Appendix A6. Comments Related to the CMP Evaluation

Comments from Thayne Currie

I wish to offer comments on the CMP and request a follow-up conversation/exchange with the auditor.

My background and key points:

- I have gone to Mauna Kea for the past 14 years for astronomical observations and thus have seen the state of the mountain prior to the completion of the CMP, during the early years of its implementation, and up to recent times.
- I have not shied away from pointed and public criticism of UH or the Institute for Astronomy in other contexts. For example, as an interviewee for EnVision Mauna Kea I expressed extreme frustration and anger at IfA for "a lack of courage" in direct and frank discussions with some TMT opposition leaders in order to have a future where the telescope is built on Mauna Kea in the most peaceful way possible. I still hold this opinion and believe, from a public relations standpoint, the entire IfA leadership should overhauled.
- Despite my misgivings about IfA's engagement (or lack thereof) in conflict resolution, I very strongly believe that the University of Hawai'i has done an exceptional job managing and protecting resources on Mauna Kea for at least the past decade: the subject of this audit. Their stewardship of the land is a stark contrast to the poor stewardship that some TMT protesters have on the Pu'u Huluhulu encampment. Their commitment to laws and regulations is a stark contrast to lackadaisical attitude from state and county law enforcement.
- I still understand that many community members believe that "management" of Mauna Kea is not exceptional right now. However, nearly all of the major flaws are not traced to UH. Rather, they clearly lay at the feet of the State of Hawaii and County of Hawai'i, in particular David Ige and Harry Kim.

Detailed comments:

7.1.1 Native Hawaiian Cultural Resources - While the record prior to my visits has been mixed, since the development of the CMP [2009] I believe that UH has done an excellent job preserving and protecting cultural resources.

The inventory of cultural/historical sites is exhaustive and well documented. In my years on Mauna Kea, I have seen cultural practitioners free to engage in their activities without harassment but with respect from UH. The cultural orientation program required for all Mauna Kea astronomy personnel is well presented.

UH has done well. The state of Hawaii has a poorer track record. For instance, the State of Hawaii (DOCARE) allowed Palikapu Dedman to disinter remains in Ka'u and place them on the TMT site as "evidence" that TMT was being built on a burial ground. In records gained from DLNR through a legal challenge, the Hawaii Burial Council chief deemed these acts to be "cultural terrorism". Yet Mr Dedman has never been prosecuted for these crimes.

7.1.2 Natural Resources –

As evidenced during TMT's most recent Contested Case Hearing, UH has done an exceptionally thorough job in documenting and protecting Mauna Kea's natural resources. Arthropod surveys are well thought out

and detailed. The weiku bug population has recovered. Documentation and surveys of plant species is also well thought out.

Once again, while UH has done well with protecting natural resources, the state of Hawai'i itself (i.e. state law enforcement) has a more mixed record. Specifically, after evidence showed that TMT protestors damaged plants and scattered trash near the Mauna Kea Access Road encampment, the encampment was not removed. Over a year after its first appearance, the encampment persists.

7.1.4 Astronomical Resources –

UH has done well with protecting Mauna Kea's astronomical resources. However, the *state* of Hawai'i has done exceptionally poor in protecting astronomical resources. In particular, it allowed an illegal sustained blockade of the Mauna Kea Access Road to persist for months. These illegal activities not just damaged the environment and were against the law, but they also make UH's job of protecting astronomical (and other) resources harder.

State and county law enforcement need to fairly enforce the law.

7.2.2. – Permitting and Enforcement

UH has done well with educating workers on cultural and natural resources on Mauna Kea. OMKM rangers are very thorough and necessarily strict with enforcing laws ranging from protecting resources to speeding.

Again, it is not UH but the state and county law enforcement itself (e.g. DOCARE, HCPD) who have failed to live up to their job of enforcing the law. The state and county of Hawai'i have allowed an illegal blockade of the Mauna Kea Access Road to persist. Previously, they allowed an illegal encampment across the street from the Visitor's Center to persist. Both without permits and both damaging the environment. It is more difficult to have compliance with laws on the mountain when law enforcement agencies simply reforce to enforce compliance.

7.3.1 – Infrastructure and Maintenance

I have gone to Mauna Kea now for 14 years and have seen the inside and immediate outside of observatories many times, though I am most familiar with Subaru. The observatories are very clean, tidy structures with little tolerance for clutter or waste, ranging between just "clean and tidy" to "doctor's surgery room"-level clean. Waste disposal is done in an environmentally responsible way.

The COVID-19 pandemic has also provided a way for the observatories to further reduce their footprint by reducing the number of people at the summit. Keck and Subaru have observing software that allows observing to be carried out remotely at an astronomer's home, eliminating even the need for a flight to Hawai'i for observing.

Where practical, observatories should consider steps to go to zero-waste facilities after 2033 much like TMT. To offset the increased traffic to the mountain for waste gathering, observatories should also consider moving more operations remotely such as is routinely done with Keck.

7.3.3 Decommissioning –

The process for decommissioning CSO and Hoku'kea is well planned but is exceedingly, frustratingly slow. Decommissioning that is not just carried out but done in a visible and timely manner builds trust within the community, especially those who are skeptical of the extent of astronomy development on Mauna Kea. For instance, all materials related to CSO that do not clearly require an EA/EIS, permit, or other legal proceedings (e.g. computers, hardware, perhaps even telescope components) should not just be removed briskly but must be visibly removed. I again applaud UH's decommissioning and site restoration plans but they only hurt themselves by not being very public about the execution of said plans.

Suggestions

- a. On whether a full site restoration or restoration-above-ground is needed for a particular decommissioning- UH should follow guidance from Kahu Ku Mauna and consult organizations such as the Hawaii Burial Council, OHA, and Royal Order of Kamehameha. Where these groups express a range of opinions, UH should err on the side of seeking fuller restoration.
- b. To build greater trust, UH needs to be far more public about steps it has already taken in decommissioning. If tangible steps have already been taken -- e.g. if observatory components have already been removed -- then the public should know.
- c. UH should seek guidance from Kahu Ku Mauna and Hawaiian cultural organizations on whether blessing ceremonies like those carried out prior to telescope construction would be appropriate for decommissioning.

Comments from State Senator Kurt Fevella

ALOHA e Consultant Dawn Chang of Ku'iwalu Consulting – Please have this email become part of the record for these Virtual Community Meetings. MUCH MAHALO! Here are my mana'o: Under the CMP, the U.H. has NOT been a good caretaker of the aina of Mauna Kea ever since the first telescope was proposed and built there 50 years ago in 1970.

-U.H. should not be allowed to continue. At this point in history, Mauna Kea should be returned to its original pristine state and managed, instead, by a Native Hawaiian non-profit or a consortium of Native Hawaiian non-profits dedicated to educating the public about the unique Native Hawaiian traditions of Mauna Kea. I am against any further desecration and destruction of our beloved Mauna Kea aina by the Thirty Meter Telescope.

-The dismal record of mismanagement of Mauna Kea has been fully documented since State audits finally began, belatedly, in the 1990s. For example, waste from the operations was allowed to accumulate for years -- until removed only after an audit revealed such waste. The U.H., as manager of the CMP, should never have allowed this to happen to the sacred aina. In addition, the U.H., through the CMP, has not provided adequate access -- and, in fact, has tried to minimize access as Native Hawaiians have tried to honor their cultural traditions of Mauna Kea on Mauna Kea itself. -Further, the modern man-made developments on Mauna Kea have not benefited the people of the Big Island and of the State of Hawaii in terms of permanent jobs. Only a handful of Hawaii-resident professionals have been hired. Most of the permanent jobs have gone to scientists who have moved to Hawaii from outside this State -So, Mauna Kea should now be returned to -- to use an academic phrase -- status quo ante bellum -- meaning: should be returned to its original pristine condition. The Mauna Kea Science Reserve and CMP should be abolished by law. As noted above, a Native Hawaiian non-profit or a group of Native Hawaiian non-profits educating the public as to the Native Hawaiian traditions of Mauna Kea should take the place of the U.H. as manager of Mauna Kea. All modern man-made structures, including telescopes, should be removed. I will propose this in the next Legislature's Session. If the Mauna Kea Science Reserve and CMP were proposed today, the Reserve and CMP would never be created. They were, however, proposed back in the late 1960s -- before the Native Hawaiian Renaissance began in the 1970s -- spurred by the Hokule'a and the Protect Kaho'olawe 'Ohana -- strongly revived interest of us Native Hawaiian people -- the kanaka maoli -- in our traditional cultural practices and traditions. These include the following traditions, from ancient times when the Native Hawaiians first arrived on the Big Island and the other Islands: The original name of Mauna Kea was Mauna O Wakea, where the first progenitors of the Native Hawaiians -- the female Papa and the male

Wakea – still reside. Also residing at the summit of Mauna Kea is Poli'ahu, the goddess of ice, cold, and snow – giving Mauna Kea its modern-era English-translation name, "White Mountain." Further, the summit of Mauna Kea is the source of live-sustaining water for the entire Big Island of Hawaii – a fact recognized from ancient times of the arrival of the first Native Hawaiians until now, the 21st Century. In ancient Hawaii, this water source was protected not only by the aforesaid Poli'ahu but also Lilinoe, the goddess of the mist; Waiau, the goddess of the natural underground reservoir at the summit; and Kahoupokane, the goddess of the natural water springs on Mauna Kea and the rest of the Big Island. These Native Hawaiian deities will breathe freely again and, in the view of us kanaka maoli, will live again once Mauna Kea is returned to its original pristine condition. That time is now! IMUA!!!

Aloha and Respectfully Submitted by State Senator Kurt Fevella, District 19 (Ewa Beach, Ocean Pointe, Ewa by Gentry, Iroquois Point, part of Ewa Villages). State Capitol, Room 415. Phone: (808)586-6360. senfevella@capitol.hawaii.gov.

Comments from E. Kalani Flores and Flores-Case 'Ohana



E ala ē me ke aloha a me ka 'oia'i'o. Awaken with aloha and truth.

FR: E. Kalani Flores, Flores-Case 'Ohana

RE: Written Comments for Virtual Meeting (October 14, 2020) - Mauna Kea Comprehensive Management Plan

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CONCLUSIONS OF LAW, AND DECISION ORDER [DOC. NO. 671]

SUMMARY OF COMMENTS

The State Board of Land and Natural Resources (BLNR), Department of Land and Natural Resources (DLNR), and University of Hawai'i (UH) have failed their affirmative duty and legal obligations to protect the natural and cultural resources, public land trust, and rights of the public and Kanaka Maoli (aka Native Hawaiians) connected with Mauna Kea.

Notwithstanding four state audits and community members and organizations, including Kanaka Maoli, expressing concern and providing testimony dating back to the 1970's about the adverse impacts and threats to Mauna Kea, the State and the UH have continuously neglected their legal duties resulting in over 50 years of mismanaging this revered and sacred mountain. Instead, they have prioritized astronomical development at the expense of properly caring for Mauna Kea's natural and cultural resources. In addition, they have taken adversary positions and actions against Kanaka Maoli cultural practitioners which have resulted in detrimental impacts upon Kanaka Maoli and their cultural practices and traditions.

Thorough examination of the UH's own documents disclose that,

From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse; the impacts would continue to be substantial, significant, and adverse with the consideration of the Project and other reasonably foreseeable future actions. (TMT FEIS, p. S-8)

The goal of the Mauna Kea Comprehensive Management Plan (CMP) was to provide the UH, specifically the Office of Maunakea Management (OMKM), with management actions to effectively and efficiently manage the uses and activities on Mauna Kea in a way that will preserve and protect its cultural and natural resources. Even with the CMP being approved by BLNR in 2009 along with subsequently approved sub-plans, why has the UH continued to impose substantial, significant, and adverse impacts upon the natural and cultural resources of Mauna Kea? And why has the State's oversight been non-existent and significant aspects of UH's mismanagement been allowed to continue?

It's very evident that UH's role to advance astronomy on Mauna Kea, conflicts with its ability to properly manage these environmentally and culturally sensitive resources of a public lands trust. The existing process has been politically driven to push through astronomical development on Mauna Kea by systematically ignoring community and Kanaka Maoli concerns resulting in the overdevelopment of this conservation district. Conclusively, the authority and management of the lands of Mauna Kea which are part of the public land trust, also considered government lands of the Kingdom of Hawai'i, should be turned over to a Native Hawaiian entity other than the UH which has an inherent conflict of interest.

BLNR/DLNR, representing the State as the Lessor, has the sole legal obligation, duty, and responsibility to appropriately manage and protect these conservation and public lands of Mauna Kea. BLNR/DLNR has improperly delegated those duties and responsibilities resulting in non-compliance with the BLNR and UH BOR approved plans for Mauna Kea. The failure of BLNR/DLNR to assume their appropriate role as Lessor has resulted in substantial, adverse, and significant impacts to the natural, cultural, and historic resources on Mauna Kea. This matter has been previously brought to the attention of the BLNR/DLNR for several decades as noted below in the Hawaii State Auditor's Report No. 05-13 (p. 30):

The lack of oversight by the department allows the university and its sublessees unchecked discretion on the use of Mauna Kea and leaves cultural and natural resources at risk for further damage.

BLNR/DLNR has a long history and pattern of not following their own rules set forth for the management of conservation lands. Likewise, BLNR/DLNR has not enforced UH's compliance with the CMP, sub-plans, and other master plans for Mauna Kea.

SPECIFIC COMMENTS

I. BLNR/DLNR has failed its statutory and constitutional obligations

BLNR/DLNR, failed to meet their statutory and constitutional obligations under *Ka Pa'akai o Ka'aina v. Land Use Commission (Ka Pa'akai)* 94 Hawaii 31, 7 P.3d 1068 (2000) to preserve and protect traditional and customary rights of Native Hawaiians. Prior to approving a permit or other actions pertaining to the culturally sensitive lands of Mauna Kea, BLNR/DLNR is required to complete an assessment/analysis independent of the developer or applicant.

This matter was brought directly to the attention of BLNR/DLNR since the first contested case hearing for CDUA HA-3568 pertaining to the Thirty Meter Telescope (TMT) project as well as at subsequent BLNR meetings through both oral and written testimony regarding the Mauna Kea master lease and TMT sublease.

In the *Ka Pa'akai* decision, the Hawaii Supreme Court articulated an analytical framework for the State's obligation to protect Native Hawaiian traditional and customary rights. The court ruled:

(1) the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;

- (2) agencies are obligated to make an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians; and.
- (3) the independent assessment must include the three factors (A, B, and C) listed below, otherwise known as the "Ka Pa'akai framework."
 - A) the identity and scope if "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
 - B) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and
 - C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

(Ho'ohana Aku, a Ho'ōla Aku at 14-22, Exhibit B.02d)

State agencies such as DLNR and BLNR as its executive board who are responsible for protecting traditional and customary Native Hawaiian rights must conduct detailed inquiries into the impacts on those rights to ensure that proposed uses of land and water resources are pursued in a culturally appropriate way. Agencies must make these inquiries independent of the developer or applicant. This means that agencies may not delegate this constitutional responsibility to others by, for example, directing the applicant to independently attempt to protect traditional and customary rights. Instead, agencies must actively research and consider the cultural, historical and natural resources of a subject property as they relate to Native Hawaiian rights, when determining what restrictions should be placed on land or water use.

Furthermore, UH reaffirms that the afore-mentioned *Ka Pa'akai* analysis is required as referenced in their own management plan; "Further, this analysis should be applied before an action is approved and begun, and the analysis should be completed by the State and not delegated by the State to the entity applying for approval." (CMP-Public Access Plan at 2-29).

BLNR/DLNR was obligated to complete an independent *Ka Pa'akai* analysis **prior** to approving projects such as the TMT project. However, the DLNR-Office of Conservation and Coastal Lands Administrator, as a subpoena witness, testified to the fact that DLNR had **not** completed a *Ka Pa'akai* analysis due lack of staff time and resources.²

In an attempt to cover up this fact that an independent *Ka Pa'akai* analysis was never done for the public lands of Mauna Kea, the State along with the attorneys representing University of

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¹ Public Access Plan for the UH Management Areas on Mauna Kea, A Sub-plan of the Mauna Kea Comprehensive Management Plan (Jan. 2010)

² Samuel Lemmo Testimony (Tr. 2/27/17, V.41) during the second contested case hearing regarding TMT's CDUA HA-3568

Hawai'i at Hilo (UHH) and TMT International Observatory LLC (TIO) falsely asserted that a *Ka Pa'akai* analysis could "be conducted by an agency within the context of a contested case hearing". It's very evident that only a select few Native Hawaiian cultural practitioners would have the time and resources to engage in a contested case hearing. What about the numerous other Native Hawaiians who were excluded from this process? How would BLNR/DLNR be able to analyze and determine the impacts upon their cultural practices? Without conducting an independent *Ka Pa'akai* analysis, the State is **not** capable of doing this. Thus, this is another attempt to circumvent statutory and constitutional obligations that are intended to preserve and protect traditional and customary rights of Native Hawaiians.

As of this date, BLNR/DLNR has failed to conduct any consultations or solicit any information from Native Hawaiian cultural practitioners associated with Mauna Kea. Furthermore, the last compilation of information and interviews with Native Hawaiians was done over 16 years ago between 1998-2005 by Kepā Maly. These were included in reports contracted by the UH. Subsequent reports have only regurgitated outdated information from these earlier accounts.

Thus, the BLNR/DLNR should be conducting an updated and independent cultural assessment including consultations with Native Hawaiians to identify traditional and customary rights and practices in order to be in compliance with the *Ka Pa'akai* decision. The BLNR/DLNR's failure to identify and assess customarily and traditionally exercised rights and practices of Native Hawaiians associated with Mauna Kea on public lands prior to being fully developed has resulted in the State not being capable of protecting such rights and practices if they're unknown to them.

II. The State has adopted a procedure of rigging the public review process

Based upon my personal experience of being engaged in the public review process, the system is substantially rigged in favor of issuing permits to corporations, businesses, and individuals who have significant political support. The permit process is heavily biased in favor of the permit applicant, not in the interest of the public or in the protection of the unique natural and cultural resources of these islands of Hawai'i. This bias and aspects of manipulation exist throughout the public review process. Public hearings appear to be just a formality as the decisions regarding applications for permits are clearly decided beforehand and/or are discussed in private under the guise of "executive session." Despite community members participating in board meetings and hearings and providing relevant

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³ See BLNR's and UHH and TIO's Findings of Fact, Conclusions of Law and Decision and Order, from the second contested case hearing regarding TMT's CDUA HA-3568

testimony, such comments are systematically dismissed or ignored when the outcome of a project has already been decided.

When decisions are made to approve politically endorsed projects known to be detrimental and/or would cause significant adverse impacts, the burden is then forced upon community members to request a contested case hearing and/or initiate litigation.⁴ It is known that most community members don't have the time, resources, legal expertise, and/or funds to pursue these options. Should someone engage in a contested case hearing, it will be discovered that the bias is also embedded at this level especially when the State agency who approves/disapproves a permit, also selects the hearing officer for the hearing. After the experience of participating in two contested case hearings pertaining to CDUA HA-3568 for the proposed TMT project, it was very evident that this process was rigged. In particular, when the hearing officers for both of these contested case hearings duplicated the applicant (UHH) and project developer's (TMT/TIO) findings of facts/conclusion of law/final decision (FOF-COL-DO) in its entirety and totally dismissed every fact and conclusion of law submitted by petitioners and other parties. The hearing officer's FOF-COL-DO for the first contested case hearing duplicated UHH's document in its entirety, including spelling and grammar errors. This was also done by the hearing officer for the second contested case hearing that lasted 44 days over the course of seven months. Despite hearing live testimony from 71 witnesses, generating over 50 volumes of transcripts totaling over 12,200 transcript pages, and including an enormous volume of about 800 exhibits and over 700 documents filed, the hearing officer's FOF-COL-DO was reduplicated identically from irrelevant, inaccurate, incomplete, unsubstantiated, and misleading information copied predominantly from UHH and TIO's Joint FOF-COL-DO. It's very evident these hearing officers did not provide a balanced and equitable perspective of these hearings by omitting and ignoring substantial, relevant, persuasive, and substantiated information highlighting the deficiencies, incompleteness, and inaccuracies contained in the permit application. This occurred despite having credible witnesses who were considered qualified experts in their field and whose testimonies were unopposed and unrebutted by any of the witnesses called by UHH and/or TIO's attorneys. By excluding such relevant and material testimony from the hearing officer's final decision, the most complete and relevant information needed by the decision-makers and subsequent court appeals has basically been suppressed.

As noted in the second contest hearing, it was very apparent that the hearing officer relied solely upon the inaccurate, incomplete, irrelevant, unsubstantiated and misleading information asserted

⁴ A contested case hearing is a quasi-judicial administrative hearing governed by Hawai'i state

law. The purpose of these hearings is to provide the decision-makers with the most complete and relevant information they need to make a proper decision.

by the UHH-TIO's counsel as presented in their joint document. In addition, the hearing officer failed to examine the entire record and failed to give full consideration of all the voluminous legal and factual arguments and materials presented in the contested case hearing including the evidence presented by other parties in this contested case hearing. This in itself violated the due process of law for the Flores-Case 'Ohana as well as other parties.

Attached are copies of a few examples of the Flores-Case 'Ohana's briefs along with written direct testimony from the second contested case hearing provided as an example of what was explicitly excluded in this rigged review process. Copies of the briefs and documents from this second contested case hearing from five others petitioners, Mauna Kea Anaina Hou and Kealoha Pisciotta, Clarence Kauakahi Ching, Paul K. Neves, Deborah J. Ward, and Kahea: The Hawaiian Environmental Alliance as well as other parties can be found in DLNR's online Mauna Kea - Document Library.

How can the appearance of impropriety be removed from this public review process? Firstly, board members of the BLNR should be elected by eligible voters instead of being appointed by the governor. Also, hearing officers should be randomly selected by the respective judicial circuit court from a list of qualified individuals.

III. UH is NOT in compliance with its Mauna Kea management plans

Before BLNR approves permits or any other actions within the Mauna Kea Science Reserve (MKSR), the UH must be in compliance with the BLNR approved management plans and conditions of the Conservation District rules. Furthermore, BLNR/DLNR has the statutory obligation to ensure that UH is in compliance with these plans. Likewise, the BLNR is required to complete a "comprehensive review" prior to approving permits and associated management plans under HAR § 13-5-30. However, BLNR's approval of the TMT CDUP HA-3568 clearly demonstrated the historical pattern of approving projects despite the UH not being in compliance with its Mauna Kea management plans.

Highlighted below are examples of the UH's non-compliance with the Mauna Kea CMP, associated sub-plans, and master plans.

1. Firstly, UH/OMKM's non-compliance with the CMP management actions that are identified as "CMP Monitoring, Evaluating and Updating" is very evident as noted below:

MEU-1: UH/OMKM have failed to inform the public of "results of management activities in a timely manner."

MEU-2: UH/OMKM have failed to regularly review and update the CMP and sub-plans that were required in order to be in compliance with the rules of the Conservation District. The CMP was submitted to and approved by the BLNR on April 9, 2009. In addition, it's been over a decade and UH/OMKM have failed to complete the five-year major review of this plan that was due by April 2014 as stipulated in the CMP. Section 7.4.2 of the CMP outlines the requirements and process for monitoring, evaluating, and updating this plan as noted below.

Regular monitoring and evaluation of the CMP is needed to determine if management actions are effective over time and are meeting management needs, and to ensure that the best possible protection is afforded Mauna Kea's resources.

Monitoring and evaluation of the effectiveness of the CMP should occur annually, and an annual progress report should be prepared. A major review and revision of the CMP should occur every five years, using information contained in the annual reports. Five-year evaluation and revision should include consultation with federal and state agencies and the local community, to inform stakeholders on program progress, and to gather input on changes or additions to management activities. The CMP must also be updated to comply with any requirements or conditions imposed by the BLNR on the CMP upon acceptance of the plan. (CMP at 7-64)

The requirement for UH to conduct a "major review every five years" is further reiterated in the CMP Implementation Plan (CMP IP) (2010) as outlined below:

4.2.2 Five-Year Management Outcome Analysis and CMP Revision The OMKM program should be subjected to a major review every five years, and the CMP should be revised, as necessary. This process should involve input from State and Federal agencies and the public. (CMP IP at 17).

	CMP MONITORING, EVALUATION AND UPDAT	ES				
Manager	Management					
MEU-1	Establish a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner.	омкм				
MEU-2	Conduct regular updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about resources.	омкм				
MEU-3	Revise and update planning documents, including the master plan, leases, and subleases, so that they will clearly assign roles and responsibilities for managing Mauna Kea and reflect stewardship matters resolved with DLNR.	ОМКМ				

	CMP MONITORING, EVALUATION	AND UPDATES	,	 	 	
Managen	nent					
MEU-1	Establish a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner.	Immediate				
MEU-2 Conduct regular updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about resources.		Short-term / As needed				
MEU-3	Revise and update planning documents, including the master plan, leases, and subleases, so that they will clearly assign roles and responsibilities for managing Mauna Kea and reflect stewardship matters resolved with DLNR.	As needed				

2010 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP (pp. B-12, C-12)

	CMP MONITORING, EVALUATION AND UPDATES						
Manager	nent						
MEU-1	Establish a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner.	Ongoing	Reports are provided at the publicly held Mauna Kea Management Board Meeting. DLNR is represented on the Mauna Kea Management Board.	NRMP 4.1.3.3 PAP 6.4, 6.6, 7			
MEU-2	Conduct regular updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about the resources.	Short-Term	Five-year CMP revision interval is 2014. Revision process initiated by OMKM for eventual submission to BLNR.	NRMP 5.2 CRMP 5.5 PAP 7			
MEU-3	Revise and update planning documents, including the master plan, leases, and subleases, so that they will clearly assign roles and responsibilities for managing Mauna Kea and reflect stewardship matters resolved with DLNR.	In Progress	Updates to the Master lease have been initiated.	PAP 7			

2015 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP

	MONITORING, EVLUATION AND UPDATES						
MEU-1	Establish a reporting system to ensure that the MKMB, DLNR, and the public are informed of results of management activities in a timely manner.	Ongoing	Reports are provided at the publicly held MKMB Meetings.				
MEU-2	Conduct regular updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about the resources.	Ongoing	Five-year CMP revision interval was initiated in 2014. EnVision Maunakea and administrative rules will play a role in the updating the CMP.				
MEU-3	Revise and update planning documents, including the master plan, leases, and subleases, so that they will clearly assign roles and responsibilities for managing Mauna Kea and reflect stewardship matters resolved with DLNR.	Ongoing	UH is preparing an EIS for a new land authorization for UH's lands on Maunakea. A Prep Notice was prepared and published in February 2018. UH is reviewing comments and is considering them in the development of the draft. The 2000 Master Plan is being replaced by a new version, with preparation ongoing. The 2009 CMP is being updated, with preparation of progress report and DLNR review ongoing.				

2020 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP

Furthermore, BLNR/DLNR have failed to enforce UH's compliance with these significant management actions of the CMP even though these actions were identified in OMKM's Annual Plans that have been submitted to BLNR since 2010.

2. UH has failed to implement and complete several significant components of these management action plans that required immediate implementation. The CMP identified specific management actions in order to protect the natural and cultural resources on Mauna Kea.

OMKM was tasked with directly overseeing and implementing the management actions identified in the CMP Implementation Plan (2010). However, there were several significant management actions that were originally listed in the 2009 timeframe as *Immediate* (1-3 years) and *Short-term* (4-6 years) that have not yet been implemented and accomplished.

Subsequently, OMKM changed their reporting methods assigned to the progress status definitions. This resulted in having the existing CMP status reports being submitted annually to BLNR for review without any definitive dates listed for the implementation of these management actions that in many cases are considered crucial in the protection of Mauna Kea's natural and cultural resources. In addition, the information included in the CMP status reports have been inaccurate or incomplete at times.

Furthermore, a thorough review and analysis of these CMP status reports by BLNR/DLNR has basically <u>not</u> occurred to ensure a timely and appropriate implementation of the CMP

management actions. Records will clearly demonstrate that DLNR staff never completed any follow-up reports to the BLNR for those CMP status reports submitted between 2010-2017. It wasn't until January 2018, after the second contested case hearing, that DLNR-OCCL staff actually did a briefing with the Board regarding Mauna Kea. DLNR-OCCL did generate a staff report with general Mauna Kea background information to accompany the CMP status reports for 2018 and 2019. However, these two staff reports failed to articulate any type of review or analysis of these CMP status reports.⁵

One such example of these incomplete management actions is *FLU-2* in which UH was required to develop "land use zones" in the Astronomy Precinct based on updated cultural and natural resource information that would "delineate areas where future land use will not be allowed and areas where future land use will be allowed". The following description outlines the significance and goal of completing management action **FLU-2 Land use zones**:

Any potential future observatories will be located inside the Astronomy Precinct. The goal of this process is to refine telescope siting areas defined in the 2000 Master Plan based on updated cultural and natural resource information (see Section 7.1.1 and Section 7.1.2). Land use zones will be developed that will delineate areas where future land use will not be allowed and areas where future land use will be allowed, but where compliance with prerequisite studies or analyses prior to approval of a CDUP, will be required. When assessing proposed infrastructure expansion, additional consideration will be given to the location of current infrastructure and previously disturbed areas (see Section 7.3.1). New land uses should be located close to existing infrastructure or previously disturbed areas, to reduce impacts on undisturbed areas and to minimize unnecessary damage to geological features. As stated in the 2000 Master Plan, all major undeveloped cinder cones and their intervening areas will be protected from future development by astronomical or other interests.

These include the following pu'u: Ala, Hoaka, Kūkahau'ula, Līlīnoe, Māhoe, Mākanaka, Poepoe, Poli'ahu, and Ula. (CMP at 7-57 to 7-58)

This is a prime example of a management action that was initially identified for "**Immediate**" implementation, but was later changed to "**Ongoing**." Later in the BLNR 2015 Annual Report submitted by the OMKM, *FLU-2* was still not implemented as required. As noted, "*This was originally listed for Immediate implementation. However, this task will require additional data gathered from baseline surveys of the resources.*" Then in the BLNR 2020 Annual Report, it

⁵ See <u>OCCL - Maunakea Management</u>

clearly exhibits that this management action still wasn't completed. Instead, there's only a convoluted comment implying that UH/OMKM doesn't intend on completing this significant aspect of the CMP.

	CONSIDERATION OF FUTURE LAND USE							
Facility F	Facility Planning Guidelines							
FLU-1	Follow design guidelines presented in the 2000 Master Plan.	As needed						
FLU-2	Develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate areas where future land use will not be allowed and areas where							

2010 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP

		Implementation Schedule	G THE BUILT ENVIRONMENT Comments FUTURE LAND USE	Sub Plans
Facility P	lanning Guidelines			
FLU-1	Follow design guidelines presented in the 2000 Master Plan.	Ongoing	The Design Review Process, which incorporated the 2000 Master Plan's design guidelines, are being used in the review of the Thirty Meter Telescope project	NRMP 5.1.1
FLU-2	Develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of Conservation District Use Permit.	Short-Term	This was originally listed for Immediate implementation. However, this task will require additional data gathered from baseline surveys of the resources.	NRMP 4.3.3.1

2015 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP

	COMPONENT PLAN: MANAGING THE BUILT ENVIRONMENT Implementation					
		Status	Comments			
		CONSIDERING F	UTURE LAND USE			
Facility Pla	anning Guidelines					
FLU-1	Follow design guidelines presented in the 2000 Master Plan.	Ongoing	The Design Review Process, which incorporated the 2000 Master Plan's design guidelines, were used in the review of the Thirty Meter Telescope project			
FLU-2	Develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of Conservation District Use Permit.	Ongoing	Areas previously mapped as off-limits for future land use through plans such as the Master Plan or CMP are used to limit any proposed activity. UH President Lassner confirmed that TMT was the last telescope to be built on undisturbed land. Resource data must be part of any proposal for major land use requests. HAR 13-5 allows for different types of land uses with each having its own requirements for preparing a land use application. Thus a single pre-prepared map cannot possibly address all potential scenarios.			

2020 Annual Plan to the BLNR, Status of the Implementation of the Mauna Kea CMP

In order to protect the natural and cultural resources on Mauna Kea, UH should be mandated to implement these incomplete requirements and other significant management actions dating back to 2009 prior to approval of any new CDUPs within this Conservation District. Correspondingly, BLNR/DLNR should assume their prime responsibility to require UH's compliance with these management actions in a timely manner.

3. UH has failed to implement and complete the significant CMP/CRMP management action that required regular consultation and engagement with Native Hawaiians to protect their rights and practices associated with Mauna Kea.

OMKM/UH have drastically failed to engage and consult with the broader Native Hawaiian community beyond Kahu Kū Mauna and the Hawaiian Culture Committee (which is either inactive or has been terminated). Guidance into this matter is outlined in the CMP and CRMP (p. 5-9 to 5-10) as such (emphasis underlined):

5.3 ON-GOING CONSULTATION WITH THE KAHU KU MAUNA COUNCIL AND THE HAWAIIAN CULTURE COMMITTEE

Preservation planning recognizes the need to continue the process of consulting with the major stakeholders. A mechanism for accomplishing this goal with the astronomy community already exists in the form of regular meetings with OMKM. Periodic reviews of the CRMP would involve all of the stakeholders. In view of all of the unresolved issues pertaining to cultural practices, it is the Native Hawaiian community that needs to be consulted on a frequent basis. Some of this is presently occurring with the Kahu Kū Mauna Council and the Hawaiian Culture Committee, but it will be broadened to include more of the Hawaiian community.

Management Actions

It is recommended that OMKM continue to consult with Native Hawaiian organizations and individuals on existing policies and proposed new policies. Two specific recommendations are presented in Table 5-3.

Table 5.3. Management Actions for On-Going Consultation with Native Hawaiians.

- Develop a mechanism to assure that Kahu Kū Mauna is consulted on individual development projects.
- Provide a list of individuals, families, or organizations who should be consulted when individual development projects are proposed or when other issues arise that may be a concern.

One benefit of compiling a list of organizations and persons that should be consulted is that such a list could accommodate those who are concerned about a particular place or area but do not wish to disclose its location or the nature of its significance. They could appear on the roster as wanting to be consulted about any planned activity or issue occurring in the general vicinity and then decide if they wish to act on any concerns they have.

According to the contested case hearing testimony of the OMKM Director, a list of Native Hawaiian individuals, families, organizations and cultural practitioners to be consulted still

hadn't been finalized as of Dec. 2016 despite this action item being identified with the CMP priority of High to Medium. What's most troubling is that this management action of compiling a list doesn't take over seven years to finalize. Without such a list, the OMKM/UH is incapable of consulting and engaging with the broader Native Hawaiian community.

4. UH's ineffective management and unlawful actions of its own employees and individuals under their jurisdiction have resulted in adverse impacts upon Mauna Kea's natural and cultural resources. UH personnel and OMKM staff have failed to follow the existing rules and protocols as outlined by the CMP.

Case-in-point, UH personnel (i.e. OMKM, MKSS, etc.) have been directly involved in the destruction and desecration of cultural resources on Mauna a Wākea. In 2013, the archaeological monitor for the geotechnical boring at the proposed TMT site identified cultural items consisting of "the erection of two small upright boulders and placement of a ti leaf bracelet." It was also reported that these "two upright stones were later dislodged by OMKM staff." During the second contested hearing for CDUP HA-3568, OMKM staff member testified under cross examination that he was the individual identified in this monitoring report who was involved with this incident. He testified further that he had intentionally knocked down an upright stone associated with Native Hawaiian cultural practices that was near the northern boundary of the proposed TMT site on the northern plateau and that he did not consult with Kahu Kū Mauna prior to taking this action. At that time, he was the cultural monitor working on behalf of OMKM at the site. In addition, he disclosed that Mauna Kea Rangers remove ho 'okupu and items left on ahu even though they do not have the authority to do so. Also, he verified that he was not very familiar with the rules and policies pertaining to the protection of Native Hawaiian cultural practices and resources even though he was initially hired as the cultural advisor to OMKM in 2012.

⁶ Archaeological Monitoring Report: Geotechnical Boring for the Proposed Thirty Meter Telescope (TMT) in the Astronomy Precinct of Mauna Kea, October 2013. Prepared by: Genevieve L. Glennon B.A. and Robert B. Rechtman, Ph.D. (p. 12)

⁷ Wally Ishibashi Testimony. 11/16/16, Vol. 9 at 135-175.



Figure 13. Newly placed upright boulders and ti leaf bracelet at the northern boundary of the TMT area.

In 2015, a Mauna Kea Support Services (MKSS) employee bulldozed an *ahu* (altar) named Ka Uakoko associated with Native Hawaiian cultural practices without any authorization or consultation with the Kahu Kū Mauna cultural advisory group. As it was reported by Hawai'i News Now, "They dismantled our altar without the right protocol, without even having a cultural person there to walk them through it the right way -- they just grabbed the bulldozer and tossed it off to the side. So yeah, it's very hurtful," stated JoJo Henderson. "There's cultural protocols that need to be put into effect. There's administrative protocols and they're not following those either. Everytime the chancellor or the president of the university goes out into the community and say that Hawaiian culture 'means something. It is very important. It is significant'. It obviously is not," said Tiffnie Kakalia, the Kahu Kū Mauna Vice Chair. Kakalia says this incident is just the latest in a string of failures by the Office of Maunakea Management and UH to consult with Kahu Kū Mauna. "The fact of the matter is the Hawaiian community is not being heard and not being valued, although it is being said that we are," said Kakalia.



Ka Uakoko *ahu* before it was bulldozed off the side of the embankment.

These incidents are only two recent examples that have been documented in detail. It is known that other incidents involving the destruction, desecration, or dismantling of cultural resources associated with Native Hawaiian practices have occurred through the actions of UH personnel.

UH should adopt, implement, and enforce rules and procedures for the conduct of their staff and personnel as well as astronomy personnel operating within the Mauna Kea lands and resources under their management.

5. UH has failed to follow the concepts, objectives, and standards set forth in the 2000 Mauna Kea Science Reserve Master Plan (2000 Master Plan). Moreover, BLNR/DLNR failed to ensure that UH was in compliance with this Master Plan.

The importance of the implementation of design guidelines is referenced in both the 2000 Master Plan and CMP.

It is important to maintain compatibility and consistency of recommendations between the 2000 Master Plan and the CMP, to ensure that identified facility needs and designs are consistent with the overarching management plan put forth in the CMP (see Section 7.2.1).

There are two aspects of facility planning location and design that need to be considered in order to protect cultural and natural resources. Location refers to the siting of facilities,

while design refers to characteristics of the physical structure, and both of these must be directed at minimizing impacts to resources. Section XI of the 2000 Master Plan provides design guidelines to direct development for both renovations of existing facilities and new construction in a manner that would integrate development into the summit environment. Topics addressed include: facility siting, scale, height and width, color, surface texture and material, roofs, fences, roadways and parking. (CMP at 7-56)

The proposed siting of the TMT observatory was clearly not in compliance with the Design Guidelines and criteria stipulated in the 2000 Master Plan (pp. IX 22-23 as referenced below) and also referenced in the CMP (p 7-56).

- 5. Minimum visual impact from significant cultural areas. Views from the pu'u and archaeological sites will be respected in the siting of future facilities. The location of new facilities will avoid interference with the visual connections between the major pu'u and the shrine complexes.
- 6. Avoid or minimize views from Waimea, Honoka'a and Hilo. Sites for proposed new facilities will maximize the use of the existing topography to shield views from the downslope communities. Prominent sites along the ridges or pu'u will not be selected for new development of astronomy or other research and education facilities.
- 7. Close to roads and existing infrastructure. Sites for proposed new development will be selected close to the existing roadways to minimize the amount of disturbance to the natural terrain. Utilities and communications service to new sites will be extended along the existing roadway routes to minimize disturbance.

The non-compliance of the Design Guidelines stipulated in the 2000 Master Plan is noted in the following areas; 5) Due to the proposed placement and the massive size of the TMT observatory amongst the shrine complexes on the northern plateau, it will definitely interfere with the visual connections between the major pu'u such as Pu'u Kūkahau'ula and Pu'u Poliahu and the hundreds of shrines at this particular elevation. The CDUA and survey reports have failed to address this impact. 6) Likewise, from Waimea, Honoka'a, and other areas, views of the TMT observatory will be another prominent eyesore and 'pimple' on this sacred landscape. A large population of Native Hawaiians as well as other residents and visitors in these areas will be impacted with this adverse visual impact. 7) Instead of using the existing roads within the SMA area, this project intends to cut another new road segment and installation of underground utilities through the side of Pu'u Kūkahau'ula, a wēkiu bug habitat, Traditional Cultural Property, and designated State Historic Property (SIHP #50-10-23-21438).

In addition, it's very apparent that the use of the aluminum-like finish for the TMT dome did not adhere to the Design Guidelines in the 2000 Master Plan (pp. XI-6) as noted below. If built, it would not blend into the landscape, but would instead be more reflective and visible from distances near and afar

Surfaces, Textures and Material: Surfaces, textures and material used for construction in the Science Reserve should seek to blend the facility into the landscape. Selection criteria are as follows:

• As much as possible, surfaces should be non-reflective in the visible spectrum to minimize glare and visibility from distant areas.

Furthermore, the failure to follow these design guidelines should have resulted in the TMT project design not being approved if the 2000 Master Plan was actually being followed:

Plans found to be inconsistent with the Master Plan concepts and objectives shall be rejected. Major variations from development standards shall also be rejected. (MP XI-9)

Consequently, UH's proposed plans for the TMT project should have been rejected as mandated by the 2000 Master Plan and CMP guidelines. Despite these deficiencies and non-compliance issues being brought to the attention of the hearing officers during the contested case hearings and directly to BLNR/DLNR through testimony and witnesses, this project was 'rubber-stamped' for approval. This is another example of the lack of any accountability in this review process.

IV. Adverse impacts upon the sacred piko and resources of Mauna a Wākea

The actions of the BLNR/DLNR and UH to permit and advance the overdevelopment of astronomical facilities within an environmentally and culturally sensitive landscape has caused adverse impacts and irreparable harm upon the sacred *piko* as well as the natural and cultural resources of Mauna a Wākea.

Mauna a Wākea is the inoa (name) reverberated by the ancestral guardians connected to this sacred mountain. In English, it literally means, "Mountain of Wākea". It's within this name that unfolds the understanding of the significance of this mountain. Wākea (Sky Father) is personified in the atmosphere and heavenly realm that envelops Papahānaumoku (Mother Earth). As such, this mountain, unlike any other in the Pacific, pierces above the clouds into the realm of Wākea. It is the tallest mountain in the world over 33,000 feet when measured from the ocean

floor to its summit. This mountain is also referred to as "Mauna a Kea", "Mauna Kea", or just "Mauna".

According to 'ike kupuna, indigenous knowledge and ancestral insight, the top of Mauna a Wākea is one of the three most sacred and significant places on Hawai'i Island. It is indeed a sacred piko. It is difficult to explain to those who have forgotten or lack an understanding of why such a place as Mauna a Wākea is sacred. The insight and knowledge of Mauna a Wākea as being kapu (sacred) was known from the remote past of the ancient ones. It is for this reason that amongst the countless ancestors of Kanaka Maoli and numerous ali'i (chiefly) dynasties that lived in these islands, they never built any large *heiau* (temples) on the summit in this realm that is considered *kapu*. This is the reason that none of the Mauna Kea archaeological surveys have ever located a traditional man-made structure on the summit. In the times of our ancestors, prior to structures being constructed, one would consult with individuals such as kahuna kuhikuhi pu'uone who specialized in protocols associated with the selection of such sites. In addition, consultation and direct communication between intermediaries and those of the ancestral realm associated with those places was an essential and integral part of the process so as not to create a physical and/or spiritual disturbance, disconnection, or imbalance between man and his akua, and between man and his environment. We charge that this process of consultation with those recognized as the ancestral akua, kupua, and kupuna of Mauna a Wākea was not done by the BLNR/DLNR, UH, or any astronomy projects built on the mountain.

There are several references in reports such as the Mauna Kea CMP and 2000 Master Plan acknowledging the sacred attributes of the landscape of Mauna a Wākea. A sampling of references from these reports that substantiate the sacredness of this mountain are copied below:

The physical prominence of Mauna Kea as well as its stationing nearest to the heavens holds a spiritual significance for the Hawaiian people, a significance that can be expressed in likening the mountain to a sacred altar. (CMP, p 1-3)

For some Hawaiians, Mauna Kea is so revered that there is no desire to ascend it, no desire to trespass on what is considered sacred space. Simply viewing the tower, the mountain, from afar, both affirms its presence, and reaffirms the sense of connection with both place and personage. For this reason, many Hawaiians feel that activities on Mauna Kea that lead to visible alterations of the landscape not only have a significant effect on the mountain itself, but also have a damaging effect on everything and everyone that is physically, genealogically, spiritually, and culturally tied to Mauna Kea. (CMP, p 1-4)

The ancient saying "Mauna Kea kuahiwi ku ha 'o i ka mālie" (Mauna Kea is the astonishing mountain that stands in the calm) (Pukui 1983: No. 2147), expresses the universal feeling experienced by all who come in contact with this special place. Standing tall over the Island of Hawai'i, Mauna Kea is home to vast physical, natural and cultural resources (Figure I-1). From early adze makers to modern day astronomers, Mauna Kea

has long been a special place for work, worship, and reflection. For native Hawaiians, both ancient and modern, the feelings for Mauna Kea go beyond wonder and astonishment, to the recognition of the mountain as a sacred domain. These profound feelings of reverence are expressed in the saying: "O Mauna Kea ko kākou kuahiwi la 'a' (Mauna Kea, our sacred mountain). As with other ethnic cultures throughout the world, early Polynesians believed their highest points of land were the most sacred; and Mauna Kea having the highest mountain top in all of Pacific Polynesia, was considered the most sacred place of all. Standing tall over the island if Hawai'i, Mauna Kea was host to early Hawai'ian traditions which included religious practices, study of the heavens, and tool making in the Keanakāko'i adze quarry. (2000 Master Plan, p I-1)

The greatest obstacle in the protection of sacred places is a lack of understanding of why these places are significant and so special. It has been forgotten when humans interacted with the natural forces and energies of this Earth. Those who have forgotten are products of their social, educational, and/or religious systems. From the modern mindset, most people can recognize the significance of a church building, appreciate the majestic and sacred architecture of a cathedral or synagogue, or be in awe of ancient pyramid and temple structures. However, it seems more difficult for modern minds to recognize that places in nature which bear no special markings or buildings are also considered sacred.

There are countless mountains around the world considered sacred by cultures past and present. These holy mountains are also keystones to indigenous religions that regarded these areas as the abodes of certain gods, goddesses, deities, divine beings, natural forces, and spirits. In addition, pilgrimages to sacred mountains have been taking place for thousands of years. Whether it is Mauna a Wākea, Mount Fuji in Japan, Mount Shasta in California, or Mount Sagarmāthā (Everest) in Nepal, their sacredness has resonated from centuries past.



Mauna a Wākea, Hawaiʻi https://www.usgs.gov/volcanoes/mauna-kea/mauna-kea-will-erupt-again



 $Mount\ Fuji,\ Japan \\ (http://images.pictureshunt.com/pics/m/mount_fuji_scenery-12120.jpg)$

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 $Mount\ Shasta,\ California \\ (http://www.vibrakeys.com/wordpress/wp-content/uploads/2010/06/\ MountShasta-HolyMountain.jpg)$



 $Mount\ Sagarm\bar{a}th\bar{a}\ (Everest)$ (http://www.blogmonde.com/wp-content/uploads/2011/05/Everest-Base-Camp.jpg)

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Sacred mountains such as Mauna a Wākea, due to their geological composition and extreme height, are a *piko* (portal) that allows for the transference of energy from one source to another. This understanding is reflected in the traditional Hawaiian concept of the "triple *piko*" of a person. In essence, the piko on the summit of the mountain is comparable to the *piko* located on the tops of one's head at the fontanel. This perspective is also described in the Cultural Anchor of the CMP. [an abbreviated description is recopied below]

Mauna Kea is "*ka piko o ka moku*," which means "Mauna Kea is the navel of the island." Understanding the word piko may give a deeper understanding of why Mauna Kea is the piko, or navel, of the island.

In terms of traditional Hawaiian anatomy, three piko can be found. The fontanel is the piko through which the spirit enters into the body. During infancy, this piko is sometimes "fed" to ensure that the piko becomes firm against spiritual vulnerability. For this reason, the head is a very sacred part of the anatomy of the Hawai'i native

The second piko is the navel. This piko is the physical reminder that we descend from a very long line of women. The care of this piko ensured two things: the healthy function of the child and the certification that the child is a product of a particular land base.

The final piko is the genitalia. The genitalia are the physical instruments that enable human life to continue. The health of all piko ensures that the life of the native person will rest on an axis of spirituality, genealogy and progeny.

When we understand the three piko of the human anatomy, we may begin to understand how they manifest in Mauna Kea. Mauna Kea as the fontanel requires a pristine environment free of any spiritual obstructions.

It is this *piko* on top of the summit where energies and life forces flow from the Creator and higher dimensions, through the realm of Wākea, and then into the Earth. Likewise, the *piko* on top of one's head where life force energies from the Creator and higher dimensions flows into one's body. On 4 March 2011, a photograph was taken from Waimea by Kehaulani Marshall showing a portal opening above the *piko* of Mauna a Wākea when such an event was occurring.

However, when the *piko* of the summit is obstructed with the physical excavation of the landscape, asphalt and cement pavement, metal posts implanted in ground, buildings, and construction, it curtails, restricts, or prevents this pure flow of energy. Thus, the development on the summit is causing adverse impacts and significant obstructions to the life force energies that flow into these islands through this *piko*.



Portal opening above the *piko* of Mauna a Wākea - Photo by Kehaulani Marshall

In addition, Mauna a Wākea anchors a very complex multi-dimensional over-fold, and does so through its very conscious geometric grid, complex frequencies, and unique electromagnetic field. The summit is also an area where vortexes of energy occur.

Vortexes are swirling eddies of electrical and magnetic energies. They are a function of the gravity and electromagnetic grids. Based upon the natural energy pattern due to the earth's polarity, vortexes generally spin counterclockwise above the equator and clockwise below it. Vortexes distribute energy outward in what is termed electrical vortexes, and inward in what is termed magnetic vortexes. Some function as both. Mauna a Wākea is an example of an inward and outward vortex-portal complex.

However, the electrical substation, power lines, and high voltage current that runs to the top of the summit for the existing telescopes is interfering and disturbing the electromagnetic fields and vortexes that naturally occur on the mountain..

Also, Mauna a Wākea also resonates in harmonic oscillation with Mount Shasta in California, Mount Fuji in Japan, and other specific mountains around the world. As a result of this energetic connection between these mountains, these other areas are also impacted by what occurs on Mauna a Wākea.

