is a sacred ancestral connection to our highest forms of divine energies, and concretely Maunakea remains a critical part of the "ceded" lands trust to which Native Hawaiians maintain unrelinquished claims; the mauna is also subject to the Public Land Trust that the State of Hawai'i, as trustee, must protect and preserve;
2. OHA highlights the potential conflict of interest in Ku'iwalu's role as an "independent" contractor to fairly and impartially evaluate UH's management and implementation of the CMP for Maunakea, considering that Ku'iwalu itself developed the same CMP;
3. Since its inception in 2009, the CMP itself has suffered and continues to suffer from serious inadequacies, which OHA has identified and communicated over the past decade, largely to no avail;
4. OHA reiterates its concerns over UH's failure to implement various CMP action items – 54 of particular concern, with at least 31 of these lacking adequate implementation, as well as UH's excessively untimely adoption of the administrative rules deemed necessary for such implementation (11 years from legislative approval).



**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
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HONOLULU, HAWAII 96817

August 14, 2020

Dawn N.S. Chang, Esq.  
Principal, Ku'iwalu  
P.O. Box 6280  
Kāne'ohe, Hawai'i 96744

Re: Ku'iwalu 2020 Evaluation

Aloha pumehana e Ms. Chang,

I write to you on behalf of the Administration of the Office of Hawaiian Affairs (OHA), providing OHA's response to your letter to Board of Trustees Chairperson Colette Machado dated May 15, 2020, introducing Ku'iwalu as the consultant hired by the Department of Land and Natural Resources (DLNR) to prepare an "independent evaluation" of whether Maunakea "is being effectively managed" by the University of Hawai'i (UH), including through the gathering of community input on the implementation of the Comprehensive Management Plan (CMP) for Maunakea. As detailed below, OHA does express concerns with Ku'iwalu's role in this evaluation, and reiterates comments it has made throughout the years regarding ongoing inadequacies in the CMP as well as in its implementation. **Please note that OHA is also in receipt of your letter to our Board of Trustees Chairperson dated July 23, 2020; however, this letter will constitute OHA's formal and only response to Ku'iwalu's evaluation.** Mahalo for your attention and consultation with OHA on these important issues affecting the Native Hawaiian community and with others who have stepped up in recent months to defend the sacredness of Maunakea from UH's continued mismanagement.

As an initial matter, OHA emphasizes that Maunakea's lands, resources, and sites are of singular cultural value and significance to Native Hawaiians. Maunakea is considered the first born child of earth-mother Papa and sky-father Wākea, the progenitors of all Native Hawaiians, and thus the mauna serves as a physical connection to ancestral understandings of creation. Given the sacredness of this area, akua (divine ancestral energies) are known to inhabit the remote summit

of Maunakea and physically manifest as various pu‘u or features such as Lake Waiau. The appropriate management protection of such a sacred place is accordingly a matter of great concern to many in the Native Hawaiian community.

Furthermore, OHA reiterates that the Maunakea lands at issue are part of the “ceded” lands trust that are also subject to the Public Land Trust.<sup>1</sup> Accordingly, the State of Hawai‘i holds moral obligations of the highest responsibility and trust when dealing with Maunakea, as both “ceded” lands, to which Native Hawaiians maintain unrelinquished claims, and as Public Land Trust lands, which the Hawai‘i State Constitution mandates must be held as “a public trust for native Hawaiians and the general public.”<sup>2</sup>

The following comments should therefore be considered in conjunction with the great cultural significance of Maunakea to the Native Hawaiian community, as well as with the specific fiduciary obligations held by the State in its management and administration of Maunakea’s lands and its natural and cultural environment.

First, **OHA questions whether there may be a potential for conflict in Ku‘iwalu’s role as an “independent” evaluator of Maunakea’s management and UH’s implementation of the CMP, given that Ku‘iwalu itself developed the CMP.** As countless community stakeholders including OHA have made clear, the CMP itself does not fully address the stewardship needs of Maunakea after over 50 years of blatant mismanagement by UH. Being that Ku‘iwalu prepared the original 2009 CMP and its sub-plans for UH, **Ku‘iwalu may have an inherent incentive to evaluate UH’s management actions and implementation of the CMP in a more favorable light, to promote the perception that the CMP is adequate.** As such, Ku‘iwalu should seek out ways to ensure that any possible bias in its findings can be counteracted and checked to mitigate concerns regarding potential conflict in its evaluation role, and to ensure a fair and objective analysis of Maunakea’s management; in any case, it is likely that Ku‘iwalu’s significant role in developing the CMP may fundamentally undermine the credibility and integrity of this current independent evaluation.

Second, **OHA highlights ongoing issues with the adequacy of the CMP itself, which it has identified over the past decade.** Notably, OHA has commented on the plan’s significant shortcomings since its inception in 2009,<sup>3</sup> including:

1. The CMP does not adequately address future observatory development, which falls under the definition of “land use” under Hawai‘i Administrative Rules (HAR) § 13-5-2;

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<sup>1</sup> See generally Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, *Office of Hawaiian Affairs vs. State of Hawai‘i, et al.*, Civ. No. 17-1-1823-11 (JPC) (1<sup>st</sup> Cir. Ct.), filed Nov. 7, 2017, available at <https://www.oha.org/maunakea/>.

<sup>2</sup> Haw. Const. art. XII, § 4.

<sup>3</sup> For further details on OHA’s concerns with the CMP, please refer to attached past letters and correspondences.

2. The management authority of the CMP between the DLNR and UH is muddled throughout the document, causing critical boundaries between lessor and lessee to be completely blurred;
3. The plan lacks any analysis of the impact proposed projects will have on current and future traditional cultural properties, as well as the effects of projects on the spiritual nature and significance of the historic district to Native Hawaiians;
4. Despite OHA's requests and testimonies, Kahu Kū Mauna is not explicitly required to consult with a wide range of Native Hawaiians on management actions pertaining to offerings on shrines, access to burial sites, ancient shrine visitation and use, construction and use of new shrines, scattering and burial of cremated iwi kūpuna, and the stacking of rocks;
5. The CMP's sub plans, such as the Cultural Resources Management Plan (CRMP), lack clarification as to how they will undergo environmental review;
6. The planning strategy of assigning UH Hilo's Office of Mauna Kea Management (OMKM) rangers to monitor Conservation District Use Permit (CDUP) compliance is problematic because as landowner, the DLNR should be the entity responsible for ensuring compliance of its own rules;
7. The CMP does not recognize that the BLNR as landowner has final approval authority for future projects in the UH Management Areas;
8. The decommissioning of telescopes is left up to sub-lessees to determine – this decision should be made by the DLNR as landowner and UH because of its expertise with observatories;
9. The CMP attempts to clearly delineate between traditional and contemporary Native Hawaiian practices which is offensive as the Native Hawaiian culture is a living, breathing, constantly evolving culture with both traditional and contemporary practices;
10. There is no process for replacing all cesspools on the mauna with new wastewater systems;
11. The vast majority of the actions in the CMP lack necessary details including timetables and review or monitoring processes; and
12. The relationship of the CMP and its subplans with the other management plans developed for Maunakea, including the soon-to-be-expired 2000 Mauna Kea Science Reserve Master Plan (which the CMP "does not replace") and 1995 Mauna Kea Management Plan, remains unclear with regards to whether and what provisions of each plan should be considered applicable to the management and use of Maunakea.

As it has not been updated since its original adoption, many if not all of these concerns regarding the inadequacy of the CMP continue to remain. **OHA urges Ku'iwalu to review the attached letters and complaint outlining OHA's concerns over the adequacy of the CMP, as part of its current evaluation of Maunakea's management.**

Third, **OHA reiterates its concerns over UH's failure to implement various CMP action items** as well as the excessive time it took UH to adopt administrative rules deemed necessary for such implementation. Notably, even after the adoption of administrative rules, and despite OHA's continued attempts to ensure that the rules addressed its concerns and comments, the rules as adopted have nonetheless failed to implement critical CMP actions. OHA further notes the shortcomings in policies adopted by the Maunakea Management Board (MKMB) and UH Board of Regents (BOR) to supposedly implement certain CMP action items, as also detailed in the attached correspondences. **OHA urges Ku'iwalu to refer to the various correspondences attached as well as OHA's active lawsuit for regarding UH's failure to adequately or appropriately implement numerous CMP action items.**<sup>4</sup> As highlighted in the attached correspondences and OHA's complaint, **of the over 100 management actions mandated by the 2009 CMP, 54 are of particular concern to OHA and its beneficiaries, and at least 31 of these 54 management actions are not being adequately implemented.**<sup>5</sup> Examples<sup>6</sup> of UH's failures to implement CMP action items include, but are not limited to:

1. Failure to establish a process for ongoing collection of information on traditional, contemporary, and customary cultural practices on Maunakea;
2. Failure to complete baseline inventories on high-priority natural resources, as outlined in an inventory, monitoring, and research plan;
3. Failure to develop a land-use zones map based on current inventories of cultural and natural resources;
4. Failure to afford specified opportunities for community members to provide input regarding cultural and natural resource management activities on the mauna (e.g., a promised online forum to document community feedback);
5. Failure to ensure adequate education for construction and observatory staff regarding historical and cultural significances of Maunakea and its environment, ecology, and natural resources;
6. Failure to implement a mandatory orientation for visitors and recreational users; and
7. Failure to properly consult with OHA or Kahu Kū Mauna on cultural processes, policies, and procedures regarding the placement and removal of offerings, scattering of cremated human remains, and appropriateness of ahu.

Compounding matters, the CMP lacks benchmarks to track the progress of management actions and deadlines to properly evaluate implementation, and further fails to specify consequences or penalties for inadequate or untimely implementation; in any case, the BLNR has

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<sup>4</sup> See OHA Complaint, *supra* note 1.

<sup>5</sup> Plaintiff's Motion for Summary Judgment, *Office of Hawaiian Affairs vs. State of Hawai'i*, et al., Civ. No. 17-1-1823-11 (JPC) (1<sup>st</sup> Cir. Ct.), filed March 2, 2020, at 15, available at <https://www.oha.org/maunakea/>.

<sup>6</sup> For more on UH and DLNR's failures to implement 32 of the 54 management actions of particular concern to Native Hawaiians, see OHA Complaint, *supra* note 1, at 21-22.

not provided oversight in their fulfillment. Furthermore, many of the management actions depend on enforcement of rules and regulations that have remained inadequate.

Another overarching issue with CMP implementation, as highlighted in the attached correspondences, is that the State, DLNR, and UH have repeatedly failed to systemically estimate the cost of implementing the plan. Yet, **despite the high costs associated with CMP implementation, UH continually declines to charge reasonable rent for its subleases of Maunakea**, and fails to use a transparent and standardized process when granting subleases and setting sublease terms.

In closing, OHA emphasizes that the 2009 CMP and its implementation have not meaningfully addressed the over 50 years of mismanagement of Maunakea by UH and the State; meanwhile, UH continues to ignore its responsibilities to Maunakea and in turn the Native Hawaiian people and all of Hawai'i's trust beneficiaries. Clearly, UH should not be allowed to continue exerting unchecked and effectively unilateral control of the mauna's management. With roughly 13 years left under UH's current master lease over Maunakea, OHA and the rest of the world wait with bated breaths to see whether UH will finally comply with its basic responsibilities to properly manage this sacred space and Hawai'i trust resource.

Mahalo nui for the opportunity to discuss these ongoing issues. If you have further questions, please contact myself at 594-1973 or via e-mail at [sylviah@oha.org](mailto:sylviah@oha.org), or have your staff contact Interim Public Policy Manager Wayne Tanaka at (808)594-1945 or via e-mail at [waynet@oha.org](mailto:waynet@oha.org).

Aloha me ka 'oia'i'o nō,



Sylvia M. Hussey, Ed.D.  
Ka Pouhana, Chief Executive Officer

SMH:lf

CC: Trustee Colette Y. Machado  
Trustee Brendon Kalei'āina Lee  
Trustee Leina'ala Ahu Isa, Ph.D.  
Trustee Robert K. Lindsey Jr.  
Trustee John D. Waihe'e IV  
Trustee Kalei Akaka  
Trustee Carmen Hulu Lindsey  
Trustee Dan Ahuna  
Trustee Keli'i Akina, Ph.D.



- Enclosures:
- (1) OHA Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages
  - (2) OHA Administrative Testimony dated 5/21/2020 to UH BOR regarding the adoption of a proposed internal restructuring plan for the management of Maunakea
  - (3) OHA Administrative Testimony dated 11/6/2019 to UH BOR regarding the adoption of Hawai'i Administrative Rules governing public and commercial activities on Maunakea, including attached past testimonies and correspondences
  - (4) Various OHA correspondences from 2009 regarding concerns with the CMP ([a] Letter to Ku'iwalu dated 3/9/2009 regarding requested comments on the CMP; [b] Letter to the Office of UH President dated 3/9/2009 regarding requested comments on the Draft Environmental Assessment for the CMP; [c] Letter to OMKM dated 9/10/2009 regarding the Draft Natural Resources Management Plan; [d] Letter to OMKM dated 9/10/2009 regarding the Draft Cultural Resources Management Plan)

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FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2017 NOV -7 PM 4: 15

F. OTAKE  
CLERK

Attorneys for Plaintiff  
THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

17 - 1 - 18 23 - 11 J P C

THE OFFICE OF HAWAIIAN AFFAIRS,	)	CIVIL NO. _____
	)	(Declaratory Judgment)
Plaintiff,	)	
	)	COMPLAINT FOR DECLARATORY AND
vs.	)	INJUNCTIVE RELIEF, ACCOUNTING,
	)	RESTITUTION, AND DAMAGES;
STATE OF HAWAI'I; UNIVERSITY OF	)	SUMMONS
HAWAI'I; DEPARTMENT OF LAND	)	
AND NATURAL RESOURCES; BOARD	)	
OF LAND AND NATURAL RESOURCES;	)	
JOHN DOES 1-10; JANE DOES 1-10;	)	
DOE PARTNERSHIPS 1-10; DOE	)	
CORPORATIONS 1-10; DOE "NON-	)	
PROFIT" CORPORATIONS 1-10; and	)	
DOE GOVERNMENTAL ENTITIES 1-10,	)	
	)	
Defendants.	)	
	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF,  
ACCOUNTING, RESTITUTION, AND DAMAGES**

Mauna Kea, kuahiwi kū ha'o i ka mālie.  
Mauna Kea, standing alone in the calm.

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

  
Clerk, Circuit Court, First Circuit

I.

**INTRODUCTION**

Mauna a Wākea (“**Mauna Kea**”) and the resources it holds comprise a critical part of the ceded lands trust and the public trust that the State of Hawai‘i (“**State**” or “**State of Hawai‘i**”) is constitutionally-bound to protect and preserve for the future generations of Hawai‘i. Having held management authority of these lands for over fifty years, the University of Hawai‘i (“**UH**”) has failed to meet its responsibilities concerning Mauna Kea’s cultural, natural, and historical resources. Instead, at the expense of the mountain’s pristine environment and cultural significance, UH has chosen to aggressively develop the summit of Mauna Kea for the benefit of astronomical institutions around the world.

After numerous attempts to resolve Mauna Kea’s mismanagement through years of advocacy and non-adversarial mediation, Plaintiffs THE OFFICE OF HAWAIIAN AFFAIRS (“**OHA**”) and THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS (“**OHA Board**”), through its counsel, McCorriston Miller Mukai MacKinnon LLP, bring this lawsuit to advocate on behalf of the Native Hawaiian people and to hold the State of Hawai‘i, the Department of Land and Natural Resources (“**DLNR**”), and UH accountable for its deficient stewardship of Mauna Kea. OHA alleges and avers as follows:

II.

**JURISDICTION**

1. This Court has jurisdiction over the claims for relief in this action pursuant to Hawaii Revised Statutes (“**HRS**”) sections 603-21.5, 603-21.9, and 632-1, and article XI, sections 1 and 9 and article XII, section 7 of the Hawai‘i State Constitution.

III.

**PARTIES**

2. Plaintiff OHA is an agency of the State of Hawai‘i established pursuant to article XII, section 5 of the Hawai‘i State Constitution and HRS Chapter 10. OHA advocates for the improved conditions of Native Hawaiians in the areas of ‘āina, culture, economic self-sufficiency, education, governance, and health.

3. Plaintiff OHA Board is a duly constituted body established pursuant to article XII, section 6 of the Hawai‘i State Constitution and HRS Chapter 10.

4. Defendant State of Hawai'i is a sovereign entity purportedly holding title to lands granted, or ceded, to it pursuant to sections 5(b) and 5(e) of the Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("**Admission Act**"), and subject to a public trust for the benefit of native Hawaiians and the general public as imposed by section 5(f) of the Admission Act and article XII, section 4 of the Hawai'i State Constitution.

5. The State also holds "[a]ll public natural resources . . . in trust . . . for the benefit of the people." Haw. Const. art. XI, § 1.

6. Defendant UNIVERSITY OF HAWAI'I ("**UH**") is an agency of the State of Hawai'i established by article X, section 5 of the Hawai'i State Constitution.

7. Defendant DEPARTMENT OF LAND AND NATURAL RESOURCES ("**DLNR**") is an agency of the State of Hawai'i charged with managing and administering the State's public lands pursuant to HRS section 26-15(b) and HRS Chapter 171. DLNR's mission is to "[e]nhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors." Mission Statement, DEPARTMENT OF LAND AND NATURAL RESOURCES, <http://dlnr.hawaii.gov> (last visited Sept. 20, 2017); see Haw. Const. art. XI, § 1. DLNR's main offices are located in the City and County of Honolulu, State of Hawai'i.

8. Defendant BOARD OF LAND AND NATURAL RESOURCES ("**BLNR**") is an agency of the State of Hawai'i and heads the DLNR pursuant to HRS section 26-15.

9. Defendant SUZANNE CASE ("**DLNR Chair**") is the Chairperson of the DLNR.

10. Defendants JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE "NON-PROFIT" CORPORATIONS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through the review of documents and efforts to ascertain the nature of the claims, their true names and identities are presently unknown to Plaintiffs except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, representatives, co-venturers, associates, sub-contractors or contractors and/or owners, lessees, assignees, and licensees of the named Defendants and/or were in some manner presently unknown to Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries, losses, or

damages to Plaintiffs and/or acted or conducted themselves in a negligent manner, which negligence was a proximate cause of injuries, losses, or damages to Plaintiffs, and/or conducted some activity in a negligent or imprudent manner; which negligent or imprudent conduct was a proximate cause of injuries, losses, or damages to Plaintiffs and/or were in some manner related to the named Defendants, and Plaintiffs pray for leave to insert herein their true names, identities, capacities, activities, and/or responsibilities when the same are ascertained.

#### IV.

#### LEGAL BACKGROUND

##### A. Mauna Kea is Part of the Ceded Lands Trust and the Public Trust

11. In 1898, five years after the illegal overthrow of the Kingdom of Hawai‘i, a Joint Resolution of Annexation, enacted by the United States Congress, resulted in the transfer of 1.8 million acres of Hawaiian Government and Crown Lands to the United States (“**ceded lands**”). Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (“**Joint Resolution**”), J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

12. The Joint Resolution recognized the nature of the ceded lands as “a special trust,” Haw.—Pub. Lands, 22 Op. Att’y Gen. 574, 576 (1899), and this trust was reaffirmed in the Organic Act of 1900 and the Hawaiian Homes Commission Act in 1921. See Hawai‘i Organic Act, ch. 339, 31 Stat. 14 (1900); Haw. Homes Comm’n Act of 1921, Pub. L. No. 34, 42 Stat. 108 (1921).

13. In 1959, as a condition of statehood, the United States Congress transferred a portion of the ceded lands back to the State of Hawai‘i, which assumed responsibility as trustee of the ceded lands trust. See Admission Act.

14. Section 5(f) of the Admission Act states that the ceded lands shall be held by [the] State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.

Id. (emphasis added).

15. The Hawai‘i State Constitution confirms this treatment, describing the ceded lands “as a public trust for native Hawaiians and the general public.” Haw. Const. art. XII, § 4.

16. Mauna Kea is part of the ceded lands trust.

17. The ceded lands trust “imposes a fiduciary duty on Hawaii’s officials to hold ceded lands in accordance with the [Admission Act section] 5(f) trust provisions.” Pele Def. Fund v. Paty, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992).

18. Accordingly, the State of Hawai‘i holds **moral obligations of the highest responsibility and trust** with respect to ceded lands, including Mauna Kea. See Ahuna v. Dep’t of Haw. Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (quoting Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)).

19. Additionally, “[a]ll public natural resources are held in trust by the State for the benefit of the people.” Haw. Const. art. XI, § 1. This public trust compels “the State and its political subdivisions [to] conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources,” and to “promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” Id.

20. As part of its public trust duties, the State also reaffirmed and committed to protect “all rights, customarily and traditionally exercised for subsistence, cultural and religious purpose 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.” Haw. Const. art. XII, § 7. Thus, public trust resources include the protection of Native Hawaiian traditional and customary rights.

21. As an integral part of the public trust, Mauna Kea is a place of singular cultural significance for Native Hawaiians, and its resources and cultural sites are essential to Native Hawaiian traditional and customary practices, specifically tied to Mauna Kea.

**B. The State Has Assumed Great Responsibility as the Fiduciary of These Trusts**

22. The State and its agents, officers, and employees are trustees of the ceded lands trust under article XII, sections 4, 5, and 6 of the Hawai‘i State Constitution, and are trustees of the public trust under article XI, section 1 of the Hawai‘i State Constitution.

23. The “conduct of the government as trustee is measured by the same strict standards applicable to private trustees.” Ahuna, 64 Haw. at 339, 640 P.2d at 1169. The

Hawai'i Supreme Court has specially adopted three specific trust duties applicable to the State and its agencies: (1) the duty "to administer the trust solely in the interest of the beneficiar[ies]," (2) the duty to "deal impartially when there is more than one beneficiary," and (3) the duty "to use reasonable skill and care to make trust property productive." Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (OHA v. HCDC), 117 Hawai'i 174, 194, 177 P.3d 884, 904 (2008) (citing Ahuna, 64 Haw. at 338, 640 P.2d at 1168).

24. Additionally, like private trustees, the State and its agents, officers, and employees, including the DLNR and UH, have the following duties with respect to trust resources:

- a. The duty to protect and preserve trust resources from substantial impairment;
- b. The duty to preserve the rights of present and future generations to use and otherwise benefit from the trust resources;
- c. The duty to administer trust resources solely for the interests of the beneficiaries, and not for the trustees' own benefit or the benefit of third parties;
- d. The duty to manage trust resources in good faith and with such vigilance, diligence, and prudence as a reasonable person would in managing his or her own affairs;
- e. The duty against privatizing the trust resources;
- f. The duty to maximize the value of trust resources for its intended beneficiaries;
- g. The duty to restore trust resources when damaged;
- h. The duty to adequately supervise administrative agencies and other state agents, officers, and employees to meet the State's fiduciary duties;
- i. The duty to manage trust resources with reasonable caution, or through use of the precautionary principle; and
- j. The duty to furnish trust beneficiaries with information concerning the health of the resources protected by the trust.

25. Under the public trust doctrine, the State and its agents, officers, and employees must protect and conserve public trust resources to the extent feasible; must balance the protection and conservation of public trust resources with the use and development of such

resources, employing a presumption in favor of public use, access, and enjoyment; must consider the cumulative impact of existing and future uses on public trust purposes; and must engage in planning and decision-making from a global, long-term perspective. In sum, the State may not compromise public rights in these public trust resources unless such a decision is made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under Hawai‘i law. See In Re Water Use Permit Applications, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000).

26. The State is responsible and liable for the acts or omissions of its agents, officers, and employees, including the DLNR and UH, in the management and disposition of the ceded lands trust and its resources, and the public trust.

27. “Mauna Kea is a special place valued by the people of Hawaii and by astronomers throughout the world. **This value demands the highest level of protection and preservation**” by its trustees, the State of Hawai‘i, the DLNR, and UH. Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13 at 33.

## V.

### **CULTURAL CONTEXT—MAUNA KEA’S SACREDNESS**

28. The Hawai‘i Supreme Court has recognized that:

‘Āina [land] is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The ‘āina is part of their ‘ohana [family], and they care for it as they do for other members of their families. For them the land and the natural environment [are] alive, respected, treasured, praised, and even worshiped.

OHA v. HCDC, 117 Hawai‘i at 214, 177 P.3d at 924 (citing the trial court) (diacritical marks added, alteration in original omitted).

#### **A. Mauna Kea Is the First-Born Son of Papa and Wākea**

29. Native Hawaiian genealogical mele [songs, poems, chants] explain the centrality of Mauna Kea within Hawaiian genealogy and cultural geography. Mele recount that Mauna Kea was born as a result of the union of Papa and Wākea, the progenitors of all things, including Hāloa, the first man from whom Native Hawaiians are descended. For many Native Hawaiians,



Mauna Kea is a physical link to Papa and Wākea and provides an important connection to their ancestral ties of creation.

30. Today, many Native Hawaiians continue to view Mauna Kea as the first-born child of Papa and Wākea. Accordingly, Mauna Kea is revered, cared for, and respected as the hiapo [respected older sibling] of all Native Hawaiians.

**B. Akua Reside On Mauna Kea**

31. In Native Hawaiian culture, ancestral akua [gods, goddesses, deities] reside within the Mauna Kea summit. The akua are embodied within the landscape of Mauna Kea—they are believed to be physically manifested in earthly form as various pu‘u [cinder cones] and as the waters of Waiau. Because these akua are revered and connected to the Mauna Kea landscape in Hawaiian genealogies, and because elders and akua are revered and looked to for spiritual guidance in Hawaiian culture, Mauna Kea is considered a sacred place.

32. Many akua are associated with Mauna Kea through genealogical mele and mo‘olelo [stories], including but not limited to: Poli‘ahu, Lilinoe, Waiau, and Kahoupakane, the goddesses adorned in kapa hau [snow garments] who embody the eternal warfare between heat and cold, fire and frost, burning lava and stony ice.

33. Poli‘ahu is commonly referred to as the beautiful snow goddess of Mauna Kea. Poli‘ahu’s sisters include Lilinoe, the goddess of the mists; Waiau, goddess of fresh water; Līhau, goddess of the chilling frost; and Kipu‘upu‘u, goddess of hail. Thus, Poli‘ahu and her sisters represent and embody the different forms of water on Mauna Kea. Accordingly, certain pu‘u [cinder cones] are named after them and are important religious sites.

34. Native Hawaiian historians report that Poli‘ahu was reared and lived like the daughter of an ancient chief of Hawai‘i, but she was restricted to the mountain of Mauna Kea by her godfather, Kāne.<sup>1</sup> Kāne created a silvery swimming pool for Poli‘ahu at the top of Mauna Kea named Lake Waiau and placed a supernatural guard named Mo‘oinanea there so Poli‘ahu could play at leisure without danger of being seen by man. The god Kūkahau‘ula [the pink-tinted snow god] was selected as a husband for Poli‘ahu. Following his selection, he appeared every morning with the rising of the sun and again every afternoon with the setting of the sun

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<sup>1</sup> Kāne is one of the four main akua in the traditional Native Hawaiian religion. He is associated with the forces of nature that provide life-giving resources, including but not limited to fresh water, sunlight, and kalo [taro].

and each day he became more fascinated. But each day Poli‘ahu’s attendants—Lilinoe [fine mist rain], Līhau [chilling frost] and Kipu‘upu‘u [hail]—drove him from the mountain. Mo‘oinanea eventually determined that Kūkahau‘ula’s love was true and she allowed Kūkahau‘ula to embrace Poli‘ahu. To this day, Kūkahau‘ula and Poli‘ahu may be seen embracing on Mauna Kea in the famously pink and orange light of dusk.

35. Lake Waiau is referred to in the Kumulipo creation chant as the lake that resides in the heavens and serves as a jumping off point for Hawaiian souls. Cultural practitioners believe the water of Lake Waiau is most sacred because it has not yet descended; rather, it remains high up in the realm of Wākea. The importance of Lake Waiau as a significant religious site and the presence of akua on Mauna Kea is also consistent with the importance of this natural resource for the people’s survival. Lake Waiau feeds the fresh water aquifer for the Hilo ahupua‘a [land district].

**C. Mauna Kea Explains Hawai‘i’s Geology**

36. Poli‘ahu and Pele [goddess of fire and lava] battled over control of Hawai‘i Island, and their conflicts help explain geological events. Native Hawaiian historians recount Poli‘ahu’s love for the eastern cliffs of Hawai‘i Island, where she often engaged with ali‘i [chiefs] and maka‘āinana [commoners] in various games and sports. One day Poli‘ahu and her companions were competing in hōlua [sledding] on the slopes of Mauna Kea, south of Hāmākua, when a beautiful stranger appeared and was invited to participate with them. After losing to Poli‘ahu, the beautiful woman raged, and her anger blew open the subterranean caverns of Mauna Kea, setting forth fountains of molten fire. The beautiful woman was Pele, goddess of volcanoes and lava. Poli‘ahu fled up Mauna Kea and threw her snow mantle over the area to chill and harden Pele’s fires. They battled on, and Poli‘ahu eventually pushed Pele back down the mountain and to the southern half of Hawai‘i Island.

37. This historical account and the rivalry between Poli‘ahu and Pele accurately describes the geological phenomenon known as the Laupahoehoe Volcanic series and the late Pleistocene Mākanaka glacial episode on the summit of Mauna Kea.

**D. Archaeology Shows Mauna Kea’s Sacredness**

38. Mauna Kea’s archaeology provides physical evidence of the historical connection between Native Hawaiians and Mauna Kea.

39. Archaeological surveys have identified 263 archaeological sites, including 29 burial sites and 233 shrines. The 233 shrines constitute what is arguably and largest and most important complexes of non-monumental religious structures in all of Polynesia.

40. For its role in Hawaiian culture/religion/science and its critical importance as a source of vital natural resources, Mauna Kea is especially sacred to the Native Hawaiian people.

## **VI.** **RELEVANT FACTUAL HISTORY OF MAUNA KEA**

### **A. UH Identified Mauna Kea as a Prime Site for Astronomical Observation**

41. In or around 1964, UH identified Mauna Kea as possessing exceptional conditions for astronomical observation. Mauna Kea was designated by the State as a conservation district, and this designation gave management authority of Mauna Kea to the DLNR.

42. In or around 1965, UH contracted with the National Aeronautics and Space Administration (“NASA”) to design and build a 2.24 meter observatory, which would be the first observatory on the summit of Mauna Kea.

43. In or around 1967, UH established the Institute for Astronomy (“IfA”) and began planning the construction of additional observatories. In or around 1968, UH IfA constructed the 0.6-meter observatory on Mauna Kea.

### **B. The State Leases Mauna Kea to UH**

44. On or about June 21, 1968, the BLNR, as the lessor, and UH, as the lessee, executed General Lease No. S-4191 (“**General Lease**”), which transferred 13,321 acres of ceded lands at the summit of Mauna Kea (“**Mauna Kea Science Reserve**”) for a period of sixty-five (65) years, from January 1, 1968 to December 31, 2033.

45. Pursuant to the General Lease, UH agreed to “keep the demised premises and improvements in a clean, sanitary and orderly condition”; to avoid “any waste, strip, spoil, nuisance or unlawful, improper or offensive use of the demised premises”; to use the land for “a scientific complex, including without limitation thereof an observatory”; and to “properly maintain, repair and keep all improvements in good condition.”

46. Pursuant to the General Lease, if UH “fail[ed] to comply with any of the terms and conditions of this lease,” then the State, through the BLNR, could “terminate this lease by giving six months’ notice in writing” to UH.

47. The BLNR retained general regulatory authority over the Mauna Kea Science Reserve, but some broad responsibilities were given to UH. As a state agency, UH possesses the same fiduciary duties with respect to the ceded lands it leases and the public trust resources on those lands.

48. In or around 1970, the UH 2.2-meter observatory, an optical/infrared telescope, was constructed on Mauna Kea and sponsored by UH's IfA.

49. With multiple observatories constructed on Mauna Kea, the public—including Native Hawaiians, local groups, hunters, and environmentalists—began voicing concerns about further development on Mauna Kea as early as 1974.

50. In or around 1974, in response to public concerns, Acting Governor George Ariyoshi directed the DLNR to develop and promulgate a master plan for all of Mauna Kea above Saddle Road.

**C. The State and UH Develop A Series of Deficient Management Plans**

51. For the next thirty-five (35) years, the State, the DLNR, and UH put forth more than ten (10) different management plans. By the time a plan was completed, additional construction on Mauna Kea often changed the conditions on the mountain such that parts of the plan were already obsolete or required revision. In many cases, the plans were aspirational and never executed.

52. In or around 1977, the BLNR approved The Mauna Kea Plan, which merely established management areas and divided management responsibility between UH and the DLNR.

53. In or around 1979, three more observatories were constructed on Mauna Kea: the 3.6-meter Canada-France-Hawai'i Telescope and the 3.8-meter United Kingdom Infrared Telescope, both of which were subleased from UH for \$0.00; and the 3.0-meter NASA Infrared Telescope Facility, which was subleased from UH at a rental rate of \$1.00 per year.

54. Due to the construction of additional observatories on Mauna Kea, UH began planning the construction of mid-elevation facilities for scientists, astronomers, and staff. In 1980, UH began preparing the Hale Pōhaku Mid-Elevation Facilities Master Plan: Complex Development Plan in response to these additional facilities.

55. Because development now incorporated structures other than observatories, UH and its Board of Regents approved the Research and Development Plan for the Mauna Kea

Science Reserve and Related Facilities (“**R&D Plan**”), which sought to establish a programmatic master plan for continued development on Mauna Kea.

56. In or around 1983, UH proposed yet another management plan, the Mauna Kea Science Reserve Complex Development Plan, which provided the physical planning framework to implement its R&D Plan. This plan included an environmental impact statement that purported to evaluate the general impacts of further development on Mauna Kea and proposed actions to mitigate negative impacts. In or around 1985, the BLNR approved the Mauna Kea Management Plan, which was a revised version of UH’s Mauna Kea Science Reserve Complex Development Plan, created in 1983. This plan projected the total number of telescopes on the mountain at thirteen (13) by the year 2000 and represented the first and only time that the BLNR approved a management plan with any sort of development limit.

57. In or around 1987, four more observatories were constructed on Mauna Kea: the 10.4-meter Caltech Submillimeter Observatory and the 15-meter James Clerk Maxwell Telescope; in or around 1992, the Very Long Baseline Array; and in or around 1993, the 10-meter W.M. Keck Observatory. Each of the operators for these observatories received subleases from UH for \$1.00 per year.

58. In or around 1995, BLNR approved the Revised Management Plan for the UH Management Areas on Mauna Kea, which addressed the management of permitted and restricted activities on Mauna Kea, including recreational, educational, cultural, and commercial activities.

59. In 1996, another 10-meter W.M. Keck Observatory was constructed on Mauna Kea, bringing the total number of observatories on Mauna Kea to nine (9). UH also subleased the land for this observatory for \$1.00 per year.

**D. Scathing Audits Highlight the Mismanagement of Mauna Kea**

60. Despite the resources expended to develop each of these plans, the public’s concerns intensified regarding the protection of Mauna Kea’s sacred natural and cultural environment. In response to these growing concerns, in or around 1997, the Hawai‘i State Legislature passed Senate Concurrent Resolution No. 109, which directed the State Auditor to conduct an audit of the management of Mauna Kea.

61. The State Auditor published the Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 98-6 (“**1998 Audit**”), in or around February 1998, thirty (30) years after UH assumed responsibility of the ceded lands on Mauna Kea.

62. With respect to UH, the 1998 Audit found:

**[UH's] management of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources.** [UH] focused primarily on the development of Mauna Kea and tied the benefits gained to its research program. Controls were outlined in the management plans [but] were often late and weakly implemented. [UH's] control over public access was weak and its efforts to protect natural resources were piecemeal. **[UH] neglected historic preservation, and the cultural value of Mauna Kea was largely unrecognized.** Efforts to gather information on the Wekiu bug came after damage had already been done. Trash from construction was cleaned up only after concerns were raised by the public. Old testing equipment constructed in the early years of development has not been removed as required by the lease agreement.

1998 Audit, Overview at 1 (emphases added).

63. With respect to the DLNR, the 1998 Audit found:

**[The DLNR] needs to improve its protection of Mauna Kea's natural resources.** The Conservation District permitting process could be strengthened by ensuring the setting of specific conditions relating to the Environmental Impact Statement's mitigating measures and implementation of management plans. . . . [P]ermit conditions, requirements, and regulations were not always enforced. Finally, administrative requirements were frequently overlooked or not completed in a timely manner.

