KLEIN LAW GROUP LLLC

ROBERT G. KLEIN #1192-0
KURT W. KLEIN #10357-0
DAVID A. ROBYAK #10321-0
Waterfront Plaza #3-480
500 Ala Moana Blvd.
Honolulu, Hawai'i 96813
Telephone: (808) 591-8822
Facsimile: (808) 427-9761
Email: rgk@kleinlg.com
kwk@kleinlg.com
dar@kleinlg.com

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; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	CIVIL NO. 17-1-1823-11 (JPC) (Declaratory Judgment) PLAINTIFF THE OFFICE OF HAWAIIAN AFFAIRS' **MOTION FOR SUMMARY JUDGMENT**; MEMORANDUM IN SUPPORT OF MOTION; DECLARATION OF ROBERT G. KLEIN; EXHIBITS "A" – "K"; NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE **HEARING:** Date: Tuesday, March 31, 2020 Time: 10:00 a.m. Judge: Honorable Jeffrey P. Crabtree [No trial date set]

PLAINTIFF THE OFFICE OF HAWAIIAN AFFAIRS'
MOTION FOR SUMMARY JUDGMENT

Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS ("Plaintiff"), by and through its attorneys, Klein Law Group, LLLC, hereby moves this Court for summary judgment on Count I of its Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages,

filed on November 7, 2017, against Defendants STATE OF HAWAI‘I, UNIVERSITY OF HAWAI‘I, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE,[1] in her capacity as Chairperson of the DEPARTMENT OF LAND AND NATURAL RESOURCES, and BOARD OF LAND AND NATURAL RESOURCES (collectively, "Defendants") and respectfully requests that the Court (a) declare that Defendants breached and continue to breach their fiduciary duties by failing to properly manage the ceded lands on Mauna Kea, (b) issue 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) order an accounting of the ceded lands on Mauna Kea and the cost of managing those lands in compliance with Defendants' fiduciary duties, and (d) pay restitution to make the trust whole.

This motion is brought pursuant to Rules 7 and 56 of the Hawai‘i Rules of Civil Procedure and is supported by the memorandum, declaration of counsel, and exhibits attached hereto, along with the records and files herein, and any additional argument of counsel at the hearing.

DATED: Honolulu, Hawai‘i, March 2, 2020.

/s/ Robert G. Klein
ROBERT G. KLEIN
KURT W. KLEIN
DAVID A. ROBYAK

Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS

[1] Defendant SUZANNE CASE, in her capacity as Chairperson of the DEPARTMENT OF LAND AND NATURAL RESOURCES, was inadvertently left off the case caption when the Complaint herein was filed, but Ms. Case is duly listed in the text of the Complaint as a defendant. Complaint ¶ 9.

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; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	CIVIL NO. 17-1-1823-11 (JPC) (Declaratory Judgment) MEMORANDUM IN SUPPORT OF MOTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS ("OHA"), by and through its attorneys, Klein Law Group, LLLC, hereby moves this Court for an order granting summary judgment on its claim[2] that Defendants STATE OF HAWAIʻI ("State"), UNIVERSITY OF HAWAIʻI ("UH"), DEPARTMENT OF LAND AND NATURAL RESOURCES ("DLNR"), SUZANNE CASE, in her capacity as Chairperson of DLNR ("CHAIRPERSON CASE"), and BOARD OF LAND AND NATURAL RESOURCES ("BLNR") (collectively, "Defendants") breached and continue to breach their fiduciary duties as trustees of Mauna Kea,[3] one of the most sacred sites in Native Hawaiian culture and a critically important parcel within the public lands trust and ceded lands trust. As observed by the Hawaiʻi Supreme Court:

> ʻĀina, or land, is of crucial importance to the Native Hawaiian people--to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. ***ʻĀina 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 ʻāina is part of their ʻohana, and they care for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured , praised, and even worshiped.

Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 117 Hawaiʻi 174, 214, 177 P.3d 884, 924 (2008) (emphasis in original).

Defendants' failure to recognize the natural and cultural importance of Mauna Kea has manifested in gross mismanagement of the mauna that has spanned over five decades--since 1968--and has resulted in three scathing legislative audits, multiple versions of ineffective and insufficient land management plans, the State and BLNR's failure to monitor UH's expanding astronomy activities and ensure compliance with law and leases, and a growing number of unauthorized intrusions and damage to the natural environment, historic sites, and cultural

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[2] *See* Count I of Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages ("Complaint") filed on November 7, 2017. The other count in the Complaint, Count II, alleging breach of contract by Defendant UH, was dismissed by the Court in a Minute Order issued on January 30, 2019.

[3] Also referred to herein as the "mauna," (*i.e.*, the mountain).

resources on the mauna. Acknowledging the State has "not done right" by Mauna Kea, Governor David Ige publicly conceded in a speech given on May 26, 2015 that "we have in many ways failed the mountain."[4]

This lawsuit seeks to comprehensively resolve the constitutionally mandated and culturally integral protection of Mauna Kea for the Native Hawaiian people and the people of Hawai'i--the beneficiaries of the public lands and ceded lands trusts enshrined in the Hawai'i State Constitution. As reasoned herein, after more than a half-century of willful and undeniable neglect and roughly twenty-two years since the first scathing report of the Hawai'i State Auditor in 1998, the Court should rule that Defendants have failed to meet their obligations as fiduciaries and must be enjoined from further mismanagement of Mauna Kea.

