

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 13, 2013

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

PSF No. 13HD-147 (summit lease)
PSF No. 13HD-148 (Hale Pohaku lease)
PSF No. 13HD-149 (easement)
Hawaii

Resubmittal:

Mutual Cancellation of General Lease No. S-4191 to the University of Hawaii (UH) for the Mauna Kea Science Reserve and Issuance of New Direct Lease to UH for Mauna Kea Science Reserve Purposes; Mutual Cancellation of General Lease No. S-5529 to UH for the Hale Pohaku Mid-Level Facilities and Issuance of New Direct Lease to UH for Hale Pohaku Mid-Level Facilities Purposes; Extension, Amendment and Restatement of Grant of Term Easement S-4697 to UH to Extend the Easement Term by Approximately 45 Years and Update the Easement Instrument with Current Provisions Approved by the Department of the Attorney General, Kaohe, Hamakua, Island of Hawaii, Tax Map Keys: 3rd/ 4-4-15:01 por., 09 & 12

APPLICANT:

University of Hawaii

LEGAL REFERENCE:

Sections 171-13 and 171-95, Hawaii Revised Statutes, as amended.

LOCATION:

Government Lands of Kaohe, Hamakua Island of Hawaii, identified by Tax Map Keys: 3rd/ 4-4-15:01 por., 09 & 12, as shown on the attached maps labeled Exhibit A.

TABLE 1- TMK/ ZONING/ AREA/ ENCUMBRANCE:

TAX MAP KEY 3 rd /	ZONING		PARCEL AREA Acres	ENCUMBRANCE
	LUC	CZO		
4-4-15:09	Conservation	Unplanned	11,215.554 ac	General Lease (GL) No. S-4191 to UH for the Mauna Kea Science Reserve; GL No. S-4697 to UH for access easement; GL No. S-3853a to the United States for a water lease
4-4-15:12	Conservation	Unplanned	19.261 ac	GL No. S-5529 to UH for the Hale Pohaku Mid-Level Facilities
4-4-15:01 por.	Conservation	Unplanned	52,741.685 ac (easement area: 70.798 ac)	Grant of Easement No. S-4697 to UH

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

General Lease No. S-4191 to UH for the Mauna Kea Science Reserve, GL No. S-5529 to UH for the Hale Pohaku Mid-Level Facilities, and GL No. S-4697 to UH for access easement (sometimes collectively referred to hereinafter as the UH Management Areas).

LEASE CHARACTER OF USE:

GL S-4191 – For a scientific complex and as a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex. Activities inimical to said scientific complex shall include light and dust interference to observatory operation and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

GL S-5529 – The lessee shall use or allow the premises leased to be used solely for permanent mid-level facilities, a construction camp, an information station as well as existing facilities purposes.

LEASE TERM:

Sixty-five (65) years.

LEASE COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

LEASE RENT:

Gratis.

LEASE PERFORMANCE BOND:

None.

EASEMENT CHARACTER OF USE:

Non-exclusive easement and right-of-way over and across the real property described therein.

EASEMENT TERM:

Grant of Easement S-4697 commenced on December 26, 1974, and is scheduled to terminate on December 31, 2033. The easement term is to be extended so that it is coterminous with the new leases to Applicant.

EASEMENT RENT:

Gratis.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See the Exemption Notification attached as Exhibit B.

DCCA VERIFICATION:

Not applicable. UH is a government agency and is not required to register with the Department of Commerce and Consumer Affairs.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for the cost of the publication of notice of disposition by negotiation pursuant to Hawaii Revised Statutes Section 171-16(c);
- 2) Provide a complete, as-built survey map and description of the alignment of the

Hawaii Electric Light Company, Inc. easement extending through the lease premises and Mauna Kea Ice Age Natural Area Reserve

REMARKS:

Background

The Mauna Kea Science Reserve (MKSR), the largest of the University of Hawaii (UH) Management Areas, was established in 1968. The entire 11,288-acre MKSR is designated as part of the Conservation District, resource subzone. While ultimate authority over the management of the MKSR is retained by the Board of Land and Natural Resources (Board), certain responsibilities are performed by UH as provided in the Mauna Kea Comprehensive Management Plan and its subplans (Cultural Resources Management Plan, Natural Resources Management Plan, Public Access Plan, and Decommissioning Plan), as the Board-approved management documents for land use and activities within the MKSR.

Eight optical and/or infrared observatories are currently present in the MKSR's 525-acre Astronomy Precinct; the first Mauna Kea observatories were built in the 1960s. Optical/infrared telescopes use mirrors to collect and focus visible and infrared light. Each optical/infrared observatory consists of a single telescope, except the W. M. Keck observatory which currently houses the two most powerful optical/infrared telescopes on Mauna Kea, each with a 10-meter diameter primary mirror. The MKSR also hosts three submillimeter observatories and a radio antenna.

The Hale Pohaku mid-level support facilities cover an area of approximately 19.3 acres at the 9,200 ft. elevation on the south slope of Mauna Kea. The mid-level site houses the Onizuka Center for International Astronomy, the visitor information and comfort stations, a construction laborers camp, and existing cabin facilities constructed by the Territory of Hawaii and State of Hawaii prior to establishment of the MKSR in 1968.

The current Summit Access Road was improved in 1983 covering an area of 70.798 acres. The Final Management Plan for Conservation District Use Permit (CDUP) HA-1573 was approved by Board at its meeting of February 22, 1985, which added a 400-yard wide corridor on either side of the roadway. The total area currently covered by the Summit Access Road and associated corridor is approximately 723 acres.

By letter dated August 22, 2013, UH, through its Board of Regents, requested the mutual cancellation of the existing leases for MKSR (GL No. S-4191) and the Hale Pohaku Mid-Level Facilities (GL No. S-5529), and the issuance of new 65-year leases for the premises. The letter also requested the amendment of Grant of Easement No. S-4697 covering the Mauna Kea Observatory Access Road to be coterminous with the new general leases. The reasons UH gave for the request were:

1) the need to address internal changes made by the UH in how it manages lands on Mauna Kea; 2) the need to reflect management actions and reporting requirements adopted by the Board of Land and Natural Resources . . .; 3) to assist in implementing legislation concerning the Mauna Kea lands managed by UH; and 4) to provide the basis for developing sublease agreements with current and . . . any potential future telescope projects.

See Exhibit C attached.

Staff reviews the history of the leases and easement, and analyzes the propriety of the requested new dispositions below.

General Lease No. S-4191

At its meeting of November 22, 1967, Item F-31, the Board approved the issuance of a 65-year lease of the Mauna Kea summit to UH “[t]o serve as a Scientific Reserve and, specifically, as a buffer zone to prevent the intrusion of activities inimical to scientific complex, including an observatory, in the process of being located near the Mauna Kea summit”. General Lease No. S-4191 dated June 21, 1968 was thereafter issued to UH with a commencement date of January 1, 1968 and a termination date of December 31, 2033.