1998 Audit, Overview at 2 (emphasis added).

64. In summary, the 1998 Audit concluded that "**both [UH] and the [DLNR] failed to develop and implement adequate controls** to balance [] environmental concerns with astronomy development." 1998 Audit at 15 (emphasis added). In response to the 1998 Audit, the DLNR "agree[d] with the auditor's finding that the [DLNR] needs to improve efforts to protect and conserve Mauna Kea's natural resources." Attachment 3 to 1998 Audit at 1.

65. Nevertheless, in or around 1999, two more observatories were constructed on Mauna Kea: the 8.3-meter Subaru Telescope and the 8.1-meter Gemini Northern Telescope, both of which received subleases from UH for \$1.00 per year.

66. As a response to the scathing 1998 Audit, the UH Board of Regents adopted the Mauna Kea Science Reserve Master Plan ("**2000 Mauna Kea Science Reserve Master Plan**") on or around June 16, 2000. The 2000 Mauna Kea Science Reserve Master Plan established the

Astronomy Precinct, an area at the summit of Mauna Kea spanning 525 acres wherein all astronomy facilities would be confined. It also attempted to address management authority on Mauna Kea, including access, natural resources, cultural resources and practices, and education and research.

67. The 2000 Mauna Kea Science Reserve Master Plan recommended the formation of the Office of Mauna Kea Management (“**OMKM**”) and the Mauna Kea Management Board (“**MKMB**”).

68. The OMKM, established as an agency within UH, is responsible for compliance and implementation of the plan and is comprised of two advisory bodies, MKMB and Kahu Kū Mauna Council. The chancellor of UH Hilo selects the members of the MKMB and the cultural advisors on the Kahu Kū Mauna Council. Both the MKMB and the Kahu Kū Mauna Council are strictly advisory; neither represents an independent voice for the community and neither has any decision-making authority. Their function is to advise OMKM, which in turn advises the UH Board of Regents on all matters impacting compliance with UH’s management plans, including preservation of Mauna Kea’s cultural integrity.

69. The 2000 Mauna Kea Science Reserve Master Plan was not approved or adopted by the BLNR.

70. In 2002, the Submillimeter Array was constructed on Mauna Kea with eight (8) separate six-meter antenna dishes. The operator of the Submillimeter Array subleased from UH for \$1.00 per year.

71. Because the public continued to voice its concerns regarding Mauna Kea’s management, the Hawai’i State Legislature passed Senate Concurrent Resolution No. 68 in 2004, which directed the State Auditor to assess the progress of UH and the DLNR in light of the 2000 Mauna Kea Science Reserve Master Plan.

72. The State Auditor published the Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13 (“**2005 Audit**”), in or around December 2005.

73. With respect to UH, the 2005 Audit found that “[d]espite improvements, **[UH’s] management of the Mauna Kea Science Reserve still falls short.**” 2005 Audit at 13 (emphasis added). The 2005 Audit continued: **UH “has not dealt with certain significant management issues,** such as resolving jurisdictional issues with the [DLNR] and monitoring

conservation district use permits. Such issues . . . **increase the likelihood of harm to [Mauna Kea's] vulnerable environment.**" *Id.* (emphases added).

74. In summary, the 2005 Audit found that UH failed to obtain "administrative rule-making authority," failed to resolve "public access issues," and failed to "implement[] signage policies or procedures" to protect environmental and cultural resources. *Id.* at 21.

75. With respect to the 2000 Mauna Kea Science Reserve Master Plan, the 2005 Audit found that the "plan lack[ed] certainty and clarity" and was inconsistent with the DLNR's plan, the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea. *Id.* at 23.

76. The 2005 Audit also criticized the 2000 Mauna Kea Science Reserve Master Plan for not completing an inventory of all cultural and natural resources on Mauna Kea: "**[UH] needs to complete the inventory of cultural and natural resources** to document the importance of providing increased protection to the mountain." *Id.* at 25-26 (emphasis added).

77. With respect to the DLNR, the 2005 Audit found that its "**advancements in oversight need to go farther.**" *Id.* at 13 (emphasis added). While the DLNR "made improvements in protecting Mauna Kea's natural resources, **[t]hese steps . . . still [fell] short of protecting Mauna Kea's natural and cultural resources.**" *Id.* at 26 (emphasis added).

78. The 2005 Audit further criticized the DLNR as follows:

**The [DLNR] has not embraced its role as landowner. In recent years, the [DLNR] has passively allowed [UH] to fulfill the [DLNR's] role of landowner.** As a result, departmental management plans and its monitoring and enforcement efforts have been thought of as subordinate to what the lessee—or, [UH]—would do. This lax attitude is reflected in the [DLNR's] failure to update the papers that define its relationship with [UH], **allowing [UH] to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements.**

*Id.* at 29 (emphases added).

79. On or about January 19, 2007, the Circuit Court of the Third Circuit, State of Hawai'i reversed the BLNR's approval of a management plan for the construction and operation of six 1.8-Meter Outrigger Telescopes on Mauna Kea.

80. The management plan approved by the BLNR to grant a conservation district use permit for the Outrigger Telescopes included an environmental impact statement, which admitted



that from a cumulative perspective, the impact of past, present, and reasonably foreseeable future activities on cultural resources on Mauna Kea is **substantial and adverse**.

81. The management plan was also limited to the specific project and the specific area of construction. The Court found that such a management plan was insufficient:

The resource that needs to be conserved, protected and preserved is the summit area of Mauna Kea, not just the area of the Project.

**Allowing management plans on a project by project basis would result in foreseeable contradictory management conditions** for each project or the imposition of special condition[s] on some projects and not others. The result would be projects within a management area that did not conform to a comprehensive management plan, and would not be consistent with the purposes of appropriate management and promoting long term sustainability of the protected resource espoused by HRS § 183C-1.

Mauna Kea Anaina Hou, et al. v. Bd. of Land and Natural Res., Civ. No. 04-1-397 (Hilo), Decision and Order at 7 (Jan. 19, 2007).

E. **The 2009 Comprehensive Management Plan Currently Governs the Management of Mauna Kea**

82. To comply with the Circuit Court's decision that the BLNR must approve a comprehensive management plan before any future development on Mauna Kea, UH began work on the 2009 Mauna Kea Comprehensive Management Plan ("2009 CMP").

83. The 2009 CMP guides UH's existing and future use of its leased Mauna Kea lands and its kuleana [responsibility, obligation] to protect and preserve Mauna Kea's cultural, natural, and scientific resources. It supplemented and superseded the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea. The 2009 CMP is meant to be read in combination with the 2000 Mauna Kea Science Reserve Master Plan, which continues to serve as UH's framework for development on Mauna Kea.

84. To obtain the BLNR's approval for the 2009 CMP, UH developed four additional sub-plans: (1) the Cultural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea ("CRMP"), completed in or about October 2009; (2) the Natural Resources Management Plan for the UH Management Areas on Mauna Kea ("NRMP"), completed in September 2009; (3) the Decommissioning Plan for the Mauna Kea Observatories

(“**2010 Decommissioning Plan**”), completed in January 2010; and (4) the Public Access Plan for the UH Management Areas on Mauna Kea (“**Access Plan**”), completed in January 2010.

85. The CRMP examines the threats or impacts that specific activities might have on Mauna Kea’s historic properties and explains the measures UH and the DLNR should take to avoid or minimize those impacts.

86. The NRMP focuses on the protection and preservation of Mauna Kea’s natural resources.

87. The 2010 Decommissioning Plan describes the process for the removal of structures associated with an observatory facility and the restoration of the site to its preconstruction condition, including the financial planning necessary for such decommissioning. All decommissioning must be completed by the end of the sublease term, or by 2033. Despite the plan’s aspiration of preconstruction restoration, it allows for “partial” removal of structures “to the greatest extent possible,” meaning that structures may remain at UH’s discretion following the lease period.

88. With the exception of TMT, which may not have a valid sublease, UH’s sublessors are not required to comply with the 2010 Decommissioning Plan.

89. The Access Plan sets forth guiding principles and policies to guide UH in developing management actions and administrative rules relating to public and commercial activities on Mauna Kea.

90. Despite concerns raised by OHA regarding its sufficiency, the BLNR approved the 2009 CMP in April 2009, and in 2010, the BLNR approved the four sub-plans.

91. In or around 2010, the UH 0.9-meter Educational Telescope (Hōkū Ke‘a) was constructed on Mauna Kea to replace the UH IfA 0.6-meter observatory.

92. Along with the 2000 Mauna Kea Science Reserve Master Plan, which governs UH’s development of Mauna Kea through 2020, the 2009 CMP and its sub-plans supplement the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea and govern UH and the DLNR’s management responsibilities. The plans are meant to guide the State, the DLNR, and UH toward fulfillment of their fiduciary duties concerning ceded lands and the public trust.

**F. State Audits Continue to Show the State’s Mismanagement**

93. Because UH and the DLNR still needed to address stewardship issues discussed in the 1998 Audit and the 2005 Audit, in or around August 2014, the State Auditor published its Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 14-07 (“**2014 Audit**”).

94. The 2014 Audit found that “UH ha[d] yet to adopt administrative rules [to] implement[] its management responsibilities,” and that “**UH issued unauthorized permits . . . for commercial tour activities, [which] put[] Mauna Kea’s resources and UH’s Mauna Kea revenues at risk.**” 2014 Audit at 15.

95. The 2014 Audit concluded that “[w]ithout administrative rules, **UH still lacks enforcement authority to effectively protect the mountain** from public activities and ensure public health and safety within the summit area.” 2014 Audit at 15 (emphasis added).

96. The 2014 Audit also recognized that after nearly half a century of managing Mauna Kea, the DLNR and UH had finally laid an acceptable “foundation for improved stewardship by developing or updating key documents [to] govern[] management of Mauna Kea[.]” 2014 Audit at 15 (emphases added). While the DLNR and UH celebrated this review of their progress, the 2014 Audit merely found that an up-to-date management plan finally existed.

97. Another updated audit in July 2017, which neither provided new recommendations nor investigated unaddressed recommendations made prior to 2014, found that none of the eight (8) recommendations in the 2014 Audit had been completely implemented. According to the audit, only four (4) recommendations were partially implemented and four (4) recommendations were not implemented at all. Further, the 2017 audit found that action items in the 2009 CMP relating to Native Hawaiian cultural practices and public safety had been neglected and that UH still had not adopted administrative rules to govern and enforce public and commercial activities, despite a recommended rulemaking deadline of 2017.

**G. The Public’s Response to Proposed Construction of the Thirty-Meter Telescope**

98. For decades, the public has voiced its concern regarding construction on Mauna Kea, specifically with respect to the construction of the thirteen (13) observatories on its summit.

99. Both Native Hawaiians and non-Hawaiians similarly protested the construction of the eighteen-and-one-half-story Thirty Meter Telescope (“TMT”), which was set for

construction in 2014. These protests culminated in a series of peaceful demonstrations on Mauna Kea beginning in 2014 and continuing to the present.

100. In March and April 2015, peaceful demonstrations continued to block construction crews from moving equipment to the summit in preparation for the start of construction. On April 2, 2015, over 300 protesters of all ages gathered on Mauna Kea to block construction crews. Twenty-three protesters were arrested for blocking a public road.

101. Governor David Ige (“**Governor Ige**”) temporarily halted construction on Mauna Kea on April 7, 2015.

102. On May 26, 2015, Governor Ige held a press conference to announce his proposal for better stewardship of Mauna Kea. News Release: Governor David Ige Announces Major Changes in the Stewardship of Mauna Kea, <http://governor.hawaii.gov/newsroom/news-release-governor-david-ige-announces-major-changes-in-the-stewardship-of-mauna-kea/> (last visited Sept. 20, 2017). In his comments, Governor Ige stated that stewardship should incorporate “the importance of respecting our host culture and the special places of Hawai‘i.” *Id.* Additionally, stewardship should include proper “[r]espect for the laws and the process of seeking and receiving approvals to do work in Hawai‘i.” *Id.*

103. Reflecting on the State’s management of Mauna Kea, Governor Ige admitted:

**“[W]e have in many ways failed the mountain. Whether you see it from a cultural perspective or from a natural resource perspective, we have not done right by a very special place and we must act immediately to change that[.]”**

*Id.* (emphases added).

104. On or about June 1, 2015, UH published a statement from UH President David Lassner and UH Hilo Chancellor Donald Straney, in which they admitted that “**[UH] has not yet met all of [its] obligations to the mountain or the expectations of the community.**”

## VII.

### **THE MISMANAGEMENT OF MAUNA KEA**

#### **A. Failure to Budget and Fund Proper Management of Mauna Kea**

105. The State, the DLNR, and UH failed and continue to fail to systematically estimate the cost of implementing the 2009 CMP.

106. The State, the DLNR, and UH failed and continue to fail to generate sufficient revenue or funds to implement appropriate management of Mauna Kea, or to establish policies to attempt to generate sufficient revenue or funds for appropriate management.

107. On or about June 12, 2015, OHA attended a meeting of the BLNR and raised concerns regarding the budget for implementing the 2009 CMP. On behalf of its beneficiaries, who are also beneficiaries of the ceded lands trust, OHA requested a budget and a report on the allocation of monies spent for each management action. The BLNR and the OMKM have not provided either a budget breakdown or a report on the allocation of monies spent for each management action.

108. On or about September 21, 2016, the OMKM informed OHA that the entire annual budget of approximately \$2,200,000.00 was spent toward Mauna Kea's management but could not provide a breakdown of how the money was allocated to each management action. OMKM did not and cannot provide sufficient substantiation for the \$2,200,000.00 figure.

109. The State, the DLNR, and UH's management of Mauna Kea lacks financial transparency and fails to identify the source of funds, distribution and transfer of funds, and the actual amounts used for Mauna Kea management.

**B. Failure to Prudently Negotiate Sublease Terms**

110. UH failed and continues to fail to use a transparent and standardized process when granting subleases and determining the terms of those subleases.

111. Despite the high costs associated with implementing the 2009 CMP and its inability to adequately and timely implement the management actions called for in the 2009 CMP, UH failed to charge reasonable rent on any of its subleases.

112. For several subleases, UH did not charge any rent. The non-UH observatories on Mauna Kea do not pay reasonable or market-value rent. Rather, they give UH a guaranteed share of the observing time. See Attachment 2 to 1998 Audit at 1.

113. Despite the potential for lucrative observatory subleases, UH has not made any attempt to establish fair and transparent processes or policies to govern the negotiation of sublease terms. Prior to the sublease for TMT, UH did not charge more than \$1.00 per year in rent on any of its subleases. In determining the amount of sublease rent, **UH did not properly consider the costs of carrying out its management responsibilities when it negotiated**

**sublease terms**, including sublease rent. Without proper vigilance, diligence, or prudence, the BLNR approved each of UH's subleases.

114. In 2014, UH and the BLNR negotiated the sublease terms for TMT and had an opportunity to generate much-needed funds for better management of Mauna Kea. Despite OHA's concerns, which it expressed through both written and oral advocacy, UH and the BLNR decided not to perform an independent analysis or appraisal to understand what a substantial or fair market rent would be. Instead, UH negotiated, and the BLNR rubber-stamped, a minimal sublease rent for TMT, which ultimately reflected TMT's pro rata share (based on acreage) of an unsubstantiated estimate of the cost to implement the 2009 CMP, or seven-hundredths of one percent (0.07%) of TMT's construction costs.

**C. Failure to Implement the Already Deficient Management Plans**

115. Although the 2009 CMP is meant to ensure the protection and preservation of valued cultural, historical, and natural resources by providing an analytical framework for management decisions consistent with the Hawai'i Supreme Court's decision in Ka Pa'akai O Ka 'Aina v. Land Use Commission, 94 Hawai'i 31, 7 P.3d 1068 (2000), the State, the DLNR, and UH failed to adequately implement a substantial number of 2009 CMP action items.

116. Based solely on its own reporting, UH and the DLNR **failed and continue to fail to adequately implement thirty-two (32) of fifty-four (54) management actions** that particularly affect or concern Native Hawaiians. These include, but are not limited to:

- a. Failure to establish a process for ongoing collection of information on traditional, contemporary, and customary cultural practices on Mauna Kea;
- b. Failure to complete baseline inventories on high-priority natural resources, as outlined in an inventory, monitoring, and research plan;
- c. Failure to develop a map with land-use zones based on updated inventories of cultural and natural resources to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of a Conservation District Use Permit;
- d. Failure to provide specified opportunities for community members to provide input to cultural and natural resource management activities on Mauna Kea (e.g., a promised online forum to document community feedback), or to

ensure systematic input regarding planning, management, and operational decisions that affect natural resources, sacred materials or places, or other ethnographic resources with which they are associated;

e. Failure to ensure adequate education for construction and observatory staff regarding historical and cultural significance of Mauna Kea and its environment, ecology, and natural resources;

f. Failure to implement a mandatory orientation process for visitors and recreational users, and to adequately ensure that observatory personnel, commercial tour operators, construction workers, and others currently required to participate in the orientation process, actually and meaningfully do so;

g. Failure to establish any authorized and enforceable commercial tour permitting processes to annually evaluate and issue commercial tour permits;

h. Failure to maintain a presence of enforcement personnel on Mauna Kea at all times to educate users, deter violations, and encourage adherence to restrictions;

i. Failure to properly consult with OHA or Kahu Kū Mauna on cultural processes, policies, and procedures regarding the placement and removal of offerings, the construction of new Hawaiian cultural features, the scattering of cremated human remains, and the appropriateness of ahu [stacking of rocks as religious or cultural altars]; and

j. Failure to develop and implement sufficient debris removal, monitoring, and prevention plans.

117. Although it was created, adopted, and approved by the State, the DLNR, and UH, the 2009 CMP fails to adequately track the progress of each management action, lacks deadlines or benchmarks to enforce implementation of those management actions, and fails to state any consequences for inadequate and/or untimely implementation of those management actions.

118. Indicative of the attitude that the DLNR and UH have taken toward its management responsibilities, the members of the BLNR often had no questions and showed little interest in reports concerning UH's progress in executing the 2009 CMP action items.

119. The State, the DLNR, and UH failed and continue to fail to adequately oversee implementation of the 2009 CMP. Non-compliance with the 2009 CMP demonstrates their collective failure to manage Mauna Kea in accordance with their fiduciary duties as trustees.

**D. Failure to Create an Environment Respectful of Mauna Kea's Cultural Landscape**

120. The State, the DLNR, and UH failed and continue to fail to adequately protect Native Hawaiian traditional and customary rights and practices on Mauna Kea, including but not limited to hunting, gathering of natural resources, and religious practices.

121. The State, the DLNR, and UH failed and continue to fail to adequately implement management actions in the 2009 CMP related to cultural resources and/or practices; to ensure systematic input regarding management decisions that may affect cultural resources and/or practices; and to establish grievance procedures to address cultural issues as they arise.

122. Despite several 2009 CMP action items, the State, the DLNR, and UH failed to require mandatory visitor orientation, trainings, or briefings to explain the cultural significance of Mauna Kea, the appropriate behavior while on Mauna Kea, and the importance of preserving its cultural landscape.

123. The existing orientation program for Mauna Kea staff and workers provides little assurance that content is understood or even observed by orientation attendees.

124. Kahu Kū Mauna and OHA have not been properly or adequately consulted on a number of management actions concerning cultural resources and/or practices.

125. The failure to adequately consult with Kahu Kū Mauna and OHA contributed to the complete destruction of an ahu on or about September 13, 2015. The ahu was likely destroyed by a Mauna Kea Support Services staff person. Despite multiple written requests from OHA, the State, the DLNR, and UH failed to adequately investigate the destruction of the ahu, failed to hold anyone accountable for the incident, failed to apologize for the desecration, and failed to develop protocols and/or procedures to provide assurances that such destruction would not occur in the future.

**E. Failure to Manage Access to Mauna Kea and Activities on Mauna Kea**

126. Unresolved regulatory and jurisdictional chaos between UH and the DLNR has resulted in inadequate management of public access to Mauna Kea and insufficient regulation of activities on Mauna Kea.



127. As a result of this poor management, the DLNR and UH failed to properly respond to safety incidents and/or accidents on Mauna Kea; failed to respond to unsafe, destructive, or inappropriate behavior on Mauna Kea; and failed to disclose public safety and health issues to the public, including fatalities.

***Vehicular Accidents and Personal Injuries***

128. The DLNR and UH's failure to manage access and/or notify the public of proper behavior on Mauna Kea has contributed to or caused numerous car accidents and fatalities, including but not limited to:

- a. An April 2007 accident that killed two people;
- b. Cars driving off the access road and tumbling down the mountainside in July 2010 and February 2013;
- c. A car fire in September 2014;
- d. A vehicular fatality in March 2017; and
- e. A car accident resulting in the total destruction of a pickup truck in March 2017.

129. The DLNR and UH's inadequate control of public access has also resulted in missing hikers and personal injuries.

***Hazardous Material Spills***

130. Solid and liquid hazardous materials are used in routine observatory operations and generate waste after their use. Operations may require glycol coolants; diesel fuel for emergency generators; hydraulic fluid; lubricants; compressed gasses (e.g., carbon dioxide, helium, oxygen, nitrogen); mercury; mirror decoating acids (e.g., hydrochloric acid, potassium hydroxide, copper sulfate, hydrofluoric acid); and paints and solvents. The facilities on Mauna Kea, including Hale Pōhaku, also utilize underground storage tanks: one housing 11,500 gallons of diesel fuel and two housing 2,000 gallons and 4,000 gallons respectively of gasoline.

131. In or around May 2004, documents were subpoenaed from the W.M. Keck Observatory regarding its proposed outrigger telescope project. These documents revealed that spills of sewage, ethylene glycol, diesel fuel, and toxic mercury marred the safety records of observatories on Mauna Kea. These documents validated concerns voiced by Native Hawaiian groups for decades regarding the effects spills may have on the mountain's natural resources, including its important fresh water sources.

132. Based on environmental reports, news reports, and independent state audits, there have been at least ten (10) mercury spills at the different observatories on Mauna Kea.

133. In or around July 2011, more than 100 liters of orange coolant spilled from a torn wrapping cable within the system shutting down the Subaru observatory for approximately two weeks.

134. In the summer of 2015, idle equipment and/or heavy machinery at the TMT construction site on Mauna Kea continuously leaked oil for months. The public raised concerns regarding these oil leaks and their effect on the environment and the fresh water in Lake Waiau on Mauna Kea.

### ***Trash***

135. The General Lease requires UH to keep “the demised [leased] premises and improvements in a clean, sanitary, and orderly condition.” Conservation District Use Permits also contain specific conditions that require UH to control trash in the specific construction area and in the general summit area.

136. These requirements impose a duty on UH to monitor construction activity on a regular basis to prevent construction-related trash from accumulating on Mauna Kea.

137. In or around 1995, the Sierra Club complained of the amount of trash on the Mauna Kea summit. Only after the Sierra Club’s complaint did UH investigate the issue and remind the sub-lessees of their duty to control trash.

138. In or around 1995, UH failed to manage the large amounts of trash generated by the Subaru observatory and the Keck observatory. 1998 Audit at 25. The amount of trash was so voluminous that a helicopter was required to airlift the trash from the summit at a cost of approximately \$20,000.00.

139. The General Lease requires UH to obtain the approval of the BLNR before abandoning remnants of facilities and/or equipment on Mauna Kea. The 1977 Mauna Kea Plan additionally required an adequate security deposit to ensure that items were timely and properly removed. Despite these requirements, the 1998 Audit found that UH failed to remove old testing equipment from the summit of Mauna Kea that UH or its sub-lessees previously used to study the conditions of potential construction areas. The old testing equipment included two concrete slabs and a large weather tower.

140. Although UH represents that its attention to trash has improved over time, excessive trash continues to be an issue on Mauna Kea. In or around April 2015, large amounts of trash—including beer bottles, bottle caps, plastic water bottles, aluminum cans, socks, gloves, paper products, and chicken bones—were found on Mauna Kea.

141. Although the 2009 CMP required the development and implementation of a plan for debris removal, monitoring, and prevention by 2013, UH admits that such a plan remains only in draft form.

142. The 2009 CMP also required the development and implementation of a plan for the removal of military wreckage by 2019. According to UH's own reporting, this plan has not yet been initiated.

**F. Failure to Manage Observatory Construction and Decommissioning**

143. Existing subleases, negotiated by UH, do not state whether all facilities and infrastructure must be removed, do not provide details about the decommissioning process, and do not include mechanisms to ensure funding for decommissioning.

144. Moreover, **UH and the DLNR have not facilitated any enforceable commitment to reduce the development footprint on Mauna Kea.** They have not required a comprehensive management plan to provide a timeline for decommissioning the existing observatories on Mauna Kea or any type of cap, limitation, outline, or timeline for observatory development and decommissioning on Mauna Kea.

145. As a condition of the BLNR's approval of the 2009 CMP, the BLNR required UH to complete the 2010 Decommissioning Plan, which provides guidelines for the observatory decommissioning process, a summary of existing observatory facilities and details relating to their potential decommissioning, and suggested requirements for future or renegotiated subleases to ensure adequate planning and financial mechanisms for decommissioning.

146. The 2010 Decommissioning Plan urges each sublessee to develop a site decommissioning plan ("SDP") and decommissioning funding plan ("DFP") to ensure compliance with applicable laws and to facilitate achievement of decommissioning and site restoration goals described in the 2009 CMP and the 2010 Decommissioning Plan.

147. **To date, no SDPs or DFPs have been developed, or even initiated, for any of the existing thirteen (13) observatories on Mauna Kea.**

148. Neither UH nor the DLNR has established any mechanisms to enforce the development of SDPs or DFPs.

149. With the exception of the sublessee for the TMT, sublessees are not required to follow the 2010 Decommissioning Plan, and neither UH nor the DLNR has taken action to facilitate compliance.

150. Existing observatory subleases require only that facilities be removed and that the land be restored to “even grade” or “original condition” at the end of the sublease term. The UH Board of Regents and/or the BLNR, however, may allow the facilities to be recycled or otherwise retained.

151. In 2013, despite UH’s decades-long history of management failures, the BLNR continued negotiations with UH for a new thirty-five (35) year general lease of Mauna Kea, which would expire in 2078. The proposed lease terms did not include sufficient or enforceable conditions to ensure adequate contributions to Mauna Kea’s management costs; sufficient or enforceable consequences for violations of the general lease terms; sufficient checkpoints to ensure progress on the action items called for in the 2009 CMP; or a sufficient and enforceable commitment to reduce the development footprint on Mauna Kea. Further, the BLNR considered granting the new general lease without fulfilling a statutorily-required environmental review.

152. A new general lease has not yet been executed, in part due to repeated testimony and advocacy from OHA and increased vigilance from the community concerning these deficiencies, both of which indicated a strong likelihood of litigation should the BLNR approve a new general lease under those or similar terms.

#### VIII.

#### **OHA’S EFFORTS TO AVOID LITIGATION ON THIS MATTER**

153. In response to the community’s concern for Mauna Kea and Governor Ige’s commitment to “be better stewards of the mountain,” OHA approached Governor Ige, the DLNR, and UH in or around June 2015 to meet to discuss proper management of Mauna Kea.

154. In or around August 2015, OHA formed the Ad Hoc Committee on Mauna Kea to help facilitate resolution of the State’s mismanagement of Mauna Kea.

155. In or around September 2015, members of the Ad Hoc Committee on Mauna Kea met with Governor Ige to discuss mediation between the Governor’s Office, the DLNR, UH, and OHA to resolve Mauna Kea’s mismanagement.

156. In the fall and winter of 2015, OHA joined the Governor's Office, the DLNR, and UH in mediation with Keith Hunter of Dispute Prevention & Resolution, Inc. The purpose of the mediation was to discuss a memorandum of understanding that would improve management of Mauna Kea for each of the different stakeholders.

157. Soon thereafter, UH declined to continue with the mediation process.

158. In the spring of 2016, the Governor's Office, the DLNR, and OHA continued to meet to discuss and draft a memorandum of understanding. OHA circulated several draft memorandums and invested significant resources to resolve the State's mismanagement issues through an improved multi-agency framework.

159. On May 31, 2016, after several months of inactivity from the Governor's Office and the DLNR, OHA sent the State, the DLNR, and UH a letter, pursuant to HRS section 673-3, giving notice of its intent to file a lawsuit against them for failing to meet their fiduciary duties as trustee of the public lands trust ("**Notice of Intent**").

160. The Notice of Intent led to increased participation in the mediation process by the Governor's Office and the DLNR.

161. In the fall and winter of 2016, following a series of meetings between OHA, the Governor's Office, and the DLNR, OHA drafted a revised Memorandum of Understanding ("**MOU**") to facilitate holistic and effective management of Mauna Kea that elevated community voices and cultural perspectives to a level that would actually impact decision-making.

162. OHA reengaged the Governor's Office and the DLNR in the spring of 2017 to inquire about the status of the proposed MOU. In the summer of 2017, OHA finally received written comments on the MOU from the Governor's Office and the Office of the Attorney General.

163. Despite additional efforts from OHA to resolve Mauna Kea's mismanagement in a cooperative and holistic manner, the State's comments and proposed revisions weakened the effect of the MOU beyond what OHA felt was effective.

164. Because two years of mediation has not produced any meaningful improvement to the management framework on Mauna Kea, OHA now brings this lawsuit to hold the State, the DLNR, and UH accountable for its continued management failures. OHA intends this lawsuit to prompt necessary changes that may lift Defendants' management of Mauna Kea in line with its responsibilities as a trustee.

**COUNT I**  
**(Defendants' Breach of Fiduciary Duty)**

165. OHA hereby realleges the allegations of Paragraphs 1 through 164 above and incorporates them as if fully set forth herein.

166. Defendants are trustees of the ceded lands on Mauna Kea.

167. As trustees, Defendants have trust responsibilities or fiduciary duties concerning those ceded lands on Mauna Kea and its public trust resources.

168. The “conduct of the government as trustee is measured by the same strict standards applicable to private trustees.” Ahuna, 64 Haw. at 339, 640 P.2d at 1169. The Hawai‘i Supreme Court has specially adopted three specific trust duties applicable to the State and its agencies: (1) the duty “to administer the trust solely in the interest of the beneficiar[ies],” (2) the duty to “deal impartially when there is more than one beneficiary,” and (3) the duty “to use reasonable skill and care to make trust property productive . . . or simply to act as an ordinary and prudent person would in dealing with his own property. OHA v. HCDC, 117 Hawai‘i at 194, 177 P.3d at 904 (citing Ahuna, 64 Haw. at 338, 640 P.2d at 1168).

169. Additionally, like private trustees, Defendants have the following duties:

- a. The duty to protect and preserve trust resources from substantial impairment;
- b. The duty to preserve the rights of present and future generations to use and otherwise benefit from the trust resources;
- c. The duty to administer trust resources solely for the interests of the beneficiaries, and not for the trustees’ own benefit or the benefit of third parties;
- d. The duty to manage trust resources in good faith and with such vigilance, diligence, and prudence as a reasonable person would in managing his or her own affairs;
- e. The duty against privatizing the trust resources;
- f. The duty to maximize the value of trust resources for its intended beneficiaries;
- g. The duty to restore trust resources when damaged;
- h. The duty to adequately supervise administrative agencies and other state agents, officers, and employees to meet the State’s fiduciary duties;

- i. The duty to manage trust resources with reasonable caution, or through use of the precautionary principle; and
- j. The duty to furnish trust beneficiaries with information concerning the health of the resources protected by the trust.

170. Under the public trust doctrine, Defendants must also protect and conserve public trust resources to the extent feasible; must balance the protection and conservation of public trust resources with the use and development of such resources, with a presumption in favor of public use, access, and enjoyment; must consider the cumulative impact of existing and future uses on public trust purposes; must engage in planning and decision-making from a global, long-term perspective; and must apply the precautionary principle whenever there is a threat or potential threat to public trust resources.

171. Defendants have breached one or more of their fiduciary duties with respect to the ceded lands on Mauna Kea.

172. Defendants' failure to fulfill their trust duties harms the resources on Mauna Kea and damages the trust corpus and its beneficiaries.

173. The State waived sovereign immunity as to claims for breach of fiduciary duty against itself, its agents, officers, and employees pursuant to HRS section 661-1 and HRS section 673-1.

174. OHA is entitled to declaratory judgment that the State and its agents have breached their fiduciary duties with respect to Mauna Kea; an order requiring action consistent with the State's fiduciary duties and/or preventing action inconsistent with the State's fiduciary duties; an accounting of the trust resources on Mauna Kea; and damages to make the trust resources whole.

**COUNT II**  
**(Defendant UH's Breach of Contract)**

175. OHA hereby realleges the allegations of Paragraphs 1 through 174 above and incorporates them as if fully set forth herein.

176. The State, the DLNR, and the BLNR entered into the General Lease with UH to lease ceded lands on Mauna Kea for use as a scientific complex and a scientific reserve.

177. The General Lease requires UH to maintain the land in a clean, sanitary, and orderly condition and to prevent unlawful, improper, or offensive use of the land.

178. The General Lease requires UH to properly maintain, repair, and keep all improvements of the land in good condition and in compliance with plans prepared in anticipation of such construction.

179. UH has breached and continues to breach the General Lease.

180. As beneficiaries of the ceded lands trust, of which Mauna Kea is a critical part, OHA and its beneficiaries are third party beneficiaries of the General Lease.

181. UH's breach and continued breaches of the General Lease caused damage to Mauna Kea, the corpus of the ceded lands trust, and to OHA and its beneficiaries.

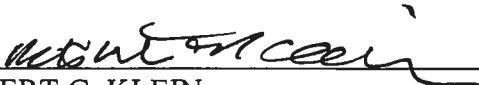
182. As a result of UH's breaches, OHA is entitled to compensation damages; rescission of the General Lease; restitution; and/or specific performance of the contract terms.

**PRAYERS FOR RELIEF**

Wherefore, OHA respectfully prays for judgment against Defendants:

- A. For a declaration that Defendants breached and continue to breach their fiduciary duties by failing to properly manage the ceded lands on Mauna Kea;
- B. For an injunction requiring Defendants to fulfill their trust duties with respect to the ceded lands on Mauna Kea and precluding actions that violate their trust duties;
- C. For an accounting of the ceded lands on Mauna Kea and the cost of managing those lands in compliance with Defendants' fiduciary duties;
- D. For restitution to make the trust whole;
- E. For damages;
- F. For rescission of the General Lease;
- G. For attorneys' fees and costs, prejudgment interest, and post-judgment interest; and
- H. For such other relief as deemed fair and equitable by the Court.

DATED: Honolulu, Hawai'i, November 7, 2017.

  
\_\_\_\_\_  
ROBERT G. KLEIN  
JORDAN K. INAFUKU  
Attorneys for Plaintiff  
THE OFFICE OF HAWAIIAN AFFAIRS



IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

THE OFFICE OF HAWAIIAN AFFAIRS, ) CIVIL NO. 17 - 1 - 18 23 - 11 J P C -  
 ) (Declaratory Judgment)  
 Plaintiff, )  
 ) SUMMONS  
 vs. )  
 )  
 STATE OF HAWAI'I; UNIVERSITY OF )  
 HAWAI'I; DEPARTMENT OF LAND )  
 AND NATURAL RESOURCES; BOARD )  
 OF LAND AND NATURAL RESOURCES; )  
 JOHN DOES 1-10; JANE DOES 1-10; )  
 DOE PARTNERSHIPS 1-10; DOE )  
 CORPORATIONS 1-10; DOE "NON- )  
 PROFIT" CORPORATIONS 1-10; and )  
 DOE GOVERNMENTAL ENTITIES 1-10, )  
 )  
 Defendants. )  
 )

**SUMMONS**

STATE OF HAWAI'I

TO THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with the court and to serve upon McCorrison Miller Mukai MacKinnon LLP, Plaintiff's attorneys, whose address is Five Waterfront Plaza, 4th Floor, 500 Ala Moana Boulevard, Honolulu, Hawai'i 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Pursuant to Rule 4(b) of the Hawai'i Rules of Civil Procedure, this Summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general

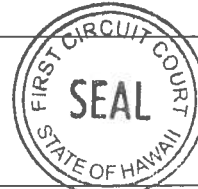
public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, \_\_\_\_\_.

NOV - 7 2017

F. OTAKE



\_\_\_\_\_  
CLERK OF THE ABOVE ENTITLED COURT



OFFICE OF HAWAIIAN AFFAIRS  
Administrative Testimony

Testimony of Sylvia M. Hussey Ed.D.  
Ka Pouhana, Chief Executive Officer

**Board of Regents, University of Hawai'i  
Agenda Item VII.B.**

**APPROVAL OF MAUNAKEA MANAGEMENT RESTRUCTURING PLAN**

May 21, 2020

10:30 a.m.

Virtual

Meeting

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on the proposed restructuring plan for the management of Maunakea lands leased by the University of Hawai'i (UH). **OHA notes that it was not consulted in the development of this or any other management restructuring proposal considered by the Board of Regents (BOR) during their April 16, 2020 meeting.** OHA therefore offers the following comments, concerns, and recommended conditions, and strongly urges the BOR to consider and incorporate them in any proposed restructuring plan it may consider approving.

