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FIRST CIRCUIT COURT
STATE OF HAWAII
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F. OTAKE
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Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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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.

[Signature]
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.¹ 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

¹ 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 the 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.

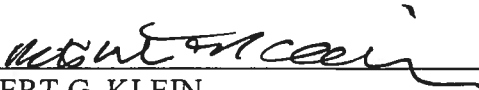
182. As a result of UH's breaches, OHA is entitled to compensation damages; rescission of the General Lease; restitution; and/or specific performance of the contract terms.

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,)
Plaintiff,)

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.)

CIVIL NO. 17 - 1 - 18 23 - 11 J P C -
(Declaratory Judgment)

SUMMONS

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

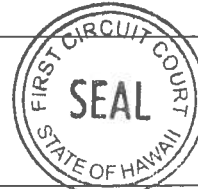
public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

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