

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

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

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

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

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

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

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

² Haw. Const. art. XII, § 4.

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

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

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

Third, **OHA reiterates its concerns over UH's failure to implement various CMP action items** as well as the excessive time it took UH to adopt administrative rules deemed necessary for such implementation. Notably, even after the adoption of administrative rules, and despite OHA's continued attempts to ensure that the rules addressed its concerns and comments, the rules as adopted have nonetheless failed to implement critical CMP actions. OHA further notes the shortcomings in policies adopted by the Maunakea Management Board (MKMB) and UH Board of Regents (BOR) to supposedly implement certain CMP action items, as also detailed in the attached correspondences. **OHA urges Ku'iwalu to refer to the various correspondences attached as well as OHA's active lawsuit for regarding UH's failure to adequately or appropriately implement numerous CMP action items.**⁴ As highlighted in the attached correspondences and OHA's complaint, **of the over 100 management actions mandated by the 2009 CMP, 54 are of particular concern to OHA and its beneficiaries, and at least 31 of these 54 management actions are not being adequately implemented.**⁵ Examples⁶ of UH's failures to implement CMP action items include, but are not limited to:

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

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

⁴ See OHA Complaint, *supra* note 1.

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

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

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

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

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

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

Aloha me ka 'oia'i'o nō,



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

SMH:lf

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

Enclosures: (1) OHA Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages

(2) OHA Administrative Testimony dated 5/21/2020 to UH BOR regarding the adoption of a proposed internal restructuring plan for the management of Maunakea

(3) OHA Administrative Testimony dated 11/6/2019 to UH BOR regarding the adoption of Hawai'i Administrative Rules governing public and commercial activities on Maunakea, including attached past testimonies and correspondences

(4) Various OHA correspondences from 2009 regarding concerns with the CMP ([a] Letter to Ku'iwalu dated 3/9/2009 regarding requested comments on the CMP; [b] Letter to the Office of UH President dated 3/9/2009 regarding requested comments on the Draft Environmental Assessment for the CMP; [c] Letter to OMKM dated 9/10/2009 regarding the Draft Natural Resources Management Plan; [d] Letter to OMKM dated 9/10/2009 regarding the Draft Cultural Resources Management Plan)

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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2017 NOV -7 PM 4: 15

F. OTAKE
CLERK

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.


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 beneficiary[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 Makanaka 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.

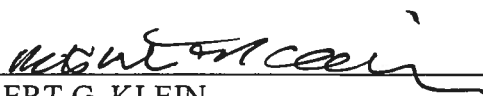
182. As a result of UH's breaches, OHA is entitled to compensation damages; rescission of the General Lease; restitution; and/or specific performance of the contract terms.

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

SUMMONS

STATE OF HAWAI'I

TO THE ABOVE-NAMED DEFENDANT(S):

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

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

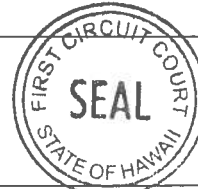
public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

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

DATED: Honolulu, Hawai'i, _____.

NOV - 7 2017

F. OTAKE



CLERK OF THE ABOVE ENTITLED COURT



OFFICE OF HAWAIIAN AFFAIRS

Administrative Testimony

Testimony of Sylvia M. Hussey Ed.D.

Ka Pouhana, Chief Executive Officer

Board of Regents, University of Hawai'i

Agenda Item VII.B.

APPROVAL OF MAUNAKEA MANAGEMENT RESTRUCTURING PLAN

May 21, 2020

10:30 a.m.

Virtual

Meeting

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

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

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

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

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

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

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

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

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

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



OFFICE OF HAWAIIAN AFFAIRS
Administrative Testimony

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

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

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

November 6, 2019

9:45 a.m.

UH Hilo Performing Arts Center

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

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

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

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

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

A. Transparency and accountability concerns remain unaddressed.

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

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

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

B. Cultural consultation requirements are essentially nonexistent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mahalo nui for the opportunity to comment on this matter.