Maunakea and its resources comprise a critical and singularly significant part of the ceded lands trust and public trust that the State of Hawai'i is constitutionally-bound to protect and preserve for future generations of Native Hawaiians and the entire Hawai'i community. Sadly, the historical and ongoing mismanagement of Maunakea has resulted not only in OHA's pending lawsuit against UH, but has also resulted in a substantial and understandable lack of trust in the community regarding the State's and UH's commitment to respectfully steward the mauna. OHA therefore strongly urges the BOR to provide more meaningful assurances in its decisionmaking on this or any other management restructuring proposal, that can ensure Native Hawaiians and the public that the aggressive development of more telescopes will not come at the expense of the mauna's sacred environment, natural and cultural resources, and cultural sites.

The mismanagement of UH's leased Maunakea lands has been a matter of concern and conflict for decades. Years of complaints from Native Hawaiian cultural practitioners and the larger community culminated in the first of four reports by the State auditor, spanning a period of over 15 years, all verifying the State's and UH's ongoing failure to properly manage the mauna. The first auditor's report in 1998 explicitly found that UH had, for decades, prioritized telescope development over appropriate management of the fragile ecosystem and cultural importance of Maunakea. Subsequent auditor's reports documented continued and serious deficiencies in UH's management. Since at least 2011, OHA itself has also raised concerns regarding the ability of Native Hawaiians to engage in traditional and customary practices dependent upon the environmental and

cultural integrity of Maunakea's lands, resources, and sites. **Unfortunately, even after decades of verified complaints, both UH and the State have consistently failed to meaningfully demonstrate any ability or willingness to serve as proper stewards of Maunakea's public trust lands and resources, leading many, including OHA, to the ultimate conclusion that appropriate management of Maunakea can only be achieved with entirely new leadership and organization.**<sup>1</sup>

OHA appreciates the apparent acknowledgement of the need for much better management of Maunakea in the proposal before the BOR today. OHA does, however, reiterate the substantial work that remains to be done in order to fulfill UH's decades-old promises to better steward the mauna, including through the implementation of numerous longstanding and unfulfilled Comprehensive Management Plan (CMP) action items of particular concern to Native Hawaiians. **OHA emphasizes that the instant proposed management restructuring plan lacks specificity and meaningful assurances that such substantive management needs will be actually addressed.**

OHA therefore strongly urges the BOR to provide conditions to require the following in any management restructuring proposal under its consideration:

1. A **cost assessment**, including staffing, equipment, and other resource needs, for the full and meaningful fulfillment of all CMP action items, including those listed in OHA's active Maunakea complaint, in a timely manner and subject to clear and reasonable benchmarks determined through consultation with OHA and other relevant stakeholders;
2. A **fiscal sustainability plan** that identifies available funding sources, including telescope sublease rent, that can provide for these costs in a sustainable and long-term manner, and that requires the Office of the Executive Director (OED) to coordinate between Maunakea Observatories Support Services and OED's subordinate entities (UH Institute for Astronomy, Director of Stewardship Programs, and 'Imiloa Astronomy Center) to develop and implement the plan;
3. A **community consultation plan** with clearly established authorities and processes for consulting with relevant stakeholder groups including but not limited to OHA, Kahu Kū Mauna, and 'ohana with familial and cultural ties to Maunakea, in the implementation of any management actions and in any decisionmaking or enforcement action otherwise authorized under the recently adopted administrative rules, where natural and cultural resources, cultural sites, or cultural practices may be impacted; and
4. A **regulatory assessment process** whereby stakeholder groups can periodically assess and recommend amendments to better incorporate Native Hawaiian traditional and customary practices and cultural concerns.

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<sup>1</sup> See Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, *Office of Hawaiian Affairs vs. State of Hawai'i*, iv. No. 17-1-1823-11 (Cir. Ct. 1<sup>st</sup> Cir. Ct.), available at <https://www.oha.org/maunakea/>.

**OHA again strongly urges that the above considerations be incorporated as conditions of approval for any proposed management restructuring plan for Maunakea, including the proposal before the BOR today.** OHA also recommends that the BOR require the Office of the Executive Director, the Director of Stewardship Programs, and the UH Institute for Astronomy to consult with OHA in their implementation of the proposed restructuring plan, and in the execution of its recommended conditions. **Without such conditions and requirements, any restructuring proposal may do little to rectify serious management issues that have persisted for generations, much less absolve community concerns regarding the same.**

Mahalo nui loa for the opportunity to testify on this matter.



OFFICE OF HAWAIIAN AFFAIRS  
Administrative Testimony

Testimony of Sylvia Hussey Ed.D.  
Ka Pouhana Kūikawā, Interim Chief Executive Officer

Board of Regents, University of Hawai'i  
Agenda Item III.B.

APPROVE ADOPTION OF CHAPTER 20-26, HAWAI'I ADMINISTRATIVE RULES,  
ENTITLED "PUBLIC AND COMMERCIAL ACTIVITIES ON MAUNA KEA LANDS," AND  
TRANSMITTAL TO THE GOVERNOR FOR FINAL APPROVAL

November 6, 2019

9:45 a.m.

UH Hilo Performing Arts Center

The Office of Hawaiian Affairs (OHA) **OPPOSES** the Board of Regents' (BORs') approval of proposed Hawai'i Administrative Rules (HAR) Chapter 20-26 as drafted. **In light of the proposed rules' continued failure to address OHA's numerous concerns and recommendations regarding potential impacts to Native Hawaiian traditional and customary practices, their adoption as drafted would contravene Hawai'i Revised Statutes (HRS) § 304-1903, and contradict the Board of Regents' own Maunakea Permitted Interaction Group's (MIG's) explicit findings and recommendations.**

As a preliminary matter, OHA yet again highlights the Maunakea rulemaking authority granted under HRS § 304A-1903, which requires that the BOR "consult with the Office of Hawaiian Affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by [Native Hawaiians]." As described repeatedly in multiple testimonies and correspondences dating back to 2011 (attached), the concerns OHA has raised and continue to raise have a direct relationship to the ability of Native Hawaiians to engage in traditional and customary practices dependent upon the environmental and cultural integrity of Maunakea's lands, resources, and sites. **The continued failure to address OHA's concerns in the proposed administrative rules therefore represents a failure to comply with the BOR's statutory rulemaking consultation requirements enacted specifically to resolve such concerns.**

As a further preliminary note, OHA does express appreciation for the MIG's recognition and findings that "Maunakea has become a symbol of Native Hawaiian self determination"; that "the University has been criticized for past and present mismanagement of Maunakea"; that there is a "need to collectively do better with regard to efficiency, effectiveness, and transparency in the functional structure of Maunakea management"; and that "Maunakea is a special place to all of Hawai'i, and Native Hawaiian cultural practices need to be acknowledged in planning for the use of Maunakea." **However, any adoption of the proposed rules as drafted – which fail to address longstanding governance, transparency, and management issues compromising**

**Native Hawaiian practitioners' ability to perpetuate their cultural practices in such a culturally significant space – would severely undermine any sense of sincerity in the MIG's statements, as well as any BOR promise to finally and substantively fulfill its responsibilities to appropriately steward Maunakea.**

While the following concerns have been raised and described repeatedly in the attached testimonies and correspondences regarding the proposed administrative rules, OHA raises them once again, to provide additional commentary on their continued absence in the instant rules draft:

**A. Transparency and accountability concerns remain unaddressed.**

Concerns regarding the rules' lack of transparency and accountability in decisionmaking, including decisionmaking that may profoundly impact practitioner access to, and the overall integrity of, cultural resources and sites, have been raised by OHA since at least 2011. More broadly, transparency concerns are also now even recognized by the MIG's findings, which describe "the need to collectively do better with regard to efficiency, effectiveness, and transparency," and call for the development of a "plan [] to improve the operations and management and make it [sic] more efficient, effective and transparent" (emphases added). **Nonetheless, the rules continue to allow all nearly all major decisions regarding access, traffic management, area closures, commercial use, the issuance of public and commercial use permits, regulatory exemptions, etc. to be made by a single individual – the UH President, or their designated stand-in – without any concrete or legally enforceable public review or cultural practitioner consultation mechanism whatsoever.**

As also illustrated in the attached testimonies and correspondences, OHA has even offered suggested approaches to balance the need for expedited decisionmaking in certain situations and in exigent circumstances, with the need for transparency and practitioner input in decisionmaking that could impact Native Hawaiian traditional and customary practices. Notably, such approaches have been adopted and used in other state administrative rule chapters, including those for the management of state conservation lands. **The proposed rules as currently drafted nonetheless inexplicably fail to explore, much less implement, OHA's suggestions, or otherwise resolve OHA's longstanding transparency concerns.**

Accordingly, adoption of the rules as drafted would not only represent an unfounded rejection of the transparency and accountability concerns raised and suggestions offered by OHA, but would also bring into question the sincerity of the MIG's findings as well as any commitment by the BOR to improve the transparency issues that have plagued Maunakea's history of mismanagement. **OHA urges the BOR to review its prior testimonies and correspondences and accordingly ensure that any administrative rules address its transparency concerns prior to their adoption.**

**B. Cultural consultation requirements are essentially nonexistent.**

As OHA has also repeatedly pointed out, the administrative rules as previously and currently drafted provide little more than lip service to Kahu Kū Mauna (KKM), the cultural advisory group for Maunakea established by UH itself, and further provide no real opportunity for OHA, cultural practitioner, or lineal descendant input in decisions that may profoundly impact Native Hawaiian traditional and customary practices or affect the environmental and cultural integrity of Maunakea. As noted above, the BOR's own MIG has recognized that "Native Hawaiian cultural practices need to be acknowledged in planning for the use of Maunakea," and that "Maunakea has become a symbol of Native Hawaiian self determination." However, as detailed most recently in the attached June 1, 2019 letter to UH President Lassner, the rules as they continue to be drafted offer no concrete requirement for Native Hawaiian participation in the governance and use of Maunakea – thereby giving no meaningful acknowledgement of Native Hawaiian cultural practices in the use of Maunakea, and providing no acknowledgement of the need to facilitate Native Hawaiian self-determination over these ancestral and unlawfully acquired former Hawaiian Kingdom lands. OHA also notes that UH and OMKM have failed to adopt other mechanisms to ensure Native Hawaiian participation in the governance and use of Maunakea, including options articulated by OHA throughout the years and most recently in June 2018; the failure to include any concrete and enforceable Native Hawaiian consultation mechanisms in the rules would only exacerbate this continued exclusion of Native Hawaiian input in matters pertaining to Maunakea.

**Accordingly, if adopted, the rules as drafted will not only represent the official rejection of legitimate and reasonable concerns long raised by OHA regarding Native Hawaiian traditional and customary practices, but further contradict the findings of the BOR's own MIG, and undermine the sincerity of the BOR in any present or future commitment to become a better steward of Maunakea.** OHA urges the BOR to instead review the attached correspondences regarding the lack of concrete consultation mechanisms in the administrative rules, and ensure that they are addressed accordingly.

**C. CMP and other management plan actions that would require or be aided by administrative rules remain unaddressed, or referenced in such a vague manner as to be rendered meaningless.**

OHA appreciates the MIG's findings that recognize decades of concern regarding the "past and present mismanagement of Maunakea," and appreciates its proposed resolution's "commitment to follow through with the recommendations made in the Management Plans to better manage the impacts of the astronomy facilities and operations upon the natural environment, cultural resources . . . and upon the broader community." OHA also appreciates the acknowledgement in the MIG's proposed resolution that "there remain unmet responsibilities and ongoing compliance issues that have delayed completion of certain recommendations and requirements under the Management Plans." **However, these acknowledgements and commitments would be severely undermined by**



**the adoption of the proposed administrative rules, insofar as the rules as drafted continue to fail to implement key actions under the referenced “Management Plans,” and provide only vague, unenforceable, and almost meaningless references in the few instances that they do cite UH’s own plans for managing Maunakea.**

The attached testimonies and correspondences, including the most recent June 1, 2019 letter to UH President Lassner, provide a detailed description of specific comprehensive management plan (CMP) actions neglected in the draft rules, and highlights areas in the draft rules where references to the CMP are vague or confusing. **OHA urges the BOR to review these previous documents and ensure their management plan concerns are addressed through additional and appropriately modified rule provisions.** OHA also offers the following additional comments that highlight ways in which the rule’s failure to fulfill management plan promises may further undermine the findings of the MIG, and the credibility of the BOR:

First, as previously mentioned, the MIG recognizes that “Native Hawaiian cultural practices need to be acknowledged in planning for the use of Maunakea,” and recommends an express commitment to follow through on management plan recommendations and requirements. **However, the draft rules appear to ignore OHA’s prior correspondences regarding the need for administrative rule provisions to effectively implement a number of actions under the CMP, including the designation of land use zones based on natural and cultural resource inventories, the establishment of a systematic input process for stakeholders, and orientation requirements for all users of Maunakea, among others.**

Second, on a related note, the MIG specifically recommends the development of a “suite of educational programs . . . including but not limited to Native Hawaiian culture, history, environmental and biological considerations,” to be designed specifically for “tour guides and drivers, employees, contractors, recreational users, scientists and observatory workers and visitors, as required by the Management Plans” (emphases added). However, while the rules do include an orientation requirement that may or may not be eventually implemented, and which could be readily adopted to use such a “suite of educational programs,” the rules explicitly state that their provisions – including orientation requirements -- “do not apply” to “education and research activities and support functions carried out by: (1) The university; (2) Persons under an agreement with the university; or (3) Government entities under an agreement with the university.” “Education and research activities” are not defined, nor is there any definition or limitation to what may constitute “an agreement with the university”; given the potential breadth of these terms, nearly all of the MIG’s education programs’ contemplated audience members would not be required to participate in such programs under the rules as drafted. While OHA appreciates that other mechanisms to ensure participation in meaningful educational or orientation programming for contractors, UH employees, and certain others exempted under the proposed rules, without some clear mandate under the rules, there is little reason to believe that such participation will in fact be required in a comprehensive,

consistent and enforceable manner; even if UH does truly intend to implement such mechanisms, there is still no reason why such a requirement should not be reflected in the rules. **Accordingly, despite the MIG's recommended commitment to implement CMP provisions that would otherwise call for an orientation process for all users of Maunakea, the proposed rules as drafted instead specifically exempt a broad and poorly defined range of individuals from its orientation and other provisions, including those whose "education and research activities" may have a particularly significant and potentially irreparable impact to natural and cultural sites and resources, as well as to the overall environmental and cultural integrity of Maunakea.**

Third, the MIG most significantly proposes the development of a "reorganization and restructuring plan," to include a presentation of "all advisory, operating and funding bodies involved in the management of Maunakea by April 2020." However, the rules as presented bring into question whether any advisory bodies and processes recommended or required by the CMP will be adequately described or even presented in such a reorganization and restructuring plan. In fact, the rules fail to recognize any advisory bodies or processes, other than decidedly non-binding language stating that the UH President "may" consult with KKM and the Mauna Kea Management Board for unspecified matters, and language regarding consultation or prior approval from the department of land and natural resources, on limited matters such as aircraft use or the installation of an access control gate. **Most notably, the rules continue to fail to establish "a systematic input process for stakeholders" (CMP Action EO-7), much less a "collaborative working group for management and resource protection" (CMP Action NR-13).** Accordingly, the rules as drafted would deprive "advisory . . . bodies" of any meaningful authority or official role in the management of Maunakea, and the rules' adoption would bring into question the credibility and substance of the MIG's most significant recommendation.

The rules' continued failure to incorporate numerous CMP and other management actions would indefinitely delay long awaited management promises; in addition, their adoption as currently drafted would also undermine the MIG's own specific findings and recommendations pertaining to the management of Maunakea, and the need to better implement its "Management Plans."

**D. The most significant and impactful "commercial and public activities" and the only reliable source of revenues sufficient in magnitude to properly manage Maunakea – telescope subleases – remain unaddressed.**

Finally, OHA appreciates the MIG's apparent recognition, in its findings and proposed resolution, that telescope development has significantly impacted Maunakea. OHA also appreciates the MIG's resolution's recognition that telescope decommissioning may be one way to finally begin to remediate such impacts. OHA further appreciates the MIG's understanding, reflected in its recommended request for state general funds, that funding is clearly necessary to provide for the appropriate management of Maunakea.

However, the MIG's aforementioned recognitions and recommendations would be completely belied by the BOR's adoption of the currently drafted rules, which, despite OHA's repeated assertions since at least 2011, continue to fail to provide standards and processes to ensure that telescope subleases are subject to meaningful terms and conditions – including sublease rent schedules that can generate sufficient funding for the appropriate management of Maunakea. OHA urges the BOR to review the attached past testimonies and correspondences regarding this matter – which provide ample explanation and justifications for OHA's concerns – and to finally ensure that the most controversial uses of Maunakea are addressed by the rules. To the extent that there are other policy mechanisms to ensure telescope subleases are subject to meaningful terms and conditions, the BOR has had ample time to adopt them and has not done so. **Accordingly, to adopt the rules otherwise would, again, severely undermine any credibility that could be attached to the MIG's findings and recommendations, as well as perpetuate if not exacerbate one of the greatest sources of conflict in the history of Maunakea's mismanagement.**

Mahalo nui for the opportunity to comment on this matter.

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**STATE OF HAWAII  
OFFICE OF HAWAIIAN AFFAIRS  
560 N. NIMITZ HWY., SUITE 200  
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June 1, 2019

David Lassner  
President, University of Hawai'i  
c/o UH System Government Relations Office  
2442 Campus Road, Administrative Services Building 1, Room 101  
Honolulu, Hawai'i 96822

Re: Public Hearing Testimony for the Proposed Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands."

Aloha e Mr. Lassner,

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** regarding the proposed administrative rules for the University of Hawai'i's (UH's) leased Maunakea lands. OHA urges the Board of Regents (BOR) and UH to amend these rules to address the longstanding concerns that we have repeatedly raised throughout the consultation and rulemaking process, with respect to Native Hawaiian traditional and customary practices and the protection of resources and sites necessary for the continuation of such practices, as further described below.

- A. The proposed rules lack the transparency and accountability necessary to ensure that Native Hawaiian traditional and customary practices are not impacted by arbitrary decisionmaking

Hawai'i Revised Statutes (HRS) § 304A-1903, the statutory authority for the instant draft rules, requires that the Board of Regents (BOR) "consult with the Office of Hawaiian Affairs to ensure that these rules shall not affect any right, 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." However, as with their prior iterations, the latest draft of the proposed Mauna Kea administrative rules continue to fail to adequately address a number of issues repeatedly raised by OHA, which are critical to the protection of Native Hawaiian traditional and customary rights, and the underlying resources, sites, and overall environment upon which they depend.

**For example, the proposed rules continue to provide for a range of decisions that may significantly impact cultural practitioner access, natural resources, cultural sites, and**

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**the overall environmental and cultural integrity of UH's Mauna Kea lands, without any assurance of public, agency, or practitioner review or input.** As with previous drafts of these rules, the current draft would provide a single individual "designee" with the authority to make decisions concerning roadway access control; public access closures; commercial activity, research, and special use permits; and the assessment of fees, fines, and penalties, and among others. Such decisions may have significant and profound impacts, both directly and indirectly, on Native Hawaiian traditional and customary rights: access closures may cut practitioners off from areas and sites underlying their traditional and customary practices; commercial tour, research, and special use permit approvals, particularly without adequate oversight, may result in the degradation or destruction of resources and sites and compromise the environmental and cultural integrity of areas underlying Native Hawaiian traditional and customary rights; and even the assessment of fees and fines may not appropriately account for the range of management and mitigation activities necessary to ensure the adequate protection of such rights, resources, and sites.

Clearly, some level of public or practitioner input may be critical to ensuring that Native Hawaiian traditional and customary rights are not affected in decisionmaking on these and other matters encompassed by the rules. However, unlike the BOR,<sup>1</sup> the individual decisionmaking designee described in the draft rules would not be subject to sunshine laws requiring a minimal level of public notice and input in their decisionmaking. Moreover, nothing in these rules would otherwise ensure that a designated decisionmaker consult with Kahu Kū Mana (KKM) – UH's own cultural advisory body – much less OHA or the knowledgeable practitioners and 'ohana with lineal ties and ongoing, living practices associated with UH's Mauna Kea lands.

Notably, the rules also lack clear processes for challenging the scope and basis of many of the decisions made by this individual designee, providing little protection for Native Hawaiian traditional and customary rights from arbitrary decisionmaking even after-the-fact.

Accordingly, **OHA again urges that these rules be amended to strike a more appropriate balance between efficient decisionmaking to address exigent management needs, and public transparency, practitioner input, and accountability in decisions that may otherwise significantly impact the ability of Native Hawaiians to exercise their traditional and customary rights.**<sup>2</sup> Although OHA has consistently raised this concern since 2011, including in meetings with Office of Mauna Kea Management (OMKM) staff, with the Mauna Kea Management Board (MKMB) Chair, and during the previous round of rulemaking public hearings, the instant draft of the subject administrative rules still fails to provide any

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<sup>1</sup> OHA appreciates that the rules do provide for some of these decisions to be made by the "board" or the "University," which is "governed by the board"; however, the rules at the outset states that "the board delegates its authority to administer this chapter to the president, who may further delegate that authority to a designee." Proposed HAR §§ 20-26-2, -8. Likewise, while certain decisions appear to be specifically assigned to the "president," the "president" as defined in these rules means "the president of the university, or the president's designee." Proposed HAR § 20-26-2 (emphasis added).

<sup>2</sup> One possible example of a balanced decisionmaking framework, which OHA provided in its 2011 letter and reiterated in 2018 consultation meetings between OHA and representatives from MKMB and OMKM, might be found in the conservation district rules, where some uses and activities may be unilaterally granted by the Chairperson, and other more intensive uses and activities must be approved by the Board of Land and Natural Resources, with additional attendant requirements such as a management plan.

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assurance of transparency, input, or accountability for the broad range of decisionmaking authority that may be entrusted to a single individual "designee" of the UH President.

- B. Consultation with Kahu Kū Mauna, the Office of Hawaiian Affairs, and/or cultural practitioners and lineal descendants, as appropriate, should be required for all actions and activities that may adversely impact Native Hawaiian traditional and customary practices.

On a similar note, in addition to providing an appropriate level of accountability in transparency in decisionmaking, OHA again urges that the rules provide clear cultural consultation requirements for any decisionmaking that may infringe on Native Hawaiian traditional and customary practices, or impact culturally significant resources and sites. As noted above, the administrative rules continue to lack any clear cultural consultation process, as otherwise described in the 2009 Mauna Kea Comprehensive Management Plan (CMP), to ensure that decisionmaking does not impact Native Hawaiian rights or their underlying resources. In fact, the rules provide no clear or enforceable assurance that any consultation whatsoever will occur with KKM, OHA, or any other entity or individual with Native Hawaiian cultural expertise or connection with Maunakea. While the draft rules suggest that the "president's designee may seek the advice of the Maunakea management board and the Kahu Kū Mauna pursuant to the comprehensive management plan and consistent with the timelines and procedures of this chapter," this sole consultation provision is permissive, unenforceable, and extremely vague as to when and what actions it is envisioned to apply. Other than descriptive language in the definitions section, the draft rules provide no other mention or role for KKM or the MKMB whatsoever in the management or administration of Maunakea. **Given the broad range of decisions and activities contemplated by these draft rules that may impact cultural resources and practices on Maunakea, OHA again urges, as it has on numerous prior occasions, that these rules provide a much clearer, enforceable, and broader role in decisionmaking for KKM, MKMB, and cultural practitioners and groups with ties to Maunakea. At minimum, this should include mandatory consultation for all decisions and actions that may adversely impact Native Hawaiian traditional and customary rights and practices including their underlying resources and sites.**

- C. CMP actions relevant to Native Hawaiian traditional and customary practices and requiring rulemaking should be included and implemented in the draft rules.

OHA again urges UH and the BOR to ensure that these rules reflect the management actions envisioned in the CMP that may be critical to protecting Native Hawaiian rights and cultural resources, particularly where actions would appear to require rulemaking to be properly implemented. As OHA previously testified, CMP actions such as FLU-2 (designating land use zones to restrict future land uses in the Astronomy Precinct, based on cultural and natural resource inventories); CR-7 (cultural education requirements for construction staff, UH staff, and researchers); ACT-2 (parking and visitor traffic plan); and CR-6 (guidelines for the visitation and use of ancient shrines), among others, would all appear to require rulemaking to be enforceable and fully implemented. Some of these actions, such as CR-6, have also been explicitly recognized by OMKM itself as requiring rulemaking. Other actions, meanwhile, including EO-7 (developing a systematic input process for stakeholders) and NR-13 (establishing a collaborative

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working group for management and resource protection), among others, could also be better implemented and institutionalized via rulemaking. However, these and other CMP action items that would otherwise serve to protect cultural practices, resource, and sites, do not appear to be reflected in the administrative rules. Instead, the rules appear largely focused on implementing those CMP provisions directly related to the facilitation of observatory activity.

Notably, past assertions by OMKM that certain regulatory action items would be substantively implemented via “policies” adopted by OMKM or the BOR have been shown to be meaningless at best, and disingenuous at worst. Of particular note is the highly problematic adoption of CR-5 (the adoption of guidelines for the placement of cultural offerings), CR-7 (the appropriateness of new cultural features), and CR-9 (the appropriateness of new cultural features); although the CMP explicitly requires that these actions be implemented in consultation with OHA, ‘ohana with lineal ties, and cultural practitioners, they were instead recommended for approval by OMKM and adopted without any meaningful consultation with OHA or a known family of cultural practitioners that specifically requested consultation.<sup>3</sup> In the year that has passed since the adoption “policies” for these action items, despite continuing concerns voiced by OHA and practitioners who were not consulted, these action items and their policies have still not been revisited by OMKM, MKMB, or the BOR, and the draft rules as written provide no process to otherwise to incorporate the input of OHA, ‘ohana, or cultural practitioners in their implementation. As these particular actions demonstrate, leaving the implementation of certain CMP actions to the adoption of future “policies” rather than through clear or enforceable rule provisions provides little to no assurance that they will be implemented properly and consistent with the CMP’s own requirements, if they are ever adopted at all.

Finally, OHA notes that even if referenced or generally contemplated in the current rules draft, specific policies and plans adopted outside of the formal rulemaking process may also not be enforceable, as illustrated in numerous court decisions relating to HRS Chapter 91.

D. CMP references are ambiguous in scope and applicability, rendering potential impacts to Native Hawaiian traditional and customary practices difficult if not impossible to evaluate and mitigate

OHA notes that in each instance where the draft rules do attempt to incorporate the CMP’s provisions, specifically by summary reference to the CMP, it is not clear as to exactly which of the CMP’s specific processes and requirements are intended to apply, who they would apply to, and how they are to be implemented. Such vagueness and inconsistency is particularly concerning in their potential impacts to the exercise of Native Hawaiian traditional and customary practices as well as the resources and sites necessary to their continued existence.

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<sup>3</sup> OHA did attend a May 2016 outreach meeting regarding these actions along with numerous other stakeholders, where the overwhelming sentiment was to conduct further public outreach; however, the only subsequent outreach events were a series of general notices stating that “OMKM would like to invite you to talk story about Maunakea,” with no indication of what, specifically, OMKM was inviting the public to “talk story” about. OHA does not consider this to represent meaningful and directed consultation with OHA, cultural practitioners, or lineal descendants, much less members of the general public.

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For example, the rules appear to establish public access hours as “set forth in the comprehensive management plan”;<sup>4</sup> meanwhile, the CMP and its Public Access Plan (PAP) – itself intended to be reviewed and updated every five years<sup>5</sup> – in turn only describes hours of operation for the Visitor Information Station and Hale Pōhaku, and for “public recreational activities” (emphasis added) within the science reserve (to be from ½ hour before sunrise to ½ hour after sunset).<sup>6</sup> It is unclear whether these hours are therefore intended to be the same public access hours as those described in the rules, whether the CMP’s hours for “public recreational activities” are intended to or may inadvertently apply to cultural practitioners seeking access outside of those hours, or whether changes to the PAP – which are not subject to rulemaking processes or requirements -- are also intended to be incorporated in the rules.

Similarly, the draft rules require that “all persons accessing the UH management areas” (emphasis added) be required to complete an orientation regarding natural and cultural resources, safety matters, and other information “as set forth in the comprehensive management plan.” Given the broad range of educational and training components in the CMP and its sub-plans, the contents and target audience of this orientation provision, how any orientation would be implemented, and – most importantly – its sufficiency in minimizing the potential for impacts to natural and cultural resources and practices, are ambiguous at best. Reflecting the importance of user education to the overall management of Maunakea, the CMP and its sub-plans describe separately and in various places mandatory and aspirational orientation and trainings regarding natural and cultural resources and sites, the historical and cultural significance of Maunakea, and/or safety issues; these include a mandatory orientation with periodic updates and certificates of completion for visitors, employees, observatory staff, contractors, and commercial and recreational users who visit and work at Maunakea;<sup>7</sup> specialized training for field-personnel, staff and volunteers;<sup>8</sup> a training program for “all persons involved with construction activities,” including staff monitoring construction activities;<sup>9</sup> and even training for commercial tour drivers;<sup>10</sup> among others. However, it is not clear whether all or part of these orientation processes and requirements are intended to be included as part of this rule provision. It is also not clear as to how or if these requirements are intended to be enforced; how orientation materials would be developed, delivered, and revised; and to whom any orientation requirement would apply.

To this latter point, while the CMP clearly contemplates orientation and training not just for visitors, but also UH employees, observatory staff, contractors, support staff, and commercial operators, the draft rule chapter explicitly exempts from its provisions UH, persons under “an agreement” with UH, and government entities with an agreement with UH, who carry out

<sup>4</sup> Proposed HAR §§ 20-26-38(c).

<sup>5</sup> See MAUNA KEA PAP 7-1 (2010).

<sup>6</sup> See MAUNA KEA PAP 2-13 (2010); MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN (MAUNA KEA CMP) 7-32 – 33, 7-66 (2009).

<sup>7</sup> SEE MAUNA KEA CMP 6-8, 7-23; MAUNA KEA NATURAL RESOURCES MANAGEMENT PLAN (MAUNA KEA NRMP) VI, 4.4-6 (2009). MAUNA KEA PUBLIC ACCESS PLAN (MAUNA KEA PAP) 4.1, 4.2, 6.1, 6.5-6.7 (2010).

<sup>8</sup> See MAUNA KEA CMP 7-23, 7-61; CULTURAL RESOURCES MANAGEMENT PLAN (CRMP) 5-2 (2009).

<sup>9</sup> See MAUNA KEA CMP 7-6.

<sup>10</sup> See MAUNA KEA NRMP 4.4-6 (2009).



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“research activities and support functions.”<sup>11</sup> Accordingly, it appears that observatory researchers and staff, scientists, maintenance workers, and even construction workers and contractors may not be subject to any access and orientation requirements under the rules.

Accordingly, OHA strongly urges a much closer review of the CMP and its subplans as may be referenced in these rules, to reduce ambiguities and minimize any impacts to Native Hawaiian traditional and customary practices and their underlying resources and sites, as envisioned in the CMP.

- E. Reliable and transparent resource-generating mechanisms, including observatory sublease provisions, are necessary to minimize impacts to Native Hawaiian traditional and customary rights resulting from permitted, unregulated, and otherwise allowed activities

Finally, and most critically, OHA yet again reiterates its long-standing assertion that any administrative rules for Maunakea provide clear assurances that future observatory subleases will generate sufficient and reliable revenue and other support for the appropriate management of Maunakea, including through the full implementation of the CMP.

**OHA notes that a number of activities which may be permitted, unregulated, or otherwise allowed under these rules have the potential to significantly undermine Native Hawaiian traditional and customary practices and beliefs associated with Maunakea, thereby impacting Native Hawaiians' ability to exercise their traditional and customary rights.** For example, access to and the availability of specific resources and sites may be hampered or foreclosed by commercial tours, research activities (including observatory development and operation), public use, and even the actions of untrained government staff and contractors. In addition, “Culture and nature are from an anthropological perspective intertwined and from a Native Hawaiian point of view inseparable . . . one cannot even begin to try and understand the meaning and significance of the cultural resources . . . without considering the relationship between people and the high altitude environment”;<sup>12</sup> therefore, the impacts of permitted and allowed activities on Maunakea’s environmental integrity as a whole, may fundamentally burden or preclude the meaningful exercise of Native Hawaiian rights in an otherwise sacred region.

**In light of this understanding, OHA does believe that full implementation of the CMP, including its various subplans, may mitigate the potential for impacts to Native Hawaiian traditional and customary rights and the practices, resources, and sites they encompass.** However, absent stronger capacity-building assurances in the rules, there is no identifiable source of funds or other resources necessary for the CMP to be fully and consistently implemented. OHA acknowledges that the proposed rules do authorize fees for permits, parking, and entrance; however, even the most lucrative commercial tour permits have historically generated only half a million dollars a year on average, just a fraction of UH’s costs of

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<sup>11</sup> Proposed HAR § 20-26-3.

<sup>12</sup> CULTURAL RESOURCES SUB-PLAN at 2-1.

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administering Maunakea.<sup>13</sup> Numerous CMP action items yet to be implemented – including greater enforcement coverage, the development and implementation of educational and cultural training curricula, the development and implementation of a parking and visitor traffic plan, the scoping of additional facilities such as restrooms and a vehicle wash station, the ongoing collection and maintenance of cultural information and practices, and many others – will likely require a much higher level of resources than in previous years. Again, without mechanisms to ensure a sufficient level of resource generation to meaningfully implement the CMP, permitted and other activities will have a high likelihood of harming Native Hawaiian traditional and customary rights.

In this regard, OHA notes that the one activity with consistently sufficient budgetary resources, which has and will likely continue to reap the most direct and unique benefits of Maunakea's lands, and which has also served as the primary source of long-standing protests by Native Hawaiian cultural practitioners and environmental groups alike, is observatory development and operation on Maunakea's summit. **OHA therefore strongly urges that the administrative rules incorporate express regulatory guidance relating to the subleasing of Maunakea lands, which can formally ensure that observatory activities provide fair compensation sufficient to implement the CMP, and mitigate future impacts to Native Hawaiian rights that would otherwise result from the proposed rules.**

OHA agrees with many that the scientific study of celestial phenomena has incredible academic and, perhaps more importantly, philosophical value, with the potential to unify humanity across national, religious, ethnic, and political barriers in the common pursuit of understanding our universe, and our very existence as a human race. As in many other cultures, Native Hawaiian traditions also involved the extensive study of the night sky, using stars, planets, and the moon to predict weather conditions, guide harvesting and farming practices, foretell events, and navigate across vast expanses of ocean. Accordingly, OHA has never opposed astronomical endeavors in and of themselves. **However, the unifying, cross-cultural value of astronomy may be severely undermined, and its philosophical call for unity and appreciation for our mutual humanity significantly subverted, if it advances only at the direct and unaddressed expense of those who maintain sincere and reasonable concerns relating to environmental resources and spiritual spaces considered to be both culturally sacred, and marred by historical injustices.**

Accordingly, formally requiring extremely well-funded astronomical endeavors on Maunakea to address their past, present, and potential future cultural and environmental impacts, in acknowledgement of the cultural displacement and unresolved historical injustices underlying Maunakea's ownership and control, would both mitigate concerns relating to Native Hawaiian rights, as well as reinforce the philosophical and humanitarian foundation of astronomy on Maunakea.

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<sup>13</sup> OFFICE OF THE AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII 2 (2014) (hereinafter "2014 AUDIT").

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June 1, 2019  
Page 8

**In light of the above, OHA strongly recommends that these administrative rules include specific provisions to ensure that any and all future observatory subleases, as public and/or commercial land uses, provide an appropriate, consistent, and sufficient level of financial and other support for the stewardship of Maunakea and its natural and cultural resources. Insofar as such sublease provisions may prove critical to the protection of Native Hawaiian traditional and customary rights in Maunakea, OHA stands ready to provide the consultation required under the Board of Regent's statutory rulemaking authority.**

Mahalo nui for the opportunity to comment on this matter. For any questions or concerns, please contact Jocelyn Doane, Public Policy Manager, at 594-1908 or via e-mail at [jocelynd@oha.org](mailto:jocelynd@oha.org).