II. RELEVANT BACKGROUND

A. The Ceded Lands Trust and the Public Trust

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 ("Joint Resolution"), resulted in the transfer of 1.8 million acres of Hawaiian Government and Crown Lands to the United States ("Ceded Lands"). Complaint ¶ 11. The Joint Resolution recognized the nature of the Ceded Lands as "a special trust," and this trust was reaffirmed in the Organic Act of 1900 and the Hawaiian Homes Commission Act in 1921. *Id.* ¶ 12. From annexation to until 1959, the federal government was recognized as trustee over this "special trust." *Id.* ¶ 13.

In 1959, as a condition of statehood under the Admission Act, the United States Congress transferred a portion of the Ceded Lands, ***along with its obligations as trustee***, to the State of Hawai'i to be held as a public trust ("Ceded Lands Trust") for, among other purposes, the "betterment of the conditions of native Hawaiians . . . ." *Id.* ¶¶ 13-14. Section 5(f) of the Admissions Act additionally provides that these "lands, proceeds, and income shall be managed and disposed of . . . in such a manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust . . . ." In 1978, the Hawai'i State Constitution ("State Constitution") was amended to include the Ceded Lands Trust at Article XII, § 4.

[4] https://governor.hawaii.gov/main/governor-iges-transcribed-mauna-kea-story/

Under the State Constitution, the State holds the Ceded Lands as "a public trust for native Hawaiians and the general public." *Id.* ¶ 15. Mauna Kea is unquestionably part of the Ceded Lands Trust and is arguably the most culturally significant and sacred site for Native Hawaiians. *Id.* ¶¶ 16, 27-40. Consequently, the State of Hawai'i and its agents, officers, and departments, including UH and the DLNR, have moral obligations of the highest responsibility and trust with respect to Mauna Kea. *See id.* ¶¶ 17-27. In addition to their duties similar to those of private trustees, *see id.* ¶ 24, the State and its agencies also have the duties to "administer the trust solely in the interest of the beneficiaries, . . . deal impartially when there is more than one beneficiary, . . . [and] use reasonable skill and care to make trust property productive." *OHA v. Hous. & Cmty. Dev. Corp. of Haw.*, 117 Hawai'i 174, 194, 177 P.3d 884, 904 (2008) (*rev'd on other grounds, Hawai'i v. OHA*, 556 U.S. 163 (2009)) (internal quotations and brackets omitted).

In addition to being part of the *res* of the Ceded Lands Trust enshrined in the State Constitution at Article XII, § 4, the Mauna Kea lands are also part of the public trust created in Article XI, § 1 of the State Constitution. *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 143 Hawai'i 379, 400, 431 P.3d 752, 773 (2018). "The plain language of Article XI, section 1 . . . requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other ***in a manner consistent with their conservation***." *Id.* (emphasis added).

B. The Mauna Kea Science Reserve Leases

On June 21, 1968, the BLNR, as lessor, and UH, as lessee, executed General Lease No. S-4191 ("General Lease"), which described and established the Mauna Kea Science Reserve ("MKSR"). Complaint ¶ 44. *See* Declaration of Robert G. Klein ("Klein Decl."), Exh. "A." Commencing on January 1, 1968 and terminating on December 31, 2033—a period of sixty-five (65) years—the BLNR agreed to lease the MKSR to UH for an exchange of "mutual promises and agreements contained [in the General Lease]." *Id.* at 1. UH promised, *inter alia*, that the MKSR would be used as a scientific complex "including without limitation thereof an observatory." *Id.* ¶ 45. *Id.* at 3 ¶ 4. To that end the General lease contemplated that UH could execute subleases to fulfill the specified use provision, provided that any such sublease required "prior written approval of the [BLNR]." *Id.* at 4 ¶ 5. The BLNR also reserved the right to review and give prior approval of any improvements constructed by UH, or its sublessees. *Id.* at 4 ¶ 6.

And, if improvements are made, UH is required to "properly maintain, repair and keep all improvements in good condition." *Id.* Importantly, the General Lease requires that any improvements made thereto must be "removed or disposed of by the Lessee at the expiration or sooner termination of this lease." *Id.* The BLNR, however, reserved the right to permit UH to abandon any improvements. *Id.*

In addition to the upkeep requirement for improvements, UH is required to maintain the premises "in a clean, sanitary, and orderly condition." *Id.* at 3 ¶ 2. Further, UH is required to prevent "any waste, strip, spoil, nuisance or unlawful, improper, or offensive use" of the MKSR. *Id.*, at 3 ¶ 3. The General Lease also prevents UH from engaging in conduct that may cause harm to "objects of antiquity." *Id.* at 5 ¶ 12. UH also has a duty to protect against introducing "undesirable plant species" in the MKSR. *Id.* at 5 ¶ 13. In accordance with these duties, the General Lease may be terminated by the BLNR under the following conditions:

> In the event that (1) [UH] fails to comply with any of the terms and conditions of this lease, or (2) UH abandons or fails to use the demised lands for the use specified under paragraph 4 of these covenants for a period of two years, the [BLNR] may terminate this lease by giving six months' notice in writing to the Lessee.

