



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.A.

FINAL REPORT AND DISSOLUTION OF THE MAUNAKEA GOVERNANCE
PERMITTED INTERACTION GROUP AND APPROVAL OF RESOLUTION TO ACT ON
ITEMS RELATING TO MAUNAKEA MANAGEMENT

November 6, 2019

9:45 a.m.

UH Hilo Performing Arts Center

The Administration of the Office of Hawaiian Affairs (OHA) offers the following comments on the Board of Regent’s Maunakea Governance Permitted Interaction Group (MIG) report and proposed Resolution 19-03 To Act on Items Relating to Maunakea Management (Resolution).

As an initial matter, OHA reiterates that for nearly half a century, the state of Hawai‘i and the University of Hawai‘i have failed their legal responsibility to properly manage Maunakea. This mismanagement has continued despite constant calls for reform from the Native Hawaiian community, Hawai‘i County residents, the general public, and the state Auditor.

The state and UH have established a long pattern of issuing superficial public statements premised on apologies and promises of doing better, that ultimately result in little material improvement in the care of Maunakea. We fear that the MIG report and proposed resolution is just a continuation of this pattern. To be clear, OHA appreciates that there is the “feeling amongst some Regents that the Board needed to do more to evaluate on the University of Hawai‘i’s . . . governance and stewardship of Maunakea by establishing the [MIG]”¹. In particular, OHA appreciates that the MIG report recognizes UH’s “past and present mismanagement” and commits UH to fulfilling its duty to properly steward Maunakea and to ensure that industrial-scale development on the mauna’s summit does not further injure natural and cultural resources on these culturally sacred and long neglected lands.

However, we must point out the similarity of these current pronouncements to what state and UH officials said just four years ago. For example, we note that UH’s recognition today that it has “unmet responsibilities and ongoing compliance issues that have delayed completion of certain recommendations and requirements under the Management Plans,” and “desires to remove any delays in compliance and to complete ongoing responsibilities in an accelerated and expeditious manner,” nearly mimics UH President David Lassner’s admission on June 1, 2015, that “UH has not yet met all of [its] obligations to the mountain,” and Governor Ige’s May 26, 2015, proclamation that the state has “in many ways failed the mountain [...] and we must act immediately to change that.” Today’s reiteration of what was said four years ago is evidence that (1) no management reforms by the state and UH have been made in the intervening years as

¹ MIG Report, at 1.

promised; and (2) regardless of what they say, the state and UH have not shown they are committed to or interested in fulfilling their legal and moral obligations to manage the mauna.

While the MIG report and proposed resolution include some indications of willingness to take some steps in the right direction, these proposed actions are woefully late, continue to leave substantial gaps in existing management tools, and exacerbate existing confusion and mismanagement concerns. Problematic aspects arise in at least four areas:

1. Foremost, the report and proposed resolution push short-term management solutions that may conflict with more fundamental efforts to reorganize and restructure Maunakea management. This potential mismatch risks causing substantial confusion about the stewardship of Maunakea going forward.
2. Shockingly, the proposed resolution seeks to fast-track the development of a telescope facility at Hale Pōhaku “or elsewhere.” While a teaching telescope may have merit under appropriate conditions and at an appropriate site, it is wholly *inappropriate* to disregard past promises to limit telescope facilities development, and instead propose a new development without a much deeper evaluation of its consistency with UH’s stewardship obligations. Once again, the fast-track approach is particularly problematic in light of the MIG’s recommendations regarding reorganizing and restructuring management of Maunakea.
3. With respect to its contemplated decommissioning of existing facilities, the proposed resolution is also problematic. It adds little or nothing to UH’s existing decommissioning obligations, while presupposing that many existing facilities will continue to operate beyond the 2033 term of UH’s Maunakea Science Reserve Master Lease (Master Lease). The resolution also proposes potentially conflicting timelines and fails to acknowledge UH’s obligation to ensure complete site restoration upon decommissioning. Again, these missteps threaten to sow confusion about stewardship going forward.
4. Finally, the resolution and report fail to address UH’s continued use of the Mauna Kea Access Road (MKAR), located almost entirely on Hawaiian Home Lands Trust lands, which it built without the permission of the Hawaiian Homes Commission. OHA implores UH to determine how it intends to redress this ongoing harm.

OHA’s concerns in these areas are described in more detail below.