'O wau iho nō me ka 'oia 'i'o,



Kamana'opono M. Crabbe, Ph.D.  
Ka Pouhana, Chief Executive Office

KC:wt

CC: Robert Lindsey, Ke Kua 'O Hawai'i, OHA Trustee



Administrative Testimony  
Testimony of Kamana'o pono Crabbe, Ph.D  
Ka Pouhana, Chief Executive Officer

University of Hawai'i Board of Regents  
Agenda Item V.B.3

APPROVAL OF ADMINISTRATION'S RECOMMENDATION, BASED ON TESTIMONY RECEIVED DURING THE PUBLIC HEARINGS PROCESS, TO DRAFT REVISIONS TO SPECIFIC PROVISIONS IN THE PROPOSED CHAPTER 20-26, HAWAII ADMINISTRATIVE RULES, ENTITLED "PUBLIC AND COMMERCIAL ACTIVITIES ON MAUNA KEA LANDS", AND TO RETURN TO THE BOARD OF REGENTS FOR APPROVAL OF THE NEW DRAFT PRIOR TO A SECOND ROUND OF PUBLIC HEARINGS.

October 18, 2018

9:30 a.m.

Conference Room 105A/B

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** regarding the University of Hawai'i (UH) Administration's recommendation to draft revisions to the proposed administrative rules for UH's leased Maunakea lands, to be presented to the Board of Regents (BOR) for approval prior to a second round of public hearings.

At this time, any proposed rule revisions are publicly unknown; however, OHA appreciates that authorizing revisions generally may provide an opportunity for the rules to address OHA's longstanding concerns regarding the management of Maunakea and the protection of traditional and customary practices and their underlying natural and cultural resources and sites. **OHA appeals to the BOR to refrain from approving any additional public hearings until OHA's concerns have been meaningfully addressed, as envisioned under HRS §304A-1903.** Otherwise authorizing an additional round of public hearings would be a costly and inefficient use of public resources, insofar as another round of public hearings may then be necessary to address OHA's concerns, or may result in rules that continue to fail to adequately protect the natural and cultural resources, cultural sites, and cultural practices associated with one of Hawai'i's most culturally sacred places. **Accordingly, OHA encourages the BOR to formally direct the UH Administration to reconcile OHA's longstanding and reiterated concerns, and any other concerns raised in public testimony.**

Attached to this testimony are OHA's previous testimony from the Board of Regents meeting on June 7, 2018, and OHA's public hearing testimony to UH President David Lassner dated September 11, 2018. Both submittals urge revising the draft rules to more comprehensively and sustainably manage and mitigate the impacts of public and commercial activities on Maunakea, in order to adequately mitigate or prevent adverse impacts to Native Hawaiian traditional and customary practices, including impacts to the resources and sites they rely upon.

Mahalo for the opportunity to comment on this matter.

PHONE (808) 594-1888

FAX (808) 594-1938



**STATE OF HAWAII  
OFFICE OF HAWAIIAN AFFAIRS  
560 N. NIMITZ HWY., SUITE 200  
HONOLULU, HAWAII 96817**

September 11, 2018

David Lassner  
President, University of Hawai'i  
c/o UH System Government Relations Office  
2442 Campus Road, Administrative Services Building 1, Room 101  
Honolulu, Hawai'i 96822

Re: Public Hearing Testimony for the Proposed Chapter 20-26, Hawai'i Administrative Rules, entitled "Public and Commercial Activities on Mauna Kea Lands."

Aloha e Mr. Lassner,

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** regarding the proposed administrative rules for the University of Hawai'i's (UH's) leased Maunakea lands. While OHA appreciates that the longstanding lack of administrative rules has substantially hindered much-needed management of public and commercial activities on Maunakea, OHA believes that the current proposed rules fall short of meaningfully ensuring the appropriate stewardship of Maunakea, including through the protection of Native Hawaiian traditional and customary rights. **Accordingly, OHA urges the inclusion of additional provisions to more comprehensively and sustainably manage and mitigate the impacts of public and commercial activities on Maunakea.**

- 1. The sacred nature and longstanding concerns over the stewardship of Maunakea strongly counsel rules that can comprehensively and sustainably fulfill its unique and diverse management needs.**

As OHA and numerous others have previously testified, Maunakea is amongst Hawai'i's most sacred places. Many Native Hawaiians believe that Maunakea connects them to the very beginning of the Hawaiian people, and Native Hawaiians have used its summit for cultural, spiritual, and religious purposes since time immemorial. Over the past several decades, OHA's beneficiaries have voiced growing concerns over the development, use, and management of Maunakea's summit and surrounding lands, concerns which have been validated and reaffirmed by numerous state audits and other third-party reports. OHA believes it is for these reasons that the UH's Board of Regents is specifically required to consult with OHA, to ensure that any administrative rules "shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by . . . descendants of native

David Lassner, President, University of Hawai'i  
September 11, 2018  
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Hawaiians who inhabited the Hawaiian Islands prior to 1778.”<sup>1</sup> **It is also for these reasons that OHA believes it is critically important for the proposed administrative rules, which have been pending since 2009, to comprehensively cover and ensure the ongoing fulfillment of Maunakea’s unique and diverse management needs.**

**2. OHA’s longstanding concerns should be addressed in the administrative rules.**

OHA appreciates the outreach meetings that took place earlier this year with Office of Mauna Kea Management (OMKM) staff and the Mauna Kea Management Board (MKMB) Chair, and the long-awaited opportunity for dialogue that these meetings provided. OHA understands that these meetings were undertaken in part to satisfy the requirement that the Board “consult with the Office of Hawaiian Affairs to ensure that [the Maunakea administrative rules] shall not affect any right, 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.” **Unfortunately, despite explicit concerns expressed by OHA during these meetings as well as in OHA’s original correspondence from 2011, the current administrative rules continue to inadequately address a number of issues critical to the protection of Native Hawaiian traditional and customary practices, and the underlying resources, sites, and overall environment upon which they depend.**

A. Decisions that may impact Native Hawaiian traditional and customary rights and underlying resources and sites should be made in a transparent and accountable manner.

OHA continues to have significant concerns, originally expressed in 2011, regarding the lack of transparency and accountability mechanisms for potentially far-reaching decisionmaking that may impact Native Hawaiian traditional and customary rights, including the environment and resources upon which these rights rely. **As OHA has previously and consistently stated, public meetings are often the only opportunity for Native Hawaiians to identify and assert their constitutionally-protected traditional and customary rights during government decisionmaking.** However, as with previous drafts of these rules, the current draft would allow a single individual “designee” – **who would not be subject to the public meeting requirements under the state sunshine law** – the authority to make decisions concerning: fees for access, permits, parking, entrance, etc.; the issuance or denial of written permits for group activities, public assemblies, research activities, hiking on cinder cones, and commercial activities, among other permits; the closure of or limitation of access to all or portions of the Maunakea lands; and various other administrative actions.<sup>2</sup> Notably, such an individual

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<sup>1</sup> HRS § 304A-1903.

<sup>2</sup> OHA appreciates that the rules do provide for some of these decisions to be made by the “board” or the “University,” which is “governed by the board”; however, the rules at the outset states that “the board delegates its authority to administer this chapter to the president, who may further delegate that authority to a designee.” Proposed HAR §§ 20-26-2, -8. Likewise, while certain decisions appear to be specifically assigned to the “president,” the “president” as defined in these rules means “the president of the university, or the president’s designee.” Proposed HAR § 20-26-2 (emphasis added).

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"designee" also may not be as accountable to the public in the same manner as Governor-appointed and Senate-confirmed board or commission members, and the rules lack clear processes for challenging the scope and basis of many of the decisions made by this individual "designee."

OHA does acknowledge that not all decisions may require the same level of public transparency or scrutiny; OHA further acknowledges the potential need for expedited decisionmaking in order to address bona fide public safety or resource protection issues, such as inclement weather or the discovery of a sensitive cultural site in a high-traffic public area. **However, OHA believes that there may be ways to balance the need for expeditious decisionmaking under exigent circumstances, and the need for public transparency and accountability in decisions that can significantly impact the ability of Native Hawaiians to exercise their traditional and customary rights.**<sup>3</sup> Although OHA has consistently raised this concern since 2011, including in meetings with OMKM staff and the MKMB Chair earlier this year, the rules still fail to identify when more intense uses and activities should be made openly and transparently, with an opportunity for public scrutiny and input.

- B. Consultation with Kahu Kū Mauna, the Office of Hawaiian Affairs, and/or cultural practitioners and lineal descendants, as appropriate, should be required for all actions and activities that may adversely impact Native Hawaiian traditional and customary practices.

On a similar note, OHA strongly urges that these administrative rules provide much clearer cultural consultation requirements, consistent with the 2009 Mauna Kea Comprehensive Management Plan (CMP), to ensure that decisionmaking does not unduly infringe on Native Hawaiian traditional and customary practices, or impact culturally significant resources and sites. OHA does take note of the draft rules' suggestion that the "president's designee may seek the advice of the Maunakea management board and the Kahu Kū Mauna pursuant to the comprehensive management plan and consistent with the timelines and procedures of this chapter," and that OMKM may, "after consulting with Kahu Kū Mauna," restore sites impacted by "customary and traditional rights" activities.<sup>4</sup> However, despite Kahu Kū Mauna (KKM's) explicit role as a Native Hawaiian cultural advisory body for the MKMB, OMKM, and the UH Chancellor, neither of these permissive regulatory references would require any actual consultation with KKM. Moreover, the draft rules provide no other mention or role for KKM, other than to advise that cultural practitioners consult with them. **Given the broad range of decisions and activities contemplated by these draft rules that may impact cultural resources and practices on Maunakea – including area closures, the designation of snow play areas, the issuance of group and commercial permits, etc. – OHA**

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<sup>3</sup> One possible example, which OHA provided in its 2011 letter and reiterated in 2018 consultation meetings, might be found in the conservation district rules, where some uses and activities may be unilaterally granted by the Chairperson, and other more intensive uses and activities must be approved by the Board of Land and Natural Resources, with additional attendant requirements such as a management plan.

<sup>4</sup> Proposed HAR § 20-26-3(e) (emphasis added); -21(b).

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**strongly believes that these rules should provide a much clearer, mandatory, and broader advisory role for the official Native Hawaiian advisory council for the management of Maunakea.**

OHA further notes that the CMP and its underlying cultural resource protection plan contain numerous "actions" and other provisions requiring OMKM and KKM to "work with families with lineal and historical connections to Maunakea, kūpuna, cultural practitioners, the Office of Hawaiian Affairs and other Native Hawaiian groups . . . toward the development of appropriate procedures and protocols regarding cultural issues." However, again, the lack of consultation requirements on a number of decisions relevant to cultural practices and protocols for Maunakea provide little assurance that any such consultation.

C. CMP actions requiring rulemaking should be included and implemented in the draft rules.

OHA further urges UH to ensure that these rules reflect the management actions envisioned in the CMP, that may be critical to protecting Native Hawaiian rights and cultural resources, and that would appear to require rulemaking to be properly implemented. For example, FLU-2 (designating land use zones to restrict future land uses in the Astronomy Precinct, based on cultural and natural resource inventories); CR-7 (cultural education requirements for construction staff, UH staff, and researchers); ACT-2 (parking and visitor traffic plan); and CR-6 (guidelines for the visitation and use of ancient shrines), among others, would all appear to require rulemaking to be enforceable and fully implemented. Other actions, such as EO-7 (developing a systematic input process for stakeholders) and NR-13 (establishing a collaborative working group for management and resource protection), among others, could also be implemented and institutionalized via rulemaking. However, these and other CMP action items that, if implemented, would serve to protect cultural practices, resource, and sites, do not appear to be reflected in the administrative rules.

OHA appreciates OMKM's assertion that some of these action items may be implemented via "policies" adopted by OMKM or the Board of Regents; however, there is no guarantee that such policies will in fact be established, much less in an appropriate and accountable way. For example, a number of these actions have been pending for years, well beyond their anticipated timeline of completion; **the need for rulemaking itself was specifically cited as the reason for the delay in implementing certain actions** (such as CR-6, "Develop and adopt guidelines for the visitation and use of ancient shrines"). **The decade-long failure to adopt "policies" to implement these outstanding actions, which would appear to otherwise require rulemaking, raises significant doubt as to whether such policies will actually be adopted in a timely manner outside of the rulemaking context.** In another example, despite the CMP's aforementioned requirement that OHA, 'ohana with lineal ties, and cultural practitioners be specifically consulted on specific actions including CR-5 (the adoption of guidelines for the placement of cultural offerings), CR-7 (the appropriateness of new cultural features), and CR-9 (the appropriateness of new cultural features), policies to "implement" these actions were recently recommended for approval by OMKM, without any meaningful consultation with OHA or a known family of cultural practitioners that specifically



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requested consultation.<sup>5</sup> Such a recommendation brings into question whether future “policies” that are in fact adopted to implement the CMP, will be done so in an appropriate way consistent with the CMP’s own requirements.

OHA notes that even if referenced or generally contemplated in the current rules draft, specific policies and plans adopted outside of the formal rulemaking process may also not be enforceable, as illustrated in numerous court decisions relating to HRS Chapter 91.

- D. Reliable and transparent resource-generating mechanisms, including observatory sublease provisions, are necessary to minimize impacts to Native Hawaiian traditional and customary rights resulting from permitted, unregulated, and otherwise allowed activities

Finally, and most critically, OHA reiterates its long-standing assertion that any administrative rules for Maunakea provide clear assurances that future observatory subleases will generate sufficient and reliable revenue and other support for the appropriate management of Maunakea, including through the full implementation of the CMP.

**OHA notes that a number of activities which may be permitted, unregulated, or otherwise allowed under these rules have the potential to significantly undermine Native Hawaiian traditional and customary practices and beliefs associated with Maunakea, thereby impacting Native Hawaiians’ ability to exercise their traditional and customary rights.** For example, access to and the availability of specific resources and sites may be hampered or foreclosed by commercial tours, research activities (including observatory development and operation), public use, and even the actions of untrained government staff and contractors. In addition, “Culture and nature are from an anthropological perspective intertwined and from a Native Hawaiian point of view inseparable . . . one cannot even begin to try and understand the meaning and significance of the cultural resources . . . without considering the relationship between people and the high altitude environment”;<sup>6</sup> therefore, the impacts of permitted and allowed activities on Maunakea’s environmental integrity as a whole, may fundamentally burden or preclude the meaningful exercise of Native Hawaiian cultural practices in an otherwise sacred region.

**In light of this understanding, OHA does believe that full implementation of the CMP, including its various subplans, may mitigate the potential for impacts to Native Hawaiian rights.** However, absent stronger capacity-building assurances in the rules, there is no identifiable source of funds or other resources necessary for the CMP to be fully and

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<sup>5</sup> OHA did attend a May 2016 outreach meeting regarding these actions along with numerous other stakeholders, where the overwhelming sentiment was to conduct further public outreach; however, the only subsequent outreach events were a series of general notices stating that “OMKM would like to invite you to talk story about Maunakea,” with no indication of what, specifically, OMKM was inviting the public to “talk story” about. OHA does not consider this to represent meaningful and directed consultation with OHA, cultural practitioners, or lineal descendants, much less members of the general public.

<sup>6</sup> CULTURAL RESOURCES SUB-PLAN at 2-1.

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consistently implemented. OHA notes that the proposed rules do authorize fees for permits, parking, and entrance; however, even the most lucrative commercial tour permits have historically generated only half a million dollars a year on average, just a fraction of UH's current costs of administering Maunakea.<sup>7</sup> Numerous CMP action items yet to be implemented – including greater enforcement coverage, the development and implementation of educational and cultural training curricula, the development and implementation of a parking and visitor traffic plan, the scoping of additional facilities such as restrooms and a vehicle wash station, the ongoing collection and maintenance of cultural information and practices, and many others – will likely require a much higher level of resources than in previous years. Again, without mechanisms to ensure a sufficient level of resource generation to meaningfully implement the CMP, permitted and other activities will have a high likelihood of harming Native Hawaiian traditional and customary rights.

**In this regard, OHA notes that the one activity with consistently sufficient budgetary resources, which has and will likely continue to reap the most direct and unique benefits of Maunakea's lands, and which has also served as the primary source of long-standing protests by Native Hawaiian cultural practitioners and environmental groups alike, is observatory development and operation on Maunakea's summit.** OHA therefore strongly urges that the administrative rules incorporate express regulatory guidance relating to the subleasing of Maunakea lands, which can formally ensure that observatory activities provide fair compensation sufficient to implement the CMP, and mitigate future impacts to Native Hawaiian rights that would otherwise result from the proposed rules.

OHA does understand that the scientific study of celestial phenomena has incredible academic and, perhaps more importantly, philosophical value, with the potential to unify humanity across national, religious, ethnic, and political barriers in the common pursuit of understanding our universe, and our very existence as a human race. As in many other cultures, Native Hawaiian traditions also involved the extensive study of the night sky, using stars, planets, and the moon to predict weather conditions, guide harvesting and farming practices, foretell events, and navigate across vast expanses of ocean. Accordingly, OHA has never opposed astronomical endeavors in and of themselves. **However, the unifying, cross-cultural value of astronomy may be severely undermined, and its philosophical call for unity and mutual compassion for our shared humanity significantly subverted, if it advances only at the direct and unaddressed expense of a particular cultural group, who maintain sincere and reasonable concerns relating to environmental resources and spiritual spaces considered to be both culturally sacred, and marred by historically unjust acquisition.**

Accordingly, ensuring that extremely well-funded astronomical endeavors on Maunakea help to address their cultural and environmental impacts would not only mitigate concerns relating to Native Hawaiian rights, but also reinforce the philosophical and humanitarian foundation of astronomy on Maunakea. Unfortunately, as illustrated by the

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<sup>7</sup> OFFICE OF THE AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII' I 2 (2014) (hereinafter "2014 AUDIT").

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Protect Mauna Kea Movement, decades-long neglect of environmental and cultural concerns in favor of observatory development have eroded away many Native Hawaiians' ability to trust in less formal assurances. Therefore, clear regulatory mechanisms to this effect should provide as much public transparency and accountability as feasible.

**In light of the above, OHA strongly recommends that these administrative rules include specific provisions to ensure that any and all future observatory subleases, as public and/or commercial land uses, provide an appropriate, consistent, and sufficient level of financial and other support for the stewardship of Maunakea and its natural and cultural resources.** Insofar as such sublease provisions may prove critical to the protection of Native Hawaiian traditional and customary rights in Maunakea, OHA stands ready to provide the consultation required under the Board of Regent's statutory rulemaking authority.

Mahalo nui for the opportunity to comment on this matter. For any questions or concerns, please contact Jocelyn Doane, Public Policy Manager, at 594-1908 or via e-mail at [jocelynd@oha.org](mailto:jocelynd@oha.org).

'O wai iho nō me ka 'oia 'i'o,



Kamana'opono M. Crabbe, Ph.D.  
Ka Pouhana, Chief Executive Office

KC:wt

CC: Robert Lindsey, Ke Kua 'O Hawai'i, OHA Trustee



Administrative Testimony  
Testimony of Kamanaʻopono Crabbe, Ph.D  
Ka Pouhana, Chief Executive Officer

University of Hawaiʻi Board of Regents  
Agenda Item C-4

AUTHORIZATION TO REQUEST GOVERNOR'S APPROVAL TO ALLOW THE  
UNIVERSITY TO HOLD PUBLIC HEARINGS REGARDING PROPOSED CHAPTER 20-26,  
HAWAII ADMINISTRATIVE RULES, ENTITLED "PUBLIC AND COMMERCIAL  
ACTIVITIES ON MAUNAKEA LANDS"

June 7, 2018

9:15 a.m.

Sullivan Conference Center

The administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** regarding the proposed administrative rules for the University of Hawaiʻi's (UH's) leased Maunakea lands. While OHA appreciates that the longstanding lack of administrative rules has substantially hindered much-needed management of public and commercial activities on Maunakea, OHA believes that the current rules draft falls short of meaningfully ensuring the appropriate stewardship of Maunakea, including through the protection of Native Hawaiian traditional and customary rights. **Accordingly, OHA urges the Board of Regents (Board) to provide further opportunities for input and to incorporate or otherwise address OHA's concerns, prior to initiating the formal rulemaking process.**

OHA is the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians.<sup>1</sup> OHA has substantive obligations to protect the cultural and natural resources of Hawaiʻi for the agency's beneficiaries.<sup>2</sup> Accordingly, OHA is required to serve as the principal public agency in the State of Hawaiʻi responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; assess the policies and practices of other agencies impacting native Hawaiians and Hawaiians; and conduct advocacy efforts for native Hawaiians and Hawaiians.<sup>3</sup> These responsibilities with relation to activities at Maunakea are particularly significant: Maunakea is amongst Hawaiʻi's most sacred places and many Native Hawaiians believe Maunakea connects them to the very beginning of the Hawaiian people; since time immemorial, Native Hawaiians have used the summit for cultural, spiritual, and religious purposes. OHA believes it is for these reasons that the Board is specifically required to consult with OHA, to ensure that any administrative rules "shall not affect any right, customarily and traditionally exercised for subsistence, cultural,

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<sup>1</sup> HAW. CONST. ART. XII, § 5

<sup>2</sup> See Haw. Rev. Stat. ("HRS") Chapter 10 (2009).

<sup>3</sup> HRS § 10-3 (2009).

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and religious purposes and possessed by . . . descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.”<sup>4</sup>

It is with these kuleana in mind that OHA offers the following comments.

**1. The decision to commence the formal rulemaking process for Maunakea should take place on Hawai‘i Island.**

As a preliminary matter, OHA strongly urges the Board to defer the action before it today and to render its decision on Maunakea rules on Hawai‘i Island, to provide the island’s residents and cultural practitioners – including individual members of Kahu Kū Mauna (KKM) as well as the Mauna Kea Management Board (MMB) – a more meaningful opportunity to weigh in on the sufficiency of any draft rules. **Such individuals may have the most detailed, intimate, and up-to-date knowledge of the environmental, cultural, historical, and geological characteristics and needs of Maunakea, particularly with regards to commercial and public activities as well as the relevant provisions of the comprehensive management plan (CMP);** accordingly, their review and insight may be critical to maximizing the management opportunities provided by administrative rules. OHA notes that the last public outreach regarding these rules occurred on Hawai‘i Island three years ago, and that while the Office of Mauna Kea Management (OMKM) reports that “over 89 comments and surveys were received,” there is no description or summary of what these comments were, or what amendments, if any, were made to address them. Moreover, OHA understands that the last opportunity for public review of any draft rules occurred when the MKMB met over a year ago to approve the draft, when substantial conflict between Hawai‘i Island cultural practitioners, OMKM, and others may have inhibited constructive and meaningful participation and dialogue over these rules. **As discussed further below, OHA continues to maintain concerns regarding long-awaited management opportunities missing or largely unaddressed in the current draft rules, and believes that Hawai‘i Island stakeholders may also maintain similar, additional concerns on the rules’ sufficiency.**

While OHA does appreciate that the formal rulemaking process will require at least one public hearing to occur on Hawai‘i Island, OHA notes that the procedural requirements of the formal rulemaking process may preclude any substantial changes to incorporate potentially critical public hearing testimony, without further and potentially costly rulemaking delays. Meanwhile, although supplemental rule amendments or changes may also be made in the future during the formal rulemaking process, the seven years it has taken to develop the current draft rules thus far suggest that such a piecemeal approach make result in additional years of delays for such adjustments, if they are made at all. **Accordingly, the failure to ensure that the administrative rules for Maunakea are fully developed to comprehensively cover its unique and diverse management needs prior to the formal rulemaking process may significantly inhibit the effective stewardship of the mountain for an indefinite length of time.**

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<sup>4</sup> HRS § 304A-1903.

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Therefore, OHA urges the Board to render its public hearing decision on Hawai'i Island itself, such that it can gather the input necessary to fully evaluate whether any administrative rules are sufficiently developed to begin the formal rulemaking process.

**2. OHA's key concerns continue to be neglected in the current rules draft.**

OHA appreciates the most recent outreach meetings with OMKM staff and the MKMB Chair, and the long-awaited opportunity for dialogue that these meetings provided. OHA understands that these meetings were undertaken in part to satisfy the requirement that the Board "consult with the Office of Hawaiian Affairs to ensure that [the Maunakea administrative rules] shall not affect any right, 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." **Unfortunately, despite explicit concerns expressed by OHA during these meetings as well as in OHA's original correspondence from 2011, the current administrative rules draft continues to inadequately address a number of issues critical to the protection of Native Hawaiian traditional and customary practices, and the underlying resources, sites, and overall environment upon which they depend.**

**A. Decisions that may impact Native Hawaiian traditional and customary rights and underlying resources and sites should be made in a transparent and accountable manner.**

OHA continues to have significant concerns, originally expressed in 2011, regarding the lack of transparency and accountability mechanisms for potentially far-reaching decisionmaking that may impact Native Hawaiian traditional and customary rights, including the environment and resources upon which these rights rely. **As OHA has previously stated, public meetings are often the only opportunity for Native Hawaiians to identify and assert their constitutionally-protected traditional and customary rights during government decisionmaking.** However, as with previous drafts of these rules, the current draft would allow a single individual "designee" – **who would not be subject to the public meeting requirements under the state sunshine law** – the authority to make decisions concerning: fees for access, permits, parking, entrance, etc.; the issuance or denial of written permits for group activities, public assemblies, research activities, hiking on cinder cones, and commercial activities, among other permits; the closure of or limitation of access to all or portions of the Maunakea lands; and various other administrative actions.<sup>5</sup> Notably, such an individual "designee" also may not be as accountable to the public in the same manner as Governor-appointed and Senate-

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<sup>5</sup> OHA appreciates that the rules do provide for some of these decisions to be made by the "board" or the "University," which is "governed by the board"; however, the rules at the outset states that "the board delegates its authority to administer this chapter to the president, who may further delegate that authority to a designee." Proposed HAR §§ 20-26-2, -8. Likewise, while certain decisions appear to be specifically assigned to the "president," the "president" as defined in these rules means "the president of the university, or the president's designee." Proposed HAR § 20-26-2 (emphasis added).

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confirmed board or commission members, and the rules lack clear processes for challenging the scope and basis of many of this individual's decisions.

OHA does acknowledge that not all decisions may require the same level of transparency or scrutiny; OHA further acknowledges the potential need for expedited decisionmaking in order to address bona fide public safety or resource protection issues, such as inclement weather or the discovery of a sensitive cultural site in a high-traffic public area. **However, OHA believes that there may be ways to balance the need for expeditious decisionmaking under exigent circumstances, and the need for public transparency and accountability in decisions that may significantly impact the ability of Native Hawaiians to exercise their traditional and customary rights.**<sup>6</sup> Although OHA has consistently raised this concern since 2011, including and when we met with OMKM staff and the MKMB Chair earlier this year, no specific amendments to the rules were made to identify when more intense uses and activities should be made openly and transparently, with an opportunity for public scrutiny. Accordingly, OHA urges the Board to recommend further opportunity for dialogue between OMKM, KKM, OHA, cultural practitioners, and other stakeholders, as appropriate, to ensure that these rules draft provide for an appropriate level of transparency and accountability in the stewardship of Maunakea.

- B. Consultation with Kahu Kū Mauna, the Office of Hawaiian Affairs, and/or cultural practitioners and lineal descendants, as appropriate, should be required for all actions and activities that may adversely impact Native Hawaiian traditional and customary practices.

On a similar note, OHA strongly urges the Board to require that these draft rules provide much clearer cultural consultation requirements, consistent with the CMP as well as the need to ensure that decisionmaking does not unduly infringe on Native Hawaiian traditional and customary practices, or impact important culturally significant resources and sites. OHA does acknowledge the draft rules' suggestion that the "president's designee may seek the advice of the Maunakea management board and the KKM pursuant to the comprehensive management plan and consistent with the timelines and procedures of this chapter," and that OMKM may, "after consulting with Kahu Kū Mauna," restore sites impacted by "customary and traditional rights" activities.<sup>7</sup> However, despite KKM's explicit role as a Native Hawaiian cultural advisory body for the MKMB, OMKM, and the UH Chancellor, neither of these permissive regulatory references would require any actual consultation with KKM. Moreover, the draft rules provide no other mention or role for Kahu Kū Mauna, other than to advise that cultural practitioners consult with them. **Given the broad range of decisions and activities contemplated by these draft rules that may**

<sup>6</sup> One possible example, which OHA provided in its 2011 letter and reiterated in 2018 consultation meetings, might be found in the conservation district rules, where some uses and activities may be unilaterally granted by the Chairperson, and other more intensive uses and activities must be approved by the Board of Land and Natural Resources, with additional attendant requirements such as a management plan.

<sup>7</sup> Proposed HAR § 20-26-3(e) (emphasis added); -21(b).

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**impact cultural resources and practices on Maunakea – including area closures, the designation of snow play areas, the issuance of group and commercial permits, etc. – OHA strongly believes that these rules should provide a much clearer, mandatory, and broader advisory role for the official Native Hawaiian advisory council for the management of Maunakea.**

OHA further notes that the CMP and its underlying cultural resource protection plan contain numerous “actions” and other provisions requiring OMKM and KKM to “work with families with lineal and historical connections to Maunakea, kūpuna, cultural practitioners, the Office of Hawaiian Affairs and other Native Hawaiian groups . . . toward the development of appropriate procedures and protocols regarding cultural issues.” However, again, the lack of consultation requirements for KKM on a number of decisions relevant to cultural practices and protocols for Maunakea preclude any such consultation.

**Accordingly, OHA again urges the Board to provide further opportunity for dialogue on and refinement of these administrative rules, to ensure that an appropriate level of cultural consultation is conducted in relevant decisionmaking actions, as envisioned and long-promised by the CMP.**

C. CMP actions requiring rulemaking should be included and implemented in the draft rules.

OHA further urges the Board to ensure that these rules reflect the management actions envisioned in the CMP, that may be critical to protecting Native Hawaiian rights and cultural resources, and that would appear to require rulemaking to be properly implemented. For example, FLU-2 (designating land use zones to restrict future land uses in the Astronomy Precinct, based on cultural and natural resource inventories); CR-7 (cultural education requirements for construction staff, UH staff, and researchers); ACT-2 (parking and visitor traffic plan); and CR-6 (guidelines for the visitation and use of ancient shrines), among others, would all appear to require rulemaking to be enforceable and fully implemented. Other actions, such as EO-7 (developing a systematic input process for stakeholders) and NR-13 (establishing a collaborative working group for management and resource protection), among others, could also be implemented and institutionalized via rulemaking. However, these and other CMP action items that, if implemented, would serve to protect cultural practices, resource, and sites, do not appear to be reflected in the administrative rules.

OHA appreciates OMKM’s assertion that some of these action items may be implemented via “policies” adopted by OMKM or the Board; however, there is no guarantee that such policies will in fact be established, much less in an appropriate and accountable way. For example, a number of these actions have been pending for years, well beyond their anticipated timeline of completion; the need for rulemaking itself was specifically cited as the reason for the delay in implementing certain actions (such as CR-6, “Develop and adopt guidelines for the visitation and use of ancient shrines”). **The decade-long failure to adopt “policies” to implement these outstanding actions, which would appear to otherwise require rulemaking, raises significant doubt as to whether**



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**such policies will actually be adopted in a timely manner outside of the rulemaking context.** In another example, despite the CMP's aforementioned requirement that OHA, 'ohana with lineal ties, and cultural practitioners be specifically consulted on specific actions including CR-5 (the adoption of guidelines for the placement of cultural offerings), CR-7 (the appropriateness of new cultural features), and CR-9 (the appropriateness of new cultural features), policies to "implement" these actions were recently recommended for approval by OMKM, without any meaningful consultation with OHA or a known family of cultural practitioners that specifically requested consultation.<sup>8</sup> Such a recommendation brings into question whether future "policies" that are in fact adopted to implement the CMP, will be done so in an appropriate way consistent with the CMP's own requirements.

OHA notes that even if referenced or generally contemplated in the current rules draft, specific policies and plans adopted outside of the formal rulemaking process may also not be enforceable, as illustrated in numerous court decisions relating to HRS Chapter 91.

**Accordingly, OHA again urges the Board to provide further opportunity, prior to the commencement of the formal rulemaking process, for consultation and dialogue on these administrative rules, to ensure that they fulfill their critical management functions in protecting Native Hawaiian rights and their underlying cultural resources and sites on Maunakea.**

- D. Reliable and transparent resource-generating mechanisms, including observatory sublease provisions, are necessary to minimize impacts to Native Hawaiian traditional and customary rights resulting from permitted, unregulated, and otherwise allowed activities

Finally, and most critically, OHA reiterates its long-standing assertion that any administrative rules for Maunakea provide clear assurances that future observatory subleases will generate sufficient and reliable revenue and other support for the appropriate management of Maunakea, including through the full implementation of the CMP.

**OHA notes that a number of activities which may be permitted, unregulated, or otherwise allowed under these rules have the potential to significantly undermine Native Hawaiian traditional and customary practices and beliefs associated with Maunakea, thereby impacting Native Hawaiians' ability to exercise their traditional and customary rights.** For example, access to and the availability of specific resources and sites may be hampered or foreclosed by commercial tours, research activities (including observatory development and operation), public use, and even the actions of untrained government

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<sup>8</sup> OHA did attend a May 2016 outreach meeting regarding these actions along with numerous other stakeholders, where the overwhelming sentiment was to conduct further public outreach; however, the only subsequent outreach events were a series of general notices stating that "OMKM would like to invite you to talk story about Maunakea," with no indication of what, specifically, OMKM was inviting the public to "talk story" about. OHA does not consider this to represent meaningful and directed consultation with OHA, cultural practitioners, or lineal descendants, much less members of the general public.

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staff and contractors. In addition, "Culture and nature are from an anthropological perspective intertwined and from a Native Hawaiian point of view inseparable . . . one cannot even begin to try and understand the meaning and significance of the cultural resources . . . without considering the relationship between people and the high altitude environment";<sup>9</sup> therefore, the impacts of permitted and allowed activities on Maunakea's environmental integrity as a whole, may fundamentally burden or preclude the meaningful exercise of Native Hawaiian cultural practices in an otherwise sacred region.

**In light of this understanding, OHA does believe that full implementation of the CMP, including its various subplans, may mitigate the potential for impacts to Native Hawaiian rights.** However, absent stronger capacity-building assurances in the rules, there is no identifiable source of funds or other resources necessary for the CMP to be fully and consistently implemented. OHA notes that the proposed rules do authorize fees for permits, parking, and entrance; however, even the most lucrative commercial tour permits have historically generated only half a million dollars a year on average, just a fraction of UH's current costs of administering Maunakea.<sup>10</sup> Numerous CMP action items yet to be implemented – including greater enforcement coverage, the development and implementation of educational and cultural training curricula, the development and implementation of a parking and visitor traffic plan, the scoping of additional facilities such as restrooms and a vehicle wash station, the ongoing collection and maintenance of cultural information and practices, and many others – will likely require a much higher level of resources than in previous years. Again, without mechanisms to ensure a sufficient level of resource generation to meaningfully implement the CMP, permitted and other activities will have a high likelihood of harming Native Hawaiian traditional and customary rights.

**In this regard, OHA notes that the one activity with consistently sufficient budgetary resources, which has and will likely continue to reap the most direct and unique benefits of Maunakea's lands, and which has also served as the primary source of long-standing protests by Native Hawaiian cultural practitioners and environmental groups alike, is observatory development and operation on Maunakea's summit.** OHA therefore urges the incorporation of express, regulatory guidance relating to the subleasing of Maunakea lands, which can provide formal assurances that observatory activities provide fair compensation sufficient to implement the CMP, and mitigate future impacts to Native Hawaiian rights that will otherwise result from these rules.

OHA does understand that the scientific study of celestial phenomena has incredible academic and, perhaps more importantly, philosophical value, with the potential to unify humanity across national, religious, ethnic, and political barriers in the common pursuit of understanding our universe, and our very existence as a human race. As in many other cultures, Native Hawaiian traditions also involved the extensive study of

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<sup>9</sup> CULTURAL RESOURCES SUB-PLAN at 2-1.

<sup>10</sup> OFFICE OF THE AUDITOR, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE: A REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF HAWAII 2 (2014) (hereinafter "2014 AUDIT").

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the night sky, using stars, planets, and the moon to predict weather conditions, guide harvesting and farming practices, foretell events, and navigate across vast expanses of ocean. Accordingly, OHA has never opposed astronomical endeavors in and of themselves. **However, the unifying, cross-cultural value of astronomy may be severely undermined, and its philosophical call for unity and mutual compassion for our shared humanity completely subverted, if it advances only at the direct and unaddressed expense of a particular cultural group, who maintain sincere and reasonable concerns relating to environmental resources and spiritual spaces considered to be both culturally sacred, and marred by historically unjust acquisition.**

Accordingly, ensuring that extremely well-funded astronomical endeavors on Maunakea help to address their cultural and environmental impacts would not only mitigate concerns relating to Native Hawaiian rights, but also reinforce the philosophical and humanitarian foundation of astronomy on Maunakea. Unfortunately, as illustrated by the Protect Maunakea Movement, decades-long neglect of environmental and cultural concerns in favor of observatory development have eroded away many Native Hawaiians' ability to trust in less formal assurances. Therefore, clear regulatory mechanisms to this effect should provide as much public transparency and accountability as feasible.