Id. at 4 ¶ 8. By its terms, the General Lease lacks specific details; a shortcoming that has led to compounding confusion and mismanagement. But what is clear is that the BLNR reserves certain rights of review and approval under the General Lease. As described in more detail below, the BLNR has failed to enforce the terms of the General Lease.

UH, pursuant to its General Lease, has subsequently executed multiple subleases to observatory operators, resulting in nine optical and/or infrared observatories, three sub millimeter observatories, and a radio antenna.[5] Complaint ¶¶ 48, 53, 57, 59, 65, 70. UH receives nominal rent ($1.00/year) in exchange for telescope viewing time. Klein Decl., Exh. "B" at 17. As described in more detail below, UH breached its fiduciary duties by failing to implement management plans upon which the developments by its sublessees were conditioned. Concurrently, the BLNR is in breach for not overseeing its lessee's compliance.

C. 1998 Audit of the MKSR (1968 – 1998)

[5] For a "List of Mauna Kea Science reserve Telescopes" as of August 2014, see Klein Decl., Exh. "I" at 3.

In 1997, the Hawai‘i State Legislature ("Legislature"), "[w]ith growing concerns over the protection of Mauna Kea's natural environment . . . requested the State Auditor ["Auditor"] to conduct an audit of the management of Mauna Kea and the [MKSR]." Klein Decl., Exh. "B," Overview at 1. In February 1998, the Auditor issued a landmark report ("1998 Audit") covering UH's thirty-year tenure as trustee and lessee which generally found that:

> [UH]'s management of the [MKSR] 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 that 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 Weiku 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.

Id., Overview at 1, Report at 13. With respect to the DLNR, the 1998 Audit:

> [f]ound that 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.

Id., Overview at 2. Overall, the 1998 Audit concluded that "both [UH] and the [DLNR] failed to develop and implement adequate controls to balance [] environmental concerns with Astronomy development." *Id.* at 15. Responding to the 1998 Audit, the DLNR agree[d] with the [A]uditor's finding that the [DLNR] needs to improve efforts to protect and conserve Mauna Kea's natural resources." *Id.* at 49.

Among other findings of note, the 1998 Audit dismissed UH's "claims that it lacks the funds and the positions to implement the protection controls outlined in its management plans" as "largely [UH]'s own fault." *Id.* at 17. Because "[a]ll subleases to [telescope] operators were gratis or for a token $1.00[,]" with UH preferring to be "compensate[d] . . . in kind through viewing time on the telescopes[,]" revenue generation for UH to discharge its fiduciary duties as

trustee of the MKSR was woefully insufficient. *Id.* What revenue was available was described by the 1998 Audit as something akin to a Ponzi scheme, with new investment being used to pay for prior obligations: "the only feasible approach to get significant funding is to allow the construction of another telescope" as "[UH] does receive some funding from the operating organizations in the form of a one-time infrastructure contribution based on telescope size." *Id.* Reserving the lion's share of the MKSR benefits to itself while short-changing or ignoring outright its fiduciary duties is tantamount to self-dealing on the part of UH. Meanwhile, UH neglected historic and cultural preservation, and historic sites were damaged. *Id.* at 21-23. By the time the 1998 Audit was released, UH and DLNR were more than a decade late in developing historic and cultural preservation plans. *Id.*

D. 2005 Follow-up Audit of the MKSR (1998 – 2005)

Seven years later in December 2005, again in response to a legislative mandate, the Auditor reported on a second, follow-up "Audit of the Management of Mauna Kea and the [MKSR]" ("2005 Audit"). Klein Decl., Exh. "C." The 2005 Audit recognized that in June 2000 UH had adopted the MKSR Master Plan, which addressed some of the problems identified in the 1998 Audit, *Id.*, Overview at 1, but later criticized that plan because it "lack[ed] certainty and clarity" and was inconsistent with the DLNR's 1995 Revised Management Plan for the UH Management Areas on Mauna Kea.[6] *Id.* at 23. Although the 2005 Audit credited the UH and DLNR for making "some positive changes[,]" it also concluded that UH "still faces several management challenges" and that the DLNR "has not provided a mechanism to ensure compliance with lease and permit requirements in protecting and preserving Mauna Kea's natural resources." *Id.*, Overview at 1. Ultimately, the 2005 Audit found that "more needs to be done." *Id.*

With respect to UH, the 2005 Audit complained of "lack of administrative rule-making authority and weak permit monitoring[,]" noting that

> [u]nder the [G]eneral [L]ease, [UH] is responsible for the protection of cultural and natural resources within its jurisdiction, but currently does not provide protection due to its lack of authority to establish or enforce administrative rules for the science reserve. [UH] also does not appear to systematically monitor its tenant observatories for compliance with conservation district use permit requirements and was recently fined $20,000 for violations.

[6] Unsurprisingly, the BLNR never approved or adopted the MKSR Master Plan.

Id. Moreover, "[UH] has not dealt with certain significant management issues, such as resolving jurisdictional issues with the [DLNR]. . . . Such issues . . . increase the likelihood of harm to [Mauna Kea's] vulnerable environment." *Id.* at 13. With respect to the DLNR, the 2005 Audit found that its "advancements in oversight need to go further." *Id.* And 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.

