

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii**

January 27, 2011

**Board of Land and  
Natural Resources  
State of Hawaii  
Honolulu, Hawaii**

**REGARDING:** Contested Case Request Regarding the Mauna Kea Comprehensive Management Plan Sub-Plans

**PETITIONERS:** KAHEA  
Mauna Kea Anaina Hou  
The Sierra Club-Hawaii Chapter  
The Royal Order of Kamehameha I  
Clarence Kukauakahi Ching

**LANDOWNER:** State of Hawaii

**LOCATION:** Mauna Kea, Hawaii  
**TMKs:** (3) 4-4-015:009 & 012

**SUBZONE:** Resource

**BACKGROUND:**

The Mauna Kea Comprehensive Management Plan (CMP) sub-plans were developed by the University of Hawaii (UH) for the Mauna Kea Science Reserve which encompasses 11,288 acres of State land leased to the UH Institute for Astronomy under General Lease S-4191; the mid-level facilities at Hale Pohaku that include support facilities for the observatories, encompassing ≈19-acres under General Lease S-5529; and the Summit Access road that extends from Hale Pohaku to the boundary of the Science Reserve under Grant of Easement S-4697 (together, UH Management Areas).

On April 9, 2009, the Board of Land and Natural Resources (BLNR) approved the University of Hawaii's Mauna Kea Comprehensive Management Plan (CMP) subject to eight conditions. As part of the Board's approval, the University was required to submit four sub-plans within one year that would include a cultural resource management plan, a natural resources management plan, a telescope decommissioning plan and a public access plan. The University was also required to submit a management and implementation framework for project developments that is consistent with the CMP.

Following the approval of the CMP, the petitioners requested a contested case hearing. The Board denied their requests because the CMP was an internal management tool that does not require a contested case hearing under the law. The petitioners filed an appeal in the 3rd Circuit Court in Hilo and the court affirmed the Board's decision. The petitioners then filed an appeal in the Hawaii Intermediate Court of Appeals and we await the appellate court's decision.

At its meeting on March 25, 2010, the Board approved four sub-plans for Mauna Kea prepared by the University of Hawaii: The Natural Resource Management Plan; the Cultural Resources Management Plan; the Public Access Plan; and the Decommissioning Plan. The Board also approved the University's project development and management framework and the delegation of implementing authority from the University of Hawaii Board of Regents to the Office of Mauna Kea Management.

### RECEIVED PETITIONS (Exhibits 1,2,3,4 & 5)

On April 6, 2010 written petitions for a contested case hearing on the sub-plans and "related documents" were submitted by KAHEA, Mauna Kea Anaina Hou (MKAH), Royal Order of Kamehameha I (ROOK I), Sierra Club, Hawaii Chapter and Clarence Kukaukahi Ching.

### ANALYSIS

§13-1-29.1 of the Hawaii Administrative Rules (HAR) allows the Board to deny a request for contested case without a hearing under certain circumstances: *The board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board or when it is clear as a matter of law that the petitioner does not have a legal right, duty, or privilege entitling one to a contested case proceeding.*

Chapter 91, Hawaii Revised Statutes (HRS), defines a "contested case" as "*a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.*"

A contested case is "required by law" if the statute or rule governing the activity in question mandates a hearing prior to the administrative agency's decision-making, or if mandated by due process.<sup>1</sup>

In Sharma v. State, Dept. of Land and Natural Resources<sup>2</sup> (Sharma) a lessee of public land brought suit against the Department of Land and Natural Resources (DLNR) alleging that his due process rights had been violated when the DLNR failed to hold a chapter 91, HRS, contested case in connection with the termination of his lease. The Court reasoned that the agency, was addressing matters of internal management and therefore a contested case was not required.

Similarly, in this case, the Board is dealing with the custodial management of a property interest entrusted to the agency. As stated in the March 25, 2010 Board submittal prepared by DLNR staff:

All sub-plans are part of the overall management strategy being implemented for the UH Management Areas on Mauna Kea. These plans help OMKM meet its mission and to allow for multiple uses of the mountain while protecting resources. They provide detailed discussions of particular elements and related management solutions. ... All sub-plans contain lists that cross-reference Mauna Kea CMP

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<sup>1</sup> Bush v. Hawaiian Homes Comm'n, 76 Hawaii 128, 134, 870 P. 2d 1272, 1278 (1994)

<sup>2</sup> Sharma v. State, Dept. of Land and Natural Resources, 66 Haw. 632, 673 P.2d 1030 (1983)

management actions to related sections of the sub-plans to aid in implementation. Management of Mauna Kea requires collaboration and cooperation among the various stakeholders because there are overlapping jurisdictions and because ecosystems do not recognize political or property boundaries.

The petitioners have not pointed to a statute or rule that requires a contested case. As to whether a hearing is required by due process, "[I]n order to assert a right to procedural due process, [a plaintiff] must possess an interest which qualifies as 'property' within the meaning of the constitution." <sup>3</sup>

Hawaii's courts have developed a two-step analysis to determine if a claimant is entitled to a due process hearing. First, the court looks at whether the particular interest is "property" within the meaning of the due process clauses of the federal and state constitutions. Second, the court determines what specific procedures are required to protect the interest asserted.

Property rights are protected by the Constitution. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." <sup>4</sup>

In this instance, the petitioners have not claimed that they were entitled to a contested case as a matter of due process. Nor is there a Constitutional mandate that requires a contested case hearing.

The CMP Sub-plans provide UH with a tool for agency planning and management of lands over which it has assumed control. The contested case requirements contained in Chapter 91, HRS, do not apply to UH's internal management of its leased lands. To the extent the CMP Sub-plans are an internal management tool, they are not subject to a due process property interest by the public.

The Sub-plans like the CMP does not permit or authorize any new land use or development on Mauna Kea, including telescope projects. New projects will still be subject to all legal requirements including the environmental requirements of Chapter 343, HRS and Conservation District permitting requirements under HRS, §183C-6.

Based upon the above analysis Staff finds that:

- 1) The Land Board's approval of the Mauna Kea Comprehensive Management Plan Sub-plans does not constitute a permit action;
- 2) The sub-plans are tools to help the University manage the UH Management Areas; and
- 3) A contested case is not required by law.

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<sup>3</sup> Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw.361, 377, 773 P.2d 250, 260 (1989)

<sup>4</sup> Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)

**RECOMMENDATION:**

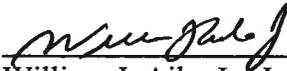
Staff therefore recommends that the Board of Land and Natural Resources deny the requests for a contested case by KAHEA, Mauna Kea Anaina Hou (MKAH), the Sierra Club-Hawaii Chapter, the Royal Order of Kamehameha I (ROOK I), and Clarence Kukauakahi Ching in regards to the Mauna Kea Comprehensive Management Plan Sub-Plans.

Respectfully submitted,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

Approved for submittal:



William J. Aila, Jr., Interim Chairperson  
Board of Land and Natural Resources

**PETITION FOR A CONTESTED CASE HEARING**

RECEIVED  
DEPT. OF CONSERVATION  
AND COASTAL LANDS

**BOARD OF LAND AND NATURAL RESOURCES**

2010 APR 12 P 4: 02

1. **Name:** Miwa Tamanaha and/or Marti Townsend  
KAHEA: The Hawaiian-Environmental Alliance  
DEPT. OF LAND & NATURAL RESOURCES  
HONOLULU, HAWAII  
Phone: (808) 524-8220  
(808) 372-1314
2. **Address:** KAHEA: The Hawaiian-Environmental Alliance  
P.O. Box 37368  
Honolulu, Hawai`i 96837
3. **Attorney:** Pro se.
4. **Address:** N/A
5. **Subject Matter:** BLNR approval and adoption of the University of Hawai`i's sub-plans and other related management plan documents for Mauna Kea, Hawai`i.
6. **Date of public hearing / Board meeting:** March 25, 2010 held at the Imiloa Astronomy Center, Hilo Hawai`i
7. **Legal authority under which hearing, proceeding or action is being made:**  
HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 205, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**
  - a. **Tax Map Key Numbers:** 4-4-15:09 &12, Mauna Kea, Hamakua, Hawai`i
  - b. **Specific Legal Interest.**

KAHEA has specific legal interests in the BLNR's decision to approve the University of Hawaii's Comprehensive Management Plan (UH CMP), subplans, and other management documents because these documents improperly empower UH to make decisions that harm the rights, duties, and privileges of KAHEA's board members and constituents. KAHEA's membership has a substantial interest in the protection of Mauna Kea that is distinct from the general public. The BLNR's decision to delegate their responsibility to protect Mauna Kea to the UH directly affects our substantial interest in this case by harming our legally protected rights, duties, and privileges.

**1. KAHEA has a substantial interest in this matter**

Because KAHEA's members have a substantial interest in the protection of Mauna Kea, KAHEA should be admitted as a party to this contested case hearing. The Hawai'i Administrative Rules identify three groups that "shall be admitted as a party": the petitioner, relevant government agencies, and "other persons who can show a substantial interest in the matter...." (HAR §13-1-31(a)(4)). KAHEA's substantial interest in this matter is reflected in its long-standing advocacy to uphold the laws that protect Mauna Kea's conservation district.

Since 2001, KAHEA has worked on behalf of its members to uphold the laws that protect the sacred summit of Mauna Kea. KAHEA's Board and constituents include Native Hawaiian cultural practitioners, conservationists, scientists, and outdoor enthusiasts, all of whom are deeply invested in the effort to protect this public trust resource and uphold the laws that protect this important area. The following examples offer a demonstration of the typical activities KAHEA members engage in on Mauna Kea. KAHEA's board President, Kumu Hula Vicky Holt-Takamine, engages in traditional hula ceremony and religious worship with her halau on the summit. KAHEA board members and constituents regularly engage in hiking and star-gazing activities on the summit. One boardmember, Mark Glick, has written a screenplay about access to the summit and the profound spiritual and emotional significance this activity has for many people – Hawaiian and non-Hawaiian alike. The well-being of the natural and cultural resources of Mauna Kea is essential to the ability of our members to engage in constitutionally protected, traditional cultural and religious practices, as well as statutorily protected recreational activities, such as hiking and star-gazing.

KAHEA asserts the rights of all Native Hawaiians to ensure Hawai'i's natural resources and the cultural beliefs and traditional practices associated with them are fully protected. KAHEA is led by and works on behalf of Native Hawaiians with constitutionally recognized rights to access and protect Mauna Kea. See, Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5. In this contested case proceeding, KAHEA will present its genuine concerns for the protections of these legitimate interests that are distinct from the general public as a whole.

The Supreme Court of Hawai'i has held that:

With regard to Native Hawaiian standing, this court has stressed that "the rights of native Hawaiians are a matter of great public concern in Hawaii." Our fundamental policy [is] that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court.

See Ka Pa'akai o Ka'aina et al. v. Land Use Commission et al, 94 Haw. 31, 42, 7 P.3d 1068, 1079 (2000) (internal quotations and citations omitted).

In the same case, the Supreme Court of Hawai'i also stated:

"where the interests at stake are in the realm of environmental concerns[,] we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements."

*Id.* (internal quotations omitted).

## **2. The Effect Of A Decision in the Contested Case On KAHEA's Interests**

This contested case hearing will decide the future of management activities in the conservation district on the summit of Mauna Kea. The constitutionally protected activities of KAHEA's board members and constituents on the summit are directly affected by the decisions made about summit resources and telescope construction. In its plans, UH representatives sought and received far-reaching authority to make significant and final decisions about basic activities, including public access, appropriate cultural practice, and future construction on the summit. The UH CMP, subplans, and other management documents approved by the BLNR wholesale delegate the authority to make these decisions to the University of Hawaii, which is also the primary advocate for all development on the summit. As an advocate for the protection of Mauna Kea's unique ecosystem and sacred landscape and the traditional, customary, and recreational practices that depend on them, KAHEA's rights, duties, and privileges are directly affected by this contested case hearing on the UH CMP, subplans, and other management documents for Mauna Kea.

Moreover, this contested case hearing concerns many of the long-standing issues surrounding the UH's use of the summit of Mauna Kea for astronomy. The outcome of this case will likely have significant affect on the future interpretation and implementation of state laws and regulations regarding land use in conservation districts, leases for the use of state land, and the state's obligation to protect constitutionally recognized Native Hawaiian traditional and customary practices. The questions of law and fact presented in this case speak to the core purpose and proper implementation of Hawaii's natural resource and cultural preservation laws. As such, this contested case directly affects KAHEA's interests as a longstanding advocate for the protection of this public trust resource and as a Native Hawaiian-led organization committed to protecting traditional and cultural rights.

## **3. KAHEA'S Participation Will Serve the Public Interest And Ensure A More Complete Record**

As a longstanding and independent advocate for the proper protection of Hawai'i's public trust resources on the sacred summit of Mauna Kea, KAHEA is the proper party to raise the distinct issues outlined in this petition in the public's interest.

KAHEA has consistently provided critical information to the Land Board to assist Board members in making the best possible decisions about the management of the Mauna Kea conservation district. Over the years, KAHEA has served as an advocate and leader for the protection of Mauna Kea's public trust natural and cultural resources on behalf of its constituents and board members. As such, KAHEA has access to independent, expert analysis related to these issues. Relevant and impartial information, such as this, is essential to an effective and efficient decision-making process.

With access to the independent information and unique perspective KAHEA provides, the BLNR will be able to make a more informed decision in this contested case hearing. KAHEA's independent information and unique perspective will ensure more complete record and will further the public's interest in protecting public trust resources .

To manage and expedite the contested case hearing, KAHEA will work jointly with other parties who share common interests to organize and make a single presentation addressing:

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa`akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai'i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP, sub-plans and other management documents impact land use within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP, sub-plans and other management documents threaten the exercise of these rights by Petitioners. Petitioners rights to exercise their traditional and customary native

Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights also include, but are not limited to:

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

Native Hawaiian customary and traditional cultural and religious rights are a public trust purpose.

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66, places jurisdiction of water quality in the Department of Health. BLNR’s jurisdiction over the conservation district of Mauna Kea must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii’s people from groundwater contamination emanating from sources traceable to any observatory projects on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories. The UH CMP, sub-plans and related documents also confirm this concern.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai`i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi`ihonua and Humu`ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants

DHHL a right of first refusal to waters from public lands. Many MKAH members are also HHCA beneficiaries.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising from the private use of public trust lands, (by the foreign and non-state governments and corporations operating atop Mauna Kea) and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation districts, including the Mauna Kea conservation district. The UH and BLNR failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) the UH CMP, sub-plans and related documents.

The *Wekiu*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. *Sierra Club v United States Fish & Wildlife Serv.* 245 F3d 434 (5<sup>th</sup> Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP, sub-plans and related documents under review and adopted in by BLNR reference the UH 2000 MP. This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the UHBOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH MP2000

includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal undertaking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the UH CMP, sub-plans and related documents will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);

- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

**9. The specific disagreement, denial or grievance with the above matter:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The environmental and Native Hawaiian concerns at issue in this contested case are outlined below:

- Improper Delegation of Authority. The BLNR completely and improperly delegated its fiduciary duty to oversee, manage and protect the cultural and natural resources of Mauna Kea to the University of Hawaii and its subsidiaries. Such a wholesale delegation of authority to the primary advocate for all development on the summit necessarily affects and negatively impacts our legal rights, duties, and privileges.

This type of wholesale delegation was found illegal by Hawaii's Supreme Court in Kapa'akai vs. Land Use Commission in 2000 because it transfers decision-making authority away from the entity legally responsible for protect the constitutionally protected rights of Native Hawaiians and the public – in this case from BLNR to UH.

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

The power and responsibility to determine the effects on customary and traditional Native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private

petitioner who, unlike a public body, is not subject to public accountability... [I]nsofar as the LUC allowed [the private developer] to direct the manner in which customary and traditional Native Hawaiian practices would be preserved and protected by the proposed development -- prior to any specific findings and conclusions by the LUC as the effect of the proposed reclassification on such practices -- the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect Native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority.

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

The BLNR engages in exactly this type of illegal wholesale delegation of its authority because it approved a management scheme that the developer – the University of Hawaii – to make significant and final decisions about activities in the conservation district of Mauna Kea. Decisions for which the University has no legal authority and which harm the rights, duties, and privileges of KAHEA's board members and constituents.

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

During the public hearings on these management documents, UH representatives admitted that they do not have a written method for distinguishing between major and minor projects. The decision is simply left to the University to decide. Thus, the UH CMP, subplans, and other management documents essentially grant the University the option of seeking further oversight from the BLNR and DLNR staff, but in no way obligates such oversight, which is what the law requires.

The UH while a state agency, is in a conflict of interest, first, because they are not the state agency mandated to oversee conservation district (BLNR has this responsibility) and secondly because the UH has a specific interest in seeking more development to improve their academic credentials (see State Auditors reports regarding the BLNR and UH's failure to management of Mauna Kea). The UH also files CDUA's with foreign and non-state observatory developers for the use of Mauna Kea. The UH therefore is the primary supporter and mover of development of Mauna Kea, which has great impact on the cultural and natural resources of Mauna Kea.

Therefore, the BLNR's approval of the UH CMP, sub-plans and related documents allows UH to abridge or outright deny constitutionally protected rights held by Petitioners as native Hawaiians and recreational users of the summit.

- Public Trust Doctrine: The conservation district of Mauna Kea is a public trust resource managed by the Department of Land and Natural Resources on behalf of and for the benefit of all people in Hawai'i (Hawai'i Const. Art. XI §§ 1, 6 and 9; HRS §171-11; HAR §13-60.5). The Hawai'i Constitution specifically provides that "any person may enforce this right against any party, public or private, through appropriate legal proceedings..." (Hawai'i Const. Art. XI § 9). Under the plans approved by the BLNR, their responsibility to protect the public trust resources of Mauna Kea is delegated to the University of Hawaii. In every decision about the summit from public access rights to cultural practice to the siting of new telescopes, the interests of Native Hawaiians and recreational users are not being protected from the competing interests to develop the summit for telescopes.
- Environmental Review: The BLNR approved the UH plans for Mauna Kea without adequate environmental review. The CMP received a cursory environmental assessment, while the subplans – including the Decommissioning Plan – received no environmental review of any kind. The BLNR was given the cumulative impact study from the EIS for NASA's Keck Observatory, which found that the cumulative impacts of 30 years of telescope construction had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea. Yet, the BLNR approved the UH CMP and subplans without taking any action to reduce or mitigate these existing and substantial harms to the natural and cultural resources of Mauna Kea.
- Water Supplies: The degradation of the watershed supply is a public health and safety issue. Mauna Kea's watershed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Current operations at the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. These threats to the water resources of Mauna Kea directly harm our rights, duties, and privileges as people who visit, worship, and struggle to protect the summit. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea, which it has failed to satisfy.
- The *Wekiu*: The insect known as the *Wekiu* is found only in the summit region of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this insect violates state law

requiring Land Board action to assure its survival. Since construction of telescope facilities on the summit began, the population samples of the *Wekiu* have declined by over 99%. Under HRS § 195D-4(b), the Land Board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. KAHEA has an interest in the protection of the *Wekiu* and its habitat based on our members' cultural and religious beliefs, and commitment to protect Hawai'i's natural resources.