V. Adverse impacts upon ancestral akua, kupua, and kupuna

The actions of the BLNR/DLNR and UH to permit and advance the overdevelopment of astronomical facilities within an environmentally and culturally sensitive landscape has caused adverse impacts and irreparable harm upon those *akua*, *kupua*, and *kupuna* of Mauna a Wākea.

The term "akua" is being used in this document in a broad cultural context to be inclusive of gods, goddesses, deities, devas, nature spirits, divine beings, and natural forces. The ancestral akua that were recognized by our kupuna are those primarily embodied in the natural forces of nature. Likewise, they could take multiple forms (kinolau) such as animals, plants, and natural elements. Some were identified with names and some were not. The use of akua as a common noun is distinct and different when used as "Akua" or "Ke Akua" in the proper name form which typically refers to the Creator or God. The term "kupua" is used in this document in reference to other entities or supernatural beings who also have the ability to assume different forms.

Individuals with a western mindset and a lack of understanding might choose to dismiss the existence of *akua* and *kupua* completely as mythological folklore. While others might choose to dismiss their existence due to personal religious persuasions and/or social upbringings. The Earth, Universe, and Cosmos is teeming with life in many variant forms, forms vastly different from our own. Yet the consciousness inside is of the same Creator, same creative divinity as our own. It is narrow minded to believe that the human physical form is the only form of life.

There are several ancestral *akua* connected to Mauna a Wākea that have been recounted by our *kupuna* in their oral traditions and subsequently articulated in literature. Some of these accounts are referenced in the document, *Mauna Kea - Ka Piko Kaulana O Ka 'Āina* (2005), prepared by Kepā and Onaona Maly of Kumu Pono Associates, LLC for the OMKM. Also, in several documents, there are various references regarding the ancestral *akua* along with their connections to the sacred landscape on the summit of this mountain as noted below:

As a result of his exhaustive studies, Kepā Maly identified many traditional cultural properties on Mauna Kea. He documented ongoing traditional cultural practices associated with several of these. It is a sacred landscape that provides a connection, genealogically, physically, and spiritually to ancestral realms. The mythical creation of Mauna Kea is part of a Hawaiian cosmology that establishes a relationship between all things animate and inanimate. (CMP, p 1-2)

Native Hawaiian traditions state that ancestral akua (gods, goddesses, deities) reside within the mountain summit area. These personages are embodied within the Mauna Kea landscape – they are believed to be physically manifested in earthly form as various pu'u and as the waters of Waiau. Because these akua are connected to the Mauna Kea

landscape in Hawaiian genealogies, and because elders and akua are revered and looked to for spiritual guidance in Hawaiian culture, Mauna Kea is considered a sacred place. (CMP p 5-3)

The origins of Maunakea and its central place in Hawaiian genealogy and cultural geography are told in mele (poems, chants) and mo'olelo (stories, traditions). Native Hawaiian traditions state that ancestral akua (gods, goddesses, deities) reside within the mountain summit area. Several natural features in the summit region are named for, or associated with, Hawaiian akua; these associations indicate the importance of Maunakea as a sacred landscape. Each part of the mountain contributes to the integrity of the overall cultural, historical, and spiritual setting (TMT FEIS, p 3-11).

Members of the Flores-Case 'Ohana have connected with some of the *akua*, *kupua*, and *kupuna* of Mauna a Wākea through genealogical ties as well as through customary and traditional practices. Through '*ike kupuna*, indigenous knowledge and ancestral insight, the following information and understanding were provided about those affiliated with this sacred mountain.

(Guardian - name not disclosed at this time), a guardian force of nature from the depths of Mauna a Wākea came forth to provide the following insight. [Note: It was felt as though it was a male presence and so his gender is referenced as such. Such beings, in truth are often not of either gender, but rather espouse certain frequencial attributes that humans define as male or female.] In a ceremony conducted on the summit on 8 May 2011, I personally witnessed the presence of this guardian. He came from the very depths of the mountain, way below the crust of the ocean floor, one who carries the ancient knowledge. He stated, "I come from the depths, the ancient *pōhaku*." He is the guardian of the bottom, deep below in the earth. He was filled with joy that we were there to listen. However, he was also filled with sadness because the observatories on her (the mountain's) shoulders and breasts were causing such desecration. He was aware of her feelings because they are all connected. Other guardians on the mountain have been awakened and are on alert regarding proposed development. They are all in full communication with the Creator who can see all things through Wākea.

He declared that those who are planning to cause further desecration on Mauna a Wākea are "ignorant and lost". In addition, he explicitly stated a message to them, "You are responsible for what you do not know and you will be held responsible." He also mentioned that everyone is accountable for their own actions. Furthermore, he emphasized that, "You don't know what is coming when you do this, you have been warned." He is the one who has the power to shake the earth. Such a decision is not his, but would come from the Creator if needed to restore balance on the mountain.

(Guardian – rough English translation of name, "The one who sees far into the heavens"), an ancestral guardian connected to a $p\bar{o}haku$ and previously unidentified site within the vicinity of

the proposed TMT site. This guardian explained the significance of many of the sites on the northern plateau as they are interconnected like a large star map. Individuals from certain family lines were guided to come up to the mountain during certain times of the year to reestablish, construct, align, activate, and/or maintain these sites. The TMT construction activities of excavating, grading, and rock-crushing in the area have already caused a great disturbance amongst these sites and guardians. This ancestral guardian also reiterated some of the significant impacts that would result from the building of this telescope and the consequences of attempting to pursue this project on this sacred landscape.

Poliahu, "ka wahine i ke kapa hau" (the woman in the mantle of snow), is at times referred to as an akua wahine. She is a part of Mauna a Wākea and creates the rain, snow, hail, and sleet on this mountain. She serves as caretaker and guardian for the mountain and grants permission to certain spirits coming to the mountain. Poliahu has two attendants assisting her, Lilinoe and Lihau. She is a part of the landscape features with a highly evolved consciousness. Both oral and written native Hawaiian traditional accounts have documented her connection to Mauna a Wākea. I have been present at times when she has shared her concerns about the existing and proposed further desecration on the mountain. She has explicitly remarked that she does not want the existing and any new observatories on this sacred mountain. They are blocking the *piko* on the summit. If she is dislocated due to the new telescope, it might create new problems and affect the weather patterns on the mountain as well as other areas on the island.



Poliahu by Herb Kawainui Kane

Mo'oinanea, *mo'o wahine* and guardian of Lake Waiau, is at times referred to as a *kupua*. She is described in several traditional accounts and has genealogical ties to the Mauna a Wākea. Firstly, it is difficult to explain or define who Mo'oinanea is for those who may lack an understanding. The existence of her as a *mo'o wahine* goes beyond anyone's personal belief, cultural attributes, or religious persuasion. We contend that just because other individuals are not able grasp this understanding, do not easily dismiss Mo'oinanea's existence on Mauna a Wākea. Mo'oinanea is a revered and significant figure in both oral and written native Hawaiian traditional accounts that have documented her connection to Mauna a Wākea. She is able to communicate with individuals who have the cultural sensitivity and 'gift' to see, hear, and interact with her.

There are numerous traditional and family accounts describing the episodes, sightings, and interactions with *mo* 'o in these islands of Hawai'i. They are often known to reside in freshwater tributaries, ponds, coastal areas, forests, and mountain zones. Their presence is not only documented in Hawai'i, but their existence has been documented throughout the ages and by cultures around the world. These benevolent and fully conscious beings exist, and are as much a part of our Earth as humanity. They possess supreme divine intelligence and are extremely advanced. They are protectors of humanity and of the planet and are often closely aligned to the earth's electromagnetic and crystalline energies and fresh waters. These *mo* 'o have been on the Earth since the beginning. They are indeed physical. They exist primarily in a higher parallel dimension, but do also bodily exist in our physical world. They do reproduce, and the ones on our planet in the present, were all spawned and birthed on the earth. Likewise, they do have physical life spans and also have their own hierarchy and distinct genealogies.

I have been present at times when Moʻoinanea has shared her personal accounts about herself and her family as well as described the type of cultural traditions our *kupuna* of old practiced on the Mauna a Wākea including pilgrimages to the top of the mountain. In addition, she has expressed her concerns about the existing observatories and proposed further desecration on the mountain. She has shared that the existing observatories have created obstructions and hazards for those who reside on Mauna a Wākea. Likewise, the proposed new observatory will adversely impact Moʻoinanea and others who dwell on the summit. When these guardians and caretakers of the natural elements on Mauna a Wākea are negatively impacted by human's actions, it will also impact the natural elements that are integrally connected to them. Consequently, these actions will also impact us as humans as the natural elements and environment start to shift and change. There is an imbalance and disharmony that has been created on this sacred *piko*.



Mo'oinanea by Diana LaRose

Kupuna, ancestors, including ali'i of the past, are also on Mauna a Wākea serving in different capacities or having come to this mountain under different circumstances. Some serve as guardians of various sites and places on the mountain. Others had ventured up to this sacred mountain during various different periods of time. Members of the Flores-Case 'Ohana have encountered and engaged with these kupuna on several occasions through our cultural practices, ceremonies, and visits on the mountain. One such group that we had encountered had fled up towards the top of their sacred mountain at the time after western contact (circa mid-1800's) when foreign diseases and epidemics swept through the villages along the Kona coast. Many of them were being persecuted by foreigners, particularly missionaries, during this time when many were dying by the hundreds. So for those who could, they fled up to the mountain to die in the realm closer to Wākea. One kupuna recounted this account as she was the last one alive amongst her family and others in her group. She sang to them as they each had passed away until she was the very last one to pass. There were literally hundreds of them who had passed during these times and their remains are scattered around the mountain depending upon where they ended up.

VI. Adverse impacts upon cultural resources and historic sites

The actions of the BLNR/DLNR and UH to permit and advance the overdevelopment of astronomical facilities within an environmentally and culturally sensitive landscape has caused adverse impacts and irreparable harm upon those cultural resources and historic sites connected to Kanaka Maoli and their practices.

The BLNR/DLNR and UH have failed to follow the CMP and Cultural Resources Management Plan (CRMP), a sub-plan of the CMP, which provided OMKM with the tools it needs to meet its cultural resource management responsibilities. It begins by identifying key management objectives and goals that can be used in making budget decisions, assessing staffing needs, and setting up contracts for specialized services.

Likewise, BLNR/DLNR and UH have failed to follow the major objectives of the 2000 Master Plan including, but not limited to those noted below:

- promoting a greater understanding of the rich cultural heritage of Mauna Kea;
- preserving and managing cultural resources in a sustainable manner so that future generations will be able share in and contribute to a better understanding of the historic properties that exist in the summit region, which is of major cultural significance to Hawaiians;
- maintaining opportunities for Native Hawaiians to engage in cultural and religious practices; and
- preserving the cultural landscape for the benefit of cultural practitioners, researchers, recreationalists, and other users.

Archaeologists contracted by the UH and astronomy projects to conduct archaeological inventory surveys and reports on Mauna a Wākea have failed to consult directly with cultural practitioners. As a result, these surveys have often misidentified historic sites, misinterpreted cultural practices, distorted Kanaka Maoli knowledge, and excluded traditional cultural properties. Furthermore, these surveys and reports tend to regurgitate information in past reports that were at times incomplete or inaccurate.

In addition, the State Historic Preservation Division has historically failed to protect the cultural resources and historic sites on Mauna a Wākea and have failed to consult with cultural practitioners during their reviews of these inventory surveys and reports.

In 1997, SHPD instituted a process of recording locations termed "find spots," which are cultural resources that are either obviously modern features or features that cannot be classified with any level of confidence as historic sites because of their uncertain age and function. This action has put the status and protection of many actual historic and cultural sites in limbo.

Also, the BLNR/DLNR has failed to complete the CMP management action **CR-2** to finalize the application of designating Mauna Kea as a Traditional Cultural Property (TCP) under the National and State Historic Registers of Historic Places. The entire mountain region of Mauna Kea from approximately the 6,000 foot elevation to the summit, including the Mauna Kea Science Reserve, was identified in the Cultural Impact Assessment [CIA] Study (1999) as a potential TCP.

VII. Adverse impacts upon Kanaka Maoli customary and traditional practices

The actions of the BLNR/DLNR and UH to permit and advance the overdevelopment of astronomical facilities within an environmentally and culturally sensitive landscape has caused adverse impacts and irreparable harm upon those cultural sites and our traditional and customary Kanaka Maoli cultural, spiritual, and religious practices.

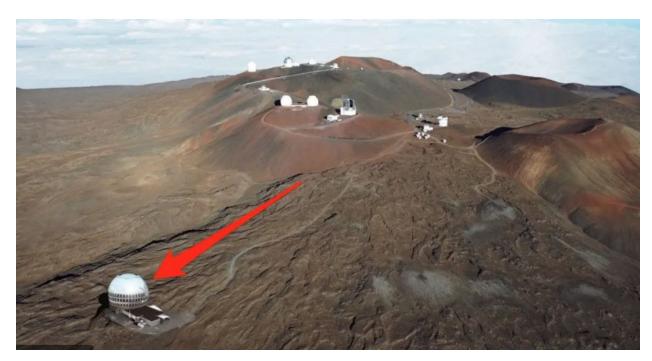
These practices are directly connected to the cultural sites and landscape of Mauna a Wākea which is further affirmed in the 2000 Master Plan:

All aspects of Hawaiian life were steeped in ritual. For the Hawaiian people, spiritual beliefs, cultural practices and all facets of daily life were intricately bound to the natural landscape of the islands. (p. V-2)

Thus, the destruction and desecration of cultural sites and the landscape, directly diminishes or extinguishes the associated practices. Cultural practitioners have been literally pushed off the summit (13,290 ft./4,050 m. elevation) of Mauna a Wākea due to the existing astronomy development. The once open space and view corridors on Kūkahauʻula have been visually impaired by the existing telescopes and observatories. A cultural practitioner's view planes and vantage points are blocked by several of these imposing structures. In addition, the constant noise and buzzing sounds from the electrical components of these observatories have impaired the once serene and peaceful environment.



Likewise, the proposed TMT project would forcefully push cultural practitioners even further below the 11,000 ft. elevation level on the northern plateau to find an unobstructed view and undisturbed area on this side of Mauna a Wākea as shown in the rendering below.



A rendering of TMT in its proposed location. https://www.businessinsider.com/thirty-meter-telescope-hawaii-protests-2015-10

Furthermore, the TMT project proposes to be built in an undeveloped area amongst the hundreds of the documented and undocumented ahu (shrines) and cultural sites. The concentration and placement of these sites on this northern plateau was not randomly done by our *kupuna*. They

were erected and established with specific intentions. Many of these ahu are interconnected similar to a star map. Embedded within these *ahu* and stones is '*ike kupuna* and ancestral knowledge along with ancestral guardians. As such, construction of the TMT observatory in this vicinity would sever our past, present, and future generational connections with the '*ike kupuna* and ancestral knowledge implanted at these sites. With the understanding that many of these sites serve as depositories of ancient wisdom as well as multi-dimensional portals, the massive extent of destruction proposed in this culturally sensitive landscape would also adversely impact our Native Hawaiian customary and traditional practices that are still connected to these sites. Once this landscape is excavated by the proposed TMT construction, it can never be repaired and restored. Many of these sites are interconnected and the detrimental impact on those in the vicinity of the proposed TMT site would also negatively impact the other sites and ancestral guardians connected to them.

On the northern plateau, many of the sites have both visual and energetic alignments with each other as well as with other noted natural features such as the surrounding pu'u. Due to the massive height and size of the TMT observatory, if built it would cause significant visual, physical, and energetic obstructions amongst these sites as well as adversely impact Kanaka Maoli in a similar way.

Other detriments to Kanaka Maoli practices on Mauna a Wākea was the extent and manner in which policies were developed by the UH to further curtail, extinguish, and criminalize such practices. These policies were developed without adequate consultation with cultural practitioners and adopted with a 'rubber-stamped' process for approval. Specific aspects of these policies are unjustified and are considered a grievous attack against Kanaka Maoli practices. Examples of these policies are listed below:

Policy for CR-5

The Placement and Removal of Offerings

- 1. Offerings shall not be placed on existing historic properties, roadways, pathways or existing structures or areas used for operations.
- 2. Offerings including food will be removed.
- 3. Any offerings that present health, safety or environmental concerns issue shall be removed
- 4. All applicable Hawaii state laws and regulations shall apply.

Comments re *Policy for CR-5*: This policy that prevents the placement of offerings on "existing" historic properties" as well as excluding food offerings contradicts fundamental customary and traditional practices of Kanaka Maoli. HAR §13-276-2 defines a "historic property" as "any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old." As such, this policy prevents the placement of an offering on or at Kūkahau'ula which is actually a historic property and also identified as a Traditional Cultural Property (SIHP No. 50-10-23- 21438) occupying an area of approximately 463 acres. The irony to this policy is that the existing telescopes were allowed to be placed on the environmentally and culturally sensitive Kūkahau'ula, yet a cultural practitioner would be prevented from placing a ho 'okupu (offering) on this same Kūkahau'ula due to this policy. Likewise, a cultural practitioner would be prevented from placing a ho 'okupu (offering) on any of the existing ahu (shrines) if they've been individually identified as a historic property. Moreover, the entire Mauna Kea Science Reserve is within the Mauna Kea Summit Region Historic District (SIHP No.50-10-23-26869) which was determined eligible for listing on the National Register of Historic Places. Since this historic district is also considered a "historic property", this policy prevents the placement of an offering anywhere in the MKSR. [see Figures 2-4 and 2-6 of the Cultural Resources Management Plan, a sub-plan of the CMP]

Policy for CR-6

Visitation and use of ancient shrines for Hawaiian Cultural observances is allowed on Maunakea lands managed, on a case by case basis, by the University of Hawaii provided the use does not violate Chapter §6E of the Hawaii Revised Statutes. The Office of Maunakea Management shall be notified a week prior to any such visit. Notification can be in writing or via email. See Office of Maunakea Management website for contact information. If there is a group of more than 10 people who wish to visit an ancient shrine they must also submit a Special Request form found on the Mauna Kea Visitor's Center website at

http://www.ifa.hawaii.edu/info/vis/visiting-maunakea/research-group-visits-and-military/group-visits.html in addition to the notification of the Office of Mauna Kea Management.

Comments re *Policy for CR-5*: This policy unnecessarily and unjustly singles-out Kanaka Maoli cultural practitioners in having to notify and justify their practices to the OMKM. What guidelines will be applied and who is qualified in the OMKM to determine "*on a case-by-case basis*" if a visitation to a cultural shrine is appropriate or not? Policy for CR-5 already prevents the placement of offerings at these shrines, this policy further curtails access to these cultural sites. Also, there isn't any justification for cultural practitioners being required to submit a Special Request form for a group of more than 10 people visiting a cultural site. In comparison, a

Special Request form isn't required for a similar sized group visiting any *heiau* or other cultural shrines within the State Parks.

Policy for CR-7

Policy for erecting and maintaining new cultural features such as, for example, shrines, alters or ahu:

- 1. Any Native Hawaiian who would like to construct a new cultural feature shall, prior to any construction or preparation for construction, register the proposed site of the new cultural feature with the OMKM. OMKM will keep a record of the location and contact information of the responsible party. Responsible party means the person who registers the proposed site.
- 2. New cultural features shall be placed out of plain sight, or a minimum of 100 yards from existing roads and in designated areas to discourage copycat behavior. Plain sight includes areas close to or adjacent to roads, parking areas, driveways or within 100 yards of buildings.
- 3. New cultural features shall not be placed in any areas used for operations.
- 4. Any and all new cultural features shall not be placed in any area that would create a risk to public health, safety or the environment.
- 5. New cultural features shall be placed at least 200 feet from existing historic sites.
- 6. New cultural features shall be made of natural materials from the surrounding area, but shall not be removed from existing historical sites. Removal, disturbance or damage to historic sites is a violation of state law, HRS §6E-11.
- 7. New cultural features are to be maintained by the responsible party.
- 8. Upon observation that the structure has been disturbed or damaged, OMKM shall contact the responsible party.
- 9. If the new cultural feature is constructed from or includes in its composition materials that are not from the surrounding area it will be removed and the incongruous materials disposed of.
- 10. New cultural features that have not been registered with the OMKM prior to construction may be subject to removal.

11. All applicable Hawaii State laws and regulations shall apply.

Comments re *Policy for CR-7*: This policy basically eliminates the established customary and traditional practice of Kanaka Maoli erecting an ahu (shrine) on Mauna a Wākea that is evidenced by the hundreds of other shrines erected on this sacred mountain by our kupuna. Part 2 of this policy stipulates that these "cultural features shall be placed out of plain sight, or a minimum of 100 yards from existing roads" and further states, "Plain sight includes areas close to or adjacent to roads, parking areas, driveways or within 100 yards of buildings." The irony to this policy is that the existing telescopes were allowed to be visible from all parts of the summit (including from the other parts of the island), yet a cultural practitioner would be prevented from erecting an ahu anywhere visible from "plain sight" or "a minimum of 100 yards from existing roads". Based upon these guidelines, practically the entire summit and all along the roadways would be restricted. In addition, Part 5 prevents ahu from being "placed at least 200 feet from existing historic sites." It is very apparent that these policy stipulations were developed without consultation with cultural practitioners associated with the cultural practice of building and consecrating ahu. In a similar manner as done by our kupuna, the placement and site selection for an *ahu* is not just randomly done. They are erected and established with specific intentions and might be interconnected with existing sites regardless if they are historic or are in plain sight.

In the development of these policies, UH has misconstrued Hawaii State Constitution, Article XII, Section 7 which states: "The State reaffirms and shall protect all rights, 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. [Add Const Con 1978 and election Nov 7, 1978]"

In respect to XII, Section 7, UH erroneously implied, "While traditional and cultural rights are recognized as an important aspect of our political heritage the Hawaii State Constitution also tasks the state with the regulation of these rights."

Comments re this statement: Firstly, these rights are an important aspect of our **cultural heritage** vs "our political heritage." The State is actually **tasked with protecting these rights** vs. "the regulation of these rights."

The UH's process for developing and approving these policies lacked any adequate consultation with the Kanaka Maoli community, Hawaiian organizations, and cultural practitioners. Furthermore, when comments were provided at meetings, they were systematically ignored. Consequently, the manner in which these policies were developed

are reflective of the adversary actions the OMKM has enacted against cultural practitioners and the failure to protect the practices and rights of Kanaka Maoli.

CONCLUDING REMARKS

Members of the Flores-Case 'Ohana have participated at all levels of the public review process pertaining to Mauna a Wākea such as attending board meetings and hearings, submitting testimony, entering into contested case hearings, and filing legal appeals. Based upon our personal experience, it's very evident that the State (inclusive of the Governor, Attorney General Office, BLNR, DLNR, UH, BOR, OMKM, their contracted law firms, hearing officers, other agencies and individuals) have taken very adversary positions and actions against Kanaka Maoli cultural practitioners which have resulted in detrimental impacts upon our cultural practices and traditions associated with Mauna a Wākea. Likewise, the State has systematically ignored community and Kanaka Maoli concerns dating back to the 1970's regarding the overdevelopment of the environmentally and culturally sensitive landscape of this sacred mountain.

The comments presented in this document highlight significant deficiencies and lack of accountability in this review process. Comments put forth are specific to the items presented and were not intended as an assessment of all aspects of the CMP and associated sub-plans as there was insufficient time and resources to do so.

The true aspect of stewardship entrusted to the BLNR/DLNR as well as the UH for our precious and public lands in conservation districts is to ensure that these significant areas are acknowledged, preserved for present and future generations, and not systematically destroyed. In essence, the astronomy development on the summit of Mauna a Wākea has been conducted as a commercial enterprise under the guise of science, educational, and economic opportunities that has resulted in the cumulative impacts upon the natural and cultural resources as being substantial, significant, and adverse due to over 50 years of mismanagement.

Everyone is responsible and accountable for their intentions and their actions in the *wao akua*, this sacred space known to our *kupuna* as Mauna a Wākea. On this *mauna*, one must interact in a manner that is **pono**, upright in the presence of the ancestral connection that binds us through space and time to teachings, traditions and lifeways that have continued because of the *kuleana* that has been passed down from one generation to the next.

It is important to remember that many peoples, including Kanaka Maoli, have a reverential relationship with the living Earth as our 'Mother' or 'Grandmother'. The cultural perspective of

mālama 'āina and *aloha 'āina*, to care for the land and nature with sincere love and respect, is at the heart of Kanaka Maoli cultural traditions. For those who are listening, what is our *'āina* trying to tell us during these times of change?

Kanaka Maoli and their allies throughout Hawai'i and the world have risen like a mighty wave and are committed to protecting their beloved Mauna a Wākea from further desecration and destruction. May these documented experiences from the Ala Hulu Kupuna assist all in understanding the Kanaka Maoli's deep connection to their sacred mountain.

<u>Like a Mighty Wave</u>; <u>Maunakea: Sacred Mountain, Sacred Conduct</u>; <u>We Are Mauna Kea</u> <u>Sacred Mountain: Mauna Kea</u>; <u>Standing Above the Clouds</u>; <u>Mauna Kea – Temple Under Siege</u>;



I ka Piko o ke Aloha

Written Direct Testimony of E. Kalani Flores

E ala ē me ke aloha a me ka 'oia'i'o. Awaken with aloha and truth.

Background, Experience, and Expertise of Witness

I am E. Kalani Flores, member of the Flores-Case 'Ohana, residing in Pu'ukapu, Waimea, Kohala Waho, Mokupuni o Hawai'i who is a Kanaka Maoli (also identified as a Native Hawaiian, he hoa'āina o Moku o Keawe, he 'ōiwi o ka pae 'āina Hawai'i, an indigenous person of the archipelago of Hawai'i) and a descendent of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 as established through my genealogical lineage of Hukiku and Keulua. I am a cultural practitioner with substantial interest in Mauna a Wākea (also referred to as Mauna Kea), who continues to exercise my traditional and customary Native Hawaiian cultural, spiritual, and religious practices and who continues to engage in cultural practices, protocols, and ceremony gatherings connected to and on Mauna a Wākea. These traditional and customary Native Hawaiian practices, including pilgrimages to the top of Mauna a Wākea, predate 1892 as evidenced through 'ike kupuna, oral traditions, indigenous knowledge, ancestral insight, cultural sites, and several reports.¹

I have a B.A. degree in Hawaiian Studies from the University of Hawai'i at Hilo (UHH) along with a D.Ö.E Teaching Certification. I have been an educator for over 30 years with the Hawai'i State Department of Education and the University of Hawai'i systems. I am presently employed as a tenured Hawai'i Life Styles - Professor at Hawai'i Community College – Palamanui instructing Hawaiian Studies courses, including, but not limited to the subjects of Hawaiian language, cultural traditions, spirituality, ethnobotany, and history. I am also fluent in the Hawaiian language. In addition, I am also owner of a consulting firm, Mana'o'i'o, specializing in the field of Hawaiian Studies who has consulted on several projects and authored several Hawaiian cultural and historical research reports for Federal and State agencies as well as for private firms. I've served for over 30 years on commissions, committees, and boards that included the review of archaeological surveys, mitigation plans, technical reports, and other similar types of documents.² I have extensive experience and knowledge in the review and assessment of reports and documents. Consequently, based upon the legal standards covered in Hawai'i Rules of Evidence - Rule 702, I would be qualified as an expert witness through my knowledge, skills, experience, training, ancestral connections, and education in the subject matter pertaining to Hawaiian cultural traditions including the review and assessment of cultural reports and surveys.

Archaeological Inventory Survey of the Mauna Kea Science Reserve – Final Report (Aug. 2010), Cultural Impact Assessment Study: Native Hawaiian Cultural Practices, Features, and Beliefs Associated with the University of Hawai'i Mauna Kea Science Reserve Master Plan Project Area (Aug. 1999), Mauna Kea – Ka Piko Kaulana o ka 'Aina (Mar. 2005)

² [see Exhibit B.02b Vitae for complete listing] served on Hawai'i County Public Access, Open Space, & Natural Resources Preservation Commission (5 yrs); Kaua'i County Historic Preservation Review Commission (6 yrs); OHA - Native Hawaiian Historic Preservation Council (10 yrs); Bishop Museum Native Hawaiian Culture & Arts Program (7 yrs)

Conclusion of Written Direct Testimony

It is very evident that the proposed Thirty Meter Telescope (TMT) construction and development within a conservation district is inconsistent with the criteria outlined in HAR § 13-5 and a permit should <u>not</u> be approved because the Applicant, University of Hawai'i (UH), is <u>not</u> capable of fulfilling the burden of demonstrating that this project is consistent with this criteria as well as associated legal authorities. Particularly, the TMT project is <u>not</u> capable of meeting the Conservation District eight criteria as stipulated in HAR § 13-5-30(c).

Likewise, significant sections of the Conservation District Use Application (CDUA) HA-3568 submitted by the Applicant are <u>incomplete and inaccurate</u>. Also, the Applicant is <u>not</u> in compliance with its mandated management plans intended to protect the natural and cultural resources on Mauna Kea.

In addition, the Board of Land and Natural Resources (BLNR) and Department of Land and Natural Resources (DLNR) have not fulfilled their affirmative duty and legal obligations to protect the public lands trust, resources, and rights of the public, beneficiaries, and Native Hawaiians associated with the lands of Mauna Kea. The following testimony will highlight why the BLNR should <u>not</u> approve a Conservation District Use Permit (CDUP) for the proposed TMT project.

<u>Prior</u> to BLNR approving any such permit pertaining to the public lands in a conservation district on Mauna Kea, the following actions are mandated by law and statutory provisions to be completed:

- BLNR/DLNR completing an independent Ka Pa'akai analysis for the lands of Mauna Kea
- UH completing a five-year review and update of the Mauna Kea Comprehensive Management Plan (CMP)
- UH taking corrective actions to ensure compliance with the Mauna Kea CMP and Mauna Kea Science Reserve Master Plan (2000)
- BLNR/DLNR ensuring that UH is in compliance with these plans
- UH completing an Environmental Impact Statement (EIS) for a proposed new general lease that would extend beyond 2033
- BLNR/DLNR determining the legality and impacts of issuing a new general lease
- UH taking corrective actions to resolve the incompleteness and inaccuracies in the CDUA HA-3568
- BLNR/DLNR thoroughly examining and reviewing CDUA HA-3568 to ensure its completeness and accuracy
- BLNR/DLNR affirming that the proposed mitigation measures for TMT impacts are adequate and accurate
- BLNR/DLNR and UH ensuring that Native Hawaiian traditional and customary rights and practices are being protected

If the BLNR/DLNR and UH attempt to circumvent this due process of law without completing the afore-mentioned actions, it will be another example of putting "the cart before the horse".

This testimony also highlights the deficiencies and lack of accountability in this process, elaborates in detail beyond what has been written in previous reports, and provides new insight not previously disclosed or included by the Applicant in their CDUA HA-3568 and their supporting documents for the proposed TMT project.

I. BLNR/DLNR has failed its statutory and constitutional obligations

BLNR/DLNR, failed to meet their statutory and constitutional obligations under *Ka Pa'akai o Ka'aina v. Land Use Commission (Ka Pa'akai)* 94 Hawaii 31, 7 P.3d 1068 (2000) to preserve and protect traditional and customary rights of Native Hawaiians. Prior to approving a permit or other actions pertaining to the culturally sensitive lands of Mauna Kea, BLNR/DLNR is required to complete an assessment/analysis independent of the developer or applicant. As such, BLNR/DLNR is not able to delegate this constitutional responsibility to the developer, Thirty Meter Telescope International Observatory LLC (TIO) (formerly TMT Observatory Corporation), or the applicant, UH.

This matter was brought directly to the attention of BLNR/DLNR since the first contested case hearing for CDUA HA-3568 as well as at subsequent BLNR meetings through both oral and written testimony regarding the Mauna Kea Master Lease and TMT sublease. In addition, this matter was once again brought to the attention of BLNR/DLNR in the agency appeal Civil No. 14-1-324, *E. Kalani Flores v. Board of Land and Natural Resources*, *et al.* as noted in those documents and briefs filed in this case. Many of the arguments set forth in this appeal regarding BLNR's consent to the TMT sublease are also relevant to the issues at hand regarding this CDUA. As of this date, BLNR/DLNR has not been able to produce a copy of any such independent *Ka Pa'akai* analysis completed by this State agency despite a formal UIPA request to produce such a copy. (See Exhibit B.02c)

In the *Ka Pa'akai* decision, the Hawaii Supreme Court articulated an analytical framework for the State's obligation to protect Native Hawaiian traditional and customary rights. The court ruled:

- (1) the state and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Native Hawaiians to the extent feasible;
- (2) agencies are obligated to make an assessment, independent of the developer or applicant of impacts on customary and traditional practices of Native Hawaiians; and.
- (3) the independent assessment must include the three factors (A, B, and C) listed below, otherwise known as the "Ka Pa'akai framework."
 - A) the identity and scope if "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
 - B) the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and
 - C) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.

(Ho'ohana Aku, a Ho'ōla Aku at 14-22, Exhibit B.02d)

Furthermore, UH reaffirms that the afore-mention *Ka Pa'akai* analysis is **required as referenced in their own management plan**; "Further, this analysis should be applied before an action is approved and begun, and the analysis should be completed by the State and not delegated by the State to the entity applying for approval." (CMP-Public Access Plan at 2-29).

B.02a

³ Public Access Plan for the UH Management Areas on Mauna Kea, A Sub-plan of the Mauna Kea Comprehensive Management Plan (Jan. 2010)

Due to the fact BLNR/DLNR failed to identify and assess customarily and traditionally exercised rights and practices of Native Hawaiians associated with the proposed TMT project on public lands <u>prior to being fully developed</u>, they failed to and are <u>not</u> capable of protecting such rights and practices because such rights and practices are unknown to them. Consequently, **BLNR/DLNR** is obligated to complete an independent *Ka Pa'akai* analysis <u>prior</u> to approving CDUA HA-3568.

BLNR/DLNR, representing the State as the Lessor, has the sole legal obligation, duty, and responsibility to appropriately manage and protect these conservation and public trust lands of Mauna Kea. BLNR/DLNR has improperly delegated those duties and responsibilities resulting in non-compliance with the BLNR and UH BOR approved plans for Mauna Kea. The failure of BLNR/DLNR to assume its appropriate role as Lessor has resulted in substantial, adverse, and significant impacts to the natural, cultural, and historic resources on Mauna Kea. This matter has been previously brought to the attention of the BLNR/DLNR for several decades as noted below in the Hawaii State Auditor's Report No. 05-13 (p. 30):

The lack of oversight by the department allows the university and its sublessees unchecked discretion on the use of Mauna Kea and leaves cultural and natural resources at risk for further damage.

In addition, the BLNR allowed TMT Observatory Corporation to take possession of said public lands and commence with construction activities including grading, excavation, and geotechnical boring on the proposed site <u>prior</u> to consenting to a sublease for this area. These activities, between August and October 2013, resulted in irreparable harm and damage to this unique and pristine geological and cultural landscape. Exhibit B.02e The BLNR did not consent to sublease under General Lease No. S-4191 to the TMT International Observatory LLC over eight months later on June 27, 2014. Exhibit B.02f. Matters pertaining to the TMT sublease are presently under appeal in the Third Circuit Environmental Court (Civil No. 14-1-324) was remanded back to BLNR as noted in the Order for Remand. (see Exhibit B.02g)

II. UH is NOT in compliance with its Mauna Kea management plans

Before BLNR approves the CDUA or any other actions within the Mauna Kea Science Reserve (MKSR), the Applicant must be in compliance with the BLNR approved management plans and conditions of the Conservation District rules. Presently, UH is <u>not</u> in compliance with the Mauna Kea CMP, associated subplans, and MKSR Master Plan. Furthermore, BLNR/DLNR has the statutory obligation to ensure that UH is in compliance with these plans. Likewise, the BLNR is required to complete a "comprehensive review" <u>prior</u> to approving permits and associated management plans under HAR § 13-5-30.

1. Firstly, UH has <u>not</u> reviewed and updated the CMP and subplans that were required to be completed by April 2014 in order to be in compliance with the rules of the Conservation District. In addition to a board permit, astronomy facilities also require an approved management plan according to HAR §13-5-24(c) [R-3/D-1]. The CDUA reaffirms that the CMP, subplans, and TMT Management Plan are "intended to fulfill the purpose of the Conservation District concerning the TMT project. In addition to this and in conjunction with one another, these plans are intended to fulfill the requirements for the Resource subzone, specifically management plan requirements under Exhibit 3 to the Conservation District Rules." (CDUA at 2-2)

The CMP was submitted to and approved by the BLNR on April 9, 2009. However, UH has failed to update and complete the five-year review of this plan as required and stipulated in the CMP. Section 7.4.2 of the CMP outlines the requirements and process for monitoring, evaluating, and updating this plan as noted below.

Regular monitoring and evaluation of the CMP is needed to determine if management actions are effective over time and are meeting management needs, and to ensure that the best possible protection is afforded Mauna Kea's resources.

Monitoring and evaluation of the effectiveness of the CMP should occur annually, and an annual progress report should be prepared. A major review and revision of the CMP should occur every five years, using information contained in the annual reports. Five-year evaluation and revision should include consultation with federal and state agencies and the local community, to inform stakeholders on program progress, and to gather input on changes or additions to management activities. The CMP must also be updated to comply with any requirements or conditions imposed by the BLNR on the CMP upon acceptance of the plan. (emphasis added) (CMP at 7-64)

The requirement for UH to conduct a "major review every five years" is further reiterated in the CMP Implementation Plan (IP) (2010) as outlined below:

4.2.2 Five-Year Management Outcome Analysis and CMP Revision The OMKM program should be subjected to a major review every five years, and the CMP should be revised, as necessary. This process should involve input from State and Federal agencies and the public. (CMP IP at 17).

2. UH has failed to implement and complete several significant components of these management action plans identified in the following Tables that required immediate implementation. The CMP identified specific management actions in order to protect the natural and cultural resources on Mauna Kea. In most cases, the Office of Mauna Kea Management (OMKM) of the University of Hawai'i at Hilo (UHH) is either directly responsible for implementing these actions or for ensuring its implementation by others.

Table 7-1. Management Actions: Native Hawaiian Cultural Resources (CMP 7-7 to 7-8)

Table 7-3. Management Actions: Natural Resources (CMP 7-15)

Table 7-4. Management Actions: Education and Outreach (CMP 7-23)

Table 7-5. Management Actions: Astronomical Resources (CMP 7-28)

Table 7-9. Management Actions: Activities and Uses (CMP 7-34 to 7-35)

Table 7-10. Management Actions: Permitting and Enforcement (CMP 7-41)

Table 7-11. Management Actions: Infrastructure and Maintenance (CMP 7-45)

Table 7-12. Management Actions: Construction Guidelines (CMP 7-49)

Table 7-13. Management Actions: Site Recycling, Decommissioning, Demolition and Restoration (CMP 7-54)

Table 7-14. Management Actions: Considering Future Land Use (CMP 7-57)

Table 7-15. Management Actions: Operations and Implementation (CMP 7-60)

Table 7-16. Management Actions: Monitoring, Evaluation and Updates (CMP 7-64)

One such example of these incomplete management actions is **FLU-2** in which UH was required to develop "land use zones" in the Astronomy Precinct based on updated cultural and natural resource information that would "delineate areas where future land use will not be allowed and areas where future land use will be allowed". It is

stated in the BLNR 2015 Annual Report (Appendix A at 26) submitted by the OMKM, **FLU-2 has still not been implemented as required**. As noted, "This was originally listed for Immediate implementation. However, this task will require additional data gathered from baseline surveys of the resources." Exhibit B.02h. The following description outlines the significance and goal of completing management action FLU-2:

FLU-2. Land use zones

Any potential future observatories will be located inside the Astronomy Precinct. The goal of this process is to refine telescope siting areas defined in the 2000 Master Plan based on updated cultural and natural resource information (see Section 7.1.1 and Section 7.1.2). Land use zones will be developed that will delineate areas where future land use will not be allowed and areas where future land use will be allowed, but where compliance with prerequisite studies or analyses prior to approval of a CDUP, will be required. When assessing proposed infrastructure expansion, additional consideration will be given to the location of current infrastructure and previously disturbed areas (see Section 7.3.1). New land uses should be located close to existing infrastructure or previously disturbed areas, to reduce impacts on undisturbed areas and to minimize unnecessary damage to geological features. As stated in the 2000 Master Plan, all major undeveloped cinder cones and their intervening areas will be protected from future development by astronomical or other interests. These include the following pu'u: Ala, Hoaka, Kūkahau'ula, Līlīnoe, Māhoe, Mākanaka, Pōepoe, Poli'ahu, and Ula. (CMP at 7-57 to 7-58)

OMKM was tasked with overseeing and implementing the management actions identified in the CMP Implementation Plan (2010). However, there were several significant management actions that were originally listed in the 2009 timeframe as Immediate (1-3 years) and Short-term (4-6 years) that have <u>not</u> yet been implemented and accomplished. Subsequently, OMKM changed their reporting methods assigned to the progress status definitions. This resulted in having the existing CMP status plans being submitted annually to BLNR for review <u>without</u> any definitive dates listed for the implementation of these management actions that in many cases that are considered crucial in the protection of Mauna Kea's natural and cultural resources. Below is a sampling of these incomplete management actions.

CMP	Management Actions	Implement- ation Schedule	Comments	Sub Plans
CR-2	Support application for designation of the summit region of Mauna Kea as a Traditional Cultural Property, per the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq. in consultation with the larger community.	Short-term	The State Historic Preservation Division approved the Archeological Inventory Survey for the Mauna Kea Ice Age Natural Area Reserve. A complete inventory of the historic properties on the summit region of Mauna Kea will be included in the filing of a petition to designate the summit region of Mauna Kea an Historic District as proposed by SHPD and for placement on the National Register of Historic Places.	CRMP 2.4.2.1
CR-4	Establish a process for ongoing collection of information on traditional, contemporary, and customary cultural practices.	Short-term		CRMP 4.2.1.1
NR-3	Maintain native plant and animal populations and biological diversity.	Mid and Long-term		NRMP 4.2.3.8

NR-4	Minimize barriers to species migration to help maintain populations and protect ecosystem processes and development.	Mid and Long-term		NRMP 4.2.3.11
NR-12	Create restoration plans and conduct habitat restoration activities, as needed.	Mid and Long-term	A proposal to study wēkiu bug habitat restoration has been reviewed and will be initiated.	NRMP 4.3
EO-4	Develop and implement a signage plan to improve signage throughout the UH Management Areas (interpretive, safety, rules and regulations).	Short Term	This was originally classified as Immediate implementation but has been deferred to Short Term to accommodate the accrual of additional resource information. A map showing the location of signs on UH's managed lands has been completed. New cultural and safety related signs are installed.	NRMP 4.4.2 PAP 4.2, 5.2, 6.2
IM-14	Encourage observatories to investigate options to reduce the use of hazardous materials in telescope operations.	Short-Term		
FLU-2	Develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of Conservation District Use Permit.	Short-Term	This was originally listed for Immediate implementation. However, this task will require additional data gathered from baseline surveys of the resources.	NRMP 4.3.3.1
OI-4	Establish grievance procedures for OMKM, to address issues as they arise.	Short-term		PAP 6.6
MEU-2	Conduct regular updates of the CMP that reflect outcomes of the evaluation process, and that incorporate new information about the resources.	Short-Term	Five-year CMP revision interval is 2014. Revision process initiated by OMKM for eventual submission to BLNR.	NRMP 5.2 CRMP 5.5 PAP 7

Furthermore, Table 4.1: Management Actions Detailed in the CMP and Subplans in the CDUA inaccurately identified the applicability to the TMT project to significant management actions. Several of these management actions that would directly or indirectly apply to the TMT project were instead identified as being "Not Applicable". These are some of same actions identified in the CMP that were <u>not</u> previously completed by the Applicant as required:

CMP	Subplans	Management Actions	Applicability to TMT Project
CR-1	NRMP 4.4.2 CRMP 4.3.3 PAP 4.2, 5.2, 6.1	Kahu Kū Mauna shall work with families with lineal and historical connections to Mauna Kea, cultural practitioners, and other Native Hawaiian groups, including the Mauna Kea Management Board's Hawaiian Culture Committee, toward the development of appropriate procedures and protocols regarding cultural issues.	Not Applicable
CR-2	CRMP 2.4.2.1	Support application for designation of the summit region of Mauna Kea as a Traditional Cultural Property, per the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq. in consultation with the larger community.	Not Applicable

CR-10	CRMP 4.3.1 PAP 5.2	Develop and implement a historic property monitoring program to systematically monitor the condition of the historic district and all historic properties, including cultural sites and burials.	Not Applicable
CR-13	CRMP 4.3.2, 4.3.7	Develop and implement a burial treatment plan for the UH Management Areas in consultation with Kahu Kū Mauna Council, MKMB's Hawaiian Culture Committee, the Hawai'i Island Burial Council, recognized lineal or cultural descendants, and SHPD.	Not Applicable
NR-15	NRMP 4.1	Conduct baseline inventories of high-priority resources, as outlined in an inventory, monitoring, and research plan.	Not Applicable
NR-16	NRMP 4.1 PAP 6.4	Conduct regular long-term monitoring, as outlined in an inventory, monitoring, and research plan.	Not Applicable
NR-17	NRMP 4.1.2.3	Conduct research to fill knowledge gaps that cannot be addressed through inventory and monitoring.	Not Applicable
NR-18	NRMP 4.1, 4.5	Develop geo-spatial database of all known natural resources and their locations in the UH Management Areas that can serve as baseline documentation against change and provide information essential for decision-making.	Not Applicable
EO-7	NRMP 4.4.2 CRMP 5.3 PAP 5.2, 6.3, 6.8	Continue and increase opportunities for community members to provide input to cultural and natural resources management activities on Mauna Kea, to ensure systematic input regarding planning, management, and operational decisions that affect natural resources, sacred materials or places, or other ethnographic resources with which they are associated.	Not Applicable
P-3	NRMP 1.4.3.2	Obtain statutory rule-making authority from the legislature, authorizing the University of Hawai'i to adopt administrative rules pursuant to Chapter 91 to implement and enforce the management actions.	Not Applicable
FLU-2	NRMP 4.3.3.1	Develop a map with land-use zones in the Astronomy Precinct based on updated inventories of cultural and natural resources, to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of Conservation District Use Permit.	Not Applicable

In order to protect the natural and cultural resources on Mauna Kea, UH should be mandated to implement these requirements and other significant management actions dating back to 2009 <u>prior</u> to approval of any new CDUPs within this Conservation District. Correspondently, BLNR/DLNR has neglected their prime responsibility to require UH's compliance with these management actions.

3. UH's ineffective management and unlawful actions of its own employees and individuals under their jurisdiction have resulted in adverse impacts upon Mauna Kea's natural and cultural resources. The OMKM has failed to follow the appropriate procedures for adopting implementing administrative rules for those lands and resources under their management. In the interim, staff and personnel of the OMKM have failed to follow the existing rules and protocols as outlined the CMP. For example, it's known that individuals associated with OMKM have desecrated and dismantled cultural sites on Mauna Kea without following their own existing rules and protocols. Exhibits B.02i and B.02j.

- **4.** UH is also <u>not</u> in compliance with the guidelines set forth in the MKSR Master Plan (MP) of 2000. The proposed siting of the TMT observatory is not in compliance with the Design Guidelines and criteria stipulated in the Master Plan (pp. IX 22-23) as noted below that are also referenced in the CMP (p 7-56).
 - 5. <u>Minimum visual impact from significant cultural areas</u>. Views from the pu'u and archaeological sites will be respected in the siting of future facilities. The location of new facilities will avoid interference with the visual connections between the major pu'u and the shrine complexes.
 - 6. <u>Avoid or minimize views from Waimea, Honoka'a and Hilo.</u> Sites for proposed new facilities will maximize the use of the existing topography to shield views from the downslope communities. Prominent sites along the ridges or pu'u will not be selected for new development of astronomy or other research and education facilities.
 - 7. <u>Close to roads and existing infrastructure</u>. Sites for proposed new development will be selected close to the existing roadways to minimize the amount of disturbance to the natural terrain. Utilities and communications service to new sites will be extended along the existing roadway routes to minimize disturbance.

The non-compliance of the Design Guidelines stipulated in the Master Plan is noted in the following areas; 5) Due to the proposed placement and the massive size of the TMT observatory amongst the shrine complexes on the northern plateau, it will definitely interfere with the visual connections between the major pu'u such as Pu'u Kūkahau'ula and Pu'u Poliahu and the hundreds of shrines at this particular elevation. The CDUA and survey reports have failed to address this impact. 6) Likewise, from Waimea, Honoka'a, and other areas, views of the TMT observatory will be another prominent eyesore and 'pimple' on this sacred landscape. A large population of Native Hawaiians as well as other residents and visitors in these areas will be impacted with this adverse visual impact. 7) Instead of using the existing roads within the SMA area, this project intends to cut another new road segment and installation of underground utilities through the side of Pu'u Kūkahau'ula, a wēkiu bug habitat, Traditional Cultural Property, and designated State Historic Property (SIHP #50-10-23-21438).

In addition, it's very apparent that the use of the aluminum-like finish for the TMT dome is <u>not</u> adhering to the Design Guidelines in the Master Plan (pp. XI-6) as it would <u>not</u> blend into the landscape, but would instead be more reflective and visible from distances near and afar.

Surfaces, Textures and Material: Surfaces, textures and material used for construction in the Science Reserve should seek to blend the facility into the landscape. Selection criteria are as follows:

• As much as possible, surfaces should be non-reflective in the visible spectrum to minimize glare and visibility from distant areas.

Consequently, the collective and cumulative impacts of the TMT project are not minimum, but instead significant, substantial, and adverse resulting in this project being inconsistent with the Master Plan concepts, objectives, and design guidelines. As such, the present plans for the TMT project should be rejected as mandated. The importance of the implementation of these design guidelines is referenced in the Master Plan and CMP as noted below.

There are two aspects of facility planning location and design that need to be considered in order to protect cultural and natural resources. Location refers to the siting of facilities, while design refers to characteristics of the physical structure, and both of these must be directed at minimizing impacts to resources. Section XI of the 2000 Master Plan provides design guidelines to direct development for both renovations of existing facilities and new construction in a manner that would integrate development into the summit environment. Topics addressed include: facility siting, scale, height and width, color, surface texture and material, roofs, fences, roadways and parking. (CMP at 7-56)

It is important to maintain compatibility and consistency of recommendations between the 2000 Master Plan and the CMP, to ensure that identified facility needs and designs are consistent with the overarching management plan put forth in the CMP (see Section 7.2.1).

Plans found to be inconsistent with the Master Plan concepts and objectives shall be rejected. Major variations from development standards shall also be rejected. (MP XI-9)

III. Matters pertaining to a proposed new general lease should be determined first

<u>Prior</u> to BLNR approving a permit for the TMT project that would extend beyond the expiration of General Lease (GL) No. S-4191 for the MKSR, UH should complete an EIS first and then BLNR/DLNR should determine the legality and impacts of issuing a new general lease.

