



SB3090 Proposed SD1
RELATING TO GOVERNMENT
Senate Committee on Higher Education
Senate Committee on Water and Land

February 12, 2018

1:15 p.m.

Auditorium

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on the Proposed SD1 of SB3090, which seeks to establish an alternative management framework for the singularly significant and long-neglected lands, resources, and sites of Maunakea. **OHA appreciates the bill's intention, to address decades-long concerns over the inability of the University of Hawai'i (UH) and the Board of Land and Natural Resources (BLNR) to properly steward Maunakea, and to balance natural and cultural resource management and protection with industrial-scale development on the mauna's summit;** OHA also understands that this bill anticipates substantial further discussion involving various stakeholders, including Native Hawaiian practitioners, educators, and other members of the Native Hawaiian community. Accordingly, OHA offers the following comments for the Committee's consideration.

As a preliminary matter, OHA re-emphasizes the litany of historical and ongoing failures of UH and BLNR in their management of Maunakea. These include, but are not limited to: the failure to budget and fund proper management of UH's Maunakea lands; the failure to prudently negotiate sublease terms, allowing for gratis or nominal rents for multi-million dollar development projects; the failure to adequately implement a decade-old Comprehensive Management Plan, including 32 of its 54 management actions specifically affecting Native Hawaiians; the failure to meaningfully consult with OHA, Kahu Kū Mauna, and other cultural stakeholders on management policies and rules; the failure to maintain an environment that appropriately respects Maunakea's cultural landscape and singular cultural significance, including through the protection of Native Hawaiian traditional and customary rights and practices; the failure to manage public access and highly inappropriate and/or unsafe activities, which have led to numerous vehicular accidents and fires, deaths and bodily injuries, and spills of highly hazardous waste; and the failure to enforce lease and sublease terms and otherwise manage observatory development and decommissioning. **Insofar as these failings, and others, have persisted for over a generation, including through four state audits and multiple lawsuits spanning two decades, OHA and much of the general public have lost all confidence in the ability of UH to and the BLNR to fulfill their full range of responsibilities as lessee, lessor, and trustees of the lands, natural and cultural resources, and cultural sites of Maunakea.**

Accordingly, OHA appreciates the intent of this measure, to address the root cause of Maunakea's mismanagement and misuse through the establishment of an alternative

management authority for the Maunakea lands currently controlled by UH. **In order to better ensure that any such management authority has the authority, capacity, resources, and structure to sufficiently address the longstanding concerns over Maunakea’s use and protection, and subject to further input that may be presented by cultural practitioners, educators, and other concerned members of the Native Hawaiian community, OHA offers the following comments for the Committees’ consideration:**

1. Ensuring the composition of the MKMA reflects the cultural, environmental, and historical character of Maunakea.

As the Committees likely realize, an area of critical importance is the composition of the MKMA, and whether this composition will adequately reflect the full range of values and beliefs associated with Maunakea. As previously noted, the current “managers” of Maunakea have grossly neglected their responsibilities to protect and uphold the ecological, cultural, and spiritual integrity of Maunakea, in favor of industrial-scale observatory development on its summit. Accordingly, to ensure that this situation is properly rectified, OHA respectfully urges the careful consideration of MKMA’s composition.

In this regard, OHA notes and appreciates that three of the nine seats on the MKMA would be reserved for individuals nominated from or who are members of groups representing Hawaiian interests, including the Native Hawaiian Bar Association, the Royal Order of Kamehameha, and the Association of Hawaiian Civic Clubs. **However, given the unique character of Maunakea, including its singular cultural significance to Native Hawaiians, as well as its status as part of the “ceded” lands corpus, to which Native Hawaiians have never relinquished their claims, OHA respectfully submits that a greater proportion of Hawaiian representation may be more appropriate.** For example, additional seats may be specifically designated for Native Hawaiian cultural practitioners, historians, artists, as well as members of ‘ohana with ancestral connections to Maunakea. Furthermore, while OHA appreciates the measure’s intent to not include members with inherent conflicts of interest, OHA notes that its own statutory responsibilities – which include serving as the principle public agency responsible for assessing and advocating on agency policies impacting Native Hawaiians – may counsel its inclusion as a member of the MKMA, notwithstanding OHA’s current litigation. Notably, OHA’s substantive expertise and institutional memory regarding Maunakea may also provide a level of continuity in the transition of management authority to the MKMA. OHA additionally suggests requiring seats intended to represent Native Hawaiian interests generally, to be filled from lists of nominees submitted by OHA, similar to the requirement for certain regional representatives on the island burial councils.

Similarly, OHA notes that Maunakea is also host to highly unique ecological features, species, and resources of great cultural and scientific value; the unique geological and environmental conditions found on Maunakea may similarly be of particular interest to researchers and others in a variety of fields. Insofar as the ecological, geological, and environmental values of Maunakea have also been overlooked under UH’s stewardship, OHA further suggests that additional seats representing these

relevant fields may further restore balance to the oversight and stewardship of Maunakea, and ensure that the MKMA can more fully consider the range of potential impacts and opportunities in its management decisions.