- Traditional and Customary Rights of Hawaiians. Approval of the UH CMP and subplans for Mauna Kea will lead to interference with and/or denial of constitutionally protected rights held by Native Hawaiians. As one example, in approving the CMP and subplans, the BLNR authorized UH and its subsidiaries to regulate constitutionally protected access rights to the summit without any further oversight from the BLNR. Only the BLNR, not UH or any of its subsidiaries, has the legal authority to regulate constitutionally protected activities, such as access to the summit or other protected cultural practices.
- Desecration and Destruction of Cultural Sites. The UH CMP and subplans for Mauna Kea give the University the authority to determine the cultural "appropriateness" of Native Hawaiian practices, and where the University and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. UH entities have already improperly removed cultural artifacts and desecrated existing cultural and religious sites, including many past incidents by UH Rangers on the summit, as well as the removal of several culturally significant items by Patrick McCoy in the course of writing the Cultural Resources Management Plan, which was approved by the BLNR on March 25, 2010. Such acts of desecration are pursuant to the BLNR's improper delegation of authority to UH and directly harm the rights, duties, and privileges of KAHEA and its members.
- Burial Sites. Mauna Kea is a burial ground for Hawai'i's highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The Land Board has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials. There is no burial plan associated with the UH CMP or the subplans, as is required by state law.
- Section 5(f) Public Trust Land Revenue. The Land Board's disposition of public lands (sub-leasing and third party leasing to foreign entities) is subject to the trust provisions outlined in Section 5(f) of the Hawaii Admission Act. To fulfill these requirements, state law requires that market-based rent be collected for the use of all public lands by entities not covered by the enumerated 5(f) purposes (See, HRS §171-17, 18). Well over a dozen foreign educational institutions and corporations own and operate telescopes on

public land in the Mauna Kea conservation district, yet none of them pay market-based rent to the general fund of the State of Hawaii. In approving the UH CMP and subplans, the BLNR perpetuates this long-standing and significant violation of our rights, duties, and privileges as named beneficiaries of the public land trust created by the Hawaii Admission Act.

- Failure to prepare a "Comprehensive" Management Plan as required by law. Despite its title, the University's "comprehensive management plan" is NOT comprehensive. The plan does not even begin to seriously address, *inter alia*, the following:

- a. Numeric carrying capacity for construction activities affecting the conservation district;
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Timelines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this plan to the University's 2000 Master Plan
- f. Updated hydrological study;
- g. Energy consumption study;
- h. Hazardous materials and use plan

#### 10. Outline of specific issues to be raised:

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397?
- b. Whether BLNR whole delegated its fiduciary duty to protect the reasonable exercise of customary and traditional Native Hawaiian cultural and traditional practices, when it allowed the UH, its agents, and private planning firms to determine, prescribe, describe, place conditions upon and regulate Hawaiian practices, use and access on Mauna Kea?
- c. Whether BLNR unlawfully voted to approve the UH CMP, sub-plans and related documents after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings held on both 4/8/09-4/9/09 and 3/25/10? Whether BLNR's approval violated both DLNR's own rules and due process?

- d. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- e. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- f. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- g. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- h. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less (for \$1.00 per year) than their independently appraised fair-market value.
- i. Whether the BLNR should have adopted the UH CMP, sub-plans and related documents before independently identifying, assessing, and implementing actions to protect Petitioner MKAH's constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP, sub-plans and related documents before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?
- j. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for UH sub-plans and related documents prior to approving them. This is one way to protect the cultural and natural resources of Mauna Kea?
- k. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
- l. Whether the BLNR improperly approved the UH CMP, sub-plans and related documents that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, cultural offerings, limiting when, how and where Native Hawaiian

Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

m. Whether the BLNR improperly noticed the item added to the agenda on March 25, 2010 regarding the delegation of authority under the CMP from the Board of Regents to the Office of Mauna Kea Management?

## **11. Outline of basic facts:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

### **b. Background**

The following background is presented in two separate but related parts. We file this background in two parts because BLNR voted twice to approve the University of Hawai'i's documents relating to the "management" of Mauna Kea. BLNR's approval of the UH documents involves the transfer of regulatory oversight and authority over the Mauna Kea Conservation District, which in turn affects our legal rights, duties and privileges.

Part I, outlines what occurred on April 8-9, 2009 when the Board of Land and Natural Resources (BLNR) voted to approve the University of Hawai'i's "Comprehensive Management Plan" (CMP) while simultaneously placing conditions requiring the University of Hawai'i's (UH) to prepare and submit four (4) more "sub-plans" for approval at a later date.

Part II outlines the BLNR's recent approval of the UH's four (4) conditional "sub-plans" on March 25, 2010.

### **PART I**

In April 2009, BLNR held a noticed public hearing (April 8-9, 2009) at the Hilo Hawaiian Hotel in Hilo, Hawai'i. On April 8, 2009, Marti Townsend, Program Director for KAHEA: The Hawaiian-Environmental Alliance (KAHEA) presented testimony addressing BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwlau Inc.). We concluded our testimony with a request for a contested case hearing, in order to have an opportunity to present evidence on how the UH CMP would affect and negatively impact our legal rights, duties and privileges.

On April 9, 2009, after the close of public comment, BLNR went into executive session. The Board after executive session proceeded to vote to adopt the UH CMP

prepared by Ku`iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. "The University of Hawai'i Board of Regents (UHBOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- **public access**
- **natural resources**
- **cultural resources**
- **decommissioning (including financing and bonds for restoration)**

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

The BLNR did not address our request for a contested case hearing and instead voted to adopt the UH CMP. In August 2009, the BLNR denied our request for a contested case hearing on the UH CMP. They denied our standing (claiming among other things that we had no "property interest" in the summit of Mauna Kea). We

filed an appeal into the Third Circuit Court where our case was dismissed without prejudice for a lack of “ripeness.”

**Judicial Notice:** On March 17, 2010, we appealed the Third Circuit Court’s decision regarding BLNR’s denial of our request for a contested case hearing and our standing into Intermediate Court of Appeals.

## **PART II**

On March 25, 2010, the BLNR held a noticed public hearing to review the UH’s four “sub-plans” previously requested at the April 8-9, 2009 public hearing described in PART I above. The UH documents under review included the UH’s cultural resource plan (CRP), natural resource plan (NRP), decommissioning plan (DP) and public access plan (PAP). The UH also submitted two other documents called the “project submittal timeline” and “major project sequence of steps.” All the abovementioned documents cite to and rely on the UH CMP approved at the April 2009 BLNR hearing. All documents cite to and rely on the UH Master Plan 2000 (UHMP2000) which has never been reviewed or adopted by BLNR.

Department staff (Mr. Sam Lemmo) presented the DLNR staff report recommending the approval of all documents. The Board Chair gave the UH President, representatives of the UH Office of Mauna Kea Management (OMKM), UH Kahu Ku Mauna group (KKM), and Mauna Kea Management Board (MKMB) time to discuss the various plans.

In addition, the BLNR added a new item for consideration that was not on the agenda originally noticed to the public. The BLNR considered for approval “the transfer of control of management of Mauna Kea from the UH Board of Regents (UHBOR) to the Office of Mauna Kea Management”.

**NOTE:** The OMKM was created under the University’s 2000 Master Plan--a document not in evidence, never reviewed nor approved by BLNR.

Neither the UH, it’s agents (i.e. OMKM) nor the private planning firms that created all of the UH management documents approved by BLNR have legal authority to manage and/or control conservation districts, including the Mauna Kea conservation district.

The BLNR afforded the public two (2) minutes to discuss the merits of these large “sub-plan” documents. We explained we needed more time, which was never granted. We requested a contested case hearing in order to have an opportunity to present evidence on how these plans and associated documents would impact our legal rights, duties and privileges as Hawaiian cultural and traditional practitioner’s of Mauna Kea.

BLNR member Mr. David Goode asked the Deputy Attorney General some basic questions, including if Kapa`akai (as in the Supreme Court case titled Ka Pa`akai v. LUC (2000)) had any precedent--for which the Deputy AG responded in the negative.

At the close of the meeting at around 12 noon, BLNR voted to approve all of the plans as well as the transfer of authority over Mauna Kea from the UHBOR to the OMKM.

The record in this matter is contained in (1) the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397 , (2) BLNR hearing records and our testimony regarding BLNR's April 8-9, 2009 public hearing, and (3) BLNR hearing records and our testimonies filed for BLNR hearing 3/25/10 and other public documents on record in all of the abovementioned proceedings. We incorporated the above mentioned proceeding documents here by reference, as BLNR has copies in their records as well.

In brief, the industrial astronomy foot print of the observatories built atop Mauna Kea has caused physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and even destroyed historic and cultural sites. The failure to genuinely prepare a master plan and to restrict and manage development activities on Mauna Kea has led to the destruction/overuse and loss of the unique natural and cultural resources on the mountain

The UH CMP, sub-plans and related documents are poorly conceived and are wholly inadequate to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The UH CMP is not such a plan. Nor are the ad hoc collection of "sub-plans" and related documents a remedy to the destruction and impact on the cultural and natural resources of Mauna Kea.

In fact the UH CMP, sub-plans and related documents impose excessive restrictions and limitations on native Hawaiian use and access. This occurs because the BLNR is delegating its authority to the UH, who is in a conflict of interest. There are already laws in place that should be enforced by BLNR--but rather than BLNR enforcing the existing laws to protect cultural and natural resources, they are letting the UH and their un-authorized agents (i.e. rangers, KKM, OMKM, and MKMB) to regulate the public and Native Hawaiians who are right-holders. We believe this regulation is excessive, burdensome and actually interferes with the "reasonable" exercise of the public and Native Hawaiians rights. For BLNR to regulate rights it must be able to show these exercised rights are un-reasonable.

There simply is no substitute for an integrated and fully considered plan prepared by DLNR and adopted by the BLNR that addresses astronomy development, the carrying capacity of the resources affected by this development, and the protection of the cultural and natural resources, as well as ensures the protection of the reasonable exercise of Hawaiian customary and traditional cultural and religious practice. The UH CMP, sub-plans and related documents the Board approved are not sufficient to meet this burden. These documents were improperly approved, illegal delegate BLNR responsibilities, and excessively interfere with and regulate our access and reasonable use, thus affecting our legal rights, duties, and privileges.

**12. The relief or remedy to which you seek or deem yourself entitled:**

That the BLNR:

- a) REJECT AND NOT APPROVE OR ADOPT UH CMP, sub-plans and related documents;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a “comprehensive management plan” as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a “comprehensive management plan” as required by law;

OR IN THE ALTERNATIVE,

- c) GRANT Petitioner KAHEA standing in the UH CMP, sub-plans and related documents proceeding and CONDUCT a full contested case hearing on the proposed CMP, sub-plans and related documents.

**TESTIMONY SUBMITTED AT THE BLNR PUBLIC MEETING ON MARCH 25, 2010:**

Aloha Land Board members,

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

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

## **I. Appeal filed with the Intermediate Court of Appeals**

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

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

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

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

The power and responsibility to determine the effects on customary and traditional Native Hawaiian practices and the means to protect such practices may not validly be delegated by the LUC to a private petitioner who, unlike a public body, is not subject to public accountability... [I]nsofar as the LUC allowed [the private developer] to direct the manner in which customary and traditional Native Hawaiian practices would be preserved and protected by the proposed development -- prior to any specific findings and conclusions by the LUC as the effect of the proposed reclassification on such practices -- the LUC failed to satisfy its statutory and constitutional obligations. In delegating its duty to protect Native Hawaiian rights, the LUC delegated a non-delegable duty and thereby acted in excess of its authority.

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

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

authority and which harm the rights, duties, and privileges of Native Hawaiians and other members of the public.

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

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

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

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

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

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

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

considered in the open, democratic process required by the rules and regulations that govern the BLNR.

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

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

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

## **III. Subplans need environmental review**

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

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

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

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

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

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

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

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

LINDA LINGLE  
GOVERNOR OF HAWAII



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

RUSSELL Y. TSUJI  
FIRST DEPUTY

KEN C. KAWAHARA  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
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STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS

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HONOLULU, HAWAII 96809  
NATURAL RESOURCES  
STATE OF HAWAII

NOV 17 2009 39  
Site Plan Approval HA-10-04

REF:OCCL:MC

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

NOV 17 2009

Dear Mr. Maberry,

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

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

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

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

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

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

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

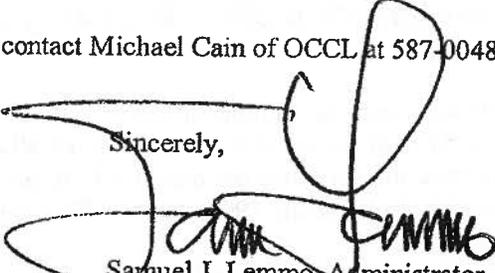
- 1) The applicant shall comply with all applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State and County governments;

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

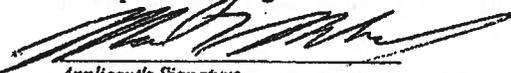
Please acknowledge receipt of this approval, with the above noted conditions, in the space provided below. Please sign two copies, retain one and return one copy within thirty (30) days.

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

Sincerely,

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

Receipt acknowledged:

  
Applicant's Signature

11-20-09  
Date

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

We thank you for your time and consideration of our contested case hearing request,

A handwritten signature in cursive script, appearing to read "M. Townsend.", positioned above a horizontal line.

Marti Townsend, Program Director  
KAHEA: The Hawaiian-Environmental Alliance

DATED: Honolulu, Hawaii, April 3, 2010

A handwritten signature in cursive script, appearing to read "M. Townsend.", positioned above a horizontal line.

Marti Townsend, Individually



PETITION FOR A CONTESTED CASE HEARING

BOARD OF LAND AND NATURAL RESOURCES

RECEIVED  
DEPT. OF CONSERVATION  
AND NATURAL LANDS

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DEPT. OF LAND &  
& NATURAL RESOURCES  
PHONE: (808) 968-7660 and  
(808) 333-2869

1. **Name:** Kealoha Pisciotta  
Mauna Kea Anaina Hou
2. **Address:** c/o Mauna Kea Anaina Hou  
P.O. Box 5864  
Hilo, Hawai'i 96720
3. **Attorney:** Pro se.
4. **Address:** N/A
5. **Subject Matter:** BLNR approval and adoption of the University of Hawai'i's sub-plans and other related management plan documents for Mauna Kea, Hawai'i.
6. **Date of public hearing / Board meeting:** March 25, 2010 held at the Imiloa Astronomy Center, Hilo Hawai'i
7. **Legal authority under which hearing, proceeding or action is being made:**  
HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 205, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**
  - a. **Tax Map Key Numbers:** 4-4-15:09 & 12, Mauna Kea, Hamakua, Hawai'i
  - b. **Background**

The following background is presented in two separate but related parts. We file this background in two parts because BLNR voted twice to approve University of Hawai'i's documents relating to the "management" of Mauna Kea. BLNR's approval of the UH documents involves the transfer of regulatory oversight and authority over the Mauna Kea Conservation District, which in turn affects our legal rights, duties and privileges.

Part I, outlines what occurred on April 8-9, 2009 when the Board of Land and Natural Resources (BLNR) voted to approve the University of Hawai'i's "Comprehensive Management Plan" (CMP) while simultaneously placing conditions requiring the University of Hawai'i's (UH) to prepare and submit four (4) more "sub-plan" for approval at a later date.

Part II outlines the BLNR's recent approval of the UH's four (4) conditional "sub-plans" on March 25, 2010.

## **PART I**

In April 2009, BLNR held a noticed public hearing (April 8-9, 2009) at the Hilo Hawaiian Hotel in Hilo, Hawai'i. On April 8, 2009, I, Kealoha Pisciotta, President, Mauna Kea Anaina Hou (MKAH) presented testimony addressing BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwlau Inc.). We concluded our testimony requesting a contested case hearing, in order to have an opportunity to present evidence on how the UH CMP would affect and negatively impact our legal rights, duties and privileges.

On April 9, 2009, after the close of public comment, BLNR went into executive session. The Board after executive session proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. "The University of Hawai'i Board of Regents (UHBOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- **public access**
- **natural resources**
- **cultural resources**
- **decommissioning (including financing and bonds for restoration)**

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include

the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

The BLNR did not address our CCH request and instead voted to adopt the UH CMP. This affected our legal rights, duties and privileges.

## **PART II**

On March 25, 2010, The BLNR held a noticed public hearing to review the UH's four "sub-plans" previously requested at the April 8-9, 2009 public hearing described in PART I above. The UH documents under review included the UH's cultural resource plan (CRP), natural resource plan (NRP), decommissioning plan (DP) and public access plan (PAP). The UH also submitted two other documents called the "project submittal timeline" and "major project sequence of steps." All the abovementioned documents cite to and rely on the UH CMP approved at the April 2009 BLNR hearing. All documents cite to and rely on the UH Master Plan 2000 (UHMP2000) which has never been reviewed or adopted by BLNR.

Department staff (Mr. Sam Lemmo) presented the DLNR staff report recommending the approval of all documents. The Board Chair gave the UH President, representatives of the UH Office of Mauna Kea Management (OMKM), UH Kahu Ku Mauna group (KKM), and Mauna Kea Management Board (MKMB) time to discuss various the "plans".

The BLNR and the UH had added approval "the transfer of control of management of Mauna Kea from the UH Board of Regents (UHBOR) to the Office of Mauna Kea Management" as well.

**NOTE:** The OMKM was created under the University's 2000 Master Plan--a document not in evidence, never reviewed nor approved by BLNR.

