



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
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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,

A handwritten signature in blue ink, appearing to read "Kamana'opono M. Crabbe".

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 '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 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.



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June 20, 2011

Stephanie Nagata
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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.