1. Potentially Conflicting Short-Term and Long-Term Management Actions

What the UH Board of Regents is doing today is the exact opposite of the sort of comprehensive and cohesive management that Maunakea deserves, and what the State Auditor has demanded. Instead, UH is concurrently pushing short-term and long-term actions that may conflict with each other, while also raising uncertainty about the future stewardship of Maunakea.

The MIG report attempts to push short-term management solutions, including requesting additional taxpayer funds and establishing expediated timelines that may not make sense, to implement long delinquent management actions. While in some ways this represents a long overdue step in the right direction, the MIG’s proposed short-term actions to address

longstanding concerns may ultimately conflict with the resolution's call for a plan to reorganize and restructure "all advisory, operating and funding bodies involved in the management of Maunakea." For example, the MIG recognizes that its reorganization and restructuring plan requires an analysis of whether the management of Maunakea should be transferred to a separate governmental entity or third party, with plans and analyses to be completed by April 2020. The result of this plan and analysis could be that these short-term actions look differently and that the responsibility for implementing these short-term actions may ultimately be transferred to an entity other than UH, even though the UH administration is being tasked with requesting the General Funds.

Further, adopting the proposed administrative rules today and requesting additional taxpayer funds to pay for tardy management actions would at best create confusion as to the sincerity of UH's desire to objectively explore the transfer of management responsibilities, and at worst institutionalize management practices that neglect Native Hawaiian and other concerns underlying the call for reorganization and restructuring.

Additionally, the MIG report and proposed resolution suggests that an update to the Maunakea Master Plan may be forthcoming in the near future, without providing any deadlines or scope. Without such deadlines or details, it is difficult to ascertain whether and how an update to the Maunakea Master Plan—a long term action—will be consistent with a concurrent reorganization and restructuring plan that may remove UH from its management authorities entirely. Moreover, we note that UH's 2000 Maunakea Science Reserve Master Plan (2000 Master Plan) will expire in two months and the 2009 Comprehensive Management Plan's five-year update has never started. With such long and ongoing delays in the scheduled updates to these critical planning documents, a vague indication that the Master Plan will be updated at some unspecified point in time – and with no request for a budget to fund either plan update – only leads to confusion regarding UH's long-term commitment to follow through on any of its promises to comprehensively and adaptively plan for and manage its Maunakea lands.

2. Inappropriate Proposal to Fast-Track Development of a Telescope Facility

Item 3 of the resolution proposes to develop a telescope facility at Hale Pōhaku "or elsewhere." While an educational telescope may have merit under appropriate conditions and in an appropriate location, this proposal throws 20 years of astronomy planning out the window, while thumbing its nose at the many in the community who for decades have demanded greater controls over telescope development.

In response to calls to establish a carrying capacity of development on the mountain, the 2000 Master Plan designated 95 percent of the Maunakea Science Reserve (10,760 acres) as a Natural/Cultural Preservation Area, "with no development activity." The plan then designated the remaining 525 acres (5 percent) as an Astronomy Precinct, "thereby greatly reducing the area previously available for astronomy development." The plan envisioned "the area outside the Astronomy Precinct [as] a 'no build' area," to prevent the construction of telescopes "anywhere" in the Science Reserve. The plan cited the Very Long Baseline Array, which is the only telescope on Maunakea not located at the summit, as a specific example of what the new Astronomy Precinct sought to avoid.

The MIG's proposal reverses course on that prior planning. This U-turn is emblematic of the broken promises that have eroded the community's trust in UH's commitment to stewardship. Moreover, the proposal comes with a fast-track target date of April 2021. This indicates that UH may be unwilling to take the time for thorough community consultation that must be undertaken before even *suggesting* a location for new development.

Adding insult to injury, this proposal also appears to have contributed to the years-long delay in the decommissioning of the existing Hōkū Ke'a facility, in contravention of a UH commitment. The special conditions identified in the Thirty-Meter Telescope Conservation District Use Permit (CDUP) require that UH "will decommission three telescopes permanently, **as soon as reasonably possible**, and no new observatories will be constructed on those sites. This commitment will be legally binding on the University"² The CDUP identified Hōkū Ke'a and two others as the three telescopes to be decommissioned.³ UH Hilo had submitted a Notice of Intent to Decommission Hōkū Ke'a (NOI) to the Maunakea Management Board (MKMB) on September 16, 2015.⁴ For years, the MKMB postponed the NOI hearing, only to finally reject it on September 27, 2019—in a process apparently related to this idea of re-locating the facility.⁵

While the resolution's proposed April 2021 Hōkū Ke'a decommissioning deadline appears to provide a glimmer of hope that decommissioning will finally make some progress, the history of past delay, and apparent disregard for the CDUP special condition—which required **permanent decommissioning as soon as possible**—illustrate why OHA is concerned about the MIG's proposal to fast-track development of another facility at Hale Pōhaku "or elsewhere."