Among other serious shortcomings in MKSR management, the 2005 Audit exposed confused, uncoordinated, and inadequate planning; lack of sufficient personnel and other resources to properly manage the mauna; lack of enforcement power by either UH or DLNR to manage public access to the MKSR; failure to implement necessary signage to prevent unintentional damage to natural and cultural resources; failure to complete an inventory of cultural and natural resources; and failure to enforce DLNR rules adopted in 2003 for historic preservation. *Id.* at 20-32. Indeed, the 2005 Audit found that "at present, based on reports, [historic sites] have been altered." *Id.* at 29. Despite having administrative rules covering historic preservation, the DLNR's ability to "fulfill is duties regarding Mauna Kea" is severely impaired by its limited staff. *Id.* As a result of these personnel issues, the DLNR has "passively allowed [UH] to fulfill the [DLNR]'s role of landowner." *Id.* Furthermore, the DLNR, as landlord, was found to have a "lax attitude" about enforcing terms of the General Lease and the Conservation District Use Permits. *Id.* at 29-30.

E. UH's "Comprehensive" Management Plan Developed After Forty Years

The 2009 Mauna Kea Comprehensive Management Plan ("2009 CMP") controls UH's activities and uses concerning the mauna. Klein Decl., Exh. "D." The 2009 CMP was created in response to the Court's order in *Mauna Kea Anaina Hou v. Bd. of Land and Nat. Res.*, Civ. No. 04-1-397 (2007). In that matter, the Court conditioned planned development on the completion of a comprehensive management plan for Mauna Kea. Four sub-plans supplement the 2009 CMP and were approved by the BLNR in March 2010: (1) the Cultural Resources Management Plan for the UH Management Areas on Mauna Kea (Klein Decl., Exh. "E"); (2) the Natural Resources Management Plan for the UH Management Areas on Mauna Kea (Klein Decl., Exh. "F"); (3) the Decommissioning Plan for the Mauna Kea Observatories (Klein Decl., Exh. "G"); and (4) the Public Access Plan for the UH Hawai'i Management Areas on Mauna Kea (Klein Decl., Exh.

"H"). Separately, the 2000 Mauna Kea MSKR Master Plan ("2000 MKSR Plan") provides a similar framework for the MKSR.[7]

F. 2014 Follow-up Audit of the MKSR (2005 – 2014)

The Auditor conducted yet another review of Mauna Kea and the MKSR in August 2014 ("2014 Audit"), forty-six years after Defendants executed the General Lease. Klein Decl., Exh. "I." The 2014 Audit reflects that UH obtained authority to promulgate administrative rules but "to date, no rules for Mauna Kea have been adopted by [UH]." *Id.* at 16. At the time, the Auditor estimated that administrative rules "will not be in place until 2017" and thus UH had no actual authority to enforce and implement its management plan. *Id.* The Auditor concluded that "[u]ntil [UH] adopts administrative rules for its Mauna Kea lands, [it] cannot fulfill its stewardship responsibilities." *Id.* Despite having the authority to promulgate administrative rules relating to public and commercial activities in ***2009***,[8] UH still had not adopted rules to initiate enforcement proceedings and assess fines. Without such rules, UH had no authority to enforce commercial permits and was prohibited from enforcing rules and issuing citations to would-be violators. Thus, (1) general access to important Native Hawaiian cultural sites was unregulated; (2) traffic and off-road vehicle management and control was non-existent; (3) alcohol consumption could not be prohibited; (4) recreational activities such as snowboarding occurred unfettered; and (5) the UH had no authority to regulate commercial tour activities.

For instance, the 2014 Audit reports that in the absence of administrative rules, UH "has relied on commercial permits to control, and to assess fees and penalties for commercial tour operations." *Id.* at 21. The fees and penalties assessed by UH, as reported by the State Auditor, were *unauthorized* without reciprocal administrative rules. The 2014 Audit reveals that UH charged unauthorized fees and penalties since 2007 resulting in "almost $2 million in unauthorized fees from commercial tour operators." .*Id.* at 19, 22. Aside from legal liability generated by imposing unauthorized fees, the State Auditor observed that, if the fees were challenged the "loss of revenue would likely result in decreased Mauna Kea management activity." *Id.* at 22. Thus, among other things, the ranger program, Visitor Information Station,

[7]The 2000 MKSR Plan superseded and replaced a 1983 development plan and applies concurrently with the 2009 CMP. Without administrative rules, however, the CMP cannot be effectively implemented.

[8]Legislature passes Act 132, SLH 2009, granting UH authority to adopt administrative rules governing public and commercial activities within the MKSR, effective July 1, 2009.

and the maintenance of roads and facility infrastructure on the mountain would be in jeopardy. *Id.* UH's actions in this regard, according to the State Auditor, put "Mauna Kea's resources and UH's Mauna Kea revenues at risk." *Id.* at 15. As reported in the 2005 Audit and echoed in the 2014 Audit, UH is manifestly ineffective at managing public access to the mauna.

Additionally, the 2014 Audit highlights another significant problem--that DLNR cannot update existing observatory permits to address cultural and historical preservation issues on Mauna Kea. As noted by the State Auditor, DLNR has no plans to update the permits "due to the contractual nature of the permits." *Id.* at 34. In other words, because UH failed to negotiate terms ensuring management and protection of the mauna at the time of contracting, it cannot impose new requirements on permit holders now. This poses a significant, unmitigated problem because, as noted by the State Auditor, "***[t]he observatory permits have no expiration date and will remain active as long as the respective astronomy facilities are in operation*** . . . ." *Id.* at 35 (emphasis added).