It is common knowledge that the life of the proposed \$1.4 billion TMT observatory is more than 50 years and its life would extend considerably beyond 2033 when the GL No. S-4191 expires. According to the proposed project schedule in the CDUA (pp. 1-18 to 1-19), construction would take seven years or longer. If construction were to resume within two years from the conclusion of this contested case hearing and potential legal appeals, the observatory might be operational around 2025, leaving only 6 years or less of service before the termination of the lease and decommissioning. Based upon the Decommissioning Plan for the Mauna Kea Observatories – a subplan of the CMP, the TMT observatory would have to be decommissioned, including removal and site restoration, before the expiration of the existing general lease. (CMP Decommissioning Plan at 31).

UH, Lessee of the MKSR, submitted a request at the BLNR Nov. 8, 2013 meeting (Agenda Item D-5) for an issuance of new direct 65-year general leases. However, this action was deferred at the BLNR Dec. 13, 2013 meeting (Agenda Item D-15) upon the request of UH in order to prepare and complete an Environmental Impact Statement (EIS) as required by HRS Chapter 343 and HAR Chapter 200 of Title 11 for proposed new long-term general leases for the MKSR and related facilities and easements to replace its existing leases. Based upon the EIS Preparation Notice (EISPN), submitted Dec. 23, 2014, to the State Office of Environmental Quality Control regarding issuance of new general leases, it discusses three alternatives. These three alternatives and potentially additional alternatives advanced by stakeholders during the EISPN review period are still yet to be fully evaluated in this environmental assessment process. Alternative 1 is a "No Action Alternative", under which the existing MKSR GL No. S-4191, would run its course and UH and its sublessees would terminate their uses no

later than the end of 2033. (EISPN-New Master Leases at 2-2). Exhibit B.02k. Should the "No Action Alternative" be selected, no new telescopes (including the TMT) should be built and all of the existing facilities would eventually be decommissioned and the land would be returned to DLNR. *Id.* at 2-5. The TMT project will no longer be viable if it has to be decommissioned by 2033, only six years or less after it is proposed to become operational. Wouldn't it beneficial to the partners of TIO of this proposed \$1.4 billion project to have this matter settled now then latter? Thus, it's for these very reasons that the EIS for the proposed new long-term general leases should be completed prior to BLNR approving a permit for the TMT project. If not, this would be another example of putting "the cart before the horse".

IV. Sections of CDUA HA-3568 are incomplete and inaccurate

The Board should <u>not</u> approve a permit for the TMT project because significant sections of CDUA HA-3568 are incomplete and inaccurate. All information, materials, reports, and documents inserted and referenced in this application are subject to further review and scrutiny to determine if they are complete and accurate. Likewise, the Applicant assumes the burden and responsibility that the CDUA is complete and accurate.

Several significant deficiencies in the CDUA were brought to the attention of the Applicant during the first contested case hearing. Thus, they had several years to address these matters, make necessary revisions and corrections, and resubmit this application. However, they chose to move ahead with the original application and failed to address its deficiencies without having it come before the BLNR for a new and proper hearing since CDUP HA-3568 was vacated by the Hawai'i State Supreme Court's decision in *Mauna Kea Anaina Hou*, et al. v. Board of Land and Natural Resources, et al..

In addition, the BLNR/DLNR is obligated to verify and substantiate that the information in the CDUA is complete and accurate. However, it appears that DLNR staff did not take a 'hard look' at significant aspects of this CDUA in the initial submittal. Instead, information was cut and pasted in their entirely directly from the Application's submittals and included in their staff OCCL report that was submitted to Board members for their consideration. Exhibit B.35. Likewise, it has been six years since October 10, 2010 when this application was submitted to BLNR/DLNR for review. Since that time, significant aspects pertaining to Mauna Kea have evolved and changed. The BLNR should have required the Applicant to update and resubmit their application to be heard at a Board meeting and required public hearing to ensure due process of law. In addition, DLNR should have revisited and updated their staff report in this matter.

1. CDUA - Sect. 4 Cultural Resources

Based upon my extensive review and examination of the CDUA, associated documents, and related archaeological surveys and reports, it's very evident that significant parts of the CDUA Sect. 4 pertaining to the cultural resources on Mauna Kea are incomplete and inaccurate. The TMT proposes to be located within the Mauna Kea Summit Region Historic District (SIHP #50-10-23-26869) which is historically and culturally significant under all five criteria of the Hawai'i Register of Historic Places (HRHP) and Hawai'i Administrative Rules (§13-275) and under all four criteria of the

⁴ Alternatives 2 and 3, respectively, include a new master lease encompassing all the area covered by the existing master lease, and one that reduces the portion of the summit under UH control.

National Register; and this Historic District is eligible for inclusion in the National Register of Historic Places (NRHP) as well as eligible for designation as a Traditional Cultural Property (TCP). The MKSRHD includes a concentration of significant historic properties that are linked through their setting, historic use, traditional associations, and ongoing cultural practices. The properties include shrines, adze quarry complexes and workshops, burials, stone markers/memorials, temporary shelters, historic campsites, traditional cultural properties, historic trails, and sites of unknown function. In 1999, the MKSRHD was determined eligible for listing on the National Register. Despite the known historic and cultural significance of Mauna Kea, the CDUA fails to disclose or assess the impacts of the TMT upon the integrity and criteria for eligibility of these historic and cultural properties.

The CDUA was incomplete for failing to:

- disclose the impacts of the TMT upon the integrity of the historic properties within the broader context of the Mauna Kea Summit Region Historic District.
- assess the impacts of the TMT upon the NRHP criteria for eligibility.
- assess the impacts of the TMT upon the HRHP integrity.
- assess the impacts of the TMT upon the TCP criteria for eligibility.
- assess the impacts of the TMT upon the view planes and spatial relationship amongst the hundreds of *ahu* (shrines) considered historical properties and cultural resources.
- assess the impacts of the TMT upon the visual alignments between the various *ahu* (shrines) and the summit and noted *pu'u* (i.e. Pu'u Kūkahau'ula, Pu'u Poliahi).
- assess the impacts of the TMT upon the cultural landscape that is presently undeveloped without any telescopes.
- disclose the impacts upon SIHP Site Nos.16169 and 21447 along with other cultural resources referred to as "find spots" (Nos. 1997.034, 2005.05, 2005.06, 2000.7, & 2005.08) that are within the Astronomy Precinct and within the vicinity of the proposed TMT project area. The CDUA omitted any reference to these sites even though they are identified in archaeological reports and survey maps.
- assess the impact of construction activities upon historical properties and cultural resources within the vicinity of the proposed TMT project area and the potential of toppling over of ahu due to ground disturbing activities.
- assess the impact of construction activities associated dust and noise upon cultural practitioners and their practices.
- assess the impact of construction activities upon the access of cultural practitioners to cultural sites on the northern plateau and near the Batch Plant.
- assess the impacts upon the historic & cultural resources due to the increased intensity of the conservation district land use with further subdivision with the subleasing to TMT

The CDUA was submitted to BLNR in October 2010 <u>prior</u> to the Final Archaeological Inventory Survey (FAIS) for the TMT Observatory Project's completion by Cultural Surveys Hawai'i, Inc. in January 2011. Thus, information was not included in the CDUA. Instead, information in the CDUA regarding the cultural resources and historic properties within the vicinity of the TMT project is attributed to Pacific Consulting Services Inc. (PCSI) who had actually done the general MKSR Archaeological Inventory Survey (AIS) and not the TMT site specific survey and report.

Upon closer examination of CDUA Figure 4.1 (p. 4-2) when compared to Figure 5.17 (AIS Vol. 1 at 5-59), both attributed to PSCI, as well as Figure 2.9 (CRMP-CMP at 2-52), it is very apparent that information in the figure in the CDUA has been manipulated and altered to downplay and reduce the significance of historic properties and cultural resources within the vicinity of the proposed location of the TMT. Exhibits B.02l-n. First of all, the figure has been cropped to exclude the historic properties and cultural sites located directly north of the Astronomy Precinct. In addition, SIHP site numbers were eliminated from sites located in right corner of this figure. Also, locations and numbers of all cultural resources were eliminated from this figure.

The AIS of the Mauna Kea Science Reserve conducted by PCSI is void of any consultation with Native Hawaiian cultural practitioners associated with customary and traditional practices in the vicinity of the proposed TMT project. As a result, significant cultural sites in the vicinity of this proposed project have been overlooked and the functions and purposes of previously identified sites have been inaccurately depicted.

There are significant sites that our 'ohana has identified through 'ike kupuna, indigenous knowledge and ancestral insight within the vicinity of the proposed TMT that have <u>not</u> been identified in archaeological surveys that would be adversely impacted by such a project in the proposed location. Many of the *ahu* (shrines) and other formations on the northern plateau are interconnected by location, function, orientation, and energetic lines. The TMT would be situated amongst these sites causing adverse disturbance and impacts between the grid of interconnected sites.

2. CDUA - Sect. 7 Visual Impact

Based upon my personal observations and experiences, I can attest that significant parts of CDUA Sect. 7 Visual Impact including the Visual Impact Technical Report are flawed with inaccuracies and are incomplete. I am able to personally testify that I've observed the visual impacts of the existing telescopes during various times of the day and from various locations from the districts of Kohala, Hāmākua, Hilo, and Kona. The visual impact of the TMT is a significant reason why this project doesn't meet the HAR § 13-5-30(c) criteria. Upon closer examination of the CDUA, it is very evident that information presented is inaccurate such as the section below:

7.2.3 TMT OBSERVATORY DOME FINISH

The finish for the TMT Observatory dome will be a reflective aluminum-like finish, similar to that of the Subaru observatory. The use of a reflective aluminum-like finish was based on the following considerations (1) visibility of the dome, (2) optimum performance of the observatory, and (3) reduced need of cooling air within the dome during the day. When considering the visibility of the dome, the aluminum-like exterior finish was selected over white and brown because the aluminum-like finish reflects the colors of the sky and ground, which helps the dome blend into its setting and reduces the visual impact whether the summit is bare or covered in snow. (CDUA 7-9)

The CDUA inaccurately stated:

- "...the TMT Observatory dome will be a reflective aluminum-like finish, similar to that of the Subaru observatory." (CDUA 7-9)
- "...the aluminum-like exterior finish was selected over white and brown because the aluminum-like finish reflects the colors of the sky and ground, which helps the dome blend into its setting and reduces the visual impact..." (CDUA 7-9)
- TMT is not visible from Mauna Kea Summit (Table 7.5, CDUA p. 7-8)
- "...its visual impact is less than significant." (CDUA 2-27)

The CDUA inaccurately depicts reflective qualities of TMT dome in:

- Figure 1.7: Preliminary Architectural Renderings (CDUA 1-16 to 1-17)
- Figure 7.5: TMT Observatory, Aluminum-Like Finish "Binocular" View from Waimea w/o Snow (CDUA 7-10)
- Figure 7.8: Simulation of the TMT Observatory from Near Keck Observatory Viewing North (CDUA 7-12)

The CDUA inaccurately compares the dome shape of the TMT observatory with the cylinder shape of the Subaru observatory which are significantly different. Due to the extremely different shapes of the TMT and Subaru observatories, the reflective qualities are also extremely different. Instead, the TMT dome is similar to the Gemini Observatory dome. (see Exhibit B.02o) As such, the proposed aluminum-like coating would actually be more visible due to the reflective sunlight and would not reflect the sky or ground to reduce the visual impacts as implied. Based upon my personal observations of these observatory domes at various times of the day from various vantage points on the summit, from my front yard, along the coast, and numerous other areas, the aluminum-like coating of the Gemini Observatory dome does not reflect the sky or ground. The primary reason for this is that the dome shape causes the sunlight to reflect directly back into your eyesight. Likewise, its practically impossible for the ground to be reflected due to the dome shape as the ground terrain would have to be located above the height of the dome. It's for these reasons that renderings and Figures 7.5, and 7.8 in the CDUA, created through a software program, inaccurately depicts the reflective nature of the TMT dome. Exhibits B.02p-r. The Applicant has failed to provide any concrete evidence such as a genuine photo of an observatory dome similar in shape to the TMT dome such as the Gemini Observatory dome that actually demonstrates it could reflect the sky or ground.

Furthermore, information in the CDUA is inaccurate regarding TMT's visual impacts. In Figure 7.5 in the CDUA, Line No. 16 states that the TMT is <u>not</u> visible from the Mauna Kea Summit. However, based upon site visits during the initial and present contested case hearing, the TMT observatory would be clearly visible from Pu'u Kūkahau'ula (also considered the Mauna Kea Summit) as evidenced by the red balloon demonstration.

The CDUA falsely downplayed the adverse visual impacts of the proposed TMT observatory and its non-compliance with the Hawai'i County General Plan (2005). Exhibit B.02s. The CDUA (Sect. 7.1.1) only briefly mentions one goal (b) and disregards the other two goals (a & c) in the section of Natural Beauty of the General Plan as outlined below especially since the TMT project is <u>not</u> capable of meeting these goals:

7.2 GOALS

- (a) Protect, preserve and enhance the quality of areas endowed with natural beauty, including the quality of coastal scenic resources.
- (b) Protect scenic vistas and view planes from becoming obstructed.
- (c) Maximize opportunities for present and future generations to appreciate and enjoy natural and scenic beauty. (General Plan 7-2)

The Hawai'i County General Plan further describes the importance of Hawai'i's natural and scenic beauty as a "valuable" and "irreplaceable" asset as part of the public trust as noted below (emphasis added):

The natural beauty of Hawaii is a universally recognized characteristic and one of the most significant and valuable assets of this island. In a relatively small area exists a great range of environments, from lush green tropical valleys to snow-capped mountains.

Hawaii's natural beauty is both an irreplaceable asset and a part of the public trust. It is fragile and although often enhanced by man can easily be adversely affected. Measures must be taken to insure its protection, both now and in the future, for the enjoyment of Hawaii's residents and visitors. (General Plan 7-1)

The importance of natural and scenic beauty and its true evaluation as an asset of public trust to be protected for future generations remain with the people of this island. While public planning and regulation are instrumental in achieving the goals set forth for this element, it is public awareness and interest that will maintain the natural beauty of the island of Hawaii. (General Plan 7-2)

In conclusion, the visual impact analysis, photos renderings of the TMT dome, and information presented in the CDUA are significantly inaccurate. Likewise, the immense and enormous size of the proposed TMT observatory in the conservation district would create an adverse visual impact upon the sacred landscape of Mauna a Wākea and this would <u>not</u> preserve or improve upon the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Also, the visual impacts of the TMT are <u>not</u> in compliance with the Hawai'i County General Plan (2005) and MKSR Master Plan (2000). It very apparent that the TMT project <u>can't</u> meet the following criteria set forth in HAR § 13-5-30(c):

- (4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region;
- (5) The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;
- (6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;

V. Mitigation measures are inadequate or non-existent

The Applicant knows that the visual impact of the TMT will be substantial and significant due to the dome height at nearly 190 feet and with a diameter of 216 feet. However, there aren't any actual measures that could mitigate this visual impact. Instead, the Applicant proposes the following non-existent mitigation measures in the CDUA (p. 2-17).

- 1) locate the TMT "north of and below the summit"
- 2) design the dome "to fit very tightly around the telescope"
- 3) to have a aluminum-like coating "that reflects the sky and reduces the visibility of the structure"

These are <u>not</u> mitigation measures for the adverse visual impacts within the Mauna Kea Summit Region Historic District upon the natural beauty and open space of the undeveloped northern plateau. The location of the TMT on the northern plateau is due to the fact that there isn't any available space available on the summit. In addition, even if an existing telescope site could be recycled for this project, the TMT would obstruct and impact the other existing telescopes due to its massive size and height of nearly 190 feet. The Master Plan clearly outlines below why the TMT is proposed to be located on the northern plateau instead of on the summit due to its extremely large size and <u>not</u> as a reason to mitigate its adverse visual impact.

Existing astronomy facilities require a clear line of sight to approximately 12 degrees above the horizon in a full circle. The location of proposed new facilities cannot obscure the observation function of the existing telescopes on the mountain." (p. IX-22)

Future telescope redevelopment on the summit ridge will limit these facilities to a maximum height and diameter of approximately 130 feet, to limit the visual impact along the ridge. (p. IX-31)

In addition, telescope engineers have indicated that wind forces acting on the structure are expected to be severe and problematic. To minimize potential obscuration of existing observatories, the potential site for this facility must also be located in an area that is distant from the prominent topography at the summit ridge and nearby pu'u. (p. IX-37)

Despite the existing design of the TMT dome to fit tightly around the telescope, it still doesn't mitigate its adverse visual impact. Furthermore, this design is inconsistent with the Design Guidelines in the 2000 Master Plan for the Next Generation Large Telescope (NGLT) with a mirror of 25 to 50 m. in diameter such as the TMT. The TMT design deviated from these guidelines that proposed a "unique sliding dome mirror enclosure with a sub-grade foundation" that would have actually drastically reduced the height less than the nearly 190 feet of the existing design. (see Figures IX-16 & IX-21, Exhibits B.02t-u) The adverse visual impact of its massive size and height still exists and has <u>not</u> been mitigated.

Strict design guidelines will dictate the size and color of the NGLT. The preliminary design concept proposed for the NGLT employs a unique sliding dome mirror enclosure with a sub-grade foundation, as shown in Figure IX-21. The lower half of this observatory will be built below grade to minimize the apparent height and mass of the facility. The facility shown in the concept has a 30-m. mirror, with a dome shaped and colored to simulate a small pu'u to blend well with the surrounding landscape. (MP IX-21)

The other mitigation measure to have an aluminum-like coating "that reflects the sky and reduces the visibility of the structure" is also <u>not</u> true as previously discussed. This also does <u>not</u> follow the Design Guidelines of the Master Plan as it proposed a "dome shaped and colored to simulate a small *pu'u* to blend well with the surrounding landscape." If the shape and color of the TMT design was in compliance with these guidelines, it could have actually mitigated its adverse visual impacts.

Likewise, other proposed mitigation measures do nothing to directly or indirectly mitigate any of the adverse impacts of this project as noted below:

- The TMT project facilities will be furnished with items to provide a sense of place and acknowledge the cultural sensitivity and spiritual attributes of Mauna Kea.
- TMT project staff will work with OMKM and 'Imiloa to develop exhibits regarding natural resources.
- The TMT project's outreach staff will work with 'Imiloa and OMKM to develop exhibits for the Visitor Information Station (VIS) and 'Imiloa regarding the cultural and archaeological resources of Mauna Kea and support/fund programs specific to Hawaiian culture.
- TMT project daytime activities will be minimized on up to four days per year identified by Kahu Kū Mauna.

None of these proposed mitigation measures directly address the harm that would be caused by the TMT project or telescope development and activities in general. Instead, some of these measures would actually provide direct financial benefits to the Applicant such as providing funds and support staff for exhibits and programs for UH's facilities at 'Imiloa and VIS. In other words, the Applicant is going to personally benefit from the adverse impacts of this project. In addition, the TMT project proposes to decorate its facilities with a "sense of place and acknowledge the cultural sensitivity and spiritual attributes of Mauna Kea" – the very aspects that its development would adversely impact. This proposed measure to decorate the facilities as such that would have in the very nature of its construction resulted in the desecration of this culturally sensitive landscape is really appalling to a cultural practitioner such as myself. Likewise, how would minimizing the TMT project's daytime activities on up to four days per year especially when most of the telescope activities are already minimized during the day be a mitigation measure?

Because the significant, substantial, and adverse impacts can't be mitigated to a level that is less than substantial, the BLNR <u>cannot</u> approve this CDUA without further attributing to the cumulative impacts upon the natural and cultural resources of Mauna Kea.

VI. Subleasing has increased the intensity of land use

UH's actions of subleasing their general lease has resulted in the intensity of the development and land use on Mauna Kea. The act of subleasing these lands resulted in the "division" of a greater parcel into smaller parcels. In other words, that act is a "subdivision" which is defined by the BLNR's own rules as "a division of a parcel of land into more than one parcel." HAR § 13-5-2. To further amplify this subdivision of land into smaller parcels, the existing subleases also include maps and legal descriptions along with metes and bounds defining their subdivided parcels. Likewise, the proposed TMT Sublease also explicitly identified an additional proposed subdivision of the premises and easement areas through maps and legal descriptions along with metes and bounds. (see Exhibit B.02f) The act of subdividing the 8.7 acres

⁵ "Subdivision" means a division of a parcel of land into more than one parcel." The County of Hawaii also defines a "subdivision" in similar manner. See Section 23-3(29), Hawaii County Code.

⁶ 3. <u>Survey/Site Specific Description</u>. The site shown in Exhibit C-l hereto has been surveyed. The area covered by the Subleased Premises is specifically described in the metes and bounds description in Exhibit C-2 hereto. The area covered by the Easement Area is specifically described in the metes and bounds description in Exhibit C-3 hereto.

of land out of 11,288 acres for TIO's use, occupancy, and construction work is deemed to be a special form of "<u>land use</u>" that would further intensify the existing land uses and development on Mauna Kea. However, this aspect has not been addressed in the CDUA.

Furthermore, the implementation of the Master Plan resulted in the creation of the Astronomy Precinct and the subdivision of about 525 acres from the 11,288 acres of the general lease.

UH's subdivision and subleasing of the conservation district lands on Mauna Kea have resulted in the violation of the following criteria set forth in HAR § 13-5-30(c):

(7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and

VII. Adverse impacts upon the sacred piko and resources of Mauna a Wākea

The proposed TMT construction and development within the environmentally and culturally sensitive landscape would cause adverse impacts and irreparable harm upon the sacred *piko* as well as the natural and cultural resources of Mauna a Wākea.

Mauna a Wākea is the *inoa* (name) reverberated by the ancestral guardians connected to this sacred mountain. In English, it literally means, "Mountain of Wākea". It's within this name that unfolds the understanding of the significance of this mountain. Wākea (Sky Father) is personified in the atmosphere and heavenly realm that envelops Papahānaumoku (Mother Earth). As such, this mountain, unlike any other in the Pacific, pierces above the clouds into the realm of Wākea. It is the tallest mountain in the world over 33,000 feet when measured from the ocean floor to its summit. This mountain is also referred to as "Mauna a Kea", "Mauna Kea", or just "Wākea".

According to 'ike kupuna, indigenous knowledge and ancestral insight, the top of Mauna a Wākea is one of the three most sacred and significant places on Hawai'i Island. It is indeed a sacred *piko*. It is difficult to explain to those who have forgotten or lack an understanding of why such a place as Mauna a Wākea is sacred. The knowing of Mauna a Wākea as being *kapu* (sacred) was known from the remote times of the ancient ones. It is for this reason that amongst the countless ancestors of Kanaka Maoli and numerous ali'i (chiefly) dynasties that lived in these islands, they never built any large heiau (temples) on the summit in this realm that is considered kapu. This is the reason that none of the Mauna Kea archaeological surveys have ever located a traditional manmade structure on the summit. In the times of our ancestors, prior to structures being constructed, one would consult with individuals such as kahuna kuhikuhi pu'uone who specialized in protocols associated with the selection of such sites. In addition, consultation and direct communication between intermediaries and those of the ancestral realm associated with those places was an essential and integral part of the process so as not to create a physical and/or spiritual disturbance, disconnection, or imbalance between man and his akua, and between man and his environment. We charge that this process of consultation with those recognized as the ancestral akua, kupua, and kūpuna of Mauna a Wākea was not done by the Applicant and was also never done by any previous astronomy projects built on the mountain.

There are several references in the Applicant's TMT CDUA and associated reports such as the TMT Final EIS (FEIS), MKSR Master Plan, and the Mauna Kea CMP acknowledging the sacred attributes and landscape of Mauna a Wākea. A sampling of references from these reports that substantiate the sacredness of this mountain are copied below (emphasis added):

The ancient saying "Mauna Kea kuahiwi ku ha'o i ka mālie" (Mauna Kea is the astonishing mountain that stands in the calm) (Pukui 1983: No. 2147), expresses the universal feeling experienced by all who come in contact with this special place. Standing tall over the Island of Hawai'i, Mauna Kea is home to vast physical, natural and cultural resources (Figure I-1). From early adze makers to modern day astronomers, Mauna Kea has long been a special place for work, worship, and reflection. For native Hawaiians, both ancient and modern, the feelings for Mauna Kea go beyond wonder and astonishment, to the recognition of the mountain as a sacred domain. These profound feelings of reverence are expressed in the saying: "O Mauna Kea ko kākou kuahiwi la'a" (Mauna Kea, our sacred mountain). As with other ethnic cultures throughout the world, early Polynesians believed their highest points of land were the most sacred; and Mauna Kea having the highest mountain top in all of Pacific **Polynesia**, was considered the most sacred place of all. Standing tall over the island if Hawai'i, Mauna Kea was host to early Hawai'ian traditions which included religious practices, study of the heavens, and tool making in the Keanakāko'i adze quarry. (MP, p I-1)

The physical prominence of Mauna Kea as well as its stationing nearest to the heavens holds a spiritual significance for the Hawaiian people, a significance that can be expressed in likening the mountain to a sacred altar. $(CMP, p\ 1-3)$

For some Hawaiians, Mauna Kea is so revered that there is no desire to ascend it, no desire to trespass on what is considered sacred space. Simply viewing the tower, the mountain, from afar, both affirms its presence, and reaffirms the sense of connection with both place and personage. For this reason, many Hawaiians feel that activities on Mauna Kea that lead to visible alterations of the landscape not only have a significant effect on the mountain itself, but also have a damaging effect on everything and everyone that is physically, genealogically, spiritually, and culturally tied to Mauna Kea. (CMP, p 1-4)

However, it is quite apparent that the UH and proponents of the TMT have either decisively disregarded its significance or do <u>not</u> understand why Mauna a Wākea is sacred. Otherwise, they would not be proposing to build this project of such an immense scale on an area of the summit, still pristine, pure, and in its natural state. Likewise, BLNR members and DLNR staff must <u>not</u> have truly grasped the magnitude of this TMT project or do not comprehend the significance and sacredness of this mountain. For if they did, they would have investigated this matter with more scrutiny and <u>not</u> be proceeding so swiftly to approve this CDUA. The true aspect of stewardship entrusted with the BLNR/DLNR for our precious and public lands in the conservation districts is to ensure that these significant areas are acknowledged, preserved for present and future generations, and not commercially destroyed. In essence, the development on the summit of Mauna a Wākea is a commercial enterprise under the guise of science, educational, and economic opportunities that has resulted in the cumulative impacts noted below.

Thorough examination of the Applicant's own documents will reveal that the TMT FEIS (p. S-8) discloses that,

From a cumulative perspective, the impact of past and present actions on cultural, archaeological, and historic resources is substantial, significant, and adverse; the impacts would continue to be substantial, significant, and adverse with the consideration of the Project and other reasonably foreseeable future actions.

In addition, it is stated in the TMT FEIS (p. 3-29) that,

The Project has the potential to impact the spiritual and sacred quality of Mauna Kea.

Yet, despite what has been written, the TMT project is pushed forward notwithstanding these cumulative impacts that are identified as substantial, significant, and adverse.

The greatest obstacle in the protection of sacred places is a lack of understanding of why these places are significant and so special. It has been forgotten when humans interacted with the natural forces and energies of this Earth. Those who have forgotten are products of their social, educational, and/or religious systems. From the modern mindset, most people can recognize the significance of a church building, appreciate the majestic and sacred architecture of a cathedral or synagogue, or be in awe of ancient pyramid and temple structures. However, it seems more difficult for modern minds to recognize that places in nature which bears no special markings or buildings are also considered sacred.

There are countless mountains around the world considered sacred by cultures past and present. These holy mountains are also keystones to indigenous religions that regarded these areas as the abodes of certain gods, goddesses, deities, divine beings, natural forces, and spirits. In addition, pilgrimages to sacred mountains have been taking place for thousands of years. Whether it is Mauna a Wākea, Mount Shasta in California, Mount Fuji in Japan, Mount Teide in the Canary Islands, or Mount Sagarmāthā (Everest) in Nepal, their sacredness has resonated from centuries past. [see photos of these sacred mountains in Exhibit B.02v]

Sacred mountains such as Mauna a Wākea, due to their geological composition and extreme height, are a *piko* (portal) that allows for the transference of energy from one source to another. This understanding is reflected in the traditional Hawaiian concept of the "triple *piko*" of a person. In essence, the *piko* on the summit of the mountain is comparable to the *piko* located on the tops of one's head at the fontanel. This perspective is also described in the Cultural Anchor of the CMP. [an abbreviated description is recopied below]

Mauna Kea is "ka piko o ka moku," which means "Mauna Kea is the navel of the island." Understanding the word piko may give a deeper understanding of why Mauna Kea is the piko, or navel, of the island.

In terms of traditional Hawaiian anatomy, three *piko* can be found. The fontanel is the *piko* through which the spirit enters into the body. During infancy, this *piko* is sometimes "fed" to ensure that the *piko* becomes firm against spiritual vulnerability. For this reason, the head is a very sacred part of the anatomy of the Hawai'i native

The second *piko* is the navel. This *piko* is the physical reminder that we descend from a very long line of women. The care of this *piko* ensured two things: the healthy function of the child and the certification that the child

is a product of a particular land base.

The final *piko* is the genitalia. The genitalia are the physical instruments that enable human life to continue. The health of all *piko* ensures that the life of the native person will rest on an axis of spirituality, genealogy and progeny.

When we understand the three *piko* of the human anatomy, we may begin to understand how they manifest in Mauna Kea. Mauna Kea as the fontanel requires a pristine environment free of any spiritual obstructions.

It is this *piko* on top of the summit where energies and life forces flow from the Creator and higher dimensions, through the realm of Wākea, and then into the Earth. Likewise, the *piko* on top of one's head where life force energies from the Creator and higher dimensions flows into one's body. On 4 March 2011, a photograph was taken from Waimea by Kehaulani Marshall showing a portal opening above the *piko* of Mauna a Wākea when such an event was occurring. [see photo in Exhibit B.02w] **However**, when the *piko* of the summit is obstructed with the physical excavation of the landscape, asphalt and cement pavement, metal posts implanted in ground, buildings, and construction, it curtails, restricts, or prevents this pure flow of energy. Thus, the development on the summit is causing adverse impacts and significant obstructions to the life forces that flow into these islands through this *piko*. Due to the immense size of the proposed TMT project, it will cause substantial, significant, and cumulative adverse impacts upon Mauna a Wākea.

In addition, Mauna a Wākea anchors a very complex multi-dimensional over-fold, and does so through its very conscious geometric grid, complex frequencies, and unique electromagnetic field. The summit is also an area where vortexes of energy occur. Vortexes are swirling eddies of electrical and magnetic energies. They are a function of the gravity and electromagnetic grids. Based upon the natural energy pattern due to the earth's polarity, vortexes generally spin counterclockwise above the equator and clockwise below it. Vortexes distribute energy outward in what is termed electrical vortexes, and inward in what is termed magnetic vortexes. Some function as both. Mauna a Wākea, for example is an inward and outward vortex-portal complex. [see diagram in Exhibit B.02x]

However, the electrical substation, power lines, and high voltage current that runs to the top of the summit is interfering and disturbing the electromagnetic fields and vortexes that naturally occur on the mountain. Thus, the development on the summit is causing adverse impacts and significant disturbances to the natural electromagnetic fields and vortexes on the mountain. Due to the immense size of the proposed TMT project, it would require an increased electrical current to the summit that further add to the substantial, significant, and cumulative adverse impacts upon Mauna a Wākea.

Also, Mauna a Wākea also resonates in harmonic oscillation with Mount Shasta in California, Mount Fuji in Japan, and other specific mountains around the world. As a result of this energetic connection between these mountains, these other areas are also impacted by what occurs on Mauna a Wākea. Thus, the development on the summit is causing adverse impacts and significant disturbances to other important mountains and areas. Due to the immense size of the proposed TMT project, it would cause substantial, significant, and cumulative adverse impacts upon Hawai'i, Japan, California, and other noted areas.

VIII. Adverse impacts upon ancestral akua, kupua, and kūpuna

The proposed TMT construction and development within the environmentally and culturally sensitive landscape would cause adverse impacts and irreparable harm upon those akua, kupua, and kūpuna of Mauna a Wākea.

The term "akua" is being used in this testimony in a broad cultural context to be inclusive of gods, goddesses, deities, devas, nature spirits, divine beings, and natural forces. The ancestral akua that were recognized by our kūpuna are those primarily embodied in the natural forces of nature. Likewise, they could take multiple forms (kinolau) such as animals, plants, and natural elements. Some were identified with names and some were not. The use of akua as a common noun is distinct and different when used as "Akua" or "Ke Akua" in the proper name form which typically refers to the Creator or God. The term "kupua" is used in this testimony in reference to other entities or supernatural beings who also have the ability to assume different forms.

Individuals with a western mindset and a lack of understanding might chose to dismiss the existence of *akua* and *kupua* completely as mythological folklore. While others might chose to dismiss their existence due to personal religious persuasions and/or social upbringings. The Earth, Universe, and Cosmos is teeming with life in many variant forms, forms vastly different from our own. Yet the consciousness inside is of the same Creator, same creative divinity as our own. It is narrow minded to believe that the human physical form is the only form of life.

There are several ancestral *akua* connected to Mauna a Wākea that have been recounted by our *kūpuna* in their oral traditions and subsequently articulated in literature. Some of these accounts are referenced in the document, Mauna Kea - Ka Piko Kaulana O Ka 'Āina (2005), prepared by Kepa and Onaona Maly of Kumu Pono Associates, LLC for the OMKM. Also, in the TMT FEIS and CMP documents, there are various references regarding the ancestral *akua* along with their connections to the sacred landscape on the summit of this mountain. An example of this type of reference is noted below.

The origins of Maunakea and it central place in Hawaiian genealogy and cultural geography are told in *mele* (poems, chants) and *mo'olelo* (stories, traditions). Native Hawaiian traditions state that ancestral akua (gods, goddesses, deities) reside within the mountain summit area. Several natural features in the summit region are named for, or associated with, Hawaiian *akua*; these associations indicate the importance of Maunakea as a scared landscape. Each part of the mountain contributes to the integrity of the overall cultural, historical, and spiritual setting (TMT FEIS, page 3-11).

As a result of his exhaustive studies, Kepā Maly identified many traditional cultural properties on Mauna Kea. He documented ongoing traditional cultural practices associated with several of these. It is a sacred landscape that provides a connection, genealogically, physically, and spiritually to ancestral realms. The mythical creation of Mauna Kea is part of a Hawaiian cosmology that establishes a relationship between all things animate and inanimate. (CMP, p 1-2)

Native Hawaiian traditions state that ancestral *akua* (gods, goddesses, deities) reside within the mountain summit area. These personages are embodied within the Mauna Kea landscape – they are believed to be physically manifested in earthly form as various *pu'u* and as the waters of Waiau. Because these *akua* are connected to the Mauna Kea landscape in Hawaiian genealogies, and because elders and *akua* are revered and

looked to for spiritual guidance in Hawaiian culture, Mauna Kea is considered a sacred place. (CMP p 5-3)

Members of the Flores-Case 'Ohana have connected with some of those akua, kupua, and $k\bar{u}puna$ of Mauna a Wākea through genealogical ties as well as through customary and traditional practices. Through these practices, 'ike kupuna, indigenous knowledge, and ancestral insight, the following information and understanding were provided about those connected to this sacred mountain.

(Guardian - name not disclosed at this time), a guardian force of nature from the depths of Mauna a Wākea came forth to provide the following insight. [Note: It was felt as though it was a male presence and so his gender is referenced as such. Such beings, in truth are often not of either gender, but rather espouse certain frequencial attributes that humans define as male or female.] In a ceremony conducted on the summit on 8 May 2011, I personally witnessed the presence of this guardian. He came from the very depths of the mountain, way below the crust of the ocean floor, one who carries the ancient knowledge. He stated, "I come from the depths, the ancient pōhaku." He is the guardian of the bottom, deep below in the earth. He was filled with joy that we were there to listen. However, he was also filled with sadness because of the observatories on her (the mountain's) shoulders and breasts were causing such desecration. He was aware of her feelings because they are all connected. Other guardians on the mountain have been awakened and are on alert regarding this proposed development. They are all in full communication with the Creator who can see all things through Wākea.

He declared that those who are planning to cause further desecration on Mauna a Wākea are "ignorant and lost". In addition, he explicitly stated a message to them, "You are responsible for what you do not know and you will be held responsible." He also mentioned that everyone is accountable for their own actions. Furthermore, he emphasized that, "You don't know what is coming when you do this, you have been warned." He is the one who has the power to shake the earth. Such a decision is not his, but would come from the Creator if needed to restore balance on the mountain.

(Guardian – rough English translation of name, "The one who sees far into the heavens"), an ancestral guardian connected to a pōhaku and previously unidentified site within the vicinity of the proposed TMT site. This guardian explained the significance of many of the sites on the northern plateau as they are interconnected like a large star map. Individuals from certain family lines were guided to come up to the mountain during certain times of the year to reestablish, construct, align, activate, and/or maintain these sites. The TMT construction activities of excavating, grading, and rock-crushing in the area have already caused a great disturbance amongst these sites and guardians. This ancestral guardian also reiterated some of the significant impacts that would result from the building of this telescope and the consequences of attempting to pursue this project on this sacred landscape.

Poliahu, "ka wahine i ke kapa hau" (the woman in the mantel of snow), is at times referred to as an akua wahine. She is a part of Mauna a Wākea and creates the rain, snow, hail, and sleet on this mountain. She serves as caretaker and guardian for the mountain and grants permission to certain spirits coming to the mountain. Poliahu has two attendants assisting her, Lilinoe and Lihau. She is a part of the landscape features with a highly evolved consciousness. Both oral and written native Hawaiian traditional accounts have documented her connection to Mauna a Wākea. I have been present at times when she has shared her concerns about the existing and proposed further desecration on the mountain. She has explicitly remarked that she does not want the existing and any new observatories on this sacred mountain. They are blocking the *piko* on the summit. If she is dislocated due to the new telescope, it might create new

problems and affect the weather patterns on the mountain as well as other areas on the island.

Mo'oinanea, *mo'o wahine* and guardian of Lake Waiau, is at times referred to as a *kupua*. She is described in several traditional accounts and has genealogical ties to the Mauna a Wākea. Firstly, it is difficult to explain or define who Mo'oinanea is for those who may lack an understanding. The existence of her as a *mo'o wahine* goes beyond anyone's personal belief, cultural attributes, or religious persuasion. We contend that just because other individuals are not able grasp this understanding, do not easily dismiss Mo'oinanea's existence on Mauna a Wākea. Mo'oinanea is a revered and significant figure in both oral and written native Hawaiian traditional accounts that have documented her connection to Mauna a Wākea. She is able to communicate with individuals who have the cultural sensitivity and 'gift' to see, hear, and interact with her.

There are numerous traditional and family accounts describing the episodes, sightings, and interactions with *mo'o* in these islands of Hawai'i. When I was younger, my Tūtū Wahine Anahiwa would share accounts of a *mo'o wahine* who would be seen basking on the rocks and combing her hair near the family's kuleana parcel alongside the Hālawa Stream on the island of O'ahu. In addition, other *kūpuna* have personally shared with me similar family accounts of *mo'o* that were seen on other islands such as Moloka'i, Maui, Kaua'i and Hawai'i Island. They are often known to reside in fresh water tributaries, ponds, coastal areas, forests, and mountain zones. Their presence is not only documented in Hawai'i, but their existence has been documented throughout the ages and by cultures around the world. These benevolent and fully conscious beings exist, and are as much a part of our Earth as humanity. They possess supreme divine intelligence and are extremely advanced. They are protectors of humanity and of the planet and are often closely aligned to the earth's electromagnetic and crystalline energies and fresh waters. These *mo'o* have been on the Earth since the beginning. They are indeed physical. They exist primarily in a higher parallel dimension, but do also bodily exist in our physical world. They do reproduce, and the ones on our planet in the present, were all spawned and birthed on the earth. Likewise, they do have physical life spans and also have their own hierarchy and distinct genealogies.

I have been present at times when Mo'oinanea has shared her personal accounts about herself and her family as well as described the type of cultural traditions our $k\bar{u}puna$ of old practiced on the Mauna a Wākea including pilgrimages to the top of the mountain. In addition, she has expressed her concerns about the existing observatories and proposed further desecration on the mountain with the new project. She has shared that the existing observatories have created obstructions and hazards for those who reside on Mauna a Wākea. Likewise, the proposed new observatory will adversely impact Mo'oinanea and others who dwell on the summit. When these guardians and caretakers of the natural elements on Mauna a Wākea are negatively impacted by human's actions, it will also impact the natural elements that are integrally connected to them. Consequently, these actions will also impact us as humans as the natural elements and environment start to shift and change. There is an imbalance and disharmony that has been created on this sacred piko.

Kūpuna, ancestors, including *ali'i* of the past, are also on Mauna a Wākea serving in different capacities or having come to this mountain under different circumstances. Some serve as guardians of various sites and places on the mountain. Others had ventured up to this sacred mountain during various different periods of time. Members of the Flores-Case 'Ohana have encountered and engaged with these *kūpuna* on several occasions through our cultural practices, ceremonies, and visits on the mountain. One such group that we had encountered had fled up towards the top of their sacred

mountain at the time after western contact (circa mid-1800's) when foreign diseases and epidemics swept through the villages along the Kona coast. Many of them were being persecuted by foreigners, particularly missionaries, during this time when many were dying by the hundreds. So for those who could, they fled up to the mountain to die in the realm closer to Wākea. One $k\bar{u}puna$ recounted this account as she was the last one alive amongst her family and others in her group. She sang to them as they each had passed away until she was the very last one to pass. There were literally hundreds of them who had passed during these times and their remains are scattered around the mountain depending upon where they ended up.

The ancestral akua, kupua, and kūpuna who are connected to Mauna a Wākea will be directly and immediately affected by the proposed TMT project. Likewise, we as Kanaka will also be directly and immediately affected by the proposed TMT project if permitted to proceed forward.

IX. Adverse impacts upon Native Hawaiian customary and traditional practices

The proposed TMT construction and development within the environmentally and culturally sensitive landscape would cause adverse impacts and irreparable harm upon those cultural sites and our traditional and customary Native Hawaiian cultural, spiritual, and religious practices as members of the Flores-Case 'Ohana.

The TMT project proposes to be built in an undeveloped area amongst the hundreds of the documented and undocumented ahu (shrines) and cultural sites. The concentration and placement of these sites on this northern plateau was not randomly done by our kūpuna. They were erected and established with specific intentions. Many of these ahu are interconnected similar to a star map. Embedded within these ahu and stones is *'ike kupuna* and ancestral knowledge along with ancestral guardians. As such, construction of the TMT observatory in this vicinity would sever our past, present, and future generational connections with the 'ike kupuna and ancestral knowledge implanted at these sites. With the understanding that many of these sites serve as depositories of ancient wisdom as well as multi-dimensional portals, the massive extent of destruction proposed in this culturally sensitive landscape would also adversely impact our Native Hawaiian customary and traditional practices that are still connected to these sites. Once this landscape is excavated by the proposed TMT construction, it can never be repaired and restored. Many of these sites are interconnected and the detrimental impact on those in the vicinity of the proposed TMT site would also negatively impact the other sites and ancestral guardians **connected to them.** Aspects of these sites are described in the Master Plan:

All aspects of Hawaiian life were steeped in ritual. For the Hawaiian people, spiritual beliefs, cultural practices and all facets of daily life were intricately bound to the natural landscape of the islands. (p. V-2)

The term 'shrine' is used by [Patrick] McCoy to describe all of the religious structures that exist in the summit region of Mauna Kea. The most common of the archaeological features on Mauna Kea, shrines are characterized by the presence of one or more upright stones. The shrines at Mauna Kea range from single uprights to more sophisticated complexes with pavements and prepared courts. The majority of shrines on Mauna Kea are located conspicuously on ridgetops or at breaks in the slope. It is not surprising that shrines were placed in prominent locations with commanding views of the landscape. Shrines have not been found on the tops of cinder cones. (p. V-7)

McCoy has interpreted the shrine complex in the summit region as evidence of an historically undocumented pattern of pilgrimage to worship the snow goddess, Poli'ahu, and other mountain gods and goddesses. (p. V-7)

Our $k\bar{u}puna$ understood and acknowledged the unseen, but recognized, energy of a site that was in their vicinity. The Earth is considered by many indigenous peoples to be our 'Mother' or 'Grandmother'; always there to care for us, nurture us and teach us when we violate her purity. Kanaka Maoli refer to her as Papahānaumoku (Earth Mother). They are also attuned and capable of feeling many facets of her energy and thus developed a communion with these energies. On the northern plateau, many of the sites have both visual and energetic alignments with each other as well as with other noted natural features such as the surrounding pu'u. Due to the massive height and size of the TMT observatory, it would cause significant visual, physical, and energetic obstructions amongst these sites.

In the pursuit of scientific exploration with a total disregard of Native Hawaiian cultural traditions and their sacred landscape, the proposed TMT project would contribute to the cumulative desecration and destruction of one the most sacred sites on this Earth. In the desire to discover the potential for life in other parts of this universe, some have forgotten the sacredness for all aspects of life on this planet. We are in the time when the understanding of the spiritual universe extends beyond the physical universe.

Everyone is responsible for their own energies and the energies they bring into this sacred space on Mauna a Wākea. All energies that are put out, comes back. All life is energy and we are transmitting it at every moment. Likewise, for every action there is an equal reaction. The Earth, the Universe, and the Cosmos are composed of living conscious energy that consists of geometries, light and electromagnetics. You can acknowledge this energy or not, you can listen to it or not. You can ignore it, or you can know it.

It is important to remember that many peoples, including Kanaka Maoli have a reverential relationship with the living Earth. The cultural perspective of *aloha 'āina*, to have sincere love and respect for the land and nature, is at the heart of Hawaiian traditions. For those who are listening, what is our *'āina* trying to tell us during these times of change?

Mālama Honua, Mālama Hawai'i, Mālama Mauna a Wākea
(Care for our Earth, Care for our Hawai'i, Care for our Sacred Mountain)

I ka Piko o ke Aloha

Written Direct Testimony of B. Pualani Case

"And what do you suppose is the mountain of vision?...

It is Mauna Kea, the most sacred mountain in all of Polynesia...

The entire mountain is a temple, a heiau and the mountain itself is kapu-sacred... The scientists didn't know this when they built their telescope on the mountain's summit. Nor did they ask permission to do so from the caretakers of that sacred place, and the mountain does have kahus. Yet we cannot be too hard on the scientists, for they were simply operating from a place of ignorance, a place of theory, and they are just passing through."

(Ancestral wisdom uttered by Hawaiian Shaman, Elder and Teacher, Hale Kealohalani Makua, The Bowl of Light by Hank Wesselman, PHD., p. 192)

I am, B. Pualani Case, member of the Flores-Case 'Ohana, residing in Pu'ukapu, Waimea, Kohala Waho, Mokupuni o Hawai'i. I am a Kanaka Maoli (also identified as a Native Hawaiian, he hoa'āina o Moku o Keawe, he 'ōiwi o ka pae 'āina Hawai'i, an indigenous person of the archipelago of Hawai'i) and a cultural practitioner with connections to Mauna a Wākea, Kumu Hula, chanter, and most importantly a parent of two daughters who are passionately connected to their culture and traditions. We are descendents of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 as established through my family lineage connected to the clan of 'Awini dating back before the time of Kamehameha's birth. My grandfather seven generations ago was 'Umihulumakaokalanikia'imaunao'awini who guarded the pass of 'Awini. Through the writings of my kūpuna, namely Kupuna Pheobe Hussey, Kupuna Sally Berg and Kupuna Marie Solomon, we have established through family stories written by the hands of our kūpuna direct connections to family 'aumākua which we still reverently acknowledge, the pueo, the manō and the mo'o.

I received a B.A. degree in Hawaiian Studies in 1983 from the University of Hawai'i at Hilo along with a D.O.E Teaching Certification. I have been an educator for nearly 30 years in the Hawaii Sate public school system. I am presently a cultural consultant, teacher, lecturer and community leader and resource. Therefore, based upon the legal standards covered in Hawai'i Rules of Evidence – Rule 702, I would also be qualified as an expert witness through my knowledge, skills, experience, training, and education in the subject matter pertaining to Hawaiian cultural traditions.

From the age of six I began to experience the ways in which our people interacted with what we might term the forces of nature, ancestral guardians, and divine beings that bridged one realm to another, both physical and spiritual. Spending much time over the years at 'Anaeho'omalu Bay camping as an 'ohana, my grandmother Mabel raised us to love the ocean and as we grew we experienced our culture first hand as we were fed from what was caught from the sea. To my grandmother this was the place where she could recognize the 'aumākua, the manō, and her ancestors with offerings of food to acknowledge and keep those ancestral ties strong. Many were the stories we heard from our parents who observed her in her practices of respect and union with them. They were real, these guardians, these guides. They were not always physical, but as in the old ways, they had their way of communicating especially when it came to providing warnings in times of danger. These aspects of our cultural traditions have also been recounted by noted Hawaiian historians such as Samuel Kamakau, Mary Kawena Puku'i, and Herb Kawainui Kāne. (see example in Exhibit B.21b.)

My mother has told the same story throughout the years about an episode that occurred when the 'ohana was camping at 'Anaeho'omalu. While waiting for the men as they fished in the ocean, my grandmother suddenly told my mother to pack up everything, take us back to Waimea, and then to come back for the men. When my mother asked "Why?" Grandma said, "There is a wave coming." When asked how she knew, she looked up at the coconut tree and told my mother that a mo'o had told her. They all hurriedly got in the vehicle. Returning to the beach after dropping-off family members and camping gear, my mother conveyed to the men the

message from Grandma and there was no hesitation or doubt. They trusted in this communication between *kanaka* and '*aumākua* and quickly fled the beach. A huge wave came later that day. The camp would have been wiped out and possible serious injuries of '*ohana* members would have occurred. This was one of many instances that would follow through *hula* or family experiences that would connect us directly to the world that was unseen and unknown to many, that had been forgotten or banished after missionary contact, the world of seeing, listening, communicating with our ancestors in their various forms. This became a sacred part of our lives. This form of communication has been passed down through several generations in my '*ohana*. An individual with this gift is referred to as a "*haka*" in Hawaiian traditional accounts as noted by M.K. Puku'i and E.S.C. Handy in The Polynesian Family System in Ka'u, Hawai'i (pp. 132-135). Exhibit B.21c

Significantly, this relationship continued with an event in 1981 in which a severe drought occurred in Waimea. Searching desperately for a rain rock we had heard about through the cowboys and elders of Parker Ranch, we located it and the ranch had it cleared. We wove flower leis to bestow upon the rock as gifts to the *mo'o wahine*, ancestral guardian of the rain in Waimea called Manaua. The rains came and with it a solidification of my family's *kuleana* or responsibility to this *mo'o*, who brought the rain, and our *kuleana* to care for her dwelling place, this *pōhaku* or rain rock, known by the same name. That was in 1981 and we have been there consistently ever since cleaning, giving leis, praying, chanting and dancing at Manaua.