Subsequently, UH obtained Board approval for and issued the following subleases:

TABLE 2 – EXISTING SUBLEASES

Sublessee	Date of Bd Action	Character of Use	Area	EIS	CDUP Appr'd	Sublease Term
National Aeronautics and Space Administration	2/19/75, Item F-1-d	Erecting and operating infrared astronomical observatory facilities	70,650 sf	Appr'd 8/4/75	HA-653; 8/29/75, Item H-5	11/29/74-12/31/33
Canada-France-Hawaii Telescope Corporation	11/7/75, Item F-11	Erecting and managing astronomical observatory research facilities	2 acres	Appr'd 8/12/74	HA-527	12/18/75-12/31/33
Science Research Council	11/18/77, Item F-17	Erecting and managing astronomical observatory research facilities	32,000 sf	Appr'd 8/4/75	HA-653; 8/29/75, Item H-5	1/21/76-12/31/33
Science and Engineering Research Council	4/22/83, Item F-1-f	Construction and operation of a 15-meter telescope facility and appurtenant	2 acres	Appr'd 1/20/83	HA-1515; 2/25/83, Item H-11	2/10/84-12/31/33

Sublessee	Date of Bd Action	Character of Use	Area	EIS	CDUP Appr'd	Sublease Term
		improvements				
California Institute of Technology	8/26/83, Item F-1-i	Construction and operation of a 10.4 meter telescope	.75 acre	Appr'd 8/26/82	HA-1492; 12/17/82, Item H-6	12/20/83-12/31/33
California Institute of Technology	6/14/85, Item F-1-a	Construction and operation of the WM Keck 10-meter telescope observatory	2 acres	Appr'd 1/2083	HA-1646; 8/24/84, Item H-1; HA-2509	10/30/85-12/31/33
National Astronomical Observatory of Japan	8/21/97, Item D-1	Construction and operation of the 8-meter Japan national large telescope	5.4 acres	Appr'd 1/20/83	HA-2642	6/5/92-12/31/33
Smithsonian Institution	8/21/97, Item D-2	Construction and operation of the Smithsonian submillimeter array telescope	3 acres	Appr'd 1/20/83	HA-2728	5/15/95-12/31/33
Associated Universities Inc.	8/21/97, Item D-3	Construction and operation of a very long baseline array antenna	87,500 sf	Appr'd 11/2/88	HA-2174	9/28/90-12/31/33
National Science Foundation	8/21/97, Item D-4	Construction and operation of the Gemini 8-meter telescope	2 acres	Appr'd 1/20/83	HA-2691	9/26/94-12/31/33

The rent charged for the subleases was nominal at \$1.00 for the term of the sublease, however, UH received observatory time at sublessees' facility in exchange for issuing the sublease.¹ For each sublease, a CDUP was secured for the telescope facility as indicated above.²

At its meeting of November 9, 1978, Item H-10, the Board approved the set aside of the Mauna Kea Ice Age Reserve (MKIAR), comprising two locations of 3,750 acres and 143.5 acres, to the Natural Area Reserve Commission. Additionally, the Board approved a CDUP for the designation of the MKIAR, as well as other locations throughout the State, as natural area reserves at its meeting of May 8, 1981, Item H-11. Governor's

¹ The Board additionally approved some short-term dispositions which have expired by their terms and are not listed in Table 2.

² A number of other CDUPs and site plan approvals were issued for various projects in the MKSR, at Hale Pohaku, and for the access road as indicated in Exhibit D attached.

Executive Order No. 3101 dated November 16, 1981 effected the set-aside. However, the MKIAR was not formally taken out of GL No. S-4191 until the Board's action of June 13, 1997, Item D-2. A Partial Withdrawal From GL No. S-4191 was thereafter executed by UH and the Board on March 23, 1998.

At its meeting of September 24, 1982, Item F-4, the Board authorized the Division of Forestry and Wildlife to hold public hearings (after-the-fact) on the proposed withdrawal of approximately 13,328.054 acres from the Mauna Kea Forest Reserve, so that the withdrawn lands could be included in the leases to UH. After public hearings, the Board approved the withdrawal of the lands from the forest reserve at its meeting of March 22, 1985, Item C-2. By Governor's Executive Order No. 3710 dated August 7, 1997, lands with a net area of 11,269.554 acres (after excluding the MKIAR) were officially withdrawn from the forest reserve.

At its meeting of September 27, 1985, Item F-2, the Board approved the grant of a perpetual, non-exclusive easement to the Hawaii Electric Light Company, Inc. (HELCO) for a power and communication line extending from Saddle Road to Mauna Kea summit.

At its meeting of February 25, 2011, Item K-1, the Board approved CDUP HA-3568 for the Thirty-Meter Telescope (TMT) while simultaneously ordering on the Board's own motion the holding of a contested case proceeding and the appointment of a hearing officer, Item K-2. A contested case followed with the Board approving the findings of fact, conclusions of law, and decision and order on April 12, 2013.

General Lease No. S-5529

At its meeting of February 14, 1986, the Board approved CDUP HA-1819 for the subdivision of an approximately 21-acre site out of the Mauna Kea Forest Reserve for the Hale Pohaku Mid-Level Facilities. At its meeting of February 28, 1986, Item F-14, the Board approved a 55-year lease to UH for approximately 21 acres covering the Hale Pohaku Mid-Level Facilities, long-term construction camp and staging area. General Lease No. S-5529 was thereafter executed between the Board and UH with a commencement date of February 28, 1986 and a termination date of February 28, 2041. The final area of the lease premises was 19.261 acres.

Grant of Easement No. S-4679

On March 1, 1974, the Governor approved the Environmental Impact Statement for the construction of an access road between Hale Pohaku and the Mauna Kea summit. At its meeting of June 27, 1974, Item H-7, as amended, the Board approved CDUP HA-537 for the construction of the access road. At its meeting of October 25, 1974, Item F-8, as amended, the Board approved the issuance of a term easement to UH for roadway purposes over the access road. The Board additionally issued a construction right-of-

entry to the Department of Transportation to build the road. Grant of Easement No. S-4697 covering the road was thereafter issued to UH as of September 8, 1981. The easement is coterminous with GL No. S-4191, ending on December 31, 2033.

Management Plans

At its meeting of February 11, 1977, Item H-10, the Board adopted the first management plan for Mauna Kea. The management plan served as a policy framework for the management of Mauna Kea from the summit to about the 6,000 foot elevation. It stated jurisdictional responsibilities for specific resources and uses, and defined specific uses and facilities to be allowed. This development plan evolved and expanded over the years, culminating in the Comprehensive Management Plan mentioned above, and discussed in further detail below.

At its meeting of December 16, 1983, Item H-5, the Board amended the plan as to the permissibility of overhead power lines and the paving of the summit access road. At its meeting of February 10, 1984, Item H-4, the Board approved CDUP HA-1573 for the installation of a permanent power line and improvements to the Summit Access Road, and also approved UH's revised management plan, with certain amendments. At its meeting of February 22, 1985, Item H-6, the Board accepted and approved the Final Management Plan under CDUP HA-1573.

At its meeting of March 10, 1995, Item H-2, as amended, the Board approved a revised management plan to include a commercial activities element under CDUP HA-1573A. The revised plan allowed a limited number of commercial tour permits so operators could take customers up the mountain for various recreational activities. At its meeting of December 15, 2000, Item D-28, as amended, the Board approved the transfer of commercial permitting authority to UH.

Also in 2000, UH adopted the Mauna Kea Science Reserve Master Plan. Nine years later, the Mauna Kea Comprehensive Management Plan ("CMP") and its subplans (Cultural Resources Management Plan, Natural Resources Management Plan, Public Access Plan, and Decommissioning Plan), were adopted by the Board at its meetings of April 9, 2009, Item K-1, and March 25, 2010, Item K-1, respectively.

