

MAUNA KEA MANAGEMENT AUTHORITY
SB3090 SD2
OHA White Paper

Preamble

SB3090 SD2 would establish a Mauna Kea Management Authority (MKMA) to reform management, responsibility, and enforcement kuleana related to Mauna Kea lands. The primary purpose of creating the MKMA is to resolve long-standing and on-going concerns over the insufficient and unsatisfactory mismanagement of Mauna Kea by the University of Hawai'i (UH) and the Board of Land and Natural Resources (BLNR). The preamble recognizes the need for a change in Mauna Kea's management, in light of

- Mauna Kea being a profound cultural and genealogical importance to Native Hawaiians, and
- Mauna Kea being valued as an exceptional site for astronomical advancements. § -1 [p 1].

Conservation District Rules Applicability & Contested Cases

To maintain procedural due process and public transparency, SB3090 SD2 would explicitly recognize and reaffirms:

- The continued applicability of conservation district rules, including the contested case opportunities in the conservation district use application process. § -50 [p 69-70] and § -34 [p 56].
- That any decisions impacting constitutional rights, including specifically Native Hawaiian traditional and customary rights and rights to a healthful environment, are subject to a contested case hearing if requested. § -50(b) [p 70].

Telescope regulation

There are currently no enforceable commitments to limit or reduce the number of observatories or the development footprint, instead UH has continued to modify its vision for the number of telescopes that would be allowed on Mauna Kea (e.g. 1985 management plan envisioned 13 steel-framed telescopes, 2000 master plan called for up to 15 observatories by 2020, UH response to HCR314 in 2006 called for development of up to 14 possible sites by 2020). Further, while UH adopted a decommissioning sub-plan that lays out a process for decommissioning telescopes, sub-lessees are not contractually required to follow all aspects the sub-plan.

SB3090 SD2 would create a commitment to reduce the number of astronomical structures and restrict Mauna Kea's development footprint. Furthermore, it sets and reduces the maximum number of telescopes that are allowed on Mauna Kea. SB3090 SD2 specifically:

- Limits the number of telescopes to not more than 13 at any time. § -31 [p 53].
- Limits the number of telescopes to no more than 9 telescopes by January 1, 2028. § -31 [p 53].
- Caps the total combined footprint to not exceed the total developed as of December 31, 2031. § -32 [p 53].

MKMA Board Composition

Importantly, SB3090 SD2 would transform the decision making body ultimately responsible for the proper management of Mauna Kea. Currently, both UH's Board of Regents and the BLNR have not fulfilled their responsibilities to ensure the proper management and stewardship of Mauna Kea, in favor of industrial-scale observatory development on its summit.

The BLNR consists of seven members from across the State, and requires

- Only one member to have a background in conservation and natural resources;
- Only one member to have demonstrated expertise in native Hawaiian traditional and customary practices;
- Only one member to be from Hawai'i Island
- Five out of seven members are not required to have any specific background or expertise in conservation or Hawaiian culture; all members are directly nominated by the Governor with no prior input or consultation with other entities.
- NOTE: The chair of the BLNR is also the Governor's full-time employee. HRS § 171-4 and HRS 25-15.

There are no specified requirements for cultural or conservation expertise for the UH Board of Regents.

In replacing the BLNR and UH Board of Regents, the MKMA would be comprised of seven voting members with a diverse range of expertise particularly relevant to its full range of responsibilities to Mauna Kea, and who will be much more likely to balance all the needs and opportunities in its stewardship of the Mauna. Notably, SB3090 SD2 would require: § -3 [p 5-11]

- Four members (of those listed below) to be residents of the county of Hawai'i.
- Two members to be Hawaiian cultural experts, including one member who is a practitioner or lineal descendant of practitioners of Native Hawaiian traditional and customary practices associated with Mauna Kea, and one member with demonstrated expertise in Native Hawaiian traditional and customary practices or Hawaiian history.
- One member to be have expertise in environmental sciences relevant to the natural resources and ecological attributes of Mauna Kea.
- Two members to be business experts with expertise in real estate, property appraisal, accounting, finance, economics, or innovation.
- One member to be a land management expert.
- One member to be an astronomy expert not currently employed at an astronomy facility or the University of Hawai'i's institute for astronomy.
- All members to be appointed by the Governor and subject to Senate confirmation, with the two cultural experts selected by a list of nominees submitted to the governor by OHA.
- The board to elect its own chairperson and vice chairperson from among its members.

No Land Alienation

Mauna Kea lands constitute “ceded,” public land trust lands, acquired without the consent of the Native Hawaiian people, and are held in trust for the benefit of Native Hawaiians and the public. Nothing in SB3090 SD2 alters the “ceded” and public land trust status of these lands.