Our foundation was set and family *kuleana* or responsibility was established at that time when the rains came. We knew that here we would be immersed in the traditions, I would come to know by interviewing, researching, and listening to those who could still communicate with the forces of nature that we came to know namely as Manaua.

Stories, historical accounts, and oral traditions were and are still passed down by noted storytellers from Tutu Kalani Phillips, Larry Kimura to Ku'ulei Keakealani. They all spoke of Manaua as she sunbathed on the *pōhaku* of the same name accepting gifts of flowers and food, prayers for rain, and prayers of gratitude after rain had fallen. Through these accounts I would come to know that Manaua did indeed exist and would show herself or speak to those who were 'gifted', those who vibrated at a frequency consistent with the mo'o guardian, called Manaua. [see article in Exhibit B.21c]

Several year ago, an event would occur which would literally propel an acceleration within us, a call to action that began rather simply while my daughter and I were waiting for my husband to bring a group of students to Manaua to learn about the stories and traditions connected with that area. As we waited my daughter said, "She's here you know, Mom. I see her." I said, "Who do you see?" She answered, "Manaua." That answer began a journey for us, a journey we witnessed and took part in. Kapulei saw her, heard her, and learned through a communication such as was documented by my grandmother and by our *kūpuna* of old. Through our daughter and others like her, Manaua revealed herself to us. With a physical description and the breath of information she shared through them, we came to know place names, events, traditions, and protocols. Through them we were advised and guided. The foundation we had established in 1981 was strengthened and sealed from then to this present date.

During one visit to Manaua, Kapulei informed me that Mo'oinanea from Mauna a Wākea had come to visit Manaua and was sitting on a lower level of the rock. She described her to me completely including the style and design on her *kīkepa*. [see portrait of Mo'oinanea in Exhibit B.23b] As we left, she paused asking me to wait. She listened and stated that Mo'oinanea was asking if I could try one more time. When I asked her what she meant, she asked, "If I could try to stop the telescope from being built, but that if I could not, it was okay." She was requesting something of me, but also as if reading my mind, was giving me a way out at the same time. This is the one of the primary reasons our family was prompted to proceed forward in this contested case hearing, because of that request.

I have been present at times when Mo'oinanea has shared her personal accounts about herself and her family as well as described the type of cultural traditions our $k\bar{u}puna$ of old practiced on

the Mauna a Wākea. In addition, she has expressed her concerns about the existing observatories and proposed further desecration on the mountain with the new project.

As a *mo'o wahine*, coexisting with humanity on this physical realm while resonating at a higher vibration, Mo'oinanea can transform into a full human form, full *mo'o* (reptile/dragon) form, or part human (top half of her body) and *mo'o* (bottom half) at times. This is due in part because her genealogy includes both *mo'o* ancestry as well as human ancestry. Mo'oinanea has shared with our family her genealogy going back several generations. She is the oldest of five siblings born to 'Elua (father who is from Hilo) and Melemele (mother who is from South O'ahu). In addition, she was born on the summit of Mauna a Wākea and assumed the responsibility as guardian of Lake Waiau from her mother who was the former guardian of this sacred body of water. Assisting Mo'oinanea are her two female *mo'o* attendants, Kīpu'upu'u and Kupukupu as well as others, including spirit attendants. Some serve as guards who watch the whole mountain while her attendants watch the lake when she is gone because there are certain other spirits such as those that might steal something or pranksters that they do not want on the mountain. Mo'oinanea also serves as counselor to Poliahu and assists with some of her problems.

According to Mo'oinanea, when kanaka of old travelled up to the summit, they went by Lake Waiau to leave an offering or left an offering at the bottom of mountain. Offerings were made to Poliahu and Mo'oinanea. Offerings often included fish, kalo, mai'a, 'uala wrapped in lā'ī. Women sometimes gave *lehua* (white, orange, and red were usual colors/if white was not found, they used yellow), kukui, kupukupu, māmane, and young lā'ī, wrapped with dried brown lā'ī leaves. The flower bundle was usually tied to the top of the food $p\bar{u}'olo$. These people would collect snow to see how it was or they used to go up there to get centered. Kahuna would also go for their chief to gather water from the lake as an offering for chiefs or places they travel to. First, they would have to state why they wanted to collect this water and their purpose for it. They also needed to state how much water was needed. Then a $l\bar{a}$ i (ti-leaf) was put on the lake. If permission was granted, $l\bar{a}'\bar{i}$ floats. If not, $l\bar{a}'\bar{i}$ sinks. If the wind blows one back, they have to leave the mountain immediately. If one lies to her, they would be banished from mountain for a period of time. If it was an exchange of water from this same island, a $l\bar{a}'\bar{\imath}$ was not needed. If from another island, then a $l\bar{a}$ ' \bar{i} was needed. One needed to state where the water was from first. If there was an exchange of water and permission was granted, one would collect water first and then pour their water in afterwards. She is fine with people putting their piko in the lake, but one has to have roots to the mountain.

Adverse impacts upon Mo'oinanea, Polihau, and our island of Hawai'i

Mo'oinanea stated that she and others feel that these developments are blocking their views and the areas they used to occupy. In addition, those who constructed these observatories did <u>not</u> get permission from them to build on their home, nobody said they could. Moreover, it blocks the *piko* (portal) to connect with Ke Akua (the Creator) and 'aumākua. Also, it might change and affect the weather patterns on the mountain and in the surrounding areas below such as Waimea. They wished that the observatories were never there and they don't like the roads either. In regards to people coming up to the mountain, it is not too bad. If they had to choose between observatories vs. people coming up, they would choose the people way over the observatories.

Through communication with Mo'oinanea, she has shared that the existing observatories have created obstructions and hazards for those who reside on Mauna a Wākea. Likewise, the proposed new observatory would adversely impact Mo'oinanea and others who dwell on the summit. The importance of Mauna a Wākea to her is that it's her home and she was born and raised there. She wants to have children up there without any more observatories. For Poliahu, it has impacted her sleeping area and it is where she and others connect with Ke Akua. It is so high, the point on the top that they put their hands up to connect to the heavens. They wish to have no other observatories on the mountain for if they continue to build, some might have to move off mountain. Others would not come up there because they had to move. What we do not know is if it will snow anymore if Poliahu is off the mountain and if she is able to make it snow from somewhere else?

Rest assured that we have asked and received permission from those whom we have discussed to share the information provided in this testimony and that these are their messages passed on to us to be delivered in this manner.

Adverse impacts upon my traditional and customary practices

Since the age of eight I have been immersed in the hula traditions and customs connected to the hula school of the noted kumu hula and the great hula master, 'Iolani Luahine. My 'uniki or graduation in the protocols and art form of the hula in 1984 was through my kumu hula, Lynette A'ala Roy Akana, a student of 'Iolani. The training I received while in E Ho'ohawai'i Kakou, a pā hula, hula school in Kona was predominantly ritualistic and traditional mirroring archival reports and written/oral testimonies of pre-contact hula traditions, training, protocols and ceremonies. Training was completed in the elements, in the environment with ancient prayers, dances and chants learned through recitation and mimicry of the teacher, without paper or pencil, without technological devices to assist in mastering what would be offered to the gods and the goddesses, the multitudes of ancestral spirits and guardians, and predominantly to specific places deemed sacred, storied because at these places, there was an exchange of mana or spiritual connectivity as you honored them. These were ancestral places you referred to as your grandparent, your teacher, because the stories and the place itself dictated your conduct, touched the very core of who you were, influenced the way you looked at the world around you. There was no separation between you and those places one you danced upon. These places were linked to your family history and you were genealogically connected to it. You developed a relationship with it and soon there was no separation between you, you were sealed to it this sacred ground and connected to it through the words and the melodies. Our training and performance occurred in the environment and at specific places as it had been done by our ancestors at *heiau* (stone walled temples), at *ahu* (shrines), and at the *hula kuahu* (hula altar).

The hula, chants and prayers taught in this way differed from what would be offered at a hula studio or school that did not delve that deeply into traditional practices and their ancestral connections. But we were privileged to be amongst a handful to learn in this way, overseen by a *kahuna*, an elder of Kona who guided and protected us, who cleared the pathway for this style of training to be accomplished. In this manner of training, we were responsible to all that we chanted about, whether they be place, deity, spirit, or human. There was no separation between us and where we stepped upon the ground to move as one in hula motion, we were one with everything around us. We accepted this lifestyle of hula though it was not an easy path to follow. Over the years as a hula practitioner, then *kumu*, one tied through chant and dance to place, I found that as some of these significant and sacred places became increasingly more developed or became off-limits to practitioners and the public, it was too painful for us to be there. There was a sense of helplessness, guilt, anger, sadness and despair at the changes, the construction and desecration that were occurring. Chants and dances connected to these places fell to the wayside. Traditions tied to these places could not be continued. For me, that would be true for the place that raised me, 'Anaeho'omalu.

In the same way that I have experienced this loss of hula traditions tied to place over the years, I see that it would happen again if the Thirty Meter Telescope is built in the upper region of our Mauna. At this time, I have consistent traditional practices connected to the entire mountain, including the northern plateau. Recitation of specific chants are uttered there, chants that ask for blessings, chants that express gratitude, chants that ask for rain and snow, chants that honor Poli'ahu, chants that call upon Wākea, Sky Father. There are rituals and ceremonies at *ahu* and sites there and dances we share only on the summit. These are the prayers and the chants connected to place, to the abode of Poli'ahu, and on the *pu'u* that bears her name. These are the chants in the realm of *wao akua*, in the domain of Wākea and the deities who make their presence known through the elements. These are the honoring chants that speak of our genealogical connections between the heavens and the earth and the mountains and the sea.

In addition, I have held many formal ceremonies up on the pu'u of Waimea with each ceremony beginning with facing Mauna Kea and gathering the breath and heartbeat of the mountain within my body. [see photo in Exhibit B.21e] As the sacredness and immensity of its vibration fills me

and each dancer standing by my side, we honor the mountain's beauty and cultural importance with the words of chants such as this one:

He lei keakea noho maila i ka mauna, Ka mauna ki'eki'e i luna ku kilakila, Kilakila 'o luna, 'o luna i ke ao (written by Nona Beamer)

In addition, a chant that describes the perspective of "triple piko", E Ho 'olōkahi \bar{e} , is often done by us in ceremonies or gatherings, connecting at times with the piko on the summit of the mountain. [see chant in Exhibit B.21f] I have witnessed a portal opening overhead in the sky above the piko of Mauna Kea. [see photo in Exhibit B.02w] Likewise, I seen and experienced other divine occurrences connected with the mountain during our ceremonies.

No matter where the ceremony, we begin by acknowledging the most significant mountain in the Pacific as did our $k\bar{u}puna$ of old. We announce who we are by our mountain, our living waters, and our land base. My tie to the mountain and cultural practices are formal and sacred, tied with deep and abiding Aloha.

How would the traditional practice of ceremonies including chanting, dancing, honoring at these places be impacted by the building of the eighteen stories? The place with its pristine form would be no more, it would be under concrete along with an enormous visual eyesore, the place would have been desecrated, destroyed. We, the *kanaka maoli* and those who share these practices physically and spiritually would not be able to recite and perform the hula traditions there because of the overwhelming sense of despair and guilt that we would be consumed with. How can we stand by and witness the desecration, destruction and construction and then conduct the same ceremonies we have done for years on the mountain? For me, it would be akin to forfeiting my right to be there if I was unsuccessful in protecting the mountain. I could not return there to chant, dance and sing in the same manner. We would not be able to pray in the way that we have been led to do. A connection would be lost between the ancestral realm and the human realm. Information shared between us, knowledge passed down ancestrally would be lost. Interaction between the mountain and the human would be diminished like a loss of a family member, and the death of a way of life.

Adverse impacts upon Mauna a Wākea, our sacred piko and water source

In 2013, Mo'oinanea stated to my daughter that she could not resonate with even the intention of building the massive Thirty Meter Telescope, the actions of the attempts to begin construction in this sanctified place were too much and she was leaving Lake Waiau because of the disturbance on the upper regions. She said to Kapulei that she would leave a sign and I would know that she had left the lake and it would be an indication of how the physical landscape would be altered, beyond the obvious physical construction impacts. At the beginning when she had first spoken to us, she stated that if built, everything would change because all of the ancestral guardians and caretakers would leave the mountain and their environmental forms would leave as well. And at this time, she showed us all what that meant. She left the land and the Lake Waiau dried up to almost nothing. (see Exhibit B.21g) And the change shook everyone. It had never been that dry before in the time of historic records. The customary ceremonies that had previously occurred at the Lake were halted, ceremonies as dictated in the past, collection of water for ceremonies, placing umbilical cord of those connected to the mountain stopped, purification and cleansing ceremonies as documented by Queen Emma on her historic journey there could not be continued. She demonstrated for us, her people, the descendants of the mountain, what it would be like if the TMT were built, traditions would end there because the climate would change, the landscape would be affected. That would pertain to more than Lake Waiau, it would pertain to the entire mountain.

Through '*ike kupuna*, indigenous knowledge, and ancestral insight, the significance of Mauna a Wākea to the water cycle on this island is revealed. From the heavens, the water falls, its purest form falls upon the mountain top perhaps in the form of rain, perhaps in the form of misi,

perhaps in the form of snow, this water flows on the mountain and beneath the mountain, drinking water, nourishing water, until it flows to the sea. Wai kapu, wai ola, sacred is that water, the water of life, life-giving waters. It is all about the water. The integrity of the water, the essence of the water must remain pure. The impurities it touches must be made clean, the surface must be clean, clear for the water to maintain its purity. That is the way of our ancestors who protected and guarded the summit. That is why human activities upon this summit were restricted. When we speak of ka wai maoli, ka wai kapu, ka wai ola we are speaking of first its spiritual quality.

While attending a water ceremony on the Shinnecock Reservation in New York, Native American elders spoke to the crew of Hōkūle'a of the spirit of water and the significance of protecting the water of the highest aquifer in the world from the sea floor. They too understood this TMT project is too large for even the mountain and the ancestral spiritual guardians to tolerate or adjust to. So they charge us as the keepers of the mountain to stand and protect the sacred waters. They stated to us that even the thought, the intention of building on this pristine upper region of the mountain has already begun to impact the essence of the water. It is imperative that we call upon the ancestral guardians to come to our aid to protect the water not just for the native people, but for all people. Chief Arvol Looking Horse who conducted the water ceremony in New York stated the following;

We the Keepers of the Sacred Sites have heard your calling. Your prayers and your journey to your Sacred Site of Mauna Kea is not only important to your culture and tradition, but we the Spiritual Leaders and Medicine People know that the Sacred Site is part of all of our lives. In our tradition and culture, this is like a Church, a Temple, a Sacred Place, where we do our prayers. We extend our heart and prayers for your Nation to protect, not only the Sacred Site, but the Mini Wic'oni (water of life), which is the most important part of our ceremonies along with the fire and air. https://ravenredbone.com/2015/04/03/chief-arvol-lookinghorse/

If we do not protect the water's spiritual and physical qualities, we would be ingesting what is not PONO for us, what is not good for us. For us as native people connected genealogically to this place, when the ancestral guides call upon us protect it, that's what we must do, it's our obligation, our privilege, our birthright, our responsibility, our cultural tradition, our *kuleana*.

In ceremonies conducted on Mauna a Wākea and at other parts of the island, I have personally witnessed the ancestral guardians and divine beings connected to this sacred mountain as they have provided a voice of concern about the existing and proposed development activities on this mountain. We have been told that the mountain is alive and can take care of itself. At any time it could clean itself with a mighty shake or a lightning bolt. Mo'oinanea has acknowledged that we all have free will to refuse but has at the same time asked us to step forward to speak for her and others on the mountain in union that this development is not beneficial for us or our environment. They have asked us to ask the question, "Who will be responsible for the consequences not yet known that will affect the mountain and all of us?" Therefore, I end with that question so that we all may know who will be ultimately responsible and that they step forward to acknowledge that indeed the responsibility lies with them!

The proposed TMT project would have a devastating impact upon Mauna a Wākea, our sacred *piko*, source of our life-giving waters, abode of *akua* and *kupua*, a fragile ecosystem, and a culturally sensitive landscape with hundreds of historic and cultural sites. Likewise, this project would have a devastating impact upon my cultural practices and traditions as well as upon my well-being and health. This project can <u>not</u> meet the criteria for the type of proposed construction in a conservation district as outlined in HAR § 13-5-30(c). Thus, a CDUP should <u>not</u> be approved.

Written Direct Testimony of Hāwane Rios

'O wau 'o Hāwane. 'O Mauna a Wākea ku'u mauna, 'o Kohākohau ku'u kahawai, a 'o Pu'ukapu, Waimea ku'u 'āina kūlāiwi.

My name is Hāwane Rios, my mountain is Mauna Kea, my river is Kohākohau, and the land that raised me is Pu'ukapu, Waimea on the island of Hawai'i. I am a descendant of Kanaka Maoli (Native Hawaiians) who inhabited the Hawaiian Islands prior to 1778 as established through my genealogical lines of 'Umihulumakaokalanikia'imauna'o'Āwini and Ka'ā'īkaulakaleikauilahāmakanoe Naweluokekikipa'a. My ancestors come from the 'Āwini Valley of the Kohala Mountains connecting me and my bloodline to a lineage of indigenous peoples rooted in honoring the land, waterways, and all living beings. The practice of aloha 'āina – to love and care for the land - was passed down by these same ancestors through the generations to my mother and then to me. It is a practice of our people to know where we come from, remember the creation story of our land and people, and understand how our family genealogies connect to it. I offer this part of our genealogical creation story here to create a space of better understanding as to why I stand to protect Mauna a Wākea from further destruction and desecration that would be inflicted by the proposed Thirty Meter Telescope.

Born to Wākea, the infinite incredible expanse of the universe and Papawalinu'u, the deep womb of the earth, is Mauna a Wākea. Born to Wākea and Papahānaumoku, the mother of our islands, is Hoʻohōkūkalani, the Goddess of the star realm. Born to Wākea and Hoʻohōkūkalani is Hāloanakalaukapalili, a still born being buried at the east end of the house. From that burial grew the first food of the Kanaka Maoli people of Hawaiʻi, the kalo. Born to Wākea and Hoʻohōkūkalani is a second child named Hāloa, the first kanaka (Hawaiian). From Hāloa comes the Kanaka Maoli (Hawaiian) people. The transcendental interconnectedness that dances between the creation of Mauna a Wākea and the movement to protect Mauna a Wākea exists in the beat of my very heart. When I say, "We Are Mauna Kea", I am bringing forth an ancient knowledge that teaches that we, as Kanaka Maoli, are made of the same force that created this mountain and that we, as Kanaka Maoli, are descendants of this mountain. I was raised to honor and respect those who came before me and that is precisely what I am doing as I stand to protect my ancestor, Mauna a Wākea.

This genealogy was taught to me by my elders with the intention to always remember my birthright and responsibility to uphold the tradition of caring for the earth in a good way. My upbringing is rooted in the traditional dances, chants, and ceremony of my ancestors. I am a Kanaka Maoli (Native Hawaiian) cultural practitioner who continues to exercise my traditional and customary practices on Mauna a Wākea. These traditional and customary Kanaka Maoli (Native Hawaiian) practices, including pilgrimages to the top of Mauna a Wākea, pre-date 1892 as evidenced through 'ike kupuna, cultural sites, oral traditions, indigenous knowledge, and several reports. I am only including this information in my testimony because I have to. I am deeply offended that according to this court system, I have to prove the legitimacy of my bloodline and my cultural

practices on my ancestral mountain in my own homelands. The Kanaka Maoli people are a living a people. We survived the illegal annexation of our Kingdom, the Great Mahele, the ban of our language and dance and many more painful atrocities that continue to oppress us today. Despite all of that, we are still here and our culture, beliefs, traditions and ceremonies remain intrinsic to the very fabric of who we are as Indigenous people of Hawai'i.

My connection to Mauna a Wākea is grounded in ceremony. My family and I have spent many years making our way to the mountain to lay our prayers and offerings down and to ask for guidance through messages from the higher spirit beings. These ceremonies have deepened my relationship with the spirit realm and has strengthened my gift of sight as a medium, a gift that many in my family line have carried with them for generations. Here I will share some of the messages I have received in ceremony at the proposed Thirty Meter Telescope Site. While in prayerful mediumship I was told by a powerful ancestral being of the mountain that the lands of the northern plateau are portals to very ancient celestial knowledge. I was shown how the shrines and upright stones found on the northern plateau are connected energetically to one another and line up with certain constellations and ocean currents during particular times of the year. The ancestral guardian shared that this place is an ancestral school of navigation and training of the highest level taught by ancient celestial beings. This portal still exists however I was told that if the Thirty Meter Telescope was built then the connection and access to this ancient school of celestial knowledge would be severed permanently. I hold these messages sacred with profound respect and reverence for this spirit realm.

The ceremony has guided my advocacy work for the Protect Mauna Kea movement and my life work as a musician. This work has taken me to the far reaches of the world to stand in solidarity with many movements rising up to protect the rights of the earth. Through these travels, I have shared time and space with different indigenous peoples speaking of the devastating realities of Intergenerational Trauma that was passed down by the people in our respective lineages that experienced the immense suffering of war, violence, rape, forced displacement, and colonization. The trauma that I carry in my DNA has come to the surface time and time again since my family and I entered into Thirty Meter Telescope contested case hearing on behalf of the spirit realm in 2011, through the Protect Mauna Kea movement these past few years, and up until now. The constant questioning and belittling of my spiritual connection to Mauna a Wākea, my beliefs, traditions, and cultural practices in the court system, by the Astronomy community and University community has been wearing on my emotional, physical, and spiritual well being. The pain in me recognizes the pain in my own people and the people from around the world that are dedicating and risking their lives to protect what is left of the clean air, land, ocean, and water.

I felt the immensity of that pain on April 2, 2015 when the first 31 arrests of peaceful protectors occurred. I remember running up the Mauna Kea Access Road passing by my fellow protectors standing arm in arm in lines as far up to the summit as they could go. My heart pounded as the police chased us up the mountain to the proposed Thirty Meter Telescope site. When we got to the summit, we took our line and began to chant.

In that moment, I felt a current of strength, pride, and honor while simultaneously feeling this sense of profound sadness, anxiety, and fear as the police made their way toward us. I can still feel the waves of tears that flowed down my face as my family and comrades were arrested and taken down the mountain in State vehicles. It was on that day that the reality set in that we would literally have to lay our bodies down to protect and defend our mountain.

I was reminded of the truth of that reality on September 9, 2015 when I was arrested in prayer in a ceremonial circle of women on Mauna a Wākea. At that time the Hawai'i State Board of Land and Natural Resources declared Emergency Rules that prohibited people from being in restricted areas on the mountain between 10:00 pm and 4:00 am which included the land across from Hale Pōhaku that had become the gathering grounds of the 24/7 vigil of the movement. On that evening I was notified that DLNR not only planned to do a sweep of the "restricted areas" but also planned to take down the traditional prayer house, Hale Kū Kia'i Mauna, that holds the wooden figures that represent significant and important deities and ceremonial offerings. As a woman raised in ceremony, I knew I needed to be there to protect this place regardless of these rules that were so blatantly targeting the people of the movement.

When I reached Hale Pōhaku my feet immediately took me to the hill that holds offerings of pōhaku (rocks) from all of the main islands in the Hawaiian Chain. I began to chant a prayer of clearing and cleansing with my eyes closed and for the first time in the duration of the Protect Mauna Kea Movement I felt total peace and compassion flow into my heart. My eyes opened to see hundreds of spirit beings of the mountain coming over the slopes. I could feel the mountain breathing and releasing the energy of heaviness and tension and emitting a breath of healing calmness. I heard a voice come to tell me to trust the wisdom of the mountain and to let that powerful energy guide the peace and compassion I felt so deeply through this prayer.

Upon closing the prayer ceremonies on the hill we decided to go to our vehicles to continue our prayer vigil because the temperature started to drop quickly. After some time passed we met in prayer in front of Hale Kū Kiaʻi Mauna. We stood in a circle and began a chant that summoned our Gods and Goddesses to come from above and below and from the uplands and lowlands to grant us guidance and protection. It was in the middle of this very sacred and powerful chant that the DLNR officers forced us apart and began arresting us. This was one of the most offensive and traumatic experiences of my life. Our ceremony and prayer was disrespected and mistreated by these officers and this system that allows and encourages this behavior. Our rights as native people were violated. According to the United Nations Declaration on the rights of Indigenous Peoples Article 12,

"Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs, and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects..."

These "emergency rules" were later determined invalid by Judge Ibarra because they were improperly implemented. Despite this ruling, the depression and heartache I felt thereafter was profoundly painful and damaging to my health and wellbeing. I experienced symptoms of Post Traumatic Stress Disorder such as intense anxiety, negativity, and overwhelm. It is still difficult for me to go back to this memory and recall the details of that night without feeling emotional.

The mountain, the ceremony, and the prayer have guided my journey in healing the pain and the trauma that I have experienced. The teachings from the spirit realm and from my elders have helped me to navigate my way in this world that needs reminding that we as human beings are not separate from the earth. I have been taught that whatever we do onto the earth we do onto ourselves and that the health of the land is a direct reflection of the health of the people. I want to see the healing of Mauna a Wākea reflect the healing of my people. I want the generations to come to know that we did everything we could to bring honor and dignity to our sacred mountain. I want to see Mauna a Wākea, our most precious watershed, clean and healthy to sustain us for years to come. That is why I chose to give everything I have down to my last breath to the protection of Mauna a Wākea.

I, Hāwane Rios, am hereby writing this testimony in protest of the building of the Thirty Meter Telescope as it would significantly and adversely impact our sacred Mauna a Wākea, Kanaka Maoli, access to 'ike kupuna, my well-being and health.

Kū Kia'i Mauna!

Comments from Imua TMT

From: IMUA TMT [mailto:imuatmt@gmail.com]
Sent: Thursday, August 20, 2020 11:35 AM

To: Dawn Chang

Subject: Native Hawaiians support TMT

Attachments: Imua TMT brochure.pdf; TMT - Combined flyers.pdf

Aloha Dawn,

Mahalo for your work on evaluating UH's implementation of the CMP.

We are writing on behalf of Imua TMT and our supporters. Imua TMT is a Native Hawaiian-led community group advocating for the construction of the Thirty Meter Telescope on Mauna Kea.

We have been deeply involved in advocacy for TMT and during that time we have witnessed UH's management of Mauna Kea, become friends with UH staff responsible for managing Mauna Kea, and spoken with many of the stakeholders that interact with UH staff. In our experience, UH is doing an excellent job managing Mauna Kea and balancing the many interests in Mauna Kea. The astronomy precinct in particular is extremely clean. That is, incredibly, in stark contrast to the protest camp created by self-declared "protectors" of Mauna Kea, where we have seen cars leaking fluids, trash left strewn across the pristine landscape, and people defecting and urinating on lava fields.

UH's sublease for TMT is the model, according to the state auditor, of how all future leases should be issued. This is part of UH's adaptation and constant improvement in response to feedback. Objectively, Mauna Kea is in fact some of the best managed state land.

The governance structure UH has installed, and is currently revising, is also excellent. It allows for engagement by the public and has advisory groups that specifically focus on Native Hawaiian cultural issues. The system may not be perfect, but like democracy, it is perhaps the worst system except for every other system.

The truth is that the constant complaints about UH's management has nothing to do with reality. Maybe 21 years ago it did, but since then UH's management has improved dramatically, as shown by the follow-up audits. The truth is that a small faction of individuals who want to scrape modern astronomy off of Mauna Kea are using UH's management as a proxy fight. They do not care about managing Mauna Kea - they care about controlling it to the exclusion of the rest of our community. As evidenced by the contrast between the protesters' camp and the astronomy precinct, we would prefer UH continue managing Mauna Kea.

What we would like to see more of out of UH is advocacy for modern astronomy on Mauna Kea. We would like to see UH organizing discussions that include supporters of astronomy, such as TMT supporters, and protesters. We would like to see UH provide rigorous analysis of the protesters' arguments and provide real education to the people of Hawaii, especially about the blatantly inaccurate statements by the protesters.

A perfect example of this can be found right at the beginning of the CMP. There is a section called "Cultural Anchor" and it is written by The Edith Kanaka'ole Foundation. This document repeatedly asserts that "the Hawaiian people" believe what the document asserts, which is that Mauna Kea is sacred. This is factually inaccurate. It is shocking that such a document is included in a state plan and it is a violation of our freedom of belief as Native Hawaiians to have the kapu religion re-imposed upon us.

We say re-imposed because the kapu religion was destroyed by Kamehameha II 201 years ago. This is history explained in detail in Shoal of Time at pages 56-57. This is a basic text on Hawaiian history and was written long before the CMP was adopted. Furthermore, there is an excellent article on the destruction of the kapu religion online here: https://hanahou.com/20.5/the-last-stand. The point is, this is known information. It is very well established that, months before any missionaries arrived in Hawaii, our people declared 'Ai Noa, granting Native Hawaiians our freedom of belief. We are not required to submit to any single belief structure and no Native Hawaiian has the right to impose such beliefs on another. And to top it all off, a brief reading of even just the first few pages of David Malo's Hawaiian Antiquities, not to mention numerous other primary source texts, makes it abundantly clear that ancient Hawaiians had numerous beliefs and creation myths. The story of Papa and Wakea is just one. It is in no way what "the Hawaiian people" believe and it never was what all of us believed (indeed, Malo tells us the "aia", or atheist Hawaiians, actually believed nothing (see Hawaiian Antiquities p. 82)). As a Native Hawaiian matter, Mauna Kea is not sacred. And to the extent some Native Hawaiians have chosen to continue worshiping the kapu gods, that is their choice, and they have absolutely no right to impose their beliefs on any other Native Hawaiians or our Hawaiian society at large. Which means that their view of Mauna Kea is but one to be considered and is not dispositive of how Mauna Kea should be used.

In our view, under the kapu religion, in the age of 'ai noa, and by any other objective standard, the construction of modern ground-based telescopes on Mauna Kea honors Mauna Kea in every way, including the sacred. We believe in ka'ana, sharing equally; in kupono, excellence; and in ka'imina'au'ao, the search for knowledge. In our view, our celestial navigation history is honored and perpetuated by the navigation of island earth through the ocean of space via the telescopes on Mauna Kea. Mauna Kea and the telescopes atop it are our culture. Mauna Kea unites science and culture. From what we have seen UH has done an admirable job of balancing these interests and perpetuating our culture through contribution. We would be happy for them to continue doing it, and we would love for them to advocate more strongly and rigorously for our community to understand the true history of our people.

We have also attached for your records a brochure and fliers we have prepared that provide testimonials and evidence-based facts about the value of TMT, and thus by extension modern astronomy on Mauna Kea, as overseen by UH these many years.

Mahalo,

Imua TMT

Malia Martin Samuel Wilder King II Mailani Neal Makana Silva



"I believe totally in getting the new telescope built on Mauna Kea. Our ancestors studied the heavens. Now a new generation of Hawaiians

can have the opportunity to advance what they discovered. A telescope that can accomplish this maintains the sacredness of the mountain. With this and in other ways, we need to be open to the future to carry us forward to the many tomorrows yet to come."

 Leimomi o Kamehae Kuamoʻo Moʻokini Lum

The Kahuna of Mo'okini Heeiau



"The historic legacy of Mauna Kea must continue its contribution to scientific knowledge."

Judge Walter Mehula Heen
 First Director of the Office of Mauna
 Kea Management; former OHA Trustee



"I'm very proud to identify myself as a Native Hawaiian. At the same time, I'm also a scientist, I'm an astronomer and I believe that these two aspects

of me can coexist. And I believe that astronomy and the culture can coexist on Mauna Kea."

Mailani Neal
 Native Hawaiian Astronomy Student;
 founder of We Support TMT petition



"As a Native
Hawaiian, I believe
Maunakea is a
deeply spiritual
place. We just
need to have the
collective will to
share the Mauna."

Kalepa Baybayan
 Master Navigator and Captain



Imua TMT supports having the Thirty Meter Telescope in Hawai'i on Mauna Kea.

Many questions and concerns were raised about TMT and unfortunately, rumors and misinformation are also circulating.

Imua TMT wants you to know the facts.





"We support astronomy in Hawai'i as a clean, sustainable industry. The best astronomy on the planet is from Maunakea. Astronomy

is a part of our stargazing, navigating heritage throughout Polynesia."

Malia MartinFounder, Imua TMT



"I think telescopes maintain the sanctity of the mauna, worshipping the sky through observation and servicing a goal of bringing

humankind closer to understanding creation of life in the universe. It isn't traditional but neither were the ahu erected on the mauna, which didn't diminish their sanctity to those who built it. It isn't Hawaiians versus desecration. It isn't a war on culture and science. It isn't an issue where only Native Hawaiians get to have a say because we are no longer the only ones who live here."

Kauionalani Onodera
 Mechanical Engineer



"I am in support of TMT and I can't wait to take my kids up there to look at the stars."

Ikaika Kamaiopili
 Native Hawaiian TMT Supporter



"I see Maunakea as a special place that allows us to understand and study our origins. As one's origin and genealogy are critical aspects

of Hawaiian culture, I view the pursuit of astronomy on Maunakea to be a beautiful blend of culture and science."

Heather KalunaAstronomer, UH



au ā me kākoʻo au i ka ʻohe nānā kanakolu mika. I am a Native Hawaiian and I support the TMT."

"He kanaka 'ōiwi

Naea Stevens
 Native Hawaiian

How Hawai'i Benefits from TMT

- Educating Hawa'i's Keiki TMT launched The Hawai'i Island New Knowledge (THINK) Fund in 2014 to better prepare Hawai'i Island students to master STEM and to become the workforce for higher paying science and technology jobs in Hawai'i's 21st century economy. For the past five years TMT has made an annual contribution of \$1 million to the Fund. To date, through the Hawai'i Community Foundation and Pauahi Foundation, TMT has provided over \$5.5 million for Hawai'i Island students, their families and teachers.
- Paying Rent Since 2014 TMT has paid \$300,000 in lease rent. This will increase throughout construction to \$600,000 when the structure is built, \$700,000 when the instruments and mirrors are placed, and \$900,000 in the 10th year of construction. After that, TMT will pay \$1 million a year for the 50 years the the telescope is in operation.
 - \$800,000 of TMT's \$1,000,000 annual rent will go directly to the Office of Mauna Kea Management, which is responsible for enforcing the telescopes' leases, protecting Maunakea's environment, and preserving cultural sites.
- Native Hawaiian Programs 20% of TMT's annual \$1M lease rent will go to the Office of Hawaiian Affairs for the benefit of the native Hawaiian population it serves. \$250,000 of TMT's \$1M annual contributions to the THINK fund goes to the Pauahi Foundation, which provides college scholarships exclusively for Native Hawaiian students.
- Economy –TMT will bring hundreds of millions of dollars in construction revenue for Hawai'i-based companies. TMT will create 300 union construction jobs. TMT will allow the University of Hawai'i to attract billions of research dollars. TMT will revitalize the astronomy sector, ensuring future large-scale diversification of our economy.
- Long-Term Jobs on Hawai'i Island once completed, TMT will expend about \$40 million annually in observatory operations and employ about 140 employees. TMT's commitment is to fill these positions with as many Hawai'i residents as possible.

TMT will continue funding the seven-year-old Workforce Pipeline Program, and increase the funding to \$1 million dollars per year. This will continue the programs that will lead to a highly qualified pool of local workers.

- Scientific Research and Discoveries TMT will add to the best astronomical research in the world that is happening on Maunakea, cementing Hawai'i's reputation as the international leader in astronomical science. The University of Hawai'i's nationally recognized Institute for Astronomy will also benefit from the important infrastructure TMT will provide to enhance students' learning by studying the universe.
- TMT Support During COVID-19 TMT donated \$100,000 to the The Food Basket Hawai'i Island's food bank during COVID-19 lockdowns. TMT provided \$50,000 for an on-line STEM program in collaboration with Hawai'i Science and Technology Museum which launched at Hilo Intermediate School in June. TMT's Hawai'i staff have been sewing masks and donating them to an on-island foster children program!

RUMOR

REALITY

Maunakea is sacred to all Native Hawaiians	Any claim that Maunakea as a whole was sacred to Native Hawaiians was extinguished, as a Hawaiian matter, 200 years ago when Mo'i Liholiho aka Kamehameha II proclaimed "'Ai noa", free eating, and broke the centuries old 'ai kapu by eating with his mother Keopuolani and Kuhina nui, Ka'ahumanu. Liholiho and his Kahuna Nui Hewahewa ordered the destruction of the kapu religion and its shrines. Liholiho then defeated the last adherents to the Kapu system at the Battle of Kuamo'o in 1819, ending once and for all any claims of special political status for the Kapu religion as a Hawaiian matter. Furthermore, as explained by Kahuna Leimomi Lum, a telescope that can advance the celestial studies of our ancestors maintains the sacredness of Maunakea, even as a matter of Kapu doctrine. Finally, there is actually no documented evidence that Maunakea was particularly sacred to Native Hawaiians in a way that prohibited digging on the summit or any use at all. Indeed, our ancestors mined rock out of Maunakea in an area 100 times the size of the TMT site.
TMT development plan does not respect Hawaiian cultural practices.	TMT site and its vicinity were not used for traditional and customary native Hawaiian practices conducted elsewhere on Mauna Kea, such as depositing piko, quarrying rock for adzes or gathering water from Lake Waiau. The TMT site is not on the summit ridge which is arguably more important culturally than the plateau 500 feet lower where TMT will be built. TMT's management plan for Mauna Kea specifically provides for cultural, ceremonial or religious activity.
TMT will block views from the summit ridge of the rising sun, setting sun, or Haleakalā.	One of the reasons for the choice of the TMT site was the fact that it cannot be seen from the actual summit or from Lake Waiau or Pu'u Lilinoe. The view of TMT from the summit is blocked by the northern ridge of Kukahau'ula. Where it would be visible, other large telescopes are already in view.
Contaminants from TMT — whether from construction or the observatory itself — will leach into the island's groundwater.	Hydrologists, both independent and paid to work on the EIS, have determined there is no reasonable prospect of adverse impact on groundwater. TMT will install a zero-discharge wastewater system, with all wastewater collected and transported off the mountain in double-lined tankers for proper treatment and disposal. The closest drinking water wells, at Waiki'i, are 12 miles away and those in Waimea, Hamakua, and Hilo are an even greater distance from the Mauna Kea summit area. The best hydrological data we have indicates that, even if contaminants were released in the summit region, it would take several thousand years to reach any existing drinking water well on Mauna Kea's flanks – a time much longer than natural degradation processes would require to completely break down any potential contaminants.
Hawaiians have not been heard regarding TMT.	There has been over a decade of litigation; two contested case hearings, the second of which lasted 44 days and heard from 71 witnesses; and an entire volume of the 3-volume EIS included letters and other input from many of the opponents (as well as supporters) of TMT. The truth is when pro-TMT Hawaiians speak up they are shouted down by the loud, vocal, minority protesting the telescope.
Mauna Kea is Crown Land therefore descendants living today own the mountain.	The last sovereign, Queen Lili'uokalani, placed all of her property in a charitable trust for the benefit of orphan and indigent Hawaiian children known as the, Queen Lili'uokalani Trust. She herself had no descendants.
It would be better to build TMT in place of one of the existing observatories.	The decision was made specifically to not place the TMT at the site of one of the existing summit ridge facilities. The reason was that doing so would require a large amount of grading, most of it in wekiu habitat, and because the visual impact would be much greater.
Dynamite will be used to prepare the TMT site for construction and TMT will be nuclear powered.	No dynamite will be used in the construction of TMT and TMT will not be nuclear powered. It will draw electricity from the Big Island's grid.
There remain culturally significant architectural sites or protected species at the TMT location.	Extensive environmental impact studies have identified no such areas on the five-acre site. The nearest site of cultural significance is located 200 yards away from the TMT location. Similarly, the wekiu bug — an insect endemic to the region that was once considered threatened (but is no longer) — nests in cinder cones that are not close to the TMT site and, other than on a small portion of the access road, will not be disturbed during construction

disturbed during construction.



"I'm a Hawaiian, and I fully understand the cultural and environmental effects TMT may have on Maunakea. But I also believe

that the scientific, financial, educational, and economic benefits that come with TMT will make vast improvements on the Big Island. Hawai'i can be the front runner for astronomy, something our ancestors always believe in. Imua TMT."

Bernard-Benjamin Villa
 UH Hilo, Performing Arts



"If Kamehameha I was ruling Mauna Kea today, he would build a heiau (temple) platform and mount the TMT on it."

Peter Apo
 Former Trustee, Office of Hawaiian Affairs



"The TMT is made up of the Pacific Rim nations of Canada, the US, Japan, India, and China. What better purpose can we aspire to than cooperation among

nations, rather than war? And what better place for cooperation than on Mauna Kea, in Hawai'i, the land of Aloha?"

Richard Ha
 Hawaiian Businessman



"As a resident of Hawai'i island, and a Native Hawaiian, I believe that our Island provides a living laboratory for science. From mauka to makai

we can access astronomy, volcanology, geology, and marine sciences. We need to be leaders in melding science and culture because as we already know, the Hawaiians had a strong and prospering society before western contact. Science can learn from us, and while we cannot go back, we can move forward together! Just as Hokulea relied on both traditional navigation supported by the instruments of their escort vessel, we need to find a way to embrace each other and become leaders for the world. "

Angela ThomasEducator from Waimea



"The TMT project is like a search for the aumakua or ancestral origins of the universe. How is this any different from us as Native Hawaiians

searching for own roots in things both natural and spiritual?"

Wallace Ishibashi
 Senior Advisor, OMKM

"It will afford me unfeigned satisfaction if my kingdom can add its quota toward the successful accomplishment of the most important astronomical observation of the present century and assist, however humbly, the enlightened nations of the earth in these costly enterprises."

 King David Kalākaua on Hawai'i's role in the observations of the Venus Transit of December 8, 1874



imuatmt.org

https://tinyurl.com/Imua TMTpanels











"TMT will bring millions of dollars in investments and jobs to Hawai'i, while simultaneously ensuring that Hawai'i, its people,

and our ideas remain at the forefront of human scientific endeavor."

Samuel W. King IIAttorney



"I am proud that my lineage includes both Native Hawaiian and Native American plus other Polynesian, European, and

Asian ancestry. I am grateful to have been born and raised in Hawai'i with Hawaiian values, thought processes, and traditions. AND I support TMT which does not mean that as a Native Hawaiian, all is forgotten and forgiven."

Jacqui Hoover
 Executive Director of Hawaii Island
 Economic Development Board



"The TMT is poised to make the most important discovery of all time: life on another planet. It'd be cool to give that planet a

Hawaiian name. A name that will spread the Hawaiian language to every corner of the globe and into perpetuity."

– **Chris King** Computer Engineer



"The reason we support TMT is because we believe it is being done the right way. We really need these STEM jobs and Hawai'i Island is so limited.

We told them that we needed more funding for STEM education to pay their fair share of rent and they listened. They followed through."

Amber Imai-Hong
 Hawai'i Space Flight Laboratory

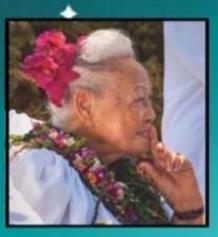


"I am a proud Hawaiian, I have true Aloha for our people of Hawai'i and the 'Aina. At the same time, I believe our world is ever changing, and

so must we. I believe in the importance of education, knowledge, and cultivating a desire to learn in our Keiki. Years ago, we arrived to these great lands, guided by the stars. Let the heavens guide us now. I support TMT."

Melanie LongHawai'i Business Owner

HAWAIIANS SUPPORT TMT



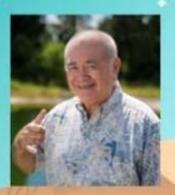
I believe totally in getting the new telescope built on Mauna Kea. Our ancestors studied the heavens. Now a new generation of Hawaiians can have the opportunity to advance what they discovered. A telescope that can accomplish this maintains the sacredness of the mountain.

~ The kahuna nui, or high priestess of Mo'okini Heiau, Leimomi o Kamehae Kuamo'o Mo'okini Lum

I see Mauna Kea as a special place that allows us to understand and study our origins. As one's origin and genealogy are critical aspects of Hawaiian culture, I view the pursuit of astronomy on Mauna Kea to be a beautiful blend of culture and science.

~Heather Kaluna Astronomer, UH





The TMT is made up of the Pacific Rim nations of Canada, the U.S., Japan, India and China. What better purpose can we aspire to than cooperation among nations, rather than war? And what better place for cooperation than on Mauna Kea, in Hawaii, the land of aloha?

~ Richard Ha, local businessman

#imuaTMT

@imuaTMTHawaii

The telescopes on Maunakea represent mankind's most advanced search for knowledge and understanding. as learning has been and will continue to be an important part of our cultural practices. In a way, the TMT project is like a search for the aumakua or ancestral origins of the universe. How is this any different from us as native Hawaiians searching for own roots in things both natural and spiritual?



-Wallace Ishibashi Senior Advisor, OMKM

A6 - 85



"As a Native Hawaiian,
I believe Maunakea
is a deeply spiritual place.
We just need to have
the collective will
to share the Mauna."

Kalepa Baybayan,
 Master Navigator
 and Captain

to identify myself as
a Native Hawaiian. At the same time,
I'm also a scientist, I'm an astronomer
and I believe that these two aspects
of me can coexist.
And I believe that astronomy
and the culture can coexist
on Mauna Kea."

-Mailani Neal Native Hawaiian Astronomy Student

"Maunakea is the Astrono
only peak anchored in
the Pacific Ocean that provides for
the excellent conditions to explore
the heavens. We feel that Maunakea
Is a sacred gift from the creator God,
planned from the foundation of the world
to confirm the Intelligent Design
of this massive universe."

-Leningrad Elarionoff resident of Waimea

"He kanaka 'Õiwi au ā me kāko'o au i ka 'ohe nānā kanakolu mika. I am a Native Hawaiian and I support the TMT."

> -Naea Stevens Native Hawaiian







#IMUATMT @IMUATMTHAWAII

IMAGINE





THE HISTORIC LEGACY OF MAUNA KEA **MUST CONTINUE** ITS CONTRIBUTION TO SCIENTIFIC KNOWLEDGE.

-Judge Walter Meheula Heen **Former Director** Mauna Kea Management, Hawaiian Affairs Trustee

THE REASON WE SUPPORT TMT IS BECAUSE WE BELIEVE IT IS BEING DONE THE RIGHT WAY. **WE REALLY NEED THESE** STEM JOBS AND HAWAI'I ISLAND IS SO LIMITED... WE TOLD THEM
THAT WE NEEDED MORE FUNDING FOR STEM EDUCATION TO PAY THEIR FAIR SHARE OF RENT AND THEY LISTENED. THEY FOLLOWED THROUGH.

-Amber Imai-Hong Hawai'i Space Flight Laboratory

TMT IS VERY IMPORTANT
TO ME BECAUSE IT'S A WAY
TO QUANTIFY OUR MOST
SACRED OLI C MELE.
OUR KUPUNA SPOKE ABOUT
THE COSMOS, IT ECHOES THROUGH
OUR FOLKLORE AND HULA...
TMT MEANS THERE WILL BE YOUNG
HAWAIIAN ASTRONOMERS WORKING
ON MAUNAKEA
AT THE BEST OBSERVATORIES IN THE WORLD.
THEIR DISCOVERIES WILL FALL IN LINE
WITH THE OLDEST CHANTS
LIKE MELE HANAU NO KAUIKEAOULI.
MAUNAKEA REMAINS THE
BEST LOCATION FOR TMT.

BEST LOCATION FOR TMT.

-Veronica Ohara

Kanaka Maoli **Native Hawaiian**

TMT IS A NECESSITY. THE WHOLE WORLD DEPENDS ON ASTRONOMY, FOR SAFETY, DISCOVERY, AND GATHERING EVIDENCE... MY WHOLE LIFE, IT WAS A NORMAL THING TO HAVE TELESCOPES ON OUR MAUNA. THEY GO HAND IN HAND. AND I CAN SEE WHY. THERES NO BETTER PLACE THEN HAWAI'L

> -Artrina De Lima Hawaiian resident







#imuaTMT

@imuatmthawaii



Hawaiians Support TMT



Angela Thomas

Educator from Waimea

I think telescopes maintain the sanctity of the mauna, worshipping the sky through observation and servicing a goal of bringing humankind closer to understanding creation of life in the universe. It isn't traditional but neither were the ahu erected on the mauna, which didn't diminish their sanctity to those who built it. I don't want to be afraid to say "Imua TMT" and want everyone to proceed with respect, on the common ground that we want what is best for Hawaii's future. It isn't Hawaiians versus desecration. It isn't a war on culture and science. It isn't an issue where only Native Hawaiians get to have a say because we are no longer the only ones

who live here.

As a resident of Hawaii Island. and a Native Hawaiian, I believe that our Island provides a living laboratory for science. From mauka to makai we can access astronomy, volcanology, geology and marine sciences. We need to be leaders in melding science and culture because as we already know, the Hawaiians had a strong and prospering society before western contact. Science can learn from us, and while we cannot go back, we can move forward together! Just as the Hokulea relied on both traditional navigation supported by the instruments of their escort vessel, we need to find a way to embrace each other and become leaders for the world.



Kauionalani Onodera Mechanical Engineer



HAWATIANS SUPPORT TMT

The TMT
is poised to make
the most important
discovery of all time:
Life on another planet.
It'd be cool to give that planet
a Hawaiian name. A name that will
spread the Hawaiian language
to every corner of the globe
and into perpetuity.

-Chris King Computer Engineer I am proud that my lineage includes both Native Hawaiian and Native American plus other Polynesian, European and Asian ancestry. I am grateful to have been born and raised in Hawaii with Hawaiian values, thought processes, and traditions. AND I support TMT which does not mean that as a Native Hawaiian, all is forgotten and forgiven.

-Jacqui Hoover Native Hawaiian Economic Development Executive Director



-Ikaika Kamaiopili Native Hawaiian TMT Supporter

If
Kamehameha I
was ruling Mauna Kea
today he would build
a heiau (temple) platform
and mount the

TMT on it.

-Peter Apo former Trustee, Office of Hawaiian Affairs



#imuaTMT @imuaTMTHawaii

hawaiians 🎬



SUPPORT

TMT



Oliver Crowell

Native Hawaiian

Kamehameha Schools

graduate

When I think of the opportunities that today's children will have because of what TMT is doing to help them in their education, it just amazes me.