**In light of the above, OHA strongly recommends that the Board, prior to approving any public rulemaking hearings, require that these administrative rules include specific provisions to ensure that any and all future observatory subleases, as public and/or commercial land uses, provide an appropriate, consistent, and sufficient level of financial and other support for the stewardship of Maunakea and its natural and cultural resources.** Insofar as such sublease provisions may prove critical to the protection of Native Hawaiian traditional and customary rights in Maunakea, OHA stands ready to provide the consultation required under the Board's statutory rulemaking authority.

Mahalo nui for the opportunity to comment on this matter. For any questions or concerns, please contact Jocelyn Doane, Public Policy Manager, at 594-1908 or via e-mail at [jocelynd@oha.org](mailto:jocelynd@oha.org).

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June 20, 2011

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**RE: Initial Comments on Working Draft of Mauna Kea Rules**

Aloha e Stephanie Nagata,

The Office of Hawaiian Affairs (OHA) appreciates the time, effort, and resources that the University of Hawai'i (UH) and the Office of Mauna Kea Management (OMKM) has expended to seek input pursuant to Act 132, Session Laws of Hawai'i 2009, on its draft rules for the lands it leases on Mauna Kea. Thus far, we are pleased with OMKM's commitment to provide OHA with updated drafts and spend time with our staff to answer questions. In light of the preliminary stage of the rules, OHA intends for this letter to highlight only initial thoughts on the working draft we have been provided.<sup>1</sup> [Attachment A]. OHA encourages OMKM to continue its informal consultation both with OHA and the community. We look forward to hearing the comments and concerns of our beneficiaries and will be submitting more thorough and specific comments once an official draft of the rules is released pursuant to chapter 91.

### **OHA's Role**

As the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians, Haw. Const. Art. XII, § 5, OHA appreciates this opportunity for comment. OHA has substantive obligations to protect the cultural and natural resources of Hawai'i for its beneficiaries. Hawai'i Revised Statutes (HRS) mandates that OHA serve as the principal public agency in the State of Hawai'i responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; assess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians; and conduct advocacy efforts for native Hawaiians and Hawaiians. HRS § 10-3.

OHA's responsibilities with relation to activities at Mauna Kea are particularly significant. Mauna Kea is amongst Hawai'i's most sacred places and many Native Hawaiians believe Mauna

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<sup>1</sup> The terms "working draft," and "current working draft" refers to a draft provided by OMKM to OHA dated 03/17/11.

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Kea connects them to the very beginning of the Hawaiian people. Since time immemorial, the Native Hawaiian people have used the summit for cultural, spiritual, and religious purposes. Over the last 40 years, activities at the summit have caused irreversible damage to this invaluable place, its irreplaceable cultural and natural resources, and the Native Hawaiian culture that relies upon it. OHA believes it is for these reasons that the Hawai'i State Legislature required the Board of Regents (BOR) to consult with OHA during the adoption of rules for the Mauna Kea lands. OHA notes that the BOR is required to

[c]onsult with the office of Hawaiian Affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupuaa tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the State to regulate such rights;

HRS § 304A-1903(2).

It is with this kuleana in mind that OHA respectfully offers the following comments and requests that responses to our concerns be addressed in subsequent drafts of the Mauna Kea lands administrative rules. OHA looks forward to working with OMKM to create rules to regulate public and commercial activities on the Mauna Kea lands that respect and protect Native Hawaiian culture and the constitutionally-protected rights of Native Hawaiians.

### **Protection of Native Hawaiian Traditional and Customary Practices**

Despite significant protections for Native Hawaiian traditional and customary rights, the exercise of these practices continue to be challenged and threatened. Pursuant to Article XII section 7 of the Hawai'i Constitution, statutory law, and Hawai'i case law our State has assumed and recognized an affirmative duty to protect Native Hawaiian traditional and customary rights.<sup>2</sup> Hawai'i's constitutional "mandate grew out of a desire to 'preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means' to recognize and reaffirm native Hawaiian rights."<sup>3</sup> These rights are subject to the State's right to regulate activities on its land which may affect traditional and customary practices. Unfortunately enforcement can be overly burdensome and ultimately prevent Native Hawaiians from continuing to exercise their practices. OHA appreciates OMKM's cognizance that "[t]he State does not have 'unfettered discretion to regulate the rights of ahupua'a tenants out of existence[.]'" and that regulations need to be justified.<sup>4</sup>

Many questions related to how traditional and customary rights will be protected remain unanswered at this stage of the Mauna Kea rules. The current draft does not yet address how

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<sup>2</sup> HRS section 7-1 and HRS section 1-1 recognizes access rights that are held by native tenants. HAW. REV. STAT. § 7-1 (2005); HAW. REV. STAT. § 1-1 (2005). See also Native Hawaiian Rights Handbook 11 - 14 (Melody Kapilialoha MacKenzie ed., 1991).

<sup>3</sup> *Ka Pa'akai O Ka'aina v. Land Use Commission*, 94 Hawai'i 31, 45, citing (Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640) (2000).

<sup>4</sup> Public Access Plan 2-28, citing *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425 (1995).

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enforcement of the rules will be conducted. OHA and OMKM agree that training enforcement officers will be critical to ensure that Native Hawaiian traditional and customary practices are respected and preserved. Additionally, OHA thinks it will be important for enforcement officers to be assisted by cultural experts. OHA understands that UH does not have the experience or expertise in managing public recreational activities and protecting traditional and customary Native Hawaiian practices and thus we suggest they continue to seek supportive partnerships. This could be done by, for example, hiring enforcement officers with an understanding of related traditional and customary practices, using a Native Hawaiian advisory group to assist with the development of enforcement policies, and/or having Native Hawaiian practitioners conduct training for enforcement officers.

Inevitably there will be disagreement on what practices are “appropriate,” authentic, and/or reasonable traditional and customary practices. Native Hawaiian culture is a living, constantly evolving culture. When possible, OHA urges adoption of policies that allow for broad interpretations of what is permissible to ensure traditional and customary rights are not abridged. Consistent with OMKM’s acknowledgements, any decisions that deny Native Hawaiians’ ability to exercise their traditional and customary rights must be justified. The State’s ability to restrict these practices is limited. OHA understands that OMKM will continue to take these issues into consideration as it moves forward with drafting the rules.

OHA commends OMKM for prioritizing the protection of Native Hawaiian traditional and customary rights in its future management of Mauna Kea. OHA notes that one of the goals that emerged from the creation of the Mauna Kea Comprehensive Management Plan (CMP) is to increase the understanding of Native Hawaiian history and cultural practice on Mauna Kea to ensure that Native Hawaiian practices are protected and respected. OHA also recognizes that OMKM places the protection of Native Hawaiian traditional and customary rights as one of its guiding principles in management of public and commercial activities at Mauna Kea.<sup>5</sup> In light of the challenges that regulations place on Native Hawaiian practitioners and OMKM’s assertion that traditional and customary rights *will* be preserved and protected, OHA believes that the Mauna Kea rules can be drafted in a way that will increase the likelihood that this mandate will be met. Specifically, OHA

- supports OMKM’s intention to clarify within the purpose section of the Mauna Kea Rules General Provisions that the rules are not intended to diminish or abrogate provisions of Haw. Const. Art. XII § 7. OHA prefers option 2 and would edit it as follows:

“The rules are not intended to diminish or abrogate the provisions of Article XII, Section 7 of the Hawai’i State Constitution or Section 7-1, Hawai’i Revised Statutes relating to Native Hawaiian traditional and customary rights.”

- suggests that, in addition to including the above language in the purpose section, an entirely separate subchapter (or alternatively section) should be added that articulates that the Mauna Kea Rules, in its entirety, are not intended to prevent practitioners from exercising their Native Hawaiian traditional and customary

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<sup>5</sup> Mauna Kea Public Access Plan, 5-1. Specifically OMKM’s guiding principles indicates that traditional and customary rights *will* be preserved and protected.

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practices. Including a separate subchapter would further emphasize OMKM's firm commitment and provide additional assurances for Native Hawaiian practitioners. OHA recommends inclusion of the following language which explicitly recognizes Native Hawaiian traditional and customary rights, within a separate subchapter of the rules:

"Subchapter 4: Protection of Native Hawaiian Rights

Nothing in this chapter is intended to restrict Native Hawaiians from exercising their traditional and customary rights. These rules should be read in conformance with Haw. Const. Art. XII § 7, HRS §§ 1-1 and 7-1, and applicable case law."

OHA believes these suggestions would help fulfill OMKM's management priorities and goals, OHA's commitment to protect and advocate for traditional and customary rights, and the Legislature's intent to ensure that traditional and customary rights are given adequate protection within the Mauna Kea rules.

### Scope of Commercial Activities

OHA asserts that the administrative rules for UH's leased Mauna Kea lands must broadly encompass *all* activities where any compensation or value, including monetary fees, barter, or services in-kind, is received in exchange for any goods or services, including subleasing the Mauna Kea lands. In the same legislation that authorized the BOR to adopt rules to regulate commercial activities at Mauna Kea, the Hawai'i State Legislature also authorized the BOR to charge fees for the use of Mauna Kea lands, facilities, and programs. Act 132 clearly authorizes the BOR to charge fees for a broad number of activities, including subleasing the Mauna Kea lands, commercial tour activities, use of facilities and programs on the Mauna Kea lands, and other activities. Inasmuch as OMKM agrees that the state Legislature has authorized the BOR to charge fees for these activities, and given the working draft's definition of "commercial activity" as "the use of or activity on state lands for which compensation is received," with "compensation" expressly including "monetary fees, barter, or services in-kind," it is unclear why OMKM has taken the position that some of these activities (particularly subleasing the land) would not be subject to the forthcoming Mauna Kea rules. It is OHA's position that the rules should comprehensively regulate all commercial activities, as defined in the working draft rules, including subleasing Mauna Kea lands, regardless of whether lease rents involves monetary payment, barter, or services in-kind, such as telescope viewing time.

An inclusive reading of commercial activities is consistent with the DLNR rules OMKM is mandated to strive for consistency with and the DLNR policy that OMKM cites both within the current working draft and the UH Management Areas on Mauna Kea Public Access Plan (Public Access Plan).

In authorizing the BOR to adopt rules to regulate commercial activities, the Legislature required the BOR to "[s]trive for consistency with the administrative rules of the division of forestry and wildlife of the department of land and natural resources related to forest reserves and natural area reserves." HRS § 304A-1903.

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The rules regulating activities within Natural Area Reserves, Hawai'i Administrative Rules (HAR) § 13-209-2, specifies

“Commercial activity” means the use of or activity on state lands for which compensation is received and by any person for goods and services or both rendered to consumers or participants in that use or activity.

The rules regulating activities within forest reserves, HAR §13-104-2, specifies

“Commercial activity” means the use of or activity in the forest reserve for which compensation is received by any person for goods or services or both rendered to customers or participants in that use of activity.

OHA notes OMKM's current working draft is generally consistent with the above definitions. It is also consistent with the DLNR's Policy for Commercial Activities on State Owned and Managed Lands and Waters [Attachment B], which is cited in OMKM's working draft and UH's Public Access Plan. DLNR's policy defines (in relevant part) commercial activity as

The collection by a party or their agent of any fee, charge, or other compensation shall make the activity commercial except when such fee, charge, or other compensation is for the sale of literature allowed under Chapter 13-7-7, HAR. [].

OHA is concerned that future drafts may diverge from these inclusive definitions. On May 18, 2011, OMKM provided OHA with a draft of General Provisions for the Administrative Procedures section of the rules which included considerations for possible definition amendments. [Attachment C]. The definitions found within this attachment appear to exempt UH and other agency activities (e.g., UH's land subleases and the sale/exchange/barter of telescope viewing time) from the commercial activities section of the rules. OHA opposes any attempt to limit the scope of commercial activities under the rules, including exempting actions by governmental agencies. Act 132 provided UH with the opportunity to establish a framework for regulating commercial activities on the Mauna Kea lands and to be effective and meaningful, this framework must comprehensively contemplate and regulate all foreseeable activities that involve the exchange of compensation for the use of or activity on Mauna Kea lands.

As such, UH's impending Mauna Kea administrative rules for commercial activities should expressly address procedures to sublease the Mauna Kea lands. In entering into leases the BOR is required to “comply with all statutory requirements in the disposition of ceded lands.” The creation of rules to assist with this mandate would be beneficial both to UH and the public. HRS chapter 171 guides the disposition of public land, much of which includes ceded lands. OHA suggests that enactment of administrative rules in line with chapter 171's leasing procedures would give UH a solid framework for properly subleasing the Mauna Kea Lands through a fair, open, and transparent process. The Department of Agricultural (DOA) administrative rules may be instructive as it takes these suggestions into consideration. The DOA's rules for its agricultural park and non-agricultural park lands programs rules specifies a process for the disposition of public lands and lease provisions. HAR §§ 4-153, 158.



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The Mauna Kea lands that UH have the pleasure and benefit of leasing are ceded lands that are part of the public land trust, held in trust by the State for the benefit of the general public and native Hawaiians. The decision by the BLNR to lease the Mauna Kea lands to UH in 1968 has had long term implications for the public and its resources. Any future subleases or lease extensions are significant decisions that will impact present and future generations of trust beneficiaries. As such, the BOR has fiduciary obligations when making decisions related to activities on Mauna Kea and its resources. These decisions should be subject to public input and participation through a process that is clearly establish and defined. Therefore, OHA strongly suggests that the scope of the Mauna Kea administrative rules must be all-inclusive and cover subleases of the Mauna Kea lands and ancillary activities, including the sale/exchange/barter of telescope viewing time, as well as the activities currently contemplated under the draft rules, such as commercial tours, film and production, concessions, and special events.

### Transparency/Accountability

At a minimum, decisions with broad or long-term implications should be made by a decision-making body that is directly accountable to the public and, at a minimum, subject to Hawai'i's sunshine laws to ensure meaningful public participation. OHA is uncomfortable with the broad decision-making authority to manage and regulate public and commercial activities that the current draft designates to chancellor of UH Hilo (or the chancellor's designee). Specifically, the current working draft gives the chancellor (or designee) the authority to issue permits, establish visiting hours, close or restrict public use of *all* or any portion of Mauna Kea for up to two years, close or restrict vehicular access of roads, and prohibit or restrict snow play in designated areas. In contrast, similar decision-making authority in DLNR's natural area and forest reserves require approval by the Board of Land and Natural Resources (BLNR), a body comprised of members that are appointed by the Governor with the consent of the Hawai'i State Senate. In the case of the natural area reserves, even more oversight is required – closing of areas, visiting hours, and special use permits require BLNR approval as well as the approval of the natural area reserves system commission.

OHA realizes that not all decisions require the same level of transparency or should be given the same level of scrutiny. The DLNR's rules in the conservation district provide a good example of how administrative rules require different levels of scrutiny depending on the intensity of proposed land uses. HAR § 13-5. While the Chairperson of the BLNR may unilaterally grant department permits for less intense land uses, the Board must approve board permits which involve land uses with potential for increased impacts. An examination of the rules reveals that land uses with increased potential impacts are also subject to increased public involvement.<sup>6</sup> The public can appeal the Chairperson's decision on a departmental permit and if the Chairperson's decision is shown to be "arbitrary and capricious, the board may affirm, amend or reverse the decision . . . , or order a contested case hearing[.]" HAR §13-5-33. With regards to board permits, public hearings are held which gives community members an opportunity to provide input, and where required contested case hearings are held. HAR § 13-5-34. These hearings are often times the only opportunity for

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<sup>6</sup> Depending on the proposed land use, permit applicants in the conservation district are required to apply for a site plan, a departmental permit, or a board permit. HAR §§ 13-5-22, 23, 24, 25 identifies different levels of review and permits required for different proposed land uses.

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Office of Mauna Kea Management  
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individuals to communicate to decision-makers how activities may adversely affect their cultural practices. OHA understands that OMKM is in its very initial stage of drafting the section of the rules applicable to contested cases (Attachment C) and urges OMKM to consider the Conservation District rules as it continues drafting. OHA also understands that there may be emergency and public safety situations that require more immediate decisions by the Chancellor alone and notes that HAR § 13-5-35 accounts for similar situations.

Designation of the chancellor's authority to the Mauna Kea Management Board (MKMB) does not resolve these concerns. OMKM advised OHA staff that these decisions may ultimately be designated to or made in conjunction with MKMB. OHA appreciates that the MKMB may be more closely affiliated with and responsive to Mauna Kea's nearby communities than the BOR. OHA reiterates – the decision-making body with such broad discretion should be directly accountable to the public and at a minimum be subject to Hawai'i's sunshine laws to ensure public scrutiny and participation. It is not enough that MKMB complies with sunshine laws without an explicit legal mandate.<sup>7</sup> Given Mauna Kea's unique character – conservation land classification, status as ceded lands, cultural significance, religious affiliations, astrological significance (both to Native Hawaiian and international astronomers), resource rich – heightened transparency is necessary.

OHA looks forward to continuing to contribute to this process with the University of Hawai'i and the Office of Mauna Kea Management. The significance of Mauna Kea compels OHA to advocate for increased understanding and protection of this special place and the Native Hawaiian people who rely upon it.

Thank you for your attention to this matter. If you have further questions, please contact us or have your staff contact us via Jocelyn Doane by phone at (808) 594-1759 or e-mail at [jocelynd@oha.org](mailto:jocelynd@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Chief Executive Officer

CWN:jd

C: Trustee Robert K. Lindsey Jr., Office of Hawaiian Affairs  
University of Hawai'i, Board of Regents  
Mr. William Ailā, Chairperson, Board of Land and Natural Resources  
OHA Hilo and Kona CRC Offices

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<sup>7</sup> OMKM advised OHA that it does not believe that MKMB meetings are subject to Hawai'i's Sunshine Laws. however MKMB conducts its meeting as if it is.

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HRD09/3754C

March 9, 2009

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1003 Bishop Street  
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**RE: Request for comments on the Mauna Kea Comprehensive Management Plan.**

Aloha e Dawn Chang,

On January 30, 2009, the Office of Hawaiian Affairs (OHA) received a letter requesting comments on the Mauna Kea Comprehensive Management Plan (CMP). The CMP was developed for the University of Hawai'i and is intended to serve as a guide for managing the existing and future activities and uses of Mauna Kea and to ensure the protection of the mountain's cultural and natural resources, many of which are unique. OHA has reviewed the plan and offers the following comments.

First, we would like to extend a warm mahalo to the university and Ku'iwalu for the extensive consultation with the Native Hawaiian community, and the broader public, that was conducted in the preparation of this CMP. As a general rule, OHA encourages project coordinators to engage communities in the planning process in recognition of the fact that identifying and discussing possible mitigation measures for issues in advance substantially improves the final project. Nevertheless, OHA still has a number issues with the document.

**Multiple management plans**

OHA has concerns that the CMP does not examine or provide management guidance for each of the astronomy development projects contemplated and proposed in the University of Hawai'i's 2000 Mauna Kea Science Reserve Master Plan. OHA notes that astronomy development has resulted in substantial and adverse impacts to the natural and cultural resources of Mauna Kea (Record of Decision for the Outrigger Telescopes Project, 2005). According to the CMP, the CMP and Master Plan will serve as two parallel management documents for

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Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development.

The CMP states that: "The CMP will not replace the 2000 Master Plan, which continues to serve as the University's development planning framework for responsible stewardship and use of the UH Management Areas. As the CMP maintains consistency with the 2000 Master Plan, future updates to that plan should be consistent with the CMP." (CMP, page 2-3.) Moreover, the document states on page 7-54 that "[i]t needs to be emphasized that the CMP manages resources; it does not advocate or promote new telescope development."

OHA notes that Mauna Kea itself is a resource, one that is especially sacred to Native Hawaiians, and the CMP must manage telescope development to protect the resource. There are a number of issues that arise from the university's strategy of operating under two parallel managing documents. First, it's confusing. Over the years, a series of management and master plans have guided activities and uses on Mauna Kea, which has confounded management of the mountain. The 2005 State Audit of Mauna Kea noted that the number of plans has resulted in "a complex web of responsibility" and that the university has "added to that web by tolerating different management documents without resolving inconsistencies between them or consolidating them into one comprehensive management plan."

The university continues this "complicated web" by allowing two management plans, despite the fact that the CMP is supposed to be the single comprehensive management plan the state auditor recommends. Moreover, the university's two management plans strategy seems to skirt both the Hawai'i Administrative Rules (HAR) and a circuit court ruling.

Chapter 13-5, HAR, allows for astronomy facilities within the Resource Subzone of the state's Conservation District, provided that the Board of Land and Natural Resources (BLNR) approves a management plan and permit for the project. Mauna Kea is located within the Resource Subzone of the state's Conservation District.

In his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara concluded that HAR §13-5-24 "requires a management plan which covers multiple land uses within the larger overall area that [the University of Hawai'i Institute for Astronomy] controls at the top of the Mauna Kea in the conservation district." Judge Hara noted that the state's administrative rules define "land use" as:

- 1) The placement or erection of any solid material on land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs;
- 2) The grading, removing, harvesting, dredging, mining or extraction of any material or natural resource on land;
- 3) The subdivision of land; or

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- 4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

The development and decommissioning of astronomy facilities, such as observatories, would fall under the state's definition of "land use," and would therefore be required to be analyzed in a BLNR-approved comprehensive management plan. However, the CMP does not consider any future observatory development, as noted earlier. This is problematic because the BLNR is only reviewing the CMP; it has not adopted nor approved the 2000 Master Plan (CMP, page 3-8), which is the only document that outlines future astronomy development on Mauna Kea. This would essentially mean that the BLNR would never have the opportunity to review the university's astronomy development plans as required by the state's administrative rules and Judge Hara's court order.

The university's dual management strategy makes it unclear to which plan projects must conform. Page 7-55 of the CMP states that three UH agencies are charged with "reviewing projects to ensure that they conform to the 2000 Master Plan." But the state's administrative rules do not require projects adhere to a master plan; they require projects to comply with a BLNR-approved management plan. Judge Hara noted that having multiple management plans would result in projects on Mauna Kea that "do not conform to a comprehensive management plan. This would *not* be consistent with the purposes of appropriate management nor the promotion of long-term sustainability of protected resources required by Haw. Rev. Stat. §183-1."

What's more, Judge Hara emphasized that the management plan must be comprehensive, meaning that its scope is "all-covering, all-embracing, all-inclusive, all-pervasive." The CMP fails Judge Hara's decision in this regard, because the CMP does not analyze any of the proposed observatories for Mauna Kea.

Furthermore, the CMP simply does not comply with the management plan requirements of the Department of Land and Natural Resources (DLNR), which are listed in Exhibit 3 of §13-5, HAR. Exhibit 3 states that the management plan must include for *each proposed land use*: a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. The CMP doesn't fulfill any of these requirements because, as noted previously, it does not consider the development of new observatories, each of which would be classified as a separate land use under HAR. Each proposed telescope must be described in detail, with timelines, as required by HAR. Moreover the CMP does not contain a start and end date, as called for by Exhibit 3.

#### **Management authority**

Another major problem with the CMP is that management authority between the DLNR and the university is muddled throughout the document, causing the critical boundary between lessor and lessee to be completely blurred.

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One example of this is the management of historic properties. The State Historic Preservation Division (SHPD) is the division of the DLNR that is statutorily tasked with managing the state's historic properties. Yet, the CMP delegates much of the management authority over Mauna Kea's numerous historic sites to the university, which has no experience or expertise in managing historic properties. SHPD is not mentioned in two of the CMP's historic properties management actions (CR-10 and CR-11), and the division is only briefly mentioned as an agency to "work with" in the additional comments section for CR-12. Historic property monitoring programs (CR-10), buffers around historic sites (CR-12) and archaeological surveys of state lands (CR-11) must all be submitted to and approved by SHPD.

Another example of confusing management jurisdiction relates to commercial activities. According to the CMP, the UH Board of Regents accepted the responsibility of regulating commercial tour activities from the BLNR in 2005, and the university's Office of Mauna Kea Management (OMKM) currently reviews and issues these permits (CMP, page 7-30). However, the university apparently has "no express statutory or regulatory authority to issue permits" for other commercial activities, such as concessions, resource extraction and special events (CMP, page 7-38). The CMP continues: "Statutory amendments allowing the University to control these activities in a manner consistent with this CMP would be beneficial." Moreover, one CMP management action, ACT-11, lays out the university's plan to seek statutory authority to regulate commercial activities. OHA asks how the BLNR, as the lessor and the state agency statutorily mandated to protect Hawai'i's natural resources, can transfer its authority to manage commercial tour operations to the university, the lessee, without a statutory amendment, yet the BLNR cannot transfer its jurisdiction over other commercial operations to the university without changing the law.

In 2005, the state auditor reported that the DLNR had previously attempted to transfer authority to permit commercial operations on Mauna Kea to the university, subject to approval by the Department of the Attorney General. Apparently, the attorney general's office rendered an "oral opinion" to a university official that the management transfer was legal. However, the university's Board of Regents later learned that the DLNR was still in fact the "primary agency responsible for protection of natural and cultural resources" within the Mauna Kea Science Reserve and that the DLNR's responsibilities "could not be delegated without legislative or constitutional action," according to the auditor. While the auditor recommended that a written opinion from the attorney general's office should be sought to resolve the issue, the CMP doesn't mention whether such an opinion was ever rendered, and it still remains unclear what authority can be transferred without a statutory amendment.

Moreover, the DLNR's delegation of authority over commercial activities to the university raises a number of questions. Is the OMKM's commercial permitting process subject to Chapters 91 and 92 of the Hawai'i Revised Statutes? Is appropriate consideration given to the impact these commercial activities could have on cultural resources and traditional and customary practices, pursuant to the three-part analysis provided in *Ka Pa'akai O Ka 'Aina v.*

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Land Use Commission, 94 Hawai'i 31, 7 P. 3d 1068 (2000) (*Ka Pa'akai*)? The CMP must clearly answer these questions.

Furthermore, OHA questions UH's strategy of creating a commercial activities management plan that relies heavily on the university receiving authority to regulate those activities through a statutory amendment. The CMP lacks detailed contingency plans to manage commercial activities if the university is unable to sway lawmakers to give it rule-making authority. In addition, the CMP provides little information on how non-tour-related commercial activities are currently managed. As noted previously, the university does not have the authority to regulate these activities. But these activities apparently are currently allowed, according to Table 7-8. Table 7-8 is very vague on who is responsible for regulating these existing commercial activities (the CMP says the responsibility is somehow shared between UH and DLNR) and how the permits for these activities are issued and reviewed. OHA notes that the 1995 Management Plan, which is the current operating management plan, specifies that "regulating commercial activities should be the sole responsibility of DLNR."

#### **Rule-making authority and enforcement**

Throughout the CMP, the university cites the need to obtain rule-making authority through the legislative process so the university can promulgate and enforce rules regulating commercial activities and public access. The CMP notes that the state auditor recommended this action in 2005. However, community opposition killed at least one bill (Senate Bill 904, 2005 Regular Session) that would have granted rule-making authority to the university, and there is no guarantee that a similar bill will be enacted. The CMP is too dependent on the UH being able to obtain rule-making authority, while providing little in terms of contingency plans in case the school never gets such authority. Alternatives are needed because the management and enforcement policies currently in place for Mauna Kea are inadequate, which is the reason the auditor recommended improvements.

What's worse is that there's scant planning offered in the event that the university actually does receive rule-making authority. For example, these two statements are found in the "Managing Access, Activities and Uses" section: "Many of the considerations described in this section cannot be implemented without rule-making authority. The specifics will need to be further evaluated and incorporated during the rule-making process." (CMP, page 7-35). This is not planning.

More importantly, OHA questions whether the university should actually be provided the rule-making authority for Mauna Kea. Many people in the community do not want the university to have this authority because they do not trust the university to manage or protect Mauna Kea's resources. We also point out that UH does not have expertise or experience in managing important natural and cultural resources or protecting traditional and customary Native Hawaiian practices. The DLNR is the entity with this expertise and experience. The university was previously responsible for managing commercial activities and enforcing rules. However, it

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failed at both, and had to relinquish these functions back to the DLNR. The 1995 Management Plan states:

As the interest in Mauna Kea increased, the question of commercial uses led to several years' discussions with the DLNR concerning management and enforcement responsibilities. Although UH has assumed these responsibilities, over the years it has become evident that UH was not structured to manage, control and enforce rules involving public recreation activities. In addition, with regard to commercial operators, UH does not have a process in place to issue permits and enforce permit conditions. It was determined that management and enforcement responsibilities – unless they were directly related to astronomy facilities, including the Mauna Kea Access Road – should be transferred back to DLNR. Because of their presence on the mountain, UH personnel would continue to assist DLNR in educating visitors on the hazards of high-altitude driving, responding to emergencies and monitoring infractions. It was decided that regulating commercial activities should be the sole responsibility of DLNR.

While the university may assume that many of its management and enforcement failures singled out in the excerpt above could be fixed if it were to obtain rule-making authority, there is no guarantee that rule-making authority is the panacea, especially with how little planning the CMP provides in the event UH actually gains this authority. On the other hand, the DLNR's management and enforcement abilities, while far from perfect for Mauna Kea, is at least tried and true at most other places within its jurisdiction. Also, the DLNR currently has the statutory authority and cannot simply abrogate it for fiscal or staffing reasons.

### **Monitoring Permits**

The CMP specifies that OMKM is the entity designated with the responsibility of monitoring tenant observatories for compliance with the conditions of their Conservation District Use Permits (CDUP). The CMP on page 7-14 states that rangers shall conduct compliance inspections at each observatory twice a year. This planning strategy is problematic for a number of reasons.

As a lessee, the university cannot be the entity responsible for ensuring CDUP compliance. As the landowner and state agency tasked with protecting natural and cultural resources, the DLNR is the entity responsible for ensuring CDUP compliance. The DLNR issues CDUPs, its rules regulate CDUPs, and therefore it is the only entity that should be enforcing the conditions of CDUPs. This is but another case of the CMP attempting to blur the line between lessor and lessee.

The university was also responsible for managing CDUPs and subleases when the State Auditor developed its report in 2005. The auditor noted:



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In recent years, the [DLNR] has passively allowed the university to fulfill the department's role of landowner. As a result, departmental management plans and its monitoring and enforcement efforts have been thought of as subordinate to what the lessee – or, the university – would do. This lax attitude is reflected in the department's failure to update the papers and define its relationship with the university, allowing the institution to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements.

The auditor further noted that the university's rangers did not monitor the observatories for permit violations, despite the fact that the 2000 Master Plan assigns this function to them, and that the rangers were not trained to do this task. Because of the lack of periodic monitoring, when the DLNR actually did inspect Mauna Kea in 2004, it found unapproved equipment and construction materials in the summit area, and the department eventually fined the university \$20,000 for permit violations by four observatories, according to the auditor.

OHA notes that under the CMP, the rangers still have this function, yet the document does not include permit monitoring training for the rangers. The CMP must establish and provide details for a permit and sublease monitoring program, as the auditor recommended in 2005. This program must be led by the DLNR, who must hold the UH and others accountable.

### **Project Approval Process**

The CMP does not seem to recognize that the BLNR, as the landowner, has final approval authority for future projects in the UH Management Areas. For example, the CMP states on page 7-55 that the UH Board of Regents and the UH president have project approval and design review authority over all major developments within the UH Management Areas. The CMP states further that the university president makes "the final determination" on whether projects are major or minor in nature, and that minor project review "ends with the University President, while major projects require formal approval by the Board of Regents." Although the CMP notes that a broad range of projects undertaken in the UH Management Area is subject to an environmental review pursuant to Chapter 343, Hawaii Revised Statutes, the CMP is unclear whether the university would be the receiving agency for any such environmental reviews and what role, if any, the BLNR would fill in this process. To be sure, page 6-5 and other areas of the CMP do state that major construction activities at the summit would require BLNR/DLNR permits such as a CDUP, while minor construction generally would not require a CDUP. But it remains unclear which Mauna Kea projects the BLNR would be able to review if the university president is the one who determines which projects are minor and therefore do not require a BLNR-approved CDUP. This is why it is incumbent that the CMP recognize that DLNR has final project approval authority.

It should be noted that the entire project review process in the CMP was adopted straight from the 2000 Master Plan, which the state auditor criticized in 2005. The state auditor stated that the review process specified in the 2000 Master Plan has "created considerable confusion" for the Mauna Kea Management Board (MKMB) and that OMKM has "also faced challenges

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deciphering the design review process.” The auditor pointed out that the master plan does not provide definitions for insignificant, minor or major projects and does not indicate who is responsible for oversight of the review and approval process. In addition, the auditor found that responsibilities had been transferred after the master plan was completed, and that a key committee tasked with design review had yet to be established. Consequently, the auditor recommended that the university “revisit the master plan to clarify the design review process and establish clear procedures for the [OMKM], [the MKMB], and the design review committee to provide effective controls for future development.”

The university cannot adopt into the CMP a section of a master plan that was singled out for criticism by the state auditor. The CMP must be revised to address the auditor’s recommendations. OHA also requests that the CMP expressly spell out that the BLNR, as the landowner and lessor, has the final say on whether projects are minor or major in nature and that BLNR also has final approval authority for all projects atop the summit. Additionally, OHA asks that the CMP name the DLNR as the accepting authority for all environmental reviews conducted pursuant to Chapter 343, Hawaii Revised Statutes, for both development projects and future management plans relating to UH Management Areas. OHA notes that this was not the case for the Draft Environmental Assessment for the CMP, as the university – not the DLNR – is identified as the receiving agency for that document. This creates the odd situation in which the BLNR must approve the CMP but will not accept the environmental review for the plan.

### **Decommissioning**

On page 7-52, the CMP indicates that the observatory sub-lessees determine when their telescopes are obsolete and should be decommissioned, removed and the site restored. This is problematic. That determination should be made by the DLNR, as the landowner, and the university, because of its expertise with observatories. The DLNR, along with the university, needs to develop a process to evaluate the conditions of telescopes. The university and the DLNR cannot delegate this authority and defer to the sub-lessees. The DLNR needs to be intimately involved in this process, because it is the agency that is statutorily mandated to protect the state’s natural and cultural resources.

### **Cultural practices**

OHA has concerns that the CMP attempts to clearly delineate between traditional and contemporary Native Hawaiian practices. We would like to point out that Native Hawaiian culture is a living, constantly evolving culture and consists of both traditional and contemporary practices. Separating the two is offensive.

In addition, the CMP relies heavily on and incorporates many of the concepts from the 1995 Management Plan. OHA notes that the 1995 Management Plan was approved prior to the *Ka Pa‘akai* ruling in 2000, and therefore does not consider the three-part analysis laid out in the ruling. OHA notes that *Ka Pa‘akai* was incorporated into the Native Hawaiian cultural resources section (CMP, page 7-7). However, the *Ka Pa‘akai* analysis must also be used to evaluate all state actions that occur on Mauna Kea, which the CMP does not do. Observatory development,

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commercial activities and closures of the summit, particularly at night, are just a few state actions that must be examined through the *Ka Pa'akai* analytical framework to establish their impact on Native Hawaiian cultural practices.

OHA also has concerns relating to the Native Hawaiian cultural specialist and the on-site construction monitor contemplated on page 7-6. The CMP indicates that a qualification for the Native Hawaiian cultural specialist is that an applicant must have previously worked as a Native Hawaiian cultural specialist. This may be too limiting as many cultural practitioners have never been paid to ply their practice. In addition, the CMP states that if construction activity will "unduly harm" cultural resources, an on-site construction monitor can order the stoppage of construction activities, provided that the work stoppage order does not exceed 72 hours. This is problematic because finding a solution that would ensure the protection of the cultural resource may not be discovered within 72 hours. The CMP must be amended to address this.

While management action CR-1 states that the university will consult with Native Hawaiian practitioners, lineal descendants and Native Hawaiian organizations on cultural issues relating to Mauna Kea, OHA requests explicit language that such consultations will be conducted for each of the other 13 management actions for Native Hawaiian cultural resources.

### **Infrastructure**

OHA is concerned by the mention in the CMP (page 6-6) of numerous cesspools on Mauna Kea. The Environmental Protection Agency's (EPA) regulations required all existing large capacity cesspools to be closed and replaced with an alternative wastewater system by April 5, 2005. Since 2000, EPA has prohibited the construction of new large capacity cesspools nationwide. The regulations do not allow an extension of the deadline. OHA understands that cesspools are more widely used in Hawai'i than in any other state in the country and that the EPA is anxious for Hawai'i to address this issue. We ask that the CMP include a process for replacing all cesspools on Mauna Kea with new wastewater systems.

OHA also requests that the CMP contain a plan that would include guidelines and protocols for managing hazardous materials, mirror washing and wastewater to prevent future spills. A monitoring and enforcement process should also be established. OHA notes that there is great value in having one uniform plan that all users of the mountain follow.