Finally, OHA acknowledges and appreciates that members with business acumen may assist the MKMA in ensuring that any leases, subleases, permits, and other revenue-generating opportunities can be maximized, to the extent appropriate. **However, OHA suggests that it may be more helpful for the MKMA to include, in lieu of otherwise unqualified members from business organizations, individuals with more particularized expertise in land appraisal, entrepreneurial innovation, and/or investment strategies.** Notably, business activities conducted upon Maunakea have thus far been generally limited to commercial tour operators, a relatively small constituency of the “business organizations” currently proposed to be represented on two seats of the nine-seat MKMA. Should the Committees wish to retain a “business organization” representative, given the unique value and character of Maunakea’s lands, OHA respectfully recommends that such a representative be nominated by or be a member of the Native Hawaiian Chamber of Commerce.

2. Maintaining OHA consultation requirements and the protection of Native Hawaiian traditional and customary practices in rulemaking.

Currently, HRS § 204A-1903 provides for Maunakea rulemaking to be conducted in consultation with the OHA, “to ensure that [] rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes.” However, although OHA provided the Office of Mauna Kea Management (OMKM) with preliminary comments on draft Mauna Kea rules in 2011, OHA did not receive a response – despite numerous requests – until late 2015, at which point rulemaking was halted at the request of the Governor. **OHA does believe that retaining such a consultation requirement in the MKMA’s rulemaking authority may be critical to ensuring the proper protection of its beneficiaries’ traditional and customary rights and practices.** Accordingly, OHA respectfully recommends amending the language found on page 72, lines 5-9, on the proposed SD1 of SB3090 to read as follows:

“ § -36 Rules; management, stewardship, and protection of cultural resources. The authority shall expedite the establishment of rules pursuant to chapter 91 on the management, stewardship, and protection of lands and cultural resources, and any fees and fee waivers under its jurisdiction, provided that the authority shall consult with the office of Hawaiian affairs to ensure that any rules shall not affect any right, customarily and traditionally exercised for subsistence, cultural, and religious purposes, by descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.”

3. Clarifying the applicability of conservation district rules.

HRS Chapter 183C gives the BLNR the exclusive authority to regulate all land use in the conservation district, regardless if the land is public or private, and regardless of which public agency holds title. HRS § 183C-6 requires the BLNR to regulate such uses via permits and specifically subjects all construction, reconstruction, demolition, or alteration of any structure, building or facility by the issuance of site plan approvals. To clarify that all lands, including Mauna Kea lands would continue to be subject to conservation district use statutes and related rules, OHA recommends amending the language found on page 74, lines 3-7, on the proposed SD1 of SB3090 to read as follows:

§ -37 Project approval authorization. The authority is authorized to approve or disapprove all projects, including but not limited to design review, on all Mauna Kea lands; provided that all land use complies with relevant conservation district rules.

4. Clarifying MKMA's authority regarding alienation of MKMA lands.

OHA greatly appreciates SB3090 Proposed SD1's inclusion of various procedural mechanisms and safeguards found in Chapter 171, that can assure Native Hawaiians, the general public, and the State a level of transparency and accountability in the MKMA's disposition of Maunakea's lands. OHA further appreciates the express prohibition on the sale, exchange, or alienation of Maunakea lands, which are "ceded" lands that must not be sold or otherwise alienated given Native Hawaiians' unrelinquished claims. However, OHA notes that, in applying the various relevant mechanisms in Chapter 171 to the MKMA, a handful of provisions appear to have been inadvertently included, that expressly contemplate the sale or exchange of Maunakea lands. **Accordingly, OHA urges the deletion of language authorizing the sale or exchange of land, as found on page 15, line 21 ("except as provided by law"); page 16, lines 11-12 ("sold or"); page 17, line 3 ("or patent"); page 19, line 11 ("sold or" and "sale or"); page 19, line 17 thru page 20, line 10 (all language regarding exchanges and quitclaims of interest in private land); page 20, line 15 thru page 23, line 16 (all instances of "sold" and "sale"); page 30, line 5 thru page 32, line 2 (section inapplicable with regards to creating security interests in and sales of land used for residential purposes); page 32, lines 7-8 and 19-20 (all references to sales and exchanges of lands); page 52, line 10 thru page 55, line 4 (section unnecessary insofar as MKMA would not be authorized to exchange lands); page 61, lines 14-16 ("Mauna Kea lands to be sold under this section..."); page 64, line 1 thru page 66, line 21 (section unnecessary insofar as the MKMA would not be authorized to sell or alienate lands); page 66, lines 1-2 ("Exchange Mauna Kea lands with the governments and agencies"); and page 67, lines 5-10 ("Sell public lands...").**

5. Further effectuating the "caps" on any future telescope development.

OHA is greatly appreciative of the numerical “caps” placed on the number of telescopes allowed to be present on Maunakea lands, which would immediately limit the number of telescopes anywhere on Maunakea to 13, and reduce this allowed amount to nine by January 1, 2028. **As these caps recognize, the overdevelopment of Maunakea for telescope purposes, with little regard of their environmental and cultural impacts or the larger management needs of the mauna, constitutes one of the most significant failings of UH and BLNR.**

OHA does believe that these caps may be made more meaningful with more precise limitations on what they would allow. For example, UH has a consistent history of circumventing prior “caps” on telescope and observatory development, by re-defining “telescope” to include multiple, large-scale instrument structures and accessory buildings as part of a single “telescope.” Such a practice has led to the continued proliferation of telescope structures notwithstanding past promises to limit the number of telescopes marring Maunakea’s landscape.