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

June 1, 2019

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

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

Aloha e Mr. Lassner,

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

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

Hawai'i Revised Statutes (HRS) § 304A-1903, the statutory authority for the instant draft rules, requires that the Board of Regents (BOR) "consult with the Office of Hawaiian Affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." However, as with their prior iterations, the latest draft of the proposed Mauna Kea administrative rules continue to fail to adequately address a number of issues repeatedly raised by OHA, which are critical to the protection of Native Hawaiian traditional and customary rights, and the underlying resources, sites, and overall environment upon which they depend.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For example, the rules appear to establish public access hours as “set forth in the comprehensive management plan”;⁴ meanwhile, the CMP and its Public Access Plan (PAP) – itself intended to be reviewed and updated every five years⁵ – in turn only describes hours of operation for the Visitor Information Station and Hale Pōhaku, and for “public recreational activities” (emphasis added) within the science reserve (to be from ½ hour before sunrise to ½ hour after sunset).⁶ It is unclear whether these hours are therefore intended to be the same public access hours as those described in the rules, whether the CMP’s hours for “public recreational activities” are intended to or may inadvertently apply to cultural practitioners seeking access outside of those hours, or whether changes to the PAP – which are not subject to rulemaking processes or requirements -- are also intended to be incorporated in the rules.

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

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

⁴ Proposed HAR §§ 20-26-38(c).

⁵ See MAUNA KEA PAP 7-1 (2010).

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

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

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

⁹ See MAUNA KEA CMP 7-6.

¹⁰ See MAUNA KEA NRMP 4.4-6 (2009).

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

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

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

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

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

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

¹¹ Proposed HAR § 20-26-3.

¹² CULTURAL RESOURCES SUB-PLAN at 2-1.

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

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

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

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

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

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

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

'O wau iho nō me ka 'oia 'i'o,



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

KC:wt

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



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

University of Hawaiʻi Board of Regents
Agenda Item V.B.3

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

October 18, 2018

9:30 a.m.

Conference Room 105A/B

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

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

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

Mahalo for the opportunity to comment on this matter.



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

September 11, 2018

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

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

Aloha e Mr. Lassner,

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

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

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

Hawaiians who inhabited the Hawaiian Islands prior to 1778.”¹ **It is also for these reasons that OHA believes it is critically important for the proposed administrative rules, which have been pending since 2009, to comprehensively cover and ensure the ongoing fulfillment of Maunakea’s unique and diverse management needs.**

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

OHA appreciates the outreach meetings that took place earlier this year with Office of Mauna Kea Management (OMKM) staff and the Mauna Kea Management Board (MKMB) Chair, and the long-awaited opportunity for dialogue that these meetings provided. OHA understands that these meetings were undertaken in part to satisfy the requirement that the Board “consult with the Office of Hawaiian Affairs to ensure that [the Maunakea administrative rules] shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua’a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.” **Unfortunately, despite explicit concerns expressed by OHA during these meetings as well as in OHA’s original correspondence from 2011, the current administrative rules continue to inadequately address a number of issues critical to the protection of Native Hawaiian traditional and customary practices, and the underlying resources, sites, and overall environment upon which they depend.**

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

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

¹ HRS § 304A-1903.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ CULTURAL RESOURCES SUB-PLAN at 2-1.

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

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

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

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

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

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

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

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

'O wau iho nō me ka 'ōia 'i'ō,



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

KC:wt

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



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

University of Hawaiʻi Board of Regents
Agenda Item C-4

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

June 7, 2018

9:15 a.m.

Sullivan Conference Center

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

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

¹ HAW. CONST. ART. XII, § 5

² See Haw. Rev. Stat. ("HRS") Chapter 10 (2009).

³ HRS § 10-3 (2009).

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

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

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

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

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

⁴ HRS § 304A-1903.

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

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

OHA appreciates the most recent outreach meetings with OMKM staff and the MKMB Chair, and the long-awaited opportunity for dialogue that these meetings provided. OHA understands that these meetings were undertaken in part to satisfy the requirement that the Board "consult with the Office of Hawaiian Affairs to ensure that [the Maunakea administrative rules] shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." **Unfortunately, despite explicit concerns expressed by OHA during these meetings as well as in OHA's original correspondence from 2011, the current administrative rules draft continues to inadequately address a number of issues critical to the protection of Native Hawaiian traditional and customary practices, and the underlying resources, sites, and overall environment upon which they depend.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹ CULTURAL RESOURCES SUB-PLAN at 2-1.