Importantly, under SB3090 SD2, MKMA is explicitly prohibited from selling or exchanging lands, and removing Mauna Kea lands from the definition of “public lands,” for the purposes of Chapter 171, removes even the BLNR’s authority to sell or exchange these lands. §4(d) [p 15].

Land Dispositions: Leases

Although under SB3090 SD2 MKMA lands would not be considered “public lands” for the purposes of HRS § 171-2, SB3090 SD2 transfers BLNR’s Chapter 171 powers and responsibilities – including restrictions and safeguards for transparency and accountability – relating to the disposition of public lands to the MKMA. SB3090 SD2 would expressly incorporate relevant sections of HRS Chapter § 171 to parallel the existing legal framework that applies to the disposition of “public lands.”

Parallel Lease Provisions – SB3090 SD2 & HRS Chapter 171

Specifically, SB3090 SD2 would subject MKMA to the following existing safeguards currently found in Chapter 171, in line with the restrictions and requirements placed upon BLNR when leasing or otherwise disposing of “public lands”:

- Establishes extensive lease requirements and safeguards, including restrictions against alienation, protection of forests and watershed lands, etc. Compare § -14 [p 30-31] & HRS § 171-35.
- Restricts lease terms to safeguard against inappropriate lease provisions. Compare § -15 [p 31-37] & HRS § 171-36.
 - Prohibits Options for renewal of terms that could otherwise lead to leases lasting up to a century or more. Compare § -15(a)(1) [p 32] & HRS § 171-36 (a)(1).
 - Restricts leases to the existing, maximum sixty-five-year term, with minor exceptions, such as those relating to mortgage financing, also found in Chapter 171. Compare § -15(a)(2) [p 32], § -15(b)(3) [p 34] & HRS § 171-36(a)(2).
 - Requires MKMA approval (subject to public meeting laws) for leases before they can be transferred or assigned to a new lessee. Compare § -15(a)(5) [p 32-33] & HRS § 171-36(a)(5).
 - Requires MKMA approval (subject to public meeting laws) for all subleases. Compare § -15(a)(6) [p 33-34] & HRS § 171-36(6).
- Requires disposition to be made at public auction with exceptions. Compare § -5 Auction [p 15-16] & HRS §171-14.
- No lands shall be leased for a sum less than the value fixed by appraisal with exceptions. Compare § -8 [p 19-20] & HRS § 171-17. See also “Additional Lease Provisions/Restrictions” below.
- Authorizes MKMA to lease to non-profit entities for nominal consideration through direct negotiation. Compare § - 22 [p 46] & HRS § 171-43.1. See also “Additional Lease Provisions/Restrictions” below (Telescope leases).
- Authorizes MKMA to lease to other government agencies through direct negotiation, MKMA has broad discretion on lease terms. Compare § - 29 [p 50-51] & HRS § 171-96.
- Prohibits lessees of Mauna Kea lands from acquiring any rights to “prehistoric and historic remains” on leased lands. Compare § -16 [p 37] & § -17 [p 37-38] with HRS § 171-36.1.

Additional Lease Provisions in SB3090 SD2

Although HRS Ch § 171 restricts how “public lands” can be disposed of and provides for the procedural issuance of public land leases, it currently grants BLNR and UH substantial discretion and flexibility as it relates to leases to nonprofit organizations and government entities – including observatory developers. Existing observatory subleases have resulted in unclear and unspecific benefits to Native Hawaiian public land trust beneficiaries, with gratis (free) or nominal, \$1 rents; at the same time, UH’s astronomy department has solely been receiving substantial benefits from these observatories in the form of extremely valuable telescope time. This substantial benefit has largely flowed solely to the astronomy program at UH, without any rent revenue to appropriately manage Mauna Kea lands, resources, and sites of unparalleled ecological, cultural, and spiritual significance.

Consequently, SB3090 SD2 would require additional considerations and restrictions for disposition of Mauna Kea lands:

- Future leases shall include, at a minimum, a stewardship component, community benefits package, and conversion of the applicable facility to a self-contained, zero-discharge waste system. § -37 [p 56-57].
- Anticipates renegotiation of subleases by MKMA, to include a balanced consideration of the MKMA’s and state’s full range of responsibilities to the mauna. § -15(a)(6) [p 35], § -15(c) [p 36] & § -15(d) [p 37].
- Requires MKMA to take into account the following with regards to telescope leases: 1) the value of land use, 2) telescope viewing time, and 3) impacts to natural and cultural resources and traditional and customary practices, including the cost of preventing and remediating any adverse impacts to lands and resources resulting from observatory. § -30 [p 52-53].

Note: UH is also authorized to charge fees for use of Mauna Kea lands, but the requirement to charge fees is discretionary. See HRS § 304A-1902(a) (“The board of regents may charge a fee for use of the Mauna Kea lands and for the use of facilities and programs related to the Mauna Kea lands” (emphasis added)).

Administrative rules per HRS Ch. 91

MKMA would be empowered to adopt rules (§ -4 (a)(5) [p 11]):

- On the management, stewardship, and protection of Mauna Kea’s cultural resources and lands, which must be expedited, § -33 [p 53-55]
- To determine what constitutes historic preservation and restoration projects. § -17(b) [p 38]
- To govern procurement § -4 (a)(11) [p 13]

MKMA would be required to consult with OHA on management rules. § -33 [p 53].

MKMA would be also required to report annually to the legislature on the status of administrative rules, and implementation of management plans. § -11 [p 27-28].

Art. XII, § 7 Traditional and Customary (T&C) Practices Protection and Promotion:

For too long, the cultural significance of Mauna Kea, its lands, resources, and sites, have been neglected by the BLNR and UH. SB3090 SD2 would establish numerous requirements to directly ensure the continuance and vitality of Native Hawaiian traditional and customary practices associated with Mauna Kea, including the exceptionally unique natural resources and natural and spiritual environment found on the mauna. It is important to note that 1) all T&C practices are inextricably tied to 'āina (land) and 2) Native Hawaiians do not separate the religious or sacred from the physical; accordingly, the proper cultural stewardship of Mauna Kea requires both natural resource protection and management as well as the explicit protection of associated Native Hawaiian traditional and customary practices. Due to the intimate and personal nature of traditional and customary rights, managed access controls must mitigate damaging as well as offensive behavior, which can interfere with and adversely impact T&C rights and the cultural integrity of Mauna Kea. SB3090 SD2 would promote this understanding by:

- Having at least two qualified cultural experts on the MKMA, along with an environmental specialist as well as two business representatives who can ensure that any generated revenues are maximized to support proper management;
- Ensuring that leases, and telescope leases in particular, account for the potential impacts to natural and cultural resources and cultural practices, including the costs of remediating such impacts;
- Expressly reaffirming conservation district use application and contested case hearing requirements;
- Requiring rulemaking specific to natural and cultural resource management, and the meaningful development and implementation of a comprehensive management plan;
- Requiring consultation with OHA to ensure that any rules promulgated by the MKMA do not affect Native Hawaiian traditional and customary rights;
- Establishing authorized enforcement personnel and procedures to properly enforce rules and policies including those relating to proper management;
- Accommodating Native Hawaiian cultural practitioners including through fee waivers and 24-hour access; and
- Establishing a division specifically tasked with working with lineal descendants, community members, environmentalists, and individuals traditionally associated with cultural resources on Mauna Kea through appropriate programs of research, planning, and stewardship. among others.

Appropriations

To ensure that MKMA has sufficient resources to execute its responsibilities from the outset, SB3090 SD2 contemplates the appropriation to the MKMA of an unspecified amount of state general funds as MKMA “startup funds.”

Management Plan

To address on-going management concerns, including the management of access by and behavior of Mauna Kea visitors, the failure of UH and BLNR to ensure adequate progress on management plans, the unauthorized permitting of commercial activities, and the prioritization of telescope development over appropriate management, SB3090 SD2 would:

- Authorize MKMA to prepare a current and comprehensive management plan (CMP) for all aspects of public and private access and use of Mauna Kea lands. § -4 (7) [p 12].

Note: Astronomy facilities currently only require a BLNR-approved conservation district use permit and a management plan, not a more detailed comprehensive management plan. HAR 13-5-24, land uses in a resource subzone, R-3.

- Require the CMP to include benchmarks for implementation of management actions. § -4 (7) [p 12]. As has been made abundantly clear, UH's existing CMP lacks adequate information to measure UH's progress, deadlines or benchmarks for implementation, as well as consequences for inadequate implementation.
- Authorize the review, revision, and update as necessary of all management plans for Mauna Kea. § -4 (20) [p 14].
- Require all visitors to register, pay applicable fees (other than cultural practitioners), and receive orientation regarding safety, environmental protection, and cultural traditions and sensitivities. § -38 [p 57-58]. Existing laws and existing CMP do not require visitors to attend a training or briefing before accessing Mauna Kea.
- Require annual reporting and updates to the legislature for land dispositions, the status of administrative rules (see below), and implementation of management plans. § -11 [p 27-28].