

*Testimony*  
**Royal Order of Kamehameha I  
And  
Mauna Kea Anaina Hou**

**Board of Land and Natural Resources  
Public Hearing  
University of Hawai'i Mauna Kea "Comprehensive" Management Plan, Sub-  
plans and other documents**

**March 25, 2010, 9:00 a.m.  
Imiloa--Astronomy Center  
Hilo**

**I. Introduction**

The last time we came before the Board, we were instructed on how to go about calling for a contested case hearing (CCH) and the DLNR staff handed out CCH petitions and many groups and individuals filed for CCH on the issue before the BLNR at the April 8-9, 2009 public hearing. But instead of delaying final decision-making on the University of Hawai'i's (UH) proposed Comprehensive Management Plan (UH CMP)--until the CCH requests had been reviewed, as the law requires, the Board voted to adopt the UH CMP and further called on the UH to produce four more plans to be submitted to BLNR--a Cultural Resources Plan, Natural Resources Plan, Public Access Plan and a Decommissioning Plan. What is actually before the Board today are six documents; the four plans plus two one page documents that outline how decision making on telescopes projects is going to be executed by the UH.

The laws requiring Board review of CCH requests prior to final decision-making is reasonable because is the only way the people's rights are protected--by providing them a way to petition the courts for redress on the denial of the request and standing issues. BLNR, you denied our CCH after you already approved the UH CMP--this was backwards.

On March 19, 2010 we filed our appeal in the Hawai'i Intermediate Court of Appeals, to have the court review, among other things, the Board's handling of our request for CCH and the Third Circuit Court's dismissal of our case. We hope that you do not repeat the same procedural errors here with regards to the CMP and sub-plans--for which we again must request a Contested Case Hearing. Our request for a CCH is a request to review the CMP and all documents, including the sub-plans presented before you at this public hearing.

Our written testimony is structured in two parts, the first part outlines the overarching problems and the second part addresses the specific problems--both of which affect our legal rights, duties and privileges. Our objections are as follows:

## II OVERARCHING PROBLEMS WITH THE UNIVERSITY'S CMP, SUB-PLANS AND OTHER DOCUMENTS

### A. Jurisdictional Confusion

**1. There is some confusion as to who is responsible for everything that occurs on Mauna Kea--this confusion is clarified simply by looking at the relevant constitutional, statutory and regulatory requirements that you--BLNR, are responsible for upholding.**

This jurisdiction confusion puts you--BLNR--in a tenuous situation, as you are forced to carry all the legal liability and costs even as you delegate your power and authority to the primary developer on Mauna Kea--The UH. The UH is a state agency but not the state agency tasked with oversight of the conservation district of Hawai'i--you BLNR, are that state agency that is responsible. The UH is the primary developer because they file Conservation District Use Applications (CDUA's)--for all the foreign and non-state astronomy developers that have built their observatories atop Mauna Kea for the last 40 years. If you are not convinced by what we are sharing regarding your legal obligations--ask your self this question--why do the courts continue to hold you legally responsible--by naming you defendant in all of the legal cases relating to Mauna Kea? It is because you are the legally responsible public agency responsible for managing and all conservation districts in the state, including Mauna Kea and therefore responsible for everything that happens on Mauna Kea. You--BLNR--have had to carry the brunt and burden of the UH and observatories actions--but this is because you have continued to delegate authority to them that legally cannot be delegated.

-There is no question the summit lands of Mauna Kea were set aside as Conservation District.

-There is no question that Haw. Rev. Stat. (HRS) 205 and 183C, assign you--BLNR--as the sole agency responsible for managing all conservation districts in the state including Mauna Kea.

There is no questions that you--BLNR--issued a lease to the UH that gave use rights but did not convey title to the UH for the lands of Mauna Kea.

-There is no question the Haw. Rev. Stat. 171, makes you responsible for collecting "fair-market" lease rent from the wealthy foreign and non-state entities--and any money collected from use of Public Trust Lands must be deposited into the general fund. The same general fund that you and the UH draw from. The UH's budget request this year alone asks for \$253 million dollars to be taken from the general fund.