You know, those fields are so important for our kids and they're getting it right now on the Big Island.



Kyla Edison Geologist

As a native Hawaiian,
I think that Mauna Kea is a special
place to not only natives but to everyone
in Hawai'i. Mauna Kea is a place to learn,
a place to remember the past and a beacon
of scientific hope for the entire world.
Culture and science can coexist if
we all work together.

TMT is important to me,
because we can teach the young
about astronomy & teach them about
stars, and science. It's good for the
state, it will bring many jobs and
can also teach the Hawaiians.



Kalani Rivera TMT Supporter

I am a proud Hawaiian,
I have true Aloha for our people of Hawaii
and the 'Aina. At the same time, I believe
our world, is ever changing, and so must we.
I believe in the importance of an education,
knowledge and cultivating a desire to learn in
our Keiki. Years ago, we arrived to these great
lands, guided by the stars.
Let the heavens guide us now.

Let the heavens guide us now.
I support TMT.



Melanie Long Hawaii Business Owner

#imuaTMT @imuaTMTHawaii



HAWAIIANS



SUPPORT

TMT



Alyssa Leilani Grace Outreach Assistant Gemini Observatory

It's important to remember that Maunakea is the best place to do research for a lot of reasons.

But, it's also my way of connecting to my Hawaiian ancestry and culture. I also think that a lot of what we study in Astronomy is studying our past and our origins as a whole race,

as mankind.

When I was a kid,
I did a week long science
camp on the Big Island that
included time on the summit,
inside one of the telescope
facilities. There was no cost to
my family, and this was a pretty
big experience for me.
Don't believe it when people
say the TMT has nothing
for Hawaii's future,
or it's Keiki.

We support
astronomy in Hawaii
as a clean, sustainable
industry. The best
astronomy on the planet
is from Maunakea.
Astronomy is part of
our stargazing, navigating
heritage throughout
Polynesia.

TMT will bring
millions of dollars
of investment and jobs
to Hawaii, while
simultaneously ensuring that
Hawaii, its people, and our
ideas remain at the
forefront of human
scientific endeavour.



Malia Martin Founder Imua TMT



Samuel W. King Il Attorney



Kaikani Laigo Audio Engineer



#imuaTMT @imuaTMTHawaii www.imuatmt.org

TMT: Tackling Our Deepest Questions

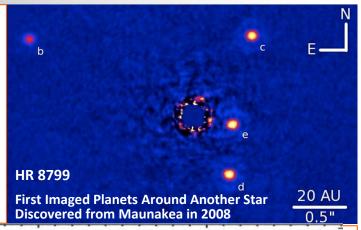


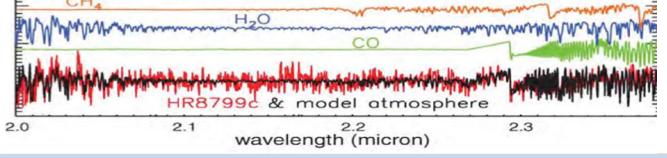
Astronomy addresses fundamental human questions. How did the universe begin? What do other worlds look like? Could they support life? With TMT, we can start to answer these questions.

Extrasolar Planets: Exploring Other Worlds

Eight years ago, Maunakea gave us the first images of planets orbiting another star (right picture; four planets). Although the planets are 750 trillion miles away from us, we can identify molecules like water and carbon monoxide (CO) in some of their atmospheres and study their clouds (picture below; a planet's "spectrum").

TMT will discover many more planets, show us how these planets' atmospheres compare to those of planets in our solar system, and provide clues about how these planets formed.





Could other planets support life?



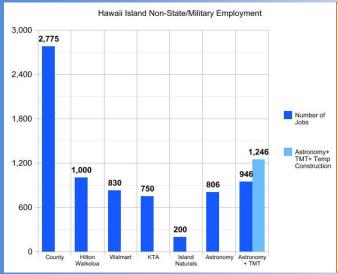
Maunakea has exceptionally calm air. With the further assistance of a technology called ``adaptive optics" and dedicated planet-imaging instruments, TMT on Maunakea can give us images 3 times sharper than Keck and 12 times sharper than NASA's Hubble Space Telescope, allowing us to see planets over ten million times fainter than the stars they orbit .

TMT may allow us to see rocky planets in the "habitable zone" around the Sun's nearest neighbors for the first time ever. With a second-generation planet imager and spectrograph, it might allow us to detect oxygen in an Earth-like planet's atmosphere: a potential sign of life.

Learn more: http://www.maunakeaandtmt.org/get-the-facts/tmt-supporting-science/the-science-behind-the-thirty-meter-telescope/

TMT: Jobs and Education for Hawai'i

Collectively, astronomy is one of the largest providers of jobs for Hawaii's residents and a source of unique educational opportunities. TMT will provide even more local job opportunities, while nurturing a local technical workforce pipeline and helping our children achieve their educational dreams.



Astronomy on Hawai'i now employs roughly as many residents as does Walmart and KTA. Astronomy contributes nearly 170 million dollars per year to Hawai'i's economy. TMT will add:



-140 Permanent jobs at the observatory
-300 Multi-year construction jobs
- 26 Million dollars/year in observatory operations



TMT has already donated over \$5.5 million to the THINK fund, benefitting 26,000 students and 1,000 teachers through STEM education programs.

TMT has provided \$2.5 million in support of the Akamai Workforce Initiative, which has provided internships to 390 college students from Hawai'i in STEM fields thus far.

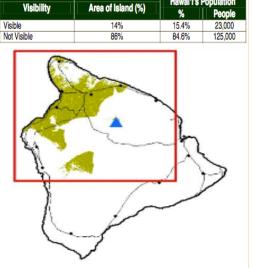
Learn more: https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf
Also see website of PUEO and ImuaTMT, independent Hawaiian groups supporting TMT for the science, jobs, and educational opportunities it provides for Hawai'i -- alohapueo.org, imuatmt.org

TMT: Environmentally Responsible

TMT is not much larger than existing observatories on Maunakea, will minimally impact existing views of Maunakea, and will honor strict rules ensuring that it poses no credible threat to our water supply.



TMT is only somewhat taller than Subaru and Gemini and comparable in area to the Keck Observatory. It will be visible to only ~14% of Hawai'i: it cannot be seen from Hilo, Pahoa, Kona, Volcano, etc. It will be built over 600 ft below the summit, not on any cinder cones. It will not harm endangered plants or animals. Of TMT's ~1 million dollars/year in rent, \$800,000/year goes towards stewardship of Maunakea.



VISIDILITY OF THE TALL ODSERVATOR



TMT's plans are consistent with Hawai'i's value of clean water. TMT will not use mercury; TMT will not be nuclear powered. TMT's site is exceptionally dry compared to lower elevations. As verified by Hawai'l's Board of Land and Natural Resources decision approving TMT's permit, it poses no credible threat to the aquifer. The strongest contaminants of our water come from local sources like cesspools. In contrast, any waste from TMT will be removed from Maunakea using trucks with double-hulled containers so that it can be safely treated in plants.

Learn more: https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf

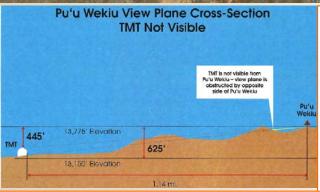
TMT: Science and Culture Coexisting

TMT was carefully designed to be minimally impactful to cultural resources on Maunakea and not interfere with long-standing religious practices.



TMT will be located <u>far</u> from cultural practice areas on Maunakea:
Pu'u Poli'ahu (0.78mi),
Lake Waiau (1.42mi),
Pu'u Weikiu (1.16mi),
Pu'u Lilinoe (2.02mi),
etc.

TMT will not be visible from culturally sensitive sites the summit of Kukahau'ula, Pu'u Lilinoe, and Lake Waiau.



As TMT cannot be seen the summit of Pu'u Weiku, it cannot interfere with long-standing solstice and equinox observations from this site.

TMT cannot interfere with the viewplane to Haleakala or the setting of the sun at Pu'u Poli'ahu.

- No known traditional/customary practices are associated with the TMT site.
- There are no shrines or burials on the TMT site.

Prior to European contact, Hawaiians did utilize Maunakea at elevations similar to TMT for mining: i.e. the adze quarries, which cover an area nearly 100 times the size of TMT, where Hawaiians mined rock to make stone tools.

TMT consulted with numerous cultural practitioners for its Environmental Impact Statement. Aspects of the telescope and mitigation measures reflect this consultation.

Learn more: http://www.maunakeaandtmt.org/get-the-facts/tmt-supporting-culture/ https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf

BOARD OF LAND AND NATURAL RESOURCES DECISION AND ORDER

PREFACE

The Board adopts the hearing officer's recommended findings of fact, conclusions of law, and decision and order, with modifications, including additional conditions. The Board commends the hearing officer's thorough, comprehensive and well-considered report, prepared after 44 days of hearings. The Board's modifications are consistent with the hearing officer's factual findings and legal conclusions. Along with minor corrections, the changes mostly give further explanations for some aspects of the decision.

Because of the length of this document, the Board thought it would be useful to the parties and public to give a brief summary. This Preface cannot describe fully how the Board considered various factors. It is not intended to replace or supplement the findings of fact, conclusions of law, and decision and order, and they prevail in case of any perceived conflict between them and this Preface.

The TMT is a very large structure, 180 feet tall, proposed near the top of a culturally important and magnificently beautiful mountain. This project is not, however, on an untouched landscape. Mauna Kea now hosts twelve observatories, including six that are between 100 and 151 feet tall. The first large telescope on Mauna Kea was completed forty-seven years ago.

The TMT will not pollute groundwater, will not damage any historic sites, will not harm rare plants or animals, will not release toxic materials, and will not otherwise harm the environment. It will not significantly change the appearance of the summit of Mauna Kea from populated areas on Hawai'i Island.

The TMT site and its vicinity were not used for traditional and customary native Hawaiian practices conducted elsewhere on Mauna Kea, such as depositing *piko*, quarrying rock for adzes, pilgrimages, collecting water from Lake Waiau, or burials. The site is not on the summit ridge, which is more visible, and, according to most evidence presented, more culturally important than the plateau 500 feet lower where TMT will be built.

Some groups perform ceremonies near the summit. The evidence shows that these ceremonies began after the summit access road and first telescopes were built, but, in any case, the TMT will not interfere with them.

Individuals testified that seeing the TMT will disturb them when they are doing ceremonies or other spiritual practices. The TMT cannot be seen from the actual summit or from many other places on the summit ridge. Where it would be visible, other large telescopes are already in view. It will not block views from the summit ridge of the rising sun, setting sun, or Haleakalā.

Some native Hawaiians expressed that Mauna Kea is so sacred that the very idea of a large structure is offensive. But there are already twelve observatories on Mauna Kea, some of them almost as large as the TMT. They will remain even if the TMT is not built. No credible evidence was presented that the TMT would somehow be worse from a spiritual or cultural point of view than the other large observatories. Each observatory received a permit after a process allowing public participation and judicial review, over a period spanning three decades.

To the extent that the belief that Mauna Kea is too sacred to allow large structures is a religious one, under the federal and state constitutions a group's religious beliefs cannot be given veto power over the use of public land.

Other witnesses, including some native Hawaiians, embrace a different way of thinking and feeling about the TMT: as a project that honors Mauna Kea rather than injures it. After a worldwide search, scientists found that Mauna Kea is the best site on earth for the most advanced telescope ever built. Mauna Kea will forever be known throughout the world as the site of profound discoveries about the universe. These witnesses see TMT and the other telescopes, not as objects spoiling the landscape, but as portals to discovery placed in this site made ideal for them.

To these witnesses, respect for Mauna Kea can be reconciled with modern astronomy. When ancient Hawaiians found a resource valuable to them – the densest rock in Hawai'i – near the summit of Mauna Kea, they made use of it, quarrying hundreds of acres. Ancient Hawaiians intensely studied the stars in ways consistent with their technology. Traditional Hawaiian navigation depended upon knowledge of the stars.

King David Kalākaua enthusiastically supported astronomy in Hawai'i. He wrote: "It will afford me unfeigned satisfaction if my kingdom can add its quota toward the successful accomplishment of the most important astronomical observation of the present century..."

TMT will contribute \$1 million a year toward education, and has signed a sublease agreement committing \$300,000/yr. at first, increasing to \$1 million/yr., for conservation on Mauna Kea. No existing observatory makes any such contributions.

Astronomy directly supports about 1,000 jobs in Hawai'i. TMT will employ about 140 people. The decision contains 43 special conditions to ensure that the project lives up to its environmental commitments, that the educational fund will help the underserved members of the community, that TMT will train and hire local workers, and that the native Hawaiian cultural presence at Hale Pōhaku will be enhanced.

Astronomers discovered that the earth goes around the sun; that we live in one of more than 100 billion galaxies; that our universe expanded from a single point 13.7 billion years ago. These discoveries shape how we see our place in the universe. Other telescopes on Mauna Kea have already contributed to human knowledge. TMT, if built, will do the same.

One native Hawaiian story about the origin of Mauna Kea is that Wakea, "Sky Father", and Papa, "Earth Mother", created a child, Hawai'i Island. Mauna Kea is the highest summit of the island, this union of heaven and earth. Today, Mauna Kea is the best place on earth to study the heavens.

Comments from Bianca Isaki on behalf of KAHEA

To whom it may concern,

Please find KAHEA: The Hawaiian-Environmental Alliance's response regarding your solicitation of comments on your office's review "to evaluate the effectiveness of the [University of Hawai'i] and more specifically, the Office of Mauna Kea Management (OMKM) in its implementation of the Mauna Kea Comprehensive Management Plan (CMP)."

Our comment focuses on the two critical flaws of the CMP. First, it is not "comprehensive" in that its scope excludes many of the issues that are most important to Hawai'i communities: "[t]ermination of the State Lease between the University and the BLNR"; "[u]se of ceded lands for \$1 a year or nominal consideration;" "[s]ubleases between the University and the observatories; "[e]xtension of the State lease beyond 2033"; "[p]roposed new development on Mauna Kea, including the Thirty Meter Telescope (TMT) and Pan Starrs;" and "[g]uaranteed employment opportunities for Native Hawaiians and the people on the Island of Hawai'i." CMP at 2-3. These are the also many of the same issues UH and the Department of Land and Natural Resources (DLNR) have been unable to address throughout their tenure as stewards of these lands.

The second flaw concerns the uncertain legal and policy status of the CMP. While fulfilling certain DLNR requirements for UH's sublease of lands, the CMP's provisions have not been implemented in a logical or evenhanded way. In your office's 2009 presentation to the Board of Land and Natural Resources, you emphasized the CMP was "not proposing any land use in the Management Actions, but rather, recommend[ing] actions for [the Office of Mauna Kea Management] to consider as they implement the CMP which [the Office of Mauna Kea Management] will be responsible for and any future land use of conservation lands [which] will go before the BLNR for approval." This representation was material to the Intermediate Court of Appeals' denial of KAHEA and others' call for a contested case against the adoption of the CMP. Mauna Kea Anaina Hou v. Univ. of Hawai'i, CAAP-No. 30397 (Haw. App. Jan. 25, 2012) (mem.). The court's holding was premised on conclusions that the CMP impacted no land uses or property interests.

On the one hand, UH, BLNR, and other decisionmakers are allowed to rely on the CMP and certain of its provisions, notwithstanding its restricted scope, to permit further uses. On the other, when KAHEA and Sierra Club of Hawai'i, amongst others, pointed to inconsistencies between the CMP Public Access and Cultural Resource subplans and the proposed UH Mauna Kea management rules, the CMP was ignored. Worse than being merely ineffective, the CMP is used to effect increasingly political agendas for the Mauna. This situation would not be corrected by updating the CMP. The CMP is not a legally binding rule and it can be ignored or used to buoy government and observatory positions when convenient. Because it is not an actually

comprehensive plan for the entirety of UH's management of Mauna Kea, the CMP is silent on the critical issues and thus allows its interpreters to fill in gaps as it suits their positions. Since its assembly in 2009, the CMP has been relied on in numerous proceedings concerning Mauna Kea management and further land use, including those addressing the Thirty-Meter Telescope (TMT) conservation district use permit, the illegal "emergency" rules for Mauna Kea, and UH's recently promulgated rules that were uniformly opposed at all public hearings.

We understand DLNR is currently assessing UH's management of Mauna Kea as part of its general leasing process. Updating the CMP at this point is inadvisable because UH should not be permitted to unilaterally sublease Mauna Kea lands. Instead of pressing forward on an increasingly broken path, we urge UH and DLNR to make a good faith effort to explore collaborative relationships with communities most invested in the Mauna. Nothing we have written in this comment should be construed as support for UH or DLNR's authority over Mauna Kea.

Yours truly, KAHEA Board and Staff 2020



MAUNA KEA MOKU NUI 'AELIKE/CONSENSUS BUILDING 'OHANA

NO JURISDICTION MA WAO AKUA

- 1. Mauna Kea belongs to Ke Akua, Nā Akua me Nā 'Aumakua and the heavenly realms. It is not for desecration, unrestricted, unmonitored or destructive use.
- 2. Mauna Kea lands are Hawaiian Kingdom crown and government "ceded" lands (aka Stolen Lands).
- 3. Native Hawaiians (Kanaka Maoli) and the General Public are the right-holders/beneficiaries and landlords of the land and all of Ko Hawai'i Pae 'Āina is held in a public trust, "... for the betterment of the conditions of Native Hawaiians and the General Public".
- **4.** The Board of Land and Natural Resources (BLNR) must affirmatively protect the 'reasonable' exercise of Native Hawaiians Cultural and Religious Rights, Access and Use on all of the trust lands of Hawaiii, including Mauna Kea.
- **5.** The BLNR is the entity that has the fiduciary duty and obligation to manage and control Mauna Kea's Conservation District and is mandated to protect it on behalf of the right -holders/beneficiaries.
- **6.** While the BLNR, as an agent of the state, (and specifically not the University) has jurisdiction over all conservation lands in Hawai'i they are limited by Native Hawaiians' Cultural and Religious Rights, Access and Use.
- 7. The University of Hawai'i does not own; it only leases the lands from the State of Hawai'i.
- **8.** The University of Hawai'i and its staff including the Mauna Kea Support Service 'Rangers' do NOT have the authority to block the roads or limit us from accessing our sacred mauna for cultural and religious use.
- **9.** The University of Hawai'i, the State of Hawai'i and the BLNR continue to confuse jurisdictions and have acted in concert and collusion to destroy and desecrate our sacred mauna.
- **10.** Even if the University of Hawai'i did have real jurisdiction over the Conservation Lands of Mauna Kea, a conflict of interest exists as the university continues to operate as a developer and has always been at the forefront of the industrial development, commodification and desecration of Mauna Kea for over sixty years.
- **11.** The University of Hawai'i is responsible for the deliberate destruction of our sacred mauna including but not limited to: lele, ahu, view planes, other prayer and ceremonial areas on the summit and lower reaches of the mauna.
- **12.** Therefore, the University of Hawai'i and hired consultants including Ku'iwalu, may make all the rules they wish for themselves to be executed inside the observatories but neither have jurisdiction to limit or control anything or anyone outside their observatory buildings. The only exception is if there is leakage of HAZMAT materials, toxic waste and/or sewage from the observatories and buildings; if leakage does occur, the observatories and the University of Hawai'i are responsible for cleanup.
- **13.** Lastly, we understand that these so-called consultations that are being conducted by Ku'iwalu (a paid consultant) are in preparation for the University of Hawai'i's request for an extended lease.
- **14.** The general lease agreement for Mauna Kea was produced in 1968 between the University of Hawai'i and the State of Hawai'i. The University has not been a good steward of Mauna Kea and therefore should not be allowed to continue the desecration and destruction of our sacred mauna.
- **15.** We as right-holders/beneficiaries of the 'āina do not give consent for any lease extension for Mauna Kea. The University of Hawai'i's general lease will expire and we hold the University to their agreements and to restore the land to its natural beauty and de-occupy by 2033.

Comments submitted via email from various stakeholders

From: Mauna Aelike/Consensus Building Ohana <noreply@123formbuilder.com>

Sent: Monday, October 26, 2020 8:22:13 PM

To: Dawn Chang dnschang@kuiwalu.com

Subject: You received a submission for Mauna Kea Comprehensive Management Plan - Kuiwalu

Subject: You received a submission for Madria Rea Comprehensive Management Plan - Ruiward			
Form Summary			
Greetings to:	Dawn Chang, Kuiwalu Consulting Company, Board of Land and Natural Resources		
Name			
Email			
City, State			
I am:			
My comments regarding to UH's comprehensive management plan review:	1. Mauna Kea belongs to Ke Akua, Nā Akua me Nā 'Aumakua and the heavenly realms. It is not for desecration, unrestricted, unmonitored or destructive use., 2. Mauna Kea lands are Hawaiian Kingdom crown and government "ceded" lands (aka Stolen Lands)., 3. Native Hawaiians		

(Kanaka Maoli) and the General Public are the right-holders/beneficiaries and landlords of the land and all of Ko Hawai'i Pae 'Āina is held in a public trust, "... for the betterment of the conditions of Native Hawaiians and the General Public"., 4. The Board of Land and Natural Resources (BLNR) must affirmatively protect the 'reasonable' exercise of Native Hawaiians Cultural and Religious Rights, Access and Use on all of the trust lands of Hawai'i, including Mauna Kea., 5. The BLNR is the entity that has the fiduciary duty and obligation to manage and control Mauna Kea's Conservation District and is mandated to protect it on behalf of the right -holders/beneficiaries., 6. While the BLNR, as an agent of the state, (and specifically not the University) has jurisdiction over all conservation lands in Hawai'i they are limited by Native Hawaiians' Cultural and Religious Rights, Access and Use., 7. The University of Hawai'i does not own; it only leases the lands from the State of Hawai'i., 8. The University of Hawai'i and its staff including the Mauna Kea Support Service 'Rangers' do NOT have the authority to block the roads or limit us from accessing our sacred mauna for cultural and religious use., 9. The University of Hawai'i, the State of Hawai'i and the BLNR continue to confuse jurisdictions and have acted in concert and collusion to destroy and desecrate our sacred mauna., 10. Even if the University of Hawai'i did have real jurisdiction over the Conservation Lands of Mauna Kea, a conflict of interest exists - as the university continues to operate as a

developer and has always been at the forefront of the industrial development, commodification and desecration of Mauna Kea for over sixty years., 11. The University of Hawai'i is responsible for the deliberate destruction of our sacred mauna including but not limited to: lele, ahu, view planes, other prayer and ceremonial areas on the summit and lower reaches of the mauna., 12. Therefore, the University of Hawai'i and hired consultants including Ku'iwalu, may make all the rules they wish for themselves to be executed inside the observatories but neither have jurisdiction to limit or control anything or anyone outside their observatory buildings. The only exception is if there is leakage of HAZMAT materials, toxic waste and/or sewage from the observatories and buildings; if leakage does occur, the observatories and the University of Hawai'i are responsible for cleanup., 13. Lastly, we understand that these so-called consultations that are being conducted by Ku'iwalu (a paid consultant) are in preparation for the University of Hawai'i's request for an extended lease., 14. The general lease agreement for Mauna Kea was produced in 1968 between the University of Hawai'i and the State of Hawai'i. The University has not been a good steward of Mauna Kea and therefore should not be allowed to continue the desecration and destruction of our sacred mauna., 15. We as right-holders/beneficiaries of the 'āina do not give consent for any lease extension for Mauna Kea. The University of Hawai'i's general lease will expire and we hold the University to their agreements and to restore the land to its natural beauty and de-occupy by 2033.

The message has been sent from us at 2020-10-26

Response and Comments from OHA

PHONE (808) 594-1888 FAX (808) 594-1938



STATE OF HAWAI'I OFFICE OF HAWAIIAN AFFAIRS

560 N. NIMITZ HWY., SUITE 200 HONOLULU, HAWAI'I 96817

August 14, 2020

Dawn N.S. Chang, Esq. Principal, Ku'iwalu P.O. Box 6280 Kāne'ohe, Hawai'i 96744

Re: Ku'iwalu 2020 Evaluation

Aloha pumehana e Ms. Chang,

I write to you on behalf of the Administration of the Office of Hawaiian Affairs (OHA), providing OHA's response to your letter to Board of Trustees Chairperson Colette Machado dated May 15, 2020, introducing Ku'iwalu as the consultant hired by the Department of Land and Natural Resources (DLNR) to prepare an "independent evaluation" of whether Maunakea "is being effectively managed" by the University of Hawai'i (UH), including through the gathering of community input on the implementation of the Comprehensive Management Plan (CMP) for Maunakea. As detailed below, OHA does express concerns with Ku'iwalu's role in this evaluation, and reiterates comments it has made throughout the years regarding ongoing inadequacies in the CMP as well as in its implementation. Please note that OHA is also in receipt of your letter to our Board of Trustees Chairperson dated July 23, 2020; however, this letter will constitute OHA's formal and only response to Ku'iwalu's evaluation. Mahalo for your attention and consultation with OHA on these important issues affecting the Native Hawaiian community and with others who have stepped up in recent months to defend the sacredness of Maunakea from UH's continued mismanagement.

As an initial matter, OHA emphasizes that Maunakea's lands, resources, and sites are of singular cultural value and significance to Native Hawaiians. Maunakea is considered the first born child of earth-mother Papa and sky-father Wākea, the progenitors of all Native Hawaiians, and thus the mauna serves as a physical connection to ancestral understandings of creation. Given the sacredness of this area, akua (divine ancestral energies) are known to inhabit the remote summit

Dawn Chang, Esq. August 14, 2020 Page 2

of Maunakea and physically manifest as various pu'u or features such as Lake Waiau. The appropriate management protection of such a sacred place is accordingly a matter of great concern to many in the Native Hawaiian community.

Furthermore, OHA reiterates that the Maunakea lands at issue are part of the "ceded" lands trust that are also subject to the Public Land Trust. ¹ Accordingly, the State of Hawai'i holds moral obligations of the highest responsibility and trust when dealing with Maunakea, as both "ceded" lands, to which Native Hawaiians maintain unrelinquished claims, and as Public Land Trust lands, which the Hawai'i State Constitution mandates must be held as "a public trust for native Hawaiians and the general public."²

The following comments should therefore be considered in conjunction with the great cultural significance of Maunakea to the Native Hawaiian community, as well as with the specific fiduciary obligations held by the State in its management and administration of Maunakea's lands and its natural and cultural environment.

First, OHA questions whether there may be a potential for conflict in Ku'iwalu's role as an "independent" evaluator of Maunakea's management and UH's implementation of the CMP, given that Ku'iwalu itself developed the CMP. As countless community stakeholders including OHA have made clear, the CMP itself does not fully address the stewardship needs of Maunakea after over 50 years of blatant mismanagement by UH. Being that Ku'iwalu prepared the original 2009 CMP and its sub-plans for UH, Ku'iwalu may have an inherent incentive to evaluate UH's management actions and implementation of the CMP in a more favorable light, to promote the perception that the CMP is adequate. As such, Ku'iwalu should seek out ways to ensure that any possible bias in its findings can be counteracted and checked to mitigate concerns regarding potential conflict in its evaluation role, and to ensure a fair and objective analysis of Maunakea's management; in any case, it is likely that Ku'iwalu's significant role in developing the CMP may fundamentally undermine the credibility and integrity of this current independent evaluation.

Second, OHA highlights ongoing issues with the adequacy of the CMP itself, which it has identified over the past decade. Notably, OHA has commented on the plan's significant shortcomings since its inception in 2009,³ including:

1. The CMP does not adequately address future observatory development, which falls under the definition of "land use" under Hawai'i Administrative Rules (HAR) § 13-5-2;

¹ See generally Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, Office of Hawaiian Affairs vs. State of Hawai'i, et al., Civ. No. 17-1-1823-11 (JPC) (1st Cir. Ct.), filed Nov. 7, 2017, available at https://www.oha.org/maunakea/.

² Haw. Const. art. XII, § 4.

³ For further details on OHA's concerns with the CMP, please refer to attached past letters and correspondences.

- 2. The management authority of the CMP between the DLNR and UH is muddled throughout the document, causing critical boundaries between lessor and lessee to be completely blurred;
- 3. The plan lacks any analysis of the impact proposed projects will have on current and future traditional cultural properties, as well as the effects of projects on the spiritual nature and significance of the historic district to Native Hawaiians;
- 4. Despite OHA's requests and testimonies, Kahu Kū Mauna is not explicitly required to consult with a wide range of Native Hawaiians on management actions pertaining to offerings on shrines, access to burial sites, ancient shrine visitation and use, construction and use of new shrines, scattering and burial of cremated iwi kūpuna, and the stacking of rocks;
- 5. The CMP's sub plans, such as the Cultural Resources Management Plan (CRMP), lack clarification as to how they will undergo environmental review;
- 6. The planning strategy of assigning UH Hilo's Office of Mauna Kea Management (OMKM) rangers to monitor Conservation District Use Permit (CDUP) compliance is problematic because as landowner, the DLNR should be the entity responsible for ensuring compliance of its own rules;
- 7. The CMP does not recognize that the BLNR as landowner has final approval authority for future projects in the UH Management Areas;
- 8. The decommissioning of telescopes is left up to sub-lessees to determine this decision should be made by the DLNR as landowner and UH because of its expertise with observatories;
- 9. The CMP attempts to clearly delineate between traditional and contemporary Native Hawaiian practices which is offensive as the Native Hawaiian culture is a living, breathing, constantly evolving culture with both traditional and contemporary practices;
- 10. There is no process for replacing all cesspools on the mauna with new wastewater systems;
- 11. The vast majority of the actions in the CMP lack necessary details including timetables and review or monitoring processes; and
- 12. The relationship of the CMP and its subplans with the other management plans developed for Maunakea, including the soon-to-be-expired 2000 Mauna Kea Science Reserve Master Plan (which the CMP "does not replace") and 1995 Mauna Kea Management Plan, remains unclear with regards to whether and what provisions of each plan should be considered applicable to the management and use of Maunakea.

As it has not been updated since its original adoption, many if not all of these concerns regarding the inadequacy of the CMP continue to remain. OHA urges Ku'iwalu to review the attached letters and complaint outlining OHA's concerns over the adequacy of the CMP, as part of its current evaluation of Maunakea's management.

Third, **OHA reiterates its concerns over UH's failure to implement various CMP action items** as well as the excessive time it took UH to adopt administrative rules deemed necessary for such implementation. Notably, even after the adoption of administrative rules, and despite OHA's continued attempts to ensure that the rules addressed its concerns and comments, the rules as adopted have nonetheless failed to implement critical CMP actions. OHA further notes the shortcomings in policies adopted by the Maunakea Management Board (MKMB) and UH Board of Regents (BOR) to supposedly implement certain CMP action items, as also detailed in the attached correspondences. **OHA urges Ku'iwalu to refer to the various correspondences attached as well as OHA's active lawsuit for regarding UH's failure to adequately or appropriately implement numerous CMP action items.⁴ As highlighted in the attached correspondences and OHA's complaint, of the over 100 management actions mandated by the 2009 CMP, 54 are of particular concern to OHA and its beneficiaries, and at least 31 of these 54 management actions are not being adequately implemented.⁵ Examples⁶ of UH's failures to implement CMP action items include, but are not limited to:**

- 1. Failure to establish a process for ongoing collection of information on traditional, contemporary, and customary cultural practices on Maunakea;
- 2. Failure to complete baseline inventories on high-priority natural resources, as outlined in an inventory, monitoring, and research plan;
- 3. Failure to develop a land-use zones map based on current inventories of cultural and natural resources;
- 4. Failure to afford specified opportunities for community members to provide input regarding cultural and natural resource management activities on the mauna (e.g., a promised online forum to document community feedback);
- 5. Failure to ensure adequate education for construction and observatory staff regarding historical and cultural significances of Maunakea and its environment, ecology, and natural resources;
- 6. Failure to implement a mandatory orientation for visitors and recreational users; and
- 7. Failure to properly consult with OHA or Kahu Kū Mauna on cultural processes, policies, and procedures regarding the placement and removal of offerings, scattering of cremated human remains, and appropriateness of ahu.

Compounding matters, the CMP lacks benchmarks to track the progress of management actions and deadlines to properly evaluate implementation, and further fails to specify consequences or penalties for inadequate or untimely implementation; in any case, the BLNR has

.

⁴ See OHA Complaint, supra note 1.

⁵ Plaintiff's Motion for Summary Judgment, *Office of Hawaiian Affairs vs. State of Hawai'i*, et al., Civ. No. 17-1-1823-11 (JPC) (1st Cir. Ct.), filed March 2, 2020, at 15, available at https://www.oha.org/maunakea/.

⁶ For more on UH and DLNR's failures to implement 32 of the 54 management actions of particular concern to Native Hawaiians, see OHA Complaint, *supra* note 1, at 21-22.

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not provided oversight in their fulfillment. Furthermore, many of the management actions depend on enforcement of rules and regulations that have remained inadequate.

Another overarching issue with CMP implementation, as highlighted in the attached correspondences, is that the State, DLNR, and UH have repeatedly failed to systemically estimate the cost of implementing the plan. Yet, despite the high costs associated with CMP implementation, UH continually declines to charge reasonable rent for its subleases of Maunakea, and fails to use a transparent and standardized process when granting subleases and setting sublease terms.

In closing, OHA emphasizes that the 2009 CMP and its implementation have not meaningfully addressed the over 50 years of mismanagement of Maunakea by UH and the State; meanwhile, UH continues to ignore its responsibilities to Maunakea and in turn the Native Hawaiian people and all of Hawai'i's trust beneficiaries. Clearly, UH should not be allowed to continue exerting unchecked and effectively unilateral control of the mauna's management. With roughly 13 years left under UH's current master lease over Maunakea, OHA and the rest of the world wait with bated breaths to see whether UH will finally comply with its basic responsibilities to properly manage this sacred space and Hawai'i trust resource.

Mahalo nui for the opportunity to discuss these ongoing issues. If you have further questions, please contact myself at 594-1973 or via e-mail at sylviah@oha.org, or have your staff contact Interim Public Policy Manager Wayne Tanaka at (808)594-1945 or via e-mail at waynet@oha.org.

Aloha me ka 'oia'i'o nō,

Sylvia M. Hussey, Ed.D. Ka Pouhana, Chief Executive Officer

SMH:1f

CC: Trustee Colette Y. Machado

Trustee Brendon Kalei'āina Lee Trustee Leina'ala Ahu Isa, Ph.D.

Trustee Robert K. Lindsey Jr. Trustee John D. Waihe'e IV

Trustee Kalei Akaka

Trustee Carmen Hulu Lindsey

Trustee Dan Ahuna

Trustee Keli'i Akina, Ph.D.

Dawn Chang, Esq. August 14, 2020 Page 6

Enclosures:

- (1) OHA Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages
- (2) OHA Administrative Testimony dated 5/21/2020 to UH BOR regarding the adoption of a proposed internal restructuring plan for the management of Maunakea
- (3) OHA Administrative Testimony dated 11/6/2019 to UH BOR regarding the adoption of Hawai'i Administrative Rules governing public and commercial activities on Maunakea, including attached past testimonies and correspondences
- (4) Various OHA correspondences from 2009 regarding concerns with the CMP ([a] Letter to Ku'iwalu dated 3/9/2009 regarding requested comments on the CMP; [b] Letter to the Office of UH President dated 3/9/2009 regarding requested comments on the Draft Environmental Assessment for the CMP; [c] Letter to OMKM dated 9/10/2009 regarding the Draft Natural Resources Management Plan; [d] Letter to OMKM dated 9/10/2009 regarding the Draft Cultural Resources Management Plan)

McCORRISTON MILLER MUKAI MacKINNON LLP

FIRST CIRCUIT COURT STATE OF HAWAII FILED

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Attorneys for Plaintiff
THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE	OF	HAWAI'I
THE OFFICE OF HAWAIIAN AFFAIRS,)	CIVIL NO. (Declaratory Judgment)
Plaintiff,)	COMPLAINT FOR DECLARATORY AND
VS.)	INJUNCTIVE RELIEF, ACCOUNTING, RESTITUTION, AND DAMAGES;
STATE OF HAWAI'I; UNIVERSITY OF HAWAI'I; DEPARTMENT OF LAND)	SUMMONS
AND NATURAL RESOURCES; BOARD)	
OF LAND AND NATURAL RESOURCES; JOHN DOES 1-10; JANE DOES 1-10;)	
DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE "NON-)	
PROFIT" CORPORATIONS 1-10; and)	
DOE GOVERNMENTAL ENTITIES 1-10,)	
Defendants.)	
	,	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, ACCOUNTING, RESTITUTION, AND DAMAGES

Mauna Kea, kuahiwi kū ha'o i ka mālie. Mauna Kea, standing alone in the calm.

I do hereby certify that this is a full, true, and correct copy of the original option this office.

Clerk, Circuit Court, First Circuit

INTRODUCTION

Mauna a Wākea ("Mauna Kea") and the resources it holds comprise a critical part of the ceded lands trust and the public trust that the State of Hawai'i ("State" or "State of Hawai'i") is constitutionally-bound to protect and preserve for the future generations of Hawai'i. Having held management authority of these lands for over fifty years, the University of Hawai'i ("UH") has failed to meet its responsibilities concerning Mauna Kea's cultural, natural, and historical resources. Instead, at the expense of the mountain's pristine environment and cultural significance, UH has chosen to aggressively develop the summit of Mauna Kea for the benefit of astronomical institutions around the world.

After numerous attempts to resolve Mauna Kea's mismanagement through years of advocacy and non-adversarial mediation, Plaintiffs THE OFFICE OF HAWAIIAN AFFAIRS ("OHA") and THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS ("OHA Board"), through its counsel, McCorriston Miller Mukai MacKinnon LLP, bring this lawsuit to advocate on behalf of the Native Hawaiian people and to hold the State of Hawai'i, the Department of Land and Natural Resources ("DLNR"), and UH accountable for its deficient stewardship of Mauna Kea. OHA alleges and avers as follows:

II.

JURISDICTION

1. This Court has jurisdiction over the claims for relief in this action pursuant to Hawaii Revised Statutes ("HRS") sections 603-21.5, 603-21.9, and 632-1, and article XI, sections 1 and 9 and article XII, section 7 of the Hawaii State Constitution.

III.

PARTIES

- 2. Plaintiff OHA is an agency of the State of Hawai'i established pursuant to article XII, section 5 of the Hawai'i State Constitution and HRS Chapter 10. OHA advocates for the improved conditions of Native Hawaiians in the areas of 'āina, culture, economic self-sufficiency, education, governance, and health.
- 3. Plaintiff OHA Board is a duly constituted body established pursuant to article XII, section 6 of the Hawai'i State Constitution and HRS Chapter 10.

- 4. Defendant State of Hawai'i is a sovereign entity purportedly holding title to lands granted, or ceded, to it pursuant to sections 5(b) and 5(e) of the Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act"), and subject to a public trust for the benefit of native Hawaiians and the general public as imposed by section 5(f) of the Admission Act and article XII, section 4 of the Hawai'i State Constitution.
- 5. The State also holds "[a]ll public natural resources . . . in trust . . . for the benefit of the people." Haw. Const. art. XI, § 1.
- 6. Defendant UNIVERSITY OF HAWAI'I ("**UH**") is an agency of the State of Hawai'i established by article X, section 5 of the Hawai'i State Constitution.
- 7. Defendant DEPARTMENT OF LAND AND NATURAL RESOURCES ("DLNR") is an agency of the State of Hawai'i charged with managing and administering the State's public lands pursuant to HRS section 26-15(b) and HRS Chapter 171. DLNR's mission is to "[e]nhance, protect, conserve and manage Hawaii's unique and limited natural, cultural and historic resources held in public trust for current and future generations of visitors and the people of Hawaii nei in partnership with others from the public and private sectors." Mission Statement, DEPARTMENT OF LAND AND NATURAL RESOURCES, http://dlnr.hawaii.gov (last visited Sept. 20, 2017); see Haw. Const. art. XI, § 1. DLNR's main offices are located in the City and County of Honolulu, State of Hawai'i.
- 8. Defendant BOARD OF LAND AND NATURAL RESOURCES ("BLNR") is an agency of the State of Hawai'i and heads the DLNR pursuant to HRS section 26-15.
 - 9. Defendant SUZANNE CASE ("DLNR Chair") is the Chairperson of the DLNR.
- Doe Corporations 1-10, Doe "Non-Profit" Corporations 1-10, and Doe Governmental Entities 1-10 are sued herein under fictitious names for the reason that after diligent and good faith efforts to ascertain their names and identities through the review of documents and efforts to ascertain the nature of the claims, their true names and identities are presently unknown to Plaintiffs except that they are connected in some manner with the named Defendants and/or were the agents, servants, employees, representatives, co-venturers, associates, sub-contractors or contractors and/or owners, lessees, assignees, and licensees of the named Defendants and/or were in some manner presently unknown to Plaintiff engaged in the activities alleged herein and/or were in some manner responsible for the injuries, losses, or

damages to Plaintiffs and/or acted or conducted themselves in a negligent manner, which negligence was a proximate cause of injuries, losses, or damages to Plaintiffs, and/or conducted some activity in a negligent or imprudent manner; which negligent or imprudent conduct was a proximate cause of injuries, losses, or damages to Plaintiffs and/or were in some manner related to the named Defendants, and Plaintiffs pray for leave to insert herein their true names, identities, capacities, activities, and/or responsibilities when the same are ascertained.

IV.

LEGAL BACKGROUND

A. Mauna Kea is Part of the Ceded Lands Trust and the Public Trust

- 11. In 1898, five years after the illegal overthrow of the Kingdom of Hawai'i, a Joint Resolution of Annexation, enacted by the United States Congress, resulted in the transfer of 1.8 million acres of Hawaiian Government and Crown Lands to the United States ("ceded lands"). Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States ("Joint Resolution"), J. Res. 55, 55th Cong., 30 Stat. 750 (1898).
- 12. The Joint Resolution recognized the nature of the ceded lands as "a special trust," Haw.—Pub. Lands, 22 Op. Att'y Gen. 574, 576 (1899), and this trust was reaffirmed in the Organic Act of 1900 and the Hawaiian Homes Commission Act in 1921. See Hawai'i Organic Act, ch. 339, 31 Stat. 14 (1900); Haw. Homes Comm'n Act of 1921, Pub. L. No. 34, 42 Stat. 108 (1921).
- 13. In 1959, as a condition of statehood, the United States Congress transferred a portion of the ceded lands back to the State of Hawai'i, which assumed responsibility as trustee of the ceded lands trust. See Admission Act.
 - 14. Section 5(f) of the Admission Act states that the ceded lands shall be held by [the] State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.

Id. (emphasis added).

- 15. The Hawai'i State Constitution confirms this treatment, describing the ceded lands "as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4.
 - 16. Mauna Kea is part of the ceded lands trust.
- 17. The ceded lands trust "imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the [Admission Act section] 5(f) trust provisions." Pele Def. Fund v. Paty, 73 Haw. 578, 605, 837 P.2d 1247, 1264 (1992).
- 18. Accordingly, the State of Hawai'i holds <u>moral obligations of the highest</u> <u>responsibility and trust</u> with respect to ceded lands, including Mauna Kea. <u>See Ahuna v. Dep't of Haw. Home Lands</u>, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982) (quoting <u>Seminole Nation v. United States</u>, 316 U.S. 286, 296-97 (1942)).
- 19. Additionally, "[a]ll public natural resources are held in trust by the State for the benefit of the people." Haw. Const. art. XI, § 1. This public trust compels "the State and its political subdivisions [to] conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources," and to "promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." Id.
- 20. As part of its public trust duties, the State also reaffirmed and committed to protect "all rights, customarily and traditionally exercised for subsistence, cultural and religious purpose 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." Haw. Const. art. XII, § 7. Thus, public trust resources include the protection of Native Hawaiian traditional and customary rights.
- 21. As an integral part of the public trust, Mauna Kea is a place of singular cultural significance for Native Hawaiians, and its resources and cultural sites are essential to Native Hawaiian traditional and customary practices, specifically tied to Mauna Kea.

B. The State Has Assumed Great Responsibility as the Fiduciary of These Trusts

- 22. The State and its agents, officers, and employees are trustees of the ceded lands trust under article XII, sections 4, 5, and 6 of the Hawai'i State Constitution, and are trustees of the public trust under article XI, section 1 of the Hawai'i State Constitution.
- 23. The "conduct of the government as trustee is measured by the same strict standards applicable to private trustees." Ahuna, 64 Haw. at 339, 640 P.2d at 1169. The 62555/368587.1

Hawai'i Supreme Court has specially adopted three specific trust duties applicable to the State and its agencies: (1) the duty "to administer the trust solely in the interest of the beneficiar[ies]," (2) the duty to "deal impartially when there is more than one beneficiary," and (3) the duty "to use reasonable skill and care to make trust property productive." Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw. (OHA v. HCDC), 117 Hawai'i 174, 194, 177 P.3d 884, 904 (2008) (citing Ahuna, 64 Haw. at 338, 640 P.2d at 1168).

- 24. Additionally, like private trustees, the State and its agents, officers, and employees, including the DLNR and UH, have the following duties with respect to trust resources:
 - a. The duty to protect and preserve trust resources from substantial impairment;
 - b. The duty to preserve the rights of present and future generations to use and otherwise benefit from the trust resources;
 - c. The duty to administer trust resources solely for the interests of the beneficiaries, and not for the trustees' own benefit or the benefit of third parties;
 - d. The duty to manage trust resources in good faith and with such vigilance, diligence, and prudence as a reasonable person would in managing his or her own affairs;
 - e. The duty against privatizing the trust resources;
 - f. The duty to maximize the value of trust resources for its intended beneficiaries;
 - g. The duty to restore trust resources when damaged;
 - h. The duty to adequately supervise administrative agencies and other state agents, officers, and employees to meet the State's fiduciary duties;
 - i. The duty to manage trust resources with reasonable caution, or through use of the precautionary principle; and
 - j. The duty to furnish trust beneficiaries with information concerning the health of the resources protected by the trust.
- 25. Under the public trust doctrine, the State and its agents, officers, and employees must protect and conserve public trust resources to the extent feasible; must balance the protection and conservation of public trust resources with the use and development of such

resources, employing a presumption in favor of public use, access, and enjoyment; must consider the cumulative impact of existing and future uses on public trust purposes; and must engage in planning and decision-making from a global, long-term perspective. In sum, the State may not compromise public rights in these public trust resources unless such a decision is made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under Hawai'i law. See In Re Water Use Permit Applications, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000).

- 26. The State is responsible and liable for the acts or omissions of its agents, officers, and employees, including the DLNR and UH, in the management and disposition of the ceded lands trust and its resources, and the public trust.
- 27. "Mauna Kea is a special place valued by the people of Hawaii and by astronomers throughout the world. **This value demands the highest level of protection and preservation**" by its trustees, the State of Hawai'i, the DLNR, and UH. Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13 at 33.

V.

CULTURAL CONTEXT—MAUNA KEA'S SACREDNESS

28. The Hawai'i Supreme Court has recognized that:

'Āina [land] is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The 'āina is part of their 'ohana [family], and they care for it as they do for other members of their families. For them the land and the natural environment [are] alive, respected, treasured, praised, and even worshiped.

OHA v. HCDC, 117 Hawai'i at 214, 177 P.3d at 924 (citing the trial court) (diacritical marks added, alteration in original omitted).

A. Mauna Kea Is the First-Born Son of Papa and Wakea

29. Native Hawaiian genealogical mele [songs, poems, chants] explain the centrality of Mauna Kea within Hawaiian genealogy and cultural geography. Mele recount that Mauna Kea was born as a result of the union of Papa and Wākea, the progenitors of all things, including Hāloa, the first man from whom Native Hawaiians are descended. For many Native Hawaiians,

Mauna Kea is a physical link to Papa and Wākea and provides an important connection to their ancestral ties of creation.

30. Today, many Native Hawaiians continue to view Mauna Kea as the first-born child of Papa and Wākea. Accordingly, Mauna Kea is revered, cared for, and respected as the hiapo [respected older sibling] of all Native Hawaiians.

B. Akua Reside On Mauna Kea

- 31. In Native Hawaiian culture, ancestral akua [gods, goddesses, deities] reside within the Mauna Kea summit. The akua are embodied within the landscape of Mauna Kea—they are believed to be physically manifested in earthly form as various pu'u [cinder cones] and as the waters of Waiau. Because these akua are revered and connected to the Mauna Kea landscape in Hawaiian genealogies, and because elders and akua are revered and looked to for spiritual guidance in Hawaiian culture, Mauna Kea is considered a sacred place.
- 32. Many akua are associated with Mauna Kea through genealogical mele and mo'olelo [stories], including but not limited to: Poli'ahu, Lilinoe, Waiau, and Kahoupakane, the goddesses adorned in kapa hau [snow garments] who embody the eternal warfare between heat and cold, fire and frost, burning lava and stony ice.
- 33. Poli'ahu is commonly referred to as the beautiful snow goddess of Mauna Kea. Poli'ahu's sisters include Lilinoe, the goddess of the mists; Waiau, goddess of fresh water; Līhau, goddess of the chilling frost; and Kipu'upu'u, goddess of hail. Thus, Poli'ahu and her sisters represent and embody the different forms of water on Mauna Kea. Accordingly, certain pu'u [cinder cones] are named after them and are important religious sites.
- 34. Native Hawaiian historians report that Poli'ahu was reared and lived like the daughter of an ancient chief of Hawai'i, but she was restricted to the mountain of Mauna Kea by her godfather, Kāne. Kāne created a silvery swimming pool for Poli'ahu at the top of Mauna Kea named Lake Waiau and placed a supernatural guard named Mo'oinanea there so Poli'ahu could play at leisure without danger of being seen by man. The god Kūkahau'ula [the pinktinted snow god] was selected as a husband for Poli'ahu. Following his selection, he appeared every morning with the rising of the sun and again every afternoon with the setting of the sun

¹ Kāne is one of the four main akua in the traditional Native Hawaiian religion. He is associated with the forces of nature that provide life-giving resources, including but not limited to fresh water, sunlight, and kalo [taro].

and each day he became more fascinated. But each day Poli'ahu's attendants—Lilinoe [fine mist rain], Līhau [chilling frost] and Kipu'upu'u [hail]—drove him from the mountain. Mo'oinanea eventually determined that Kūkahau'ula's love was true and she allowed Kūkahau'ula to embrace Poli'ahu. To this day, Kūkahau'ula and Poli'ahu may be seen embracing on Mauna Kea in the famously pink and orange light of dusk.

35. Lake Waiau is referred to in the Kumulipo creation chant as the lake that resides in the heavens and serves as a jumping off point for Hawaiian souls. Cultural practitioners believe the water of Lake Waiau is most sacred because it has not yet descended; rather, it remains high up in the realm of Wākea. The importance of Lake Waiau as a significant religious site and the presence of akua on Mauna Kea is also consistent with the importance of this natural resource for the people's survival. Lake Waiau feeds the fresh water aquifer for the Hilo ahupua'a [land district].