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

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

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

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

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



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

June 20, 2011

Stephanie Nagata
Office of Mauna Kea Management
University of Hawai'i at Hilo
640 North A'ohoku Place
Hilo, Hawai'i 96720

RE: Initial Comments on Working Draft of Mauna Kea Rules

Aloha e Stephanie Nagata,

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

OHA's Role

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

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

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

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

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

HRS § 304A-1903(2).

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

Protection of Native Hawaiian Traditional and Customary Practices

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

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

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

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

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

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

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

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

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

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

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

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

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

"Subchapter 4: Protection of Native Hawaiian Rights

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

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

Scope of Commercial Activities

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

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

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

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

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

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

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

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

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

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

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

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

Transparency/Accountability

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

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

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

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

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

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

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

'O wau iho nō me ka 'ōia'i'ō,



Clyde W. Nāmu'o
Chief Executive Officer

CWN:jd

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

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



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HRD09/3754C

March 9, 2009

Dawn Chang, Principal
Ku'iwalu
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Honolulu, HI 96813

RE: Request for comments on the Mauna Kea Comprehensive Management Plan.

Aloha e Dawn Chang,

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

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

Multiple management plans

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

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

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

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

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

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

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

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

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

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

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

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

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

Management authority

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

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

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

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

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

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

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

Rule-making authority and enforcement

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

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

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

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

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

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

Monitoring Permits

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

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

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

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

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

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

Project Approval Process

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

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

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

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

Decommissioning

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

Cultural practices

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

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

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

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

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

Infrastructure

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

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

Flaws in structure of CMP

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

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

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

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

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

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

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

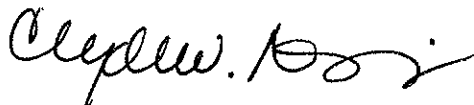
The CMP also leans heavily on the 2000 Master Plan for guidance. This is a major issue. The CMP shouldn't liberally incorporate sections of and concede to a plan that has never been and may never be approved by the BLNR. Moreover, the Master Plan is almost a decade old, has not been revised and was criticized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

Conclusion

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

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

‘O wau iho nō me ka ‘ōia‘i‘o,



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HRD09/3754D

March 9, 2009

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

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

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

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

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

OHA's legal mandates

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

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

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

Environmental Assessment requirements

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

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

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

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

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

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

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

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

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

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

Comprehensive Management Plan requirements

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

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

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

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

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

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

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

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

Conclusion

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

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

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o
Administrator

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

C: OHA Board of Trustees

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HRD09/3754G

September 10, 2009

Stephanie Nagata, Associate Director
Office of Mauna Kea Management
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Hilo, HI 96720

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

Aloha e Stephanie Nagata,

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

OHA supports CMP

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

Future Astronomy Development

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

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

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

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

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

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

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

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

Native Hawaiian voice

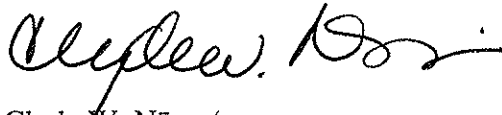
According to the NRMP, Kahu Kū Mauna should be consulted with on various natural resource management issues. OHA appreciates this, as there is no separation between cultural resources and natural resources within the Native Hawaiian worldview. Traditions hold that Native Hawaiians share the same genealogy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

Environmental Review

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

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

‘O wau iho nō me ka ‘ōia‘i‘o,



Clyde W. Nāmu‘o
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Office of Mauna Kea Management
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Hilo, HI 96720

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

Aloha e Stephanie Nagata,

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

OHA supports CMP

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

Future Astronomy Development

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

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

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

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

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

Determination of Effect

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

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

Native Hawaiian Community Involvement

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

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

Traditional Cultural Property

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

Evaluation Section

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

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

Environmental Review

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

Programmatic Agreement

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

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

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o
Administrator

C: Board of Trustees

Stephanie Nagata
September 9, 2009
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