-And while the UH continues to claim they have rights equal to holding actual title to the lands of Mauna Kea, and they continue to cite to the early Executive Order and Act 132, passed last year, what they have not told people is that none of the relevant laws that establish your fiduciary obligations to manage, oversee, conserve and protect

Mauna Kea for the betterment of the conditions of the Native Hawaiians and the general public have changed.

**BLNR, you have the responsibility and when you wholesale delegate your fiduciary public duties you violate *Kapa`akai v. LUC* and this necessarily affects our rights, duties and privileges.**

**B. The UH sub-plans, CMP and UH MP2000 create even more jurisdictional confusion**

All of the UH plans and documents discuss two land areas, the "UH Management Area" and the "Astronomy Precinct" for which the UH controls and astronomy development is supposed to be permitted. The problem is that neither of these land areas actually exist except on UH maps--the only land designation that exists on Mauna Kea is "Conservation"--and here again BLNR you have responsibility for overseeing and protecting conservation districts. The UH claims they put the rest of the land on Mauna Kea into a cultural and natural preserve--all of the land on Mauna Kea are conservation and therefore have always under protective status.

**The UH Master Plan 2000**

The sub-plans and other documents cite to and rely on the CMP which in turns relies on the UH MP 2000 and this creates confusion.

1. The UH MP 2000 is not in evidence now nor was it when you approved the UH CMP. So the question is, when a conflict arises between these documents which of these documents will be controlling?
2. The UH MP 2000 establishes a management structure that takes the place of BLNR on many key land-use decisions. These structures include the Office of Mauna Kea Management (OMKM), the Mauna Kea Management Board (MKMB), and the advisory groups like Kahu Ku Mauna (KKM) and the Environment committee.
3. This is to say, the people empowered to decide, direct, impose conditions and restrict Hawaiian and public access are people under the direct control of the UH. They are not selected by the people of Hawai'i nor are they even legally authorized to make these kinds of decisions on public trust and conservation lands.

**For example, in the Project Submittal Timeline (PST) the UH and it's appointed people grant to themselves the sole power and authority to classify a telescopes project or a land altering activities as "major" or "minor." What's the criteria for classifying a telescopes or land altering project "major" and "minor" projects? Even "minor" projects can involve land altering activities. Like when the UH classified bulldozing to remove the road on Pu`u Poliahu as "minor" but this involved land altering activity.**

Further, according to the UH documents if the UH decides the project is "minor" the project will be exempt from state and/or federal environmental, historic preservation and/or cultural impact review. The first purpose of any conservation district is conservation and not development--so all land altering activities in a conservation

district are major. BLNR, it is not enough that you may have some control over project the UH classifies as "major". By law you must have control over all land altering activities on Mauna Kea.

### **C. THE PEOPLE HAVE A RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT**

#### **1. Hawai'i is unique in that, environmental protections are written into our Constitutions, which reads,**

ARTICLE XI Section 9. Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

#### **2. The UH sub-plans and documents do not adequately address the hazardous waste and sewage treatment on the summit of Mauna Kea**

The Natural Resource Plan (NRP at p.3-10) relies only on the limited hazardous materials analysis used in the NASA EIS. It does not analysis the 10,000 hazardous materials documents we obtained under subpoena. They did not complete the full analysis of these documents with respect to any impacts to the hydrology of Mauna Kea. We incorporate them here by reference since BLNR you have the same copies in your departmental records.

We take exception to the NRP use of a news paper reporter opinion to minimize the impacts of mercury spills that have occurred on Mauna Kea. Page 3-33 of NRP states "the best available information suggests that while mercury spills have occurred spilled amounts occurred during mirror re-aluminizing activities and were small" (McNarie 2004). Mr. McNarie is a newspaper report not a hydrologist or hazardous waste specialist.