C. Mauna Kea Explains Hawai'i's Geology

- 36. Poli'ahu and Pele [goddess of fire and lava] battled over control of Hawai'i Island, and their conflicts help explain geological events. Native Hawaiian historians recount Poli'ahu's love for the eastern cliffs of Hawai'i Island, where she often engaged with ali'i [chiefs] and maka'āinana [commoners] in various games and sports. One day Poli'ahu and her companions were competing in hōlua [sledding] on the slopes of Mauna Kea, south of Hāmākua, when a beautiful stranger appeared and was invited to participate with them. After losing to Poli'ahu, the beautiful woman raged, and her anger blew open the subterranean caverns of Mauna Kea, setting forth fountains of molten fire. The beautiful woman was Pele, goddess of volcanoes and lava. Poli'ahu fled up Mauna Kea and threw her snow mantle over the area to chill and harden Pele's fires. They battled on, and Poli'ahu eventually pushed Pele back down the mountain and to the southern half of Hawai'i Island.
- 37. This historical account and the rivalry between Poli ahu and Pele accurately describes the geological phenomenon known as the Laupahoehoe Volcanic series and the late Pleistocene Makanaka glacial episode on the summit of Mauna Kea.

D. Archaeology Shows Mauna Kea's Sacredness

38. Mauna Kea's archaeology provides physical evidence of the historical connection between Native Hawaiians and Mauna Kea.

- 39. Archaeological surveys have identified 263 archaeological sites, including 29 burial sites and 233 shrines. The 233 shrines constitute what is arguably and largest and most important complexes of non-monumental religious structures in all of Polynesia.
- 40. For its role in Hawaiian culture/religion/science and its critical importance as a source of vital natural resources, Mauna Kea is especially sacred to the Native Hawaiian people.

VI. RELEVANT FACTUAL HISTORY OF MAUNA KEA

A. UH Identified Mauna Kea as a Prime Site for Astronomical Observation

- 41. In or around 1964, UH identified Mauna Kea as possessing exceptional conditions for astronomical observation. Mauna Kea was designated by the State as a conservation district, and this designation gave management authority of Mauna Kea to the DLNR.
- 42. In or around 1965, UH contracted with the National Aeronautics and Space Administration ("NASA") to design and build a 2.24 meter observatory, which would be the first observatory on the summit of Mauna Kea.
- 43. In or around 1967, UH established the Institute for Astronomy ("IfA") and began planning the construction of additional observatories. In or around 1968, UH IfA constructed the 0.6-meter observatory on Mauna Kea.

B. The State Leases Mauna Kea to UH

- 44. On or about June 21, 1968, the BLNR, as the lessor, and UH, as the lessee, executed General Lease No. S-4191 ("General Lease"), which transferred 13,321 acres of ceded lands at the summit of Mauna Kea ("Mauna Kea Science Reserve") for a period of sixty-five (65) years, from January 1, 1968 to December 31, 2033.
- 45. Pursuant to the General Lease, UH agreed to "keep the demised premises and improvements in a clean, sanitary and orderly condition"; to avoid "any waste, strip, spoil, nuisance or unlawful, improper or offensive use of the demised premises"; to use the land for "a scientific complex, including without limitation thereof an observatory"; and to "properly maintain, repair and keep all improvements in good condition."
- 46. Pursuant to the General Lease, if UH "fail[ed] to comply with any of the terms and conditions of this lease," then the State, through the BLNR, could "terminate this lease by giving six months' notice in writing" to UH.

- 47. The BLNR retained general regulatory authority over the Mauna Kea Science Reserve, but some broad responsibilities were given to UH. As a state agency, UH possesses the same fiduciary duties with respect to the ceded lands it leases and the public trust resources on those lands.
- 48. In or around 1970, the UH 2.2-meter observatory, an optical/infrared telescope, was constructed on Mauna Kea and sponsored by UH's IfA.
- 49. With multiple observatories constructed on Mauna Kea, the public—including Native Hawaiians, local groups, hunters, and environmentalists—began voicing concerns about further development on Mauna Kea as early as 1974.
- 50. In or around 1974, in response to public concerns, Acting Governor George Ariyoshi directed the DLNR to develop and promulgate a master plan for all of Mauna Kea above Saddle Road.

C. The State and UH Develop A Series of Deficient Management Plans

- 51. For the next thirty-five (35) years, the State, the DLNR, and UH put forth more than ten (10) different management plans. By the time a plan was completed, additional construction on Mauna Kea often changed the conditions on the mountain such that parts of the plan were already obsolete or required revision. In many cases, the plans were aspirational and never executed.
- 52. In or around 1977, the BLNR approved The Mauna Kea Plan, which merely established management areas and divided management responsibility between UH and the DLNR.
- 53. In or around 1979, three more observatories were constructed on Mauna Kea: the 3.6-meter Canada-France-Hawai'i Telescope and the 3.8-meter United Kingdom Infrared Telescope, both of which were subleased from UH for \$0.00; and the 3.0-meter NASA Infrared Telescope Facility, which was subleased from UH at a rental rate of \$1.00 per year.
- 54. Due to the construction of additional observatories on Mauna Kea, UH began planning the construction of mid-elevation facilities for scientists, astronomers, and staff. In 1980, UH began preparing the Hale Pōhaku Mid-Elevation Facilities Master Plan: Complex Development Plan in response to these additional facilities.
- 55. Because development now incorporated structures other than observatories, UH and its Board of Regents approved the Research and Development Plan for the Mauna Kea 62555/368587.1

Science Reserve and Related Facilities ("R&D Plan"), which sought to establish a programmatic master plan for continued development on Mauna Kea.

- 56. In or around 1983, UH proposed yet another management plan, the Mauna Kea Science Reserve Complex Development Plan, which provided the physical planning framework to implement its R&D Plan. This plan included an environmental impact statement that purported to evaluate the general impacts of further development on Mauna Kea and proposed actions to mitigate negative impacts. In or around 1985, the BLNR approved the Mauna Kea Management Plan, which was a revised version of UH's Mauna Kea Science Reserve Complex Development Plan, created in 1983. This plan projected the total number of telescopes on the mountain at thirteen (13) by the year 2000 and represented the first and only time that the BLNR approved a management plan with any sort of development limit.
- 57. In or around 1987, four more observatories were constructed on Mauna Kea: the 10.4-meter Caltech Submillimeter Observatory and the 15-meter James Clerk Maxwell Telescope; in or around 1992, the Very Long Baseline Array; and in or around 1993, the 10-meter W.M. Keck Observatory. Each of the operators for these observatories received subleases from UH for \$1.00 per year.
- 58. In or around 1995, BLNR approved the Revised Management Plan for the UH Management Areas on Mauna Kea, which addressed the management of permitted and restricted activities on Mauna Kea, including recreational, educational, cultural, and commercial activities.
- 59. In 1996, another 10-meter W.M. Keck Observatory was constructed on Mauna Kea, bringing the total number of observatories on Mauna Kea to nine (9). UH also subleased the land for this observatory for \$1.00 per year.

D. Scathing Audits Highlight the Mismanagement of Mauna Kea

- 60. Despite the resources expended to develop each of these plans, the public's concerns intensified regarding the protection of Mauna Kea's sacred natural and cultural environment. In response to these growing concerns, in or around 1997, the Hawai'i State Legislature passed Senate Concurrent Resolution No. 109, which directed the State Auditor to conduct an audit of the management of Mauna Kea.
- 61. The State Auditor published the Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 98-6 ("1998 Audit"), in or around February 1998, thirty (30) years after UH assumed responsibility of the ceded lands on Mauna Kea.

62. With respect to UH, the 1998 Audit found:

[UH's] management of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources. [UH] focused primarily on the development of Mauna Kea and tied the benefits gained to its research program. Controls were outlined in the management plans [but] were often late and weakly implemented. [UH's] control over public access was weak and its efforts to protect natural resources were piecemeal. [UH] neglected historic preservation, and the cultural value of Mauna Kea was largely unrecognized. Efforts to gather information on the Wekiu bug came after damage had already been done. Trash from construction was cleaned up only after concerns were raised by the public. Old testing equipment constructed in the early years of development has not been removed as required by the lease agreement.

1998 Audit, Overview at 1 (emphases added).

63. With respect to the DLNR, the 1998 Audit found:

<u>IThe DLNR</u> <u>needs to improve its protection of Mauna Kea's natural resources</u>. The Conservation District permitting process could be strengthened by ensuring the setting of specific conditions relating to the Environmental Impact Statement's mitigating measures and implementation of management plans. . . . [P]ermit conditions, requirements, and regulations were not always enforced. Finally, administrative requirements were frequently overlooked or not completed in a timely manner.

1998 Audit, Overview at 2 (emphasis added).

- 64. In summary, the 1998 Audit concluded that "both [UH] and the [DLNR] failed to develop and implement adequate controls to balance [] environmental concerns with astronomy development." 1998 Audit at 15 (emphasis added). In response to the 1998 Audit, the DLNR "agree[d] with the auditor's finding that the [DLNR] needs to improve efforts to protect and conserve Mauna Kea's natural resources." Attachment 3 to 1998 Audit at 1.
- 65. Nevertheless, in or around 1999, two more observatories were constructed on Mauna Kea: the 8.3-meter Subaru Telescope and the 8.1-meter Gemini Northern Telescope, both of which received subleases from UH for \$1.00 per year.
- 66. As a response to the scathing 1998 Audit, the UH Board of Regents adopted the Mauna Kea Science Reserve Master Plan ("2000 Mauna Kea Science Reserve Master Plan") on or around June 16, 2000. The 2000 Mauna Kea Science Reserve Master Plan established the

Astronomy Precinct, an area at the summit of Mauna Kea spanning 525 acres wherein all astronomy facilities would be confined. It also attempted to address management authority on Mauna Kea, including access, natural resources, cultural resources and practices, and education and research.

- 67. The 2000 Mauna Kea Science Reserve Master Plan recommended the formation of the Office of Mauna Kea Management ("**OMKM**") and the Mauna Kea Management Board ("**MKMB**").
- 68. The OMKM, established as an agency within UH, is responsible for compliance and implementation of the plan and is comprised of two advisory bodies, MKMB and Kahu Kū Mauna Council. The chancellor of UH Hilo selects the members of the MKMB and the cultural advisors on the Kahu Kū Mauna Council. Both the MKMB and the Kahu Kū Mauna Council are strictly advisory; neither represents an independent voice for the community and neither has any decision-making authority. Their function is to advise OMKM, which in turn advises the UH Board of Regents on all matters impacting compliance with UH's management plans, including preservation of Mauna Kea's cultural integrity.
- 69. The 2000 Mauna Kea Science Reserve Master Plan was not approved or adopted by the BLNR.
- 70. In 2002, the Submillimeter Array was constructed on Mauna Kea with eight (8) separate six-meter antenna dishes. The operator of the Submillimeter Array subleased from UH for \$1.00 per year.
- 71. Because the public continued to voice its concerns regarding Mauna Kea's management, the Hawai'i State Legislature passed Senate Concurrent Resolution No. 68 in 2004, which directed the State Auditor to assess the progress of UH and the DLNR in light of the 2000 Mauna Kea Science Reserve Master Plan.
- 72. The State Auditor published the Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 05-13 ("2005 Audit"), in or around December 2005.
- 73. With respect to UH, the 2005 Audit found that "[d]espite improvements, [UH's] management of the Mauna Kea Science Reserve still falls short." 2005 Audit at 13 (emphasis added). The 2005 Audit continued: UH "has not dealt with certain significant management issues, such as resolving jurisdictional issues with the [DLNR] and monitoring

conservation district use permits. Such issues . . . <u>increase the likelihood of harm to [Mauna Kea's] vulnerable environment</u>." <u>Id.</u> (emphases added).

- 74. In summary, the 2005 Audit found that UH failed to obtain "administrative rule-making authority," failed to resolve "public access issues," and failed to "implement[] signage policies or procedures" to protect environmental and cultural resources. <u>Id.</u> at 21.
- 75. With respect to the 2000 Mauna Kea Science Reserve Master Plan, the 2005 Audit found that the "plan lack[ed] certainty and clarity" and was inconsistent with the DLNR's plan, the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea. <u>Id.</u> at 23.
- 76. The 2005 Audit also criticized the 2000 Mauna Kea Science Reserve Master Plan for not completing an inventory of all cultural and natural resources on Mauna Kea: "[UH] needs to complete the inventory of cultural and natural resources to document the importance of providing increased protection to the mountain." Id. at 25-26 (emphasis added).
- 77. With respect to the DLNR, the 2005 Audit found that its "advancements in oversight need to go farther." Id. at 13 (emphasis added). While the DLNR "made improvements in protecting Mauna Kea's natural resources, [t]hese steps...still [fell] short of protecting Mauna Kea's natural and cultural resources. Id. at 26 (emphasis added).
 - 78. The 2005 Audit further criticized the DLNR as follows:

The [DLNR] has not embraced its role as landowner. In recent years, the [DLNR] has passively allowed [UH] to fulfill the [DLNR's] role of landowner. As a result, departmental management plans and its monitoring and enforcement efforts have been thought of as subordinate to what the lessee—or, [UH]—would do. This lax attitude is reflected in the [DLNR's] failure to update the papers that define its relationship with [UH], allowing [UH] to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements.

Id. at 29 (emphases added).

- 79. On or about January 19, 2007, the Circuit Court of the Third Circuit, State of Hawai'i reversed the BLNR's approval of a management plan for the construction and operation of six 1.8-Meter Outrigger Telescopes on Mauna Kea.
- 80. The management plan approved by the BLNR to grant a conservation district use permit for the Outrigger Telescopes included an environmental impact statement, which admitted

that from a cumulative perspective, the impact of past, present, and reasonably foreseeable future activities on cultural resources on Mauna Kea is **substantial and adverse**.

81. The management plan was also limited to the specific project and the specific area of construction. The Court found that such a management plan was insufficient:

The resource that needs to be conserved, protected and preserved is the summit area of Mauna Kea, not just the area of the Project.

Allowing management plans on a project by project basis would result in foreseeable contradictory management conditions for each project or the imposition of special condition[s] on some projects and not others. The result would be projects within a management area that did not conform to a comprehensive management plan, and would not be consistent with the purposes of appropriate management and promoting long term sustainability of the protected resource espoused by HRS § 183C-1.

Mauna Kea Anaina Hou, et al. v. Bd. of Land and Natural Res., Civ. No. 04-1-397 (Hilo), Decision and Order at 7 (Jan. 19, 2007).

E. The 2009 Comprehensive Management Plan Currently Governs the Management of Mauna Kea

- 82. To comply with the Circuit Court's decision that the BLNR must approve a comprehensive management plan before any future development on Mauna Kea, UH began work on the 2009 Mauna Kea Comprehensive Management Plan ("2009 CMP").
- 83. The 2009 CMP guides UH's existing and future use of its leased Mauna Kea lands and its kuleana [responsibility, obligation] to protect and preserve Mauna Kea's cultural, natural, and scientific resources. It supplemented and superseded the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea. The 2009 CMP is meant to be read in combination with the 2000 Mauna Kea Science Reserve Master Plan, which continues to serve as UH's framework for development on Mauna Kea.
- 84. To obtain the BLNR's approval for the 2009 CMP, UH developed four additional sub-plans: (1) the Cultural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea ("CRMP"), completed in or about October 2009; (2) the Natural Resources Management Plan for the UH Management Areas on Mauna Kea ("NRMP"), completed in September 2009; (3) the Decommissioning Plan for the Mauna Kea Observatories

- ("2010 Decommissioning Plan"), completed in January 2010; and (4) the Public Access Plan for the UH Management Areas on Mauna Kea ("Access Plan"), completed in January 2010.
- 85. The CRMP examines the threats or impacts that specific activities might have on Mauna Kea's historic properties and explains the measures UH and the DLNR should take to avoid or minimize those impacts.
- 86. The NRMP focuses on the protection and preservation of Mauna Kea's natural resources.
- 87. The 2010 Decommissioning Plan describes the process for the removal of structures associated with an observatory facility and the restoration of the site to its preconstruction condition, including the financial planning necessary for such decommissioning. All decommissioning must be completed by the end of the sublease term, or by 2033. Despite the plan's aspiration of preconstruction restoration, it allows for "partial" removal of structures "to the greatest extent possible," meaning that structures may remain at UH's discretion following the lease period.
- 88. With the exception of TMT, which may not have a valid sublease, UH's sublessors are not required to comply with the 2010 Decommissioning Plan.
- 89. The Access Plan sets forth guiding principles and policies to guide UH in developing management actions and administrative rules relating to public and commercial activities on Mauna Kea.
- 90. Despite concerns raised by OHA regarding its sufficiency, the BLNR approved the 2009 CMP in April 2009, and in 2010, the BLNR approved the four sub-plans.
- 91. In or around 2010, the UH 0.9-meter Educational Telescope (Hōkū Keʻa) was constructed on Mauna Kea to replace the UH IfA 0.6-meter observatory.
- 92. Along with the 2000 Mauna Kea Science Reserve Master Plan, which governs UH's development of Mauna Kea through 2020, the 2009 CMP and its sub-plans supplement the 1995 Revised Management Plan for the UH Management Areas on Mauna Kea and govern UH and the DLNR's management responsibilities. The plans are meant to guide the State, the DLNR, and UH toward fulfillment of their fiduciary duties concerning ceded lands and the public trust.

F. State Audits Continue to Show the State's Mismanagement

- 93. Because UH and the DLNR still needed to address stewardship issues discussed in the 1998 Audit and the 2005 Audit, in or around August 2014, the State Auditor published its Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 14-07 ("2014 Audit").
- 94. The 2014 Audit found that "UH ha[d] yet to adopt administrative rules [to] implement[] its management responsibilities," and that "UH issued unauthorized permits... for commercial tour activities, [which] put[] Mauna Kea's resources and UH's Mauna Kea revenues at risk." 2014 Audit at 15.
- 95. The 2014 Audit concluded that "[w]ithout administrative rules, <u>UH still lacks</u> enforcement authority to effectively protect the mountain from public activities and ensure public health and safety within the summit area." 2014 Audit at 15 (emphasis added).
- 96. The 2014 Audit also recognized that after nearly half a century of managing Mauna Kea, the DLNR and UH had finally laid an acceptable "foundation for improved stewardship by developing or updating key documents [to] govern[] management of Mauna Kea[.]" 2014 Audit at 15 (emphases added). While the DLNR and UH celebrated this review of their progress, the 2014 Audit merely found that an up-to-date management plan finally existed.
- 97. Another updated audit in July 2017, which neither provided new recommendations nor investigated unaddressed recommendations made prior to 2014, found that none of the eight (8) recommendations in the 2014 Audit had been completely implemented. According to the audit, only four (4) recommendations were partially implemented and four (4) recommendations were not implemented at all. Further, the 2017 audit found that action items in the 2009 CMP relating to Native Hawaiian cultural practices and public safety had been neglected and that UH still had not adopted administrative rules to govern and enforce public and commercial activities, despite a recommended rulemaking deadline of 2017.

G. The Public's Response to Proposed Construction of the Thirty-Meter Telescope

- 98. For decades, the public has voiced its concern regarding construction on Mauna Kea, specifically with respect to the construction of the thirteen (13) observatories on its summit.
- 99. Both Native Hawaiians and non-Hawaiians similarly protested the construction of the eighteen-and-one-half-story Thirty Meter Telescope ("TMT"), which was set for

construction in 2014. These protests culminated in a series of peaceful demonstrations on Mauna Kea beginning in 2014 and continuing to the present.

- 100. In March and April 2015, peaceful demonstrations continued to block construction crews from moving equipment to the summit in preparation for the start of construction. On April 2, 2015, over 300 protesters of all ages gathered on Mauna Kea to block construction crews. Twenty-three protesters were arrested for blocking a public road.
- 101. Governor David Ige ("Governor Ige") temporarily halted construction on Mauna Kea on April 7, 2015.
- 102. On May 26, 2015, Governor Ige held a press conference to announce his proposal for better stewardship of Mauna Kea. News Release: Governor David Ige Announces Major Changes in the Stewardship of Mauna Kea, http://governor.hawaii.gov/newsroom/news-release-governor-david-ige-announces-major-changes-in-the-stewardship-of-mauna-kea/ (last visited Sept. 20, 2017). In his comments, Governor Ige stated that stewardship should incorporate "the importance of respecting our host culture and the special places of Hawai'i." Id. Additionally, stewardship should include proper "[r]espect for the laws and the process of seeking and receiving approvals to do work in Hawai'i." Id.
 - 103. Reflecting on the State's management of Mauna Kea, Governor Ige admitted:

 "[W]e have in many ways failed the mountain. Whether you see it from a cultural perspective or from a natural resource perspective, we have not done right by a very special place and we must act immediately to change that[.]"

Id. (emphases added).

104. On or about June 1, 2015, UH published a statement from UH President David Lassner and UH Hilo Chancellor Donald Straney, in which they admitted that "[UH] has not yet met all of [its] obligations to the mountain or the expectations of the community."

VII. <u>THE MISMANAGEMENT OF MAUNA KEA</u>

A. Failure to Budget and Fund Proper Management of Mauna Kea

105. The State, the DLNR, and UH failed and continue to fail to systematically estimate the cost of implementing the 2009 CMP.

- 106. The State, the DLNR, and UH failed and continue to fail to generate sufficient revenue or funds to implement appropriate management of Mauna Kea, or to establish policies to attempt to generate sufficient revenue or funds for appropriate management.
- 107. On or about June 12, 2015, OHA attended a meeting of the BLNR and raised concerns regarding the budget for implementing the 2009 CMP. On behalf of its beneficiaries, who are also beneficiaries of the ceded lands trust, OHA requested a budget and a report on the allocation of monies spent for each management action. The BLNR and the OMKM have not provided either a budget breakdown or a report on the allocation of monies spent for each management action.
- 108. On or about September 21, 2016, the OMKM informed OHA that the entire annual budget of approximately \$2,200,000.00 was spent toward Mauna Kea's management but could not provide a breakdown of how the money was allocated to each management action.

 OMKM did not and cannot provide sufficient substantiation for the \$2,200,000.00 figure.
- 109. The State, the DLNR, and UH's management of Mauna Kea lacks financial transparency and fails to identify the source of funds, distribution and transfer of funds, and the actual amounts used for Mauna Kea management.

B. Failure to Prudently Negotiate Sublease Terms

- 110. UH failed and continues to fail to use a transparent and standardized process when granting subleases and determining the terms of those subleases.
- 111. Despite the high costs associated with implementing the 2009 CMP and its inability to adequately and timely implement the management actions called for in the 2009 CMP, UH failed to charge reasonable rent on any of its subleases.
- 112. For several subleases, UH did not charge any rent. The non-UH observatories on Mauna Kea do not pay reasonable or market-value rent. Rather, they give UH a guaranteed share of the observing time. See Attachment 2 to 1998 Audit at 1.
- attempt to establish fair and transparent processes or policies to govern the negotiation of sublease terms. Prior to the sublease for TMT, UH did not charge more than \$1.00 per year in rent on any of its subleases. In determining the amount of sublease rent, <u>UH did not properly</u> consider the costs of carrying out its management responsibilities when it negotiated

<u>sublease terms</u>, including sublease rent. Without proper vigilance, diligence, or prudence, the BLNR approved each of UH's subleases.

opportunity to generate much-needed funds for better management of Mauna Kea. Despite OHA's concerns, which it expressed through both written and oral advocacy, UH and the BLNR decided not to perform an independent analysis or appraisal to understand what a substantial or fair market rent would be. Instead, UH negotiated, and the BLNR rubber-stamped, a minimal sublease rent for TMT, which ultimately reflected TMT's pro rata share (based on acreage) of an unsubstantiated estimate of the cost to implement the 2009 CMP, or seven-hundredths of one percent (0.07%) of TMT's construction costs.

C. Failure to Implement the Already Deficient Management Plans

- 115. Although the 2009 CMP is meant to ensure the protection and preservation of valued cultural, historical, and natural resources by providing an analytical framework for management decisions consistent with the Hawai'i Supreme Court's decision in <u>Ka Pa'akai O Ka 'Aina v. Land Use Commission</u>, 94 Hawai'i 31, 7 P.3d 1068 (2000), the State, the DLNR, and UH failed to adequately implement a substantial number of 2009 CMP action items.
- 116. Based solely on its own reporting, UH and the DLNR <u>failed and continue to fail</u> to adequately implement thirty-two (32) of fifty-four (54) management actions that particularly affect or concern Native Hawaiians. These include, but are not limited to:
 - a. Failure to establish a process for ongoing collection of information on traditional, contemporary, and customary cultural practices on Mauna Kea;
 - b. Failure to complete baseline inventories on high-priority natural resources, as outlined in an inventory, monitoring, and research plan;
 - c. Failure to develop a map with land-use zones based on updated inventories of cultural and natural resources to delineate areas where future land use will not be allowed and areas where future land use will be allowed but will require compliance with prerequisite studies or analysis prior to approval of a Conservation District Use Permit;
 - d. Failure to provide specified opportunities for community members to provide input to cultural and natural resource management activities on Mauna Kea (e.g., a promised online forum to document community feedback), or to

- ensure systematic input regarding planning, management, and operational decisions that affect natural resources, sacred materials or places, or other ethnographic resources with which they are associated;
- e. Failure to ensure adequate education for construction and observatory staff regarding historical and cultural significance of Mauna Kea and its environment, ecology, and natural resources;
- f. Failure to implement a mandatory orientation process for visitors and recreational users, and to adequately ensure that observatory personnel, commercial tour operators, construction workers, and others currently required to participate in the orientation process, actually and meaningfully do so;
- g. Failure to establish any authorized and enforceable commercial tour permitting processes to annually evaluate and issue commercial tour permits;
- h. Failure to maintain a presence of enforcement personnel on Mauna Kea at all times to educate users, deter violations, and encourage adherence to restrictions;
- i. Failure to properly consult with OHA or Kahu Kū Mauna on cultural processes, policies, and procedures regarding the placement and removal of offerings, the construction of new Hawaiian cultural features, the scattering of cremated human remains, and the appropriateness of ahu [stacking of rocks as religious or cultural altars]; and
- j. Failure to develop and implement sufficient debris removal, monitoring, and prevention plans.
- 117. Although it was created, adopted, and approved by the State, the DLNR, and UH, the 2009 CMP fails to adequately track the progress of each management action, lacks deadlines or benchmarks to enforce implementation of those management actions, and fails to state any consequences for inadequate and/or untimely implementation of those management actions.
- 118. Indicative of the attitude that the DLNR and UH have taken toward its management responsibilities, the members of the BLNR often had no questions and showed little interest in reports concerning UH's progress in executing the 2009 CMP action items.

119. The State, the DLNR, and UH failed and continue to fail to adequately oversee implementation of the 2009 CMP. Non-compliance with the 2009 CMP demonstrates their collective failure to manage Mauna Kea in accordance with their fiduciary duties as trustees.

D. Failure to Create an Environment Respectful of Mauna Kea's Cultural Landscape

- 120. The State, the DLNR, and UH failed and continue to fail to adequately protect Native Hawaiian traditional and customary rights and practices on Mauna Kea, including but not limited to hunting, gathering of natural resources, and religious practices.
- 121. The State, the DLNR, and UH failed and continue to fail to adequately implement management actions in the 2009 CMP related to cultural resources and/or practices; to ensure systematic input regarding management decisions that may affect cultural resources and/or practices; and to establish grievance procedures to address cultural issues as they arise.
- 122. Despite several 2009 CMP action items, the State, the DLNR, and UH failed to require mandatory visitor orientation, trainings, or briefings to explain the cultural significance of Mauna Kea, the appropriate behavior while on Mauna Kea, and the importance of preserving its cultural landscape.
- 123. The existing orientation program for Mauna Kea staff and workers provides little assurance that content is understood or even observed by orientation attendees.
- 124. Kahu Kū Mauna and OHA have not been properly or adequately consulted on a number of management actions concerning cultural resources and/or practices.
- 125. The failure to adequately consult with Kahu Kū Mauna and OHA contributed to the complete destruction of an ahu on or about September 13, 2015. The ahu was likely destroyed by a Mauna Kea Support Services staff person. Despite multiple written requests from OHA, the State, the DLNR, and UH failed to adequately investigate the destruction of the ahu, failed to hold anyone accountable for the incident, failed to apologize for the desecration, and failed to develop protocols and/or procedures to provide assurances that such destruction would not occur in the future.

E. Failure to Manage Access to Mauna Kea and Activities on Mauna Kea

126. Unresolved regulatory and jurisdictional chaos between UH and the DLNR has resulted in inadequate management of public access to Mauna Kea and insufficient regulation of activities on Mauna Kea.

127. As a result of this poor management, the DLNR and UH failed to properly respond to safety incidents and/or accidents on Mauna Kea; failed to respond to unsafe, destructive, or inappropriate behavior on Mauna Kea; and failed to disclose public safety and health issues to the public, including fatalities.

Vehicular Accidents and Personal Injuries

- 128. The DLNR and UH's failure to manage access and/or notify the public of proper behavior on Mauna Kea has contributed to or caused numerous car accidents and fatalities, including but not limited to:
 - a. An April 2007 accident that killed two people;
 - b. Cars driving off the access road and tumbling down the mountainside in July 2010 and February 2013;
 - c. A car fire in September 2014;
 - d. A vehicular fatality in March 2017; and
 - e. A car accident resulting in the total destruction of a pickup truck in March 2017.
- 129. The DLNR and UH's inadequate control of public access has also resulted in missing hikers and personal injuries.

Hazardous Material Spills

- 130. Solid and liquid hazardous materials are used in routine observatory operations and generate waste after their use. Operations may require glycol coolants; diesel fuel for emergency generators; hydraulic fluid; lubricants; compressed gasses (e.g., carbon dioxide, helium, oxygen, nitrogen); mercury; mirror decoating acids (e.g., hydrochloric acid, potassium hydroxide, copper sulfate, hydrofluoric acid); and paints and solvents. The facilities on Mauna Kea, including Hale Pōhaku, also utilize underground storage tanks: one housing 11,500 gallons of diesel fuel and two housing 2,000 gallons and 4,000 gallons respectively of gasoline.
- 131. In or around May 2004, documents were subpoenaed from the W.M. Keck Observatory regarding its proposed outrigger telescope project. These documents revealed that spills of sewage, ethylene glycol, diesel fuel, and toxic mercury marred the safety records of observatories on Mauna Kea. These documents validated concerns voiced by Native Hawaiian groups for decades regarding the effects spills may have on the mountain's natural resources, including its important fresh water sources.

- 132. Based on environmental reports, news reports, and independent state audits, there have been at least ten (10) mercury spills at the different observatories on Mauna Kea.
- 133. In or around July 2011, more than 100 liters of orange coolant spilled from a torn wrapping cable within the system shutting down the Subaru observatory for approximately two weeks.
- 134. In the summer of 2015, idle equipment and/or heavy machinery at the TMT construction site on Mauna Kea continuously leaked oil for months. The public raised concerns regarding these oil leaks and their effect on the environment and the fresh water in Lake Waiau on Mauna Kea.

Trash

- 135. The General Lease requires UH to keep "the demised [leased] premises and improvements in a clean, sanitary, and orderly condition." Conservation District Use Permits also contain specific conditions that require UH to control trash in the specific construction area and in the general summit area.
- 136. These requirements impose a duty on UH to monitor construction activity on a regular basis to prevent construction-related trash from accumulating on Mauna Kea.
- 137. In or around 1995, the Sierra Club complained of the amount of trash on the Mauna Kea summit. Only after the Sierra Club's complaint did UH investigate the issue and remind the sub-lessees of their duty to control trash.
- 138. In or around 1995, UH failed to manage the large amounts of trash generated by the Subaru observatory and the Keck observatory. 1998 Audit at 25. The amount of trash was so voluminous that a helicopter was required to airlift the trash from the summit at a cost of approximately \$20,000.00.
- 139. The General Lease requires UH to obtain the approval of the BLNR before abandoning remnants of facilities and/or equipment on Mauna Kea. The 1977 Mauna Kea Plan additionally required an adequate security deposit to ensure that items were timely and properly removed. Despite these requirements, the 1998 Audit found that UH failed to remove old testing equipment from the summit of Mauna Kea that UH or its sub-lessees previously used to study the conditions of potential construction areas. The old testing equipment included two concrete slabs and a large weather tower.

- 140. Although UH represents that its attention to trash has improved over time, excessive trash continues to be an issue on Mauna Kea. In or around April 2015, large amounts of trash—including beer bottles, bottle caps, plastic water bottles, aluminum cans, socks, gloves, paper products, and chicken bones—were found on Mauna Kea.
- 141. Although the 2009 CMP required the development and implementation of a plan for debris removal, monitoring, and prevention by 2013, UH admits that such a plan remains only in draft form.
- 142. The 2009 CMP also required the development and implementation of a plan for the removal of military wreckage by 2019. According to UH's own reporting, this plan has not yet been initiated.

F. Failure to Manage Observatory Construction and Decommissioning

- 143. Existing subleases, negotiated by UH, do not state whether all facilities and infrastructure must be removed, do not provide details about the decommissioning process, and do not include mechanisms to ensure funding for decommissioning.
- 144. Moreover, <u>UH and the DLNR have not facilitated any enforceable</u>

 <u>commitment to reduce the development footprint on Mauna Kea</u>. They have not required a comprehensive management plan to provide a timeline for decommissioning the existing observatories on Mauna Kea or any type of cap, limitation, outline, or timeline for observatory development and decommissioning on Mauna Kea.
- 145. As a condition of the BLNR's approval of the 2009 CMP, the BLNR required UH to complete the 2010 Decommissioning Plan, which provides guidelines for the observatory decommissioning process, a summary of existing observatory facilities and details relating to their potential decommissioning, and suggested requirements for future or renegotiated subleases to ensure adequate planning and financial mechanisms for decommissioning.
- 146. The 2010 Decommissioning Plan urges each sublessee to develop a site decommissioning plan ("SDP") and decommissioning funding plan ("DFP") to ensure compliance with applicable laws and to facilitate achievement of decommissioning and site restoration goals described in the 2009 CMP and the 2010 Decommissioning Plan.
- 147. To date, no SDPs or DFPs have been developed, or even initiated, for any of the existing thirteen (13) observatories on Mauna Kea.

- 148. Neither UH nor the DLNR has established any mechanisms to enforce the development of SDPs or DFPs.
- 149. With the exception of the sublessee for the TMT, sublessees are not required to follow the 2010 Decommissioning Plan, and neither UH nor the DLNR has taken action to facilitate compliance.
- 150. Existing observatory subleases require only that facilities be removed and that the land be restored to "even grade" or "original condition" at the end of the sublease term. The UH Board of Regents and/or the BLNR, however, may allow the facilities to be recycled or otherwise retained.
- 151. In 2013, despite UH's decades-long history of management failures, the BLNR continued negotiations with UH for a new thirty-five (35) year general lease of Mauna Kea, which would expire in 2078. The proposed lease terms did not include sufficient or enforceable conditions to ensure adequate contributions to Mauna Kea's management costs; sufficient or enforceable consequences for violations of the general lease terms; sufficient checkpoints to ensure progress on the action items called for in the 2009 CMP; or a sufficient and enforceable commitment to reduce the development footprint on Mauna Kea. Further, the BLNR considered granting the new general lease without fulfilling a statutorily-required environmental review.
- 152. A new general lease has not yet been executed, in part due to repeated testimony and advocacy from OHA and increased vigilance from the community concerning these deficiencies, both of which indicated a strong likelihood of litigation should the BLNR approve a new general lease under those or similar terms.

VIII. OHA'S EFFORTS TO AVOID LITIGATION ON THIS MATTER

- 153. In response to the community's concern for Mauna Kea and Governor Ige's commitment to "be better stewards of the mountain," OHA approached Governor Ige, the DLNR, and UH in or around June 2015 to meet to discuss proper management of Mauna Kea.
- 154. In or around August 2015, OHA formed the Ad Hoc Committee on Mauna Kea to help facilitate resolution of the State's mismanagement of Mauna Kea.
- 155. In or around September 2015, members of the Ad Hoc Committee on Mauna Kea met with Governor Ige to discuss mediation between the Governor's Office, the DLNR, UH, and OHA to resolve Mauna Kea's mismanagement.

- 156. In the fall and winter of 2015, OHA joined the Governor's Office, the DLNR, and UH in mediation with Keith Hunter of Dispute Prevention & Resolution, Inc. The purpose of the mediation was to discuss a memorandum of understanding that would improve management of Mauna Kea for each of the different stakeholders.
 - 157. Soon thereafter, UH declined to continue with the mediation process.
- 158. In the spring of 2016, the Governor's Office, the DLNR, and OHA continued to meet to discuss and draft a memorandum of understanding. OHA circulated several draft memorandums and invested significant resources to resolve the State's mismanagement issues through an improved multi-agency framework.
- 159. On May 31, 2016, after several months of inactivity from the Governor's Office and the DLNR, OHA sent the State, the DLNR, and UH a letter, pursuant to HRS section 673-3, giving notice of its intent to file a lawsuit against them for failing to meet their fiduciary duties as trustee of the public lands trust ("Notice of Intent").
- 160. The Notice of Intent led to increased participation in the mediation process by the Governor's Office and the DLNR.
- 161. In the fall and winter of 2016, following a series of meetings between OHA, the Governor's Office, and the DLNR, OHA drafted a revised Memorandum of Understanding ("MOU") to facilitate holistic and effective management of Mauna Kea that elevated community voices and cultural perspectives to a level that would actually impact decision-making.
- 162. OHA reengaged the Governor's Office and the DLNR in the spring of 2017 to inquire about the status of the proposed MOU. In the summer of 2017, OHA finally received written comments on the MOU from the Governor's Office and the Office of the Attorney General.
- 163. Despite additional efforts from OHA to resolve Mauna Kea's mismanagement in a cooperative and holistic manner, the State's comments and proposed revisions weakened the effect of the MOU beyond what OHA felt was effective.
- 164. Because two years of mediation has not produced any meaningful improvement to the management framework on Mauna Kea, OHA now brings this lawsuit to hold the State, the DLNR, and UH accountable for its continued management failures. OHA intends this lawsuit to prompt necessary changes that may lift Defendants' management of Mauna Kea in line with its responsibilities as a trustee.

COUNT I

(Defendants' Breach of Fiduciary Duty)

- 165. OHA hereby realleges the allegations of Paragraphs 1 through 164 above and incorporates them as if fully set forth herein.
 - 166. Defendants are trustees of the ceded lands on Mauna Kea.
- 167. As trustees, Defendants have trust responsibilities or fiduciary duties concerning those ceded lands on Mauna Kea and its public trust resources.
- standards applicable to private trustees." Ahuna, 64 Haw. at 339, 640 P.2d at 1169. The Hawai'i Supreme Court has specially adopted three specific trust duties applicable to the State and its agencies: (1) the duty "to administer the trust solely in the interest of the beneficiar[ies]," (2) the duty to "deal impartially when there is more than one beneficiary," and (3) the duty "to use reasonable skill and care to make trust property productive . . . or simply to act as an ordinary and prudent person would in dealing with his own property. OHA v. HCDC, 117 Hawai'i at 194, 177 P.3d at 904 (citing Ahuna, 64 Haw. at 338, 640 P.2d at 1168).
 - 169. Additionally, like private trustees, Defendants have the following duties:
 - a. The duty to protect and preserve trust resources from substantial impairment;
 - b. The duty to preserve the rights of present and future generations to use and otherwise benefit from the trust resources;
 - c. The duty to administer trust resources solely for the interests of the beneficiaries, and not for the trustees' own benefit or the benefit of third parties;
 - d. The duty to manage trust resources in good faith and with such vigilance, diligence, and prudence as a reasonable person would in managing his or her own affairs;
 - e. The duty against privatizing the trust resources;
 - f. The duty to maximize the value of trust resources for its intended beneficiaries;
 - g. The duty to restore trust resources when damaged;
 - h. The duty to adequately supervise administrative agencies and other state agents, officers, and employees to meet the State's fiduciary duties;

- i. The duty to manage trust resources with reasonable caution, or through use of the precautionary principle; and
- j. The duty to furnish trust beneficiaries with information concerning the health of the resources protected by the trust.
- 170. Under the public trust doctrine, Defendants must also protect and conserve public trust resources to the extent feasible; must balance the protection and conservation of public trust resources with the use and development of such resources, with a presumption in favor of public use, access, and enjoyment; must consider the cumulative impact of existing and future uses on public trust purposes; must engage in planning and decision-making from a global, long-term perspective; and must apply the precautionary principle whenever there is a threat or potential threat to public trust resources.
- 171. Defendants have breached one or more of their fiduciary duties with respect to the ceded lands on Mauna Kea.
- 172. Defendants' failure to fulfill their trust duties harms the resources on Mauna Kea and damages the trust corpus and its beneficiaries.
- 173. The State waived sovereign immunity as to claims for breach of fiduciary duty against itself, its agents, officers, and employees pursuant to HRS section 661-1 and HRS section 673-1.
- 174. OHA is entitled to declaratory judgment that the State and its agents have breached their fiduciary duties with respect to Mauna Kea; an order requiring action consistent with the State's fiduciary duties and/or preventing action inconsistent with the State's fiduciary duties; an accounting of the trust resources on Mauna Kea; and damages to make the trust resources whole.

COUNT II (Defendant UH's Breach of Contract)

- 175. OHA hereby realleges the allegations of Paragraphs 1 through 174 above and incorporates them as if fully set forth herein.
- 176. The State, the DLNR, and the BLNR entered into the General Lease with UH to lease ceded lands on Mauna Kea for use as a scientific complex and a scientific reserve.
- 177. The General Lease requires UH to maintain the land in a clean, sanitary, and orderly condition and to prevent unlawful, improper, or offensive use of the land.

- 178. The General Lease requires UH to properly maintain, repair, and keep all improvements of the land in good condition and in compliance with plans prepared in anticipation of such construction.
 - 179. UH has breached and continues to breach the General Lease.
- 180. As beneficiaries of the ceded lands trust, of which Mauna Kea is a critical part, OHA and its beneficiaries are third party beneficiaries of the General Lease.
- 181. UH's breach and continued breaches of the General Lease caused damage to Mauna Kea, the corpus of the ceded lands trust, and to OHA and its beneficiaries.
- 182. As a result of UH's breaches, OHA is entitled to compensation damages; rescission of the General Lease; restitution; and/or specific performance of the contract terms.

PRAYERS FOR RELIEF

Wherefore, OHA respectfully prays for judgment against Defendants:

- A. For a declaration that Defendants breached and continue to breach their fiduciary duties by failing to properly manage the ceded lands on Mauna Kea;
- B. For an injunction requiring Defendants to fulfill their trust duties with respect to the ceded lands on Mauna Kea and precluding actions that violate their trust duties;
- C. For an accounting of the ceded lands on Mauna Kea and the cost of managing those lands in compliance with Defendants' fiduciary duties;
- D. For restitution to make the trust whole;
- E. For damages;
- F. For rescission of the General Lease;
- G. For attorneys' fees and costs, prejudgment interest, and post-judgment interest; and
- H. For such other relief as deemed fair and equitable by the Court.

DATED: Honolulu, Hawai'i, November 7, 2017.

ROBERT G. KLEIN

JORDAN K. INAFUKU

Attorneys for Plaintiff

THE OFFICE OF HAWAIIAN AFFAIRS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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SUMMONS

STATE OF HAWAI'I

TO THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with the court and to serve upon McCorriston Miller Mukai MacKinnon LLP, Plaintiff's attorneys, whose address is Five Waterfront Plaza, 4th Floor, 500 Ala Moana Boulevard, Honolulu, Hawai'i 96813, an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

Pursuant to Rule 4(b) of the Hawai'i Rules of Civil Procedure, this Summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general

public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawaiʻi,

NOV - 7 2017

F. OTAKE SEAL STAL

CLERK OF THE ABOVE ENTITLED COURT



Board of Regents, University of Hawai'i Agenda Item VII.B. APPROVAL OF MAUNAKEA MANAGEMENT RESTRUCTURING PLAN

May 21, 2020	10:30 a.m.	Virtual
,	<u>Meeting</u>	

The Administration of the Office of Hawaiian Affairs (OHA) offers the following <u>COMMENTS</u> on the proposed restructuring plan for the management of Maunakea lands leased by the University of Hawai'i (UH). **OHA notes that it was not consulted in the development of this or any other management restructuring proposal considered by the Board of Regents (BOR) during their April 16, 2020 meeting.** OHA therefore offers the following comments, concerns, and recommended conditions, and strongly urges the BOR to consider and incorporate them in any proposed restructuring plan it may consider approving.

Maunakea and its resources comprise a critical and singularly significant part of the ceded lands trust and public trust that the State of Hawai'i is constitutionally-bound to protect and preserve for future generations of Native Hawaiians and the entire Hawai'i community. Sadly, the historical and ongoing mismanagement of Maunakea has resulted not only in OHA's pending lawsuit against UH, but has also resulted in a substantial and understandable lack of trust in the community regarding the State's and UH's commitment to respectfully steward the mauna. OHA therefore strongly urges the BOR to provide more meaningful assurances in its decisionmaking on this or any other management restructuring proposal, that can ensure Native Hawaiians and the public that the aggressive development of more telescopes will not come at the expense of the mauna's sacred environment, natural and cultural resources, and cultural sites.

The mismanagement of UH's leased Maunakea lands has been a matter of concern and conflict for decades. Years of complaints from Native Hawaiian cultural practitioners and the larger community culminated in the first of four reports by the State auditor, spanning a period of over 15 years, all verifying the State's and UH's ongoing failure to properly manage the mauna. The first auditor's report in 1998 explicitly found that UH had, for decades, prioritized telescope development over appropriate management of the fragile ecosystem and cultural importance of Maunakea. Subsequent auditor's reports documented continued and serious deficiencies in UH's management. Since at least 2011, OHA itself has also raised concerns regarding 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. Unfortunately, even after decades of verified complaints, both UH and the State have consistently failed to meaningfully demonstrate any ability or willingness to serve as proper stewards of Maunakea's public trust lands and resources, leading many, including OHA, to the ultimate conclusion that appropriate management of Maunakea can only be achieved with entirely new leadership and organization.¹

OHA appreciates the apparent acknowledgement of the need for much better management of Maunakea in the proposal before the BOR today. OHA does, however, reiterate the substantial work that remains to be done in order to fulfill UH's decades-old promises to better steward the mauna, including through the implementation of numerous longstanding and unfulfilled Comprehensive Management Plan (CMP) action items of particular concern to Native Hawaiians. **OHA emphasizes that the instant proposed management restructuring plan lacks specificity and meaningful assurances that such substantive management needs will be actually addressed.**

OHA therefore strongly urges the BOR to provide conditions to require the following in any management restructuring proposal under its consideration:

- A cost assessment, including staffing, equipment, and other resource needs, for the full and meaningful fulfillment of all CMP action items, including those listed in OHA's active Maunakea complaint, in a timely manner and subject to clear and reasonable benchmarks determined through consultation with OHA and other relevant stakeholders;
- 2. A **fiscal sustainability plan** that identifies available funding sources, including telescope sublease rent, that can provide for these costs in a sustainable and long-term manner, and that requires the Office of the Executive Director (OED) to coordinate between Maunakea Observatories Support Services and OED's subordinate entities (UH Institute for Astronomy, Director of Stewardship Programs, and 'Imiloa Astronomy Center) to develop and implement the plan;
- 3. A **community consultation plan** with clearly established authorities and processes for consulting with relevant stakeholder groups including but not limited to OHA, Kahu Kū Mauna, and 'ohana with familial and cultural ties to Maunakea, in the implementation of any management actions and in any decisionmaking or enforcement action otherwise authorized under the recently adopted administrative rules, where natural and cultural resources, cultural sites, or cultural practices may be impacted; and
- 4. A **regulatory assessment process** whereby stakeholder groups can periodically assess and recommend amendments to better incorporate Native Hawaiian traditional and customary practices and cultural concerns.

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¹ See Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, Office of Hawaiian Affairs vs. State of Hawai'i, iv. No. 17-1-1823-11 (Cir. Ct. 1st Cir. Ct.), available at https://www.oha.org/maunakea/.

OHA again strongly urges that the above considerations be incorporated as conditions of approval for any proposed management restructuring plan for Maunakea, including the proposal before the BOR today. OHA also recommends that the BOR require the Office of the Executive Director, the Director of Stewardship Programs, and the UH Institute for Astronomy to consult with OHA in their implementation of the proposed restructuring plan, and in the execution of its recommended conditions. Without such conditions and requirements, any restructuring proposal may do little to rectify serious management issues that have persisted for generations, much less absolve community concerns regarding the same.

Mahalo nui loa for the opportunity to testify on this matter.



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 <u>all</u> 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 HAWAI'I OFFICE OF HAWAIIAN AFFAIRS 560 N. NIMITZ HWY., SUITE 200 HONOLULU, HAWAI'I 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 <u>COMMENTS</u> 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

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 decisonmaking 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

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 Hawaijan 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. <u>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</u>

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"; meanwhile, the CMP and its Public Access Plan (PAP) — itself intended to be reviewed and updated every five years — 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). 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; specialized training for field-personnel, staff and volunteers; 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." 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"; 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 Hawai'ı 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,

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 Kamana opono Crabbe, Ph.D Ka Pouhana, Chief Executive Officer

University of Hawai'i 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 Hawaii (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 Hawai'i'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 HAWAI'I OFFICE OF HAWAIIAN AFFAIRS 560 N. NIMITZ HWY., SUITE 200 HONOLULU, HAWAI'I 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 <u>COMMENTS</u> 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." 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. <u>Decisions that may impact Native Hawaiian traditional and customary rights and underlying resources and sites should be made in a transparent and accountable manner.</u>

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

^{&#}x27; 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 Governorappointed 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. 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. <u>CMP actions requiring rulemaking should be included and implemented in the draft rules.</u>

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 decadelong 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"; 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. 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, crosscultural 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 HAWAI'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 no 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 Kamana opono Crabbe, Ph.D Ka Pouhana, Chief Executive Officer

University of Hawai'i 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,
HAWAI'I 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 <u>COMMENTS</u> 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 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 Hawai'i for the agency's beneficiaries.² Accordingly, OHA is required to 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 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 Hawai'i'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 farreaching 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. 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.

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. <u>CMP actions requiring rulemaking should be included and implemented in the draft rules.</u>

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

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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"; 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 HAWAI'I 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.



STATE OF HAWAI'I OFFICE OF HAWAIIAN AFFAIRS 711 KAPI'OLANI BOULEVARD, SUITE 500 HONOLULU, HAWAI'I 96813

June 20, 2011

Stephanie Nagata
Office of Mauna Kea Management
University of Hawai'i at Hilo
640 North A'ohoku Place
Hilo, Hawai'i 96720

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 Hawaiii (UH) and the Office of Mauna Kea Management (OMKM) has expended to seek input pursuant to Act 132, Session Laws of Hawaiii 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. [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.

