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Aloha Land Board members,

Mahalo for the opportunity to submit testimony on the subplans submitted by the University of Hawaii as required by your approval of the Comprehensive Management Plan (CMP) on April 9, 2009. We respectfully oppose the CMP and subplans. The CMP subplans are procedurally out of order, illegal, incomplete, and disregard established protections for Native Hawaiian cultural practice.

Before proceeding, however, ***we reserve the right to request a contested case hearing*** should the BLNR approve the CMP, subplans, timelines, and project sequences.

I. Appeal filed with the Intermediate Court of Appeals

Adopting the CMP subplans now is procedurally improper because the BLNR's April 9, 2009 decision to adopt the CMP is still under consideration by the courts. On March 17, 2010, Mauna Kea Anaina Hou, the Royal of Kamehameha I, Sierra Club, KAHEA, and Clarence Ching filed an appeal of with the Intermediate Court of Appeals to review the BLNR's denial of our request for a contested case hearing on the University's CMP. The BLNR denied our request for a contested case hearing on two grounds: 1) that we have no property interest in the conservation district that encompasses the entire summit of Mauna Kea, 2) that the CMP does not affect our rights, duties, and privileges.

II. CMP subplans are an illegal delegation of BLNR's authority to the University.

The University's CMP and subplans are not a management plan, but rather a framework for transferring the responsibility and authority for decisionmaking away from BLNR and to the University. Such a transfer of authority is illegal under Kapa'akai v. LUC.

In Ka Pa'akai, the Supreme Court found that the Land Use Commission (LUC) had violated its statutory and constitutional obligations when it approved a request to reclassify land without completing its own independent assessment of the impact to traditional cultural and natural resources and feasible actions to reasonably protect those resources. The Supreme Court rejected the LUC's claim that it had delegated the authority to prepare a management to the developer. The Court said:

The power and responsibility to determine the effects on customary and traditional Native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner who, unlike a public body, is not subject to public accountability... . [I]nsofar as the LUC allowed [the private developer] to direct the manner in which customary and traditional Native Hawaiian practices would be preserved and protected by the proposed development -- prior to any specific findings



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and conclusions by the LUC as the effect of the proposed reclassification on such practices -- the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect Native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority.

Ka Pa'akai, 94 Haw. 1, 22-23 (2000).

The BLNR engages in exactly this type of illegal wholesale delegation of its authority if it approves the CMP and subplans and thereby allows the developer – the University of Hawaii – to make significant decisions about activities in the conservation district of Mauna Kea. Decisions for which the University has no legal authority and which harm the rights, duties, and privileges of Native Hawaiians and other members of the public.

The fact that the developer in this situation also happens to be another state agency is irrelevant. Under the Court's ruling in Ka Pa'akai, an agency cannot delegate authority to any entity that does not share the same statutory and constitutional obligations. The BLNR is the only agency with the legal obligation to management conservation districts and ceded lands. The University has no similar mandate under law. Moreover, in this situation, the University's interests are more aligned with the developer in Ka Pa'akai than with any state agency fulfilling its statutory and constitutional obligations.

At best, the CMP and subplans provide a description of all the possible actions that could be undertaken on the summit. The ultimate decision about what is actually done is left to the University to decide with inadequate oversight from the public and the BLNR. This is what it means to improperly delegate authority and it cannot be allowed.

An obvious example of this is the process for distinguishing major and minor projects. The CMP clearly states, *"the President of the University [makes] the final determination on whether projects are major or minor. ... Minor project review ends with the University President, while major projects require formal approval by the Board of Regents. OMKM functions as a liaison to ensure consistency in the project review process."* CMP 7.3.4 Considering Future Land Use, page. 7-55.

Under this system, the University – in the form of either OMKM, the President, or the Board of Regents – will decide which projects are minor and which are major. In approving the CMP and subplans the BLNR is endorsing a decisionmaking framework that improperly empowers the University to decide future land uses in the conservation district on Mauna Kea without any BLNR oversight.

b. Consultation with OCCL inadequate to protect our rights, duties and privileges

HO'OKAHI NO KA 'ĀINA A ME NA KĀNAKA

KAHEA

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Even for those projects that the University opts to bring to the Department of Land and Natural Resources for review, the type of consultation provided is inadequate to protect the rights, duties, and privileges of Native Hawaiians and the general public.