3. Decommissioning

In addition to OHA's concern about delays in decommissioning Hōkū Ke'a, at least three additional decommissioning-related aspects of the proposed resolution are troubling.

First, the proposed resolution appears to retreat from prior decommissioning commitments. The proposed resolution calls for decommissioning two facilities by 2021, a third by 2024, and two others by 2033. The commitments described in the CDUP called for decommissioning three telescopes "as soon as reasonably possible," and two others by 2033.⁶

² In the Matter of Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568, Findings of Fact, Conclusions of Law and Decision and Order, 267 [hereinafter *TMT CDUP*] (Special Condition 10) (emphasis added). By citing UH's commitments in relation to the CDUP, OHA does not intend to convey that it concedes to, or agrees with, any assertion that the CDUP was properly granted. Rather, this reference to the CDUP special conditions is intended to illustrate a disconcerting failure by UH to abide by its earlier commitments.

³ *Id.*

⁴ See, e.g., VIDEO: Mauna Kea Board Fails To Advance Hōkū Ke'a Telescope Decommissioning, <https://www.bigislandvideonews.com/2019/09/27/video-mauna-kea-board-fails-to-advance-hoku-kea-decommissioning>.

⁵ See, e.g., Hawai'i Public Radio, *Decommissioning Mauna Kea Telescopes Not As Easy As Switching Off The Lights*, <https://www.hawaiipublicradio.org/post/decommissioning-mauna-kea-telescopes-not-easy-switching-lights#stream/0> (quoting MKMB Director Nagata: "'There was quite a lot of public comments...about not decommissioning this educational telescope and so the University of Hawai'i at Hilo was asked to go out to the community and consult on this,' Nagata said.").

⁶ *TMT CDUP* (Special Condition 11) ("at least two additional facilities will be permanently decommissioned by December 31, 2033, including the Very Long Baseline Array antenna and at least one additional observatory.").

OHA questions why the MIG concluded that two facilities can be reasonably decommissioned by 2021, but the third will not be decommissioned until 2024. This additional three-year delay may be contrary to the “as soon as reasonably possible” commitment prescribed in the CDUP.⁷

Second, and more globally, the Master Lease also prescribes decommissioning obligations.⁸ The Master Lease requires all improvements on the Maunakea Science Reserve to be “removed or disposed of by the Lessee at the expiration or sooner termination of this lease.”⁹ The Master Lease expires in 2033. The terms of the Master Lease are also tied into the subleases with all entities that own or operate existing telescopes.¹⁰ In general, by the expiration of a sublease the sublessees are required to “remove the facilities and restore the property at the expenses of the sublessee,” unless the facility is sold or surrendered to UH.¹¹

In contemplation of these binding lease terms, the Resolution appears to presuppose that most of the existing facilities will *not* be decommissioned by 2033, and thus presupposes that the Master Lease and subleases will be renewed or extended. This presupposition is inappropriate, particularly in light of the MIG’s call for restructuring, reorganizing, and/or transferring management to another entity.

Third, the proposed resolution continues a disappointing practice of describing decommissioning in uncertain and unambiguous terms. The Maunakea Comprehensive Management Plan describes decommissioning as action by a “lessee to **remove** the facilities and **restore** the site.”¹² The Decommissioning Plan expands on this, describing decommissioning as the “**partial or total removal** of all structures associated with the observatory facility and the **restoration of the site to the greatest extent possible**, to pre-construction conditions.”¹³ However, the plan ultimately defers to UH, the Department of Land and Natural Resources, and the sublessee to negotiate the extent of restoration.¹⁴ Now, the proposed resolution describes decommissioning as “the **complete removal** of all man-made structures at each respective site bringing each site to **as close as feasible to its natural state** prior to construction.” While these standards are perhaps intended to be very similar—or perhaps even to convey that the MIG recommends foreclosing the option of partial removal—the specific scope of this commitment remains unclear, and it has been recommended “[f]or the purposes of this resolution” (i.e. only for the five telescopes described in the proposed resolution). Together with the history of industrial development and disregard for Maunakea, this underscores why OHA and others remain concerned about whether decommissioning will be consistent with UH’s obligations as a steward. Progress on this issue calls for a harmonized and unambiguous commitment to take all practicable steps to completely remove all non-natural structures, above- and below-grade, and to

⁷ In addition, the proposed resolution is unclear about what decommissioning timeline information will be shared with the public. Item 2 calls for a visual schedule for key decommissioning steps for two of the sites. While such transparency is helpful and appreciated, it should be required for *all* facilities.