### **Flaws in structure of CMP**

We have previously noted that the CMP does not comply with the DLNR's requirements for management plans, as stipulated in Exhibit 3 of HAR. There are also other major flaws with the actual planning aspect of the CMP. The vast majority of the 102 actions listed in the CMP only indicate a need to develop various plans. But the actions generally do not provide details for the plans; timetables to develop the plans; do not require the plans to be implemented; do not offer a detailed review or monitoring process for either the plans or the implementation of those plans; and do not provide for mitigation plans. Consequently, the CMP is more of a plan to plan

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than an actual comprehensive management plan, required by the state's administrative rules and a circuit court order.

For example, the CMP lists a set of management actions to protect the natural resources of Mauna Kea. Management action NR-7 states that OMKM will "delineate areas of high native diversity, unique communities, or unique geological features within the Astronomy Precinct and at Hale Pōhaku and *consider* protection from development." (CMP, page 7-15, emphasis added.) The CMP later states that areas "considered" for protection may include: cultural and historical resources and habitat for important, rare, threatened or endangered native species, including the wēkiu bug (candidate for federal listing), Mauna Kea silversword (federally listed as endangered), the palila (endangered), the Hawaiian hoary bat (endangered) and māmāne trees, which in certain areas on Mauna Kea is considered critical habitat for the palila. The university shouldn't just consider protecting these natural resources, they must protect these resources. Threatened and endangered species as well as cultural and historical resources are statutorily protected, both by the state and the federal government. This management action must contain an actual plan with timetables to protect these resources.

Another example of a flawed management action is NR-12, which states that OMKM will "create restoration plans and conduct habitat restoration activities, as needed." The CMP does not offer any guidance as to what a restoration plan will look like, what the timetable is for developing and implementing a restoration plan and what the process is for identifying and prioritizing areas that need to be restored. These are just two management actions that are deficient. Nearly all 102 suffer from similar deficiencies.

Moreover, the CMP is not clear on the mechanisms established to ensure that its management actions are carried out. On page 7-64, the CMP states that the OMKM "should" produce an annual progress report and that the annual report "should" describe actions to be taken to improve the program. In addition, the CMP states that the OMKM "shall" submit a written report to the BLNR, but it doesn't indicate what that report will contain. The CMP needs to expressly state that OMKM must produce an annual progress report, and the CMP must offer more details about what the written report to the BLNR will contain. To be sure, the CMP contains a requirement for a five-year revision plan; however, the natural and cultural resources of Mauna Kea can be seriously impacted between those five-year plans if interim, annual reports are not conducted. Many of the shortcomings of the CMP are historical ones that were identified in two state audits and have still yet to be resolved. OHA fears that the structure of the draft CMP and its equivocal reporting process cannot ensure that these problems will ever be resolved.

In addition, the CMP indicates that the OMKM is "responsible for implementing the CMP and ensuring adherence to its provisions." (Page 7-64). OHA notes that aside from its rangers, OMKM currently has only two people on staff: an interim director and a secretary. The task of implementing the entire CMP would be daunting for any agency, but wholly impossible for an agency staffed with just two individuals. The CMP does not contain any requirements to create more positions for OMKM to fulfill its responsibilities. OHA has concerns that if the

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CMP does not include specific language for new positions at OMKM, the division will remain under staffed, especially when considering the present economic climate. The resources of Mauna Kea will surely suffer as a result.

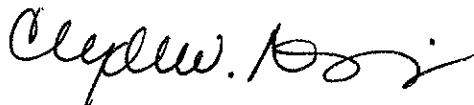
The CMP also leans heavily on the 2000 Master Plan for guidance. This is a major issue. The CMP shouldn't liberally incorporate sections of and concede to a plan that has never been and may never be approved by the BLNR. Moreover, the Master Plan is almost a decade old, has not been revised and was criticized by the state auditor. If the 2000 Master Plan is allowed to play such a pivotal role in the CMP, it should be included in the CMP and reviewed and approved concurrently by the BLNR. OHA would also like to point out that the CMP does not include in its appendices any archaeological or biological studies cited throughout the document. In addition, while the maunakeacmp.com website contains links to some past management plans, several were not made available, namely the 1982 Research and Development Plan and the 1983 Mauna Kea Science Reserve Complex Development Plan.

#### **Conclusion**

While OHA appreciates the amount of work that was invested into the production of the CMP, especially the community consultation, we believe that this draft of the CMP is unacceptable. OHA recommends that the BLNR decline this draft and require a thoroughly revised version that at the very least meets the published requirements for a management plan and the requirements of Judge Hara. Mauna Kea is one of the most sacred places in Hawai'i, and its status as such demands no less.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248 or e-mail him at [sterlingw@oha.org](mailto:sterlingw@oha.org).

'O wau iho nō me ka 'oia 'i'o,



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HRD09/3754D

March 9, 2009

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**RE: Request for comments on the Mauna Kea Comprehensive Management Plan: UH Management Areas – Draft Environmental Assessment.**

Aloha e Office of the President of the University of Hawai'i,

On February 9, 2009, the Office of Hawaiian Affairs (OHA) received a letter requesting comments on the Draft Environmental Assessment (EA) for the Mauna Kea Comprehensive Management Plan (CMP). If approved, the current draft of the CMP would provide a framework for planning for the management of existing and future activities within the ceded, public lands atop Mauna Kea that the University leases from the Department of Land and Natural Resources.

OHA has found it very difficult to provide an adequate review of this Draft EA for a number of reasons. First, the CMP itself is incomplete, and we do not recommend its approval in its current state. Although the Draft EA states, "The CMP, once approved by the BLNR, will be the guiding management plan for decisions involving the UH Management Areas" (Draft EA, page 3-1), the document is far too vague and preliminary to allow anyone to base a decision upon it, because it basically prescribes studies and future plans, not activities and their possible impacts. We have enclosed a copy of our separate review of that document for your information and will not burden you with that analysis in this letter. Second, in large measure because of the inadequacies of the CMP, this Draft EA does not fulfill the statutory requirements of Chapter 343 of the Hawaii Revised Statutes (HRS), which would have allowed us to provide adequate analysis and review of the proposed activities. Thus, we urge the University, which is in the awkward position of being both the applicant and the accepting agency, not to accept this Draft EA and to request a more thorough and compliant environmental review be executed, preferably upon a truly comprehensive management plan, as was ordered by Third Circuit Court Judge

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Glenn S. Hara in his January 19, 2007 ruling. (Civil No. 04-1-397, *Mauna Kea Anaina Hou, et. al. v. Board of Land and Natural Resources, et. al.*)

### **OHA's legal mandates**

OHA respectfully reminds the University that we should work together to protect public trust and ceded lands, as well as Native Hawaiian traditional and customary rights and practices. The subject lands on Mauna Kea are ceded lands, which is not mentioned in either the CMP or the Draft EA, and are both sacred to Native Hawaiians and unique environmentally as critical habitat for a number of endemic, native and endangered species.

Not only does the State, including the University, have a constitutional obligation “for the benefit of present and future generations,” to “conserve and protect Hawaii’s natural beauty and all natural resources” because “[a]ll public natural resources are held in trust by the State for the benefit of the people” (Hawai’i Constitution, Article XI, Section 1), but the State also has a constitutional mandate to “protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes” for Native Hawaiians (Hawai’i Constitution, Article XII, Section 7). The HRS helps create a methodology for State agencies to meet the latter mandate. Section 10(1)(b) affirms, “It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.” Meanwhile, OHA is tasked in HRS § 10(3)(4) with “[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians.”

OHA cannot meet that statutory mandate via the Draft EA provided to us, because it does not provide us with enough information to “ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations.” (HRS Section 343-1 and Hawaii Administrative Rules (HAR), Section 11-200-1). So few environmental or cultural specifics were provided in this document that a true analysis or decision making cannot be conducted from it. Instead, this document generally recognizes the significance of the place for Native Hawaiians and environmental components of the mountain, but does not provide any detailed description of those components in either the document or any appendices.

### **Environmental Assessment requirements**

Unlike most EAs, this one includes no appendices including archaeological, cultural, biological, geological, or aquatic studies, among others. Instead, a list of references is included, and the necessary studies for analysis of potential impacts are anticipated products of the CMP. Some of these prescribed studies must be included in an amended Draft EA, or, at the very least,



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in a Final EA. (Including, but not limited to: CR-11 Complete archaeological survey of the portions of the Summit Access Road corridor under UH management; CR-13 Develop and implement a burial treatment plan; NR-7 Delineate areas of high native diversity, unique communities, or unique geological features within the Astronomy Precinct and at Hale Pōhaku and consider protection from development; and NR-15 Conduct baseline inventories of high-priority resources). Thus, this Draft EA includes a summary of literature searches, no independent oral interviews or analysis for a Cultural Impact Assessment, no scientific descriptions of the federally and state protected plant and animal species or their habitats, and no mitigation measures.

The CMP apparently was drafted as a plan to create more plans, and a plan to do the studies necessary to determine potential impacts of those plans. This is backwards. The Draft EA is supposed to determine potential impacts of activities proposed in the CMP. Circuitous wording does not exempt the University from either its requirements to provide a Comprehensive Management Plan as required under the HAR and via Circuit Court Order or its requirements to conduct an environmental review that “will integrate the review of environmental concerns with existing planning processes of the state and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions.” (HRS Section 343-1) No integration was conducted, just a listing of potentially applicable federal and state laws, but no analysis or application of any of them.

In fact, several times the Draft EA alluded to subverting such applicable laws, raising the question of whether or not the applicant understands the laws and their implications. For example, the federal Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and Hawai'i's burial and historic preservation laws have been all but ignored by this document and the CMP. Some of the actions described by the EA (in language that was largely cut and pasted from the CMP) include “considering” protecting critical habitat and cultural resources. This is more than inadequate; it is illegal. And, if critical habitat may even potentially be impacted, a Section 7 consultation under the ESA is required. Has such consultation occurred? Equally, depending on the source of funding or what agency is proposing an activity that may impact on a site that either may be listed on the federal or state historic registers, the agency must consult under HRS Chapter 6E or under Section 106 of NHPA. Laws are not matters of convenience that can be avoided by vague language in a CMP that is neither comprehensive nor a plan for management.

This Draft EA should evaluate the activities proposed in a site-specific manner. It must describe, for the reviewers and decision makers, proposed management of species and areas. There is no timetable for any of the proposed activities, whether they are communication, planning, studies, etc. There are no build-out priorities or stages of analysis, implementation, mitigation, or review. No specific impacts on any resources are discussed, which is imperative for a reviewer's ability to determine potential consequences. The biggest impact on the

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mountain is the telescopes, and they are only briefly alluded to in the summary cumulative impact section.

HAR §11-200-10 lists the required contents of an Environmental Assessment. Of the 12 requirements, this Draft EA is completely missing one: "G. Proposed mitigation measures". At least two are also substantially inadequate and incomplete, for reviewing and decision-making purposes: "E. Summary description of the affected environment" and "F. Identification and summary of impacts and alternatives considered".

Mitigation measures are key components of the environmental review process, as are alternatives. No mitigation measures are addressed, not even to state that there are no mitigation measures. Equally, although an alternatives analysis is listed in the table of contents, none is actually conducted. A discerning reader of both the CMP and the Draft EA would automatically note that there are, by practical necessity, at least three alternatives that must be described and examined:

1. The No Action alternative, which would "maintain[] the current status in the UH Management Areas";
2. The Proposed Action alternative, which would require "approval of the CMP"; and
3. An alternative in case the current legislative process does not provide statutory, rule-making authority to the University for the UH Management Areas.

It is irresponsible for both the CMP and EA drafters to presume that the Hawai'i State Legislature will undoubtedly provide for the precise statutory authority requested by the University. A third, non-preferred alternative must be presented to reviewers and decision makers to provide for the possibility that rule making is not authorized, but that management of leased lands must continue, and a CMP still must be in place, per existing rules (HAR) and Circuit Court Order. Without that alternative presented in either the CMP or its associated Draft EA, neither is complete and no legitimate analysis of the proposals can be undertaken.

### **Comprehensive Management Plan requirements**

Because the Mauna Kea lands that the University leases from the BLNR include "astronomy facilities" in a conservation district, land uses in that area require a Conservation District Use Permit (CDUP) from the Office of Conservation and Coastal Lands, and that CDUP cannot be granted unless the proposed use is appropriately addressed in a "management plan". (HAR Section 13-5-24(c)(4)). The Third Circuit Court found that the last BLNR-approved management plan was one adopted on March 10, 1995, and that management plan "did not provide the scope and coverage for the development of the astronomy facilities on Mauna Kea" and could not support a CDUA for such development because it "is virtually silent on the matter of future development of astronomy facilities on Mauna Kea." (See August 3, 2006

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Memorandum of Decision for Civil No. 04-1-397, *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*).

Equally, the current draft CMP is virtually silent on all land uses, thereby not meeting the basest requirement for a management plan. As Judge Hara spelled out in his August 3, 2007 Memorandum of Decision, HAR Chapter 13-5 states, “‘Management plan’ means a comprehensive plan for carrying out multiple land uses.” Judge Hara continues: “The plain meaning of the term ‘comprehensive’ suggests a scope that is ‘all-covering, all-embracing, all-inclusive, all-pervasive....’ Burton, William C. *Legal Thesaurus*, Regular Ed. MacMillan Publishing Co. Inc. (1980). The term is also defined by *the American Heritage Dictionary of the English Language*, American Heritage Publishing Co., Inc and Houghton Mifflin Company (1969), as ‘Including or comprehending much, large in scope or content.’ (Emphasis added).”

Not only does this CMP not address land uses, it specifically does not address land uses in the Astronomy Precinct, and it is in no way “comprehensive” because it only plans to plan, incorporates elements of the 1995 management plan and incorporates the 2000 Master Plan by reference only, without even appending the latter. The latter was never approved by the BLNR, so it cannot be considered a legitimate management plan, and it is not included in the current CMP, therefore not enabling that requirement to be remedied. Both the 1995 management plan and the 2000 Master Plan did not incorporate a cultural analysis via a Cultural Impact Assessment or address what impact these commercial activities could have on cultural resources and traditional and customary practices, pursuant to the three-part analysis provided in *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P. 3d 1068 (2000). Thus, both would require those analyses by the Draft EA if they are to be legitimately incorporated into the CMP in an open and straight-forward manner.

Judge Hara also stated in his August 6, 2006 Memorandum of Decision that management plans could not be developed on a project-by-project basis because that

would result in foreseeable contradictory management conditions for each project or the imposition of special condition (sic) on some projects and not others. The result would be projects within a management area that did not conform to a comprehensive management plan, and would not be consistent with the purposes of appropriate management and promoting long term sustainability of the protected resource espoused by HRS §183C-2.

Presuming that the University of Hawai'i intends, should this CMP be approved, to reapply for a permit to construct and operate the Outrigger Telescope Project in a resource subzone of a conservation district in the Astronomy Precinct of Mauna Kea, there is no way that it could conform to this CMP either, because this CMP includes no land use analysis and no mention of

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the Astronomy Precinct at all. Without full and complete integration of the 2000 Master Plan, by the BLNR, that project, for example, would not be able to be approved per the court's analysis.

## Conclusion

This Draft EA cannot, in good faith, be accepted as it is currently drafted. OHA understands that the Draft EA could only review what it was provided by the CMP. This provides more legitimacy to our advocacy that the CMP also not be approved as is, because it is neither comprehensive, nor a management plan, and does not provide for adequate or thorough decision making ability or planning.

Thank you for the opportunity to comment. If you have further questions, please contact Heidi Guth by phone at (808) 594-1962 or e-mail her at [heidig@oha.org](mailto:heidig@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Administrator

Attachment (1): Copy of signed letter reviewing the Mauna Kea CMP (HRD09/3754C)

C: OHA Board of Trustees

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**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
711 KAPI'OLANI BOULEVARD, SUITE 500  
HONOLULU, HAWAII 96813

HRD09/3754G

September 10, 2009

Stephanie Nagata, Associate Director  
Office of Mauna Kea Management  
640 N. A'ohoku Place  
Hilo, HI 96720

**RE: Preliminary Draft Report: Natural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea, Ka'ohē Ahupua'a, Hāmākua District, Hawai'i Island.**

Aloha e Stephanie Nagata,

The Office of Hawaiian Affairs (OHA) is in receipt of your letter requesting comments on the above-mentioned project. When the Board of Land and Natural Resources (BLNR) approved the Mauna Kea Comprehensive Management Plan (CMP) on April 9, 2009, it required that the University of Hawai'i (UH) submit for review and approval four sub plans. The sub plans were to be submitted within one year of the BLNR's approval of the CMP or prior to the submission of a Conservation District Use Application (CDUA), whichever came first. The Natural Resources Management Plan (NRMP) is being developed as one of the required sub plans to the CMP.

### **OHA supports CMP**

On April 16, 2009, the OHA Board of Trustees approved a motion to support the CMP "to assure the protection of our cultural resources and the preservation of our customary and historical practices; and that OHA stands ready to participate in the process to enhance the CMP as drafted." Our comments below are intended to provide guidance on how we believe that the CMP and its sub plans can be improved to better protect the sacred mountain of Mauna Kea and its precious cultural and natural resources.

### **Future Astronomy Development**

We have previously expressed concern that the CMP does not cover the proposed development of new astronomy facilities contemplated in the 2000 Master Plan. According to the

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CMP, the CMP and the Master Plan will serve as two parallel management documents for Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development.

The CMP specifically states that the CMP “will not replace the 2000 Master Plan” (CMP, page 2-3.) and that the CMP “manages resources; it does not advocate or promote new telescope development.” (CMP, page 7-54) This approach is problematic because it doesn’t address the requirements of Hawaii Administrative Rules (HAR).

Chapter 13-5-24, HAR, allows for astronomy facilities within the Resource Subzone of the state’s Conservation District, provided that the Board of Land and Natural Resources (BLNR) approves a management plan and permit for the project. Mauna Kea is located within the Resource Subzone of the state’s Conservation District.

Exhibit 3, §13-5, HAR, further states that comprehensive management plans must include for “each proposed land use”: a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. Chapter 13-5-2, HAR, specifies that one of the definitions of “land use” is: “[t]he construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.”

The construction of new astronomy facilities would be considered a land use under §13-5 and would therefore need to comply with the requirements of Exhibit 3, §13-5, HAR. However, virtually none of the required detail and description for new astronomy development is included in either the CMP or NRMP. What’s especially frustrating is that the 2000 Master Plan identifies new telescope projects and the proposed location for each. With this information readily available, fleshing out specific details for habitat mitigation measures should be easy to include in the NRMP’s Section 4.3.3.3, Mitigation and Rehabilitation. However, it’s not included, thereby unnecessarily limiting the NRMP’s ability to adequately plan for the management of natural resources.

The CMP and NRMP cannot completely rely on the Master Plan to address future observatory development because the Master Plan was never approved by the BLNR. The CMP and its sub plans are the management plans that the BLNR is reviewing and approving.

It’s worth noting here that in his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara emphasized that the management plan must be comprehensive, meaning that its scope is “all-covering, all-embracing, all-inclusive, all-pervasive.” The CMP and NRMP fail Judge Hara’s decision because neither analyzes in a comprehensive manner any of the proposed observatories for Mauna Kea. Therefore, we ask that the NRMP be amended to include a detailed analysis of the new astronomy facilities proposed in the 2000 Master Plan.

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### **Native Hawaiian voice**

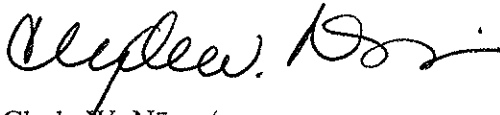
According to the NRMP, Kahu Kū Mauna should be consulted with on various natural resource management issues. OHA appreciates this, as there is no separation between cultural resources and natural resources within the Native Hawaiian worldview. Traditions hold that Native Hawaiians share the same genealogy with the native plants and animals of our lands. Therefore, we care for the natural world as we would a family member. Moreover, many of our customary practices depend on the health of our natural resources. With this in mind, we ask that Native Hawaiians be consulted on as many natural resources issues as possible. Perhaps the Mauna Kea Management Board's Environmental Committee could include a Native Hawaiian cultural practitioner, if one doesn't already sit on the committee.

### **Environmental Review**

OHA requests clarification on how the CMP's sub plans, such as the NRMP, will undergo an environmental review, in accordance with Chapter 343, Hawaii Revised Statutes. We note that the Final Environmental Assessment for the CMP was released in April 2009 and did not cover the sub plans; therefore either a supplemental or an entirely new, more inclusive review must be done of the plan in its entirety. The sub plans cannot be reviewed in isolation, because Chapter 343 does not allow for segmentation. OHA looks forward to the opportunity to review the forthcoming, complete Draft Environmental Assessment or Draft Environmental Impact Statement.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248, or e-mail him at [sterlingw@oha.org](mailto:sterlingw@oha.org).

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o  
Administrator

C: Board of Trustees

OHA Hilo and Kona CRC Offices

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HRD09/3754G

September 10, 2009

Stephanie Nagata, Associate Director  
Office of Mauna Kea Management  
640 N. A'ohoku Place  
Hilo, HI 96720

**RE: Preliminary Draft Report: A Cultural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea, Ka'ohē Ahupua'a, Hāmākua District, Hawai'i Island.**

Aloha e Stephanie Nagata,

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### **OHA supports CMP**

On April 16, 2009, the OHA Board of Trustees approved a motion to support the CMP "to assure the protection of our cultural resources and the preservation of our customary and historical practices; and that OHA stands ready to participate in the process to enhance the CMP as drafted." Our comments below are intended to provide guidance on how we believe that the CMP and its sub plans can be improved to better protect the sacred mountain of Mauna Kea and its precious cultural and natural resources.

### **Future Astronomy Development**

We have previously expressed concern that the CMP does not cover the proposed development of new astronomy facilities contemplated in the 2000 Master Plan. According to the

Stephanie Nagata  
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CMP, the CMP and the Master Plan will serve as two parallel management documents for Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development. The CMP specifically states that the CMP “will not replace the 2000 Master Plan” (CMP, page 2-3.) and that the CMP “manages resources; it does not advocate or promote new telescope development.” (CMP, page 7-54)

The CRMP, however, attempts to account for the impact of future astronomy development on the cultural and historic properties of Mauna Kea. Pages 4-37 and 4-38 note that the 2000 Master Plan calls for the construction of new astronomy facilities. The CRMP then lists the various historic preservation requirements and mitigation measures for these new land uses as well as other land uses. While this is a good start, the CRMP analysis still falls short of what is called for in Chapter 13-5, HAR.

Exhibit 3, §13-5, HAR, states that comprehensive management plans must include for “each proposed land use”: a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. As noted previously, the CMP doesn’t address future observatory development, which falls under the definition of “land use” under §13-5-2, HAR. The CRMP goes a step further by at least mentioning that new observatories are planned, but the document doesn’t name or describe them in any particular detail, as required by Exhibit 3, §13-5, HAR. The CMP and CRMP cannot completely rely on the Master Plan to address future observatory development because the Master Plan was never approved by the BLNR. Chapter 13-5-24, HAR, requires that the BLNR approve a comprehensive management plan for astronomy facilities in the Resource Subzone of the Conservation District, which Mauna Kea is located within.

It’s worth noting here that in his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara emphasized that the management plan must be comprehensive, meaning that its scope is “all-covering, all-embracing, all-inclusive, all-pervasive.” The CMP and CRMP fail Judge Hara’s decision because neither analyzes in a comprehensive manner any of the proposed observatories for Mauna Kea. Therefore, we ask that the CRMP be amended to include a detailed analysis of the new astronomy facilities proposed in the 2000 Master Plan.

### **Determination of Effect**

Section 4.2.7.1, Determination of Effect, explains how developers must evaluate the effects new projects will have on cultural resources. The section states that proposed projects within the historic district must assess the effect of the project on the historic district “as a whole” as well as on individual historic properties. The section further specifies that visual impacts to the landscape must also be considered both to the district and individual properties. We request the expansion of this analysis to include the impact proposed projects will have on Traditional Cultural Properties (TCP) that have already been designated and ones that are proposed for designation. The proposed TCP of the mountain’s summit region should be

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included in this analysis because one of the CMP's management actions calls for supporting its designation. We also ask that the evaluation cover the effect projects have on the spiritual nature and significance of the historic district to Native Hawaiians.

### **Native Hawaiian Community Involvement**

We note that the CMP's Management Action CR-1 requires that Kahu Kū Mauna work with a wide range of people to address "the development of appropriate procedures and protocols regarding cultural issues." The management action indicates that consultations will occur between Kahu Kū Mauna and families with lineal and historical connections to Mauna Kea, cultural practitioners, Native Hawaiian groups and Mauna Kea Management Board's Hawaiian Culture Committee. OHA appreciates the CRMP's commitment to inclusive discussion on cultural issues, and we applaud the members of Kahu Kū Mauna for their dedication to protect Mauna Kea.

We ask that the inclusive spirit of CR-1 be reflected in a more explicit manner throughout Section 4.2.1, Cultural Practices. We specifically ask that Kahu Kū Mauna consult with a wide range of Native Hawaiians on management actions pertaining to: offerings on shrines (Section 4.2.1.3); access to burial sites (Section 4.2.1.4); ancient shrine visitation and use (Section 4.2.1.5); construction and use of new shrines (Section 4.2.1.6); scattering and burial of cremated human remains (Section 4.2.1.7); and the piling and stacking of rocks (Section 4.2.1.8).

### **Traditional Cultural Property**

The CRMP needs to clarify exactly will be done with the proposed designation of the summit region of Mauna Kea as a TCP, per the National Historic Preservation Act of 1966. While the CMP's Management Action CR-2 calls for supporting the designation, page 2-42 of the CRMP states only that the Office of Mauna Kea Management (OMKM) will "give further consideration" to designating "a larger area" of the mountain as a TCP, or advancing the formal nomination of the Mauna Kea Summit Region Historic District to the National Register of Historic Places. OHA requests that OMKM not just consider, but actually move forward with both the TCP designation and National Register listing of the summit area. We ask that the CRMP make both the TCP designation and National Register listing high priorities and provide timetables for the completion of each. We support this because it provides greater protection as well as recognition of the summit's unique significance to Native Hawaiians. We ask that Department of Land and Natural Resources and OMKM work together closely on these two projects.

### **Evaluation Section**

The evaluation section of the CRMP is sorely lacking. It's only three paragraphs long and does not provide any detailed methodology to assess the progress of each of the CRMP's action items, as well as the document's successes and failures. The CRMP's evaluation section does not

Stephanie Nagata  
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mention that the CMP requires annual reports to be completed to inform management and stakeholders of the progress of the CRMP and the direction it will take into the future. The CRMP also makes no mention that the CMP requires a five-year outcome analysis report to describe "the state of the resources, the status of the various management programs, progress towards meeting CMP goals and other relevant information." (CMP, page 7-64) OHA notes that the evaluation section in the Natural Resources Management Plan is much more thorough than the CRMP's.

### **Environmental Review**

OHA requests clarification on how the CMP's sub plans, such as the CRMP, will undergo an environmental review, in accordance with Chapter 343, Hawaii Revised Statutes. We note that the Final Environmental Assessment for the CMP was released in April 2009 and did not cover the sub plans; therefore either a supplemental or an entirely new, more inclusive review must be done of the plan in its entirety. The sub plans cannot be reviewed in isolation, because Chapter 343 does not allow for segmentation. OHA looks forward to the opportunity to review the forthcoming, complete Draft Environmental Assessment or Draft Environmental Impact Statement.

### **Programmatic Agreement**

Finally, OHA officially requests to be an invited signatory to any Programmatic Agreement under the National Historic Preservation Act (NHPA) for the cultural and historic resources of Mauna Kea. While OHA, as a named Native Hawaiian Organization in the NHPA, must be a consulting party, because of the significance of Mauna Kea to Native Hawaiians, OHA should be an invited signatory to any Programmatic Agreement that relates to the long-term management and potential, anticipated effects to the historic and cultural resources of the mountain. We respectfully suggest that you review the U.S. Advisory Council on Historic Preservation's official policy on consultation with Native Hawaiians. We anticipate a thorough consultation process under §106.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248, or e-mail him at [sterlingw@oha.org](mailto:sterlingw@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Administrator

C: Board of Trustees

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September 9, 2009  
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OHA Hilo and Kona CRC Offices

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Honolulu, Hawaii 96813

**HR-33**

Submitted on: 2/23/2021 10:35:41 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dr. Noe Noe Wong-Wilson	Hawaiian Civic Club of Hilo	Support	No

Comments:

Aloha Kā• kou,

Please accept this testimony on behalf of the Hawaiian Civic Club of Hilo. Our members support the intent of HR33/HCR41 Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea. The intent of this resolution is the development of recommendation(s) to replace the University of Hawai'i as the manager of the summit area of the mauna, including oversight of the current astronomy facilities.

It is also our understanding that the intent of the resolution is to create an opportunity for the Native Hawaiian community to engage in the process of developing the recommendations. This was pointed out as a major shortcoming of the UH's management process which has taken place over the last several decades.

This resolution garners our support specifically to replace the University in its management role and eliminate the inherent conflict of interest in its numerous responsibilities as regulator/enforcer, cultural monitor, astronomy industry advocate, financial manager and telescope operator.

Please accept these recommendations for the resolution:

- While there are seven seats provided for the community, the process for selecting those representatives must be open and transparent. Please indicate the process which will be used to select those representatives.

- We urge the working group to develop a community-based and community-informed plan to manage the mauna. In order to accomplish this within a short time, it must NOT be required to do the work that the University of Hawai'i should have done on their own to develop their management options.

- Finally, the legislature should request that the recommendations of this group be considered before any decision by DLNR to renegotiate the lease to University of Hawai'i which terminates in 2033.

Failure to engage the large Native Hawaiian community in this process will contribute to the ongoing distrust and dissatisfaction for the State of Hawai'i's care of our sacred mauna and cultural resource. Likewise, if this effort is not coordinated with DLNR's timeline for consideration of the lease extension, it will appear to be an exercise in futility and yet another failure of government to be responsive to the Native Hawaiian community.

We hope you find these suggestions constructive.

Me ka 'o ia 'i'o,

Dr. Noe Noe Wong-Wilson, Pelekikina

Hawaiian Civic Club of Hilo





To: Representative David Tarnas, Chair  
Representative Patrick Branco, Vice-Chair  
Committee on Water & Land

Representative Mark M. Nakashima, Chair  
Representative Scot Z. Matayoshi, Vice-Chair  
Committee on Judiciary & Hawaiian Affairs

From: Maunakea Observatories

Subj: Letter to **support the intent and offer comments regarding** HR33 and HCR41: Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea  
Testimony Scheduled for Thursday, 02-25-21 9:00AM in conference rooms 430 & 325 Via Videoconference.

Date: 24 February 2021

Aloha Chairs Tarnas and Nakashima, Vice-Chairs Branco and Matayoshi, and Members of the Committees on Water & Land and Judiciary & Hawaiian Affairs,

The Maunakea Observatories (MKO) **support the intent and offer comments on HR33 and HCR41:** Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea. We appreciate inclusion of the MKOs in the Working Group and are hopeful that this process might identify opportunities to serve the community's collective interest, inclusive of astronomy.

The MKOs seek a timely decision on land authorization required for Maunakea astronomy to continue beyond the expiration of the current master lease in 2033. We continue to support productive collaboration that seeks solutions, cognizant of this need.

As the committees on Water & Land and Judiciary & Hawaiian Affairs weigh decision-making on HR33 and HCR41, the Maunakea Observatories respectfully request careful consideration of the following:

- Diversity of expertise on the Working Group  
Astronomy is currently represented in the resolution by a single seat for MKO on the working group; **it will be challenging for a single person to represent the diversity of expertise and working knowledge of astronomy operations.** Astronomy on Maunakea is a complex collaboration. The MKOs represent 12 independent nonprofit observatories with 500+ cumulative employees on Hawai'i Island and a wide range of funding agencies at local, national and international levels. Other entities that participate in the current structure of astronomy on Maunakea include UH's Maunakea Support Services for road, utility and other operations, Rangers for public safety, as well as numerous other affiliated entities that make up astronomy on Hawai'i Island as it exists today.
- Access to topical experts

Allowing the Working Group to **call on topical experts external to the Working Group** as needed to provide information relevant to the evaluation of governance models would help ensure a well-informed decision-making process. For example, Working Group members may choose to call upon legal experts with knowledge of land use issues unique to Hawai'i, current Maunakea Support Services front line employees with first-hand experience working on Maunakea, ecological experts to speak to conservation needs unique to Maunakea, experts in maintaining dark skies for astronomical research and environmental conservation, and many more.

The Maunakea Observatories stand ready to support this effort by making our subject matter experts on astronomy, telescope operations, outreach, education and others available upon request.

The Maunakea Observatories are committed to a long-term future for astronomy in Hawai'i that is inclusive, creates opportunities of value to our communities, and prioritizes the perspectives of those who have kuleana for Maunakea in decision-making for future stewardship. Thank you for your leadership on this issue; we ask for your favorable consideration of our suggestions.

Mahalo,



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Director Doug Simons, Canada-France-Hawaii Telescope



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Director Paul Ho, James Clerk Maxwell Telescope (East Asian Observatory)



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Director John Rayner, NASA Infrared Telescope Facility



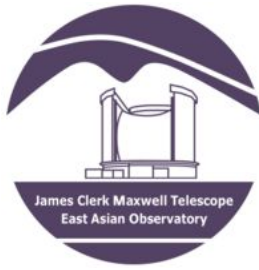
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Director Michitoshi Yoshida, Subaru Telescope



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Director Hilton Lewis, W.M. Keck Observatory (Keck I and Keck II)



To: Representative David Tarnas, Chair  
Representative Patrick Branco, Vice-Chair  
Committee on Water & Land

Representative Mark M. Nakashima, Chair  
Representative Scot Z. Matayoshi, Vice-Chair  
Committee on Judiciary & Hawaiian Affairs

From: James Clerk Maxwell Telescope (East Asian Observatory)

Subj: Letter to **support the intent** of HR33 and HCR41: Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea Testimony Scheduled for Thursday, 02-25-21 9:00AM in conference rooms 430 & 325 Via Videoconference.

Date: 24 February 2021

Aloha Chairs Tarnas and Nakashima, Vice-Chairs Branco and Matayoshi, and Members of the Committees on Water & Land and Judiciary & Hawaiian Affairs,

East Asian Observatory (EAO) **supports the intent and offer comments on HR33 and HCR41**: Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea. Like our colleagues across the Maunakea Observatories, we appreciate inclusion of the MKOs in the Working Group and are hopeful that this process might identify opportunities to serve the community's collective interest, inclusive of astronomy.

Alongside our colleagues in Hawai'i astronomy, EAO feels an urgent need to have a timely decision on land authorization required for Maunakea astronomy to continue beyond the expiration of the current master lease in 2033. Collaboration that seeks solutions is worth supporting, so long as it is cognizant of the need for timely authorization decisions.

Thank you for the opportunity to offer testimony.

Mahalo,

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Deputy Director Jessica Dempsey, James Clerk Maxwell Telescope (East Asian Observatory)



Hawaii State House of Representatives  
Water & Land Committee  
Judiciary & Hawaiian Affairs Committee

Testimony Re: HR33

H.R. 33 recognizes that the Independent Evaluation of the Implementation of the Maunakea Comprehensive Management Plan prepared by Ku'iwalu for the DLNR and published in December 2020, found a "lack of genuine consultation with the Native Hawaiian Community," and that "this lack of genuine consultation with the Native Hawaiian community has resulted in greater mistrust of the University of Hawaii and management of Mauna Kea, leading to polarization between various stakeholders on Mauna Kea and in our communities." Sustainable Energy Hawaii supports the intent of the H.R. 33 to foster an inclusive process that enables participation by Native Hawaiians in decisions that shape the future stewardship of Maunakea.

We respectfully submit the following Native Hawaiians to be considered for selection on the Working Group named by H.R. 33. Their diverse, personal accomplishments only add to the broad perspective needed to bring balance when the State makes decisions affecting our local community. We also support Ms. NoeNoe Wong Wilson as the Chairperson for the Working Group.