As an example, in Fall of 2009, the University decided to remove the road that leads up Pu'u Poli'ahu. In a two-page letter, Office of Conservation and Coastal Lands staff determined that this project required no further review of any kind. See Exhibit A. In reality, however, the removal of this road has serious implications for cultural practice since it will restrict the access of those with limited mobility. While the natural resource benefits of removing this road **may** outweigh the burden to continued cultural practice, the point is this is not the University's or OCCL staff's decision to make. This is a decision that must be brought to the BLNR and considered in the open, democratic process required by the rules and regulations that govern the BLNR.

This is the decision-making process that is outlined in the University's "Major Project Sequence Steps." All actual decisions are made by the University and OCCL staff offers a short letter of endorsement. In the case of the road to Pu'u Poli'ahu, this process was woefully inadequate. If it is inadequate for a decision to remove a road and restore the natural grade of a pu'u, then it is definitely inadequate for any decision to alter any landscape or regulate any activity on the sacred summit of Mauna Kea, especially where cultural and religious practices are involved.

II. CMP and subplans have no carrying capacity and thus are incomplete

As the Third Circuit Court outlined in Mauna Kea Anaina Hou, et al vs. BLNR, a management plan by definition includes a carrying capacity. The current management plan adopted in 1983 and amended in 1985 provides for 11 major and 2 minor telescopes of specific dimensions. The CMP and subplans provide no such numerically based limitation for construction on the summit. In fact there is no measure by which to determine the carrying capacity of the summit under the University's new CMP and subplans. Without a carrying capacity, the CMP and subplans do not satisfy the requirements of a truly comprehensive management plan.

III. Subplans need environmental review

In 2008, the BLNR decided to uphold the principles of Hawaii Revised Statutes Chapter 343 and required the University to complete an environmental assessment for their CMP. In April 2009, the BLNR accepted the University's EA and approved the CMP, though it also required four subplans. These subplans involve significant land-altering activities, like decommissioning. If the CMP had been complete when it was adopted in April 2009, then these activities would have also been considered in that environmental review. At the very least, the BLNR should require an EA for these subplans, as it was required for the CMP.



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IV. CMP and subplans disregard legal protections for Native Hawaiian cultural practice

The University claims it will affirmatively protect Native Hawaiian customary and traditional rights, yet their management plan disregards the established legal protections for Native Hawaiian cultural practice. In the Cultural Resources Plan, the University states:

"Although contemporary cultural practices are not afforded special protection under the Hawai'i constitution..." Cultural Resources Plan, page 2-18.

The supreme court of Hawai'i specifically used two words (customary and traditional) to describe Native Hawaiians continued cultural and religious rights; "traditional" is used to describe long held beliefs, belief systems and ways of seeing the world (like honoring and extending Aloha), and "customary" is used to describe the way people demonstrate or express these beliefs (giving leis as an expression of Aloha). Contemporary Hawaiian practice is rooted in both traditional and customary practice. These practices are recognized by law, see Public Access Shoreline Hawaii (PASH) vs. Hawaii County Planning Commission (1995). The reasonable exercise of these rights is a public trust purpose and can only be regulated by the BLNR.

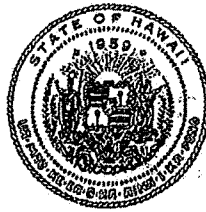
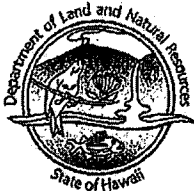
Customary and traditional Hawaiian cultural and religious practice on Mauna Kea include, but are not limited to the following:

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the "piko" or umbilical cord, and water collection in and from Lake Waiiau;
- Traditional astronomy, cosmology, and navigation;
- Burial practices;
- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of kinolau images.
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area

The University does not have the authority to restrict or otherwise evaluate the quality of these practices. That authority is vested in the BLNR and can only be exercised in compliance with the many rules and regulations that have been adopted through an open and democratic process.