⁸ Office of Maunakea Management, Mauna Kea Comprehensive Management Plan: Decommissioning Plan for Mauna Kea Observatories, 5-6 [hereinafter *Decommissioning Plan*].

⁹ General Lease No. S-4191, 4 (Maunakea Master Lease).

¹⁰ *Decommissioning Plan* at 6 (Section 2.2 Sublease Terms).

¹¹ *Id.*

¹² Office of Maunakea Management, Mauna Kea Comprehensive Management Plan, 7-53.

¹³ *Decommissioning Plan* at 23.

¹⁴ *Decommissioning Plan* at 26.

restore each site to the condition necessary to uphold the natural and cultural integrity of this singularly sacred and unique site.

4. Mauna Kea Access Road

While the Board of Regents may express a commitment to cooperating with the Department of Hawaiian Home Lands (DHHL) to resolve any outstanding issues relating to the roadway infrastructure on Maunakea, OHA notes that there are specific historical and ongoing issues, illustrated most saliently by the MKAR, that counsel a much more detailed and concrete response than that provided for in the MIG report and proposed resolution. The known history of the State and UH's past and ongoing failures to address improper and uncompensated use of Hawaiian Home Lands Trust lands not only counsel UH's cooperation but begs the questions of whether UH is fulfilling its independent responsibilities to native Hawaiians and whether UH should be compensating the Hawaiian Homes Land Trust. Not surprisingly, the MKAR, which is located almost entirely on Trust lands and was constructed between the 1960s-1970s, has recently fallen under renewed scrutiny as part of an apparent pattern of disregard for native Hawaiian and Hawaiian interests and concerns regarding Maunakea. DHHL land management staff have confirmed that the Hawaiian Homes Commission did not consent before UH commenced construction of the MKAR, which has been used continuously and without compensation to the Trust. Legal jurisdictional uncertainties notwithstanding, the State has recently gone so far as to arrest Hawaiian Home Lands beneficiaries who are peacefully occupying the MKAR in protest of UH's gross mismanagement of Maunakea. The State has also closed the MKAR to Hawaiian Home Lands Trust beneficiaries and the general public, while allowing UH employees and contractors generally unrestrained use of the road. Accordingly, OHA implores the Board of Regents to do more than *cooperate* with DHHL, but rather take initiative to specifically identify how UH will assist in redressing UH's long and continued use of Trust lands without permission or compensation.

Continued Mismanagement

UH's actions today reinforce its well-documented legacy of failing Maunakea. The MIG report and proposed resolution concede that UH is failing to adequately and timely implement critical actions of the 2009 CMP. This specific management failure – delayed and weak implementation of management plan actions – stretches back decades and was explicitly called out by the State Auditor in 1998. In 1998, the State Auditor found:

The university developed plans that outlined protection controls designed to limit access; provide for public safety; and protect the cultural, historic, and natural resources. However, many of these plans were submitted late and were weakly implemented. In addition, the university's lack of commitment and the Department of Land and Natural Resources' failure to enforce the plans compounded the problem of inadequate environmental protection.

[...]

The Department of Land and Natural Resources identified the need for a comprehensive management plan in the mid-1970s. However, plans that subsequently developed were poorly implemented.

Moreover, the MIG report and proposed resolution recommend actions that directly conflict with existing management plans (e.g. proposing a telescope at a location that the 2000 Master Plan identified as a “no build” area and introducing decommissioning terminology inconsistent with language from other management plans) reaffirms another hallmark of UH’s legacy of mismanagement. In 2005, the State Auditor criticized UH for maintaining numerous and inconsistent management plans when it found:

In its 2000 master plan, the university acknowledged that changes in plans over the years have resulted in a complex web of responsibility. The university has added to this web by tolerating different management documents without resolving inconsistencies between them or consolidating them into one comprehensive management plan.

Without irony, the MIG’s proposed resolution lists six documents that – most likely for the sake of clarity because there are so many – it collectively refers to as “Management Plans.” Should the UH Board of Regents approve the MIG resolution, UH would then officially have seven management documents for Maunakea, and begin developing a new reorganization and restructuring plan and updating its 2000 Master Plan. All of this will continue the complex and confusing management “web” called out by the auditor nearly 15 years ago.

Mahalo for the opportunity to comment on this matter.