Kalepa Baybayan - Master Navigator

<http://www.hokulea.com/crewmember/kalepa-baybayan/>

Dr Dane Silva- La'au Lapa'au, student of Papa Auwae. Royal Order of Kamehameha

<https://earthmedicineinstitute.com/teachers/kumu-dane-kaohelani-silva/>

Ali'i Desmon Antone Haumea, Kumu A'o - Open ocean navigator. Helped establish the Aloha Aina Party. Royal Order of Kamehameha

<https://docs.google.com/document/d/17ElqsQI7iutPDQCFSPSVILB74qEBCAfgwewgC2aJZV4/edit>

Keith "Skibs" Nehls - Honoli'i Paka

<https://bigislandnow.com/2017/04/12/surfers-give-back-to-their-home-break-honolii/>

Richard Ha - Ag and Energy

<https://www.sustainableenergyhawaii.org/>

Wallace Ishibashi

[http://www.malamamaunakea.org/uploads/about/news/2013\\_IshibashiNewHire.pdf](http://www.malamamaunakea.org/uploads/about/news/2013_IshibashiNewHire.pdf)

Makana Silva

<https://www.hawaiinewsnow.com/2019/10/17/advocates-both-sides-tmt-issue-come-together-open-discussion/>

This effort is about future generations. It's not about us as individuals, companies, government agencies, or educational institutions. This is a once-in-a-lifetime opportunity to pivot – to permanently disrupt the status quo that so many of us have come to accept as having too much momentum to stop. The pandemic has taught us that we "life as we know it" can change at any moment. We can make these

changes. We can create our “new” normal. Through this collaborative process, we can embrace the diversity in perspectives to fully appreciate how to build the bridges to support collaboration. This discussion is about our mutual respect and our joint aloha for Maunakea, for this place, for this community.

There is no question that there are strong emotions and positions that will drive the discussion about the next steps related to the stewardship of Maunakea. We all must be willing to listen to each other. We should take advantage of this opportunity with the diligence required to truly understand the underlying issues of contention regarding the future stewardship of Maunakea. We have full confidence that each of the individuals recommended in the list above can create the necessary space that welcomes the exploration of diversity to understand best what we might have in common as we think about the future of Maunakea.

One of the areas that we recommend be explored is the lack of the physical expression of Hawaiian values on Maunakea. We ask that the Working Group consider creating a “Hawaiian Culture/Science Center Above the Clouds” as part of its recommendations for the next steps in the stewardship of Maunakea.

A Hawaiian Cultural/Science Center Above the Clouds must be robust enough to physically exhibit the ancestral knowledge and technology practiced by Hawaii’s indigenous peoples for hundreds of years before western contact. This includes *mālama ‘āina* and *aloha*. Like the establishment of a working group that reflects the importance of the Native Hawaiian mindset, language, and voice, a Center Above the Clouds can similarly begin to directly remove barriers to social justice, equity, and access to decision-making authority.

Early estimates of the cost for such a facility are approximately \$30 million. Supporters of this collaborative concept are committed to fundraise from private sources. We can do this together if we take the time to listen, respect, set shared intentions, and move forward.

A location a quarter mile to the west of Hale Pohaku on DLNR land might be considered as a location. If developed, traffic to the summit might originate from the Cultural Center or a location at the beginning of the road, and could be restricted to fee-supported shuttles, thus addressing safety concerns and minimizing traffic in an environmentally sensitive area.

We commend the House of Representatives for introducing this resolution, but humbly request an amendment to include members of the Hawaii State Senate in this working group. Both bodies in the Legislature need to buy into the identified solutions. We need to do this together and by not including members of the Senate will do a disservice to the entire process. Together, we look forward to a future that embraces the ancestral knowledge and technology, education, innovation and science for the collective well-being, sustainability and future of our island.

*Sustainable Energy Hawaii, formerly Big Island Community Coalition (BICC), is a grassroots organization dedicated to improving the quality of life of Hawaii Island residents. We are an advocacy group dedicated to raising public awareness and stimulating the political will to enable change. We understand that the price of energy is the common factor affecting the cost of everything in our State. Through that lens, our vision is a future of affordable energy for Hawaii, produced using only local renewable resources. This will keep money in our local economy, producing economic equity, energy independence, and prosperity.*



# Hawai'i Island Chamber of Commerce

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**Testimony to the House Committee on Water & Land  
and House Committee on Judiciary & Hawaiian Affairs  
Thursday, February 25, 2021 at 9:00a.m.  
Via Videoconference**

**RE: HR33 and HCR41, RELATING TO CONVENING A WORKING GROUP TO  
DEVELOP RECOMMENDATIONS FOR A GOVERNANCE AND MANAGEMENT  
STRUCTURE FOR MAUNA KEA.**

Chair Tarnas, Vice Chair Branco and Members of the Committee on Water and Land  
Chair Nakashima, Vice Chair Matayoshi and Members of the Committee on Judiciary and  
Hawaiian Affairs

The Hawaii Island Chamber of Commerce has supported the development of the astronomy industry ever since our involvement of the first telescope being place on Maunakea in the 1960's. Our organization supports the intent of this resolution which recognizes the need for improved governance options for the mountain while keeping our community's interest in mind.

We urge you to consider the following:

- All practical models of governance of Maunakea should be discussed, including the continuing role of the University of Hawaii.
- Hawai'i Island is home to Maunakea and members of our community, being the most affected, should have the greatest say. We implore you to assure that our community is diversely represented in the Working Group and to include leadership from the County of Hawai'i and members from the astronomy field.
- Our youth must know that there is a future for them in Hawai'i where opportunities in science and technical fields are available for them and their children. Our island is capable of producing highly motivated, high achieving, bright students and we need to keep them here.

Our chamber continues to stand with Hawaii's business community in support of astronomy research, science, culture and environmental stewardship and looks forward to the positive collaboration efforts this Working Group could bring.

Thank you for the opportunity to provide testimony on HR33 and HCR41.

February 24, 2021

Dear Chair Tarnas and the House Committee on Water & Land and Chair Nakashima and the House Committee on Judiciary & Hawaiian Affairs,

We would like to offer **comments** on HR33 and HCR41: Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea.

The Kona-Kohala Chamber of Commerce works to strengthen our local economy and promote the well-being of our community. With nearly 500 member businesses, organizations and individuals, we exist to provide leadership and advocacy for a successful business environment in West Hawai'i. Our vision is to enhance the quality of life for our community through a strong, sustainable economy.

In regards to one of our top priorities, Astronomy & Maunakea, our positions are as follows:

- Support culture, science and environmental stewardship on Maunakea.
- Support the astronomy industry on Maunakea noting significant scientific discovery, global leadership, educational outreach, workforce pipelines, jobs and economic impact.
- Encourage a new state lease for the University of Hawai'i on Maunakea.

As stated previously in a response to the announcement of this resolution, we are very concerned here on Hawai'i Island. The idea of scrapping the existing management to start a new process seems counterproductive to supporting the astronomy industry – an industry that generates needed economic diversity to our island and our state. We know that businesses need predictability. We believe that this is not the time to create more uncertainty to Hawai'i's economy as our state continues to struggle due to COVID-19 impacts and will do so in the foreseeable future.

**We would like you to work with and support the University of Hawai'i to create solutions.**

Sincerely,



Wendy J. Laros, President and CEO  
Kona-Kohala Chamber of Commerce



**HR33 and HCR41**  
**Relating to**  
**CONVENING A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR A GOVERNANCE AND**  
**MANAGEMENT STRUCTURE FOR MAUNA KEA**  
**House Committees on**  
**Water and Land**  
**And**  
**Judiciary and Hawaiian Affairs**  
**25 February 2021 – 9:00 a.m.**

Aloha Chairs Tarnas and Nakashima, Vice Chairs Branco and Matayoshi, and Members of the House Committees on Water and Land and Judiciary and Hawaiian Affairs:

My name is Jacqui Hoover and I have the privilege of serving as Executive Director and Chief Operating Officer of the Hawaii Island Economic Development Board (HIEDB), a private, member-based 501(c)3 organization incorporated in 1984 to help strengthen and diversify Hawaii Island's economy in partnership with Federal, State, County, and private sector resources to ensure a thriving, resilient community.

While HIEDB **supports the intent** of this resolution, it is vitally important the Hawaii Island perspectives are represented on the proposed working group. While Maunakea draws interest statewide, Hawaii Island stakeholders with Hawaii Island perspectives have a deeper kuleana to Maunakea and a better appreciation for and more direct impact by decisions made regarding Maunakea.

Of particular concern is the lack of inclusion in the current resolution language indicating that there will be any assured role for Hawaii Island stakeholders, nor is a seat for the County of Hawaii included.

Governance models for Maunakea should support opportunities we need to foster for future generations including and not limited to,

- Quality careers in science, technical and innovation fields
- Economic growth rooted in the knowledge economy in balance with the diverse and unique resources of our island home and respectful of our culture and heritage.
- Educational opportunities that provide our students globally unique competitive advantages, especially where indigenous knowledge systems align and merge with other academic disciplines such as astronomy, biology, climatology, ecology, and more.

The continued presence and support of a thriving astronomy research collaboration is essential to the continued growth of these opportunities into the future.

Mahalo for this opportunity to share our concerns and comments.





Hawaii State House of Representatives  
Water & Land Committee  
Judiciary & Hawaiian Affairs Committee

Testimony Re: HR33

H.R. 33 recognizes that the Independent Evaluation of the Implementation of the Maunakea Comprehensive Management Plan prepared by Ku'iwalu for the DLNR and published in December 2020, found a "lack of genuine consultation with the Native Hawaiian Community," and that "this lack of genuine consultation with the Native Hawaiian community has resulted in greater mistrust of the University of Hawaii and management of Mauna Kea, leading to polarization between various stakeholders on Mauna Kea and in our communities." Sustainable Energy Hawaii supports the intent of the H.R. 33 to foster an inclusive process that enables participation by Native Hawaiians in decisions that shape the future stewardship of Maunakea.

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Richard Ha - Ag and Energy

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changes. We can create our “new” normal. Through this collaborative process, we can embrace the diversity in perspectives to fully appreciate how to build the bridges to support collaboration. This discussion is about our mutual respect and our joint aloha for Maunakea, for this place, for this community.

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We commend the House of Representatives for introducing this resolution, but humbly request an amendment to include members of the Hawaii State Senate in this working group. Both bodies in the Legislature need to buy into the identified solutions. We need to do this together and by not including members of the Senate will do a disservice to the entire process. Together, we look forward to a future that embraces the ancestral knowledge and technology, education, innovation and science for the collective well-being, sustainability and future of our island.

Respectfully,



Richard Ha, Board Chair  
Sustainable Energy Hawaii

*[Sustainable Energy Hawaii](#), formerly Big Island Community Coalition (BICC), is a grassroots organization dedicated to improving the quality of life of Hawaii Island residents. We are an advocacy group dedicated to raising public awareness and stimulating the political will to enable change. We understand that the price of energy is the common factor affecting the cost of everything in our State. Through that lens, our vision is a future of affordable energy for Hawaii, produced using only local renewable resources. This will keep money in our local economy, producing economic equity, energy independence, and prosperity.*



## Japanese Chamber of Commerce & Industry of Hawaii

February 24, 2021

Representative David Tarnes, Chair  
House Water and Land Committee

Representative Mark Nakashima, Chair  
Judiciary & Hawaiian Affairs Committee

Re: Comments on HR33 & HRC41  
Hearing Date: Thursday, February 25, 2021, 9:00am  
Location: Conference Rooms 43 & 325 via videoconference

Chairman Tarnas, Chairman Nakashima, and members of the committees,

My name is Ross Birch, and I am the current President of the Japanese Chamber of Commerce and Industry of Hawaii (JCCIH). The Japanese Chamber of Commerce & Industry of Hawaii has been incorporated since 1951 and represents 320 members of the business community.

Mahalo nui for the opportunity to provide testimony for HR 33 and HRC41. We support the intent of this resolution and the need to identify options for improved governance that serve the community's collective interest, which includes astronomy. All viable options for effective governance of Maunakea should be explored, however we believe that the University of Hawai'i continues to adapt and strengthen their stewardship of Maunakea. As such, UH should have a critical role in any planning and governance structure moving forward.

Additionally and while Maunakea draws interest statewide, Hawai'i Island stakeholders with Hawai'i Island perspectives have a deeper responsibility to Maunakea – and a better appreciation for the impacts of what happens on island. The current resolution language does not indicate that there will be any assured role for Hawai'i Island stakeholders, nor does it include a seat for the County of Hawai'i. We believe that Hawai'i Island representation, including the County of Hawai'i, should be a majority of seat holders on the committee.

Maunakea governance models should support opportunities we need to foster for future generations - quality careers in science and technical fields; economic growth rooted in the knowledge economy; educational opportunities that give our students globally-unique competitive advantages, especially where indigenous knowledge systems merge with other academic disciplines like astronomy, conservation and more. The continued presence of a thriving astronomy research collaboration is essential to the continued growth of these opportunities into the future.

Thank you for your time.

Mahalo,

Ross Birch  
President, 2020-2021

Audrey Takamine  
Co-Chair, Government Affairs



Chamber of Commerce HAWAII  
*The Voice of Business*

**Testimony to the House Committees on Water & Land and  
Judiciary & Hawaiian Affairs  
Thursday, February 25, 2021 at 9:00 A.M.  
Written Testimony**

**RE: HCR 41/HR 33, CONVENING A WORKING GROUP TO DEVELOP  
RECOMMENDATIONS FOR A GOVERNANCE AND MANAGEMENT STRUCTURE  
FOR MAUNA KEA.**

Chais Tarnas and Nakashima, Vice Chairs Branco and Matayoshi, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **supports the intent** of HCR 41 and HR 33 to establish a working group to develop recommendation for a government and management structure for Mauna Kea.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

We appreciate the intent of this measure in exploring a working group to establish recommendations for Mauka Kea. The working group is comprised of a diverse group that will consider the governance model to serve the community's collective interest.

However diverse, we understand that each community and island is unique. We respectfully ask that consideration be given for representation from Hawai'i Island stakeholders or county leaders from Hawai'i Island who offer valuable knowledge and would be intimately familiar with the issues surrounding Mauna Kea.

The Chamber stands with Hawaii's business community in support of astronomy research, science, culture and environmental stewardship and looks forward to the positive collaboration efforts of the working group.

Thank you for this opportunity to provide testimony.

**HR-33**

Submitted on: 2/22/2021 12:08:57 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Veronica Ohara	Individual	Comments	No

Comments:

Thank for taking the time to read my testimony. I support a "working group" to resolve issues surrounding Mauna Kea but see this particular bill as a move to exclude the Hawaiians and Hawaii residents who support astronomy and the Thirty Meter Telescope.

The speaker is appointing over half of the panel and the senate doesn't even have a seat here. Where will the funding come from, taxes? There is only one seat for the observatories and the decisions from this yet to be formed committee will affect jobs at all Hawaii observatories. Astronomy is 5-10% of the economy, possibly even more with COVID-19.

Please do not appoint opponents of astronomy as a chairperson of this group because this would disenfranchise native Hawaiians who followed the law, supported projectes like TMT following a legal process. We did not participate in an illegal blockade the roads, run up the taxes for the good people of the State of Hawaii. Nor did we build ahu, cairns, altars with rocks from outside the Maunakea Science Reserve and place disinterred human remains on them.

Mahalo,

Veronica Ohara



I and others (and apparently UH) are open to changings in the management of Mauna Kea that improve stewardship of natural and cultural resources, including organizational restructuring. I also strongly believe that the legislature should take some action this session to resolve some of the Mauna Kea standoff.

However, I write to OPPOSE HCR 41/HR 33, at least in its current form. As written, I believe the bill contains several key flaws that prevent support, at least at this time.

**1. The selection and makeup of the working group is not acceptable –**

**a. The Resolution must include new language requiring the chairperson to be a moderate, good-faith actor acceptable to a wide range of voices on Mauna Kea, not just hardline astronomy opponents.** The resolution states that Speaker Saiki will personally select a chairperson for this working group. There are no listed restrictions on whom this may be.

Selecting an ideologue for this position, especially someone whose Mauna Kea activities include criminal activities – e.g. the physical obstruction of equipment – is not acceptable. Selecting such a person would cross a bright red line for majority of island residents who support astronomy and cannot properly develop a consensus position.

Noe-Noe Wong-Wilson and other similar public anti-TMT activists – none of whom have any experience in land management – would be unacceptable.

Similarly, in order for the working group to be a success, the committee member from the Office of Mauna Kea Affairs must be seen as moderate, non-ideological, and pragmatic.

**b. The Resolution must increase its wholly inadequate representation for the astronomy community.** Astronomy collectively is the Big Island's 4<sup>th</sup> largest employer. Any decision on the future restructuring of Mauna Kea's management directly affects hundreds and hundreds of hard-working people who depend on Mauna Kea-related jobs to support their families: technicians, engineers, day crew, rangers, maintenance staff, etc.

However, currently there is a just a single slot for the Mauna Kea Observatories (7%!!!). This is not acceptable.

The working group should include multiple members from the observatories, not just one, who represent the interests not just of the telescopes as science engines but as providers of a livelihood. A seat at the table reserved for observatory staff born and raised in Hawaii would be especially appropriate.

Similarly, the Resolution should include language stating explicitly that its member balance properly represents a wide range of perspectives on Mauna Kea, including the majority of island residents who see astronomy as empowering and good. An imbalanced representation – whether it be skewed towards pro or anti astronomy voices – cannot develop a proper consensus.

**2. UH has performed the core task of land management on Mauna Kea very well over the past 10 years** – The basic task of a land manager is to manage land. The resolution is predicated on the idea that UH has “mismanaged” Mauna Kea, in particular citing actions to “respective Hawaiian cultural practices and resources” and “conduct education and outreach”.

As described in my CMP audit comments, I insist that the Resolution acknowledge the truth: that UH does well in the nuts-and-bolts management of Mauna Kea. The Resolution fails to properly acknowledge UH’s excellent track record of core management expertise and thus gives a skewed perception to any working group about the scope of its mandate. The independent audit itself states that “the cultural and natural resources on the state conservation lands on Mauna Kea [managed by UH] are some of the best managed and protected lands in the entire State.”

This opinion aligns with my own observations. I have gone to Mauna Kea for the past 14 years for astronomical observations and thus have seen the state of the mountain prior to the completion of the CMP, during the early years of its implementation, and up to recent times. Details of my comments are attached. The University of Hawai’i has done an exceptional job managing and protecting resources on Mauna Kea for at least the past decade. Their stewardship of the land is a stark contrast to the poor stewardship that some TMT protesters have on the Pu’u Huluhulu encampment. Their commitment to laws and regulations is a stark contrast to lackadaisical attitude from state and county law enforcement.

**3. Many of the faults listed in the Independent Auditor’s Report are ultimately due to the State of Hawaii or are overstated**

The audit faults UH for an untimely development and implementation of administrative rules. However, as clearly indicated in the 2017 auditor’s report, Governor Ige must authorize the initiation of public hearings for the draft rules: he specifically asked UH to halt the process of finalizing such rules. He did not authorize the start of public hearings until 2019: the admin rules were approved in 2020, just prior to the start of the COVID-19 pandemic. Prior to 2017, UH suspended rulemaking pursuant to a TMT contested case hearing petitioner’s request in order to avoid violating ex parte communication rules. Since the TMT protesters dragged on the legal process for nearly a decade, rulemaking promulgation was naturally delayed.

Absent protestor filibustering and delays induced by the governor, there is every indication that administrative rules would have been implemented years ago and this concern would be moot.

The audit states that “[m]aterials and programs developed to educate staff and visitors about Mauna Kea lacked the Native Hawaiian perspective on its importance.” This was certainly not my experience regarding the cultural resource orientation provided by OMKM. Despite some misgivings about the Visitor’s Center management, I found their presentation to clearly communicate information about the cultural significance of Mauna Kea to visitors.

The report also states “Native Hawaiian practitioners, Families who have cultural or lineal connections to Mauna Kea, and NHOs feel they were not adequately or regularly consulted and/or informed about actions taking place on Mauna Kea.” The one major situation I have



personal knowledge of – DLNR’s identification of Palikapu Dedman’s placement of bones in an ahu on the TMT site – directly contradicts this claim. There, DLNR’s investigation was extremely thorough, with documented consultation with the Hawaii Burial Council, cultural practitioners, and opponents to TMT. I also believe that UH’s extensive public hearings process serves as an especially clear example of consultation.

4. In its current form, **this resolution threatens to put at risk the entire astronomy sector in Hawaii** - UH is currently working on a new land authorization to continue its leasing past 2033. Even within this current framework, no doubt the lease renewal will face legal challenges put forth by activists who are unbending in their opinion that all observatories should be removed. Putting in a new management structure will take significant amount time to implement and will almost assuredly face similar challenges by bad-faith actors exploiting the slowness of the legal process.

Funding agencies in the US, Japan, and Canada are responsible for the current telescopes and TMT: they are ultimately responsible for the employment of hundreds of island residents, including your constituents. They will see these changes as destabilizing.

The Resolution should include language to make absolutely clear the following. 1. UH should proceed with steps to obtain a new master lease renewal. 2. Any restructuring of UH’s management is **not** necessarily an indication of fundamental problems with the university’s management. Rather, the goal of any restructuring is to retain UH’s current expertise in land management while improving its consulting, education, and outreach.

5. **This resolution will not resolve the standoff over TMT or astronomy in general**- Concerns over the management of Mauna Kea, especially over whether a wider range of voices should be given a seat at the table for decisions, is at the heart of some of the TMT protest movement. It is possible that a restructuring of management will address these concerns. Insofar as this resolution achieves seeks this compromise, I may be able to support a substantially revised version of this bill.

However, a restructuring of it will not mean that the standoff over TMT will end. A substantial wing of the group actively blocking the Mauna Kea Access Road are emphatic in their position of "no TMT". Changing the management of Mauna Kea will not change their opinion. Any movement by the state to restructure the management of Mauna Kea must be accompanied by tangible action to equitably enforce the law.

Furthermore, it is unclear whether a change in management structure gets closest to core issues driving the protests. Many others are not against the telescope(s) per se but see the issue as symbolic, a way to raise awareness over past injustices against Hawaiians. I am extremely sympathetic to this view. However, changing the management of Mauna Kea will not 1) fully fund DHHL, 2) repay beneficiaries for the Mauna Kea Access Road, 3) or bring about Hawaiian sovereignty.

**6. The resolution wrongly turns a blind eye to (in)action by the State and County of Hawaii demonstrating gross incompetence and wanton negligence with respect to Mauna Kea that dwarfs any failures by UH.**

Put simply, David Ige, Harry Kim, Josh Green, and others have thrown the people of Hawaii under the bus by failing to equitably enforce the law on Mauna Kea.

The attachments – my CMP testimony and the decision by the Hawaii County Ethics Board to sanction Harry Kim for non-enforcement – make plain their failings.

Numerous community members have pleaded with you, the legislature, to “do something” to ensure that the law is equitably enforced. As one example, the protest encampment sits on parcels zoned just like the astronomy district – Conservation District. Hawaii law stipulates that any structures on these lands must have a permit and any unpermitted structures must be removed. To date, though, we have seen no action to remove the structures.

What is the legislature going to do to ensure that the law is enforced?

## Appendix A6. Comments Related to the CMP Evaluation

### Comments from Thayne Currie

I wish to offer comments on the CMP and request a follow-up conversation/exchange with the auditor.

My background and key points:

- I have gone to Mauna Kea for the past 14 years for astronomical observations and thus have seen the state of the mountain prior to the completion of the CMP, during the early years of its implementation, and up to recent times.
- I have not shied away from pointed and public criticism of UH or the Institute for Astronomy in other contexts. For example, as an interviewee for EnVision Mauna Kea I expressed extreme frustration and anger at IfA for "a lack of courage" in direct and frank discussions with some TMT opposition leaders in order to have a future where the telescope is built on Mauna Kea in the most peaceful way possible. I still hold this opinion and believe, from a public relations standpoint, the entire IfA leadership should overhauled.
- Despite my misgivings about IfA's engagement (or lack thereof) in conflict resolution, I very strongly believe that the University of Hawai'i has done an exceptional job managing and protecting resources on Mauna Kea for at least the past decade: the subject of this audit. Their stewardship of the land is a stark contrast to the poor stewardship that some TMT protesters have on the Pu'u Huluhulu encampment. Their commitment to laws and regulations is a stark contrast to lackadaisical attitude from state and county law enforcement.
- I still understand that many community members believe that "management" of Mauna Kea is not exceptional right now. However, nearly all of the major flaws are not traced to UH. Rather, they clearly lay at the feet of the State of Hawaii and County of Hawai'i, in particular David Ige and Harry Kim.

Detailed comments:

7.1.1 Native Hawaiian Cultural Resources - While the record prior to my visits has been mixed, since the development of the CMP [2009] I believe that UH has done an excellent job preserving and protecting cultural resources.

The inventory of cultural/historical sites is exhaustive and well documented. In my years on Mauna Kea, I have seen cultural practitioners free to engage in their activities without harassment but with respect from UH. The cultural orientation program required for all Mauna Kea astronomy personnel is well presented.

UH has done well. The state of Hawaii has a poorer track record. For instance, the State of Hawaii (DOCARE) allowed Palikapu Dedman to disinter remains in Ka'u and place them on the TMT site as "evidence" that TMT was being built on a burial ground. In records gained from DLNR through a legal challenge, the Hawaii Burial Council chief deemed these acts to be "cultural terrorism". Yet Mr Dedman has never been prosecuted for these crimes.

7.1.2 Natural Resources –

As evidenced during TMT's most recent Contested Case Hearing, UH has done an exceptionally thorough job in documenting and protecting Mauna Kea's natural resources. Arthropod surveys are well thought out

and detailed. The weiku bug population has recovered. Documentation and surveys of plant species is also well thought out.

Once again, while UH has done well with protecting natural resources, the state of Hawai'i itself (i.e. state law enforcement) has a more mixed record. Specifically, after evidence showed that TMT protestors damaged plants and scattered trash near the Mauna Kea Access Road encampment, the encampment was not removed. Over a year after its first appearance, the encampment persists.

#### 7.1.4 Astronomical Resources –

UH has done well with protecting Mauna Kea's astronomical resources. However, the \*state\* of Hawai'i has done exceptionally poor in protecting astronomical resources. In particular, it allowed an illegal sustained blockade of the Mauna Kea Access Road to persist for months. These illegal activities not just damaged the environment and were against the law, but they also make UH's job of protecting astronomical (and other) resources harder.

State and county law enforcement need to fairly enforce the law.

#### 7.2.2. – Permitting and Enforcement

UH has done well with educating workers on cultural and natural resources on Mauna Kea. OMKM rangers are very thorough and necessarily strict with enforcing laws ranging from protecting resources to speeding.

Again, it is not UH but the state and county law enforcement itself (e.g. DOCARE, HCPD) who have failed to live up to their job of enforcing the law. The state and county of Hawai'i have allowed an illegal blockade of the Mauna Kea Access Road to persist. Previously, they allowed an illegal encampment across the street from the Visitor's Center to persist. Both without permits and both damaging the environment. It is more difficult to have compliance with laws on the mountain when law enforcement agencies simply reforce to enforce compliance.

#### 7.3.1 – Infrastructure and Maintenance

I have gone to Mauna Kea now for 14 years and have seen the inside and immediate outside of observatories many times, though I am most familiar with Subaru. The observatories are very clean, tidy structures with little tolerance for clutter or waste, ranging between just "clean and tidy" to "doctor's surgery room"-level clean. Waste disposal is done in an environmentally responsible way.

The COVID-19 pandemic has also provided a way for the observatories to further reduce their footprint by reducing the number of people at the summit. Keck and Subaru have observing software that allows observing to be carried out remotely at an astronomer's home, eliminating even the need for a flight to Hawai'i for observing.

Where practical, observatories should consider steps to go to zero-waste facilities after 2033 much like TMT. To offset the increased traffic to the mountain for waste gathering, observatories should also consider moving more operations remotely such as is routinely done with Keck.

### 7.3.3 Decommissioning –

The process for decommissioning CSO and Hoku'kea is well planned but is exceedingly, frustratingly slow. Decommissioning that is not just carried out but done in a visible and timely manner builds trust within the community, especially those who are skeptical of the extent of astronomy development on Mauna Kea. For instance, all materials related to CSO that do not clearly require an EA/EIS, permit, or other legal proceedings (e.g. computers, hardware, perhaps even telescope components) should not just be removed briskly but must be visibly removed. I again applaud UH's decommissioning and site restoration plans but they only hurt themselves by not being very public about the execution of said plans.

#### Suggestions

- a. On whether a full site restoration or restoration-above-ground is needed for a particular decommissioning- UH should follow guidance from Kahu Ku Mauna and consult organizations such as the Hawaii Burial Council, OHA, and Royal Order of Kamehameha. Where these groups express a range of opinions, UH should err on the side of seeking fuller restoration.
- b. To build greater trust, UH needs to be far more public about steps it has already taken in decommissioning. If tangible steps have already been taken -- e.g. if observatory components have already been removed -- then the public should know.
- c. UH should seek guidance from Kahu Ku Mauna and Hawaiian cultural organizations on whether blessing ceremonies like those carried out prior to telescope construction would be appropriate for decommissioning.

BEFORE THE BOARD OF ETHICS

COUNTY OF HAWAI'I

In the Matter of the Petition by

Lisa Malakaua, Michael Nathaniel, and  
Thayne Currie,

Petitioners,

and

Mayor Harry Kim,

Respondent.

PETITION NO. 2020-04

INFORMAL ADVISORY OPINION

Hearing: December 9, 2020

INFORMAL ADVISORY OPINION

On January 16, 2020, the Hawai'i County Board of Ethics (hereinafter referred to as "Board") received a complaint via email (hereinafter referred to "Petition") from Lisa Malakaua and Michael Nathaniel (hereinafter referred to as "Petitioners") "...regarding the lack of enforcement and/or unequal enforcement of state laws at the Thirty Meter Telescope protest encampment at Mauna Kea Access Road." The email attached their complaint and indicated it was prepared with the assistance of Thayne Currie.

At its duly noticed meeting on December 9, 2020, the Board reviewed and considered the above-captioned Petition pursuant to Rule 4 of the Rules and Practice and Procedure of the Board of Ethics. Petitioners Lisa Malakaua and Michael Nathaniel were present in person at the meeting and Petitioner Thayne Currie appeared via videoconference. Respondent Mayor Harry Kim was not present at that meeting. The Board, having received into evidence all relevant facts and hearing arguments then deliberated and considered and giving appropriate weight to the testimony and evidence submitted by the parties and contained in the record, and having

considered the arguments presented, hereby renders the following Findings of Fact, Conclusions of Law, and Order.

#### FINDINGS OF FACT

1. To the extent that any of these Findings of Fact are Conclusions of Law, they are to be so construed.
- A. The Petition
  2. On January 16, 2020, Lisa Malakaua and Michael Nathaniel emailed a complaint (hereinafter referred to as "Petition") to the Board of Ethics and stated "[w]e wish to submit an official ethics complaint regarding the lack of enforcement of state laws at the Thirty Meter Telescope protest encampment at Mauna Kea Access Road. Our complaint is detailed in the attached document, prepared with the assistance of Thayne Currie, who is familiar with the legal status of the protests."
  3. The Petitioners are residents of the County of Hawai'i.
  4. At the Board's October 14, 2020 meeting, the Petitioners amended their Petition and named County of Hawai'i Mayor Harry Kim as a Respondent. (p. 24, October 14, 2020 minutes).
  5. Mayor Harry Kim ("Respondent") was a duly elected officer of the County of Hawai'i until his term of office ended on December 7, 2020.
  6. On December 7, 2020, Thayne Currie emailed the Board a document that supplemented the subject Petition which was accepted by the Board at its December 9, 2020 meeting.
  7. At the Board's December 9, 2020 meeting, the Board allowed Thayne Currie to be added as a Petitioner to the subject Petition.
- B. August 12, 2020 Meeting

8. Petitioner Malakaua stated “Our complaint is very simple. The County and State have not impartially enforced their own laws. We have submitted to this Board various testimonies. Photos, videos and articles in support of our claim. The protest camp is illegal regardless of who owns the road.” (p. 10, August 12, 2020 minutes).
9. Thayne Currie testified at the meeting and stated “I currently have a dual appointments at the NASA Ames Research Center and also has (sic) an affiliated researcher at the Subaru Telescope on the Big Island. To be very clear, Mauna Kea is personally very special to me. Requires care when I believe it’s (sic) resources should be protected. And I also believe very strongly in due process and equality of the law for everybody. And It’s (sic) for these reasons, I support Lisa Malakaua and Mike Nathaniel’s effort to show the truth which is that the State and County of Hawai’i have committed severe ethics violations by allowing an unpermitted environment damaging and habitually trash-strewn TMT protest site to persist. And also by not enforcing TMT safe legal access to its (sic) construction site even though they enforced they (sic) law at different locations or on the same plot of land for different issues.” (p. 14, August 12, 2020 minutes).
10. The Petition did not reference a Hawai’i County Code section being violated but when asked by the Board, Mr. Currie stated that the applicable provision is Section 2-83 (a) and (b), Fair Treatment. (p. 17, August 12, 2020 minutes).
11. Petitioner Michael Nathaniel testified that “The rule of law is a principal under which all persons, institutions, and entities are held accountable. And if our State



and County officials find it difficult to be impartial when acting out their duties, then they have no business being there.” (p. 20, August 12, 2020 minutes).

12. Board Chairman Rick Robinson stated “What you’ve have filed your appeal on has basically the reason we’re gonna be hearing from Corp. Counsel a little bit later today about our request for a special counsel to do an investigation of this matter. So when I read your petition, I thought this is following along exactly on the petition that we had previously that was initiated by the Board.” (p. 19, August 12, 2020 minutes)

13. The Board voted 5-0 to hold the Petition in abeyance pending its request for special counsel and discussion with Corporation Counsel Joseph Kamelamela. (p. 22-23, August 12, 2020 minutes).

C. August 12, 2020 Meeting in Executive Session

14. The Board met in executive session to hear from Corporation Counsel Joseph Kamelamela regarding the Board’s request to hire special counsel.

15. In a letter from Corporation Counsel Joseph Kamelamela dated August 12, 2020, the Board’s request to hire special counsel was denied.

16. Since the August 12, 2020 letter was not available to all of the Board members, the members was provided an opportunity to review the letter before the next meeting.

D. September 9, 2020 Meeting

17. The Board informed the Petitioners that the Board was still in the process of discussing the opinion from Corporation Counsel. (p. 10, September 9, 2020 minutes).

18. The Board voted 5-0 to continue the Petition to the October 14, 2020 meeting. (p. 12-13, September 9, 2020 minutes).

E. October 14, 2020 Meeting

19. Board Chair Robinson stated that the Board received a legal opinion from the Corporation Counsel indicating "...that this Board has no authority to conduct an investigation at the County, or request outside counsel from the County Council. So we do not have the authority to do an ethical investigation of the lack of enforcement on Mauna Kea as well as that this is really a political question and that the Board of Ethics has no jurisdiction over a political question of this nature." (p. 15, October 14, 2020 minutes).

20. The Board was not able to release the legal opinion at that time because it was still deemed to be confidential. (p. 15, October 14, 2020 minutes).

21. Petitioner Malakaua testified that "Article 15 of the Hawai'i County Code of Ethics is what supports our MKAR petition, and that was filed on January of 2020. And Section 2-83 of that code, emphasizes importance of fair treatment noting that all property is to be treated as a public trust and that all persons are to be treated in an impartial manor." (p. 17, October 14, 2020 minutes).

22. Hawai'i County Code, Article 15, Code of Ethics, Section 2-83 (a) and (b) Fair Treatment, provides as follows,

**Section 2-83. Fair treatment.**

(a) Officers and employees of the County, while discharging their duties and dealing with the public, shall adhere to the following precepts:

(1) All public property and equipment are to be treated as a public trust and are not to be used in a proprietary manner or for personal purposes without proper consent.

(2) No person in a supervisory capacity shall engage in personal or business relationships with subordinates, which might intimidate said subordinates in the discharge of their official duties.

(3) All persons shall be treated in a courteous, fair, and impartial manner.

(b) No officer or employee shall use or attempt to use the officer's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages,

contracts, or treatment, for oneself or others, including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the officer's or employee's office or position.
- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the officer's or employee's official duties or responsibilities except as provided by law.
- (3) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the officer or employee inspects or supervises in the officer's or employee's official capacity.
- (4) Using County property, facilities, equipment, time, or personnel for private business, campaign purposes, or for any purpose other than for a public purpose.

23. Petitioner Malakaua requested that their Petition be amended to add Mayor Harry Kim as a respondent. (p. 24, October 14, 2020 minutes).
24. The Board indicated it would send the Petition to Mayor Kim and request a response. (p. 25, October 14, 2020 minutes).
25. The Board voted 4-0 with Board Vice-Chair David Wiseman abstaining, to waive the attorney-client privilege with respect to the August 12, 2020 legal opinion from Corporation Counsel Joseph Kamelamela. (p. 33, October 14, 2020 minutes).