Exhibit A

LINDA LINGLE
GOVERNOR OF HAWAII



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OFFICE OF CONSERVATION
AND COASTAL LANDS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES: 39
OFFICE OF CONSERVATION AND COASTAL LANDS

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HONOLULU, HAWAII 96809 NATURAL RESOURCES
STATE OF HAWAII

LAURA H. THIELEN
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BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCES MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAJIARA
DEPUTY DIRECTOR - WATER

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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:MC

Mike Maberry
University of Hawai'i at Mānoa
Institute for Astronomy
2680 Woodlawn Drive
Honolulu, HI 96822

NOV 17 2009

Dear Mr. Maberry,

SUBJECT: SITE RESTORATION
Pu'u Poli'ahu, Manua Kea, Hamakua, Hawai'i
TMK (3) 4-4-15:09

The Office of Conservation and Coastal Lands (OCCL) has reviewed the request from the University of Hawai'i, Institute for Astronomy, for restoration of the natural grade at an abandoned road site at Pu'u Poli'ahu on the above subject parcel. The area is in the Resource Subzone of the State Land Use Conservation District.

The unpaved road was cut in 1964 during the construction of the 12.5 inch site-testing telescope. The road was closed to vehicular traffic in 2001. The University now proposes to demolish the road and to restore the natural grade.

The project will start near the summit of the Pu'u, and work backwards down the cinder cone using an excavator with a 54-inch bucket and thumb, and a 4WD loader *extendahoe* with a 4-in-1 loader bucket and 24-inch backhoe bucket. Original material from downslope of the road and dressing material from upslope will be used to restore the 1964 contour. The total project area is less than one acre.

The proposed restoration is an identified land use pursuant to HAR §13-5-23, Identified Land Uses in the Limited Subzone, R-5 LANDSCAPING, (B-1). This use requires a Site Plan Approval from OCCL.

In conformance with Chapter 343, Hawai'i Revised Statutes (HRS), as amended, and HAR §11-200-8, EXEMPT CLASSES OF ACTIONS A.1. *Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing*, the proposed use is exempt from needing an Environmental Assessment.

After careful review of the project, and after consultation with the Division of Forestry and Wildlife and State Historic Preservation Division, the Department gives a Site Plan Approval to the demolition of the road and restoration of the natural grade at Pu'u Poli'ahu, Mauna Kea, Hamakua, Hawai'i, TMK (3) 4-4-15:9, subject to the following conditions:

- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;

- 2) The applicant, its successors and assigns, shall indemnify and hold the State of Hawai'i harmless from and against any loss, liability, claim or demand for property damage, personal injury or death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this permit or relating to or connected with the granting of this permit;
- 3) The applicant shall comply with all applicable Department of Health administrative rules;
- 4) In issuing this approval, the Department has relied on the information and data that the applicant has provided in connection with this approval application. If, subsequent to the issuance of the approval such information and data prove to be false, incomplete, or inaccurate, this approval may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
- 5) Quarantine procedures be followed when transporting heavy equipment to the site;
- 6) Should historic resources, including but not limited to human remains, be discovered during construction activities then all work in the vicinity should cease and the State Historic Preservation Division be notified;
- 7) The applicant shall comply with the terms and conditions of the Mauna Kea Comprehensive Management Plan;
- 8) Other terms and conditions as may be prescribed by the Chairperson; and
- 9) Failure to comply with any of these conditions shall render this Site Plan Approval null and void.

Please acknowledge receipt of this approval, with the above noted conditions, in the space provided below. Please sign two copies, retain one and return one copy within thirty (30) days.

Should you have any questions, please feel free to contact Michael Cain of OCCL at 587-0048.

Sincerely,


Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

Receipt acknowledged:


Applicant's Signature

11-20-09
Date

cc: Chairperson
Hawai'i District Land Office
Historic Preservation Department
DOFAW
Office of Mauna Kea Management