Neither the UH, it's agents (i.e. OMKM) nor the private planning firms that created all of the UH management documents approved by BLNR have legal authority to manage and/or control conservation districts, including the Mauna Kea conservation district.

The BLNR afforded the public two (2) minutes to discuss the merits of these large "sub-plan" documents. We explained we needed more time, which was never granted. We requested a contested case hearing in order to have an opportunity to present evidence on how these plans and associated documents would impact our legal rights, duties and privileges as Hawaiian cultural and traditional practitioner's of Mauna Kea.

BLNR member Mr. David Good asked the Deputy Attorney General some basic questions, including if Kapa`akai (as in the Supreme Court case titled *kappa`akai v. LUC*) had any precedent--for which the Deputy AG responded in the negative.

At the close of the meeting at around 12 noon, BLNR voted to approve all of the plans as well as approving the transfer of authority over Mauna Kea from the UHBOR to the OMKM.

**c. Standing.**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Mauna Kea Anaina Hou (MKAH) is an unincorporated association of individuals (Hawaiian and non-Hawaiian) throughout the island of Hawaii. MKAH is dedicated to protecting, preserving and perpetuating Native Hawaiian traditional and customary cultural, historic and religious practices, access and site (landscape) protection on Mauna Kea and other areas in Hawai`i.

MKAH Members have been actively involved in protecting Mauna Kea's natural and cultural resources since the late 1980s. I, Kealoha Pisciotto, President of Mauna Kea Anaina Hou, continue to exercise traditional and customary Hawaiian cultural and religious practices on Mauna Kea. I and other MKAH members have family and genealogical ties to Mauna Kea.

BLNR denied our request for a CCH on the UH CMP. They denied our standing (claiming among other things that we had no "property interest"). We filed an appeal into the Third Circuit Court where our case was dismissed without prejudice for lack of "ripeness."

**Judicial Notice:** On March 19, 2010, we appealed the Third Circuit Court's decision regarding BLNR's denial of our request for a CCH and our standing into Intermediate Court of Appeals.

BLNR previously granted MKAH standing and our request for contested case hearing on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. MKAH was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).

MKAH members exercise their traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. Many MKAH members are native Hawaiian, as defined in the Hawaii Admission Act, Section 4. These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. MKAH members enjoy constitutionally protected traditional and customary native Hawaiian rights.

MKAH has an interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, sub-plans and other related documents, separate from those of the general public. MKAH can and will provide information to assist decision-making on the UH CMP, sub-plans and other related documents. To manage and expedite the Contested Case Hearing, MKAH will work jointly with other parties who share common interests to organize and make a single presentation addressing:

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of

customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable exercise of these rights. Kapa`akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai`i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP, sub-plans and other management documents impact land use within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP, sub-plans and other management documents threatens the exercise of these rights by Petitioners. Petitioners rights to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights also include, but are not limited to:

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

Native Hawaiian customary and traditional cultural and religious rights are a public trust purpose.

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water

resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66, places jurisdiction of water quality in the Department of Health. BLNR's jurisdiction over the conservation district of Mauna Kea must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory projects on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories. The UH CMP, sub-plans and related documents also confirm this concern.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi'ihonua and Humu'ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants DHHL a right of first refusal to waters from public lands. Many MKAH members are also HHCA beneficiaries.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising from the private use of public trust lands, (by the foreign and non-state governments and corporations operating atop Mauna Kea) and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation districts, including the Mauna Kea conservation district. The UH and BLNR failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) the UH CMP, sub-plans and related documents.

The *Wekiu*. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5<sup>th</sup> Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of “[t]he present or threatened destruction, modification, or curtailment of its habitat or range.” HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP, sub-plans and related documents under review and adopted in by BLNR reference the UH 2000 MP. This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the UHBOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH MP2000 includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the “intangible aspects” of the property. National Register Bulletin 38-“Guidelines for evaluating and documenting Traditional Cultural Properties” establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the UH CMP, sub-plans and related documents will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," id. § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," id. § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b) (10).

**9. The specific disagreement, denial or grievance with the above matter:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Traditional and Customary Rights of Hawaiians. The BLNR wholesale delegation of their fiduciary duty to oversee, manage and reasonable protect the cultural and natural resources of Mauna Kea necessarily affects and negatively impacts our legal rights, duties, and privileges.

The UH while a state agency, is in a conflict of interest, first, because they are not the state agency mandated to oversee conservation district (BLNR has this responsibility) and secondly because the UH has a specific interest in seeking more development to improve their academic credentials (see State Auditors reports regarding the BLNR and UH's failure to management of Mauna Kea). The UH also files CDUA's with foreign and non-state observatory developers for the use of Mauna Kea. The UH therefore is the primary supporter and mover of development of Mauna Kea, which has great impact on the cultural and natural resources of Mauna Kea.

Therefore, the BLNR's approval of the UH CMP, sub-plans and related documents will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP, sub-plans and other related documents grants the UH and their designated agents (hand selected and appointed people) the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. MKAH seeks to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State

vehicles. One of the observatory tour guides and UH "rangers" giving also removed, desecrated and destroyed a family shrine of MKAH President's (family stone and ahu). To date the same site has been desecrated and destroyed at least seven times in all, the latest of which occurred just this year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The archeological studies of the summit area of Mauna Kea are not complete, and so far burial sites are the second largest historic sites found. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting, s the water ice and snow is collected for medicine and other ceremonies. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea conservation district. Petitioner MKAH has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Petitioner MKAH has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the

Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust. MKAH native Hawaiian members have been adversely affected by this conduct.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner MKAH have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently accessed impacts, or to reduce or mitigate these impacts. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner MKAH have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review as impacts on the environmental quality where

our traditional and cultural practice occurs affects our rights, duties, and privileges.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. "Carrying capacity;"
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

**10. Outline of specific issues to be raised:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397?
- b. Whether BLNR whole delegated its fiduciary duty to protect the reasonable exercise of customary and traditional Native Hawaiian cultural and traditional practices, when it allowed the UH, its agents, and private planning firms to determine, prescribe, describe, place conditions upon and regulate Hawaiian practices, use and access on Mauna Kea?
- c. Whether BLNR unlawfully voted to approve the UH CMP, sub-plans and related documents after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings held on both 4/8/09-4/9/09 and 3/25/10? Whether BLNR's approval violated both DLNR's own rules and due process?
- d. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?

- e. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- f. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- g. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- h. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less (for \$1.00 per year) than their independently appraised fair-market value.
- i. Whether the BLNR should have adopted the UH CMP, sub-plans and related documents before independently identifying, assessing, and implementing actions to protect Petitioner MKAH's constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP, sub-plans and related documents before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?
- j. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for UH sub-plans and related documents prior to approving them. This is one way to protect the cultural and natural resources of Mauna Kea?
- k. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
- l. Whether the BLNR improperly approved the UH CMP, sub-plans and related documents that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, cultural offerings, limiting when, how and where Native

Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

**11. Outline of basic facts:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The record in this matter is contained in (1) the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397, (2) BLNR hearing records and our testimony regarding BLNR's April 8-9, 2009 public hearing, and (3) BLNR hearing records and our testimonies filed for BLNR hearing 3/25/10 and other public documents on record in all of the abovementioned proceedings. We incorporated the above mentioned proceeding documents here by reference, as BLNR has copies in their records as well.

In brief, the industrial astronomy foot print of the observatories built atop Mauna Kea has caused physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and even destroyed historic and cultural sites (including those of MKAH, and myself, Kealoha Pisciotta). The failure to genuinely prepare a master plan and to restrict and manage development activities on Mauna Kea has led to the destruction/overuse and loss of the unique natural and cultural resources on the mountain

The UH CMP, sub-plans and related documents are poorly conceived and are wholly inadequate to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The UH CMP is not such a plan. Nor are the ad hoc collection of "sub-plans" and related documents a remedy to the destruction and impact on the cultural and natural resources of Mauna Kea.

In fact the UH CMP, sub-plans and related documents impose excessive restrictions and limitations on native Hawaiian use and access. This occurs because the BLNR is delegating its authority to the UH, who is in a conflict of interest. There are already laws in place that should be enforced by BLNR--but rather than BLNR enforcing the existing laws to protect cultural and natural resources, they are letting the UH and their

un-authorized agents (i.e. rangers, KKM, OMKM, and MKMB) to regulated the public and Native Hawaiians who are right-holders. We believe this regulation is excessive, burdensome and actually interferes with the "reasonable" exercise of the public and Native Hawaiians rights. For BLNR to regulate rights it must be able to show these exercised rights are un-reasonable.

There simply is no substitute for an integrated and fully considered plan prepared by DLNR and adopted by the BLNR that addresses astronomy developmental carrying capacity, protection of the cultural and natural resources and that ensure the protection of the reasonable exercise of Hawaiian customary and traditional cultural and religious practice. The UH CMP, sub-plans and related documents the Board approved are not sufficient and further excessively interfere and regulate our access and reasonable use, thus affecting our legal rights, duties, and privileges.

**12. The relief or remedy to which you seek or deem yourself entitled:**

That the BLNR:

- a) REJECT AND NOT APPROVE OR ADOPT UH CMP, sub-plans and related documents;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;

OR IN THE ALTERNATIVE,

- c) GRANT Petitioner MKAH standing in the UH CMP, sub-plans and related documents proceeding and CONDUCT a full contested case hearing on the proposed CMP, sub-plans and related documents.

TESIMONY SUBMITTED AT THE BLNR PUBLIC HEARING ON MARCH 25, 2010:

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

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

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

**I. Introduction**

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

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

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

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

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

**A. Jurisdictional Confusion**

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

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

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

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

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

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

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

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

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

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

### **The UH Master Plan 2000**

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

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

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

Further, according to the UH documents if the UH decides the project is "minor" the project will be exempt from state and/or federal environmental, historic preservation and/or cultural impact review. The first purpose of any conservation district is conservation and not development--so all land altering activities in a conservation district are major. BLNR, it is not enough that you may have some control over project the UH classifies as "major". By law you must have control over all land altering activities on Mauna Kea.

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

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

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

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

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

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

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

On page 7, 15 of 86 the DP states,

**2.2.4 Site Abandonment**

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

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

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

Clean up of contaminated soil costs

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

UKIRT claims their costs are confidential

Received confidential quote for decommissioning in 2006. This information is

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

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

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

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

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

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

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

There is no question the greatest threat to the cultural and natural resources of Mauna Kea is destruction of the sacred landscape--destruction of the landscape due to the astronomy industry's expanding footprint. The sub-plans regulate public and Hawaiians activities and access, but they are virtually silent on how they intend to actually halt the expanding industrial astronomy footprint. The plans do not consider a limit on development with respect to the resources--can the resources handle any more development? When the resources are degraded it affects public ability to enjoy these resources and impacts Hawaiian cultural rights, which in turn impacts our rights, duties, and privileges.

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

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

resources, it impacts Hawaiian cultural rights and therefore impacts our rights, duties, and privileges.

### III. SPECIFIC PROBLEMS

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

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

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

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

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

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

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

The supreme court of Hawai'i specifically used two words (customary and traditional) to describe Native Hawaiians continued cultural and religious rights. Where one definition describes long held beliefs, belief systems and ways of seeing the world (like honoring and extending Aloha), the other describes the way people demonstrate or express these beliefs (giving leis as an expression of Aloha).

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

- Gathering of ice, snow, water, raw materials for adz making;
- Depositing of the "piko" or umbilical cord, and water collection in and from Lake Waiau;
- Traditional astronomy, cosmology, and navigation;

- Burial practices;
- Solstice and equinox ceremonies;
- Rights to conduct temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve, in the affected areas; and
- Exercise of other rights for religious, cultural, and subsistence purposes.
- Protection of mauka-makai and makai-mauka view planes.
- Protection of kinolau images.
- Native Hawaiian traditional and customary, cultural and religious uses.
- Access to and through the area

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

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

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

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

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

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

**4. UH grants to themselves and their people the power to determine what is culturally appropriate or what is not.** The UH CRP on pages 4-18-124 of 262, states “No restrictions shall be placed on any Hawaiian cultural observance that is deemed to be appropriate by Kahu K Mauna and other Native Hawaiian organizations as long as the practices do not violate Chapter 6E.” Here power and authority to determine what is cultural “appropriate” and what is not is held by the UH and people that sit on the Kahu Ku Mauna who are hand selected by the UH. And while the UH give some boiler pot

language to include other organizations--this is another stark example of excessive control and interference by the UH. Since in the end the UH has the ultimate and final say--on what is **culturally appropriate or not**.

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

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

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

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

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

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

Furthermore, the CRP omits information including the fact that my family ahu was desecrated on four separate occasions (even stolen and taken to the Hilo dump) by UH employees -- Mr. Hugh Grossman and Mr. Kimo Pihana both UH “Rangers” allegedly tasked with protecting our cultural sites. My family stone was found at the Hilo dump and once recovered and returned to Mauna Kea was again taken and has never been recovered. It’s interesting the CRP does not include the UH IFA apology letter (1998) to myself--regarding the UH involvement in the removal of my family ahu. In total the site has been desecrated on seven separate occasions, with the last being the destruction of a

small ahu erected at the same location by myself, Keomailani Von Gogh and Ali`i Sir Paul K. Neves of the Royal Order.

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

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

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

First, "A`ohe pau ka ike i ka halau ho`okahi-All knowledge is not taught in the same school." While different families may carry different knowledge--no one family or appointed groups of people can speak for all. To discount our histories is to discount our genealogy as well. We would like to refer the CRP authors to Malcolm Naea Chun's recent book titled "The History of Kanalu: Mo`oku`auhau `Elua" which recounts the repopulating of the earth after the flood--and includes at least 900 generations.

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

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

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

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

We thank you for your time and consideration of our contested case hearing request,  
In Aloha I remain,

---

Kealoha Pisciotta, President  
Mauna Kea Anaina Hou

DATED: Hilo, Hawáii, April 1, 2010

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Kealoha Pisciotta, Individually

We thank you for your time and consideration of our contested case hearing request,  
In Aloha I remain,



Kealoha Pisciotta, President  
Mauna Kea Anaina Hou

DATED: Hilo, Hawaii, April 1, 2010



Kealoha Pisciotta, Individually



**PETITION FOR A CONTESTED CASE HEARING**

RECEIVED  
BLNR CONSERVATION  
DISTRICT LANDS

**BOARD OF LAND AND NATURAL RESOURCES**

2010 APR 12 P 4: 02

1. **Name:** Deborah Ward,  
Sierra Club, Hawai'i Chapter

Phone: (808) 966-2000 &  
(808) 933-2050  
LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

2. **Address:** Sierra Club, Hawai'i Chapter  
c/o Debbie Ward  
P.O. Box 918  
Kurtistown, HI 96760

Contacts for Sierra Club Hawai'i Chapter are Ms. Debbie Ward and Mr. Nelson Ho and their phone contacts are provided above.

3. **Attorney:** Not sure yet.

4. **Address:** N/A

5. **Subject Matter:** BLNR approval and adoption of the University of Hawai'i's sub-plans and other related management plan documents for Mauna Kea, Hawai'i.

6. **Date of public hearing / Board meeting:** March 25, 2010 held at the Imiloa Astronomy Center. Hilo Hawai'i

7. **Legal authority under which hearing, proceeding or action is being made:** HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 205, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31

8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**

a. **Tax Map Key Numbers:** 4-4-15:09 &12, Mauna Kea, Hamakua, Hawai'i

b. **Background**

The following background is presented in two separate but related parts. We file this background in two parts because BLNR voted twice to approve University of Hawai'i's documents relating to the "management" of Mauna Kea. BLNR's approval of the UH documents involves the transfer of regulatory oversight and authority over the Mauna Kea Conservation District, which in turn affects our legal rights, duties and privileges.

Part I, outlines what occurred on April 8-9, 2009 when the Board of Land and Natural Resources (BLNR) voted to approve the University of Hawai'i's "Comprehensive Management Plan" (CMP) while simultaneously placing conditions requiring the University of Hawai'i's (UH) to prepare and submit four (4) more "sub-plan" for approval at a later date.

Part II outlines the BLNR's recent approval of the UH's four (4) conditional "sub-plans" on March 25, 2010.

## **PART I**

In April 2009, BLNR held a noticed public hearing (April 8-9, 2009) at the Hilo Hawaiian Hotel in Hilo, Hawai'i. On April 8, 2009, I, Deborah Ward of Sierra Club(SC) and Mr. Nelson Ho presented testimony addressing BLNR's review and proposed decision making on the University of Hawai'i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku'iwalu Incorporated (Ku'iwlau Inc.). We concluded our testimony requesting a contested case hearing, in order to have an opportunity to present evidence on how the UH CMP would affect and negatively impact our legal rights, duties and privileges.

On April 9, 2009, after the close of public comment, BLNR went into executive session. The Board after executive session proceeded to vote to adopt the UH CMP prepared by Ku'iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. "The University of Hawai'i Board of Regents (UHBOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.
2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:
  - **public access**
  - **natural resources**
  - **cultural resources**
  - **decommissioning (including financing and bonds for restoration)**
3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.
4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR
5. The BOR recognizes that by approving the CMP, the BLNR has not

delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

The BLNR did not address our CCH request and instead voted to adopt the UH CMP. This affected our legal rights, duties and privileges.

## **PART II**

On March 25, 2010, The BLNR held a noticed public hearing to review the UH's four "sub-plans" previously requested at the April 8-9, 2009 public hearing described in PART I above. The UH documents under review included the UH's cultural resource plan (CRP), natural resource plan (NRP), decommissioning plan (DP) and public access plan (PAP). The UH also submitted two other documents called the "project submittal timeline" and "major project sequence of steps." All the abovementioned documents cite to and rely on the UH CMP approved at the April 2009 BLNR hearing. All documents cite to and rely on the UH Master Plan 2000 (UHMP2000) which has never been reviewed or adopted by BLNR.

Department staff (Mr. Sam Lemmo) presented the DLNR staff report recommending the approval of all documents. The Board Chair gave the UH President, representatives of the UH Office of Mauna Kea Management (OMKM), UH Kahu Ku Mauna group (KKM), and Mauna Kea Management Board (MKMB) time to discuss various the "plans".

The BLNR and the UH had added approval "the transfer of control of management of Mauna Kea from the UH Board of Regents (UHBOR) to the Office of Mauna Kea Management" as well.

**NOTE:** The OMKM was created under the University's 2000 Master Plan--a document not in evidence, never reviewed nor approved by BLNR.

Neither the UH, its agents (i.e. OMKM) nor the private planning firms that created all of the UH management documents approved by BLNR have legal authority to manage and/or control conservation districts, including the Mauna Kea conservation district.

The BLNR afforded the public two (2) minutes to discuss the merits of these large “sub-plan” documents. We explained we needed more time, which was never granted. We requested a contested case hearing in order to have an opportunity to present evidence on how these plans and associated documents would impact our legal rights, duties and privileges as Hawaiian cultural and traditional practitioner’s of Mauna Kea.

BLNR member Mr. David Good asked the Deputy Attorney General some basic questions, including if Kapa`akai (as in the Supreme Court case titled *Kappa`akai v. LUC*) had any precedent--for which the Deputy AG responded in the negative.

At the close of the meeting at around 12 noon, BLNR voted to approve all of the plans as well as approving the transfer of authority over Mauna Kea from the UHBOR to the OMKM.

### **c. Standing.**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Sierra Club, Hawaii Chapter. Sierra Club, Hawaii Chapter (SC), is the local chapter of the national Sierra Club, one of America’s oldest grassroots environmental organization, with 700,000 members joined together to protect and preserve natural ecosystems and work against degradation from a variety of causes. I, Deborah Ward and members of the Sierra Club, Hawaii Chapter (Sierra Club) include residents of Hawai’i Island regularly use Mauna Kea for hiking, viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.

In our call for a contested case, both for the UH CMP, and for these subplans, we assert that we have standing as distinct from the general public by our longstanding recreational and regenerative use of the Mauna Kea Conservation District. We believe that ceded land belongs to the native Hawaiians and the general public, held in trust by DLNR, and that all of the people have “property rights”, and should not be denied standing.

Furthermore, the University has not demonstrated its expertise and experience in managing important natural and cultural resources, nor does it have a history of protecting traditional and customary Native Hawaiian practices. As pointed out in the comments by the Office of Hawaiian Affairs (OHA), “the university was previously held responsible for managing commercial activities and enforcing rules; it failed at both, and had to relinquish these functions back to DLNR.” The BLNR-approved 1995 Mauna Kea management plan states that “It was determined that management and enforcement responsibilities—unless they are directly related to astronomy facilities, including the Mauna Kea access road—should be transferred back to DLNR.”

The Legislative Auditor reported in 2005 that “(DLNR) has failed to 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.”

As a member of the Office of Mauna Kea Management's (OMKM) Environment Committee since the year 2000, I was tasked to draft the Environment Committee white paper that led to our decision to hire a natural resources planning firm to construct a natural resources management plan for OMKM. I participated in the development of the Request for Proposals to seek planners for the natural resource plan for OMKM. The Env Comm specifically required the telescope decommissioning, demolition and site restoration be addressed in the NRMP. The planning team, SRGII, developed management recommendations to identify, protect and conserve the fragile natural resources, including flora, fauna, hydrologic resources, geologic resources, and more. The management recommendations were presented to a wide representation of scientists in Hilo for comment in November 2008, and the SRGII planners were warmly commended for the management strategies posed. The NRMP recommendations were removed in the final draft of the UH CMP for reasons not explained by the University's legal team.

I, Deborah Ward and SC continue to assert that developer should NOT be preparing a comprehensive Management Plan for Mauna Kea. The initiative, scope, guidance and oversight of plan management plan development rests with DLNR. Delegation of authority to the developer is inappropriate, in that it places the developer in the role of decision-maker—this is YOUR role (BL:NR), and it must not be delegated, as it affects the rights, duties and privileges of myself and our members. The CMP and sub-plans effectively attribute all decisions to a single entity, the President of the University of Hawaii, without prior action by the BLNR with public input.

**9. The specific disagreement, denial or grievance with the above matter:**

**The people of Hawaii have the right to a clean and healthy environment**

Hawai'i is unique in that, environmental protections are written into our Constitution, which reads,

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

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

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

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

On page 6 the DP states,

#### **2.2.4 Site Abandonment**

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

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

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

Clean up of contaminated soil costs

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

UKIRT claims their costs are confidential

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

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

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66, places jurisdiction of water quality in the Department of Health. BLNR's jurisdiction over the conservation district of Mauna Kea must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory projects on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories. The UH CMP, sub-plans and related documents also confirm this concern.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act. Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising from the private use of public trust lands, (by the foreign and non-state governments and corporations operating atop Mauna Kea) and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation districts, including the Mauna Kea conservation district. The UH and BLNR failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) the UH CMP, sub-plans and related documents.

The Wekiu. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5<sup>th</sup> Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Environmental Policy Act. Press statements to the contrary, actions covered by the UH CMP, sub-plans and related documents will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);

- Whether the action threatens a violation of...requirements imposed for the protection of the environment, id. § 1508.27(b) (10).

**10. The specific disagreement, denial or grievance with the above matter:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting, as the water ice and snow is collected for medicine and other ceremonies. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea conservation district. Petitioner SC has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their use which includes, hiking, viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. Petitioner SC has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, in order to protect its members use which includes, hiking, viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation

The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either. The lack of environmental review and impacts on the environmental quality affects our rights, duties, and privileges.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%.

Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner SC has spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their individual and member use and enjoyment. The lack of environmental review impacts on the environmental quality affects our rights, duties, and privileges.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently assessed impacts, or to reduce or mitigate these impacts. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner SC has spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review as impacts on the environmental quality where our use and enjoyment takes places affects our rights, duties, and privileges.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. "Carrying capacity;"
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

**11. Outline of specific issues to be raised:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397?
- b. Whether BLNR delegated its fiduciary duty to protect the cultural and natural resources, when it allowed the UH, its agents, and private planning firms to determine, prescribe, describe, place conditions upon and regulate Hawaiian practices, use and access on Mauna Kea?
- c. Whether BLNR unlawfully voted to approve the UH CMP, sub-plans and related documents after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings held on both 4/8/09-4/9/09 and 3/25/10? Whether BLNR's approval violated both DLNR's own rules and due process?
- d. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- e. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- f. Whether BLNR should have adopted the UH CMP, sub-plans and related documents even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- g. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- h. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5 lands on Mauna Kea without a proper appraisal and at less (for \$1.00 per year) than their independently appraised fair-market value.
- i. Whether the BLNR should have adopted the UH CMP, sub-plans and related documents before independently identifying, assessing, and implementing actions to protect Petitioner SC's constitutionally-based rights to a clean and healthful environment?
- j. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental

Impact Statement for UH sub-plans and related documents prior to approving them. This is one way to protect the cultural and natural resources of Mauna Kea?

k. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.

l. Whether the BLNR improperly approved the UH CMP, sub-plans and related documents that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, cultural offerings, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

**11. Outline of basic facts:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The record in this matter is contained in (1) the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397, (2) BLNR hearing records and our testimony regarding BLNR's April 8-9, 2009 public hearing, and (3) BLNR hearing records and our testimonies filed for BLNR hearing 3/25/10 and other public documents on record in all of the abovementioned proceedings. We incorporated the above mentioned proceeding documents here by reference, as BLNR has copies in their records as well.

In brief, the industrial astronomy foot print of the observatories built atop Mauna Kea has caused physical destruction of the sacred landscape (cultural and natural resources which is used by Native Hawaiians and many others in the community. The failure to genuinely prepare a master plan and to restrict and manage development activities on Mauna Kea has led to the destruction/overuse and loss of the unique natural and cultural resources on the mountain

The UH CMP, sub-plans and related documents are poorly conceived and are wholly inadequate to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The UH CMP is not such a plan. Nor are the ad hoc collection of "sub-plans" and related documents a remedy to the destruction and impact on the cultural and natural resources of Mauna Kea.

In fact the UH CMP, sub-plans and related documents impose excessive restrictions and limitations on public and native Hawaiian use and access. This occurs because the BLNR is delegating its authority to the UH, who is in a conflict of interest. There are already laws in place that should be enforced by BLNR--but rather than BLNR enforcing the existing laws to protect cultural and natural resources, they are letting the UH and their un-authorized agents (i.e. rangers, KKM, OMKM, and MKMB) to regulated the public and Native Hawaiians who are right-holders. We believe this regulation is excessive, burdensome and actually interferes with the "reasonable" exercise of the public and Native Hawaiians rights. For BLNR to regulate rights it must be able to show these exercised rights are un-reasonable.

There simply is no substitute for an integrated and fully considered plan prepared by DLNR and adopted by the BLNR that addresses astronomy developmental carrying capacity, protection of the cultural and natural resources and that ensure the protection of the reasonable exercise of Hawaiian customary and traditional cultural and religious practice. The UH CMP, sub-plans and related documents the Board approved are not sufficient and further excessively interfere and regulate our access and reasonable use, thus affecting our legal rights, duties, and privileges.

**12. The relief or remedy to which you seek or deem yourself entitled:**

**That the BLNR:**

**a) REJECT AND NOT APPROVE OR ADOPT UH CMP, sub-plans and related documents;**

**b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;**

**OR IN THE ALTERNATIVE,**

**c) GRANT Petitioner MKAH standing in the UH CMP, sub-plans and related documents proceeding and CONDUCT a full contested case hearing on the proposed CMP, sub-plans and related documents.**

## **TESTIMONY SUBMITTED BY SC AND DEBORAH WARD OF SC**

### **RESPECTIVELY AT THE BLNR PUBLIC HEARING ON MARCH 25, 2010:**

March 24, 2010

Aloha, Chair and Members, Board of Land and Natural Resources,

This testimony is presented on behalf of the Sierra Club, Hawaii Chapter. Sierra Club, Hawaii Chapter (SC), is the local chapter of the national Sierra Club, one of America's oldest grassroots environmental organization, with 700,000 members joined together to protect and preserve natural ecosystems and work against degradation from a variety of causes. Members of the Sierra Club, Hawaii Chapter (Sierra Club) include residents of Hawai'i Island who regularly use Mauna Kea for hiking, viewing and enjoying open spaces, and other forms of recreation, including wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation.

BLNR held that Sierra Club had standing to participate in a contested case hearing regarding the Keck Outrigger Telescope Project. The Contested Case Hearing and subsequent District Court ruling found that the agency responsible for Conservation District lands must develop a comprehensive management plan to address multiple uses. As parties to BLNR contested case hearing and court proceeding, the SC asks to meaningfully participate in this decision making process. **We hereby reserve the right to request a contested case hearing should BLNR approve the CMP, sub-plans, timelines, and other project documents.**

In our call for a contested case, both for the UH CMP, and for these sub-plans, we assert that SC members have standing as distinct from the general public by our longstanding recreational and regenerative use of the Mauna Kea Conservation District. We further believe that ceded land belongs to the native Hawaiians and the general public, held in trust by DLNR, and that all of the people have "property rights", and should not be denied standing.

SC has reviewed the Office of Conservation and Coastal Lands' staff submittal relating to the Request for Approval of Natural Resources Management Plan, Cultural Resources Management Plan, Public Access Plan, Decommissioning Plan and Management Framework, and other related matters now before the BLNR. SC believes that BLNR decision makers have not been given sufficient and accurate information with which to make an informed decision on delegating implementing authority to the OMKM.

#### **1) Illegal delegation of authority**

SC continues to assert that developer should NOT be preparing a comprehensive Management Plan for Mauna Kea. The initiative, scope, guidance and oversight of plan management plan development rests with DLNR. Delegation of authority to the developer is inappropriate, in that it places the developer in the role of decision-maker—this is YOUR role, and must not be delegated, as it affects the rights, duties and privileges of our members. The CMP and sub-plans effectively attribute all decisions to a single entity, the President of the University of Hawaii, without prior action by the BLNR with public input.

The Legislative Auditor reported in 2005 that "(DLNR) has failed to 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."

#### **2) BLNR Rules Cite Eight Criteria**

None of the sub-plan address the eight criteria (8 criteria) contained in BLNR rules and regulations. These are the criteria BLNR is required to apply for approving land uses/development in conservation districts. If a proposed project does not meet ALL of the criteria, then no further action should be considered, at any time.

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

### **3) BLNR erroneously incorporates the UH 2000 Master Plan into the CMP document**

SC, cultural practitioners and members of the public have warned you that the 200MP document is seriously flawed and contributed to the 10 years of bad decisions, delayed protection actions and missteps on the part of the UH.

The court order in *Mauna Kea Anaina Hou v. State of Hawai'i et. al.*, Third Circuit Court, Civil No. 04-1-397, requires the BLNR and the State to prepare a comprehensive management plan for Mauna Kea and then act in accordance with that plan. The ruling challenged the legal status of the University of Hawaii's 2000 Master Plan (and thus the UH Office of Mauna Kea Management (OMKM) the plan created)—which was neither reviewed nor approved by BLNR. There is no legal authority that supports the plan the UH is offering. The UH "plan" is little more than a development proposal and sophisticated press release disguised as a conservation plan (see OHA Position statements on the UH's CMP).

The University has not demonstrated its expertise and experience in managing important natural and cultural resources, not does it have a history of protecting traditional and customary Native Hawaiian practices. As pointed out in the comments by the Office of Hawaiian Affairs (OHA), "the university was previously held responsible for managing commercial activities and enforcing rules; it failed at both, and had to relinquish these functions back to DLNR." The BLNR-approved 1995 Mauna Kea management plan states that "It was determined that management and enforcement responsibilities—unless they are directly related to astronomy facilities, including the Mauna Kea access road—should be transferred back to DLNR."

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

1. The UH 2000 MP is not in evidence, nor was it when the UH CMP was approved. When a conflict arises between these documents, which of these documents will be controlling?
2. The UH 2000 MP establishes a management structure that takes the place of BLNR on many key land-use decisions. These structures include the Office of Mauna Kea Management (OMKM), the Mauna Kea Management Board (MKMB), and the advisory groups like Kahu Ku Mauna (KKM), the UH chancellors, and ultimately the President of the University of Hawaii.

This is to say, the people empowered to decide, direct, impose conditions and restrict Hawaiian and public access are people under the direct control of the UH. They are not selected by the people of Hawai'i, nor are they even legally authorized to make these kinds of decisions on public trust and conservation lands.

The **Project Submittal Timeline** (PST) delegates the *sole* power and authority to classify a telescopes project or a land altering activities as "major" or "minor" to UH. Even "minor" projects can involve land altering activities.

For example, the UH proposal to remove the road on Pu'u Poliahu was classified as "minor" but this involved land altering activity, and affected wekiu habitat.

Further, according to the UH documents if the UH decides the project is "minor" the project will be exempt from state and/or federal environmental, historic preservation and/or cultural impact review. The first purpose of any conservation district is conservation and not development--so all land altering activities in a conservation district are major. BLNR, it is not enough that you may have some control over project the UH classifies as "major". By law you must have control over all land altering activities on Mauna Kea.

### **4) Sub-plans were not included in the CMP Environmental Assessment**

While the Board determined that an Environmental Assessment was required for the UH CMP, no environmental review has been completed for the sub-plans, which describe in detail large land-altering activity. The impact of decommissioning and site restoration must be subject to the same review.

**5) Role of developer and decision-maker has inherent conflicts**

Major Projects Review Steps (exhibit 4 (1of 2) is an inaccurate and misleading process flow chart. The Office of Mauna Kea Management (OMKM) is fatally conflicted with institutional mandates. It repeats the fatal flaws that have crippled true management programs for the last 30 years of the Mauna Kea Science Reserve Lease to the University of Hawaii.

One example, (there are more) see the nine big review steps in the center column. First green one after 8 big blue boxes. States MKMB RECOMMENDS APPROVAL OR DISAPPROVAL OF PROJECT (MAJOR).

*Now compare that with the statement by UH Regents to the Legislature:*

*OMKM funds are requested to initiate baseline research, continue long-term monitoring and engage in activities necessary to implement and enforce the CMP... In addition, **OMKM/UH is responsible for defending State and or Federal Environmental Impact Statements and Conservation District Use applications for the TMT and PanSTARRs projects. These costs include outside legal fees...***

UH has changed the mission of OMKM from cultural and Natural Resource protection and management to promotion and legal funding arm for Institute for Astronomy (IfA), This conflicts with documents presented to you today and promises made by UH a year ago.

This CMP thinly veils the "project-by-project" basis for resource management and is ONLY being done to further the goals of bringing in the Thirty Meter Telescope.

Staff submission erroneously believes that money and resources will be allocated to implement the language of the CMP submission. Please read the UH \$2.1 mill submission to the legislature BEFORE you make a final decision.

**6) Interested parties excluded from consultation**

Staff submittal improperly repeats CMP writer's inaccuracies. Interested parties with cultural and civil rights were NOT consulted because of impending legal and court challenges. A SIGNIFICANT group of stake holders were therefore excluded from the process which is NOW PAINTED AS THOROUGH AND COMPREHENSIVE.

**7) The people of Hawaii have the right to a clean and healthy environment**

Hawai'i is unique in that, environmental protections are written into our Constitution, which reads,

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

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

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

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

On page 6 the DP states,

#### **2.2.4 Site Abandonment**

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

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

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

Clean up of contaminated soil costs

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

UKIRT claims their costs are confidential

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

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

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

The University agreed in the 1985 MKSRCDP to conduct baseline inventories and ongoing monitoring of the flora and fauna, and threats inherent in industrial development. Over the past twenty five years, the funds have been found to construct numerous additional telescope facilities, but funds have been notably absent for the protective activities promised in that 25 year-old plan. In this plan we see far more detail about the data gaps, and prioritization of research, monitoring and protection proposed, but without funding to carry out the plan, the proposed actions rely on the taxpayer to pay for the responsibilities incurred by the University. So little is known about the resources that any future development could impact the resource irrevocably.

Over and over, the budget concerns for proposed actions are mentioned in the sub-plans, but no funding source (other than the taxpayer, through University base-funding) is identified. " *OMKM may need to secure increases in base funding or obtain funds from other sources. If funding is limited, the NRMP may be implemented incrementally.*" (NRMP 5-12)

Without mandated conditions, performance measures, reporting and funding requirements placed on the University by BLNR, the plans are simply a wish-list, and the rights of the public are affected when the natural resources are degraded by neglect and indifference.

**8) The CMP designates individuals not legally authorized to regulate both Hawaiian and public uses to restrict access on Mauna Kea.**

On page 108-109 the UH CMP grants UH "Rangers" broad powers to regulate the public and Hawaiians. The UH Rangers are not state enforcement officers (i.e. DOCARE) and therefore have no power to enforce state law and/or to restrict Hawaiian and public uses and/or access on Public lands such as those of Mauna Kea.

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

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

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

**9) UH grants to themselves and their people the power to determine what is culturally appropriate or what is not.**

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

**10) Decommissioning Sub-Plan inadequate for planning**

The Decommissioning sub-plan is all but useless to the Mauna Kea facilities users. It is NOT a valid planning document for removal of outdated facilities, because it is not implementable by the engineers seeking guidance on how to close out their facilities.

**JUST ASK THOSE INSTITUTIONS WHO ARE ABOUT TO LEAVE THE MOUNTAIN TOP.**

**11) Funding sources for management rest inadequately addressed**

The "UH CMP" and subplans do not offer a cohesive management plan, but rather a menu of planning options. In the subplans, the vague references to astronomy industrial development in the decommissioning plan do not spell out anything but past and current projections. The subplans are inconsistent regarding the criteria for determining the carrying capacity and criteria for determining the optimal protections for resources in the conservation district. The subplans fail to protect our state's resources, nor do they delineate responsible parties and earmarked funding. It is unconscionable that DLNR would decline its full responsibility to manage these conservation lands, and it is time that the legislature addresses this failure of the Department to protect our natural resources. While the University is requesting \$2.1 M in funding for CMP implementation **including \$300,000 to address legal defense of proposed telescope development**, these funds could be allocated, instead to DLNR management staff and enforcement personnel.

We attach with this testimony the UH Operating budget Attachment A. This decision should not take place until a review of the financial audit of the valuation of the University and its affiliates use of Mauna Kea is conducted.

In summation, SC therefore feels that irreparable harm will be done to the natural and cultural resources of MK summit and hereby asks for contested case status to formally participate in the BLNR decision on these agonized matters.

Respectfully submitted,

Deborah Ward and Nelson Ho  
Co-Chair, State Mauna Kea Issues Committee.  
Sierra Club

### **DW testimony**

Aloha, Chair, Laura Thielen and Members,

My name is Deborah Ward. I farm land in upper Puna, and I have lived in Hawaii for more than forty years. I was a senior faculty member of the University of Hawaii Department of Natural Resources and Environmental Management until my retirement. I began my involvement in issues regarding the management of Mauna Kea since the early eighties. I have spent much of my adult life working to protect and conserve natural habitats unique to this land that I love so much. Staff member Lemmo omitted from his presentation the MKSRCDP, that was directed by DLNR and approved by the BLNR in 1985. That plan, as well as the 1995 plan had a Board approved permit. The "UH CMP" has no board approved permit, not does it have an application; it remains unclear to us what exactly the BLNR intended during the last public hearing on this issue nearly a year ago.

We were hopeful in 1985, and for twenty five years thereafter, that the University would carry out its promises in the plan to fund the biological inventories and other studies necessary to understand the fragile region. The promised funding was never allocated for this effort. It was shocking to visit the summit in 1996 and document the damage to Pu'u Hau Oki. This damage took place as a result of decisions by the Director of UH IfA, and approved by a DLNR planner who had never even been to Mauna Kea. This deliberate action filled the base and damaged slopes of the cinder cone, prime habitat of the wekiu bug. This same Pu'u was contaminated by a sewage spill, and was documented by Dr. Fred Stone and Dr. Frank Howarth on another visit. The discovery of these violations, which directly violated conditions in the Mauna Kea Management Plan, approved by the BLNR in 1985, were the impetus for my involvement to find ways to improve the management of this highly delicate and fragile natural environment.

At the request of the Legislative Auditor, I participated in discussions for the audits conducted in 1998 and 2005. At the request of the Office of Mauna Kea Management (OMKM), I have been an active member of the OMKM Environment Committee since 2000. Contrary to what you may have been told, I am not a naysayer; I was tasked to draft the Environment Committee white paper that led to our decision to hire a natural resources planning firm to construct a natural resources management plan for OMKM. When the MP 2000 was passed by the BOR and the OMKM was initiated, the Environment Committee was assured by then Director Bill Stormont, that natural resources staffing was the highest priority. Inexplicably, that position and others were not filled, or funded. After nine long years we have an interim director, a secretary, and five roving rangers, but no natural resource manager, and no biological inventory, no monitoring and no active management of invasive species.

I am a member of a hui of participants, including Sierra Club, who took part in successful litigation to overturn the Department of Land and Natural Resources permit for Keck Outrigger telescope development, due to the absence of a current comprehensive development plan to address multiple uses on Mauna Kea.

We were forced to intervene in the BLNR's management of Mauna Kea because BLNR abdicated its fiduciary responsibility under the law to preserve and protect the summit. The BLNR refused to comply with its own administrative rules requiring that it restrict the growth and development of the summit pursuant to a comprehensive management plan. The BLNR breached and abandoned its duties *before the contested case even began*, and then actively opposed the appellants' efforts to bring BLNR into compliance with its own administrative rules. The DLNR administrative rules explicitly state that Astronomy facilities are among the uses requiring "approved management plans", and that management in the conservation district must address "reliance on management plans to address *cumulative land proposals*."

We continue to seek to bring comprehensive management, planning and protective measures to Mauna Kea's summit to benefit the Native Hawaiian community, the citizens of Hawaii County, the citizens of the State of Hawaii, and people throughout the world who benefit from Mauna Kea's scientific, cultural, natural, esthetic, recreational, and religious resources, and for future generations.

At the end of the contested case process, the BLNR received the recommendations of the Hearing Officer, Michael Gibson. The primary condition that he recommended to the Board was the development of a management plan, and the Board adopted this condition. Only after this ruling was the development of the natural resource management plan was instigated by Ron Terry, chair of the Environment Committee.

Eventually the Board's decision to allow construction of the Keck Outrigger Telescopes was overturned, but the need for a management plan was upheld. Judge Glenn Hara's Decision and Order (January 19, 2007) ruled that a comprehensive management plan that covers multiple land uses must be developed for BLNR approval. The State of Hawaii DLNR has the sole responsibility to conserve, protect, and preserve the natural resources of the state through the appropriate management and use. It is the responsibility of the state DLNR to promulgate a comprehensive management plan for Mauna Kea. The state delayed implementation of their administrative rules, adopted in 1995, to implement a comprehensive management plan for Mauna Kea's summit that should have been in place before any additional applications were accepted for development of the summit, even though both the Administrative Rules and the public trust doctrine require implementation of a comprehensive management plan. The Hawaii Constitution adopted the public trust doctrine as a fundamental principle of constitutional law in Hawaii; for the benefit of present and future generations, all public natural resources are held in trust by the State for the benefit of the people. When it came to Mauna Kea, the state not only abandoned its duty, but it opposed substantive public rights.

The court order in *Mauna Kea Anaina Hou v. State of Hawai'i et. al.*, Third Circuit Court, Civil No. 04-1-397, requires the BLNR and the State to prepare a comprehensive management plan for Mauna Kea and then act in accordance with that plan. The ruling challenged the legal status of the University of Hawaii's 2000 Master Plan (and thus the UH Office of Mauna Kea Management the plan created)—which was neither reviewed nor approved by BLNR. There is no legal authority that supports the plan the UH is offering. The UH "plan" is little more than a development proposal and sophisticated press release disguised as a conservation plan (see OHA Position statements on the UH's CMP).

The University has not demonstrated its expertise and experience in managing important natural and cultural resources, nor does it have a history of protecting traditional and customary Native Hawaiian practices. As pointed out in the comments by the Office of Hawaiian Affairs (OHA), "the university was previously held responsible for managing commercial activities and enforcing rules; it failed at both, and had to relinquish these functions back to DLNR." The BLNR-approved 1995 Mauna Kea management plan states that "It was determined that management and enforcement responsibilities—unless they are directly related to astronomy facilities, including the Mauna Kea access road—should be transferred back to DLNR."

The Legislative Auditor reported in 2005 that "(DLNR) has failed to 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."

As a member of the Office of Mauna Kea Management's (OMKM) Environment Committee since the year 2000, I was tasked to draft the Environment Committee white paper that led to our decision to hire a natural resources planning firm to construct a natural resources management plan for OMKM. I participated in the development of the Request for Proposals to seek planners for the natural resource plan for OMKM. The Env Comm specifically required the telescope decommissioning, demolition and site restoration be addressed in the NRMP. The planning team, SRGII, developed management recommendations to identify, protect and conserve the fragile natural resources, including flora, fauna, hydrologic resources, geologic resources, and more. The management recommendations were presented to a wide representation of scientists in Hilo for comment in November 2008, and the SRGII planners were warmly commended for the management strategies posed. The NRMP recommendations were removed in the final draft of the UH CMP for reasons not explained by the University's legal team.

Members of the OMKM Environment Committee, which initially contracted with SRGII to develop a natural resource management plan for Mauna Kea, were taken aback when the University selected the public relations firm, Kuiwalu, to craft a management document, supposedly in response to Judge Hara's decision. Ms. Chang has stated in the Mauna Kea CMP draft that I have consulted on this UH "CMP". I would like to make it very clear that this is a misrepresentation of the truth. I have never consulted on this plan. I attended one of the public meetings run by Ku'iwalu, but I was not willing to participate due to the constraints placed on testimony by the imposition of an artificial agenda that did not allow the open discussion of concerns. I did take notes, and my notes reflect significant disparity between what the speakers said and what Ms Chang reported. For example, I can state without reservation that there was no unanimous agreement about the proposal to require every visitor to take part in cultural, environmental and safety education before going to the summit. I am very concerned that the truth of other statements made by Ms Chang to the legislature, the public, and to DLNR must be challenged. The public relations consulting firm hired by the University of Hawaii represents the interests of its client, not the people of Hawaii.

There are no specific objectives, benchmarks, timelines, funding sources and management entities identified to the degree that OMKM or anyone else could use to move forward. In fact this plan continues to muddy the waters with vague assertions of shared responsibility (UH/DLNR) that could allow each to point fingers at the other for years to come. This is not planning. DLNR staff Sam Lemmo has reported to you that for many management actions, the UH "CMP" did not clearly identify a responsible entity, who would prepare the sub-plan, or what it would cost.

Specific concerns, even those identified as issues with the highest risk for damage to natural resources, are not addressed. An example is the threat of contamination by hazardous materials, such as petrochemicals, fuel, and more. The desire of at least one observatory to double the diesel fuel capacity for backup power after a long power outage leads to queries over the possibility of tank rupture when another powerful earthquake strikes, such as the one that damaged the telescopes in October 2006. The NRMP does not discuss the geologic hazards in association with management of this potential contaminant.

No energy audit, no specific timetable for biological inventories of flora and fauna, no timetable for hydrologic surveys, no plan to address the possible consequences of climate change, no benchmarks to assess, and no funding sources are identified.

These proposed actions affect our rights, duties and privileges: The natural resources are the responsibility of the BLNR to protect. We have a right to a clean and healthful environment. The BLNR is required to address the eight criteria for all decisions in the Conservation District. If a proposed project does not meet ALL of the criteria, then no further action should be considered, at any time.

The University agreed in the 1985 MKSRCDP to conduct baseline inventories and ongoing monitoring of the flora and fauna, and threats inherent in industrial development. Over the past twenty five years, the funds have been found to construct numerous additional telescope facilities, but funds have been notably absent for the protective activities promised in that plan. In this plan we see far more detail about the data gaps, and prioritization of research, monitoring and protection proposed, but without funding to carry out

the plan, the proposed actions rely on the taxpayer to pay for the responsibilities incurred by the University. So little is known about the resources that any future development could impact the resource irrevocably.

Over and over, the budget concerns for proposed actions are mentioned in the subplans, but no funding source (other than the taxpayer, through University base-funding) is identified. " *OMKM may need to secure increases in base funding or obtain funds from other sources. If funding is limited, the NRMP may be implemented incrementally.*" (NRMP 5-12)

Without mandated conditions, performance measures, reporting and funding requirements placed on the University by BLNR, the plans are simply a wish-list, and the rights of the public are affected when the natural resources are degraded by neglect and indifference.

The "UH CMP" and subplans do not offer a cohesive management plan, but rather a menu of planning options. In the subplans, the vague references to astronomy industrial development in the decommissioning plan do not spell out anything but past and current projections. The subplans are inconsistent regarding the criteria for determining the carrying capacity and criteria for determining the optimal protections for resources in the conservation district. The subplans fail to protect our state's resources, nor do they delineate responsible parties and earmarked funding. It is unconscionable that DLNR would decline its full responsibility to manage these conservation lands, and it is time that the legislature addresses this failure of the Department to protect our natural resources. While the University is requesting \$2.1 M in funding for CMP implementation and funds to address legal defense of proposed telescope development, these funds could be allocated, instead to DLNR management staff and enforcement personnel.

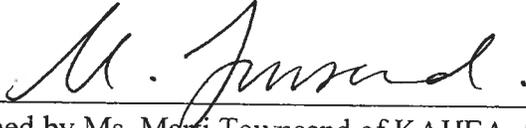
This UH "CMP", which references the 2000 Master Plan sixty two (62) times, claims the document provides the guiding principles for this document. That development plan has never been scrutinized by the BLNR, and yet it is referenced as the determining document for future development. Any consideration of the CMP, would deny due process to the public, because the CMP does not append the MP2000 for public review, nor have announcements indicated that the MP2000 is under consideration. DLNR staff Sam Lemmo references the 2000 MP in staff recommendations, that future plans be consistent with this document. Any incorporation of the 2000 MP, which has never come before the BLNR for approval, into the UH "CMP" violates BLNR rules and public notice requirements.

In our call for a contested case, both for the UH CMP, and for these subplans, we assert that we have standing as distinct from the general public by our longstanding recreational and regenerative use of the Mauna Kea Conservation District. We believe that ceded land belongs to the native Hawaiians and the general public, held in trust by DLNR, and that all of the people have "property rights", and should not be denied standing.

I share with most of the audience an intense desire to improve the management of Mauna Kea, and to protect it for future generations. I do not believe that the UH "CMP" and subplans address this goal appropriately. I do not believe that DLNR has the authority to abandon its responsibilities to manage this fragile conservation land. I join others in this room in calling for a contested case hearing.

**We thank you for your time and consideration of our contested case hearing request,**

**Aloha,**



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Signed by Ms. Marti Townsend of KAHEA, for Deborah Ward of Sierra Club Hawai'i Chapter

DATED: Hilo, Hawaii, April 1, 2010



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Signed by Ms. Marti Townsend of KAHEA, for Ms. Deborah Ward, Individually

Please see signature authorization for Ms. Marti Townsend attached also.

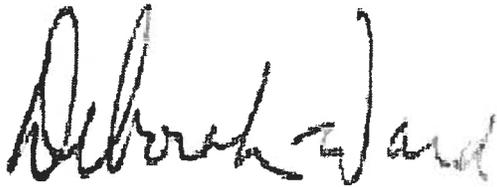


April 1, 2010

KAHEA  
Marti Townsend  
Kealoha Pisciotta

I am travelling on the mainland, and I hereby authorize KAHEA to submit the Contested Case Hearing Request and application for standing on behalf of Sierra Club, Hawaii Chapter.

Sincerely,

A handwritten signature in black ink that reads "Deborah Ward". The signature is written in a cursive, flowing style.

Deborah Ward  
Mauna Kea Issues Co-Chair



**PETITION FOR A CONTESTED CASE HEARING**

**BOARD OF LAND AND NATURAL RESOURCES**

RECEIVED  
DEPT. OF CONSERVATION  
& COASTAL LANDS  
2010 APR 12 P 4: 02  
Phone: (808) 935-9656  
DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

1. **Name:** Royal Order of Kamehameha I,  
Moku o Mamalahoa, Heiau Helu `Elua,  
Paul K. Neves
2. **Address:** Royal Order of Kamehameha I  
c/o Paul K. Neves  
380 Nahale-a Ave.  
Hilo, Hawai`i 96720
3. **Attorney:** Not sure yet.
4. **Address:** N/A
5. **Subject Matter:** BLNR review and adoption of the University of Hawai`i's  
Comprehensive Management Plan (UHCMP), Sub-plans and  
related documents
6. **Date of public hearing/Board meeting:** March 25, 2010 and also April 8-9,  
2009 in Hilo Hawai`i
7. **Legal authority under which hearing, proceeding or action is being made:**  
  
HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 205, HAR §  
13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key  
of property affected:**
  - a. **Tax Map Key Numbers:** 4-4-15:09 &12, Mauna Kea, Hamakua, Hawai`i
  - b. **Background**

The following background is presented in two separate but related parts. We file this background in two parts because BLNR voted twice to approve University of Hawai`i's documents relating to the "management" of Mauna Kea. BLNR's approval of the UH documents involves the transfer of regulatory oversight and authority over the Mauna Kea Conservation District, which in turn affects our legal rights, duties and privileges.

Part I, outlines what occurred on April 8-9, 2009 when the Board of Land and Natural Resources (BLNR) voted to approve the University of Hawai`i's "Comprehensive Management Plan" (CMP) while simultaneously placing conditions requiring the University of Hawai`i's (UH) to prepare and submit four (4) more "sub-plan" for approval at a later date.

Part II outlines the BLNR's recent approval of the UH's four (4) conditional "sub-plans" on March 25, 2010.

## **PART I**

In April 2009, BLNR held a noticed public hearing (April 8-9, 2009) at the Hilo Hawaiian Hotel in Hilo, Hawai`i. On April 8, 2009, I, Kealoha Pisciotta, President, Mauna Kea Anaina Hou (MKAH) presented testimony addressing BLNR's review and proposed decision making on the University of Hawai`i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku`iwalu Incorporated (Ku`iwalu Inc.). We concluded our testimony requesting a contested case hearing, in order to have an opportunity to present evidence on how the UH CMP would affect and negatively impact our legal rights, duties and privileges.

On April 9, 2009, after the close of public comment, BLNR went into executive session. The Board after executive session proceeded to vote to adopt the UH CMP prepared by Ku`iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. "The University of Hawai`i Board of Regents (UHBOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- **public access**
- **natural resources**
- **cultural resources**
- **decommissioning (including financing and bonds for restoration)**

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not

delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

The BLNR did not address our CCH request and instead voted to adopt the UH CMP. This affected our legal rights, duties and privileges.

## **PART II**

On March 25, 2010, The BLNR held a noticed public hearing to review the UH's four "sub-plans" previously requested at the April 8-9, 2009 public hearing described in PART I above. I, Paul K. Neves was not able to attend the public hearing to represent myself or the Royal Order of Kamehameha I held on March 25, 2010 as I had injured my leg. Ms. Kealoha Pisciotta submitted our joint testimony on that day.

The UH documents under review included the UH's cultural resource plan (CRP), natural resource plan (NRP), decommissioning plan (DP) and public access plan (PAP). The UH also submitted two other documents called the "project submittal timeline" and "major project sequence of steps." All the abovementioned documents cite to and rely on the UH CMP approved at the April 2009 BLNR hearing. All documents cite to and rely on the UH Master Plan 2000 (UHMP2000) which has never been reviewed or adopted by BLNR.

Department staff (Mr. Sam Lemmo) presented the DLNR staff report recommending the approval of all documents. The Board Chair gave the UH President, representatives of the UH Office of Mauna Kea Management (OMKM), UH Kahu Ku Mauna group (KKM), and Mauna Kea Management Board (MKMB) time to discuss various the "plans".

The BLNR and the UH had added approval "the transfer of control of management of Mauna Kea from the UH Board of Regents (UHBOR) to the Office of Mauna Kea Management" as well.

**NOTE:** The OMKM was created under the University's 2000 Master Plan--a document not in evidence, never reviewed nor approved by BLNR.

Neither the UH, it's agents (i.e. OMKM) nor the private planning firms that created all of the UH management documents approved by BLNR have legal authority to manage and/or control conservation districts, including the Mauna Kea conservation district.

The BLNR afforded the public two (2) minutes to discuss the merits of these large “sub-plan” documents. We explained we needed more time, which was never granted. We requested a contested case hearing in order to have an opportunity to present evidence on how these plans and associated documents would impact our legal rights, duties and privileges as Hawaiian cultural and traditional practitioner’s of Mauna Kea.

BLNR member Mr. David Good asked the Deputy Attorney General some basic questions, including if Kapa`akai (as in the Supreme Court case titled *kappa`akai v. LUC*) had any precedent--for which the Deputy AG responded in the negative.

At the close of the meeting at around 12 noon, BLNR voted to approve all of the plans as well as approving the transfer of authority over Mauna Kea from the UHBOR to the OMKM.

**c. Standing.**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The Royal Order of Kamehameha I, Moku o Mamalahoa, Heiau Helu `Elua (ROOK I), is an unincorporated association of Hawaiian individuals. The Royal order of Kamehameha I of which ROOK I is a part, was created well over 130 years ago. Its charter dates back to the 1860’s. The Royal order was formed to instill loyalty and patriotism to the Hawaiian Kingdom and to uphold the protocols of the traditional and customary Hawaiian leadership. Members of ROOK I have been actively involved exercising traditional and customary Native Hawaiian cultural and religious practice and ceremony on Mauna Kea and have consistently worked for greater natural and cultural resources protection of Mauna Kea since the 1990’s.

I, Paul K. Neves, Ali`i Sir of the ROOKI, and as an individual continue to exercise traditional and customary Hawaiian cultural and religious practice and I and other members of ROOK I have family and genealogical ties to Mauna Kea and Haleakala.

BLNR denied our request for a CCH on the UH CMP. They denied our standing (claiming among other things that we had no “property interest”). We filed an appeal into the Third Circuit Court where our case was dismissed without prejudice for lack of “ripeness.”

**Judicial Notice:** On March 19, 2010, we appealed the Third Circuit Court’s decision regarding BLNR’s denial of our request for a CCH and our standing into Intermediate Court of Appeals.

ROOK I was previously granted standing by BLNR in a previous Contested Case Hearing regarding BLNR approval of Conservation District Use Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. ROOK I was also Plaintiff in the Third Circuit Court agency appeal of the final decision made by

the BLNR regarding the CDUP Application (HA-3065B), in 2004 (*Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397).

Members of ROOK I participate in many traditional and customary native Hawaiian practices within the Mauna Kea summit, Ice Age Natural Area Reserve and Mauna Kea Science Reserve and Hale Pohaku areas. However, ROOK I members have maintained and temple ceremony and practices within the above area land areas, including Pu`u Wekiu of Mauna Kea. ROOK I erected a ceremonial plate form on the Pu`u Wekiu many years ago and has had to replace it on at numerous and separate occasions after it was desecrated and destroyed.

Many ROOK I members are native Hawaiian, as defined under Section 4 of the Hawaii Admission Act. These rights include but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. Thus, members of ROOK I enjoy constitutionally protected traditional and customary native Hawaiian rights.

ROOK I has interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, sub-plans and related documents separate from those interests held by the General Public and can provide relevant information to help decision-making regarding the UH CMP. In order to help expedite the Contested Case Hearing Process, ROOK I is willing to work with any other parties so that where common and shared interests between parties exist we will to work to file jointly.

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect these rights by preventing any interference with the reasonable

exercise of these rights. Kapa`akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai`i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP, sub-plans and other management documents impact land use within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP, sub-plans and other management documents threatens the exercise of these rights by Petitioners. Petitioners rights to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights also include, but are not limited to:

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

Native Hawaiian customary and traditional cultural and religious rights are a public trust purpose.

Public Trust. Article XI. Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66, places jurisdiction of water quality in the Department of Health. BLNR’s jurisdiction over the conservation district of Mauna Kea must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii’s people from groundwater contamination emanating from sources traceable to any observatory projects on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating

from the observatories. The UH CMP, sub-plans and related documents also confirm this concern.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi'ihonua and Humu'ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants DHHL a right of first refusal to waters from public lands. Many ROOK I members are also HHCA beneficiaries.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising from the private use of public trust lands, (by the foreign and non-state governments and corporations operating atop Mauna Kea) and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation districts, including the Mauna Kea conservation district. The UH and BLNR failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) the UH CMP, sub-plans and related documents.

The *Wekiu*. Extinction is forever and any possible threats to any species are unacceptable in these times. The ROOK I as hereditary chiefs have an interest in protecting all life in Hawai'i. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5<sup>th</sup> Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it

if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the Wekiu as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP, sub-plans and related documents under review and adopted in by BLNR reference the UH 2000 MP. This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the UHBOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH MP2000 includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the UH CMP, sub-plans and related documents will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," *id.* § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," *id.* § 1508.27(b)(4);

- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," *id.* § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," *id.* § 1508.27(b)(7);
- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b)(10).

**9. The specific disagreement, denial or grievance with the above matter:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Traditional and Customary Rights of Hawaiians. The BLNR wholesale delegation of their fiduciary duty to oversee, manage and reasonable protect the cultural and natural resources of Mauna Kea necessarily affects and negatively impacts our legal rights, duties, and privileges.

The UH while a state agency, is in a conflict of interest, first, because they are not the state agency mandated to oversee conservation district (BLNR has this responsibility) and secondly because the UH has a specific interest in seeking more development to improve their academic credentials (see State Auditors reports regarding the BLNR and UH's failure to manage Mauna Kea). The UH also files CDUA's with foreign and non-state observatory developers for the use of Mauna Kea. The UH therefore is the primary supporter and mover of development of Mauna Kea, which has great impact on the cultural and natural resources of Mauna Kea.

Therefore, the BLNR's approval of the UH CMP, sub-plans and related documents will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support

Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP, sub-plans and other related documents grants the UH and their designated agents (hand selected and appointed people) the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. ROOK I seeks to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. One of the observatory tour guides and UH "rangers" giving also removed, desecrated and destroyed a family shrine of MKAH President's (family stone and ahu). I, Paul K. Neves also helped to build a small ahu with Ms. Pisciotta and to date the ahu and this site has been desecrated and destroyed many times the latest of which occurred just last year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The archeological studies of the summit area of Mauna Kea are **not** complete, and so far burial sites are the second largest historic sites found. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting, as the water ice and snow is collected for medicine and other ceremonies. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea conservation district. Petitioner ROOK I has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and

Pohakuloa Military Training Reserve. Petitioner MKAH has spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner ROOK I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently accessed impacts, or to reduce or

mitigate these impacts. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

Petitioner ROOK I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review as impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Failure to prepare a “Comprehensive” Management Plan as required by law. UH’s public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. “Carrying capacity;”
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

**10. Outline of specific issues to be raised:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397?
- b. Whether BLNR whole delegated its fiduciary duty to protect the reasonable exercise of customary and traditional Native Hawaiian cultural and traditional practices, when it allowed the UH, its agents, and private planning firms to determine, prescribe, describe, place conditions upon and regulate Hawaiian practices, use and access on Mauna Kea?
- c. Whether BLNR unlawfully voted to approve the UH CMP, sub-plans and related documents after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings held on both 4/8/09-4/9/09 and 3/25/10? Whether BLNR’s approval violated both DLNR’s own rules and due process?

- d. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- e. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- f. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- g. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- h. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper appraisal and at less (for \$1.00 per year) than their independently appraised fair-market value.
- i. Whether the BLNR should have adopted the UH CMP, sub-plans and related documents before independently identifying, assessing, and implementing actions to protect Petitioner MKAH's constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP, sub-plans and related documents before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?
- j. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for UH sub-plans and related documents prior to approving them. This is one way to protect the cultural and natural resources of Mauna Kea?
- k. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.
- l. Whether the BLNR improperly approved the UH CMP, sub-plans and related documents that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, cultural offerings, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance

of those sites, and the ability to continue religious practices at these sites?

**11. Outline of basic facts:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The record in this matter is contained in (1) the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397, (2) BLNR hearing records and our testimony regarding BLNR's April 8-9, 2009 public hearing, and (3) BLNR hearing records and our testimonies filed for BLNR hearing 3/25/10 and other public documents on record in all of the abovementioned proceedings. We incorporated the above mentioned proceeding documents here by reference, as BLNR has copies in their records as well.

In brief, the industrial astronomy foot print of the observatories built atop Mauna Kea has caused physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and even destroyed historic and cultural sites (including those of MKAH, and myself, Kealoha Pisciotta). The failure to genuinely prepare a master plan and to restrict and manage development activities on Mauna Kea has led to the destruction/overuse and loss of the unique natural and cultural resources on the mountain

The UH CMP, sub-plans and related documents are poorly conceived and are wholly inadequate to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The UH CMP is not such a plan. Nor are the ad hoc collection of "sub-plans" and related documents a remedy to the destruction and impact on the cultural and natural resources of Mauna Kea.

In fact the UH CMP, sub-plans and related documents impose excessive restrictions and limitations on native Hawaiian use and access. This occurs because the BLNR is delegating its authority to the UH, who is in a conflict of interest. There are already laws in place that should be enforced by BLNR--but rather than BLNR enforcing the existing laws to protect cultural and natural resources, they are letting the UH and their un-authorized agents (i.e. rangers, KKM, OMKM, and MKMB) to regulated the public and Native Hawaiians who are right-holders. We believe this regulation is excessive, burdensome and actually interferes with the "reasonable" exercise of the public and Native Hawaiians rights. For BLNR to regulate rights it must be able to show these exercised rights are un-reasonable.

There simply is no substitute for an integrated and fully considered plan prepared by DLNR and adopted by the BLNR that addresses astronomy developmental carrying capacity, protection of the cultural and natural resources and that ensure the protection of the reasonable exercise of Hawaiian customary and traditional cultural and religious practice. The UH CMP, sub-plans and related documents the Board approved are not sufficient and further excessively interfere and regulate our access and reasonable use, thus affecting our legal rights, duties, and privileges.

**12. The relief or remedy to which you seek or deem yourself entitled:**

That the BLNR:

- a) REJECT AND NOT APPROVE OR ADOPT UH CMP, sub-plans and related documents;
- b) DIRECT the DLNR staff to undertake, supervise, and prepare a “comprehensive management plan” as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a “comprehensive management plan” as required by law;

OR IN THE ALTERNATIVE,

- c) GRANT Petitioner MKAH standing in the UH CMP, sub-plans and related documents proceeding and CONDUCT a full contested case hearing on the proposed CMP, sub-plans and related documents.

TESTIMONY SUBMITTED AT THE BLNR PUBLIC HEARING ON MARCH 25, 2010:

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

**Board of Land and Natural Resources  
Public Hearing**

University of Hawai'i Mauna Kea “Comprehensive” Management Plan, Sub-plans and other documents

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

**I. Introduction**

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

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

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

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

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

### **A. Jurisdictional Confusion**

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

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

everything that happens on Mauna Kea. You--BLNR--have had to carry the brunt and burden of the UH and observatories actions--but this is because you have continued to delegate authority to them that legally cannot be delegated.

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

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

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

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

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

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

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

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

#### **The UH Master Plan 2000**

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

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

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

Further, according to the UH documents if the UH decides the project is “minor” the project will be exempt from state and/or federal environmental, historic preservation and/or cultural impact review. The first purpose of any conservation district is conservation and not development--so all land altering activities in a conservation district are major. BLNR, it is not enough that you may have some control over project the UH classifies as “major”. By law you must have control over all land altering activities on Mauna Kea.

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

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

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

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

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

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

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

On page 7, 15 of 86 the DP states,

#### **2.2.4 Site Abandonment**

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

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

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

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

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

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

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

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

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

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

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

There is no question the greatest threat to the cultural and natural resources of Mauna Kea is destruction of the sacred landscape--destruction of the landscape due to the astronomy industry's expanding footprint. The sub-plans regulate public and Hawaiians activities and access, but they are virtually silent on how they intend to actually halt the expanding industrial astronomy footprint. The plans do not consider a limit on development with respect to the resources--can the resources handle any more development? When the resources are degraded it affects public ability to enjoy these resources and impacts Hawaiian cultural rights, which in turn impacts our rights, duties,

and privileges.

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

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

### III. SPECIFIC PROBLEMS

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

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

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

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

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

**“Although contemporary cultural practices are not afforded special protection under the Hawai`i constitution...”**

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

The supreme court of Hawai`i specifically used two words (customary and traditional) to describe Native Hawaiians continued cultural and religious rights. Where one definition describes long held beliefs, belief systems and ways of seeing the world (like honoring and extending Aloha), the other describes the way people demonstrate or express these beliefs (giving leis as an expression of Aloha).

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

the state is obligated to protect. The customary and traditional Hawaiian cultural and religious practices relating to Mauna Kea include the following:

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

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

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

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

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

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

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

**4. UH grants to themselves and their people the power to determine what is culturally appropriate or what is not.** The UH CRP on pages 4-18-124 of 262, states “No restrictions shall be placed on any Hawaiian cultural observance **that is deemed to be appropriate by Kahu Kū Mauna and other Native Hawaiian organizations** as long as the practices do not violate Chapter 6E.” Here power and authority to determine what is cultural “appropriate” and what is

not is held by the UH and people that sit on the Kahu Ku Mauna who are hand selected by the UH. And while the UH give some boiler pot language to include other organizations--this is another stark example of excessive control and interference by the UH. Since in the end the UH has the ultimate and final say--on what is **culturally appropriate or not**.

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

**6. The UH grants to themselves the right to override Native Hawaiian burial traditions.**

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

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

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

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

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

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

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

How was my ahu construed as an unreasonable activity?

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

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

First, "A`ohe pau ka ike i ka halau ho`okahi-All knowledge is not taught in the same school." While different families may carry different knowledge--no one family or appointed groups of people can speak for all. To discount our histories is to discount our genealogy as well. We would like to refer the CRP authors to Malcolm Naea Chun's recent book titled "The History of Kanalu: Mo`oku`auhau `Elua" which recounts the repopulating of the earth after the flood--and includes at least 900 generations.

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

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

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

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

I, thank you for your time and consideration of our contested case hearing request,  
In Aloha I remain,

---

Signed by Ms. Kealoha Pisciotta on behalf of Paul K. Neves of The Royal Order of  
Kamehameha I

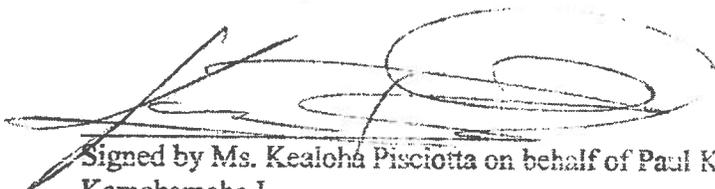
DATED: Hilo, Hawaii, April 1, 2010

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Signed by Ms. Kealoha Pisciotta on behalf of Paul K. Neves, Individually

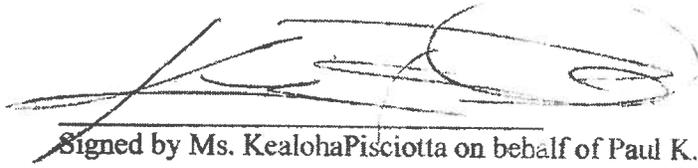
Please see signature authorization attached

I, thank you for your time and consideration of our contested case hearing request,  
In Aloha I remain,



Signed by Ms. Kealoha Pisciotto on behalf of Paul K. Neves of The Royal Order of  
Kamehameha I

DATED: Hilo, Hawaii, April 1, 2010



Signed by Ms. Kealoha Pisciotto on behalf of Paul K. Neves, Individually

Please see signature authorization attached



PETITION FOR A CONTESTED CASE HEARING

RECEIVED  
OFFICE OF CONSERVATION  
& COASTAL LANDS

BOARD OF LAND AND NATURAL RESOURCES

2010 APR 12 P 4: 03

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

1. **Name:** Clarence Kukauakahi Ching  
**Phone:** (808) 769-3828
2. **Address:** 64-823 Mamalahoa Highway  
Kamuela, HI 96743
3. **Attorney:** Pro se.
4. **Address:** N/A
5. **Subject Matter:** BLNR approval and adoption of the University of Hawai'i's sub-plans and other related management plan documents for Mauna Kea, Hawai'i.
6. **Date of public hearing / Board meeting:** March 25, 2010 held at the Imiloa Astronomy Center, Hilo Hawai'i
7. **Legal authority under which hearing, proceeding or action is being made:**  
HRS § 91-2, 91-9, HRS § 171-6, HRS §§ 183C-3, 183C-6, HRS § 205, HAR § 13-1-28, HAR § 13-1-29, HAR § 13-1-31
8. **Nature of your specific legal interest in the above matter, including tax map key of property affected:**

a. **Tax Map Key Numbers:** 4-4-15:09 &12, Mauna Kea, Hamakua, Hawai`i

b. **Background**

The following background is presented in two separate but related parts. We file this background in two parts because BLNR voted twice to approve University of Hawai`i's documents relating to the "management" of Mauna Kea. BLNR's approval of the UH documents involves the transfer of regulatory oversight and authority over the Mauna Kea Conservation District, which in turn affects our legal rights, duties and privileges.

Part I, outlines what occurred on April 8-9, 2009 when the Board of Land and Natural Resources (BLNR) voted to approve the University of Hawai`i's "Comprehensive Management Plan" (CMP) while simultaneously placing conditions requiring the University of Hawai`i's (UH) to prepare and submit four (4) more "sub-plan" for approval at a later date.

Part II outlines the BLNR's recent approval of the UH's four (4) conditional "sub-plans" on March 25, 2010.

## **PART I**

In April 2009, BLNR held a noticed public hearing (April 8-9, 2009) at the Hilo Hawaiian Hotel in Hilo, Hawai`i. On April 8, 2009, I, Clarence Ching, presented testimony addressing BLNR's review and proposed decision making on the University of Hawai`i (UH) Comprehensive Management Plan (UH CMP) prepared by the Honolulu based public relations firm Ku`iwalu Incorporated (Ku`iwlau Inc.). I concluded my testimony requesting a contested case hearing, in order to have an opportunity to present evidence on how the UH CMP would affect and negatively impact my legal rights, duties and privileges.

On April 9, 2009, after the close of public comment, BLNR went into executive session. The Board after executive session proceeded to vote to adopt the UH CMP prepared by Ku`iwalu Inc., subject to the following conditions (transcribed from video tape of the BLNR 4/8/09-4/9/09 public hearings):

1. "The University of Hawai'i Board of Regents (UHBOR) is the entity responsible for the implementation of the CMP, subject to the oversight of the BLNR. The BOR may delegate its responsibility and accompanying authority to another entity within the University system, subject to the approval of the BLNR.

2. Within one year of the approval of the CMP or prior to submittal of a CDUA, the BOR or its authorized designee shall provide the BLNR in writing and in person with the following sub-plans for review and approval:

- public access
- natural resources
- cultural resources
- decommissioning (including financing and bonds for restoration)

3. The BOR or its authorized designee shall continue to submit annual reports to the BLNR (in writing and in person) which shall include the items listed in No. 2 above.

4. Amendments to the CMP shall be reviewed and approved first by the BOR and second by the BLNR

5. The BOR recognizes that by approving the CMP, the BLNR has not delegated any authority (not already in existence) to the University with respect to land use approvals, leasing, or public access at Mauna Kea

6. Within one year of BLNR's approval of the CMP or prior to submission of a CDUA, the BOR (or its authorized designee) shall provide the BLNR (for review and approval), with a management and implementation framework that has been authorized by the BOR for developments within UH Management Area as that is consistent with the specific management actions, conditions, and policies of the CMP.

7. Failure to comply with these conditions may subject the University to the imposition of additional conditions to ensure compliance with the CMP and any penalties allowed under the law."

The BLNR did not address our CCH request and instead voted to adopt the UH CMP. This affected our legal rights, duties and privileges.

## **PART II**

On March 25, 2010, The BLNR held a noticed public hearing to review the UH's four "sub-plans" previously requested at the April 8-9, 2009 public hearing described in PART I above. The UH documents under review included the UH's cultural resource plan (CRP), natural resource plan (NRP), decommissioning plan (DP) and public access plan (PAP). The UH also submitted two other documents called the "project submittal timeline" and "major project sequence of steps." All the abovementioned documents cite to and rely on the UH CMP approved at the April 2009 BLNR hearing. All documents cite to and rely on the UH Master Plan 2000 (UHMP2000) which has never been reviewed or adopted by BLNR.

Department staff (Mr. Sam Lemmo) presented the DLNR staff report recommending the approval of all documents. The Board Chair gave the UH President, representatives of the UH Office of Mauna Kea Management (OMKM), UH Kahu Ku Mauna group (KKM), and Mauna Kea Management Board (MKMB) time to discuss various the "plans".

The BLNR and the UH had added approval "the transfer of control of management of Mauna Kea from the UH Board of Regents (UHBOR) to the Office of Mauna Kea Management" as well.

**NOTE:** The OMKM was created under the University's 2000 Master Plan--a document not in evidence, never reviewed nor approved by BLNR.

Neither the UH, it's agents (i.e. OMKM) nor the private planning firms that created all of the UH management documents approved by BLNR have legal authority to manage and/or control conservation districts, including the Mauna Kea conservation district.

The BLNR afforded the public two (2) minutes to discuss the merits of these large "sub-plan" documents. We explained we needed more time, which was never granted. We requested a contested case hearing in order to have an opportunity to present evidence on how these plans and associated documents

would impact our legal rights, duties and privileges as Hawaiian cultural and traditional practitioner's of Mauna Kea.

BLNR member Mr. David Good asked the Deputy Attorney General some basic questions, including if Kapa`akai (as in the Supreme Court case titled *kappa`akai v. LUC*) had any precedent--for which the Deputy AG responded in the negative.

At the close of the meeting at around 12 noon, BLNR voted to approve all of the plans as well as approving the transfer of authority over Mauna Kea from the UHBOR to the OMKM.

### c. Standing.

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

I have been actively involved in protecting Mauna Kea's natural and cultural resources since the late 1980s. I continue to exercise traditional and customary Hawaiian cultural and religious practices on Mauna Kea. I have family and genealogical ties to Mauna Kea.

BLNR denied my request for a CCH on the UH CMP. They denied my standing (claiming among other things that I had no "property interest"). I, along with other cultural practitioners and conservationists, filed an appeal into the Third Circuit Court where our case was dismissed without prejudice for lack of "ripeness."

**Judicial Notice:** On March 19, 2010, we appealed the Third Circuit Court's decision regarding BLNR's denial of our request for a CCH and our standing into Intermediate Court of Appeals.

BLNR previously granted us standing and our request for contested case hearing on the Conservation District Use Permit (CDUP) Application (CDUA-HA-3065B, 2002) for the expansion of observatory facilities on Mauna Kea. MKAH was one of the Plaintiffs in *Mauna Kea et al., v. State of Hawai'i, University*

*of Hawaii, Board of Land and Natural Resources, Third Circuit, Civil No. 04-1-397 (appeal of CDUP HA-3065B in 2004).*

I exercise my traditional and customary native Hawaiian rights within the Mauna Kea summit, Ice Age Natural Area Reserve, the Mauna Kea Science Reserve, and Hale Pohaku areas. I am native Hawaiian, as defined in the Hawaii Admission Act, Section 4. These rights include, but are not limited to the exercise of traditional and customary practices related to the use of Lake Waiau and other water sources and cultural sites in and around the summit area for the gathering of ice, snow, water, raw materials for adz making, depositing of the "piko" or umbilical cord in Lake Waiau, performing traditional astronomy, cosmology, navigation, continuing burial practices, performing solstice and equinox ceremonies, and conducting temple worship, in, among, and around the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve. I have enjoy constitutionally protected traditional and customary native Hawaiian rights.

I have an interest in the Mauna Kea lands under review by the BLNR relating to the adoption of the UH CMP, sub-plans and other related documents, separate from those of the general public. I can and will provide information to assist decision-making on the UH CMP, sub-plans and other related documents. To manage and expedite the Contested Case Hearing, I will work jointly with other parties who share common interests to organize and make a single presentation addressing:

Rights protected under Section 5(f) of the Hawaii Admission Act, Hawaii Const. Art. XI, secs.1 & 7, Art. XII, § 7, HRS § 1-1, HRS § 7-1, HRS § 10-13.5, HRS § 171-55, HRS §§ 171-58(a)-(g); HRS §§ 183C-3, 183C-6, HRS chapter 195D, HRS chapter 343; 40 C.F.R. § 1508.27(b).

Traditional and Customary Practices. Article XII, section 7, Hawaii Constitution recognizes the importance of such rights by placing an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights. Accordingly, the State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. Public Access Shoreline Hawaii v. Hawai'i County Planning Commission (hereinafter "PASH"), 79 Haw. 425, 450 n.43, 903 P.2d 1246, 1271 n.43 (1995), certiorari denied, 517 U.S. 1163, 116 S. Ct. 1559, 134 L. Ed. 2d 660 (1996). More precisely, all State agencies have a duty to identify them, assess the potential impacts of development on them, and protect

these rights by preventing any interference with the reasonable exercise of these rights. Kapa`akai v Land Use Commission, 94 Haw. 31; 7 P.3d 1068 (2000). These rights, established during the period of the Kingdom of Hawaii, have been carried forth in the laws of Hawai`i unaffected by the changes in government. The exercise of such rights is a public trust purpose.

The proposed UH CMP, sub-plans and other management documents impact land use within the Mauna Kea summit, Ice Age Natural Area Reserve, and Science Reserve areas of Mauna Kea. The UH CMP, sub-plans and other management documents threatens the exercise of these rights by Petitioners. Petitioners rights to exercise their traditional and customary native Hawaiian rights in, among, and around Mauna Kea summit and slopes derived from custom which is recognized statutorily in HRS § 1-1. These rights also include, but are not limited to:

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

Native Hawaiian customary and traditional cultural and religious rights are a public trust purpose.

Public Trust. Article XI, Sections 1 and 7. Hawaii Constitution recognize the application of the public trust to all natural and water resources without exception or distinction and require that the State to protect all water resources (and water quality) for the benefit of its people.

HRS § 174C-66, places jurisdiction of water quality in the Department of Health. BLNR's jurisdiction over the conservation district of Mauna Kea must be exercised in conjunction with the Department of Health Department to preserve water quality in the water sources underlying Mauna Kea. Petitioners have an interest in protecting that water source for the benefit of future generations of Hawaiians and Hawaii's people from groundwater contamination emanating from sources traceable to any observatory projects on Mauna Kea. Petitioners are informed and believe that there is a substantial threat of such pollution, especially from sewage and the use of mercury and other hazardous materials, emanating from the observatories. The UH CMP, sub-plans and related documents also confirm this concern.

Hawaiian Homes Commission Act. The ground water beneath the summit of Mauna Kea is a source of drinking water for Hawai'i Island, the Pohakuloa Military Training Ground, and Mauna Kea State Park. It is also source of groundwater for homesteading in Pi'ihonua and Humu'ula where the Department of Hawaiian Home Lands owns over 59,000 acres of homestead land. Section 221 of the Hawaiian Homes Commission Act grants DHHL a right of first refusal to waters from public lands.

Section 5(f) Public Trust Land Revenues. Petitioners are beneficiaries of the public trust established by Section 5(f) of the Hawaii Admission Act to support programs "for the betterment of the conditions of native Hawaiians." As beneficiaries of this trust, Petitioners have an interest in the Trustee's conduct to protect the trust res, to prevent waste, to secure trust revenues arising from the private use of public trust lands, (by the foreign and non-state governments and corporations operating atop Mauna Kea) and to require an accounting. The failure of the Trustee to collect fair market lease rent from private third party occupation and use of 5(f) lands raises serious legal issues that beneficiaries have standing to raise before the Trustee.

Hawaii Environmental Policy Act. Under HRS chapter 343, an EIS is required for all projects which will significantly impact a conservation districts, including the Mauna Kea conservation district. The UH and BLNR failed to prepare an EIS, despite the significant cumulative effects of the proposed observatory expansion as referenced in the UH 2000 Master Plan) the UH CMP, sub-plans and related documents.

The Wekiu. Under the Endangered Species Act, the state is required to protect species that are subject to potential extinction and is supposed

to coordinate its activities with the federal government to promote the conservation of endangered and threatened species. 16 USC § 1531, et seq. The purpose of this act is not only to allow such species to survive but to recover from their endangered or threatened status. Sierra Club v United States Fish & Wildlife Serv. 245 F3d 434 (5<sup>th</sup> Cir. 2001). This board also has the power under state law to protect any other specie it determines needs protection because of "[t]he present or threatened destruction, modification, or curtailment of its habitat or range." HRS § 195D-4(b).

Although the *Wekiu* insect has been designated as a candidate for listing since 1999, it has never been listed as endangered or threatened species under the Endangered Species Act, the BLNR has specific duties to protect and conserve it if its survival is threatened by over-development of the Mauna Kea summit. It should be noted that a formal request has been filed with the Department of the Interior to list the *Wekiu* as an endangered species.

National Historic Preservation Act (NHPA). The UH CMP, sub-plans and related documents under review and adopted in by BLNR reference the UH 2000 MP. This plan has no force or effect of law, since it was not prepared by DLNR and approved by BLNR, only the UHBOR. The UH CMP incorporates by reference the UH 2000 MP, mentioning it at least 62 times. The development section of the UH 2000 MP referenced in the UH MP2000 includes future development of dozens of telescopes, including those planned by federal agencies, and/or those that have received substantial federal funding (i.e. The Thirty Meter Telescope or the TMT) constituting a federal under taking under federal law.

Section 106 of the NHPA requires all federal undertakings expending funds on projects to assure that there is adequate consultation with the Advisory Council on Historic Preservation and to assure that historic properties eligible for inclusion on the National Historic Register are protected after adequate consultation with affected groups. The State Historic Preservation Officer has determined that Mauna Kea is eligible for inclusion on the National Historic Register. Federal law requires federal project/agencies to consult with native groups to give them the opportunity to define their concerns relating to the "intangible aspects" of the property. National Register Bulletin 38-"Guidelines for evaluating and documenting Traditional Cultural Properties" establishes criteria for evaluating these aspects of historic properties. Bulletin 38 criteria are

supposed to be used in conjunction with Section 106 to evaluate Historic Properties.

National Environmental Policy Act. Press statements to the contrary, actions covered by the UH CMP, sub-plans and related documents will employ federal funds. Under NEPA regulations, "an agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." The regulations promulgated by the Council on Environmental Quality established the following nonexclusive criteria for determining when a full EIS is required:

- "Impacts that may be both beneficial and adverse. A significant impact may exist even if the Federal agency believes that on balance the effect will be beneficial," 40 C.F.R. § 1508.27(b)(1);
- "Unique characteristics of the geographic area such as the *proximity to historic or cultural resources...or ecologically critical areas*," id. § 1508.27(b)(3);
- "The degree to which the effects on the quality of the human environment are likely to be *highly controversial*," id. § 1508.27(b)(4);
- "The degree to which the possible effects on the human environment are *highly uncertain* or involve unique and unknown risks," id. § 1508.27(b)(5);
- "The degree to which *the action may establish a precedent for future actions with significant effects* or represents a decision in principle about a future consideration," id. § 1508.27(b)(6);
- "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a *cumulatively significant impact* on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts," id. § 1508.27(b)(7);

- "The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or *eligible for listing in the National Register of Historic Places* or may cause loss or destruction of significant scientific, cultural or historical resources," *id.* § 1508.27(b)(8);
- Whether the action threatens a violation of...requirements imposed for the protection of the environment, *id.* § 1508.27(b) (10).

**9. The specific disagreement, denial or grievance with the above matter:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

Traditional and Customary Rights of Hawaiians. The BLNR wholesale delegation of their fiduciary duty to oversee, manage and reasonable protect the cultural and natural resources of Mauna Kea necessarily affects and negatively impacts our legal rights, duties, and privileges.

The UH while a state agency, is in a conflict of interest, first, because they are not the state agency mandated to oversee conservation district (BLNR has this responsibility) and secondly because the UH has a specific interest in seeking more development to improve their academic credentials (see State Auditors reports regarding the BLNR and UH's failure to management of Mauna Kea). The UH also files CDUA's with foreign and non-state observatory developers for the use of Mauna Kea. The UH therefore is the primary supporter and mover of development of Mauna Kea, which has great impact on the cultural and natural resources of Mauna Kea.

Therefore, the BLNR's approval of the UH CMP, sub-plans and related documents will lead to abridgement and/or denial of constitutionally protected rights held by Petitioners as native Hawaiians. In the past, Mauna Kea Support Services (MKSS) staff denied access to Petitioner's members who sought to exercise religious, cultural and traditional practices. Under the pretense of ensuring public safety, these agents erected a blockade at the 9,000 feet level near the Hale Pohaku base camp and near the lake area. These blockades on public roads prevented

Petitioners and the general public access to the lake or upper regions of the summit area. The blockades did not hinder observatory personnel from accessing the summit and other areas of Mauna Kea.

Desecration and Destruction of Cultural Sites. The UH CMP, sub-plans and other related documents grants the UH and their designated agents (hand selected and appointed people) the right to determine cultural "appropriateness" of Native Hawaiian Practices, and where UH and its agents deem appropriate, to remove and dismantle Hawaiian cultural sites. I work with others to preserve numerous traditional and cultural sites on, in and around Mauna Kea's summit, slopes, Ice Age Natural Area Reserve, and Science Reserve, ranging from the 5,000 feet level to Pu'u Wekiu. Many of these sites have been desecrated and destroyed on numerous occasions, in some cases by University employees using State vehicles. One of the observatory tour guides and UH "rangers" also removed, desecrated and destroyed a family shrine of then MKAH President (family stone and ahu). To date the same site has been desecrated and destroyed at least seven times in all, the latest of which occurred just this year.

Burial Treatment Plan. Mauna Kea is a burial ground for our highest born and most sacred ancestors. Burial of human remains and associated objects is a traditional and customary Native Hawaiian cultural and religious practice. The archeological studies of the summit area of Mauna Kea are not complete, and so far burial sites are the second largest historic sites found. The BLNR has not taken any action to protect Native Hawaiian traditional and customary practices relating to burials.

Public Trust. The current operations of the observatory threaten the current and future quality of the water beneath the Mauna Kea summit, with inadequate sewage treatment facilities and the use and release of hazardous materials into these same inadequate sewage facilities. This is a resource which Petitioners have an interest in protecting, as the water ice and snow is collected for medicine and other ceremonies. The BLNR has a statutory and constitutional obligation to protect the watershed resources of Mauna Kea conservation district. I have spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

Water Supplies. The degradation of the watershed supply is a public health and safety issue. Mauna Kea's water shed is a primary water source for Hawai'i Island, including the sources for the Mauna Kea State Park and Pohakuloa Military Training Reserve. I have spent years advocating for greater protections of the cultural and natural resources, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their traditional and customary cultural and religious practice.

The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Section 5(f) Public Trust Land Revenue. The BLNR's disposition of public lands (sub-leasing and third party leasing to foreign governments and corporations) is subject to the trust provisions of Section 5(f) of the Hawaii Admission Act. In the absence of a fair appraisal, the nominal sublease lease rent (or none at all) is a breach of the trust and statutory duties owed to all beneficiaries, including Petitioners and native Hawaiians. The BLNR and the State has foregone substantial revenues that the observatories could have generated for the trust. I, as a native Hawaiian practitioner, have been adversely affected by this conduct.

The *Wekiu*. The insect known as the *Wekiu* is found in only one place in the world - on the slopes of Mauna Kea. The failure to adequately assess and determine the effects of the observatory development on this specie violates state law requiring board action to assure its survival. Petitioners are informed (via the NASA Federal Environmental Impact Statement, Cumulative Impact Study, previously submitted to BLNR) that since the observatory operations began, the population samples have declined by over 99%. Under HRS § 195D-4(b), the board has an imperative to take steps to protect the range and habitat of this insect irrespective of its formal status. Petitioners have an interest in its protection, based on their members' cultural and religious beliefs, which requires them to seek the preservation and conservation of all the resources of the Mauna Kea summit area. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Environmental Impact Review. While the BLNR was provided with the NASA EIS, cumulative impact study, which found that the cumulative impacts of 30 years of astronomy development had resulted in "adverse, significant and substantial" impact to the natural and cultural resources of Mauna Kea, the BLNR has taken no affirmative action independently accessed impacts, or to reduce or mitigate these impacts. The UH sub-plans have never undergone environmental review violating HRS chapter 343. No cultural Impact statement has been conducted either.

I have spent years advocating for greater protection, and has a continued interest in protecting the ecosystem, and sacred landscape as apart of their cultural and religious practice. The lack of environmental review as impacts on the environmental quality where our traditional and cultural practice occurs affects our rights, duties, and privileges.

Failure to prepare a "Comprehensive" Management Plan as required by law. UH's public assertions to the contrary, the proposed CMP is NOT a comprehensive plan, nor does it even pretend to be. The CMP does not even begin to seriously address, *inter alia*, the following:

- a. "Carrying capacity;"
- b. The number of astronomy facilities and telescopes which may be constructed on the summit;
- c. Time lines for proposed activities
- d. Cumulative impacts on specific natural resources;
- e. Relation of this CMP to 2000 UH Plan (never adopted by the BLNR);
- f. No updated hydrological study;
- g. No energy consumption study

**10. Outline of specific issues to be raised:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

- a. Whether the DLNR itself (not its lessee or a third party) is required to prepare, and BLNR to adopt and implement a Comprehensive

Management Plan for the Conservation District of Mauna Kea pursuant to the Third Circuit Court judgment and final order. *Mauna Kea et al., v. State of Hawai`i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397?

- b. Whether BLNR whole delegated its fiduciary duty to protect the reasonable exercise of customary and traditional Native Hawaiian cultural and traditional practices, when it allowed the UH, its agents, and private planning firms to determine, prescribe, describe, place conditions upon and regulate Hawaiian practices, use and access on Mauna Kea?
- c. Whether BLNR unlawfully voted to approve the UH CMP, sub-plans and related documents after Petitioners and numerous groups and individuals formally and timely requested a contested case hearing at the public hearings held on both 4/8/09-4/9/09 and 3/25/10? Whether BLNR's approval violated both DLNR's own rules and due process?
- d. Whether BLNR violated its own rules and regulation regarding management plan requirements by allowing the UH to file as applicant, instead of DLNR/BLNR?
- e. Whether DLNR/BLNR was required to prepare and file a Conservation District Use Permit Application for a "management plan" for the Conservation District of Mauna Kea?
- f. Whether BLNR should have adopted the UH CMP even though BLNR failed to address the eight (8) criteria required by BLNR's own rules?
- g. Whether the conditions in the DLNR General Lease GL S-4191 to the UH have been violated?
- h. Whether BLNR violated its fiduciary duties under Section 5(f) of the Hawaii Admission Act and its statutory duty under HRS § 171-33(5) by disposing of the Section 5(b) lands on Mauna Kea without a proper

appraisal and at less (for \$1.00 per year) than their independently appraised fair-market value.

i. Whether the BLNR should have adopted the UH CMP, sub-plans and related documents before independently identifying, assessing, and implementing actions to protect my constitutionally-based traditional and customary native Hawaiian rights on Mauna Kea? Further, whether the BLNR should have adopted the UH CMP, sub-plans and related documents before identifying, assessing, and implementing actions to protect burial sites on Mauna Kea and before giving the Hawaiian community full notice and opportunity to be heard on this issue?

j. Whether the BLNR must comply with the requirements of HRS § 343-5(b) and prepare and circulate for public review and comment an Environmental Impact Statement for UH sub-plans and related documents prior to approving them. This is one way to protect the cultural and natural resources of Mauna Kea?

k. Whether the BLNR is violating state and federal laws protecting species facing possible extinction (even if not designated endangered or threatened) by failing to follow the proper procedures and apply proper standards for the protection of those species.

l. Whether the BLNR improperly approved the UH CMP, sub-plans and related documents that incorporates by reference more observatory expansion (i.e. UH 2000 MP) and expressly authorizes UH and their agents to implement actions (i.e. blocking public access, removal of cultural sites, cultural offerings, limiting when, how and where Native Hawaiian Practitioners practice their constitutionally protected traditional and customary native Hawaiian rights) that include, but are not limited to, access to important cultural sites, the maintenance of those sites, and the ability to continue religious practices at these sites?

## **11. Outline of basic facts:**

**NOTE:** Please see also our testimony submitted on March 25, 2010 attached

The record in this matter is contained in (1) the DLNR files, the contested case hearing and appeal in the Third Circuit. *Mauna Kea et al., v. State of Hawai'i, University of Hawaii, Board of Land and Natural Resources*, Civil No. 04-1-397, (2) BLNR hearing records and our testimony regarding BLNR's April 8-9, 2009 public hearing, and (3) BLNR hearing records and our testimonies filed for BLNR hearing 3/25/10 and other public documents on record in all of the abovementioned proceedings. We incorporated the above mentioned proceeding documents here by reference, as BLNR has copies in their records as well.

In brief, the industrial astronomy foot print of the observatories built atop Mauna Kea has caused physical destruction of the sacred landscape which is used for solstice and equinox ceremonies, as alignment markers, and representation of the divine bodily forms (Kinolau) of the goddess Poliahu (and other deities). UH agents have denied Petitioners access to these cultural sites and even destroyed historic and cultural sites. The failure to genuinely prepare a master plan and to restrict and manage development activities on Mauna Kea has led to the destruction/overuse and loss of the unique natural and cultural resources on the mountain

The UH CMP, sub-plans and related documents are poorly conceived and are wholly inadequate to arrest this deterioration. A broad based and properly vetted master plan is essential to the future of Mauna Kea. The UH CMP is not such a plan. Nor are the ad hoc collection of "sub-plans" and related documents a remedy to the destruction and impact on the cultural and natural resources of Mauna Kea.

In fact the UH CMP, sub-plans and related documents impose excessive restrictions and limitations on native Hawaiian use and access. This occurs because the BLNR is delegating its authority to the UH, who is in a conflict of interest. There are already laws in place that should be enforced by BLNR--but rather than BLNR enforcing the existing laws to protect cultural and natural resources, they are letting the UH and their un-authorized agents (i.e. rangers, KKM, OMKM, and MKMB) to regulate the public and Native Hawaiians who are right-holders. We believe this regulation is excessive, burdensome and actually interferes with the "reasonable" exercise of the public and Native Hawaiians rights.

For BLNR to regulate rights it must be able to show these exercised rights are un-reasonable.

There simply is no substitute for an integrated and fully considered plan prepared by DLNR and adopted by the BLNR that addresses astronomy developmental carrying capacity, protection of the cultural and natural resources and that ensure the protection of the reasonable exercise of Hawaiian customary and traditional cultural and religious practice. The UH CMP, sub-plans and related documents the Board approved are not sufficient and further excessively interfere and regulate our access and reasonable use, thus affecting our legal rights, duties, and privileges.

**12. The relief or remedy to which you seek or deem yourself entitled:**

That the BLNR:

a) REJECT AND NOT APPROVE OR ADOPT UH CMP, sub-plans and related documents;

b) DIRECT the DLNR staff to undertake, supervise, and prepare a "comprehensive management plan" as required under the Department of Land and Natural Resources Hawaii Administrative Rules, chapter 13-5 for the Conservation District that meets the full scope, terms, and conditions for a "comprehensive management plan" as required by law;

OR IN THE ALTERNATIVE,

c) GRANT Petitioner Clarence Kukaukahi Ching standing in the UH CMP, sub-plans and related documents proceeding and CONDUCT a full contested case hearing on the proposed CMP, sub-plans and related documents.

TESTIMONY SUBMITTED AT THE BLNR PUBLIC HEARING ON MARCH 25, 2010:

**Board of Land and Natural Resources**  
**Meeting of March 25, 2010**  
**Hilo, Hawai'i**

From: Clarence ku Ching  
64-823 Mamalahoa Highway  
Kamuela, HI 96743  
Phone: (808)769-3828

Amended Comments on the proposed Cultural Resource Management Plan

Let me start out with the conclusion that the CMP and the 4 Subplans do not comprehensively make up a plan, but moreso, they are mostly plans to make further plans. They are surely not comprehensive. My comments include references to items that directly violate the practice of my constitutionally protected cultural and religious rights.

As stated by many of the supporters of the CMP - a year ago - it is just the first steps that may eventually amount to a "comprehensive" plan. I am NOT a supporter.

First of all - Mauna Kea is primarily zoned "Conservation." Astronomy is only a sub-use - and is subservient to the primary Conservation zoning.

However, an innocent observer of the mountain would have a hard time believing it to be conservation-zoned - as it looks to be about as dense as Waikiki. How soon will the interests of astronomy request a change of primary zoning to "Astronomy," with a change for "Conservation" as a sub-zone?

Something is definitely wrong.

The CMP - as "approved" and "to be approved" subject to court challenge - makes very little mention of the "Conservation" status on the mountain. There isn't even a mention of the (8) "Criteria" for Conservation Zones which are fundamentally basic requirements and/or how Astronomy must comply with all requirements of the Conservation Zone, except where specifically excepted. A discussion on the "Criteria" should be, must be, included.

For instance, that one of the criteria requires any development to enhance the NATURAL BEAUTY is completely ignored. Taking the adjective "natural" at its most basic definition - present observatory development on Mauna Kea is akin to calling the Frankenstein monster beautiful!

I must object to the process that DLNR has used to establish the Comprehensive Management Plan, the 4 Subplans - that this Cultural Resource Management Plan (CRMP) is intended to be a part of - as it involves applications and

procedures for Contested Case Hearings - of which I have been an applicant, and for this process, am. And I respectfully request and apply for contested case hearings on the proposed subplans on the agenda today.

Additionally, I wish to incorporate by reference, the testimonies of KAHEA, Kealoha Pisciotto, Keo Van Gough, Debbie Ward, Nelson Ho and Fred Stone into my testimony.

Secondly, a brief comment on the proposed Public Access Subplan, the Ka Ula Trail, that I consider to be a major trail on Mauna Kea, is NOT mentioned (I have recently been updated on the fact that the writers of the Subplan have included it upon my urging at the public meetings) in the proposed Subplan, nor shown on the accompanying maps.

Incidentally, is it the Ka Ula Trail, or is it the Kaula Trail?

These kinds of discrepancies plainly point out the non-comprehensiveness of a supposed "comprehensive" plan.

On the other hand, there are major conflicts in the plan.

For instance, the CMP that is supposedly "approved" indicates that there is a buffer on both sides of the 4-wheel drive road above Hale Pohaku. On the other hand, the maps in the Cultural Resource Management Plan shows it only on one side of the road.

As both of these "suggestions" cannot be correct - I suppose that one of them is. The plans don't give a sufficient indication of the correct situation. Such sloppy and incomplete work is a direct reflection of the process that BLNR is following in "rushing" the process and not carrying out a thorough and comprehensive analysis and review of its work product.

The following comments more specifically respond to issues contained in the Executive Summary of the proposed CRMP - but generally apply to the remainder of the CRMP text.

Specifically - I feel that the issue of cultural and religious practices should NOT be included under any "Public" issues - as they are treated as separate, specific and special issues under the Hawai'i State Constitution and in the Statutes.

OK - as to the proposed document. My comments are delineated in the "large" type - while the smaller type "statements" are extracted from the text of the proposed CRMP.

"Public and commercial uses are equally varied and include such activities as cultural and religious practices, astronomy, commercial tours and events, filming,

and scientific research."

I must object to the ambiguity of this statement. While the adjective "equally" may not intend to "equalize" the listed activities - the suggestion or impression that they do cannot be overlooked.

That the Conservation zoning and the Constitution of the State of Hawaii specifically protects "cultural and religious practices" - their status as activities stand high above the other mentioned activities. The other activities are definitely NOT equal to them.

I don't think that cultural and religious practices ought to be classified with public and commercial uses.

"In developing the CRMP consultation was undertaken with a number of Hawaiian organizations regarding cultural issues, such as access and cultural practices. Different opinions were expressed during the consultation meetings regarding the appropriateness of some cultural practices and the unintended consequences that these may be having on the cultural landscape and spiritual values of the mountain. OMKM's cultural advisory group, the Kahu Kū Mauna Council, will take the lead in consulting with Hawaiian organizations and individuals with historical ties to Mauna Kea, cultural practitioners, and the Mauna Kea Management Board in developing procedures and protocols regarding cultural issues."

Cultural practices should NOT bring up issues of appropriateness or unintended consequences - that they may have on the cultural landscape and spiritual values of the mountain. The mountain has spiritual values? It should be assumed that "normal" cultural values (and possible negative unintended consequences) would NEVER have negative effects on the cultural landscape. Unintended consequences? Like what?

Actual cultural practices being personal - it doesn't follow that procedures and protocols - would not/should not trigger any processes that a management plan should be involved in. It is or should be beyond the scope of any management or administrative concerns of "the" plan.

To be a "qualified" member of Kahu Ku Mauna - one should specifically be an active cultural and religious practitioner on Mauna Kea. An "active" Mauna Kea cultural practitioner need not be a person of "Hawaiian" ancestry, but one whose cultural background and practices are specifically that of Hawaiian culture and religion as it pertains specifically to Mauna Kea.

However, as it is very correct in Hawaiian culture to elevate the wisdom of Kupuna - I would suggest the Kupuna-ness be a qualification of a member of Kahu ku Mauna. Where else would one expect that the wisdom of the culture be

located?

CR-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.

Developing "appropriate" procedures and protocols "regarding" cultural issues is one thing. Developing "appropriate" procedures and protocols "regarding" the practice of culture is something else - something that should be beyond the scope of any plan that BLNR should approve or be concerned with.

The language above - that "Kahu ku Mauna shall work ... toward the development of appropriate procedures and protocols regarding cultural issues" is excessively broad and is an intrusion into Constitutional protections.

My recommendation is that there should be specific language stating my "above" concern. Without such a specific prohibition - the rights of practitioners may be further violated.

ACT-5 Implement policies to reduce impacts of recreational hiking

Cultural hiking, which is part of my cultural practice, is not a close relative of recreational hiking - and should NOT be considered to be similar or the same - and surely NOT included here by association or reference.

As a cultural hiker, I visit a number of cultural and religious sites throughout the mountain. If the difference between "cultural" and "recreational" hiking is not distinguished, by NOT distinguishing one from the other - my right to hike, and the ability to follow all the protocols of my practice, would be violated.

P-1 Comply with all applicable federal, state, and local laws, regulations, and permit conditions related to activities in the UH Management Areas.

Cultural and (Hawaiian) religious practices should NOT ever be subject to permitting (as the above can possibly be interpreted as stating) - as they have their basis as "Rights" - and permitting connotes "having to ask for permission." However, as to the "regulation" of the reasonable practice of those rights - which the law allows - that is a different issue.

One of my personal experiences on Mauna Kea involved an overnight stay - which took place adjacent to the Mauna Kea-Humu'ula Trail. So, waking in the morning, expecting everything to be serene, but with a Mauna Kea ranger disturbing the silence with his excessively close presence, and with his camera invading our peaceful and spiritual environment - was a disturbance of my, and

others', cultural protocols and practices. That I believe that our presence on the mountain - as part of, as I stated, cultural and religious protocol, was the subject of a complaint to DLNR - was especially unwarranted and troublesome.

The Law of the Splintered Paddle, among other things - not having been specifically revoked by "contemporary" law - which allows women, children and the elderly to "sleep" safely by the side of a trail, road or thoroughfare, fully applies to Mauna Kea.

The ranger, which was ignorant of the law and maybe ill supervised, was very much out of order.

IM-5 Develop and implement a Debris Removal, Monitoring and Prevention Plan.

What debris? Observatories should remove their own debris. Tourists too. Appropriate cultural practice does NOT create debris.

Under 1.5.5 Cultural activities which are otherwise consistent with this plan and do not involve physical impacts are permitted. These activities will normally be restricted to daylight hours; special permission may be granted by UH and DLNR for night activities.

Restricting cultural practices to "daylight" is an unreasonable "regulation" of the practice of cultural rights. It is as absurd as restricting "visual" telescopes to allow operation only during daylight hours.

Cultural activities, being a Constitutionally protected activity, is not negatively subject to the CMP or its Subplans whether "consistent" or not. If anything, the CMP and its Subplans are subject to and consistent with traditional cultural and religious practices.

1.5.5 (above) is a violation of my cultural and religious rights on Mauna Kea.

Generally speaking - the CMP and the 4 Subplans do not comply with the full legal requirements and ramifications of the P.A.S.H. and KaPa'akai cases. The failure to fully comply with these cases that denote Hawai'i state case law is a major basis for my objection to all parts of the CMP and 4 Subplans.

While I have numerous additional objections to the CMP and Subplans - I will save them for another opportunity for appeal and redress. I thank you.

/s/ Clarence Ku Ching

**I thank you for your time and consideration of my contested case hearing request,  
Aloha,**

*M. Townsend*

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Signed by Ms. Marti Townsend of KAHEA, for Clarence Kukaukahi Ching

DATED: Hilo, Hawaii, April 3, 2010

Please see signature authorization for Ms. Marti Townsend attached also.

To Whom It May Concern:

For the purposes of signing the Petition Applying For or Requesting a Contested Case Hearing on the Mauna Kea Comprehensive Management Plan and 4 Subplans, Kealoha Pisciotta and/or Marti Townsend are authorized and directed to affix a signature for me and on my behalf to any relevant document.

Dated: Kamuela, Hawaii, April 1, 2010.

/s/ Clarence Kukauakahi Ching