**For example,** in the Decommissioning Plan (DP, which is 86 pages, and was prepared for the UH's OMKM by Sustainable Resources Group Intn'l, Inc.) reveals that there is currently, no legally binding requirements that would force any of the observatories to do either decommissioning or clean up, including clean up of hazardous material, brown fields and contaminated soil. BLNR, you should read this plan carefully, because confirms our earlier claims, regarding your legal liability. (see page 2, 10 of 86)

On page 7, 15 of 86 the DP states,

#### **2.2.4 Site Abandonment**

**Although unlikely, it is possible that a sublessee could abandon an observatory in place, without deconstructing and site restoration. If this happens, UH, as the lessee to DLNR, will ultimately be will be responsible for the site through the terms of their master lease.**

This demonstrates that when you delegate your authority the taxpayers get saddled with the clean-up since they fund both the BLNR and the UH.

See also Table 3, p. 16 of 86 which reads,

Clean up of contaminated soil costs

Canada France Hawai`i claims \$6 million quote for decommissioning was given in 2004. This did not include any clean-up of contaminated soil. Planning for one year of operational costs for 'cleaning cost'. Potentially sell Waimea headquarters to fund decommissioning.

UKIRT claims their costs are confidential

Received confidential quote for decommissioning in 2006. This information is not available for public record. Facility to be removed and site restored to original condition at end of operation. The financial provision for this is maintained within the STFC (not Joint Astronomy Centre) budget and is informed by an exercise conducted every 3-5 years to secure up-to-date estimates for decommissioning.

All of the people of Hawai`i have a constitutional right to a clean and healthy environment--the waters of Mauna Kea provide drinking water for people of Hawai`i Island. If these waters or the lands are contaminated this impacts our rights duties and privileges

Native Hawaiians harvest snow, ice and waters from the summit of Mauna Kea--these waters are used for healing and ceremonial purposes, if the waters or the land are contaminated this impacts our rights duties and privileges. are impacted if these waters and are contaminated.

#### **D. No Chapter 343, Cultural Impact or 6E review**

No cultural impact statement, burial treatment plan or environmental reviews have been conducted for any of the sub-plans. These plans grant broad and sweeping powers to the UH and their hand selected people to make critical land use decisions, which impact the cultural and natural resources, including Native Hawaiian burials.

#### **E. No Carrying Capacity for Mauna Kea**

**The summit of Mauna Kea is vast but the cultural and natural resources are finite. None of the sub-plans establish the carrying capacity of the natural and cultural resources of Mauna Kea.**

There is no question the greatest threat to the cultural and natural resources of Mauna Kea is destruction of the sacred landscape--destruction of the landscape due to the astronomy industries expanding footprint. The sub-plans regulate public and Hawaiians activities and access, but they are virtually silent on how they intend actually halt the expanding industrial astronomy footprint. They plans do not consider a limit on

development with respect to the resources--can the resources handle any more development? When the resources are degraded it affects public ability to enjoy these resources and impacts Hawaiian cultural rights, which in turn impacts our rights, duties, and privileges.

**F. None of the sub-plan address the eight criteria (8 criteria) contained in BLNR rules and regulations. These are the criteria BLNR is required to apply for approving land uses/development in conservation districts**

The NASA Federal Environmental Impact Statement found 30 years of astronomy development had resulted in **adverse, significant and substantial** impact to the cultural and natural resources of Mauna Kea. The eight criteria do not allow approval of projects that have adverse impacts on the lands and resources, including those on Mauna Kea. When the resources are adversely impacted it affects public ability to enjoy these resources, it impacts Hawaiian cultural rights and therefore impacts our rights, duties, and privileges.

### III. SPECIFIC PROBLEMS

**A. The Cultural Resource Plan (CRP) was prepared for the UH's Office Of Mauna Kea Management (OMKM) by the Pacific Services Inc. (The CRP is 262 pages)**

First, we wish to acknowledge Dr. Patrick McCoy who has attempted to provide a thorough accounting of many cultural aspects relating to Mauna Kea. We understand much hard work has gone into the cultural resources plans--however, any good plan depends and the quality of data used, and herein is where our criticism will lie.

**1. The UH and the authors of the Cultural Resources Plan (CRP) seeks to water down Native Hawaiian constitutional protections**

The UH and the authors of the Cultural Resource Plan (CRP) are hard pressed to claim they will *affirmatively* protect Native Hawaiian customary and traditional rights when they don't believe any Constitutional protections for such rights even exist.