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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. 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. 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."

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).

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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. 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.

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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.

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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.

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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. 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. IIAR §§ 13-5-22, 23, 24, 25 identifies different levels of review and permits required for different proposed land uses.

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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. 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 – heighted 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 no me ka 'oia'i'o,

Clyde W. Nāmu'o Chief Executive Officer

"linew.

CWN:jd

C: Trustee Robert K. Lindsey Jr., Office of Hawaiian Affairs
 University of Hawaiii, 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.



STATE OF HAWAI'I OFFICE OF HAWAIIAN AFFAIRS

711 KAPI'OLANI BOULEVARD, SUITE 500 HONOLULU, HAWAI'I 96813

HRD09/3754C

March 9, 2009

Dawn Chang, Principal Ku'iwalu Pauahi Tower, 27th Floor 1003 Bishop Street Honolulu, HI 96813

RE: Request for comments on the Mauna Kea Comprehensive Management Plan.

Aloha e Dawn Chang,

On January 30, 2009, the Office of Hawaiian Affairs (OHA) received a letter requesting comments on the Mauna Kea Comprehensive Management Plan (CMP). The CMP was developed for the University of Hawai'i and is intended to serve as a guide for managing the existing and future activities and uses of Mauna Kea and to ensure the protection of the mountain's cultural and natural resources, many of which are unique. OHA has reviewed the plan and offers the following comments.

First, we would like to extend a warm mahalo to the university and Ku'iwalu for the extensive consultation with the Native Hawaiian community, and the broader public, that was conducted in the preparation of this CMP. As a general rule, OHA encourages project coordinators to engage communities in the planning process in recognition of the fact that identifying and discussing possible mitigation measures for issues in advance substantially improves the final project. Nevertheless, OHA still has a number issues with the document.

Multiple management plans

OHA has concerns that the CMP does not examine or provide management guidance for each of the astronomy development projects contemplated and proposed in the University of Hawai'i's 2000 Mauna Kea Science Reserve Master Plan. OHA notes that astronomy development has resulted in substantial and adverse impacts to the natural and cultural resources of Mauna Kea (Record of Decision for the Outrigger Telescopes Project, 2005). According to the CMP, the CMP and Master Plan will serve as two parallel management documents for

Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development.

The CMP states that: "The CMP will not replace the 2000 Master Plan, which continues to serve as the University's development planning framework for responsible stewardship and use of the UH Management Areas. As the CMP maintains consistency with the 2000 Master Plan, future updates to that plan should be consistent with the CMP." (CMP, page 2-3.) Moreover, the document states on page 7-54 that "[i]t needs to be emphasized that the CMP manages resources; it does not advocate or promote new telescope development."

OHA notes that Mauna Kea itself is a resource, one that is especially sacred to Native Hawaiians, and the CMP must manage telescope development to protect the resource. There are a number of issues that arise from the university's strategy of operating under two parallel managing documents. First, it's confusing. Over the years, a series of management and master plans have guided activities and uses on Mauna Kea, which has confounded management of the mountain. The 2005 State Audit of Mauna Kea noted that the number of plans has resulted in "a complex web of responsibility" and that the university has "added to that web by tolerating different management documents without resolving inconsistencies between them or consolidating them into one comprehensive management plan."

The university continues this "complicated web" by allowing two management plans, despite the fact that the CMP is supposed to be the single comprehensive management plan the state auditor recommends. Moreover, the university's two management plans strategy seems to skirt both the Hawai'i Administrative Rules (HAR) and a circuit court ruling.

Chapter 13-5, HAR, allows for astronomy facilities within the Resource Subzone of the state's Conservation District, provided that the Board of Land and Natural Resources (BLNR) approves a management plan and permit for the project. Mauna Kea is located within the Resource Subzone of the state's Conservation District.

In his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara concluded that HAR §13-5-24 "requires a management plan which covers multiple land uses within the larger overall area that [the University of Hawai'i Institute for Astronomy] controls at the top of the Mauna Kea in the conservation district." Judge Hara noted that the state's administrative rules define "land use" as:

- 1) The placement or erection of any solid material on land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs;
- 2) The grading, removing, harvesting, dredging, mining or extraction of any material or natural resource on land;
- 3) The subdivision of land; or

4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

The development and decommissioning of astronomy facilities, such as observatories, would fall under the state's definition of "land use," and would therefore be required to be analyzed in a BLNR-approved comprehensive management plan. However, the CMP does not consider any future observatory development, as noted earlier. This is problematic because the BLNR is only reviewing the CMP; it has not adopted nor approved the 2000 Master Plan (CMP, page 3-8), which is the only document that outlines future astronomy development on Mauna Kea. This would essentially mean that the BLNR would never have the opportunity to review the university's astronomy development plans as required by the state's administrative rules and Judge Hara's court order.

The university's dual management strategy makes it unclear to which plan projects must conform. Page 7-55 of the CMP states that three UH agencies are charged with "reviewing projects to ensure that they conform to the 2000 Master Plan." But the state's administrative rules do not require projects adhere to a master plan; they require projects to comply with a BLNR-approved management plan. Judge Hara noted that having multiple management plans would result in projects on Mauna Kea that "do not conform to a comprehensive management plan. This would *not* be consistent with the purposes of appropriate management nor the promotion of long-term sustainability of protected resources required by Haw. Rev. Stat. §183-1."

What's more, Judge Hara emphasized that the management plan must be comprehensive, meaning that its scope is "all-covering, all-embracing, all-inclusive, all-pervasive." The CMP fails Judge Hara's decision in this regard, because the CMP does not analyze any of the proposed observatories for Mauna Kea.

Furthermore, the CMP simply does not comply with the management plan requirements of the Department of Land and Natural Resources (DLNR), which are listed in Exhibit 3 of §13-5, HAR. Exhibit 3 states that the management plan must include for *each proposed land use*: a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. The CMP doesn't fulfill any of these requirements because, as noted previously, it does not consider the development of new observatories, each of which would be classified as a separate land use under HAR. Each proposed telescope must be described in detail, with timelines, as required by HAR. Moreover the CMP does not contain a start and end date, as called for by Exhibit 3.

Management authority

Another major problem with the CMP is that management authority between the DLNR and the university is muddled throughout the document, causing the critical boundary between lessor and lessee to be completely blurred.

One example of this is the management of historic properties. The State Historic Preservation Division (SHPD) is the division of the DLNR that is statutorily tasked with managing the state's historic properties. Yet, the CMP delegates much of the management authority over Mauna Kea's numerous historic sites to the university, which has no experience or expertise in managing historic properties. SHPD is not mentioned in two of the CMP's historic properties management actions (CR-10 and CR-11), and the division is only briefly mentioned as an agency to "work with" in the additional comments section for CR-12. Historic property monitoring programs (CR-10), buffers around historic sites (CR-12) and archaeological surveys of state lands (CR-11) must all be submitted to and approved by SHPD.

Another example of confusing management jurisdiction relates to commercial activities. According to the CMP, the UH Board of Regents accepted the responsibility of regulating commercial tour activities from the BLNR in 2005, and the university's Office of Mauna Kea Management (OMKM) currently reviews and issues these permits (CMP, page 7-30). However, the university apparently has "no express statutory or regulatory authority to issue permits" for other commercial activities, such as concessions, resource extraction and special events (CMP, page 7-38). The CMP continues: "Statutory amendments allowing the University to control these activities in a manner consistent with this CMP would be beneficial." Moreover, one CMP management action, ACT-11, lays out the university's plan to seek statutory authority to regulate commercial activities. OHA asks how the BLNR, as the lessor and the state agency statutorily mandated to protect Hawai'i's natural resources, can transfer its authority to manage commercial tour operations to the university, the lessee, without a statutory amendment, yet the BLNR cannot transfer its jurisdiction over other commercial operations to the university without changing the law.

In 2005, the state auditor reported that the DLNR had previously attempted to transfer authority to permit commercial operations on Mauna Kea to the university, subject to approval by the Department of the Attorney General. Apparently, the attorney general's office rendered an "oral opinion" to a university official that the management transfer was legal. However, the university's Board of Regents later learned that the DLNR was still in fact the "primary agency responsible for protection of natural and cultural resources" within the Mauna Kea Science Reserve and that the DLNR's responsibilities "could not be delegated without legislative or constitutional action," according to the auditor. While the auditor recommended that a written opinion from the attorney general's office should be sought to resolve the issue, the CMP doesn't mention whether such an opinion was ever rendered, and it still remains unclear what authority can be transferred without a statutory amendment.

Moreover, the DLNR's delegation of authority over commercial activities to the university raises a number of questions. Is the OMKM's commercial permitting process subject to Chapters 91 and 92 of the Hawai'i Revised Statutes? Is appropriate consideration given to the impact these commercial activities could have on cultural resources and traditional and customary practices, pursuant to the three-part analysis provided in *Ka Pa'akai O Ka 'Aina v*.

<u>Land Use Commission</u>, 94 Hawai'i 31, 7 P. 3d 1068 (2000) (Ka Pa'akai)? The CMP must clearly answer these questions.

Furthermore, OHA questions UH's strategy of creating a commercial activities management plan that relies heavily on the university receiving authority to regulate those activities through a statutory amendment. The CMP lacks detailed contingency plans to manage commercial activities if the university is unable to sway lawmakers to give it rule-making authority. In addition, the CMP provides little information on how non-tour-related commercial activities are currently managed. As noted previously, the university does not have the authority to regulate these activities. But these activities apparently are currently allowed, according to Table 7-8. Table 7-8 is very vague on who is responsible for regulating these existing commercial activities (the CMP says the responsibility is somehow shared between UH and DLNR) and how the permits for these activities are issued and reviewed. OHA notes that the 1995 Management Plan, which is the current operating management plan, specifies that "regulating commercial activities should be the sole responsibility of DLNR."

Rule-making authority and enforcement

Throughout the CMP, the university cites the need to obtain rule-making authority through the legislative process so the university can promulgate and enforce rules regulating commercial activities and public access. The CMP notes that the state auditor recommended this action in 2005. However, community opposition killed at least one bill (Senate Bill 904, 2005 Regular Session) that would have granted rule-making authority to the university, and there is no guarantee that a similar bill will be enacted. The CMP is too dependent on the UH being able to obtain rule-making authority, while providing little in terms of contingency plans in case the school never gets such authority. Alternatives are needed because the management and enforcement policies currently in place for Mauna Kea are inadequate, which is the reason the auditor recommended improvements.

What's worse is that there's scant planning offered in the event that the university actually does receive rule-making authority. For example, these two statements are found in the "Managing Access, Activities and Uses" section: "Many of the considerations described in this section cannot be implemented without rule-making authority. The specifics will need to be further evaluated and incorporated during the rule-making process." (CMP, page 7-35). This is not planning.

More importantly, OHA questions whether the university should actually be provided the rule-making authority for Mauna Kea. Many people in the community do not want the university to have this authority because they do not trust the university to manage or protect Mauna Kea's resources. We also point out that UH does not have expertise or experience in managing important natural and cultural resources or protecting traditional and customary Native Hawaiian practices. The DLNR is the entity with this expertise and experience. The university was previously responsible for managing commercial activities and enforcing rules. However, it

failed at both, and had to relinquish these functions back to the DLNR. The 1995 Management Plan states:

As the interest in Mauna Kea increased, the question of commercial uses led to several years' discussions with the DLNR concerning management and enforcement responsibilities. Although UH has assumed these responsibilities, over the years it has become evident that UH was not structured to manage, control and enforce rules involving public recreation activities. In addition, with regard to commercial operators, UH does not have a process in place to issue permits and enforce permit conditions. It was determined that management and enforcement responsibilities – unless they were directly related to astronomy facilities, including the Mauna Kea Access Road – should be transferred back to DLNR. Because of their presence on the mountain, UH personnel would continue to assist DLNR in educating visitors on the hazards of high-altitude driving, responding to emergencies and monitoring infractions. It was decided that regulating commercial activities should be the sole responsibility of DLNR.

While the university may assume that many of its management and enforcement failures singled out in the excerpt above could be fixed if it were to obtain rule-making authority, there is no guarantee that rule-making authority is the panacea, especially with how little planning the CMP provides in the event UH actually gains this authority. On the other hand, the DLNR's management and enforcement abilities, while far from perfect for Mauna Kea, is at least tried and true at most other places within its jurisdiction. Also, the DLNR currently has the statutory authority and cannot simply abrogate it for fiscal or staffing reasons.

Monitoring Permits

The CMP specifies that OMKM is the entity designated with the responsibility of monitoring tenant observatories for compliance with the conditions of their Conservation District Use Permits (CDUP). The CMP on page 7-14 states that rangers shall conduct compliance inspections at each observatory twice a year. This planning strategy is problematic for a number of reasons.

As a lessee, the university cannot be the entity responsible for ensuring CDUP compliance. As the landowner and state agency tasked with protecting natural and cultural resources, the DLNR is the entity responsible for ensuring CDUP compliance. The DLNR issues CDUPs, its rules regulate CDUPs, and therefore it is the only entity that should be enforcing the conditions of CDUPs. This is but another case of the CMP attempting to blur the line between lessor and lessee.

The university was also responsible for managing CDUPs and subleases when the State Auditor developed its report in 2005. The auditor noted:

In recent years, the [DLNR] has passively allowed the university to fulfill the department's role of landowner. As a result, departmental management plans and its monitoring and enforcement efforts have been thought of as subordinate to what the lessee – or, the university – would do. This lax attitude is reflected in the department's failure to update the papers and define its relationship with the university, allowing the institution to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements.

The auditor further noted that the university's rangers did not monitor the observatories for permit violations, despite the fact that the 2000 Master Plan assigns this function to them, and that the rangers were not trained to do this task. Because of the lack of periodic monitoring, when the DLNR actually did inspect Mauna Kea in 2004, it found unapproved equipment and construction materials in the summit area, and the department eventually fined the university \$20,000 for permit violations by four observatories, according to the auditor.

OHA notes that under the CMP, the rangers still have this function, yet the document does not include permit monitoring training for the rangers. The CMP must establish and provide details for a permit and sublease monitoring program, as the auditor recommended in 2005. This program must be led by the DLNR, who must hold the UH and others accountable.

Project Approval Process

The CMP does not seem to recognize that the BLNR, as the landowner, has final approval authority for future projects in the UH Management Areas. For example, the CMP states on page 7-55 that the UH Board of Regents and the UH president have project approval and design review authority over all major developments within the UH Management Areas. The CMP states further that the university president makes "the final determination" on whether projects are major or minor in nature, and that minor project review "ends with the University President, while major projects require formal approval by the Board of Regents." Although the CMP notes that a broad range of projects undertaken in the UH Management Area is subject to an environmental review pursuant to Chapter 343, Hawaii Revised Statutes, the CMP is unclear whether the university would be the receiving agency for any such environmental reviews and what role, if any, the BLNR would fill in this process. To be sure, page 6-5 and other areas of the CMP do state that major construction activities at the summit would require BLNR/DLNR permits such as a CDUP, while minor construction generally would not require a CDUP. But it remains unclear which Mauna Kea projects the BLNR would be able to review if the university president is the one who determines which projects are minor and therefore do not require a BLNR-approved CDUP. This is why it is incumbent that the CMP recognize that DLNR has final project approval authority.

It should be noted that the entire project review process in the CMP was adopted straight from the 2000 Master Plan, which the state auditor criticized in 2005. The state auditor stated that the review process specified in the 2000 Master Plan has "created considerable confusion" for the Mauna Kea Management Board (MKMB) and that OMKM has "also faced challenges

deciphering the design review process." The auditor pointed out that the master plan does not provide definitions for insignificant, minor or major projects and does not indicate who is responsible for oversight of the review and approval process. In addition, the auditor found that responsibilities had been transferred after the master plan was completed, and that a key committee tasked with design review had yet to be established. Consequently, the auditor recommended that the university "revisit the master plan to clarify the design review process and establish clear procedures for the [OMKM], [the MKMB], and the design review committee to provide effective controls for future development."

The university cannot adopt into the CMP a section of a master plan that was singled out for criticism by the state auditor. The CMP must be revised to address the auditor's recommendations. OHA also requests that the CMP expressly spell out that the BLNR, as the landowner and lessor, has the final say on whether projects are minor or major in nature and that BLNR also has final approval authority for all projects atop the summit. Additionally, OHA asks that the CMP name the DLNR as the accepting authority for all environmental reviews conducted pursuant to Chapter 343, Hawaii Revised Statutes, for both development projects and future management plans relating to UH Management Areas. OHA notes that this was not the case for the Draft Environmental Assessment for the CMP, as the university – not the DLNR – is identified as the receiving agency for that document. This creates the odd situation in which the BLNR must approve the CMP but will not accept the environmental review for the plan.

Decommissioning

On page 7-52, the CMP indicates that the observatory sub-lessees determine when their telescopes are obsolete and should be decommissioned, removed and the site restored. This is problematic. That determination should be made by the DLNR, as the landowner, and the university, because of its expertise with observatories. The DLNR, along with the university, needs to develop a process to evaluate the conditions of telescopes. The university and the DLNR cannot delegate this authority and defer to the sub-lessees. The DLNR needs to be intimately involved in this process, because it is the agency that is statutorily mandated to protect the state's natural and cultural resources.

Cultural practices

OHA has concerns that the CMP attempts to clearly delineate between traditional and contemporary Native Hawaiian practices. We would like to point out that Native Hawaiian culture is a living, constantly evolving culture and consists of both traditional and contemporary practices. Separating the two is offensive.

In addition, the CMP relies heavily on and incorporates many of the concepts from the 1995 Management Plan. OHA notes that the 1995 Management Plan was approved prior to the *Ka Pa'akai* ruling in 2000, and therefore does not consider the three-part analysis laid out in the ruling. OHA notes that *Ka Pa'akai* was incorporated into the Native Hawaiian cultural resources section (CMP, page 7-7). However, the *Ka Pa'akai* analysis must also be used to evaluate all state actions that occur on Mauna Kea, which the CMP does not do. Observatory development,

commercial activities and closures of the summit, particularly at night, are just a few state actions that must be examined through the *Ka Pa'akai* analytical framework to establish their impact on Native Hawaiian cultural practices.

OHA also has concerns relating to the Native Hawaiian cultural specialist and the on-site construction monitor contemplated on page 7-6. The CMP indicates that a qualification for the Native Hawaiian cultural specialist is that an applicant must have previously worked as a Native Hawaiian cultural specialist. This may be too limiting as many cultural practitioners have never been paid to ply their practice. In addition, the CMP states that if construction activity will "unduly harm" cultural resources, an on-site construction monitor can order the stoppage of construction activities, provided that the work stoppage order does not exceed 72 hours. This is problematic because finding a solution that would ensure the protection of the cultural resource may not be discovered within 72 hours. The CMP must be amended to address this.

While management action CR-1 states that the university will consult with Native Hawaiian practitioners, lineal descendants and Native Hawaiian organizations on cultural issues relating to Mauna Kea, OHA requests explicit language that such consultations will be conducted for each of the other 13 management actions for Native Hawaiian cultural resources.

Infrastructure

OHA is concerned by the mention in the CMP (page 6-6) of numerous cesspools on Mauna Kea. The Environmental Protection Agency's (EPA) regulations required all existing large capacity cesspools to be closed and replaced with an alternative wastewater system by April 5, 2005. Since 2000, EPA has prohibited the construction of new large capacity cesspools nationwide. The regulations do not allow an extension of the deadline. OHA understands that cesspools are more widely used in Hawai'i than in any other state in the country and that the EPA is anxious for Hawai'i to address this issue. We ask that the CMP include a process for replacing all cesspools on Mauna Kea with new wastewater systems.

OHA also requests that the CMP contain a plan that would include guidelines and protocols for managing hazardous materials, mirror washing and wastewater to prevent future spills. A monitoring and enforcement process should also be established. OHA notes that there is great value in having one uniform plan that all users of the mountain follow.

Flaws in structure of CMP

We have previously noted that the CMP does not comply with the DLNR's requirements for management plans, as stipulated in Exhibit 3 of HAR. There are also other major flaws with the actual planning aspect of the CMP. The vast majority of the 102 actions listed in the CMP only indicate a need to develop various plans. But the actions generally do not provide details for the plans; timetables to develop the plans; do not require the plans to be implemented; do not offer a detailed review or monitoring process for either the plans or the implementation of those plans; and do not provide for mitigation plans. Consequently, the CMP is more of a plan to plan

than an actual comprehensive management plan, required by the state's administrative rules and a circuit court order.

For example, the CMP lists a set of management actions to protect the natural resources of Mauna Kea. Management action NR-7 states that OMKM will "delineate areas of high native diversity, unique communities, or unique geological features within the Astronomy Precinct and at Hale Pōhaku and *consider* protection from development." (CMP, page 7-15, emphasis added.) The CMP later states that areas "considered" for protection may include: cultural and historical resources and habitat for important, rare, threatened or endangered native species, including the wēkiu bug (candidate for federal listing), Mauna Kea silversword (federally listed as endangered), the palila (endangered), the Hawaiian hoary bat (endangered) and māmane trees, which in certain areas on Mauna Kea is considered critical habitat for the palila. The university shouldn't just consider protecting these natural resources, they must protect these resources. Threatened and endangered species as well as cultural and historical resources are statutorily protected, both by the state and the federal government. This management action must contain an actual plan with timetables to protect these resources.

Another example of a flawed management action is NR-12, which states that OMKM will "create restoration plans and conduct habitat restoration activities, as needed." The CMP does not offer any guidance as to what a restoration plan will look like, what the timetable is for developing and implementing a restoration plan and what the process is for identifying and prioritizing areas that need to be restored. These are just two management actions that are deficient. Nearly all 102 suffer from similar deficiencies.

Moreover, the CMP is not clear on the mechanisms established to ensure that its management actions are carried out. On page 7-64, the CMP states that the OMKM "should" produce an annual progress report and that the annual report "should" describe actions to be taken to improve the program. In addition, the CMP states that the OMKM "shall" submit a written report to the BLNR, but it doesn't indicate what that report will contain. The CMP needs to expressly state that OMKM must produce an annual progress report, and the CMP must offer more details about what the written report to the BLNR will contain. To be sure, the CMP contains a requirement for a five-year revision plan; however, the natural and cultural resources of Mauna Kea can be seriously impacted between those five-year plans if interim, annual reports are not conducted. Many of the shortcomings of the CMP are historical ones that were identified in two state audits and have still yet to be resolved. OHA fears that the structure of the draft CMP and its equivocal reporting process cannot ensure that these problems will ever be resolved.

In addition, the CMP indicates that the OMKM is "responsible for implementing the CMP and ensuring adherence to its provisions." (Page 7-64). OHA notes that aside from its rangers, OMKM currently has only two people on staff: an interim director and a secretary. The task of implementing the entire CMP would be daunting for any agency, but wholly impossible for an agency staffed with just two individuals. The CMP does not contain any requirements to create more positions for OMKM to fulfill its responsibilities. OHA has concerns that if the

CMP does not include specific language for new positions at OMKM, the division will remain under staffed, especially when considering the present economic climate. The resources of Mauna Kea will surely suffer as a result.

The CMP also leans heavily on the 2000 Master Plan for guidance. This is a major issue. The CMP shouldn't liberally incorporate sections of and concede to a plan that has never been and may never be approved by the BLNR. Moreover, the Master Plan is almost a decade old, has not been revised and was criticized by the state auditor. If the 2000 Master Plan is allowed to play such a pivotal role in the CMP, it should be included in the CMP and reviewed and approved concurrently by the BLNR. OHA would also like to point out that the CMP does not include in its appendices any archaeological or biological studies cited throughout the document. In addition, while the maunakeacmp.com website contains links to some past management plans, several were not made available, namely the 1982 Research and Development Plan and the 1983 Mauna Kea Science Reserve Complex Development Plan.

Conclusion

While OHA appreciates the amount of work that was invested into the production of the CMP, especially the community consultation, we believe that this draft of the CMP is unacceptable. OHA recommends that the BLNR decline this draft and require a thoroughly revised version that at the very least meets the published requirements for a management plan and the requirements of Judge Hara. Mauna Kea is one of the most sacred places in Hawai'i, and its status as such demands no less.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248 or e-mail him at sterlingw@oha.org.

'O wau iho no me ka 'oia'i'o,

Clyde W. Nāmu'o

Administrator

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HRD09/3754D

March 9, 2009

University of Hawai'i Office of the President 2444 Dole Street Bachman 202 Honolulu, HI 96822

RE: Request for comments on the Mauna Kea Comprehensive Management Plan: UH Management Areas – Draft Environmental Assessment.

Aloha e Office of the President of the University of Hawai'i,

On February 9, 2009, the Office of Hawaiian Affairs (OHA) received a letter requesting comments on the Draft Environmental Assessment (EA) for the Mauna Kea Comprehensive Management Plan (CMP). If approved, the current draft of the CMP would provide a framework for planning for the management of existing and future activities within the ceded, public lands atop Mauna Kea that the University leases from the Department of Land and Natural Resources.

OHA has found it very difficult to provide an adequate review of this Draft EA for a number of reasons. First, the CMP itself is incomplete, and we do not recommend its approval in its current state. Although the Draft EA states, "The CMP, once approved by the BLNR, will be the guiding management plan for decisions involving the UH Management Areas" (Draft EA, page 3-1), the document is far too vague and preliminary to allow anyone to base a decision upon it, because it basically prescribes studies and future plans, not activities and their possible impacts. We have enclosed a copy of our separate review of that document for your information and will not burden you with that analysis in this letter. Second, in large measure because of the inadequacies of the CMP, this Draft EA does not fulfill the statutory requirements of Chapter 343 of the Hawaii Revised Statutes (HRS), which would have allowed us to provide adequate analysis and review of the proposed activities. Thus, we urge the University, which is in the awkward position of being both the applicant and the accepting agency, not to accept this Draft EA and to request a more thorough and compliant environmental review be executed, preferably upon a truly comprehensive management plan, as was ordered by Third Circuit Court Judge

Glenn S. Hara in his January 19, 2007 ruling. (Civil No. 04-1-397, Mauna Kea Anaina Hou, et. al. v. Board of Land and Natural Resources, et. al.)

OHA's legal mandates

OHA respectfully reminds the University that we should work together to protect public trust and ceded lands, as well as Native Hawaiian traditional and customary rights and practices. The subject lands on Mauna Kea are ceded lands, which is not mentioned in either the CMP or the Draft EA, and are both sacred to Native Hawaiians and unique environmentally as critical habitat for a number of endemic, native and endangered species.

Not only does the State, including the University, have a constitutional obligation "for the benefit of present and future generations," to "conserve and protect Hawaii's natural beauty and all natural resources" because "[a]ll public natural resources are held in trust by the State for the benefit of the people" (Hawai'i Constitution, Article XI, Section 1), but the State also has a constitutional mandate to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" for Native Hawaiians (Hawai'i Constitution, Article XII, Section 7). The HRS helps create a methodology for State agencies to meet the latter mandate. Section 10(1)(b) affirms, "It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs." Meanwhile, OHA is tasked in HRS § 10(3)(4) with "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians."

OHA cannot meet that statutory mandate via the Draft EA provided to us, because it does not provide us with enough information to "ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." (HRS Section 343-1 and Hawaii Administrative Rules (HAR), Section 11-200-1). So few environmental or cultural specifics were provided in this document that a true analysis or decision making cannot be conducted from it. Instead, this document generally recognizes the significance of the place for Native Hawaiians and environmental components of the mountain, but does not provide any detailed description of those components in either the document or any appendices.

Environmental Assessment requirements

Unlike most EAs, this one includes no appendices including archaeological, cultural, biological, geological, or aquatic studies, among others. Instead, a list of references is included, and the necessary studies for analysis of potential impacts are anticipated products of the CMP. Some of these prescribed studies must be included in an amended Draft EA, or, at the very least,

in a Final EA. (Including, but not limited to: CR-11 Complete archaeological survey of the portions of the Summit Access Road corridor under UH management; CR-13 Develop and implement a burial treatment plan; NR-7 Delineate areas of high native diversity, unique communities, or unique geological features within the Astronomy Precinct and at Hale Pöhaku and consider protection from development; and NR-15 Conduct baseline inventories of high-priority resources). Thus, this Draft EA includes a summary of literature searches, no independent oral interviews or analysis for a Cultural Impact Assessment, no scientific descriptions of the federally and state protected plant and animal species or their habitats, and no mitigation measures.

The CMP apparently was drafted as a plan to create more plans, and a plan to do the studies necessary to determine potential impacts of those plans. This is backwards. The Draft EA is supposed to determine potential impacts of activities proposed in the CMP. Circuitous wording does not exempt the University from either its requirements to provide a Comprehensive Management Plan as required under the HAR and via Circuit Court Order or its requirements to conduct an environmental review that "will integrate the review of environmental concerns with existing planning processes of the state and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions." (HRS Section 343-1) No integration was conducted, just a listing of potentially applicable federal and state laws, but no analysis or application of any of them.

In fact, several times the Draft EA alluded to subverting such applicable laws, raising the question of whether or not the applicant understands the laws and their implications. For example, the federal Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), and Hawai'i's burial and historic preservation laws have been all but ignored by this document and the CMP. Some of the actions described by the EA (in language that was largely cut and pasted from the CMP) include "considering" protecting critical habitat and cultural resources. This is more than inadequate; it is illegal. And, if critical habitat may even potentially be impacted, a Section 7 consultation under the ESA is required. Has such consultation occurred? Equally, depending on the source of funding or what agency is proposing an activity that may impact on a site that either may be listed on the federal or state historic registers, the agency must consult under HRS Chapter 6E or under Section 106 of NHPA. Laws are not matters of convenience that can be avoided by vague language in a CMP that is neither comprehensive nor a plan for management.

This Draft EA should evaluate the activities proposed in a site-specific manner. It must describe, for the reviewers and decision makers, proposed management of species and areas. There is no timetable for any of the proposed activities, whether they are communication, planning, studies, etc. There are no build-out priorities or stages of analysis, implementation, mitigation, or review. No specific impacts on any resources are discussed, which is imperative for a reviewer's ability to determine potential consequences. The biggest impact on the

mountain is the telescopes, and they are only briefly alluded to in the summary cumulative impact section.

HAR §11-200-10 lists the required contents of an Environmental Assessment. Of the 12 requirements, this Draft EA is completely missing one: "G. Proposed mitigation measures". At least two are also substantially inadequate and incomplete, for reviewing and decision-making purposes: "E. Summary description of the affected environment" and "F. Identification and summary of impacts and alternatives considered".

Mitigation measures are key components of the environmental review process, as are alternatives. No mitigation measures are addressed, not even to state that there are no mitigation measures. Equally, although an alternatives analysis is listed in the table of contents, none is actually conducted. A discerning reader of both the CMP and the Draft EA would automatically note that there are, by practical necessity, at least three alternatives that must be described and examined:

- 1. The No Action alternative, which would "maintain[] the current status in the UH Management Areas";
- 2. The Proposed Action alternative, which would require "approval of the CMP"; and
- 3. An alternative in case the current legislative process does not provide statutory, rule-making authority to the University for the UH Management Areas.

It is irresponsible for both the CMP and EA drafters to presume that the Hawai'i State Legislature will undoubtedly provide for the precise statutory authority requested by the University. A third, non-preferred alternative must be presented to reviewers and decision makers to provide for the possibility that rule making is not authorized, but that management of leased lands must continue, and a CMP still must be in place, per existing rules (HAR) and Circuit Court Order. Without that alternative presented in either the CMP or its associated Draft EA, neither is complete and no legitimate analysis of the proposals can be undertaken.

Comprehensive Management Plan requirements

Because the Mauna Kea lands that the University leases from the BLNR include "astronomy facilities" in a conservation district, land uses in that area require a Conservation District Use Permit (CDUP) from the Office of Conservation and Coastal Lands, and that CDUP cannot be granted unless the proposed use is appropriately addressed in a "management plan". (HAR Section 13-5-24(c)(4)). The Third Circuit Court found that the last BLNR-approved management plan was one adopted on March 10, 1995, and that management plan "did not provide the scope and coverage for the development of the astronomy facilities on Mauna Kea" and could not support a CDUA for such development because it "is virtually silent on the matter of future development of astronomy facilities on Mauna Kea." (See August 3, 2006

Memorandum of Decision for Civil No. 04-1-397, Mauna Kea Anaina Hou v. Board of Land and Natural Resources).

Equally, the current draft CMP is virtually silent on all land uses, thereby not meeting the basest requirement for a management plan. As Judge Hara spelled out in his August 3, 2007 Memorandum of Decision, HAR Chapter 13-5 states, "Management plan' means a comprehensive plan for carrying out multiple land uses." Judge Hara continues: "The plain meaning of the term 'comprehensive' suggests a scope that is 'all-covering, all-embracing, all-inclusive, all-pervasive....' Burton, William C. Legal Thesaurus, Regular Ed. MacMillan Publishing Co. Inc. (1980). The term is also defined by the American Heritage Dictionary of the English Language, American Heritage Publishing Co., Inc and Houghton Mifflin Company (1969), as 'Including or comprehending much, large in scope or content.' (Emphasis added)."

Not only does this CMP not address land uses, it specifically does not address land uses in the Astronomy Precinct, and it is in no way "comprehensive" because it only plans to plan, incorporates elements of the 1995 management plan and incorporates the 2000 Master Plan by reference only, without even appending the latter. The latter was never approved by the BLNR, so it cannot be considered a legitimate management plan, and it is not included in the current CMP, therefore not enabling that requirement to be remedied. Both the 1995 management plan and the 2000 Master Plan did not incorporate a cultural analysis via a Cultural Impact Assessment or address what impact these commercial activities could have on cultural resources and traditional and customary practices, pursuant to the three-part analysis provided in *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P. 3d 1068 (2000). Thus, both would require those analyses by the Draft EA if they are to be legitimately incorporated into the CMP in an open and straight-forward manner.

Judge Hara also stated in his August 6, 2006 Memorandum of Decision that management plans could not be developed on a project-by-project basis because that

would result in foreseeable contradictory management conditions for each project or the imposition of special condition (sic) on some projects and not others. The result would be projects within a management area that did not conform to a comprehensive management plan, and would not be consistent with the purposes of appropriate management and promoting long term sustainability of the protected resource espoused by HRS §183C-2.

Presuming that the University of Hawai'i intends, should this CMP be approved, to reapply for a permit to construct and operate the Outrigger Telescope Project in a resource subzone of a conservation district in the Astronomy Precinct of Mauna Kea, there is no way that it could conform to this CMP either, because this CMP includes no land use analysis and no mention of

the Astronomy Precinct at all. Without full and complete integration of the 2000 Master Plan, by the BLNR, that project, for example, would not be able to be approved per the court's analysis.

Conclusion

This Draft EA cannot, in good faith, be accepted as it is currently drafted. OHA understands that the Draft EA could only review what it was provided by the CMP. This provides more legitimacy to our advocacy that the CMP also not be approved as is, because it is neither comprehensive, nor a management plan, and does not provide for adequate or thorough decision making ability or planning.

Thank you for the opportunity to comment. If you have further questions, please contact Heidi Guth by phone at (808) 594-1962 or e-mail her at heidig@oha.org.

'O wau iho no me ka 'oia'i'o,

Clydew Wo

Clyde W. Nāmu'o Administrator

Attachment (1): Copy of signed letter reviewing the Mauna Kea CMP (HRD09/3754C)

C: OHA Board of Trustees

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HRD09/3754G

September 10, 2009

Stephanie Nagata, Associate Director Office of Mauna Kea Management 640 N. A'ohoku Place Hilo, HI 96720

RE: Preliminary Draft Report: Natural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea, Ka'ohe Ahupua'a, Hāmākua District, Hawai'i Island.

Aloha e Stephanie Nagata,

The Office of Hawaiian Affairs (OHA) is in receipt of your letter requesting comments on the above-mentioned project. When the Board of Land and Natural Resources (BLNR) approved the Mauna Kea Comprehensive Management Plan (CMP) on April 9, 2009, it required that the University of Hawai'i (UH) submit for review and approval four sub plans. The sub plans were to be submitted within one year of the BLNR's approval of the CMP or prior to the submission of a Conservation District Use Application (CDUA), whichever came first. The Natural Resources Management Plan (NRMP) is being developed as one of the required sub plans to the CMP.

OHA supports CMP

On April 16, 2009, the OHA Board of Trustees approved a motion to support the CMP "to assure the protection of our cultural resources and the preservation of our customary and historical practices; and that OHA stands ready to participate in the process to enhance the CMP as drafted." Our comments below are intended to provide guidance on how we believe that the CMP and its sub plans can be improved to better protect the sacred mountain of Mauna Kea and its precious cultural and natural resources.

Future Astronomy Development

We have previously expressed concern that the CMP does not cover the proposed development of new astronomy facilities contemplated in the 2000 Master Plan. According to the

CMP, the CMP and the Master Plan will serve as two parallel management documents for Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development.

The CMP specifically states that the CMP "will not replace the 2000 Master Plan" (CMP, page 2-3.) and that the CMP "manages resources; it does not advocate or promote new telescope development." (CMP, page 7-54) This approach is problematic because it doesn't address the requirements of Hawaii Administrative Rules (HAR).

Chapter 13-5-24, HAR, allows for astronomy facilities within the Resource Subzone of the state's Conservation District, provided that the Board of Land and Natural Resources (BLNR) approves a management plan and permit for the project. Mauna Kea is located within the Resource Subzone of the state's Conservation District.

Exhibit 3, §13-5, HAR, further states that comprehensive management plans must include for "each proposed land use": a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. Chapter 13-5-2, HAR, specifies that one of the definitions of "land use" is: "[t]he construction, reconstruction, demolition, or alteration of any structure, building, or facility on land."

The construction of new astronomy facilities would be considered a land use under §13-5 and would therefore need to comply with the requirements of Exhibit 3, §13-5, HAR. However, virtually none of the required detail and description for new astronomy development is included in either the CMP or NRMP. What's especially frustrating is that the 2000 Master Plan identifies new telescope projects and the proposed location for each. With this information readily available, fleshing out specific details for habitat mitigation measures should be easy to include in the NRMP's Section 4.3.3.3, Mitigation and Rehabilitation. However, it's not included, thereby unnecessarily limiting the NRMP's ability to adequately plan for the management of natural resources.

The CMP and NRMP cannot completely rely on the Master Plan to address future observatory development because the Master Plan was never approved by the BLNR. The CMP and its sub plans are the management plans that the BLNR is reviewing and approving.

It's worth noting here that in his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara emphasized that the management plan must be comprehensive, meaning that its scope is "all-covering, all-embracing, all-inclusive, all-pervasive." The CMP and NRMP fail Judge Hara's decision because neither analyzes in a comprehensive manner any of the proposed observatories for Mauna Kea. Therefore, we ask that the NRMP be amended to include a detailed analysis of the new astronomy facilities proposed in the 2000 Master Plan.

Native Hawaiian voice

According to the NRMP, Kahu Kū Mauna should be consulted with on various natural resource management issues. OHA appreciates this, as there is no separation between cultural resources and natural resources within the Native Hawaiian worldview. Traditions hold that Native Hawaiians share the same genealogy with the native plants and animals of our lands. Therefore, we care for the natural world as we would a family member. Moreover, many of our customary practices depend on the health of our natural resources. With this in mind, we ask that Native Hawaiians be consulted on as many natural resources issues as possible. Perhaps the Mauna Kea Management Board's Environmental Committee could include a Native Hawaiian cultural practitioner, if one doesn't already sit on the committee.

Environmental Review

OHA requests clarification on how the CMP's sub plans, such as the NRMP, will undergo an environmental review, in accordance with Chapter 343, Hawaii Revised Statutes. We note that the Final Environmental Assessment for the CMP was released in April 2009 and did not cover the sub plans; therefore either a supplemental or an entirely new, more inclusive review must be done of the plan in its entirety. The sub plans cannot be reviewed in isolation, because Chapter 343 does not allow for segmentation. OHA looks forward to the opportunity to review the forthcoming, complete Draft Environmental Assessment or Draft Environmental Impact Statement.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248, or e-mail him at sterlingw@oha.org.

'O wau iho no me ka 'oia'i'o,

aleden Dosi

Clyde W. Nāmu'o Administrator

C: Board of Trustees

OHA Hilo and Kona CRC Offices

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STATE OF HAWAI'I OFFICE OF HAWAIIAN AFFAIRS

711 KAPI'OLANI BOULEVARD, SUITE 500 HONOLULU, HAWAI'I 96813

HRD09/3754G

September 10, 2009

Stephanie Nagata, Associate Director Office of Mauna Kea Management 640 N. A'ohoku Place Hilo, HI 96720

RE: Preliminary Draft Report: A Cultural Resources Management Plan for the University of Hawai'i Management Areas on Mauna Kea, Ka'ohe Ahupua'a, Hāmākua District, Hawai'i Island.

Aloha e Stephanie Nagata,

The Office of Hawaiian Affairs (OHA) is in receipt of your letter requesting comments on the above-mentioned project. When the Board of Land and Natural Resources (BLNR) approved the Mauna Kea Comprehensive Management Plan (CMP) on April 9, 2009, it required that the University of Hawai'i (UH) submit for review and approval four sub plans. The sub plans were to be submitted within one year of the BLNR's approval of the CMP or prior to the submission of a Conservation District Use Application (CDUA), whichever came first. The Cultural Resources Management Plan (CRMP) is being developed as one of the required sub plans to the CMP.

OHA supports CMP

On April 16, 2009, the OHA Board of Trustees approved a motion to support the CMP "to assure the protection of our cultural resources and the preservation of our customary and historical practices; and that OHA stands ready to participate in the process to enhance the CMP as drafted." Our comments below are intended to provide guidance on how we believe that the CMP and its sub plans can be improved to better protect the sacred mountain of Mauna Kea and its precious cultural and natural resources.

Future Astronomy Development

We have previously expressed concern that the CMP does not cover the proposed development of new astronomy facilities contemplated in the 2000 Master Plan. According to the

CMP, the CMP and the Master Plan will serve as two parallel management documents for Mauna Kea, with the CMP managing access and day-to-day activities on Mauna Kea and the Master Plan serving as the framework for future development. The CMP specifically states that the CMP "will not replace the 2000 Master Plan" (CMP, page 2-3.) and that the CMP "manages resources; it does not advocate or promote new telescope development." (CMP, page 7-54)

The CRMP, however, attempts to account for the impact of future astronomy development on the cultural and historic properties of Mauna Kea. Pages 4-37 and 4-38 note that the 2000 Master Plan calls for the construction of new astronomy facilities. The CRMP then lists the various historic preservation requirements and mitigation measures for these new land uses as well as other land uses. While this is a good start, the CRMP analysis still falls short of what is called for in Chapter 13-5, HAR.

Exhibit 3, §13-5, HAR, states that comprehensive management plans must include for "each proposed land use": a description of the proposed land use, a site plan, justification that it is an identified land use for the subzone, its relationship to existing and other proposed land uses, expected timing and monitoring strategies. As noted previously, the CMP doesn't address future observatory development, which falls under the definition of "land use" under §13-5-2, HAR. The CRMP goes a step further by at least mentioning that new observatories are planned, but the document doesn't name or describe them in any particular detail, as required by Exhibit 3, §13-5, HAR. The CMP and CRMP cannot completely rely on the Master Plan to address future observatory development because the Master Plan was never approved by the BLNR. Chapter 13-5-24, HAR, requires that the BLNR approve a comprehensive management plan for astronomy facilities in the Resource Subzone of the Conservation District, which Mauna Kea is located within.

It's worth noting here that in his January 19, 2007 ruling, Third Circuit Court Judge Glenn Hara emphasized that the management plan must be comprehensive, meaning that its scope is "all-covering, all-embracing, all-inclusive, all-pervasive." The CMP and CRMP fail Judge Hara's decision because neither analyzes in a comprehensive manner any of the proposed observatories for Mauna Kea. Therefore, we ask that the CRMP be amended to include a detailed analysis of the new astronomy facilities proposed in the 2000 Master Plan.

Determination of Effect

Section 4.2.7.1, Determination of Effect, explains how developers must evaluate the effects new projects will have on cultural resources. The section states that proposed projects within the historic district must assess the effect of the project on the historic district "as a whole" as well as on individual historic properties. The section further specifies that visual impacts to the landscape must also be considered both to the district and individual properties. We request the expansion of this analysis to include the impact proposed projects will have on Traditional Cultural Properties (TCP) that have already been designated and ones that are proposed for designation. The proposed TCP of the mountain's summit region should be

included in this analysis because one of the CMP's management actions calls for supporting its designation. We also ask that the evaluation cover the effect projects have on the spiritual nature and significance of the historic district to Native Hawaiians.

Native Hawaiian Community Involvement

We note that the CMP's Management Action CR-1 requires that Kahu Kū Mauna work with a wide range of people to address "the development of appropriate procedures and protocols regarding cultural issues." The management action indicates that consultations will occur between Kahu Kū Mauna and families with lineal and historical connections to Mauna Kea, cultural practitioners, Native Hawaiian groups and Mauna Kea Management Board's Hawaiian Culture Committee. OHA appreciates the CMRP's commitment to inclusive discussion on cultural issues, and we applaud the members of Kahu Kū Mauna for their dedication to protect Mauna Kea.

We ask that the inclusive spirit of CR-1 be reflected in a more explicit manner throughout Section 4.2.1, Cultural Practices. We specifically ask that Kahu Kū Mauna consult with a wide range of Native Hawaiians on management actions pertaining to: offerings on shrines (Section 4.2.1.3); access to burial sites (Section 4.2.1.4); ancient shrine visitation and use (Section 4.2.1.5); construction and use of new shrines (Section 4.2.1.6); scattering and burial of cremated human remains (Section 4.2.1.7); and the piling and stacking of rocks (Section 4.2.1.8).

Traditional Cultural Property

The CRMP needs to clarify exactly will be done with the proposed designation of the summit region of Mauna Kea as a TCP, per the National Historic Preservation Act of 1966. While the CMP's Management Action CR-2 calls for supporting the designation, page 2-42 of the CRMP states only that the Office of Mauna Kea Management (OMKM) will "give further consideration" to designating "a larger area" of the mountain as a TCP, or advancing the formal nomination of the Mauna Kea Summit Region Historic District to the National Register of Historic Places. OHA requests that OMKM not just consider, but actually move forward with both the TCP designation and National Register listing of the summit area. We ask that the CRMP make both the TCP designation and National Register listing high priorities and provide timetables for the completion of each. We support this because it provides greater protection as well as recognition of the summit's unique significance to Native Hawaiians. We ask that Department of Land and Natural Resources and OMKM work together closely on these two projects.

Evaluation Section

The evaluation section of the CRMP is sorely lacking. It's only three paragraphs long and does not provide any detailed methodology to assess the progress of each of the CRMP's action items, as well as the document's successes and failures. The CRMP's evaluation section does not

mention that the CMP requires annual reports to be completed to inform management and stakeholders of the progress of the CRMP and the direction it will take into the future. The CRMP also makes no mention that the CMP requires a five-year outcome analysis report to describe "the state of the resources, the status of the various management programs, progress towards meeting CMP goals and other relevant information." (CMP, page 7-64) OHA notes that the evaluation section in the Natural Resources Management Plan is much more thorough than the CRMP's.

Environmental Review

OHA requests clarification on how the CMP's sub plans, such as the CRMP, will undergo an environmental review, in accordance with Chapter 343, Hawaii Revised Statutes. We note that the Final Environmental Assessment for the CMP was released in April 2009 and did not cover the sub plans; therefore either a supplemental or an entirely new, more inclusive review must be done of the plan in its entirety. The sub plans cannot be reviewed in isolation, because Chapter 343 does not allow for segmentation. OHA looks forward to the opportunity to review the forthcoming, complete Draft Environmental Assessment or Draft Environmental Impact Statement.

Programmatic Agreement

Finally, OHA officially requests to be an invited signatory to any Programmatic Agreement under the National Historic Preservation Act (NHPA) for the cultural and historic resources of Mauna Kea. While OHA, as a named Native Hawaiian Organization in the NHPA, must be a consulting party, because of the significance of Mauna Kea to Native Hawaiians, OHA should be an invited signatory to any Programmatic Agreement that relates to the long-term management and potential, anticipated effects to the historic and cultural resources of the mountain. We respectfully suggest that you review the U.S. Advisory Council on Historic Preservation's official policy on consultation with Native Hawaiians. We anticipate a thorough consultation process under §106.

Thank you for the opportunity to comment. If you have further questions, please contact Sterling Wong by phone at (808) 594-0248, or e-mail him at sterlingw@oha.org.

'O wau iho no me ka 'oia'i'o,

alexee 1000

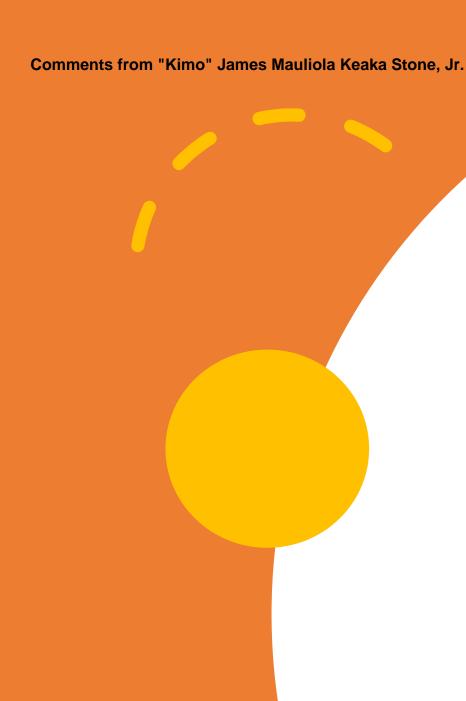
Clyde/W. Nāmu'o Administrator

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Office of Environmental Quality Control 235 South Beretania Street, Suite 702 Honolulu, Hawaii 96813



Pupukahi I Holomua: The Way Forward From A Native Hawaiian POV

Astronomy Does Not Offend Hawaiian Culture

- In 1778 the first westerner to visit Hawaii, Captain James Cook, was given permission to set up the first observatory and our kahuna insisted that it be placed adjacent to the heiau temple.
- Similarly, the TMT site was chosen in consultation with members of the public, cultural practitioners and native Hawaiian families that have a genealogical connection to Mauna Kea.

Protesters' Claim That TMT Violates Maunakea's Sacred Nature Is Not True.

- Kapu is the Hawaiian religion that defined sacred matters and imposed strict rules upon all aspects of life via a system of prohibitions.
- The penalty for any transgression, large or small, was death which was enforced by the ruling chiefs.
- The core prohibition was, "Ai kapu". The prohibition against men and women eating together.