G. 2017 Follow-up Report on 2014 Audit and After (2014 – Present)

In 2017, the Auditor delivered his most recent findings on the State's management of the MKSR ("2017 Follow-up")—nineteen years after the Auditor's first of three scathing reports on the subject. Klein Decl., Exh. "J." The 2017 Follow-up was conducted pursuant to HRS § 23-7.5(a), which requires the Auditor to report to the Legislature annually on all audit recommendations made ***but not implemented*** by the audited agency within one year,[9] and "presents the results of [the Auditor's] review of eight recommendations made to [UH] and the [DLNR] in the [2014 Audit]." *Id.* at 3.

In none of the eight areas reviewed where the 2014 Audit had found UH and the DLNR should improve, were the Auditor's corresponding recommendations fully implemented. *Id.* at 5. To be fair, UH disagreed with the 2014 Audit that it should consider returning fees collected since 2007 from commercial tour operators because it allegedly lacked authority to do so, and the recommendation to include cultural and environmental protections in the permit conditions for the Thirty Meter Telescope (TMT) observatory were mooted when the permit was voided by the

[9] Under §23-7.5(b), the delinquent agency then has thirty (30) days to submit a response to the Auditor and the Legislature.

Hawai‘i Supreme Court.[10] *Id.* at 7, 9. Nonetheless, UH had still not held required hearings on the long overdue administrative rules the 2005 Audit found it was lacking. *Id.* at 6. UH had not drafted a fee scheduled to be included in commercial tour permits, much less obtained UH Board of Regents approval for same. *Id.* at 6-7. UH had not fully implemented all Comprehensive Management Plan management actions, missing a 2016 deadline. *Id.* at 7. UH had neither begun the new Environmental Impact Statement required before securing a new General Lease nor moved to "renegotiate with existing sublessees to amend subleases to include provisions that address stewardship issues." *Id.* at 7-8.

Subsequent to the 2017 Follow-up, the Hawai‘i Supreme Court issued its opinion in *Ching v. Case*, 145 Hawai‘i 148, 449 P.3d 1146 (2019) ("*Ching*") regarding breach of fiduciary duty claims against the State relating to Ceded Lands leased to the United States federal government for military training at the Pōhakuloa Training Area ("PTA") on the Big Island. The *Ching* case "concern[ed] the degree to which the State must monitor the leased trust land and the [USA's] compliance with the lease terms to ensure the property is ultimately safeguarded for the benefit of Hawai‘i's people." *Ching* at 152, 1146. Largely upholding the decision of the trial Court below, the Court in *Ching* held that:

> an essential component of the State's duty to protect and preserve trust land is an obligation to reasonably monitor a third-party's use of the property, and that this duty exists independent of whether the third party has in fact violated the terms of any agreement governing its use of the land. To hold otherwise would permit the State to ignore the risk of impending damage to the land, leaving trust beneficiaries powerless to prevent irreparable harm before it occurs.

Id. Specifically, the court held that the trial court did not err when it found three DLNR inspections and a handful of miscellaneous other studies conducted since 1964 constituted insufficient monitoring of the Ceded Lands within the PTA in violation of trust duties. *Id.* at 182, 1180. Furthermore, the *Ching* Court agreed that the State was required to (a) submit and execute a monitoring plan for the Ceded Lands in question, (b) make detailed reports for each monitoring or inspection event, and (c) create a procedure to make those reports accessible to the general public. *Id.* at 185-86, 1183-84.

[10] *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 363 P.3d 224 (2015).

With regard to DLNR's monitoring of UH and its sublessees in the MKSR, it is clear that the State has no regular, transparent monitoring plan, and State compliance inspections are woefully inadequate and infrequent.[11] Furthermore, Native Hawaiians and the general public, as trust beneficiaries, do not have a convenient way to access the record of the State's compliance monitoring to ensure Defendants are discharging their constitutionally mandated duties.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the record demonstrates that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Hawai'i Rules of Civil Procedure ("HRCP") Rule 56; *see also Young v. Planning Comm'n of Cty. of Kaua'i*, 89 Hawai'i 400, 407, 974 P.2d 40, 47 (Haw. 1999). The movant bears the burden of showing that (1) "no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions," and (2) "based on the undisputed facts, it is entitled to summary judgment as a matter of law." *Anderson v. State*, 88 Hawai'i 241, 246, 956 P.2d 783, 788 (App. 1998).

Although on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [HRCP Rule 56], must set forth specific facts showing that there is a genuine issue for trial." *Young*, 89 Hawai'i at 407, 974 P.2d at 47. "A party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he [or it] entitled to a trial on the basis of a hope that he can produce some evidence at that time." *Id.* (citation, internal quotation marks omitted). If Defendants cannot meet this burden, then this Court should enter summary judgment against them. *See Young*, 89 Hawai'i at 407, 974 P.2d at 47 (citing *Henderson v. Prof'l Coatings Corp.*, 72 Haw. 387, 401, 819 P.2d 84, 92 (1991)).