On P. 2-18 (67 of 262) the authors of the CRP (citing to State v. Hanapi), claim:

**"Although contemporary cultural practices are not afforded special protection under the Hawai'i constitution..."**

This assertion is not correct. Do the authors mean to suggest the State Constitution doesn't protect *living* Hawaiians and their associated customary and traditional cultural and religious practice? Do the authors mean to suggest only our ancestors are protected--or that the Hawaiian cultural cannot evolve?

The supreme court of Hawai'i specifically used two words (customary and traditional) to describe Native Hawaiians continued cultural and religious rights. Where one definition describes long held beliefs, belief systems and ways of seeing the world (like

honoring and extending Aloha), the other describes the way people demonstrate or express these beliefs (giving leis as an expression of Aloha).

Both may change as all cultures must evolve in order to survive, but deep rooted and long held beliefs change more slowly than do the various way of expressing these beliefs-PASH recognized the disruption to our customary and traditional practice by western contact, and sought to permit us to continue our practices. Contemporary Hawaiian practice is rooted in one or the other and/or both traditional and customary practice--and the exercise of these rights is a public trust purpose the state is obligated to protect. The customary and traditional Hawaiian cultural and religious practices relating to Mauna Kea include 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 Waiau;
- 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

**For example**, the authors of the CRP rely on State v. Hanapi to defend the UH unreasonable regulation and interference with the reasonable Hawaiian practices. The UH relies on selective case law (State v. Hanapi) while excluding the other cases relating to Native Hawaiian cultural and religious rights, such as Kapa`akai v. LUC and many others. State v. Hanpai is a case that specifically involved a question of criminal trespass, this misses the point as the rights and resources under question here involve protecting the reasonable exercise Native Hawaiian customary and traditional cultural and religious practice on Public Trust and Conservation Lands.

**To excessively regulate and/or interfere with the “reasonable” exercise of** Native Hawaiian customarily and traditionally rights, necessarily impacts our rights, duties, and privileges.

**2. The CRP allows individuals not legally authorize to regulate both Hawaiian and public uses to restrict access on Mauna Kea.** On page 108-109 the UH CRP grants UH “Rangers” broad powers to regulate the public and Hawaiians. The UH Rangers are not state enforcement officers (i.e. DOCARE) and therefore have no power to enforce state

law and/or to restrict Hawaiian and public uses and/or access on Public lands such as those of Mauna Kea.

The UH and CRP authors state all access shall be limited to ½ hours after sunrise and ½ before sunset. This means only astronomers and observatory personnel can use Mauna Kea during the night--and no one else can enjoy the beauty of a sunset or a sunrise from the summit--or have access to perform practices and ceremonies (i.e. Hawaiian practices such as solstice/equinox, navigation, and star alignment practices requires night and sunrise access).

**For example on page 2-13 of the Public Access Plan (PAP), under Guidelines and Recommendations, it states, that UH may install a gate or chain across the road at night.**

BLNR, the delegation of oversight and blocking off public and Native Hawaiian access impacts our rights, duties, and privileges.

**4. UH grants to themselves and their people the power to determine what is culturally appropriate or what is not.** The UH CRP on pages 4-18-124 of 262, states "No restrictions shall be placed on any Hawaiian cultural observance that is deemed to be appropriate by Kahu Kū Mauna and other Native Hawaiian organizations as long as the practices do not violate Chapter 6E." Here power and authority to determine what is cultural "appropriate" and what is not is held by the UH and people that sit on the Kahu Ku Mauna who are hand selected by the UH. And while the UH give some boiler pot language to include other organizations--this is another stark example of excessive control and interference by the UH. Since in the end the UH has the ultimate and final say--on what is culturally appropriate or not.

**To excessively regulate and/or interfere with the "reasonable" exercise of Native Hawaiian customarily and traditionally rights, necessarily impacts our rights, duties, and privileges.**

**6. The UH grants to themselves the right to override Native Hawaiian burial traditions.** Mauna Kea is a burial ground and has been since time immemorial. Some of the most sacred and revered Native Hawaiian ancestors are buried on the summit areas of Mauna Kea. From a broad cultural perspective most burial practice is conducted in secrecy. Yet on p. 4-19-125 of 262 CRP, the UH now claims they have to power to regulate and control burial practices, stating controls will be established to determine "where and how human ashes are being scattered in the Science Reserve."