Hawaiians Abolished the Kapu System

- In 1819, Kamehameha II Liholiho proclaimed, "Ai noa", literally "eat freely" and took a meal with his mother. With this one act, the King broke hundreds of years of religious tradition and abolished the old religion.
- The King's High Priest Hewahewa led the dismantling of the formally sacred temples.
- High Chief Kekuaokalani led a rebellion to defend the old gods but he and his army were defeated by the King at the battle of Kuamo'o.
 From a Hawaiian point of view this settled the matter. Kekuaokalani's death proved that he did not have the mana, the spiritual power, to preserve the old religion.

Why Modern Astronomy Came to Hawaii In the late 1960s Governor John A. Burns and the Hilo business community foresaw the demise of the plantation manual labor system and specifically identified two fields that could provide high paying opportunities for local families: oceanography and astronomy.

New Poll: HAWAII SUPPORTS TMT BY AN OVERWHELMING MARGIN

A new scientific poll released May 28, 2020, found:

- 92% of Hawaii residents agree there should be a way for science and Hawaiian culture both to exist on Mauna Kea.
- 83% of Hawaii residents agree that the protest on Mauna Kea is really about issues larger than TMT, such as Hawaiian homelands, overthrow of the Hawaiian kingdom, and land management.
- 80% of Hawaii residents agree that peaceful protests are fine but have no tolerance for protests that result in laws being broken.
- 79% of Hawaii residents agree that the government is responsible for providing safe construction access to the TMT site.

Modern Astronomy On Maunakea Supports **Important** Hawaiian Values

- Kupono: Excellence, honesty.
- 'Imi na'au'ao: Seek knowledge.
- Ka'ana: Share equally.

OMKM's Stewardship And Implementation of the CMP Sets The Standard For Government Operations

- Adopted in 2009, the Comprehensive Management Plan for the University of Hawaii Management Areas ("CMP") contains policies and procedures that accomplish several important goals.
- Identification and protection of significant Hawaiian cultural sites.
- 24/7 access for cultural practitioners.
- Protection of a sensitive high-altitude ecosystem.
- The development of world-class astronomy observation sites.
- Since 2009, the Office of Mauna Kea Management's ("OMKM") implementation of CMP has been outstanding.

Legal Support for TMT

- The Hawaii Supreme Court confirmed that all necessary permits and approvals are valid, and TMT has a legal right to begin construction. In The Matter of Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hamakua, Hawaii TMK (3) 404-015:009 (2018).
- As a result, there are no further legal questions regarding TMT's right to begin construction.

The Current
Protests Are
Examples Of
"Movement
Politics"

MOVEMENT POLITICS ARE NOT CONCERNED WITH, NOR INTERESTED IN, COMPROMISE OR ACCOMMODATION. IT IS ABOUT OBTAINING A POLITICAL OBJECTIVE.

MOVEMENT POLITICS AROSE IN THE 60S CIVIL RIGHTS MOVEMENT AND WAS USED BY VARIOUS GROUPS SEEKING JUSTICE AND BASIC RIGHTS.

The Real Issues Facing Hawaiians Are Issues of Poverty

The three most important issues facing native Hawaiians are:

- Chronic health disease
- Sub-standard housing
- An alarming rate of incarceration

Protests Do Not Benefit Native Hawaiians In Anyway If protesters prevent the construction of TMT, not a single important issue affecting native Hawaiians will be addressed. Not a single program for chronic disease will be provided; not a single housing project will be built; and not a single native will be assisted from prison to society.

COVID-19 Has Changed Everything

- The economic crisis caused by COVID-19 has created an economic urgency that did not exist before.
- Hawaii's over-dependence upon resort development and massive air-lift capacity has exposed the fragile nature of our economy.
- Now is the time to act. The only fully approved, fully permitted, shovel ready \$2.4 billion project cannot be ignored by responsible policy makers.

Astronomy Is Pono

When Europeans were afraid to sail beyond the sight of land, Hawaiians used the stars to navigate with confidence and purpose.

As a Hawaiian, I can draw a straight line between native star-based navigation and TMT.

Comments from Mililani Trask on behalf of Wahine Apapalani Hawaiian Cultural Practitioners



Submittal & Comments of Wahine Apapalani Hawaiian Cultural Practitioners Re: Independent Evaluation of the University of Hawaii's (UH) implementation of the Mauna Kea CMP

October 10th, 2020

To: Kuiwalu Consulting
Dawn N.S. Chang Esq.
Principal, Ku`iwalu Consulting,
P.O. Box 6280, Kaneohe, HI 96744
dnschang@kuiwalu.com

From: Mililani B. Trask, Esq. Founding Member Wahine Apalani Attorney & Hawaiian Cultural Practitioner mililani.trask@iclchawaii.com

Aloha Dawn,

I. WHO WE ARE: We are Hawaiian Cultural Practitioners of Maunakea.

Wahine Apapalani is a collective of Hawaiian (male & female) cultural practitioners who for years have worshipped, gathered and protected Maunakea as a Wahi Pana – Sacred Place. We have participated individually and collectively in numerous State hearings, as well as filed written testimony on the proposed DLNR Maunakea Rules. Our members have also filed a Complaint to the DLNR on the Commercial Activities of DLNR Board member (Pacheco) and Submitted an Intervention al the United Nations.

Nearly 30 years ago, members of WAHINE APAPALANI & the ROK built the ahu located at Hale Pohaku & have worshipped there & tended the ahu since that time.

For years Hawaiians seeking to preserve & protect Mauna Kea have requested that the BLNR & State follow State law by adopting Administrative Rules for the Mauna. Several requests have been made in direct testimony and through written correspondence by myself and other Hawaiian practitioners seeking to exercise rights defined & acknowledged in Article XII Section 7 of the Hawaii State Constitution and the First Amendment of the U.S. Constitution.

Wahine Apapalani practitioners, Ki'ai & ohana submitting this testimony have tried for several years to work with those seeking to develop Mauna Kea (including State parties), to resolve the problems on Mauna Kea. Testimony has been submitted by Wahine & Ki'ai individually at hearings for Mauna development going back for years the Subaru, Keck and TMT telescope projects.

Wahine Practitioners called for & helped sponsor & organized the 3-year sunrise ceremonies called the Apapalani ceremonies that drew hundreds of practitioners and were held in conjunction with the Merry Monarch competitions to accommodate visiting Hawaiians & Statewide Halau. Thereafter, we were called Wahine Apapalani.

Wahine Apapalani were invited to participate in the discussions on initial rules & we responded by submitting comments & testimony to the KKM on May 18, 2016 and on August 18, 2017. In our testimony of August 2017, we described ourselves, our religious & our cultural practices, the locations of our uses on the Mauna, as well as the problems we encountered. We suggested 6 things that could be done to resolve these issues and ended with a request for "CONSULTATION".

NO RESPONSE WAS EVER RECEIVED NOR WERE OUR REQUESTS FOR CONSULTATION EVER ACKNOWLEGED. Instead some of our members were arrested for violating the law.

II. <u>General Comments on the Status of the Maunakea Comprehensive</u>
<u>Management Plan.</u>

A. The CMP has not been implemented because no contract was posted for its implementation and there is no entity that had comprehensive jurisdiction to oversee & implement the plan in its entirety. This deficiency and the States failure to establish an overarching governance framework for the CMP's implementation were deliberate. It resulted in the piecemeal implementation of certain aspects of the CMP, that favored commercial science & tourism, while ensuring that Hawaiian cultural, religious and human rights would be excluded from consideration.

The CMP was passed by the BLNR on the pretext and misrepresentation that the University, DLNR, BLNR OHA, KKM & OMKM would work collectively to implement the recommendations its recommendations. This never occurred because BLNR and the University and all other State parties never intended to implement the CMP, its purpose was to facilitate commercial development for private parties while excluding Hawaiian practitioners from participating/

Example: OHA never met with Hawaiian "lineal descendants", never developed and proposal for protection of the Mauna or Hawaiian constitutional rights. Despite Wahine Apapalani's many request for a "Consultation", no consultations were ever scheduled or conducted by the State parties Hawaiians, including lineal descendants and/or practitioners whose rights are specifically addressed in Article XII Section 7 of the State Constitution.

Hawaii Revised Statutes section 171-6-15 which imposes penalties and fines for illegal uses of the Mauna specifically exempts Hawaiians engaging in cultural practices. It states ..." No person shall be sanctioned pursuant to this section for the exercise of native Hawaiian gathering rights and traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii state constitution".

Act 132 passed by the Legislature in 2009 states... "Access for traditional and customary native Hawaiian cultural and religious purposes **shall be accommodated**"

The University, DLNR, OHA and the Science Community ignored and violated these legal mandates and have violated Hawaiian Constitutional and Human rights.

B. What was supposed to happen - The components of the CMP adopted in 2009:

The CMP adopted by the BLNR in **2009** states in Section 2.1.2 (pages 201 to 2-3) states...

"Integrated Planning and Management

OMKM was established in 2000 as the Hawai'i Island management authority for the UH Management Areas (see Section 3.2). This CMP provides the framework for managing multiple existing and future activities, such as astronomy, recreational and commercial activities, scientific research, and cultural and religious activities. More importantly, the CMP provides a guide for protecting Mauna Kea's many unique cultural and natural resources. Once the CMP is adopted by the BLNR, it will also provide management guidelines and specific management recommendations to be included in BLNR's CDUPs.

Updated Planning Guidance. Since its establishment in 2000 OMKM has operated on the basis of the Revised Management Plan for the UH Management Areas on Mauna Kea (1995 Management Plan) (DLNR 1995) and the Mauna Kea Master Plan (2000 Master Plan) (Group 70 International 2000). The 1995 Management Plan is the current BLNR approved plan for Mauna Kea. The 1995 plan assigns management and enforcement responsibilities for public and commercial use and institutes commercial use and management controls for the UH Management Areas. The 2000 Master Plan, a development planning document, provides the policy framework for the responsible stewardship and use of the UH Management Areas (see Section 3.2). This CMP reflects the current state of knowledge on cultural and natural resources and the current institutional structure to manage these resources. The CMP also provides a comprehensive vision for protection of the natural and cultural resources on Mauna Kea from impacts that may result from use of the summit area for astronomical

management plan to ensure resource protection was also identified in the audits of the University and their management of Mauna Kea and the Mauna Kea Science Reserve conducted by the Office of the Legislative Auditor in 1998 and 2005 (Office of the Legislative Auditor 1998, 2005) (see Section 3.2).

Rule-Making Authority. Currently the University lacks administrative control to develop, implement and enforce rules and regulations for public activities within the UH Management Areas. This limits its ability to protect resources and bring enforcement actions (see Section 7.2.2). The 2005 audit conducted by the Office of the Legislative Auditor describes the lack of rule-making authority as a management challenge, lists it as the main reason protection of resources is challenging, and recommends that the University obtain administrative rule-making authority (Office of the Legislative Auditor 2005). Statutory authority for the University to implement administrative rules will protect resources and support some of the management actions identified in this CMP that require rule-making authority.

Community Engagement. An important component in resource management is the human community. Mauna Kea is a sacred site to the Native Hawaiian community (Maly 1999; Maly and Maly 2005). Mauna Kea also serves as an important astronomical site, educational facility, and recreational area. These human uses of the environment can directly conflict with the protection of cultural and natural resources. This CMP recognizes Mauna Kea's importance from both the cultural and natural standpoints while also attempting to provide for evolving astronomical use. Stakeholder cooperation in the long-term management of Mauna Kea's resources is therefore essential. As a result, this plan offers processes for on-going education and community consultation in the management of the UH Management Areas. These processes to engage the community is important for successful implementation of the CMP as well as rebuilding trust between stakeholders and the University and ultimately sustaining the resources for future generations (see Section 2.3.1 and Section 4)." Emphasis added.

C. What actually happened with the CMP's implementation: All CMP provisions & obligations to Hawaiians & Hawaiian rights are omitted & ignored.

Following the adoption of the 2009 CMP the DLNR, OMKM, OHA & University moved immediately to implement all tasks in the CMP that would benefit the public & commercial users (Science & Tourism) while ensuring that none of the CMP commitments to the environment and Hawaiians were implemented. Instead Hawaiian Rights to Access, Worship, Gathering and use were deliberately ignored.

Examples:

1. PUBLIC ACCESS PLAN FOR THE UH MANAGEMENT AREAS ON MAUNA KEA, A Sub-Plan of the Mauna Kea Comprehensive Management Plan, January 2010 & Section 7.1 of the CMP.

The Public Access Plan that is a Sub-plan of the CMP was immediately posted for bid following the adoption of the CMP in 2009. It was completed in January of 2010. The Plan discussed, provided for and included Access for Observatories, Commercial Tours, Independent Visitors, Snow Play, Hunters, Hikers and Researchers.

Although the Plan had a section that specifically quoted State Statutory, Constitutional & case law protecting Hawaiian Cultural Rights, (see Access Plan section 2.7.4 & Native Hawaiian Traditional and Customary Rights pgs. 2-28 to 2-29), the Plan ignored Hawaiian rights to access and instead put Hawaiian Gathering, Religious and other Access Rights in section 6.8 (pgs 6-13) under "Unresolved Issues."

The Access Plan left Hawaiian Constitutional Right out while saying it was an "... important issue that will remain unresolved until more extensive dialogue can occur amongst the public and other stakeholders or more information becomes available..." The Report identified the KKM as the responsible Party to address Hawaiian Access, KKM never did anything.

It should be noted that the CMP also identified OHA as the Party to work with lineal descendants, however OHA chose instead to sue the State for income from the Mauna! When OHA eventually created an 'official' Committee of the Board, it was an AD HOC Committee which did not post public agendas, did not make its minutes available for beneficiaries and did not allow Hawaiian beneficiaries to attend or participate in its meetings! The OHA process completely excluded Hawaiians.

2. Section 7.1 CMP: Understanding and Protecting Mauna Kea's Cultural and Natural Resources:

Section 7.1 of the CMP deals with Maunakea and the rights of Hawaiians to access & utilize them. It called for and integrated into the planning process the constitutional rights of Hawaiians through an inclusive process for CONSULTATION. It states, in part....

"It is **imperative** that the management plan not adversely affect the constitutionally protected right to access for the exercise of traditional and customary practices. In order to ensure this, it is important to identify the access needs for cultural, religious, and spiritual practices. As the advisory body on cultural matters, Kahu Kū Mauna or the Hawaiian Cultural Committee of the MKMB shall invite and consult with families

with lineal and historic connections to Mauna Kea, $k\bar{u}puna$, cultural practitioners, the Office of Hawaiian Affairs and other Native Hawaiian groups on developing culturally appropriate protocols to ensure access for engaging in traditional and customary practices while minimizing adverse impacts to cultural and natural resources. "

This recommendation in the CMP was completely ignored. KKM, OHA and the Hawaiian Cultural Committee of the MKMB never held Consultations with the Practitioners. None have been held to date.

2. Rule Making Authority & the Administrative Rules.

Following the adoption of the CMP in 2009, the BLNR was supposed to adopt Administrative Rules governing the management of the Mauna and providing for the protection of Hawaiian Cultural & Religious Rights, the rights set forth in the Federal & State Constitution (Article XII Section 7).

There is no better example of the deliberate effort made by the State Parties to prevent and avoid and suppress Hawaiian rights to gather & worship on the Mauna than the refusal of the State parties to prepare & adopt Administrative Rules.

The CMP was adopted in 2009, immediately following its adoption, Hawaiians including Wahine practitioners, called for Administrative Rules to be drafted, taken out for public review and adopted. Our efforts were denied & repeatedly ignored for 18 years.

The State Auditors office repeatedly found that the BLNR (and later the OMKM) had failed to adopt Administrative Rules. The Auditors findings & recommendations were ignored for 16+ consecutive years, during which time the State, BLNR and University of Hawaii supported & funded over-development and commercial use of the Mauna by private and State parties, to the detriment of the biodiversity, environment, cultural resources and cultural & religious rights of Hawaiians.

State auditors reports on the Mauna for the years 1998, 2005, 2009 and 2014 document numerous violations of State law and verify that although the University and private Telescope Operators created several studies & plans for the Development (Native Cultural Report, Public Access Report, Decommissioning Report and Comprehensive Management Plan) none of these plans have been implemented and no plan actually provided for Hawaiian rights to worship or for other cultural practices.

It is important to note that OMKM never approved either the Draft Rules or the Final Rules.

6.

In 2014, the State Auditor (citing Act 132, 2009) noted, "Administrative rules governing public and commercial activities on Mauna Kea lands are necessary to provide effective protection of cultural and natural resources from certain public activities, and to help ensure public health and safety. Examples of public and commercial activities to be governed by administrative rules include general access to sensitive resource areas, such as specific and off-road vehicle management and control; alcohol consumption; recreational activities; and commercial tour activities."

The auditor found that the University and Office of Maunakea Management (OMKM) had not implemented any of their own studies, reports or plans because they have refused to establish rules to implement these plans. Consequently, the Mauna has not been protected these many years, nor have there been rules to facilitate Hawaiian cultural practices guaranteed by the State Constitution & Laws. During this time, development proceeded to a point that it exceeded the carrying capacity of the Mauna and its unique environment. The last Comprehensive Management Plan called for development to cease after 13 permits for telescopes had been awarded, today there are 22 structures on the Mauna!

The 2014 audit found that the OMKM had benefitted significantly by avoiding its rule making obligations and giving out unauthorized and illegal permits for public commercial uses. In the last few years, the science community has brought in 2 million dollars through illegal permitting for tourism. These funds did not go to the DLNR for management purposes, in fact the BLNR record reflects that the Board has repeatedly acknowledged that it did not have funds to meet the environmental and cultural needs of the Mauna.

The State Auditors Report No. 17-06 July 2017, entitled Follow-Up on Recommendations from Report No. 14-07, Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve states in part ... "Recommendation 1: UH should adopt administrative rules governing public and commercial activities as soon as possible, but no later than 2017. Partially Implemented UH completed the drafting of administrative rules and was prepared to begin the necessary public hearing process. However, at the request of the governor, who must authorize the initiation of public hearings for the draft rules, UH has temporarily halted the process of finalizing such rules. Target Date Per UH, the estimated date of completion cannot be determined at this time."....

The State auditor specifically recommended *protocols regarding cultural issues*.

The State Audit Report of 2017 verifies that the reason there were no rules to protect Hawaiian rights was that the Governor deliberately prevented any hearing to prevent Hawaiians from having access, religious rights ad gathering rights.

Because of the Governor refusal to allow hearings on the Proposed Rules, no draft rules were proposed by the State for 9 years. Testimony submitted by Hawaiians, rejected the proposed rules as arbitrary & biased. The ACLU of Hawaii also expressed concerns that the proposed rules appeared to e unconstitutional!

Wahine Apapalani submitted testimony dated September 2018 that we attach hereto and incorporate by reference. Our testimony examined in detail how the rules were racist and drafted for the purpose of violating Hawaiian Constitutional & Human Rights. Our testimony demonstrates how: 1) The Rules are racist, biased and seek to impose unreasonable restrictions on Hawaiians while making sweeping exemptions for State, Commercial and other individuals that have pre-existing deals with commercial lessees, the University & the DLNR; 2) 3) The Rules favor some religions and practices while providing restrictions on Hawaiian traditional practices, 4) The vague and biased processes contained in the Rules are designed to prevent Hawaiians from practicing traditional religious ceremony by prohibiting them from accessing sacred areas, worshipping in private, gathering necessary items of worship from the Aina and participating with their families, children and religious community in ceremony, 5) The Rules created Procedural Barriers for Hawaiians, Exemptions for Commercial Users, 6) Prohibited Traditional Gathering by Hawaiians, and 7) Set double standards for Group Permits for public tours and the collective rights to worship that Hawaiians have. (See testimony dated September 28, 2018, incorporated herein by reference, To: uhhar@hawaii.edu David Lassner President, University of Hawaii, From: Mililani B. Trask, Hawaiian Cultural Practitioner in behalf of Wahine Practitioners & Ki'ai.)

Conclusion:

The CMP has not been implemented deliberately by State and Commercial parties currently involved with Maunakea. No Good Faith Consultations have ever taken place with Hawaiians and none are planned. Instead the State has continued to demonstrate its bad faith by spending 15 million dollars to arrest and prevent Hawaiians from exercising our rights as Hawaiians.

These problems will not be resolved until there is a real Consultation with Hawaiian practitioners and a real effort is made to protect the Mauna and respect and acknowledge paramount Hawaiian legal & cultural Rights. Wahine Apapalani and our ohana will never relinquish our rights to our culture nor will we ever forsake our responsibility to act as guardians and protectors of the Mauna. Several of us are now facing criminal charges for our efforts to Malama Maunakea.

Ku Ki'ai Maunakea - Maunakea is Sacred

Approved

Mililani B. Trask Kalae Olaa Trask-Batti Kaila Moke-Sakamoto Kaoi Brit Kualii Onaona Damien-Marie Trask Kuleiohu Kealoha Cooper Lakea Trask-Batti Kaiana Trask

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Mililani B. Trask

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mililani.trask@icllchawaii.com



To: uhhar@hawaii.edu

September 28, 2018

David Lassner

President, University of Hawaii

From: Mililani B. Trask, Hawaiian Cultural Practitioner in behalf of

Wahine Practitioners & Ki'ai

Re: Comments to Maunakea Proposed Administrative Rules

Background:

For years Hawaiians seeking to preserve & protect Mauna Kea have requested that the BLNR & State follow State law by adopting Administrative Rules for the Mauna. Several requests have been made in direct testimony and through written correspondence by myself and other Hawaiian practitioners seeking to exercise rights defined & acknowledged in Article XII Section 7 of the Hawaii State Constitution and the First Amendment of the U.S. Constitution.

In addition, the State Auditors office has repeatedly found that the BLNR (and later the OMKM) had failed to adopt Administrative Rules. The Auditors findings & recommendations were ignored for 16+ consecutive years, during which time the State, BLNR and University of Hawaii have supported & funded over-development and commercial use of the Mauna by private and State parties, to the detriment of the biodiversity, environment, cultural resources and cultural & religious rights of Hawaiians. There were only 13 telescopes approved but 22 building were constructed!

In recent years the State, BLNR and OMKM have lost many legal challenges on the procedures used by State and private sector to deny Hawaiians due process of the law.

Wahine Practitioners prior efforts to work with OMKM, DLNR, & University:

Wahine practitioners submitting this testimony have tried for several years to work with those seeking to develop Mauna Kea (including State parties), to resolve the problems on Mauna Kea. Testimony has been submitted by Wahine individually at hearings for Mauna development going back for years the Subaru, Keck and TMT telescope projects. Wahine supported & helped sponsor & organized the 3-year sunrise ceremonies called the ApapaLani ceremonies that drew hundreds of practitioners and were held in conjunction with the Merry Monarch competitions to

accommodate visiting Hawaiians & Statewide Halau.

Wahine practitioners were invited to participate in the discussions on initial rules & we responded by submitting comments & testimony to the KKM on May 18, 2016 and on August 18, 2017. In our testimony of August 2017, we described ourselves, our religious & our cultural practices, the locations of our uses on the Mauna, as well as the problems we encountered. We suggested 6 things that could be done to resolve these issues and ended with a request for "CONSULTATION". In our initial testimony in 2016 we pointed out what the legal standards in the Hawaii Constitution & U.S. Constitutions require & how the proposed rules violated them. Again we requested 'Consultation' to resolve these issues, and asked that our Ahu not be touched & that our religious practice be respected.

NO RESPONSE WAS EVER RECEIVED NOR WERE OUR REQUESTS FOR CONSULTATION EVER ACKNOWLEGED.

Instead some of our members were arrested, threatened and convicted of violating the law. We ended our prior testimony with this statement:

"When Cultural Resource planning is undertaken in ernest, it begins with Consultation with practitioners so that all cultural resources (tangible and intangible) and their uses can be identified, and their locations mapped. This was never done for Mauna K ea."

Where we are today:

The State, TMT, University & DLNR never held practitioner consultations statewide, although they knew that there were hundreds of Hawaiian practitioners on Hawaii Island and thousands (who marched) on neighbor islands. Instead, they worked with DLNR, KKM & other "stakeholders" to create rules to criminalize Hawaiian practices in direct derogation of our Human and Constitutional Rights.

Rather than work with Hawaiian practitioners to hold Statewide Consultations, the State, BLNR & private sector drafted these rules in a vacuum. The purpose & function of the Rules is to prevent Hawaiians from accessing the Mauna rather than facilitating their access.

For years the State refused to adopt Rules to accommodate our cultural rights while supporting & funding commercial users. Now that the State has created a "Science Zone" and approved 22 buildings for Commercial Science, they have fashioned rules that give a preference to Commercial users. Hawaiians are required to demonstrate that our cultural use is 'compatible' with commercial science.

General Comments:

I. The Rules are racist, biased and seek to impose unreasonable restrictions on Hawaiians while making sweeping exemptions for State, Commercial and other individuals that have pre-existing deals with commercial lessees, the University & the DLNR.

For example, Sec. 20-26-3 gives a blanket exemption to: all university activities, to persons & governmental entities with an agreement with the University, and to all 'research' and 'education' activities carried out by to the University, regardless of the impact these activities have on Hawaiian religious practice or cultural rights, the environment or public health safety. This section also provides that the Mauna Kea Administrative Rules will never apply when there is any other statute regulating conservation areas, forest reserve, hunting etc. Because the State BLNR & University have always refused to adopt protective measures & procedures to accommodate & facilitate Hawaiian cultural & religious practice, these rights are not protected under existing statutes. The State however did adopted hunting rules in the past, so under section 20-26-3(c) public hunting is exempt from the Mauna Kea Rules! On sacred Mauna Kea, hunting laws have a priority over Hawaiian rights to worship!

II. The Rules favor some religions and practices while providing restrictions on Hawaiian traditional practices.

The Rules favor Christian religious practices and ceremonies over indigenous traditional religious practices of native Hawaiians. An example of this is the Christian blessing ceremony initiated by the TMT with the support of Governor Ige, the OMKM and DLNR. This event was planned, implemented and paid for by State, University and private sector parties. DLNR and University 'security' allowed dozens of cars to drive to the summit. The explicit purpose of the ceremony was to bless the TMT construction site and endeavor. Attendees included government officials & business leaders, who came to participate for political reasons and free publicity in the coming election. Seventy + metal folding chairs were set up along with tents for the media. Although no parking area was designated, cars admitted were allowed to park all around the facilities and ceremony site. A Christian minister was brought in to conduct a Christian blessing ceremony. No protocols were imposed to ensure that cars & guest attending the Christian blessing were not inadvertently transporting red ants or other 'invasive species'!

This type of Christian/political religious ceremony is allowable under the draft Rules because of the built in 'exemptions' in the Rules (20-26-3). The TMT has an 'agreement' with the University and

the TMT is not engaging in a Hawaiian practice under Article XII. Section 7 of the State Constitution (20-26-21). In the future, science & commercial lessees of the University and DLNR can continue to undertake Christian practices, without any restriction, limitation, protective protocol or the threat of arrest & prosecution. Hawaiians practicing traditional ceremonies however are prohibited from worshipping & conducting traditional ceremonies by unreasonable restrictions.

III. The vague and biased processes contained in the Rules are designed to prevent Hawaiians from practicing traditional religious ceremony by prohibiting them from accessing sacred areas, worshipping in private, gathering necessary items of worship from the Aina and participating with their families, children and religious community in ceremony. In addition, the cost for Hawaiians to obtain a Special use permit after attending meetings with OMKM, KKM on Hawaii Island and to either purchase or rent a 4-wheel vehicle impose unreasonable costs & limitations on Hawaiians right to worship and engage in cultural practices.

Section 20-26-21 demonstrates how the Rules are designed to negatively impact Hawaiian traditional practitioners. Although the section begins (a) with the recognition that the Chapter is subject to the rights of Hawaiians under Article XII section 7 of the State Constitution, this recitation is meaningless in light of the processes that follow.

Recognizing Rights while Failing to Protect Them:

Section 20-26-21 of the Rules says that the University 'recognizes' the State Constitutional protections, (Article XII, sec. 7) of Hawaiians, but says that only those traditional practices that have "minimal or no impact on existing cultural, natural or scientific resources" can be pursued without a permit.

The term 'minimal impact' is not defined on the Rules, neither is there any standard for Hawaiian practitioners to use to determine if they need a permit. If a Hawaiian believes their practice of worship does not have any negative impact, and the practitioner does not get a permit ad goes to worship, and the University, OMKM, TMT, DLNR disagree, the practitioner(s) are immediately subject to arrest and criminal prosecution as well as a fine. Because of their arrest, they will be denied any future permit!

Sub-section (c) says that if a Hawaiian person or families traditional practice has been found to impact existing cultural, natural or scientific resources, the practitioner must "consult" with OMKM, and the State designated Kahu Ku Mauna (Priests of the Mountain, hereafter KKM).

There is no explanation or description of what an 'impact' is or is not. It is unclear who determines there is an 'impact' and under what criteria the 'impact' is reviewed? Who is going to "find" the impact is 'minimal' and what is the definition of minimal? There is no definition of "Consultation".

The Rules further provide that *if* there is an 'impact' the Hawaiian practitioner has to obtain a 'special use permit under section 20-26-65. In addition, *if* there are any other laws that may apply, the practitioner must obtain 'other applicable permits' from 'other governmental entities.'

This burdensome process is not required of any other user of the Mauna. University and other commercial licensees, including telescope operators and tour companies who have an 'agreement' with the University and are exempt from these restrictions. Specific sections of the existing law & Rules facilitate snow play, hunting and other private endeavors for commercial lessees. By providing specific statutory provisions to accommodate these public & commercial uses, the commercial and public users of the Mauna do not need to apply for a special use permit nor do they have to attend several meetings with the State, OMKM and the Kahuna.

Procedural Barriers for Hawaiians, Exemptions for Commercial Users

Although the Rules require that Hawaiian practitioners consult with OMKM, KKM and OHA, there is no streamlined procedure for practitioners to utilize to obtain a Special Use Permit. There is no defined process for or definition of "Consultation" in the Rules.

OMKM & OHA are State entities that have office hours M-F and are closed on State & Federal holidays & weekends. The KKM are 'volunteers' who do not work at OMKM. They are employed in other jobs & meet irregularly. Practitioners needing to 'consult' must arrange on their own for these consultations and meetings with OHA, OMKM and KKM. Hawaiians are required to take week days off from their paying jobs to attend these meetings, and to schedule them themselves.

Practitioners from neighbor islands are required to fly by plane to Hawaii Island for these 'Consultations' on weekdays. Meetings with KKM members may have to occur on weekends because they do not work as Kahuna on weekdays. If some of the KKM cannot attend a meeting, practitioners will have to return to Hawaii Island for additional meetings.

Practitioners must undertake these costs & suffer loss of income to attend "Consultations" without even knowing what the "Consultation" is!

Four Wheel Trucks Required to Pray!

If Hawaiian practitioners are able to attend these various 'consultations' and do receive a Special Use Permit, they are still prevented for worshipping and gathering on the Mauna if they do not drive a 4-wheel vehicle!

Section 20-26-29(b)of the Rules prohibits any Hawaiian from going to the Mauna for cultural practice & religious worship, unless they are driving a 4 -wheel vehicle. *This requirement is imposed regardless of the weather conditions or health & safety concerns.*

For centuries Hawaiians have worshipped on Mauna Kea, they did not have 4-wheel trucks in traditional times. Commercial vans have 4 - wheel drive, as do the DLNR trucks used by the State & paid for by taxpayers. It may make sense to restrict the use of certain vehicles when the weather creates dangerous conditions, however, when such conditions do not exist there is no reason to prevent Hawaiians from driving to the summit or any other areas on the Mauna with a 2 wheel drive vehicle.

Traditional Gathering Prohibited

Under the biased standards in the Rules, a Hawaiian who gathers a Kuni stone for ceremony without a Special Use Permit can be accused of taking 'natural resources' and 'scientific resources' arrested and fined. Section 20-26-22 of the Rules has 12 subsections describing 'prohibit' activities. This list prohibits Hawaiians from gathering items needed for cultural and sacred practices, including kuni stone, seeds, and sacred water which is gathered from various locations and used as a Hookupu during ceremony.

Traditional containers, including water containers (Coco Nut shells, wooden bowls) and lauhala baskets used to store salt, iliahi & other items for ceremony are prohibited because these items used in ceremony on the Mauna have to be brought in by Wahine practitioners. It is impossible to carry water or leave the water as a Hookupu on the Ahu unless the water is in a container. Women maintain the Ahu and return monthly to clean it. These activities are prohibited by the Rules because they entail removal of plants! This section also prohibits Hawaiians with cultural affiliations to burials on the Mauna from accessing burial caves located on the Mauna and requires practitioners get a separate permit from DLNR.

Under the Rules, Hawaiians gathering water or other items for ceremony are required to obtain another permit from the DLNR *if* they have walk through a NARS in order to gather. This requirement is imposed even if no gathering is taking place in the NARS. There is a high likelihood that practitioners gathering kuni may stray into the NARS because the University & DLNR have never demarcated the NARS boundaries. Making this mistake will result in their being arrested, fined & denied another permit in the future.

Group Use Permits - Double Standards

Section 20-26-62 requires that any group with more than 10 members must get an additional permit known as a 'group use permit'. The limit to 10 people was established because Commercial users vans accommodate 10 people. Commercial users who advertise that they are "educational" however, may then claim an 'educational' exemption under the rules. Commercial users do not have to get a Special use permit or other agency or Mauna permits, under Section 21-26-66 (e) the Presidents designee can expedite commercial tours with a 'concession agreement' directly rather than forcing them to go through the tortuous process Hawaiian practitioners are required to follow.

6.

Commercial tour operators are not required to prove that youth being transported have "chaperones", but Hawaiians coming to the Mauna with children are required to submit a "Special Request Form" with information verifying that they are "chaperones'. The chaperone forms allow the applicants with two choices – visiting the Visitors Center or going to the Summit. There are no choices on the required forms for Hawaiian practitioners who want to go to other areas to gather, worship or engage in other cultural activities. Existing commercial users will be grandfathered in, this preserves the current system under which permits were awarded based on who had the political connections & who their friends were, rather than the State RFP process.

Other rules are being proposed for the sole purpose of preventing Wahine Practitioners from worshipping. For Example, in our previous comments to proposed rules, we specifically noted that we worship by the moon cycles and at times need to be on the Mauna at night. The new rules prohibit us from the using flashlights or torches. We need illumination to worship at night. Commercial users however are allowed to go to the Mauna at night &where the Mauna Rangers are there to give them small group sessions. The rangers use high intensity flashlights so strong they shine to the stars! When these night tours occur, all parking at the Hale are "reserved" for the tour groups.

We have witnessed well over 100 "visitors" (tour groups in vans) at the Hale Pohaku at night. They get all parking stalls at the hale, but parking by others is prohibited. The Mauna managers have even put out cones to prevent us from parking on the side of the road for ceremony. The Mauna mangers only allow tourists to use the toilet, they have locked the bathrooms up at night to prevent Wahine Practitioners from relieving themselves.

The Compatibility Test:

Subsection(c) of section 20-26-62 requires that group uses must meet a 'Compatibility' requirement, it states...

"c) Applications for group use permits shall be evaluated for compatibility with the functions and purpose of the UH management areas, for consistency with existing approved management plans; for the potential effect on the surrounding resources, the existing facilities, and the public's use of the UH management areas, for compatibility with existing approved uses; for compatibility with scheduled or ongoing construction, repairs, or maintenance activities; and for the applicant's *prior record of non-compliance with permit conditions, or of violations.* " Additional information from the applicant may be required to make this evaluation. Failure to provide additional information when requested may be grounds for permit denial." Traditional prayer & ceremony are not functions of the University.

This requirement abridges Hawaiian rights to worship under the 1st Amendment of the U.S. Constitution and Article XII of the State Constitution. It is clear from this language that Hawaiian rights to worship God are secondary to all other Science, construction and public rights. This language is also the excuse to 'ban' all Hawaiians who have been previously arrested on the Mauna.

In addition to these permits and forms, Hawaiians holding religious or other cultural *meetings, gatherings or demonstrations* may have to obtain a fourth permit issued by the "presidents designee" under section 20-26-63 (a). Because there is no additional information contained in the Rules about this permit & its applicable procedures, it s doubtful that any Hawaiian will seek or obtain this permit. If the OMKM disagrees, the Hawaiian will be arrested, fined and refused a permit in the future under the criterion set out in 20-26-62 (c)

<u>Delegation of Authority - Passing the decisions-making Buck:</u>
Section 20-26-8 states "The board delegates its authority to administer this chapter to the president, who may further delegate that authority to a designee." Women practitioners believe that this provision violates the Ruling in Supreme Court of Hawai'i in Kilakika 'O Healeakala.

KILAKILA 'O HALEAKALÂ, Petitioner/Appellant-Appellant, v. BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE,1 in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAI'I, Respondents/Appellees-Appellees. SCWC-13-0003065 Decided: October 06, 2016.

This provision is the 'fail-safe mechanism' in the Rules. The Board has the obligation & authority to ensure that the Rules and Hawaiian Constitutional & U.S. Constitutional requirements are met. The process also allows that the President can thereafter designate decision-making authority to another unidentified "designee". The Rules are silent on who the un-named designee of the President actually is!

This provision allows the Board to designate the President to make determinations. When the Board meets, the law requires public notice & the opportunity to testify. If the Board delegates its authority to the President, there is no public notice of when the official State action is being considered. Because there is no 'Board action', there is no record of the Board meeting and no opportunity to receive public & Hawaiian input. In this process, there is no public transparency or accountability.

III. Wahine Practitioners Effort to Work with State & OMKM Rejected in favor of armed violence.

Wahine practitioners have repeatedly sought to interface with the State on issues relating to Mauna Kea. Other Hawaiians have done the same. These efforts have been to no avail.

The record reflects that the State & Commercial science have delayed enacting Rules to accommodate Hawaiian religious & cultural practice for years. This is evidenced by several Court decisions that have forced the State Agencies & DLNR Board to implement Contested Case procedures for Hawaiian practitioners that were costly and inevitably failed to resolve any of the issues on the Mauna.

<u>State & Commercial Science efforts to misrepresent Hawaiian as violent while arming State officers with shotguns & semi-Automatic weapons.</u>

In July 2015, media outlets reported that the State BLNR created fake "emergency Rules" to prevent Hawaiian practitioners from engaging in nighttime religious practice. The State claimed that the reason for such rules was the protection of the public safety. Judge Ibarra struck the Emergency Rules down.

The following year, the State Administration & BLNR supported the introduction of SB 895 to add another criminal trespass law to our Sate statutes. It had been drafted to facilitate arrest of Mauna Kea protesters. It never passed. The ACLU opposed the measure & in their testimony stated in part....

"This bill is ... unnecessary. Criminal trespass laws and other regulations prohibiting use of public lands are often used to disproportionately affect protesters, as well as homeless individuals and families. Indeed, S.B. 895 seemingly targets protesters — such as those who demonstrated at Mauna Kea — by adding redundant penalties for remaining in/on state parks, lands, and highways. S.B. 895, if passed, would merely add to a problematic national trend of punishing dissenting speech. We strongly urge this committee to defer S.B. 895."

On June 6th, 2015 false reports were generated by Commercial users (Subaru Telescope) on the Mauna that a bullet hole had been found in the door of a telescope on Mauna Kea. The report was made to the Hilo Police Department and posted on the blog site of the telescope & other commercial science users. Photos were included.

The next day on June 7th, Science bloggers posted this lie.....

"For the past few weeks, anti-TMT (Thirty Meter Telescope) advocates have been increasingly promoting the use of violence and physical damage not only to the current telescopes and potential telescopes, but also toward individuals working on the mountain and future construction workers and workers at the TMT.

If this in fact turns out to be a shot fired at a telescope on the mountain, this has officially become an act of domestic terrorism." That same day, KHON TV reported that the entire story & police report were false and that the bullet hole was actually caused by a door flying into the wall during high winds, (as recorded in writing on the door repair invoice).

What was not false was a comment posted by a blogger that said..."I am the Punishment of God. If you had not committed great sins, God would not have sent a punishment like me upon you".

Ten days later on July 17, 2015 Hawaii News Now reported that Jason Redulla, the acting chief of the Department of Land and Natural Resources' Division of Conservation and Resource Enforcement, and the state's top law enforcement official on Mauna Kea, posted a photo of himself with his personal AR-15 automatic assault rifle and the words "Say hello to my little friend" on a Mauna blog conversation on line. Radula's' blog was defended by Suzanne Case who said it was just "a personal matter".

Five months later, on December 11th 2015 Suzanne Case supported and BLNR Board funded \$53, 350.00 for the purchase of 10 shotguns and 20 semi-automatic rifles for Redulla to use on Mauna Kea because of "an increased threat of terrorism." Civil Beat Should Hawaii's DLNR Cops Carry Semi-Automatic Weapons?, by Chad Blair 12-16-15.

One year later, in June and July of 2016, KITV reported that DLNR employee, Thomas Friel had been forced out of his 'new' job as Chief of DLNR enforcement division because of "racial profiling". He had requested more guns for the State DLNR, unlike Redula who was against Hawaiian, Freil was concerned about Muslim fishermen who were deckhands on incoming vessels. There is no evidence & never has been that Hawaiian practitioners are 'domestic terrorists' or that Muslim Asian deckhands on fishing vessels are either.

KITV covered the story and reported that "Guns could also be behind a personnel clash in the DOCARE department. Missing DLNR hand guns, along with misappropriated federal funds and equipment thefts are some of the more than 12 internal investigation reportedly started by Friel." After Friel departed, the investigations were terminated. The missing guns are still missing!

Hawaiian women practitioners of Mauna Kea who have gone to Mauna to exercise their right to protest have personally experienced threats of violence and physical abuse on the Mauna at the hands of DLNR employees & security. The current proposed Rules now authorize violent & racist DLNR employees to carry & use weapons on Mauna Kea against Hawaiians seeking to exercise their cultural & religious rights on the Mauna.

VI. The Rules fail to protect endangered cultural resources Wahi pana, Ahu, Pohaku) from ongoing & deliberate destruction & desecration by Science & State employees, their lessees.

There is a long history of Science related people & others desecrating Hawaiian areas & implements of worship on the Mauna with impunity.

For many years there were two wood Ahu built atop 2 of the Mauna summits. These Ahu were used & maintained by the Royal Order of Kamehameha. When Hawaiians began to oppose telescope construction, employees of the Institute For Astronomy (IFA) began to desecrate, destroy and remove the sacred Ahu & marking stones of the Mauna. On one occasion, employees of the County at the Hilo dumpsite witnessed employees of the IFA discarding a Mauna marking stone at the dump. They recorded the description of the truck --- including the sign on the door which was the IFA logo. Practitioners from Maunakea Anaina Hou returned the stone, but it was later removed & never found. All the marking stones & Ahu on the Mauna have disappeared.

On April. 6th, 2009 at State hearings on HB1174 HDs SD1, the Maunakea Rangers submitted testimony on point. (See Testimony Presented before the Senate Ways and Means, By David Byrne, Supervisor Mauna Kea Ranger Corps Program, April 6,2009).

It acknowledged that "there was destruction of cultural and/or archaeological sites and suspected artifact removal" occurring on the Mauna. Attached to their testimony were before and after photos of one of the primary summit Ahu. It had been smashed & chopped down with an ax. The Hookupu in calabashes were smashed to smithereens. These photos are in the hearing record.

The Rangers implored the State to pass administrative rules so they could do their job. In the 9 years that have elapsed, nothing was done. Today all of the summit Ahu are gone and every marking stone has been removed by 'vandals'. The deliberate destruction of sacred places & objects of worship on Mauna Kea by people associated with OMKM & its commercial lessees continues to this day. On February 12, 2018 Big Island Video News released a video of Senator Kai Kahele questioning Stephanie Nagata of the OMKM on the destruction of Summit Ahu by a bulldozer. The video transcript recorded the following exchange...

"Did a University of Hawaii employee bulldoze an ahu on the summit of Mauna Kea in the summer of 2015?" demanded State Senator Kai Kahele during a hearing on Monday.

Sen. Kahele, chair of the Senate Committee on Higher Education, questioned testifiers who came to the Capitol auditorium podium to voice their concerns with SB 3090, proposing to establish a new Mauna Kea Management Authority.

"Kahele's inquisition of the Office of Mauna Kea Management director Stephanie Nagata was particularly tense. The questions centered around an ahu – built on the mountain during the tumult of 2015 and named 'ahu Ka Uakoko – that was later destroyed by a Mauna Kea Support Services employee."

"No one gave the order to bulldoze," Nagata told Kahele. "Are you telling me a University of Hawaii Mauna Kea Support Services employee, on their own, started up a bulldozer and desecrated and destroyed an 'ahu that was built on Mauna Kea?" Kahele fired back. It was in an area that is actively used for the storage of materials that are used to maintain the road and the 'ahu happened to be in the way of the bulldozer to access the materials," Nagata explained.

"Was there an investigation done? Was the individual held accountable? Does the individual still work for the University of Hawaii?" Kahele asked.

Nagata told Kahele that the individual had been counseled, but she could not say more about the matter, Kahele continued with his line of questioning. **She also told Kahele that the Mauna Kea Support Services employee does not report to OMKM, but rather to the Institute For Astronomy.**

The State of Hawaii, University and Commercial Science have known for years that desecration of Hawaiian places of burial and worship was going on the Mauna but did nothing. In Hawaii persons committing these crimes are sentenced to 1 year in prison and \$10,000 because it's a felony.

See: §711-1107 Desecration.

- (1) A person commits the offense of desecration if the person intentionally desecrates:
- (a) Any public monument or structure; or (b) A place of worship or burial; or (c) In a public place the national flag or any other object of veneration by a substantial segment of the public.
- (2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.
- (3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than \$10,000, or both. [L 1972, c 9, pt of §1; gen ch 1993; am L 2002, c 198, §1]

COMMENTARY ON §711-1107: Section 711-1107 deals more generally with all acts of desecration; i.e., acts of physical damage to or mistreatment of venerated places and objects under circumstances which the defendant knows are likely to outrage the sensibilities of persons who observe or discover the defendant's actions.

Thus, any desecration of a public monument or structure; or a place of worship or burial (public or private); or, in a public place, the national flag, or any other object (such as certain religious objects) revered by a substantial segment of the public, will constitute an offense. Damage by desecration is treated separately from other types of property damage because the sense of outrage produced by such acts is out of proportion to the monetary value of the damage. than \$50,000.00

OMKM had an obligation to report the criminal activity of IFA personal who were desecrating Hawaiian places of worship, but instead they covered it up. OMKM has demonstrated that they will not protect the cultural resources and Wahipana of the Mauna. They have proven that they will not report or take action against ongoing criminal activities occurring on the Mauna involving destruction of the very cultural resources they are being paid to protect. Despite these irrefutable facts, the rules provide that Hawaiians cannot worship or practice their culture unless they consult with OMKM and get them to agree to approve a permit allowing us to pray!

Only OMKM can build Ahu/Altars for worship!

Section 2-26-21 prohibits Hawaiians from re-building their own Ahu/Altar once it has been destroyed. Now that all of the summit Ahu have been destroyed by vandals & IFA personal, Hawaiians will never be allowed to reconstruct our Ahu.. Under the rules, only the OMKM can rebuild our sacred Ahu! See Sec.(b) "If such activity is found to impact cultural, natural or scientific resources, OMKM after consulting with Kahu Ku Mauna and the Office of Hawaiian Affairs, may restore the site to its condition prior to such activity".

This section of the rules actually directs a State body (OMKM) to consult with a State Agency (OHA) and the State appointed priests (KKM)who advise them before the State body rebuilds the Ahu where Hawaiians may be authorized to worship! **This language is clearly unconstitutional and a violation of the establishment clause of the 1**st Amendment as well as an infringement on Hawaiian practitioners right to worship.

<u>Conclusion- The State must undertake Consultation in good faith to protect Hawaiian Rights and our natural & cultural resources</u>

These are only a few of the problems Wahine Practitioners have with the rules. There are many more. Wahine Practitioners, our Ohana & Ki'ai again request that the State act in good faith & sponsor Consultations on all islands. A consultation means that a gathering is held on every island so that Hawaiian practitioners can attend and identify their areas of worship & cultural practice and locate them on a map. Once these areas are mapped, they can be identified on the ground & protective measures designed & implemented.

The Administrative Rules must accommodate our cultural practice, their drafting should be an interactive process directly involving Hawaiian practitioners. This has not been done.

OMKM & the State have to STOP ignoring the law & start implementing it

Hawaiian Cultural Rights are specifically addressed in Article XII Section 7 of the State Constitution. **Hawaii Revised Statutes section 171-6-15 which imposes penalties and fines for illegal uses of the Mauna specifically exempts Hawaiians engaging in cultural practices. It states:**

"No person shall be sanctioned pursuant to this section for the exercise of native Hawaiian gathering rights and traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii State Constitution".

In addition, Act 132 passed by the Legislature in 2009 that gave the University 'Autonomy' in its management of the Mauna specifically provides ... "Access for traditional and customary native Hawaiian cultural and religious purposes shall be accommodated." The University, DLNR and the Science Community have ignored and violated these mandates and consequently have violated Hawaiian Constitutional and Human rights. (UN Declaration on the Rights of Indigenous Peoples, provisions 11, 12 & 25).

In 2015 the State Supreme Court reviewed the Petition of the Maunakea Anaina Hou and several other "Protector" groups. The majority and minority opinions recognized the sacredness and profound importance of Maunakea to Hawaiian practitioners, and recognized that traditional and customary practices are exercised throughout the summit area.

The Court ruled that the State and DLNR had an "affirmative obligation" to protect Hawaiian rights recognized in Article XII Section 7 of the Constitution, this argument was expanded in the Minority opinion which also affirmed that this obligation was part of the protection of the public trust. See Maunakea Anaina Hou vs., DLNR/State of Hawaii. SCAP-14-0000873, December 2, 2015.

It is impossible for the State, University & Commercial science to create rules to "accommodate" Hawaiian worship & practice if they do not know what Hawaiian practice is & where our areas of worship & gathering are. This means that working with Hawaiian practitioners is primary.

The approach being pursued by the State, University and OMKM, TMT etc. excludes Hawaiians from our cultural & sacred places in order to accommodate commercialization of our Sacred Mauna. The State has enflamed the situation by repeatedly abridging the law, (as noted by State Courts) encouraging violence and purchasing weapons for use against Hawaiians on the Mauna.

Please do not destroy our Ahu, do not remove our Hookupu and do not vandalize our Wahipana. Stop the threats, arrests, trials & fines.

Ku Ki'ai Mauna, Maunakea is Sacred

I. Wahine Practitioners/Ki'ai:
Onaona Trask, Kumu Hula
Mililani B. Trask

Brit Kualii

LAKEA

Kalae'ōla'a Trask-Sharpe

Kuuleiohuokalani Kealoha Cooper

.... and others by Internet