IV. DISCUSSION

Article XII, section 4 of the Hawai'i State Constitution mandates: "The lands granted to the State of Hawai'i by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution . . . shall be held by the State as a public trust for [N]ative Hawaiians and

[11]OHA asserts that the audit reports and the documents produced by Defendants State of Hawai'i, BLNR, and DLNR since they responded to OHA's discovery requests in August 2019 do not evidence regular monitoring of UH's compliance with the General Lease.

the general public." Haw. Const. Art. XII, § 4. This constitutional directive "imposes a fiduciary duty on Hawai'i'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 (1992). Section 5(f) of the Admission Act commands the State to manage the land and its proceeds and income as a public trust:

> For the support of the 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.

Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5-6 (emphasis added).

In managing the ceded lands trust, the State's trust duties are "measured by the same strict standards applicable to private trustees." *Pele Def. Fund*, 73 Haw. At 604 n.18, 837 P.2d at 1261 n.18 (citing *Ahuna v. Dept. of Haw. Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982)) ("The State owes this same high standard to the beneficiaries of the ceded land trust" as to the beneficiaries of the Hawaiian Home Lands trust). These strict standards include: (1) "the obligation to administer the trust solely in the interest of the beneficiary"; and (2) the "obligation 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." *Ahuna*, 64 Haw. at 340, 640 P.2d at 1169 (citations omitted). As such, Defendants "[are charged] with moral obligations of the highest responsibility and trust . . . and should therefore be judged by the most exacting fiduciary standards" when managing ceded lands. *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

While the constitutional provisions are general in nature, they clearly show that Hawaiian rights or benefits in the Ceded Lands Trust cannot be easily overlooked or "diminished"[12] as they are now under the current management regime concocted by Defendants. The Hawai'i Supreme Court concluded as much in *Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 133 P.3d 767 (2006) when it held that:

> [I]n administering the ceded lands, the State is subject to the standard of "high fiduciary duties" recognized in [*Ahuna v. Department of*

[12] Haw. Const. Art. XVI, § 7 (stating that state legislation concerning the ceded lands "shall not diminish or limit the benefits of [N]ative Hawaiians under Section 4 of Article XII.").

> *Hawaiian Home Lands*], which include well-settled principles laid out by the federal courts in dealing with lands set aside by Congress in trust for the benefit of native Americans and Alaskans, noting that: ***(1) the conduct of the government as trustee is measured by the same strict standards applicable to private trustees; (2) one specific trust duty includes the obligation to administer the trust solely in the interest of the beneficiary; and (3) a trustee must deal impartially when there is more than one beneficiary.***

OHA v. State, 110 Hawai‘i at 355, 133 P.3d at 784 (internal quotations omitted and emphasis added) .

As applicable to private trustees, Defendants have the following duties with respect to the trust resources at issue in this case:

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.

See Restatement (Second) of Trusts §§ 169-80; *see also* Restatement (Third) of Trusts §§ 76-84.

In addition to their fiduciary duties as trustees of the *Ceded Lands Trust*, Defendants and their 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. *See In re Water Use Permit Applications*, 94 Hawai‘i 97, 143, 9 P.3d 409, 455 (2000).

D. The General Lease and UH's Subleases Represent Ongoing Breaches of Defendants' Fiduciary Duties

As evidenced in the audits discussed *supra* Defendants have largely ignored their fiduciary duties for the last five decades. For example, both the General Lease and UH's subleases fail to include enforceable conditions on the lease, checks and balances between the parties, or specific safeguards to ensure compliance with lease terms. *See* Klein Decl., Exh. "A". The 2014 Audit criticized DLNR for not providing any mechanism by which to ensure compliance with the General Lease or the requirements of permits issued by the department. Instead, lease and permit language remain broad and general, which allows rampant mismanagement and disobedience by respective lessees without consequence. Specific lease provisions are necessary for Defendants to meet their fiduciary duty to "use reasonable skill and care to make trust property productive." Put a different way, an "ordinary and prudent person" would not lease his own property under such broad and unenforceable terms. UH also fails to use transparent and standardized processes when granting subleases and determining sublease terms. UH has made it a practice of charging nominal rent or no rent at all, with little to no conditions addressing historical, environmental, and cultural protection issues. Again, these are the types of decisions that UH may not make as a fiduciary of the Ceded Lands Trust. UH must remain transparent and act as an ordinary and prudent person would with his own land—charging a reasonably competitive rent—such that all trust beneficiaries, including Native Hawaiians, may benefit. Further, the State has abandoned imposing heightened standards on sublessees and has otherwise failed to hold UH accountable for agreeing to lopsided sublease terms. As it exists, the General Lease and UH's subleases grant nearly unconditional use of Ceded Lands and Public Trust land—indisputable evidence that their trust duties were an afterthought, at best.

E. UH's Management Plans Are Ineffective and Allow Widespread Mismanagement to Continue Without Oversight and Adequate Standards

Decades passed before the UH developed a comprehensive management plan. Still, UH has made no effort to systematically estimate the true cost of implementing its management plans or to develop a plan to generate sufficient revenue or funds to support that effort.