The CRP acknowledges (p. 4-58, 164 of 262) the archeological survey work or the documenting of the historic and cultural sites on Mauna Kea has not been completed on Of the 12 or so percent that has been completed since 2005--burials are the second largest type of historic site on Mauna Kea.

**To excessively regulate and/or interfere with the "reasonable" exercise of Native Hawaiian customarily and traditionally rights, necessarily impacts our rights,**



duties, and privileges.

**7. The UH CRP omit critical information and fail to include other relevant information.** On page 2-1, 71 or 262 the UH CRP describe the placement of family stone, as a continuation of traditional practice "except"--for the fact that I "imported" my stone rather than using one from the summit. I would like the record to reflect, that my family ahu was on Mauna Kea many years before the UH formed the Kahu Ku Mauna cultural advisory group and before the UH invented "Rangers."

The CRP representations regarding my family ahu are incorrect. There are numerous traditions that involve bringing stones (including aumakua stones) to sacred places. This is well established. For example, the family (or aumakua) stones of young people dedicated to the practice of navigation were brought by their parent to be placed atop and/or near the navigational heiau--so they could connect back to their home. So it is incorrect to place an exception in your discussion of my family practice.

Furthermore, the CRP omits facts including the fact that my family ahu was desecrated on four separate occasions (even stolen and taken to the Hilo dump) by UH employees -- Mr. Hugh Grossman and Mr. Kimo Pihana both UH "Rangers" allegedly tasked with protecting our cultural sites. My family stone was found at the Hilo dump and once recovered and once returned to Mauna Kea was again taken and has never been recovered. It's interesting the CRP does not include the UH IFA apology letter (1998) to myself--regarding the UH involvement in the removal of my family ahu. In total the site has been desecrated on seven separate occasions, with the last being the destruction of a small ahu erected at the same location by myself, Keomailani Von Gogh and Ali`i Sir Paul K. Neves of the Royal Order.

The archeological survey work or the documenting of the historic and cultural sites has not been completed on Mauna Kea. So it is ever concerning that when the UH is removing cultural sites (i.e. removing ahu) what criteria are they using to decide which ahu's should be allowed to stay and which one should be taken to the Hilo dump? How was my ahu to be construed as an unreasonable activity?

My family stone was destroyed and has never been recovered, UH personnel, who believed they right and continue to have the power to dismantle and destroy cultural sites or those things they deem "inappropriate" is **excessively and/or interferes with the** "reasonable" exercise of Native Hawaiian customarily and traditionally rights, which impacts our rights, duties, and privileges.

**8. The authors of the CRP remove and/or discredits important Hawaiian genealogical information.** We object and take exception to the CRP authors discrediting the Hawai`i Loa legend relating to Mauna Kea On page (p. 2-9--58 of 262) The CRP states "Fornander included Lilinoe...as the wife of Nu`u...of the now discredited Hawai`i Loa Legend."

First, "A`ohe pau ka ike i ka halau ho`okahi-All knowledge is not taught in the same school." While different families may carry different knowledge--no one family or

appointed groups of people can speak for all. To discount our histories is to discount our genealogy as well. We would like to refer the authors to Malcolm Naea Chun's recent book titled "The History of Kanalu: Mo`oku`auhau `Elua" which recounts the repopulating of the earth after the flood--and includes at least 900 generations.

Attempting to eliminate critical cultural and historical information necessary for protecting the "reasonable" exercise of Native Hawaiian customarily and traditionally practice impacts our rights, duties, and privileges.

We reserve the right to call for a contested case hearing on the UH CMP, Sub-plans and other related documents.

BLNR we thank you very much for your time and consideration.  
In Aloha we remain,

Paul K. Neves, Royal Order of Kamehameha I,  
Kealoha Pisciotta, Mauna Kea Anaina Hou