



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,
HAWAIʻI 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 may 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’1 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.