While the UH finally formulated a "comprehensive" plan after decades of failed attempts, its execution of that plan remains vastly inadequate. An alarming number of the 2009 CMP's management actions remain unaccomplished—many of them have yet to be initiated. Of the more than 100 management actions mandated by the 2009 CMP, fifty-four of them are of particular concern to OHA and its beneficiaries. At least thirty-one of these fifty-four management actions are not being adequately implemented. The 2009 CMP lacks benchmarks to track the progress of management actions and deadlines to properly evaluate implementation. The 2009 CMP does not penalize UH or otherwise provide consequences for the inadequate or untimely implementation of management actions, and BLNR has not provided oversight on their fulfillment.

Accordingly, not only has UH failed to satisfy many of the 2009 CMP management actions but, based on the structure of the 2009 CMP, UH cannot determine the adequacy of any progress made toward completion of management actions or accurately estimate likely completion dates. The implementation schedule for the 2009 CMP management actions categorize each action as either (1) Short or Long Term; (2) Ongoing; (3) In Progress; or (4) Completed. A management action marked Short or Long Term indicates that planning has not yet begun (*i.e.*, UH cannot report that progress has been made). These items are of particular concern. A CMP item marked "Ongoing" represents a management task that can never be fully completed. For example, the monitoring of the Wekiu arthropods will persist indefinitely. Nevertheless, the 2009 CMP is inadequate with respect to "Ongoing" tasks because it fails to set guidelines on how these particular tasks are to be conducted or evaluated, and how often they are to occur (*i.e.*, there are no measurable standards). "In Progress" tasks present a different problem—there are no deadlines or benchmarks for implementation. Finally, successful implementation of many of the management actions depends on enforcement of rules and regulations which have remained inadequate. Their inadequacy is evident from issues related to public access including, but not limited to, visitors, hiking, parking, and orientation or training requirements. Compounding matters, the 2009 CMP contemplates no consequences for inadequate implementation, and the BLNR attempts no oversight or enforcement. UH continues to struggle with managing Mauna Kea and in the last four decades has received no incentive to change its typical practice. Klein Decl., Exh. "K."

F. UH Favors Development of its Astronomy Activities and Institutional Prestige at the Expense of Mauna Kea's Cultural Significance to Native Hawaiians

As discussed *supra* Defendants on the one hand blame many of their deficiencies in managing the MKSR on lack of funds, while on the other hand they intentionally structured their subleases to compensate UH in kind with telescope viewing time. This is effectively self-dealing because UH has reserved the benefits of MKSR development to itself. At best, UH will argue that its development of the astronomy precinct benefits education, which is one of the Ceded Lands Trust purposes; however, ignoring Native Hawaiian beneficiaries' interests in arguably their most significant cultural site represents a grossly imbalanced approach which is anything but impartial--a duty legally imposed upon Defendants as trustees.

Additionally, UH has failed to systematically estimate the cost of implementing its management plans. Thus, it does not generate sufficient revenue from the land to fund the successful completion of the action items set forth in its management plans. A prudent land manager does not act this way; instead, a prudent land manager would conduct a comprehensive study on the costs of managing its property. Furthermore, UH's failure to collect or budget money for decommissioning telescopes means that the public, a beneficiary of the trust, will likely need to indirectly cover those costs via taxes. This adds insult to injury, essentially forcing the beneficiaries to restore the *res* of the Ceded Lands Trust and Public Trust.

Combined, the audits illustrate that the UH has continuously mismanaged the MKSR for nearly fifty years without effective oversight by the State, DLNR, or BLNR. Widespread mismanagement has placed fragile resources within the MKSR in peril and Defendants have failed to properly protect and preserve the trust corpus for Native Hawaiians and the general public. The unambiguous and virtually uncontested record leaves no doubt that UH has completely failed in its duties to prudently manage Mauna Kea and the DLNR and BLNR are equally at fault for failing to manage UH and the mauna's cultural resources, choosing instead to defer oversight and management responsibilities to its tenant (UH) and subtenants who have proven to be solely interested in development of the astronomy precinct to the detriment of Native Hawaiians' traditional and cultural interests and the interest of the public.

V. CONCLUSION

For the foregoing reasons and authorities, Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS respectfully requests that the Court **grant** its Motion for Summary Judgment and (a) declare that Defendants breached and continue to breach their fiduciary duties by failing to properly manage the ceded lands on Mauna Kea, (b) issue 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) order an accounting of the ceded lands on Mauna Kea and the cost of managing those lands in compliance with Defendants' fiduciary duties, and (d) pay restitution to make the trust whole.

DATED: Honolulu, Hawai'i, March 2, 2020.

/s/ Robert G. Klein
ROBERT G. KLEIN
KURT W. KLEIN
DAVID A. ROBYAK

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; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	CIVIL NO. 17-1-1823-11 (JPC) (Declaratory Judgment) DECLARATION OF ROBERT G. KLEIN

DECLARATION OF ROBERT G. KLEIN

I, ROBERT G. KLEIN, hereby declare that:

1. I am licensed to practice law in all courts of the State of Hawai‘i.

2. I am a partner with Klein Law Group LLLC, attorneys for Plaintiff THE OFFICE OF HAWAIIAN AFFAIRS (“OHA”) in the above-referenced action.

3. I have personal knowledge of the matters set forth herein except and unless stated to be upon information and belief.

4. Attached hereto as Exhibit “A” is a true and correct copy of General Lease No. S-4191 dated June 21, 1968 between the State of Hawai‘i, Board of Land and Natural Resources and the University of Hawai‘i.