Accordingly, OHA respectfully urges to Committees to provide more concrete limitations for telescope development, in addition to the numerical “caps” provided for in this measure, by inserting a new section after page 72, line 4, to read as follows:

§ -__ Footprint; limitations “At no time shall the total combined footprint of all improvements, including buildings, roads, telescopes, decommissioned telescope structures, and all infrastructure, on Mauna Kea lands, exceed the total developed footprint of improvements, including buildings, roads, telescopes, and all infrastructure present on Mauna Kea as of June 1, 2018.”

6. Clarifying access policies for traditional and customary practices.

OHA is further highly appreciative of SB3090 Proposed SD1’s managed access provisions, which seek to ensure that all visitors to Maunakea are appropriately informed and educated regarding safety, environmental protection, and cultural traditions and sensitivities, an issue of longstanding concern. OHA further appreciates the waiver of fees for those wishing to access Maunakea for the exercise of Native Hawaiian traditional and customary practices. **However, OHA does note that Native Hawaiian traditional and customary practices may require access to Maunakea and its summit beyond “normal operating hours,” as described in this measure.** Accordingly, to ensure that Native Hawaiian cultural practitioners can continue to maintain their full range of traditions, OHA urges the Committees to amend the language found on page 76, lines 4-10, to read as follows:

“sensitivities. Except as provided under section -36 or this section, all visitors who travel to the summit shall be required to use a shuttle service established by the authority. The authority shall establish a policy that allows access at all times, without any

entrance fee, to visitors seeking to exercise Native Hawaiian traditional and customary practices protected under article XII, section 7, of the Hawaii State Constitution.”

7. Clarifying intent of public land trust revenue transfers to OHA

OHA appreciates the inclusion of express language intended to ensure that the MKMA complies with its constitutional and statutory obligation to provide Native Hawaiians with a pro rata share of revenues from the use of Public Land Trust lands – which includes the subject Maunakea lands – and to ensure that the beneficiary classes under the Trust fairly benefit from the use of Maunakea trust lands. In order to provide consistency with legal terms and references relating to Native Hawaiians’ pro-rata share of Public Land Trust receipts, OHA respectfully recommends technical amendments amending the language found on page 85, line 15 thru page 86, line 7, to read as follows:

“ § -48 **Revenue to be shared with the office of Hawaiian affairs.** The authority and the University of Hawaii shall transfer to the office of Hawaiian affairs twenty per cent of all receipts collected by the authority or university as a result of lease rent, fees, penalties, commercial activities, technology transfers, monetization of intellectual properties or discoveries, and other revenue sources; provided that any funds transferred to the office of Hawaiian affairs pursuant to this section shall be deemed income and proceeds from the use of public land trust lands by the authority and university to be expended by the office of Hawaiian affairs under section 10-13.5.”

8. Concluding remarks

As a final note, OHA recognizes and appreciates the bold step that this measure seeks to take, to begin to address the mismanagement concerns that have plagued Maunakea for over a generation. **OHA understands that this measure would, for the first time in the history of telescope development on Maunakea, finally and decisively remove UH’s and BLNR’s authority over the use of these much-neglected lands of immense ecological, cultural, and spiritual significance.** OHA further understands that this measure would explicitly require and empower the newly-formed MKMA to address additional outstanding issues that have been identified by Native Hawaiian practitioners, environmental interests, researchers, and even astronomy personnel over the decades of UH control over Maunakea, including: establishing policies for cultural access and traditional and customary practices; educating visitors and managing public access and its attendant impacts to the environmental, cultural, and historical integrity of Maunakea; addressing public safety and health issues; statutorily limiting telescope development; ensuring that any telescope dispositions consider and account for impacts to natural and cultural resources as well as to cultural practices and

sites, including the costs of remediating any such impacts; and providing for actual enforcement authorities necessary to meaningfully manage and protect Maunakea.

OHA also acknowledges and appreciates the retention of numerous mechanisms and procedural safeguards to ensure transparency and accountability in any disposition of Maunakea's lands, and notes that the current contested case hearing process and with simple amendments the conservation district rules and permitting procedures for any proposed uses of Maunakea lands will be unaffected by this measure.

OHA accordingly offers the above comments and recommendations to further effectuate the intent of this measure, and provide greater assurances that the MKMA can and will fulfill its critical responsibilities to properly steward and care for Maunakea. **OHA urges the Committees to also carefully consider and address any additional issues and concerns identified by Native Hawaiian cultural practitioners, 'ohana with ancestral and cultural ties to Maunakea, researchers, educators, and other members of the Native Hawaiian community, in its discussion and deliberation regarding this bill.**

Mahalo nui loa for the opportunity to comment on this measure.