There are twelve observatories currently operating with supporting infrastructure within the MKSR. The 2000 Master Plan for the UH Management Areas limited observatory development to the 525-acre Astronomy Precinct leaving the remaining 10,763 acres of the MKSR as a science reserve and buffer zone which has been designated a Natural/Cultural Preservation Area managed by UH in coordination with the Board pursuant to the CMP and subplans.

Environmental Analysis

The new leases would reflect recent changes in the management of the UH Management Areas adopted by the Board of Land and Natural Resources such as the CMP and its subplans. While not specifically required for the current request, an analysis was previously conducted of the potential impacts of the existing uses on historic and cultural resources within the UH Management Areas during the preparation of the CMP and its subplans. A cornerstone of the CMP is a recognition that Mauna Kea is a cultural landscape where historic and cultural resources including traditional and customary Native Hawaiian practices must be addressed through the analytical framework set out in the Hawaii Supreme Court's decision in *Ka Pa 'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31, 7 P.3d 1068 (2000) ("*Ka Pa 'akai*"). At a minimum, this framework requires that: (1) the identity and scope of "valued cultural, historical, or natural resources" in the UH Management Areas, including the extent to which traditional and customary Native Hawaiian rights are exercised; (2) the extent to which those resources – including traditional and customary Native Hawaiian rights – will be affected or impaired by the proposed action or use; and (3) the "feasible action", if any, to be taken to reasonably protect Native Hawaiian rights if they are found to exist.

The *Ka Pa 'akai* analytical framework was discussed extensively in the Final Environmental Assessment for the Mauna Kea Comprehensive Management Plan for the University of Hawaii Management Areas in April 2009. The CMP and its subplans adopted by the Board of Land and Natural Resources on April 9, 2009 and March 25, 2010, respectively, also address the requirements of *Ka Pa 'akai* as follows:

1. The CMP and the many archaeological surveys or ethnographic studies undertaken for the UH Management Areas, including the Archaeological Inventory Survey (AIS) Report for the Mauna Kea Science Reserve (PCSI, 2011), the AIS Report for the Astronomy Precinct within the Mauna Kea Science Reserve (PCSI, 2010), the AIS Report for the Mauna Kea Access Road Management Corridor (PCSI, 2010), the Architectural Inventory Survey of Hale Pōhaku Rest Houses 1 and 2 and Comfort Station (PCSI, 2010), the Archaeological Study and Assessment for the TMT Ancillary Facilities at Hale Pohaku (CSH, 2009), and Kēpa and Onaona Maly's *Mauna Kea, Ka Piko Kaulana o ka Aina, A Collection of Native Hawaiian Traditions, Historical Accounts and Oral History* (Kumu Pono Associates, 2005), identified the valued cultural and historical resources, including traditional and customary practices exercised within the UH Management Areas.
2. The CMP and its subplans describe the threats or impacts to these valued resources by existing and continuing uses and activities within the UH Management Areas. Many of the human use impacts are unintentional, caused by uneducated visitors and facilitated by loose regulation and minimally managed access. Threats from various user groups vary in type and intensity and are factors that are being considered in the

management recommendations. Other threats, such as climate change, act over a longer time frame and are more difficult to quantify and correlate with specific impacts.

3. The third step of the *Ka Pa 'akai* analysis requires the consideration of “feasible actions” or in this case the management actions to be taken to reasonably protect these valued resources within the UH Management Areas. The management actions recommended for implementation in the CMP and its subplans, including those described in detail in the Cultural Resource Management Plan, set out specific and feasible measures to mitigate the effects and impact of existing and continuing use within the UH Management Areas. The management actions consistently recommend an approach that emphasizes education and orientation as cost effective tools, as well as information gathering, management measures, and regulations and enforcement to preserve and protect cultural, historical and natural resources, including traditional and customary Native Hawaiian practices. The CMP also identified the need for legislative authority to allow UH to adopt regulations to effectively manage and protect resources on public lands leased on Mauna Kea.

In 2009 the State Legislature passed Act 132, which, among other things, authorized UH, in consultation with the Office of Hawaiian Affairs, to promulgate administrative rules governing public and commercial activities within the UH Management Areas consistent with the administrative rules of the Division of Forestry and Wildlife relating to forest reserves and natural area reserves. The intent of the law is to protect "valued cultural, historical and natural resources" within the UH Management Areas by allowing UH to enforce such protections through the imposition of fines. Once approved, the rules will identify permissible and prohibited activities. They will also provide clear lines of authority for UH to carry out its stewardship responsibilities, however, the ultimate authority over these lands will remain with the Board as defined in the CMP. More importantly, the act established the Mauna Kea Lands Management Special Fund into which fees are deposited. Fees deposited into the special fund can only be applied toward the management of the resources within UH Management Areas. The new leases requested by UH for the MKSR and Hale Pohaku will also provide a basis for implementing and enforcing the management actions described in the CMP and its subplans for the protection of these resources beyond the current expiration date of the existing leases and does not constitute an improper delegation of authority to UH.

The three combined UH Management Areas under the two existing leases and grant of easement cover approximately 12,034 acres and were the subject of the Final Environmental Assessment for the Mauna Kea Comprehensive Management Plan for the University of Hawaii Management Areas in April 2009. In reviewing the environmental impact of the management framework in the draft CMP, the study addressed past and existing uses as well as considered management actions and objectives for anticipated future uses within the UH Management Areas. It also concluded that CMP would have no significant impact on the natural and cultural resources on Mauna Kea. The proposed

uses within the areas under the new leases for the MKSR and Hale Pohaku have existed since the inception of the first lease in the 1960's and are continuing.

Special Lease Terms

UH has requested revisions to a number of the standard lease provisions found in the Department of the Attorney General's current template for direct leases to government agencies. A copy of the proposed lease for the MKSR redlined to show changes requested by UH is attached as Exhibit E, and a copy of the proposed Hale Pohaku facilities lease redlined to show requested changes is attached as Exhibit F.

The lease form that the Department of the Attorney General uses for the new leases to government agencies contains a provision regarding improvements that reserves to the Board:

Ownership of improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of this lease, excluding those improvements constructed during the term of this lease unless provided otherwise.

The present request involves the mutual cancellation of two existing leases and the issuance of new direct leases for the purposes discussed above. Ownership of the improvements constructed by UH and its sublessees during the terms of GL No. S-4191 and GL No. S-5529 should remain with UH into and through the term of the new lease. Accordingly, staff recommends that the standard "Ownership of improvements" provision be revised to reserve to the Board:

Ownership of improvements. The ownership of all improvements of whatever kind or nature located on the land prior to or on the commencement date of [General Lease No. S-4191 or General Lease No. S-5529, as applicable], and excluding those improvements constructed by the Lessee and its sublessees during the term of [General Lease No. S-4191 or General Lease No. S-5529, as applicable] and the term of this lease [i.e., the new UH leases] and this lease unless provided otherwise.

The standard lease at paragraph 13 on page contains the following indemnity provision:

Indemnity. The Lessee shall indemnify, defend, and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of Lessee relating to Lessee's use, occupancy, maintenance, or

enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the premises and sidewalks, roadways and parking areas adjacent thereto in Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

Similar to the concerns held by the State and its agencies regarding contractual indemnification provisions, UH also has a concern regarding the use of these provisions and has proposed retaining the indemnity language in current lease for the Hale Pohaku Mid-Level Facilities (GL No. S-5529):

Indemnity. The Lessee shall be responsible for damages or injury caused by Lessee's concessionaires and sublessees, or Lessee's agents, officers, and employees in the course of their employment to the extent that the Lessee's liability for such damage or injury has been determined by a court or otherwise agreed to by Lessee, and the Lessee shall pay for such damages and injury to the extent permitted by law and approved by the Hawaii Legislature.

The standard lease form at paragraph 22 relates to hazardous materials and requires the lessee to obtain the Board's consent prior to the storage and use of hazardous materials on the premises. UH already provides the Board with a list of such materials in the course its management responsibilities pursuant to the CMP. Most recently, all hazardous materials, including fuels, used or stored within the UH Management Areas were identified and listed on Table 5-4 of the Final Environmental Assessment for the CMP adopted by the Board in April 2009. UH will continue providing updates to the list and has proposed amending the provision requiring the Board consent. Similar to its request for an amendment to the general indemnity, above, UH has requested retaining the same indemnification clause for hazardous material liability used in the Hale Pohaku Mid-Level Facilities (GL No. S-5529):

Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Lessee's business where the Lessee has provided the

Lessor with a list that provides the identity of such materials used or stored by Lessee or its approved Sublessees or Concessionaires in the ordinary course of their business and in compliance with all applicable federal and state regulations. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

~~Lessee agrees to indemnify, defend, and hold Lessor harmless, from any damages and claims resulting from the release of hazardous materials on the premises occurring while Lessee is in possession, or elsewhere if caused by Lessee or persons acting under Lessee. These covenants shall survive the expiration or earlier termination of the lease.~~

Lessee agrees to be responsible for any damages and claims resulting from the release of hazardous material on the premises caused by the Lessee's concessionaires and sublessees or Lessee's agents, officers, and employees in the course of their employment. These covenants shall survive the expiration or earlier termination of the lease.

For the purpose of this lease “hazardous material” shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

The standard lease form at paragraph 35 requires a Phase 1 environmental site assessment prior to termination of the lease. Given the size of the MKSR and the requirement that all future astronomy facilities will be limited to the 525 acre Astronomy Precinct, UH is requesting that this provision in the MKSR lease, and not the lease for Hale Pohaku, be amended to limit this requirement to all observatory sites within the MKSR:

Phase I environmental site assessment. Prior to termination or revocation of the subject lease, Lessee shall conduct a Phase I environmental site assessment of all observatory sites within the Mauna Kea Science Reserve and conduct a complete abatement and disposal of any such sites, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Failure to comply with the provisions of this paragraph shall not extend the term of this lease or automatically prevent termination or revocation of the lease. The Board, at its sole option, may refuse to approve termination or revocation, unless this evaluation and abatement provision has been performed. In addition or in the alternative, the Board may, at its sole option if Lessee does not do so, arrange for performance of the provisions of this paragraph, all costs and expenses of such performance to be charged to and paid by Lessee.

UH has also requested the following special conditions to be added as paragraph 37:

Other conditions etc. The Lessor and Lessee agree that the lease shall be subject to the following Special Conditions:

a. The lease shall be subject to all existing subleases entered into by the Lessee and approved by the Lessor pursuant to General Lease No. S-4191 dated June 21, 1968 and which subleases shall remain in full force and effect until December 31, 2033 (provided that this lease also remains in effect), or until such time as the subleases are earlier terminated or otherwise renegotiated;³

b. The demised premises are within the State Land Use (SLU) Conservation District and all uses shall comply with the rules and regulations of the State Conservation District including but not limited to Hawaii Revised Statutes ("HRS") Chapter 183C and Hawaii Administrative Rules ("HAR") Chapter 13-5;

c. Lessee shall comply with State rules and regulations related to historic preservation including but not limited to HRS Chapter 6E, and HAR Chapters 13-197, 13-198, 13-275 through 13-284 and 13-300, and any amendments of or supplements to such historic preservation regulations;

³ This provision is relevant only to the MKSR and will not be included in the new lease for the Hale Pohaku Mid-Level Facilities.

d. The demised premises shall be managed pursuant to management plans approved by the BLNR, including the Mauna Kea Comprehensive Management Plan and sub plans - Natural Resources Management Plan, Cultural Resources Management Plan, Decommissioning Plan and Public Access Plan, and any amendments of or supplements to management plans approved by the Board of Land and Natural Resources for the demised premises;

e. All fees, including any from existing or future subleases, collected by the Lessee for the use of ceded lands pursuant to Act 132 (SLH 2009) shall be deposited into the Mauna Kea Lands Management Special Fund. The amount to be deposited shall be net of the funds required by law to be transferred to the Office of Hawaiian Affairs for the use of ceded lands;

f. All public and commercial activities, including recreational activities, shall be governed by administrative rules promulgated pursuant to the authority granted Lessee by Act 132 (SLH 2009). In addition, Lessee shall consult with the Office of Hawaiian Affairs and Division of Forestry and Wildlife of the Department of Land and Natural Resources on the development of administrative rules in compliance with Act 132 (SLH 2009);

g. The Constitution of the State of Hawaii mandates the protection of recognized customary and traditional native Hawaiian rights subject to State regulation. The lease shall be subject to the right of Native Hawaiians to exercise protected traditional and customary practices within the demised premises as provided under the laws of the State of Hawaii;

h. The Lessee has established a management structure to manage the demised premises which structure includes the Office of Mauna Kea Management at the University of Hawaii at Hilo, the volunteer community-based Mauna Kea Management Board and the Kahu Kū Mauna advisory council on Hawaiian cultural matters. Any changes in the management structure shall be made in consultation with the Board of Land and Natural Resources as provided by the Mauna Kea Comprehensive Management Plan;

UH has requested a modification to the standard lease form provision at paragraph 27 which reserves the right of the State to withdraw any portion of the premises. The following modification would require that the lessor use its best efforts to avoid

impacting any existing telescope facility in the withdrawal of any lands and that the value paid for the loss of such improvements described in paragraph 27 include costs incurred for decommissioning a telescope facility as a result of the withdrawal:

i. In the event Lessor exercises its right of withdrawal to any portion of the premises pursuant to paragraph 27 of the lease, it shall use its best efforts to avoid impacting any existing or continuing telescope or observatory uses including those uses under subleases entered into by the Lessee with third parties and approved by the Board of Land and Natural Resources; provided, however, upon the withdrawal or taking of land on which any permanent improvements have been constructed by Lessee or Sublessee, the value to be paid by Lessor pursuant to paragraph 27 shall also include the cost of decommissioning such improvements including site restoration as required in the Decommissioning Plan approved by the Board of Land and Natural Resources in March 2010; and

j. Should this lease be rendered or declared invalid, illegal, or unenforceable by a court of competent jurisdiction, such invalidation shall cause, without further action, General Lease S-4191 dated June 21, 1968 to be revived in its entirety for the duration of the term therein, unless and until the parties subsequently agree otherwise. The parties expressly acknowledge that it is their respective intent that this lease shall be replaced in its entirety by General Lease S-4191 dated June 21, 1968 should this lease be declared invalid, illegal, or unenforceable. The parties agree this is reasonable in view of the parties' respective interests.

Additional Matters

UH has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Agency Comments

Staff solicited comments on UH's request from the agencies listed below, with the following results.

Agency	Comments
State:	
Department of Transportation, Highways Division	The proposed actions "will not impact our State highway facilities. Of course any planned or

	future expansion of facilities or functions would likely require a traffic assessment, but that does not appear to be the point of the lease actions.”
Forestry and Wildlife	See Exhibits G and H attached and discussion below.
Office of Conservation and Coastal Lands	No comments
State Parks	Requested a clarification that the MKIAR is under the Natural Area Reserve Commission (and not State Parks). Submittal revised accordingly.
Historic Preservation	See Exhibits I and J attached and discussion below.
Engineering	No comments
Commission on Water Resource Management	No comments
Conservation and Resources Enforcement	No response
Department of Hawaiian Home Lands	No response
Office of Hawaiian Affairs	See Exhibits K and L attached and discussion below.
County of Hawaii:	
Planning Department	The County has no land use jurisdiction in the subject areas.
Property Management	No comments
Public Works	No response
Police Department	No comments
Environmental Management	No comments
Civil Defense	No comments
Federal:	
Department of Transportation	No response
Fish & Wildlife Service	No response
Department of the Army	No response

DOFAW’s comments, attached as Exhibit G, relate to four main issues. The first issue is the forest reserve status of the UH lease and easement areas. Staff has confirmed that these areas were formally removed from the Mauna Kea Forest Reserve by Governor’s Executive Order No. 3710.

The second issue is the power line easement to HELCO that the Board approved on September 27, 1985, Item F-2. As the DOFAW comments indicate, the grant of easement has not been finalized because the survey of the easement corridor was not completed. The location of the

easement is important to DOFAW because a part of it passes through the MKIAR. DOFAW seeks clarity on the delineation of the easement so that it can monitor HELCO's work MKIAR when maintenance and upgrades are necessary. Land Division staff agrees that the easement should be finalized, and is including an applicant requirement above that UH provide an as-built survey of the easement corridor prior to the new leases being executed. In UH's letter responding to the DOFAW comments, UH explains that the survey was completed in 2011 and will be provided to Land Division. See Exhibit H. Accordingly, staff is including an Applicant Requirement above that UH submit the completed survey before the new leases are issued. The new leases will reflect the easement as an encumbrance.

The third issue DOFAW raises is that the visitor facilities are inadequate for the commercial activities and public use occurring on the mountain. DOFAW requests UH "to develop a master plan for the Hale Pohaku Visitor Station that takes into account current needs and future growth of use. We have received requests from [UH] to expand parking into the Mauna Kea Forest Reserve, but feel it would be better to develop a plan, rather than deal with the current shortage of space in a piece-meal manner." UH responds that the CMP and its sub-plans recognize the inadequacy of the visitor center to meet current needs, and that UH is awaiting the release of CIP funds appropriated by the 2013 legislature to study and design infrastructure improvements including a parking lot and visitor traffic pattern.

The fourth point that DOFAW makes is that it is under a federal court order to remove sheep from the Palila critical habitat area on Mauna Kea. While the UH Management Areas are mostly above of the critical habitat area, there is a concern the lease premises could serve as a reservoir for animals that will transit to the lower elevations in the critical habitat to forage. "DOFAW and UH will need to work cooperatively to ensure that these animals are removed and do not impact the court order." UH responds that it will cooperate with DOFAW on the issue of sheep removal.

The State Historic Preservation Division (SHPD) submitted comments attached as Exhibit I. In short, SHPD recommended that UH "pursue due diligence and ensure that extensive and appropriate consultation and public outreach take place in order to fully address all of the potential effects that this proposed action will have. Until such time that a record of consultation has been submitted, SHPD cannot comment at this time and we look forward to continued consultation in order to provide an appropriate determination of effect for the current proposed action. UH's response is attached as Exhibit J. To summarize UH's position, UH's present request is limited to the lease extensions and covers those uses that have previously been assessed pursuant to HRS Chapter 343 and approved by the Board under HRS Chapter 183C or the earlier regulations covering uses within the conservation district. See Exhibit J.

OHA's comments, attached as Exhibit K, address four issues. The first is that the lease cancellations and re-issuances should not be found exempt under HRS Chapter 343. OHA's position is that the lease extensions can be viewed as part of a larger project that requires environmental review. In UH's response, attached as Exhibit L, UH clarifies that the lease

extensions do not seek authorization for the construction of additional facilities, and that UH is not arguing that such facilities qualify for exemption under HRS Chapter 343. Rather, the lease extensions allow for the continuation of the presently permitted operations and facilities.

The second issue for OHA is that new 65-year leases may constrain the Board's ability to make best use of the Mauna Kea lands in the future. UH responds that the new leases will allow for the Board to withdraw areas from the leases in the event the Board determines that areas are needed for other uses.

The third comment from OHA is that new leases should require adequate compensation for the sublease of the lands. UH responds that future subleases will require the sublessees to pay rent that will provide a significant portion of the funding required for UH to carry out its management and stewardship responsibilities.

OHA's fourth comment is that conditions on the termination of the current leases should be fulfilled prior the execution of new leases. Specifically, OHA states that a Phase I environmental site assessment (Phase I) should be completed prior to the current leases being terminated. However, the current leases do not require a Phase I. That is a requirement that is being included in the new leases.

Staff appreciates the statement made by SHPD and echoed by other concerned parties that "Mauna Kea is a location of significant cultural importance for the Native Hawaiian community and a known site for traditional and cultural practices." However the Board generally does not require an environmental assessment or environmental impact assessment to extend a lease and its existing uses. Rather, lease extensions are determined to be exempt because they are "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 [HAR § 11-200-8(a)(1)]." Accordingly, to be consistent with the Board's prior practice, the staff recommendation is to grant UH's requests.

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed dispositions as provided by Chapter 343, HRS, and Chapter 11-200, HAR, the dispositions will probably have minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment.
2. Authorize the mutual cancellation of General Lease No. S-4191, University of Hawaii, Lessee, subject to the following:
 - a. The standard terms and conditions of the most current mutual cancellation of lease document form, as may be amended from time to time;

- b. Review and approval by the Department of the Attorney General; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a direct lease to the University of Hawaii covering the Mauna Kea Science Reserve under the terms and conditions cited above, which are by this reference incorporated herein, and further subject to the following:
 - a. The lease shall be substantially in the form of Exhibit E attached hereto and shall be subject to the subleases listed in Table 2 above;
 - b. In the event the new lease is declared to be invalid, illegal, or unenforceable by a court of competent jurisdiction, then General Lease No. S-4191 dated June 21, 1968 shall be revived in its entirety for the duration of the term therein, unless and until the Board and the University of Hawaii agree otherwise, as provided in subparagraph 37.j. of the new lease;
 - c. Review and approval by the Department of the Attorney General; and
 - d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 4. Authorize the mutual cancellation of General Lease No. S-5529, University of Hawaii, Lessee, subject to the following:
 - a. The standard terms and conditions of the most current mutual cancellation of lease document form, as may be amended from time to time;
 - b. Review and approval by the Department of the Attorney General; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 5. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a direct lease to the University of Hawaii covering the Hale Pohaku Mid-Level Facilities under the terms and conditions cited above, which are by this reference incorporated herein, and further subject to the following:
 - a. The lease shall be substantially in the form of Exhibit F attached hereto;

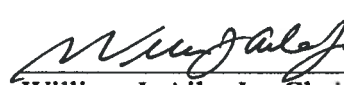
- b. In the event the new lease is declared to be invalid, illegal, or unenforceable by a court of competent jurisdiction, then General Lease No. S-5529 dated February 28, 1986 shall be revived in its entirety for the duration of the term therein, unless and until the Board and the University of Hawaii agree otherwise, as provided in subparagraph 37.j. of the new lease;
 - c. Review and approval by the Department of the Attorney General; and
 - d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
6. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the extension, amendment and restatement of Grant of Easement No. S-4697 so that UH holds a 65-year term, non-exclusive easement covering the Mauna Kea Access Road between Hale Pohaku and the MKSR under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- a. The standard terms and conditions of the most current extension, amendment and restatement of term easement document form, as may be amended from time to time;
 - b. The easement shall be coterminous with the new leases to Applicant covering Tax Map Keys: 3rd/ 4-4-15:09 & 12;
 - c. Review and approval by the Department of the Attorney General; and
 - d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,




Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson



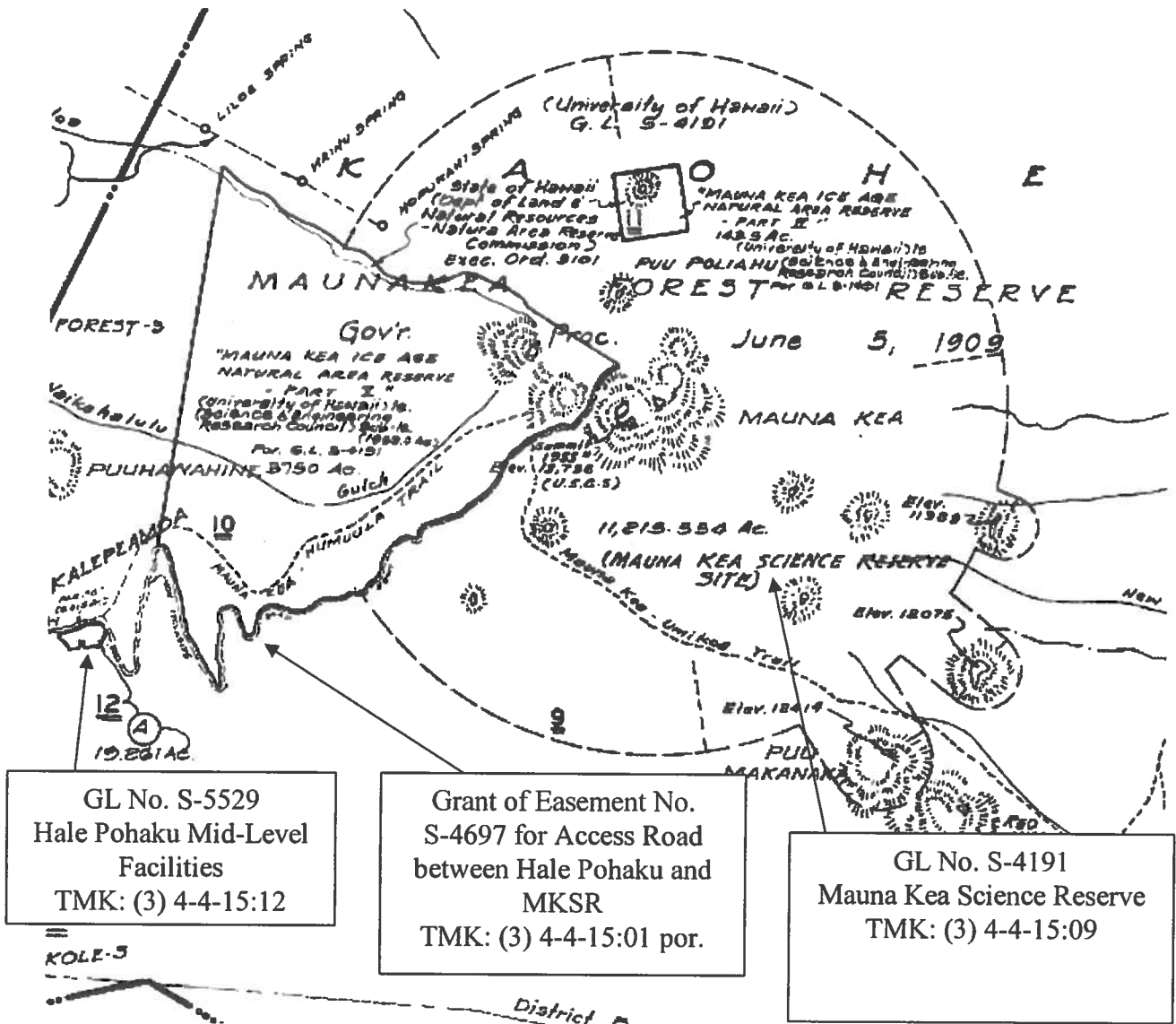
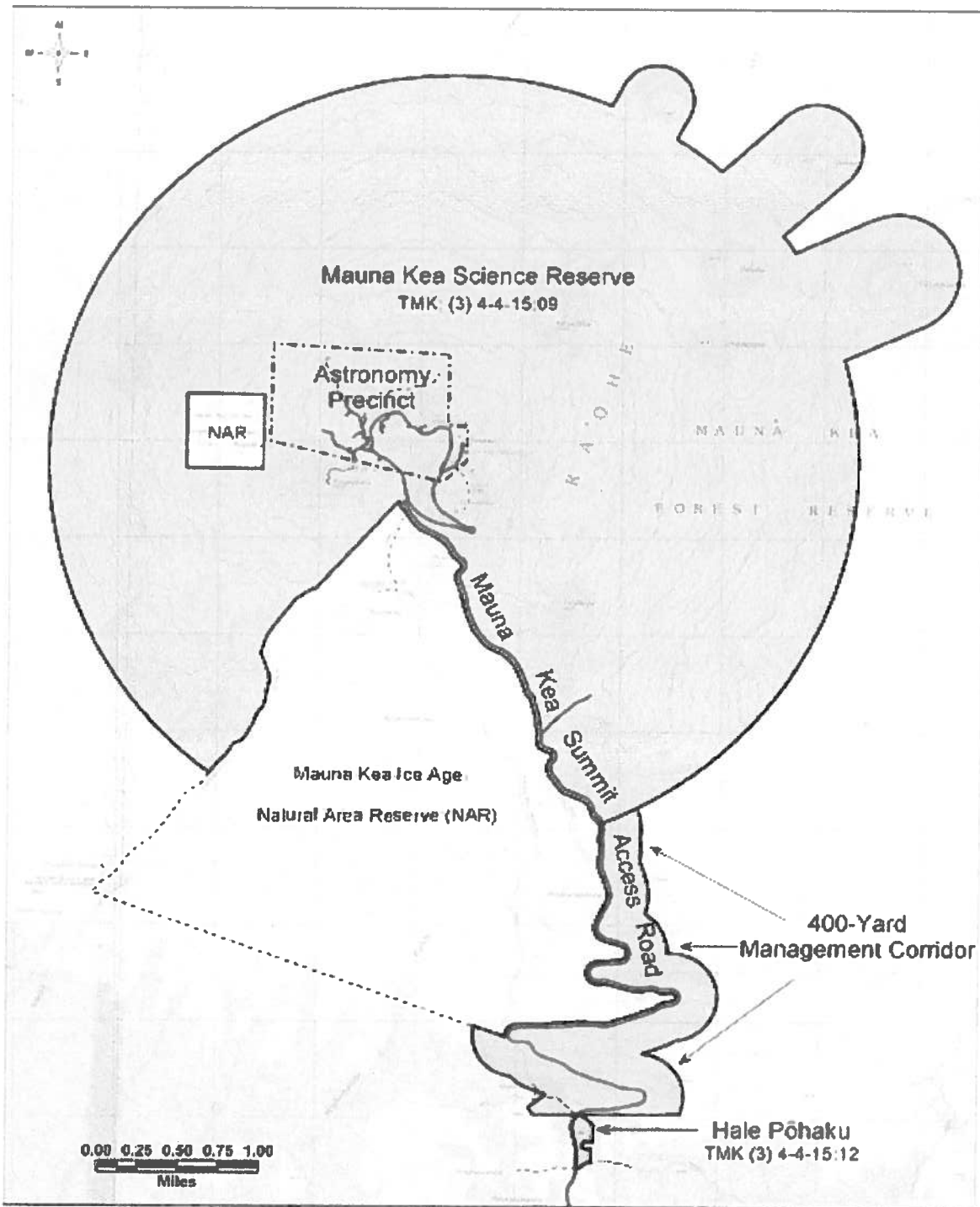


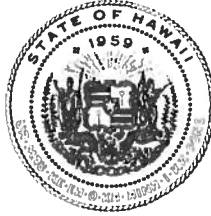
EXHIBIT A



UH Management Areas

EXHIBIT A

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
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
KAIHOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

EXEMPTION NOTIFICATION

From the preparation of an environmental assessment under the authority of Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Mutual Cancellation of General Lease No. S-4191 to the University of Hawaii (UH) for the Mauna Kea Science Reserve and Issuance of New Direct Lease to UH for Mauna Kea Science Reserve Purposes; Mutual Cancellation of General Lease No. S-5529 to UH for the Hale Pohaku Mid-Level Facilities and Issuance of New Direct Lease to UH for Hale Pohaku Mid-Level Facilities Purposes; Extension, Amendment and Restatement of Grant of Term Easement S-4697 to UH to Extend the Easement Term by 65 Years and Update the Easement Instrument with Current Provisions Approved by the Department of the Attorney General

Project Number: PSF Nos. 13HD-147, -148 & -149

Project Location: Kaohe, Hamakua, Island of Hawaii, Tax Map Keys: 3rd/ 4-4-15:01 por., 09 & 12

Project Description: Cancel existing leases to UH for Mauna Kea Science Reserve (MKSR) and Hale Pohaku Mid-Level Facilities, issue a new direct 65-year leases to UH for these purposes, and amend an access and utility easement over the portion of the Mauna Kea Access Road between MKSR and Hale Pohaku so that it is coterminous with the new leases.

Consulted Parties: Office of Conservation and Coastal Lands; Division of Forestry and Wildlife, and others

Exemption Class No.: In accordance with the "Exemption List for the State of Hawaii, Department of Land and Natural Resources, as Reviewed and Concurred Upon by the Environmental Council (Docket 91-EX-2, December 4, 1991), the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No.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

EXHIBIT B

existing [HAR § 11-200-8(a)(1)]."

**Exemption Item No.
And Description:**


Class No.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."

This exemption is appropriate because UH has leased the MKSR since 1968 under General Lease No. S-4191, and has leased Hale Pohaku since 1986 under General Lease No. S-5529 for midlevel facilities purposes. The existing leases (with 20 years remaining on the term under GL S-4191 and 28 years remaining under GL S-5529) will be cancelled and new leases will be issued for 65-year terms for the same purposes. Additionally, Grant of Easement No. S-4697 extended, amended and restated. The easement, which is scheduled to terminate on December 31, 2033, will be extended by approximately 45-years to be coterminous with the new leases.


While these actions are part of a multi-phase project, the cancellation of the existing leases, issuance of new leases, and amendment of the grant of easement in themselves will result in no material change or significant cumulative impact. If further actions are taken that result in a material change, UH will be required to be in compliance with Chapter 343.

Recommendation:

The cancellation of General Lease Nos. S-4191 and S-5529, the issuance of new direct leases to UH, and the extension, amendment and restatement of Grant of Easement No. S-4697 in themselves will probably have minimal or no significant effect on the environment. It is recommended that the Board of Land and Natural Resources find that the action is exempt from the preparation of an environmental assessment. Inasmuch as the Chapter 343 environmental requirements apply to any future use of the lands, the UH shall be responsible for compliance with Chapter 343, HRS, as amended.



William J. Aila, Jr., Chairperson



Date



UNIVERSITY
of HAWAII[®]
SYSTEM

August 22, 2013

William J. Aila, Chairperson
Attn: Russell Y. Tsuji, Land Division Administrator
Department of Land and Natural Resources
P.O. Box 621
1151 Punchbowl Street
Honolulu, Hawai'i 96809-0621

Subject: Request for Issuance of New Master Leases for (a) the Mauna Kea Science Reserve and (b) the Hale Pōhaku Mid-Level Facilities, and an Amendment of the Grant of Easement for the Mauna Kea Observatory Access Road; Lessee: University of Hawai'i; TMK 3/4-4-015:01 (port.), 09 and 12; Kaohe, Hāmākua District, Island, County and State of Hawai'i

Dear Chairman Aila:

The University of Hawai'i ("UH") respectfully requests the termination of the existing leases for the Mauna Kea Science Reserve (G.L. No. S-4191) and Hale Pōhaku Mid-Level Facilities (G.L. No. S-5529), with the issuance of new 65-year General Leases for these two parcels. In addition, the UH requests an amendment to the Grant of Easement for the Mauna Kea Observatory Access Road (Easement No. S-4697) to be coterminous with the new General Leases. The reasons for making this request are fourfold: 1) the need to address internal changes made by the UH in how it manages lands on Mauna Kea; 2) the need to reflect management actions and reporting requirements adopted by the Board of Land and Natural Resources ("BLNR"); 3) to assist in implementing legislation concerning the Mauna Kea lands managed by UH; and 4) to provide the basis for developing sublease agreements with current and any potential future telescope projects.

Summary of UH Land Tenure Documents

The UH presently holds the lease to the summit of Mauna Kea on the Island of Hawai'i identified as the Mauna Kea Science Reserve ("MKSR"), covering approximately 11,288 acres within the State's Conservation District Resource subzone. The public land lease for the MKSR was issued to UH by the BLNR in 1968 for the term of 65 years ending on December 31, 2033. UH also leases the Hale Pōhaku Mid-Level Facilities ("Hale Pōhaku") covering an area of just over 19 acres with a termination date of February 27, 2041. These two properties, together with the Mauna Kea Observatory Access Road corridor ("Summit Access Road"), collectively constitute the UH Management Areas within the ahupua'a of Kaohe in the district of Hāmākua.

New Management Policy for Mauna Kea

In June 2000 the UH Board of Regents ("BOR") adopted the Mauna Kea Science Reserve Master Plan ("Master Plan") which provided a new "policy framework for the responsible stewardship and use" of the UH Management Areas. An important aspect of the Master Plan was the establishment of a new management structure comprised of the Office of Mauna Kea Management ("OMKM") which is based at UH Hilo and is advised by the volunteer, community-based Mauna Kea Management Board ("MKMB"), and a native Hawaiian advisory council ("Kahu Kū Mauna"). In addition, the Master Plan

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EXHIBIT C

requires any proposed projects to be reviewed and vetted by Kahu Kū Mauna and the MKMB. This new management structure is also responsible for developing and implementing management policies and programs for protecting Mauna Kea's cultural and natural resources.

BLNR Approved Management Plans

The BLNR adopted the Mauna Kea Comprehensive Management Plan and four supplementary sub-plans in April 2009 and March 2010, respectively. These documents contain management actions and strategies for protecting, preserving and enhancing the cultural, scientific, educational and natural resources within the UH Management Areas of Mauna Kea. UH Hilo and OMKM are specifically charged by the BOR with the implementation of the Comprehensive Management Plan.