5. Attached hereto as Exhibit “B” is a true and correct copy of “Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve,” The Auditor, State of Hawai‘i, Report No. 96-6 (Feb. 1998).

6. Attached hereto as Exhibit "C" is a true and correct copy of "Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve," The Auditor, State of Hawai'i, Report No. 05-13 (Dec. 2005).

7. Attached hereto as Exhibit "D" is a true and correct copy of "Mauna kea Comprehensive Management Plan: UH Management Areas" prepared by Ho'akea, LLC dba Ku'iwalu for University of Hawai'i (April 2009).

8. Attached hereto as Exhibit "E" is a true and correct copy of "A Cultural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea, Ka'ohe Ahupua'a, Hāmākua District, Hawai'i Island, State of Hawai'i: A Sub-Plan for the Mauna Kea Comprehensive Management Plan," prepared by Pacific Consulting Services, Inc. for the Office of Mauna Kea Management, University of Hawai'i at Hilo (Oct. 2009).

9. Attached hereto as Exhibit "F" is a true and correct copy of "Natural Resources Management Plan for the UH Management Areas on Mauna Kea: A Sub-Plan of the Mauna Kea Comprehensive Management Plan," prepared by Sustainable Resources Group Intn'l, Inc. for the Office of Mauna Kea Management, University of Hawai'i at Hilo (Sept. 2009).

10. Attached hereto as Exhibit "G" is a true and correct copy of "Decommissioning Plan for the Mauna Kea Observatories: A Sub-Plan of the Mauna Kea Comprehensive Management Plan," prepared by Sustainable Resources Group Intn'l, Inc. for the Office of Mauna Kea Management, University of Hawai'i at Hilo (Jan. 2010).

11. Attached hereto as Exhibit "H" is a true and correct copy of "Public Access Plan for the UH Management Areas on Mauna Kea: A Sub-Plan of the Mauna Kea Comprehensive Management Plan," prepared by Sustainable Resources Group Intn'l, Inc., Island Planning, and

Island Transitions, LLC, for the Office of Mauna Kea Management, University of Hawai'i at Hilo (Jan. 2010).

12. Attached hereto as Exhibit "I" is a true and correct copy of "Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve," The Auditor, State of Hawai'i, Report No. 14-07 (Aug. 2014).

13. Attached hereto as Exhibit "J" is a true and correct copy of "Follow-Up on Recommendations from Report No. 14-07, *Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve*," The Auditor, State of Hawaii, Report No. 17-06 (July 2017).

14. Attached hereto as Exhibit "K" is a true and correct copy of "2015 Annual Report: Status of the Implementation of the Mauna Kea Comprehensive Management Plan," prepared by Michael Cain, Office of Conservation and Coastal Lands, Department of Land and Natural Resources (June 12, 2015).

I, ROBERT G. KLEIN, declare under penalty of law that the foregoing is true and correct.

Executed this 2nd day of March 2020, at Honolulu, Hawai'i.

ROBERT G. KLEIN

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; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.	CIVIL NO. 17-1-1823-11 (JPC) (Declaratory Judgment) NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE

NOTICE OF HEARING MOTION

TO: CLARE E. CONNORS, ESQ. ***Email: clare.e.connors@hawaii.gov***
State of Hawai‘i Attorney General
WILLIAM J. WYNHOFF, ESQ. ***Email: bill.j.wynhoff@hawaii.gov***
Deputy Attorney General
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawai‘i 96813

Attorneys for Defendants
STATE OF HAWAI‘I, SUZANNE CASE,
in her capacity as Chairperson of the
DEPARTMENT OF LAND AND NATURAL RESOURCES,
DEPARTMENT OF LAND AND NATURAL RESOURCES, and
BOARD OF LAND AND NATURAL RESOURCES

CARRIE K.S. OKINAGA, ESQ. ***Email: carrieok@hawaii.edu***
University General Counsel
DEREK T. MAYESHIRO, ESQ. ***Email: derekmay@hawaii.edu***
Associate General Counsel
University of Hawai‘i
2444 Dole Street, Bachman Hall 110
Honolulu, Hawai‘i 96822

Attorneys for Defendant
UNIVERSITY OF HAWAI‘I

NOTICE IS HEREBY GIVEN that the above-entitled Motion for Summary Judgment shall come on for hearing before the Honorable Jeffrey P. Crabtree, Judge of the above-entitled Court, in his courtroom in the Kaahumanu Hale, 1111 Alakea Street, 6th Floor, Honolulu, Hawai‘i, at 10:00 o'clock a.m. on Tuesday, March 31, 2020, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai‘i, March 2, 2020.

/s/ Robert G. Klein
ROBERT G. KLEIN
KURT W. KLEIN
DAVID A. ROBYAK

Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the date noted below, a true and correct copy of *Plaintiff The Office of Hawaiian Affairs' Motion for Summary Judgment; Memorandum in Support of Motion; Declaration of Robert G. Klein; Exhibits "A"-"K"; Notice of Hearing Motion and Certificate of Service,* was duly served upon the above-named individuals electronically through the Judiciary Electronic Filing System (JEFS), at their last known email addresses, as set forth above.

DATED: Honolulu, Hawai'i, March 2, 2020.

/s/ Robert G. Klein
ROBERT G. KLEIN
KURT W. KLEIN
DAVID A. ROBYAK

Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS