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RE: Initial Comments on Working Draft of Mauna Kea Rules

Aloha e Stephanie Nagata,

The Office of Hawaiian Affairs (OHA) appreciates the time, effort, and resources that the University of Hawai'i (UH) and the Office of Mauna Kea Management (OMKM) has expended to seek input pursuant to Act 132, Session Laws of Hawai'i 2009, on its draft rules for the lands it leases on Mauna Kea. Thus far, we are pleased with OMKM's commitment to provide OHA with updated drafts and spend time with our staff to answer questions. In light of the preliminary stage of the rules, OHA intends for this letter to highlight only initial thoughts on the working draft we have been provided.¹ [Attachment A]. OHA encourages OMKM to continue its informal consultation both with OHA and the community. We look forward to hearing the comments and concerns of our beneficiaries and will be submitting more thorough and specific comments once an official draft of the rules is released pursuant to chapter 91.

OHA's Role

As the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians, Haw. Const. Art. XII, § 5, OHA appreciates this opportunity for comment. OHA has substantive obligations to protect the cultural and natural resources of Hawai'i for its beneficiaries. Hawai'i Revised Statutes (HRS) mandates that OHA serve as the principal public agency in the State of Hawai'i responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; assess the policies and practices of other agencies impacting on native Hawaiians and Hawaiians; and conduct advocacy efforts for native Hawaiians and Hawaiians. HRS § 10-3.

OHA's responsibilities with relation to activities at Mauna Kea are particularly significant. Mauna Kea is amongst Hawai'i's most sacred places and many Native Hawaiians believe Mauna

¹ The terms "working draft," and "current working draft" refers to a draft provided by OMKM to OHA dated 03/17/11.

Kea connects them to the very beginning of the Hawaiian people. Since time immemorial, the Native Hawaiian people have used the summit for cultural, spiritual, and religious purposes. Over the last 40 years, activities at the summit have caused irreversible damage to this invaluable place, its irreplaceable cultural and natural resources, and the Native Hawaiian culture that relies upon it. OHA believes it is for these reasons that the Hawai'i State Legislature required the Board of Regents (BOR) to consult with OHA during the adoption of rules for the Mauna Kea lands. OHA notes that the BOR is required to

[c]onsult with the office of Hawaiian Affairs to ensure that these rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupuaa tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the State to regulate such rights;

HRS § 304A-1903(2).

It is with this kuleana in mind that OHA respectfully offers the following comments and requests that responses to our concerns be addressed in subsequent drafts of the Mauna Kea lands administrative rules. OHA looks forward to working with OMKM to create rules to regulate public and commercial activities on the Mauna Kea lands that respect and protect Native Hawaiian culture and the constitutionally-protected rights of Native Hawaiians.

Protection of Native Hawaiian Traditional and Customary Practices

Despite significant protections for Native Hawaiian traditional and customary rights, the exercise of these practices continue to be challenged and threatened. Pursuant to Article XII section 7 of the Hawai'i Constitution, statutory law, and Hawai'i case law our State has assumed and recognized an affirmative duty to protect Native Hawaiian traditional and customary rights.² Hawai'i's constitutional "mandate grew out of a desire to 'preserve the small remaining vestiges of a quickly disappearing culture [by providing] a legal means' to recognize and reaffirm native Hawaiian rights."³ These rights are subject to the State's right to regulate activities on its land which may affect traditional and customary practices. Unfortunately enforcement can be overly burdensome and ultimately prevent Native Hawaiians from continuing to exercise their practices. OHA appreciates OMKM's cognizance that "[t]he State does not have 'unfettered discretion to regulate the rights of ahupua'a tenants out of existence[']" and that regulations need to be justified.⁴

Many questions related to how traditional and customary rights will be protected remain unanswered at this stage of the Mauna Kea rules. The current draft does not yet address how

² HRS section 7-1 and HRS section 1-1 recognizes access rights that are held by native tenants. HAW. REV. STAT. § 7-1 (2005); HAW. REV. STAT. § 1-1 (2005). *See also* Native Hawaiian Rights Handbook 11 - 14 (Melody Kapilialoha MacKenzie ed., 1991).

³ *Ka Pa'akai O Ka'aina v. Land Use Commission*, 94 Hawai'i 31, 45, citing (Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 640) (2000).

⁴ Public Access Plan 2-28, citing *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Hawai'i 425 (1995).

enforcement of the rules will be conducted. OHA and OMKM agree that training enforcement officers will be critical to ensure that Native Hawaiian traditional and customary practices are respected and preserved. Additionally, OHA thinks it will be important for enforcement officers to be assisted by cultural experts. OHA understands that UH does not have the experience or expertise in managing public recreational activities and protecting traditional and customary Native Hawaiian practices and thus we suggest they continue to seek supportive partnerships. This could be done by, for example, hiring enforcement officers with an understanding of related traditional and customary practices, using a Native Hawaiian advisory group to assist with the development of enforcement policies, and/or having Native Hawaiian practitioners conduct training for enforcement officers.

Inevitably there will be disagreement on what practices are “appropriate,” authentic, and/or reasonable traditional and customary practices. Native Hawaiian culture is a living, constantly evolving culture. When possible, OHA urges adoption of policies that allow for broad interpretations of what is permissible to ensure traditional and customary rights are not abridged. Consistent with OMKM’s acknowledgements, any decisions that deny Native Hawaiians’ ability to exercise their traditional and customary rights must be justified. The State’s ability to restrict these practices is limited. OHA understands that OMKM will continue to take these issues into consideration as it moves forward with drafting the rules.

OHA commends OMKM for prioritizing the protection of Native Hawaiian traditional and customary rights in its future management of Mauna Kea. OHA notes that one of the goals that emerged from the creation of the Mauna Kea Comprehensive Management Plan (CMP) is to increase the understanding of Native Hawaiian history and cultural practice on Mauna Kea to ensure that Native Hawaiian practices are protected and respected. OHA also recognizes that OMKM places the protection of Native Hawaiian traditional and customary rights as one of its guiding principles in management of public and commercial activities at Mauna Kea.⁵ In light of the challenges that regulations place on Native Hawaiian practitioners and OMKM’s assertion that traditional and customary rights *will* be preserved and protected, OHA believes that the Mauna Kea rules can be drafted in a way that will increase the likelihood that this mandate will be met. Specifically, OHA

- supports OMKM’s intention to clarify within the purpose section of the Mauna Kea Rules General Provisions that the rules are not intended to diminish or abrogate provisions of Haw. Const. Art. XII § 7. OHA prefers option 2 and would edit it as follows:

“The rules are not intended to diminish or abrogate the provisions of Article XII, Section 7 of the Hawai‘i State Constitution or Section 7-1, Hawai‘i Revised Statutes relating to Native Hawaiian traditional and customary rights.”

- suggests that, in addition to including the above language in the purpose section, an entirely separate subchapter (or alternatively section) should be added that articulates that the Mauna Kea Rules, in its entirety, are not intended to prevent practitioners from exercising their Native Hawaiian traditional and customary

⁵ Mauna Kea Public Access Plan, 5-1. Specifically OMKM’s guiding principles indicates that traditional and customary rights *will* be preserved and protected.

practices. Including a separate subchapter would further emphasize OMKM's firm commitment and provide additional assurances for Native Hawaiian practitioners. OHA recommends inclusion of the following language which explicitly recognizes Native Hawaiian traditional and customary rights, within a separate subchapter of the rules:

"Subchapter 4: Protection of Native Hawaiian Rights

Nothing in this chapter is intended to restrict Native Hawaiians from exercising their traditional and customary rights. These rules should be read in conformance with Haw. Const. Art. XII § 7, HRS §§ 1-1 and 7-1, and applicable case law."

OHA believes these suggestions would help fulfill OMKM's management priorities and goals, OHA's commitment to protect and advocate for traditional and customary rights, and the Legislature's intent to ensure that traditional and customary rights are given adequate protection within the Mauna Kea rules.

Scope of Commercial Activities

OHA asserts that the administrative rules for UH's leased Mauna Kea lands must broadly encompass *all* activities where any compensation or value, including monetary fees, barter, or services in-kind, is received in exchange for any goods or services, including subleasing the Mauna Kea lands. In the same legislation that authorized the BOR to adopt rules to regulate commercial activities at Mauna Kea, the Hawai'i State Legislature also authorized the BOR to charge fees for the use of Mauna Kea lands, facilities, and programs. Act 132 clearly authorizes the BOR to charge fees for a broad number of activities, including subleasing the Mauna Kea lands, commercial tour activities, use of facilities and programs on the Mauna Kea lands, and other activities. Inasmuch as OMKM agrees that the state Legislature has authorized the BOR to charge fees for these activities, and given the working draft's definition of "commercial activity" as "the use of or activity on state lands for which compensation is received," with "compensation" expressly including "monetary fees, barter, or services in-kind," it is unclear why OMKM has taken the position that some of these activities (particularly subleasing the land) would not be subject to the forthcoming Mauna Kea rules. It is OHA's position that the rules should comprehensively regulate all commercial activities, as defined in the working draft rules, including subleasing Mauna Kea lands, regardless of whether lease rents involves monetary payment, barter, or services in-kind, such as telescope viewing time.

An inclusive reading of commercial activities is consistent with the DLNR rules OMKM is mandated to strive for consistency with and the DLNR policy that OMKM cites both within the current working draft and the UH Management Areas on Mauna Kea Public Access Plan (Public Access Plan).

In authorizing the BOR to adopt rules to regulate commercial activities, the Legislature required the BOR to "[s]trive for consistency with the administrative rules of the division of forestry and wildlife of the department of land and natural resources related to forest reserves and natural area reserves." HRS § 304A-1903.

The rules regulating activities within Natural Area Reserves, Hawai'i Administrative Rules (HAR) § 13-209-2, specifies

“Commercial activity” means the use of or activity on state lands for which compensation is received and by any person for goods and services or both rendered to consumers or participants in that use or activity.

The rules regulating activities within forest reserves, HAR §13-104-2, specifies

“Commercial activity” means the use of or activity in the forest reserve for which compensation is received by any person for goods or services or both rendered to customers or participants in that use of activity.

OHA notes OMKM's current working draft is generally consistent with the above definitions. It is also consistent with the DLNR's Policy for Commercial Activities on State Owned and Managed Lands and Waters [Attachment B], which is cited in OMKM's working draft and UH's Public Access Plan. DLNR's policy defines (in relevant part) commercial activity as

The collection by a party or their agent of any fee, charge, or other compensation shall make the activity commercial except when such fee, charge, or other compensation is for the sale of literature allowed under Chapter 13-7-7, HAR. [].

OHA is concerned that future drafts may diverge from these inclusive definitions. On May 18, 2011, OMKM provided OHA with a draft of General Provisions for the Administrative Procedures section of the rules which included considerations for possible definition amendments. [Attachment C]. The definitions found within this attachment appear to exempt UH and other agency activities (e.g., UH's land subleases and the sale/exchange/barter of telescope viewing time) from the commercial activities section of the rules. OHA opposes any attempt to limit the scope of commercial activities under the rules, including exempting actions by governmental agencies. Act 132 provided UH with the opportunity to establish a framework for regulating commercial activities on the Mauna Kea lands and to be effective and meaningful, this framework must comprehensively contemplate and regulate all foreseeable activities that involve the exchange of compensation for the use of or activity on Mauna Kea lands.

As such, UH's impending Mauna Kea administrative rules for commercial activities should expressly address procedures to sublease the Mauna Kea lands. In entering into leases the BOR is required to “comply with all statutory requirements in the disposition of ceded lands.” The creation of rules to assist with this mandate would be beneficial both to UH and the public. HRS chapter 171 guides the disposition of public land, much of which includes ceded lands. OHA suggests that enactment of administrative rules in line with chapter 171's leasing procedures would give UH a solid framework for properly subleasing the Mauna Kea Lands through a fair, open, and transparent process. The Department of Agricultural (DOA) administrative rules may be instructive as it takes these suggestions into consideration. The DOA's rules for its agricultural park program and non-agricultural park lands programs rules specifies a process for the disposition of public lands and lease provisions. HAR §§ 4-153, 158.

The Mauna Kea lands that UH have the pleasure and benefit of leasing are ceded lands that are part of the public land trust, held in trust by the State for the benefit of the general public and native Hawaiians. The decision by the BLNR to lease the Mauna Kea lands to UH in 1968 has had long term implications for the public and its resources. Any future subleases or lease extensions are significant decisions that will impact present and future generations of trust beneficiaries. As such, the BOR has fiduciary obligations when making decisions related to activities on Mauna Kea and its resources. These decisions should be subject to public input and participation through a process that is clearly establish and defined. Therefore, OHA strongly suggests that the scope of the Mauna Kea administrative rules must be all-inclusive and cover subleases of the Mauna Kea lands and ancillary activities, including the sale/exchange/barter of telescope viewing time, as well as the activities currently contemplated under the draft rules, such as commercial tours, film and production, concessions, and special events.

Transparency/Accountability

At a minimum, decisions with broad or long-term implications should be made by a decision-making body that is directly accountable to the public and, at a minimum, subject to Hawai'i's sunshine laws to ensure meaningful public participation. OHA is uncomfortable with the broad decision-making authority to manage and regulate public and commercial activities that the current draft designates to chancellor of UH Hilo (or the chancellor's designee). Specifically, the current working draft gives the chancellor (or designee) the authority to issue permits, establish visiting hours, close or restrict public use of *all* or any portion of Mauna Kea for up to two years, close or restrict vehicular access of roads, and prohibit or restrict snow play in designated areas. In contrast, similar decision-making authority in DLNR's natural area and forest reserves require approval by the Board of Land and Natural Resources (BLNR), a body comprised of members that are appointed by the Governor with the consent of the Hawai'i State Senate. In the case of the natural area reserves, even more oversight is required – closing of areas, visiting hours, and special use permits require BLNR approval as well as the approval of the natural area reserves system commission.

OHA realizes that not all decisions require the same level of transparency or should be given the same level of scrutiny. The DLNR's rules in the conservation district provide a good example of how administrative rules require different levels of scrutiny depending on the intensity of proposed land uses. HAR § 13-5. While the Chairperson of the BLNR may unilaterally grant department permits for less intense land uses, the Board must approve board permits which involve land uses with potential for increased impacts. An examination of the rules reveals that land uses with increased potential impacts are also subject to increased public involvement.⁶ The public can appeal the Chairperson's decision on a departmental permit and if the Chairperson's decision is shown to be "arbitrary and capricious, the board may affirm, amend or reverse the decision . . . , or order a contested case hearing[.]" HAR §13-5-33. With regards to board permits, public hearings are held which gives community members an opportunity to provide input, and where required contested case hearings are held. HAR § 13-5-34. These hearings are often times the only opportunity for

⁶ Depending on the proposed land use, permit applicants in the conservation district are required to apply for a site plan, a departmental permit, or a board permit. HAR §§ 13-5-22, 23, 24, 25 identifies different levels of review and permits required for different proposed land uses.

individuals to communicate to decision-makers how activities may adversely affect their cultural practices. OHA understands that OMKM is in its very initial stage of drafting the section of the rules applicable to contested cases (Attachment C) and urges OMKM to consider the Conservation District rules as it continues drafting. OHA also understands that there may be emergency and public safety situations that require more immediate decisions by the Chancellor alone and notes that HAR § 13-5-35 accounts for similar situations.

Designation of the chancellor's authority to the Mauna Kea Management Board (MKMB) does not resolve these concerns. OMKM advised OHA staff that these decisions may ultimately be designated to or made in conjunction with MKMB. OHA appreciates that the MKMB may be more closely affiliated with and responsive to Mauna Kea's nearby communities than the BOR. OHA reiterates – the decision-making body with such broad discretion should be directly accountable to the public and at a minimum be subject to Hawai'i's sunshine laws to ensure public scrutiny and participation. It is not enough that MKMB complies with sunshine laws without an explicit legal mandate.⁷ Given Mauna Kea's unique character – conservation land classification, status as ceded lands, cultural significance, religious affiliations, astrological significance (both to Native Hawaiian and international astronomers), resource rich – heightened transparency is necessary.

OHA looks forward to continuing to contribute to this process with the University of Hawai'i and the Office of Mauna Kea Management. The significance of Mauna Kea compels OHA to advocate for increased understanding and protection of this special place and the Native Hawaiian people who rely upon it.

Thank you for your attention to this matter. If you have further questions, please contact us or have your staff contact us via Jocelyn Doane by phone at (808) 594-1759 or e-mail at jocelynd@oha.org.

‘O wau iho nō me ka ‘oia‘i‘o,



Clyde W. Nāmu‘o
Chief Executive Officer

CWN:jd

C: Trustee Robert K. Lindsey Jr., Office of Hawaiian Affairs
University of Hawai'i, Board of Regents
Mr. William Ailā, Chairperson, Board of Land and Natural Resources
OHA Hilo and Kona CRC Offices

⁷ OMKM advised OHA that it does not believe that MKMB meetings are subject to Hawai'i's Sunshine Laws, however MKMB conducts its meeting as if it is.