F. November 16, 2020 Meeting

26. Mayor Kim appeared at the November 16, 2020 meeting and stated:

In regards to Mauna Kea, you know there's been so much confusion about the County government's roll, (sic) which obviously I am part of, in regards to what is our roll (sic) in the Mauna Kea issue. The Mauna Kea issue in regards to the Telescope is strictly a state issue. The only participation the County Government did working backwards was when the Governor pulled out all of Mauna Kea in regards to Emergency Proclamation of the National Guard and the State Resources and at the (sic) that time, I forgot the date of it, he notified me and all representatives of County Government, the access to Mauna Kea mountain was now to be open was under the responsibility of the County Government of Hawai'i. That is the only time we took any kind of authority of all the project up there. All the rest of it, and I do mean all, without any hesitation including use of Police, use of Fire, or any other resources was with the State Government of Hawai'i. (p. 32, November 16, 2020 minutes).

27. In response to a question from Board Member Nan Sumner-Mack regarding the expenditure of funds from the County budget, Mayor Kim stated “The money was reimbursed by the State Government. As far as County money, all of the Police and other resources, was not used, except for the opening and I did delegate a Public Works crew to go out there and clear out the road and do emergency repairs to make it safe for general public use. And if you count the Office of the Mayor’s time, you know, time converted to money, yes I did spend some time up there and so did others, but the major cost factor that were, were the Police 24 hours and also Fire personnel. But all of the Police personnel was reimbursed by the State. As far as I know the only actual money spent up there was in regards to clearing out the road. (p. 33-34, November 16, 2020 minutes).

28. In response from Board Member Lawrence Heintz as to whether Mayor Kim has an arrangement with the protestors, Mayor Kim stated “The only agreement I have with the people of Mauna Kea, protestors or protectors, is asking them to leave the area for free access and assuring them that we have been assured by the Thirty Meter Telescope people that there would be no attempt of any kind for construction to begin. And this is what I notified them, asking for their cooperation to open it up, which they did, very gracefully. Gratefully accepted, obviously and assure them that I will communicate with them and there would be no attempt of any kind to sneak people up there.” (p. 35, November 16, 2020 minutes).

29. In response to a question from Board Vice-Chair Wiseman regarding the Governor’s requests to Mayor and the State of Hawai’i’s involvement, Mayor Kim stated,

First of all, I have stated this is a State project and the University of Hawai'i and Hawaiian Homes authority. My only responsibility at the time that was given in two-fold. One of em was because I had expressed publicly my opinion of Mauna Kea and the telescope. I forwarded to him the going issue of Mauna Kea, and there was a personal element of what I thought Mauna Kea can be and could be for the people of Hawai'i and the world, in regards to astronomy and relationships. In regards to that, that was a personal thing, asked to be done by the Governor, which I did. The second time was regards to, because he was informed by the TMT individuals that there would be no construction attempt for a while, it'd be suspended because of various reasons of climate and timing and everything else. And it was at that time I say, he made an announcement, that there's no reason for the State Government to be up there and in regards to the blockade area, screening and those things in order, that he is going to pull out the State resources of National Guard, DOCARE and others, County police as well. And it was at that time I was informed that the responsibility of opening the road falls through the County Government of Hawai'i. And that is the only two times that I had any kind of responsibility on the mountain, on the road. (p. 35-36, November 16, 2020 minutes).

30. In response to a question from Board Vice-Chair Wisemans regarding whether Mayor Kim believed he had line authority with the County Police to direct them and tell them what to do, Mayor Kim stated "No, sir. That confusion part which is easily understandable. This is a County Police department but they were in agreement including the responsibility and including payment which was made in full by the State Government. Truthfully, I was quite surprised that I could even ask the Police in regards to focus on safety by a certain kind of manpower and I could not even do that. I think it's the opportune time for people to understand the County Government Mayor responsibility with the Police Department is strictly supervisory administrative and it is ruled by a commission. A people's commission." (p. 36, November 16, 2020 minutes).
31. The Board had concerns regarding the fair and impartial enforcement of the rules, regulations and laws of the State of Hawai'i concerning the day that officers from Oahu, Maui, Hawai'i Island and DOCARE officers were at the protest site, there

was a last minute decision to stand down and Mayor Kim stated the Governor made that decision. (p. 37-38, November 16, 2020 minutes).

G. December 9, 2020 Meeting

32. Pursuant to a request by Petitioner Malakaua, the Board allowed Thayne Currie to be added as a Petitioner in the subject Petition.

33. On December 7, 2020, Petitioner Currie emailed written testimony to the Board to supplement the subject Petition which was reviewed and accepted by the Board at the December 9, 2020 meeting.

34. Petitioners December 7, 2020 supplemental claims alleged the following:

To the TMT protest leaders encamped at the MKAR, Mayor Kim gave his personal guarantee that he would notify them of any imminent construction attempts. Effectively, he promised to 'tip off' protesters in advance. The obvious practical consequence of this act, clearly acknowledged by the protest leader, would mean allowing protesters to more 'effectively' block vehicles on a state highway, an act that is against the law (e.g. HRS 711-1105). (citing [www.hawaiinewsnow.com/2019/10/17/mayor-kim-tmt-opposition-leader-describe-promise-no-sneaking-telescope-equipment/](http://www.hawaiinewsnow.com/2019/10/17/mayor-kim-tmt-opposition-leader-describe-promise-no-sneaking-telescope-equipment/))

The county authorized county taxpayer funded manpower and equipment to lay and grade an aggregate material pad on the lava rock for the benefit of only the protesters. This act broke state environmental laws, as such construction activity requires environmental review. It also inappropriately used taxpayer funds for the sole benefit of one group, indeed one whose entire purpose for being at the MKAR is to physically block construction vehicles on a highway. (citing [www.westhawaii.com/2020/01/05/hawaii-news/kupuna-tent-moves-kim-to-meet-with-governor-tmt-officials-this-week/](http://www.westhawaii.com/2020/01/05/hawaii-news/kupuna-tent-moves-kim-to-meet-with-governor-tmt-officials-this-week/))

35. Respondent was not present at the meeting as he was no longer an officer of the County.

36. The Board finds that protestors blocked the Mauna Kea Access Road on July 15, 2019.

37. Governor David Ige issued an emergency proclamation on July 17, 2019 due to the protests that occurred on and near the Mauna Kea Access Road in opposition to the construction of the Thirty Meter Telescope on Mauna Kea.
38. Governor David Ige withdrew his emergency proclamation on July 30, 2019.
39. The Board finds that the County of Hawai'i assumed responsibility of the Mauna Kea Access Road from the State of Hawai'i on July 31, 2019.
40. The Board finds that Mayor Kim violated Section 2-83 (a) (3) of the Hawai'i County Code by the following reasons:
  - a. Access to the Mauna Kea Access Road was blocked and not kept open for all citizens from July 31, 2019 until December 26, 2019.
  - b. Authorizing the use of County funds to lay gravel for benefit of the protesters beneath the kupuna tent.
  - c. Mayor Kim's agreement to notify the protesters of any attempt to begin construction on Mauna Kea.
41. Hawai'i County Code Section 2-83, Fair Treatment, (a) (3) states in pertinent part, "Officers and employees of the County, while discharging their duties and dealing with the public, shall adhere to the following precepts: ... (3) All persons shall be treated in a courteous, fair and impartial manner."
42. The Board finds that Respondent did not treat the citizens of Hawai'i County in a fair and impartial manner under Hawai'i County Code Section 2-83 (a) (3).
43. The Board finds that as of December 7, 2020, Mayor Kim is no longer an officer of the County of Hawai'i and is not currently subject to the jurisdiction of this Board.
44. Board Member Lawrence Heintz made a motion to find that that while Mayor Kim was an officer of the County, he violated Section 2-83 (a) (3) of the Hawai'i County Code. Board Member Denise Nakanishi seconded the motion.

45. The Board, having examined, reviewed and weighed the evidence, the record and files herein, including the Petition, Hawai'i County Charter, the Hawai'i County Code, and the Board's Rules of Practice and Procedure, made and unanimously approved the motion with Board Chair George R. Robinson, Vice-Chair David Wiseman, Board Members Nan Sumner-Mack, Lawrence Heintz and Denise Nakanishi voting in the affirmative.

CONCLUSION OF LAW


Based upon the evidence presented and the Board's review of the Hawai'i County Charter, the Hawai'i County Code, and the Board's Rules of Practice and Procedure, the Board finds and concludes that Respondent violated Section 2-83 (a) (3) of the Hawai'i County Code while he was an officer of the County.

ORDER


Pursuant to Board Rule 4.9, this Informal Advisory Opinion shall be filed with the Board and a copy shall be sent to the Petitioners and the Respondent.

Dated: Hilo, Hawai'i, JANUARY 13, 2021.

BOARD OF ETHICS, COUNTY OF HAWAI'I

By   
GEORGE R. ROBINSON  
Chair

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
J. YOSHIMOTO  
Deputy Corporation Counsel



**HR-33**

Submitted on: 2/22/2021 3:48:17 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
KATHERINE ROSEGUO	Individual	Oppose	No

Comments:

Aloha. I am a recently retired Hawaiian speaking middle school science teacher and I am submitting testimony to HR33 in opposition to its current form. As a science educator who graduated from Hawai'i public school and has taught in both public and charter school environments, such a bill as presented makes me wary and distrustful that this is yet another way to placate the uncompromising protestors while ignoring the local residents, including those of Hawaiian descent, who actively support the astronomy community on Mauna Kea, including TMT. One reason why am submitting written testimony only instead of in person testimony is due to my apprehension at being bullied, shamed, yelled at, and humiliated for supporting a clean educational industry which continues to give generously to the community through Food Banks, scholarships, teacher workshops, PPE for our health care workers, and online resources for our teachers to continue to teach science during this crippling pandemic. As written, it appears to me to hand off way too much power to the astronomy opponents who would just as soon kick off all telescopes off the mountain. My own children, once inspired by astronomy, are among the many local residents, including native Hawaiian astrophysicists, and my own middle school students, who change the course of their lives and resign themselves to living on the mainland so they can avoid having to hide their drive for a deeper understanding of the universe. They are not safe here. Because after all the court battles had been won in favor of astronomy, and we were so close to seeing a new future available for our kids and for Hawai'i, what did the state do? Abandon us. The state apparently doesn't believe in the law. Actions, or inactions, speak louder than words and our kids and scientists got the message loud and clear: physics and astronomy are not welcome here in Hawai'i, no matter how much they give to the community. Apparently what's important to the state is the Hawaiian religion / sovereignty of the loud protestors, who do NOT represent the majority of Hawaiians or residents, as evidenced by the results of recent elections. My plea is for the state to defend education and science, who CAN co-exist hand in hand with Hawaiian language and culture. I did it when I was teaching science at NÄ• wahÄ«okalaniÄ• pu'u. We were so close, and then, ... nothing. Ignorance and intentional misinformation apparently won. As an educator, my heart was broken. The state did not carry out its kuleana and has refused to act, and continues to do nothing. Give us our dreams back. Give our kids a future. Is this just another Harry Kim "let's try to work it out" delay tactic to make sure TMT never gets built? UH has been working hard to improve but that is ignored. Convince me, and all

of Hawai'i through your actions that education and wonder infused with a Hawaiian perspective are attainable and worth fighting for. Aloha.

**HR-33**

Submitted on: 2/23/2021 12:26:24 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Paul Lawler	Individual	Oppose	No

Comments:

I am testifying in opposition to HR33, for the following reasons:

**The selection and makeup of the working group is not acceptable** – it leaves the Speaker the option of choosing a hardline TMT opponent as the chair and fails to properly represent the interests of those who work on Mauna Kea at the observatories.

**UH has managed Mauna Kea well over the past decade.**

**Many of the faults listed in the Independent Auditor’s Report are ultimately due to the State of Hawaii or are overstated**

In its current form, **this resolution threatens to put at risk the entire astronomy sector in Hawaii**

**This resolution will not resolve the standoff over TMT or astronomy in general**

**The resolution wrongly turns a blind eye to (in)action by the State and County of Hawaii -- especially David Ige and Harry Kim -- demonstrating incompetence and negligence with respect to Mauna Kea that dwarfs any failures by UH.**

The legislature should push the governor to enforce the law.

## NA KUPUNA MOKU O KEAWE

Hanalei Fergerstrom, Spokesperson  
Na Kupuna Moku O Keawe  
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### **Regarding HR33 OPPOSITION**

This resolution is written with intended bias. To be non-bias it would first have to properly identify land title. Those lands of Mauna Kea are the property of the Hawaiian Kingdom Crown and Government. Those lands were illegally seized by the Provisional Government as a result of the illegal overthrow of the Hawaiian Kingdom government in 1893.

I think that this suggested process would have been better received had you utilized the information you already had about the lack of genuine consultation with the Native Hawaiian Community. Perhaps an early community consultation would have made your resolution a bit more genuine rather than appearing like this is just a process you have to go thru to say you tried.

Here's a few thoughts that may help.

- 1) Stop purporting to be the authority, without speaking of the illegal acts in continuity that has you appear to be on the high moral ground when you know that the whole existence of the State of

Hawaii is based the illegal overthrow of the Hawaiian Kingdom and the thief of the Kingdoms property.

2) What starts illegal remains illegal regardless of the passage of time. Like the old verbage “two wrongs do not make a right”

I’m going to end here as I’m sure if my testimony is well received, then there is much work that we need to do.

Dated: 2/23/2021

Respectfully,

// Hanalei Fergerstrom

**HR-33**

Submitted on: 2/23/2021 1:03:24 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Michelle Sandell	Individual	Oppose	No

Comments:

Good morning,

This is for consideration as written testimony regarding HR 33/HCR 41, on changing the management of Mauna Kea.

While on the whole, I believe it is important for space to be reserved for Native Hawaiians' voices on what happens on Mauna Kea, I am not confident this bill works to improve this conversation. Furthermore, in light of astronomical interests on Mauna Kea, this bill looks to do little more than delay — yet again! — a process that should have been started already: the construction of the Thirty Meter Telescope.

The aim of this bill is to reconcile the mistrust and polarization that has occurred around a particular group of Native Hawaiians.

Please note that this is NOT the Native Hawaiian community at large. Looking more carefully into the BOR, and the language for specifying the aggrieved party, it refers primarily to Native Hawaiians who hold that Mauna Kea is sacred. It is also known that

1. Not all Native Hawaiians are polarized against astronomy on Mauna Kea, and
2. There are Native Hawaiians who DO hold that Mauna Kea is sacred, as sacred as any 'Ä• ina, and they support astronomy on Mauna Kea as well.

\* The general evaluation of the University of Hawaii's management is quite good and has improved over the past decade. That they still have room to improve on one component of their management does not necessarily entail that the University of Hawaii should no longer have stewardship of Mauna Kea. In fact, it should be argued that their history of improvement is justification for why their stewardship should continue.

\* In their internal restructuring alone, there were more than 90 meetings with Native Hawaiians and organizations affiliated with the Native Hawaiian community. HR 33/HCR 41 asserts that UH's engagement with the Native Hawaiian community has been insufficient, which is too vague. I'd argue that the assertion is also false, or at least

short-sighted. In either case, it is poor justification for forming a new management structure.

\* Those who have protested most loudly have made their view quite clear: there is no room for negotiating the continuation of astronomy on Mauna Kea.

\* If the purpose of HR 33/HCR 41 is to give that point of view managerial authority, that would be tantamount to working in from the side a way to subvert every legal and administrative challenge the TMT has met. This is disingenuous.

\* If that is not the purpose of HR 33/HCR 41, then given that there are already, and have been already, and will continue to be, numerous types and occasions of outreach from the astronomical community, the bill does not make clear how its proposal will be better. Pending the time and complications involved with establishing and populating a new management structure, the measure stands as another delay to moving forward on the TMT.

\* With the other observatories on Mauna Kea in the mix as well, this bill does not sound a clear message on their future, which is a poor position to put them into. It also does a disservice to an aspect of Hawaii that brings prestige, and educational and employment opportunities, to our state.

WRITTEN TESTIMONY ONLY

February 23, 2021

Chairs Tarnas and Nakashima, and Members of the Committees on Water and Land, and Judiciary and Hawaiian Affairs:

Aloha kākou. My name is Norma Wong, and I am writing in favor of HR 33 and HCR 41.

In the 80s and 90s, I was active in Native Hawaiian and other policy issues in the early days of Alu Like, at the Legislature and for eight years as part of the administration of Governor John Waihee. It was my privilege to be a part of a team to steward a number of complex and difficult issues such as Hawaiian Home Lands claims, ceded lands issues, and the transition, cleanup, and stewardship structure for Kaho`olawe. This background is offered to punctuate the following perspectives:

- Hawaii has the possibility of accounting for and productively addressing native issues more creatively and with better outcomes for all peoples than any other state in the U.S.;
- There is no one-time quick fix for that which has been broken or abandoned for centuries;
- Doing more of the same is likely to frustratingly and repeatedly yield the same result;
- Mauna Kea deserves more from all of us.

For these reasons, I support the formation and work envisioned in this resolution. An official mechanism is needed to bring parties together that may otherwise be reluctant to talk with one another, choosing instead to push their separate views in silos. A better policy narrative is needed, and policy is the purview of the legislature.

Me ke aloha, me ka ha'aha'a, with aloha and with humility,

Norma Wong



Testimony in opposition to HR33 and HCR41

Members of the committee,

Careful examination of the management of any public trust is laudable, but the working group proposed in HR33 and HCR41 offers no such reasoned examination. The very premises proposed to justify this legislative action, upon which this commission are proposed, are questionable and biased.

“WHEREAS, this mismanagement, mistrust, and polarization must be reconciled; now, therefore,” - from HR33

Stating that there is mismanagement is fundamentally incorrect from the start. The state auditor has clearly shown that current management is succeeding in completing management goals despite a very difficult situation, with opposition and protest devouring time and resources that could otherwise be used to care for the mauna.

The list of accusations leveled at the university and those who manage the Mauna Kea is long, but any hard examination shows that so many of those accusations are long outdated, exaggerated, or based on outright myths. Much of the mistrust is founded on a series of myths fostered and spread by the anti-astronomy community... Trash on the mauna, abandoned and rusting telescopes, moving the true summit to make way for a telescope, military involvement, so many myths used to foster the mistrust. This controversy has gone on so long it has become difficult to separate myth from fact.

“WHEREAS, the report found a lack of genuine consultation with the Native Hawaiian community;” - from HR33

The insistence that there has been a lack of genuine consultation is questionable. It ignores the many Hawaiian voices in support of astronomy and the current management of the mauna. The premise of consultation and involvement assumes that a mutual solution is possible, that both parties are prepared to compromise and work together for that solution.

Astronomy proponents and the university have repeatedly reached out to the Native Hawaiian community only to be rebuffed, ignored, insulted, and falsely accused. Any management action with which telescope opponents disagree is vehemently accused of being unfair, illegal, or fraudulent despite extensive outreach, consultation opportunities, and lawful process.

In fact the university has implemented significant education about the cultural and natural and cultural resources. I myself have been required to attend some of this education and have witnessed other efforts to do so. An extensive program (at least before COVID-19 restrictions) of lectures and outreach was in place. This has continued if at a somewhat reduced level with pandemic restrictions in place.

In this polarized controversy the proposed makeup of the working group becomes very questionable, with Native Hawaiians receiving an outsized voice in this group at the likely detriment to the many others who's lives and livelihoods revolve around the mauna. No voice for the surrounding communities of Waimea, Laupahoehoe, Honoka'a, Hilo, Waikoloa, or the many others who live in her shadow. No voice for the hunters, or those who hike the trails, or simply visit the mauna for a multitude of reasons. Only one seat for the thirteen observatories and the hundreds of families and thousands of people who work on and care for the mauna as much as any.

The proposed makeup of this working group does not represent the island community. Creating a working group without balanced representation of the community consigns the outcome to failure from the start, making this another exercise in futility, any actions proposed will be ignored and rightly condemned by those not properly represented.

Perhaps a thorough examination of the current management could be productive, but this proposal is flawed from the start. Only with fair representation of the mauna community, all of those who look to the mountain, and an unbiased premise with which the commission is charged would action by the legislature be warranted.

Andrew Cooper  
Waikoloa, Hawaii  
23 Feb 2021

February 23, 2021

H.R. No 33  
Companion  
H.C.R. No 41

Aloha,

My name is Cindy Freitas and I'm a Native Hawaiian descended of the native inhabitants of Hawai'i prior to 1778 and born and raised in Hawai'i.

I am also a practitioner who still practice the cultural traditional customary practices that was instill in me by my grandparents at a young age from mauka (MOUNTAIN TO SEA) to makai in many areas.

I Opposed for the following reasons;

I will give a brief time line on issues that has happen in the pass relating to Mauna A Wakea....

## **INTRODUCTION**

For Native Hawaiians, Maunakea is the home of Na Akua (the divine deities). Na 'Aumakua (the divine ancestors). And the meeting place of Papa(Earth Mother) and Wakea (Sky Father) who are considered the progenitors of the Hawaiian people. Maunakea is a both the burial ground and the embodiment of the most sacred ancestors, including Na Ali'i and Kahuna (high ranking chiefs and priests).

## **TIMELINE**

1998 Hawaii State Auditor issued a report criticizing the UH Institute for Astronomy (UHIFA) and Board of Land and Natural Resources (BLNR) management of Maunakea. The Auditor found that the UHIFA's focus on telescope construction "at the expense of neglecting the site's natural resources". Also the destruction of Wekiu Bug's habitat; destruction of historic sites and Hawaiian family shrines; trash and construction debris left on the summit; and abandoned facilities and equipment.

2001 Establishment of a Public Land Trust Information System,  
The report provides a very comprehensive approach to the inventory of the past and current status of lands ceded to the state upon admission to the union. The suggested approach and information that is expected to be inventoried would provide OHA and all Hawaii with an understanding of all lands previously owned or controlled by the crown and government and their subsequent disposition and transfer to the present. The Auditor identifies the need for the land "abstractor" to do a complete chain of title search beginning at the time of the Mahele. This is a critical piece of analysis that is fully supportable by the OHA Board of Trustees. Your report states:

"...the significance of this issue [search chain of title beginning with the Mahele] cannot be overstated Far-reaching fiscal and legal impacts beyond the scope of this report hinge upon what lands are determined to be ceded or non-ceded".

The significance of the work to be done is such that the outcome will provide OHA with a complete and accurate inventory and accounting of all ceded lands for the first time.

The four-year process outlined, though rather lengthy, appears appropriate considering the breadth and depth of the plan.

2002 Office of Hawaiian Affairs sued NASA and the UHIFA in federal district court alleging environmental assessment issued by NASA for the outrigger telescopes was inadequate.

2003 Hawaii Federal District court agreed, citing NASA's failure to properly evaluate cumulative impacts.

2004 UHIFA's application to state BLNR for a conservation district use permit to build the outrigger telescopes was approved in December 2004.

2004 Mauna Kea Anaina Hou, the Royal Order of Kamehameha I, the Sierra Club's, Hawaii Chapter and a Native Hawaiian with genealogical ties to Mauna Kea triggered a lawsuit against the BLNR.

2006 A Memorandum of Decision dated August 3, 2006, Third Circuit Judge Gleen S. Hara reversed the conservation district use permit. Judge's finding that administrative rules govern facilities required a comprehensive management plan for the summit of Maunakea

2006 NASA has essentially canceled the construction of the telescopes due to no moneys.

2007 Judge Hara rejected the BLNR's permit for six outrigger telescopes, saying the BLNR and UNIFA must first develop a comprehensive management and development plan for the summit of Maunakea. The decision of Judge Hara, should be taken as a precedent for all construction on sacred mountains, and which desecration of one area impacts the whole.

2011 The Thirty Meter Telescope supported by the University of Caltech, as well as a number of international astronomy groups. This triggered a contested case.

2013 Notice of Appeals by Mauna Kea Aina Hou, Clarence Kukauakahi Ching, Flores-Case Ohana, Deborah Ward, Paul K Neves, and KAHEA (The Hawaiian Environmental Alliance)

2015 A construction permit for the Thirty Meter Telescope, or TMT, to be built on Maunakea was invalidated by the Supreme Court.

2016 2<sup>nd</sup> Contested Case with Retired Judge Riki Amano as Hearing Officer for the Conservation District Use Permit (CDUP)

2017 Retired Judge Riki Amano gave judgment on behalf of the CDUP

2017 OHA files lawsuit against the State of Hawaii for mismanagement of Maunakea

2019 Mauna Kea Aina Hou ETAL vs David Ige ETAL (Surety/Bond from TMT )

2020 Contested Case for Department of Health State of Hawaii Water Pollution Control Permit Renewing NPDES Permit # No. HI S000431 TMT(Hearing Officer Steven Jacobson)

2020 Plaintiffs seek judgment in lawsuit over Maunakea Road

## **CONCLUSION**

State of Hawaii holds public land as a public trust for Native Hawaiians and the general public and the State of Hawaii are ONLY the LESSOR, we the Native Hawaiian are the rightful holders of the land.

The timeline express clearly that the State of Hawaii has vested interest in the land and trying to protect what is not theirs, it belongs to the rightful holders of the land with genealogical ties to Maunakea as well as the uncertainly and insecurity of the issues at stake.

The history of the timeline express a deep impact of DESECRATION (Hawaii Revise Statues 711-1107) and sacred sight, burial, ahu, shines ect (Article 12 Section 7 of Hawaii State Constitution)

Its clear that the Native Hawaiians has lack of trust for the State of Hawaii, as well as lack of commitment and obligations.

The State of Hawaii will never do a chain of title beginning from the GREAT MAHELE of 1848 represents the formal transition from the ancient land system to a private ownership land system.

The State of Hawaii should be doing a consensus with the people of Hawaii for the betterment of Maunakea by an independent entity voted by the people.

Therefore, it is illegal to convening a working group to develop recommendations for a governance and management structure for Maunakea.

Mahalo

Cindy Freitas

**HR-33**

Submitted on: 2/23/2021 10:54:23 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Naalehu Anthony	Individual	Support	No

Comments:

Support for HR33 and HCR41: Convening a Working Group to Develop Recommendations for a Governance and Management Structure for Mauna Kea

Aloha e Chair Tarnas, Chair Nakashima and the committees on Water & Land and Judiciary & Hawaiian Affairs,

As a member of this community and an individual who cares about the future for Maunakea and our people, I **support** HR33 and HCR41. The proposal to convene a working group to develop recommendations for a governance and management structure for Maunakea plays a critical role in helping us move forward as a community toward a solution to the impasse we have been stuck in for too long. It shifts the conversation.

The impasse is one that exists because there has never been a common set of foundational understandings as to what the problem surrounding Maunakea is about in its most fundamental forms. The people who have claimed decision-making roles have come to previous problem-solving tables with neither a common contextual understanding of the issues at play, nor the stakeholder set necessary to have an informed conversation that could yield a durable solution set for our community.

I applaud Speaker Saiki and representatives Tarnas and Nakashima for recognizing that there needs to be a shift in the conversation and for supporting it with this proposed resolution. When the kia'i took a stand on Maunakea, they once again demonstrated that Native Hawaiians are stakeholders not just because we hold genealogical ties to this place or because laws codify us as such. The kia'i also demonstrated that we as people are capable of exercising power and kuleana by being immovable in values and conviction.

Thousands of years of perspectives and values come with Native Hawaiian voices when we sit at the table. In scientific research today, the line between traditional knowledge and contemporary practice is blurred and great discoveries are emerging because of it. Likewise, we can merge these perspectives for really successful results when seeking

solutions for complex issues in our communities and on our lands. This contribution is fundamental not only to success on the mountain but to the success of Hawai'i.

Mahalo for the opportunity to offer my support for these resolutions.

Na'alehu Anthony

**HR-33**

Submitted on: 2/24/2021 8:34:08 AM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
E. Flores	Individual	Support	No

Comments:

There's an expectation that this process would be based upon an understanding that the summit and surrounding lands of Mauna Kea are within the ahupua'a of Ka'ohe, which were designated as Government Lands of Kingdom of Hawai'i at the time of the Mahele, which were subject to the rights of the ho'a'ina (native tenants), which are also considered lands of the public land trust today, which are designated as conservation lands with specific criteria for the protection of its natural and cultural resources.



**HR-33**

Submitted on: 2/24/2021 8:41:59 AM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Deborah Ward	Individual	Oppose	No

Comments:

Aloha, Chair and committee members,

HR33 and HCR41 would establish a working group tasked with developing recommendations for a new governance and management structure for Mauna Kea. Not unlike the bill introduced by Senator Kahele two years ago, the large majority representatives to the working group would be hand-picked, not by the Governor this time, but by Senator Saiki, both of whom are avowed supporters of an industrial development in the Conservation District that has been opposed by many tens of thousands of Hawaii residents and people around the world. Thousands of Hawaii residents put their lives on hold and risked arrest and prosecution to protect this land.

The sponsors of these proposals are expecting that the working group will find a COMPROMISE that will allow expanded industrialization in an ecologically vulnerable ecosystem, an extended lease, and a master plan outlining further development plans, including construction of the TMT.

The (mis)management of Mauna Kea, recently evaluated by the author of the management plan, described in detail the lack of consultation, and hence the failure to fully understand the nature of the profoundly held belief that the industrial development is an unconstitutional and existential infringement of Native Hawaiian cultural, spiritual and religious beliefs.

The DLNR has indeed failed in its public trust responsibility to care for the land whose owners were illegally denied the ability to manage their own land after the illegal overthrow of the lawful government. DLNR has allowed the significant, adverse and substantial cumulative impacts to natural and cultural resources, carefully outlined in two EIS documents in 2003 and 2009. Then, without addressing or effectively mitigating these impacts, DLNR proceeded to permit yet another major development on land far from the impacted footprint. DLNR knew full well that funding for the development and management was not yet secured, and yet DLNR failed to secure a bond to protect the taxpayer from failure, and we all know too well that large projects with unsecured budgets can and do fail.

The University has acknowledged, time and again, administration after administration, that management has been poorly handled. The structure of the most recent UH

management iteration, (now dubbed the Center for Maunakea Stewardship), was opposed by the very community board selected by the administration to represent community interests. The plans for this entity were developed without a single consultation with those who have deeply held cultural, spiritual and religious beliefs regarding the sacred nature of the Mauna, and the trauma associated with the continued desecration, the Kia'i.

Twenty years and thousands of hours of testimony opposing Mauna Kea's industrialization have fallen on deaf ears, and now the sponsors of this resolution think that fifteen hand-picked representatives can resolve these long-standing issues in 9 months. HR33 and HCR41 would attempt to create the illusion of inclusion while ensuring that the majority of the voices would always favor the foregone conclusion of the sponsors, to promote further development.

Please HOLD these resolutions. Mahalo!

Deborah Ward P. O. Box 918 Kurtistown HI 96760

**HR-33**

Submitted on: 2/24/2021 8:44:16 AM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lanny Sinkin	Individual	Oppose	No

Comments:

It is strange to watch the futile efforts to resolve the questions surrounding the current and future management of Mauna Kea. There seems to be a dedication to a false narrative that compromise by the Kia'i is possible, if they would simply allow the TMT to be built. The inherent contradiction in that approach is unmistakable.

This issue is very difficult because there is no middle ground. There is no compromise. The TMT will either be built or it will not. The working group proposal in this resolution is simply rearranging the deck chairs on the Titanic. The "report" could be written now because nothing has changed since thousands of people said "No."

There appear to be numerous back door agendas trying to open a path for construction of the TMT. Those efforts simply discredit the idea that this resolution is based on an objective, informed, compassionate, and legitimate foundation.

Simply kicking the can down the road for someone else to solve later is not the solution. Taking "No" for the answer is.

**HR-33**

Submitted on: 2/24/2021 10:08:56 AM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Shannon Rudolph	Individual	Oppose	No

Comments:

Oppose. Plainly, more bogus baloney.

**HR-33**

Submitted on: 2/24/2021 12:43:45 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Clarence Ching	Individual	Support	No

Comments:

I am Clarence ku Ching and I'm taking a position of reserved support for this resolution. I am also a member of the so-called Mauna Kea Hui.

The resolution should more correctly cite that Mauna Kea is part of the so-called "ceded" (stolen from the Kingdom of Hawai'i - that is the real title holder) that was transferred to the so-called "State of Hawaii" by the 1959 Admission Act for the "betterment of Native Hawaii and the general public" (at the time and for this purpose consisting of Hawaiians of less than 50%).

Mauna Kea, in Hawaiian culture, characterized in my Hawaiian cultural beliefs as my older Mountain Brother. It is sacred.

Mauna Kea is on the List of United States Landmarks. As a result of development - that status is being questioned.

Mauna Kea is also on National Geographic's list of Sacred Places.

The Kuiwalu survey stated - "While UH has carried out most of the plan's management actions and it appears the natural and cultural resources on Mauna Kea are being effectively managed, ..." THAT'S A LIE! The EIS for the Keck Observatories Outrigger Telescopes concluded: "From a cumulative perspective, the impact of past, present, and reasonably foreseeable future activities on cultural resources on Mauna Kea is substantial and adverse."

Interestingly, the astronomy time and situation that the Outrigger Telescopes EIS includes, includes major projects, including the Keck Observatories, of University of California and California Institute of Technology. These are the same two major institutions that organized and control TMT International Observatories Corporation LLC (TIO), the sponsoring institution of the Thirty Meter Telescope. It is very ironic that two of the major entities that have operated astronomical observations on Mauna Kea that have been major causative factors in effecting substantial and adverse impacts on Mauna Kea AND have (as TIO) been awarded a Conservattion District Use Permit - to do further construction.

And as for compliance with the Mauna Kea Comprehensive Management Plan - partial compliance doesn't work (although Ku'iwalu's conclusion is that most of the Plan is being complied with). However some of the key issues continue in non-compliance. For example: Section 2.2.4 of the De-Commissioning Subsection of the Plan requires that Subleases must contain a requirement for bonding/surety - yet the TMT Sublease is Non-Compliant on this issue AND "the state" via the Governor, the Attorney General, BLNR/DLNR, TMT International Observatory Corporation LLC, and the University in an ongoing appeal in the Hawai'i Intermediate Court of Appeals are strongly opposing the requirement. So the propaganda, fake news and political and ethical untruth continue!

Section 2.2.4 of the De-Commissioning Subplan states: " Site Abandonment Although unlikely, it is possible that a sublessee could abandon an observatory in place, without deconstructing and site restoration. If this happens, UH, as the lessee to DLNR, will ultimately be responsible for the site through the terms of their master lease. If the facility cannot be recycled, site decommissioning could include having to remove facilities and restore the site. Funding mechanisms to limit the possibility of the financial burden from falling on UH in this situation should be included in any new or renegotiated sublease (see Section 3.1)"

That so many key political folks specifically ignore the working of important parts of the Mauna Kea CMP flouts the law - and is TRAGIC!!

That UH should NOT be the LESSOR of the Mauna Kea General Lease is key. UH is NOT a land manager. And BLNR's/DLNR's attempted to transfer powers to control cultural uses and practices on the Mountain is UnConstitutional.

Interestingly - the so-called Mauna Kea Hui - that has been protecting Mauna Kea for more than 20 years - that has been a major entity in making "Mauna Kea" law for all these years is not even mentioned in this legislation.

**HR-33**

Submitted on: 2/24/2021 3:08:59 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jennifer Noelani Ahia	Individual	Oppose	No

Comments:

I strongly oppose this resolution. This is a racket! The people have spoken loud and clear. Tens of thousands of people came to Mauna Kea in 2019 to say no to TMT and NO further development on Mauna Kea. There is not and has never been free prior and informed consent. Kia'i Mauna have been saying NO for decades and now you want us to come to your table to discuss your options? YOU have no options. These are crown and government lands which are held in trust for the kÄ• naka maoli people. We are right holders, not stake holders. This resolution is an attempt to make kia'i jump through more hoops when the answer to the question has already been made loud and clear. Enough is enough. Our queen said "the voice of the people is the voice of God!" The people have spoken. Will you listen?

Mahalo,

Noelani Ahia



**HR-33**

Submitted on: 2/24/2021 5:37:25 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sherri Thal	Individual	Oppose	No

Comments:

Aloha,

Management of Mauna Kea needs to be in the correct hands to respect the Culture of the Hawaiian People, the Kanaka, our host culture. This bill looks good on paper, but it is an illusion of "fairness and equality at the table." Please HOLD this resolution or, if not, then please oppose it.

Mahalo,

Sherri Thal, Kea'au, HI 96749

**HR-33**

Submitted on: 2/24/2021 6:19:13 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Bronson Kainoa Kiyoshi Azama	Individual	Comments	No

Comments:

Aloha mai kākou,

I would like to comment that only Kānaka Maoli shall be entailed to manage Mauna Kea, should any organization that is not solely based in the kānaka maoli community I would oppose such a decision.

**HR-33**

Submitted on: 2/24/2021 7:27:11 PM

Testimony for WAL on 2/25/2021 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
MaryAnn Omerod	Individual	Oppose	No

Comments:

I OPPOSE HR 33 and HCR 41. There is no middle ground nor can we compromise. TMT will not be built on our Mauna.