Legislation

In 2009 the State Legislature passed Act 132 that, among other thing, authorized the UH, in consultation with the Office of Hawaiian Affairs, to promulgate administrative rules governing public and commercial activities within the UH Management Areas. The intent of the law is to protect the resources by allowing UH to develop and implement rules enforceable through the penalty of fines. Once approved, the rules will identify permissible and prohibitive activities. They will also provide clear lines of authority for UH in carrying out its stewardship responsibilities. More importantly, the act established the Mauna Kea lands management special fund into which fees are deposited. Fees deposited into the special fund can only be applied toward the management of the mountain.

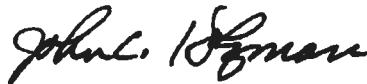
Need for Improvements in the Existing Land Tenure Documents for the UH Management Areas

Moving forward, there is a need to address the UH's future land tenure on Mauna Kea beyond 2033. New general leases with a longer term are necessary for UH to enter into meaningful negotiations with current and any potential future telescope projects. UH anticipates that future subleases' rent will provide a significant portion of the funding required for UH to carry out its management and stewardship responsibilities.

The Board of Regents have authorized UH Hilo to work with the Department of Land and Natural Resources on the terms and conditions for new 65-year leases for both the MKSR and Hale Pohaku together with an appropriate amendment extending the term of the existing easement to be coterminous with the two new leases. Of course, the Board of Regents retains the decision-making authority on approval of the final documents

We greatly appreciate the Department's cooperation and assistance on this matter; our staff looks forward to working with the Land Division and the BLNR in completing the process for developing mutually-acceptable terms for surrendering the existing leases and issuing the new leases. Please feel free to contact University of Hawai'i at Hilo Chancellor Donald Straney at 808-974-7444 or by email at dstraney@hawaii.edu if you have any questions or require additional information regarding this request.

Sincerely,



John C. Holzman
Chair, Board of Regents

cc: Dr. Donald Straney, Chancellor, UH Hilo

Prior Conservation District Use Permits, Mauna Kea Science Reserve & Mid-Level Facilities

Telescope Facilities	
UH 0.6-M, Planetary Patrol (removed 1994)	HA-954, 1977 (post facto)
UH 0.6-M Air Force (removed 2008)	HA-954, 1977 (post facto)
UH 2.2-M	HA-954, 1977 (post facto)
Canada-France-Hawaii Telescope	HA-527, 1974
Fiber Optic Cables from Gemini to CFHT	SPA-HA-06-49, 2006
United Kingdom Infrared Telescope	HA-653, 1975
NASA Infrared Telescope Facility	HA-653, 1975
Caltech Submillimeter Observatory	HA-1492, 1982
James Clerk Maxwell Telescope	HA-1515, 1983
W. M. Keck Observatory	
Keck I	HA-1646, 1984
Keck II	HA-2509, 1991
-Carport	Site Plan Approval, 1997
-Temporary Optical Test Sites	HA-SPA-21, 1998
Very Long Baseline Array Antenna	HA-2174, 1988
Japan National Large Telescope (Subaru)	HA-2462, 1991
-Subaru Concrete Walkway	Site Plan Approval, 1997
-Subaru Seepage Pit Collar	SPA-HA-05-08, 2004 (post facto)
Gemini Northern 8-M Telescope	HA-2691, 1993
Smithsonian Submillimeter Array	HA-2728, 1994
UH Hilo 0.9M Telescope	HA-3406, 2007
Thirty Meter Telescope	HA-3568, 2013 (FOF, COL, Decision and Order issued by BLNR on April 12, 2013)
Mid-Level Facilities	
Subdivision & Construction of Hale Pōhaku Mid-Level Facilities	HA-1430, 1982
- Removal of Solar Hot Water Heating System	SPA-HA-03-34, 2002
- Installation of Five Septic Tanks	SPA-HA-05-18, 2005
- Minor Renovations to Visitor Information Station	SPA-HA-06-17, 2005
Subdivision to Create ~21-acre Site for Permanent Mid-Level Facilities	HA 1819, 1986
Other Permits and Approvals	
Site Testing	HA-1314, 1981
Road, Power, Conceptual Management Plan	HA-1573, 1983
-Management Plan	HA-1573, 1985
-Revised Management Plan	HA-1573A, 1995 (DLNR co-applicant)
-Upgrade of Summit Power & Communications Distribution System	Site Plan Approval, 1995
-Fiber-Optics from Pōhakuoa to Hale Pōhaku	SPA-HA-96-05, 1996
Wēkiu Bug Habitat Restoration	OA-SPA-01-03, 2000
Temporary Site Testing within Northwest Plateau	HA-3225D, 2005
Restoration of Jeep Road up to Poli'ahu	SPA-HA-10-04, 2009

EXHIBIT D

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STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-_____

THIS LEASE, made this _____ day of _____, 20____, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor," by its Board of Land and Natural Resources, called the "Board," and UNIVERSITY OF HAWAII, a body corporate, whose address is 2444 Dole Street, Honolulu, Hawai'i 96822, hereinafter referred to as the "Lessee."

WITNESSETH:

The Lessor, pursuant to Section 171-95(a)(2), Hawaii Revised Statutes, and for and in consideration of the terms, covenants and conditions herein contained, all on the part of the Lessee to be kept, observed and performed, does lease unto the Lessee, and the Lessee does lease from the Lessor the premises identified as "Mauna Kea Science Reserve", the _____ more particularly described in Exhibit "A" and as shown on the map marked Exhibit "B," attached hereto and made parts hereof.

TO HAVE AND TO HOLD the leased premises unto the Lessee for the term of Sixty-five (65) years, commencing on the _____ day of _____, 2013, up to and including the _____ day of _____, 2078, unless sooner terminated as hereinafter provided.

The annual rent shall be gratis.

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas, coal,

phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of the Lessee's permitted activities on the premises and not for sale to others. (b) All surface and ground waters appurtenant to the premises and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the premises required in the exercise of this right reserved; provided, however, that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph, just compensation shall be paid to the Lessee for any of Lessee's improvements taken.

2. Ownership of improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of this lease General Lease No. S-4191, excluding those improvements constructed by the Lessee and its sublessees during the term of General Lease No. S-4191 and this lease unless provided otherwise.

SUBJECT TO the rights of native tenants and to regulatory rights and ownership rights (if any) of the State of Hawaii established pursuant to state law including Chapter 6E, Hawaii Revised Statutes, over prehistoric or historic remains found in, on, or under the land.

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR AS FOLLOWS:

1. Taxes, assessments, etc. The Lessee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description as to which the premises or any part, or any improvements, or the Lessor or Lessee, are now or may be assessed or become liable by authority of law during the term of this lease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only those installments, together with interest, which becomes due and payable during the term of this lease.

2. Utility services. The Lessee shall be responsible for obtaining any utility services and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which the premises or any part, or any improvements, or the Lessor or Lessee may become liable for during the term, whether assessed to or payable by the Lessor or Lessee.

3. Covenant against discrimination. The use and enjoyment of the premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

4. Sanitation. The Lessee shall keep the premises and improvements in a strictly clean, sanitary and orderly condition.

5. Waste and unlawful, improper or offensive use of premises. The Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the premises or any part, nor, without the prior written consent of the Lessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

6. Compliance with laws. The Lessee shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force.

7. Inspection of premises. The Lessee shall permit the Lessor and its agents, at all reasonable times during the lease term, to enter the premises and examine the state of its repair and condition.

8. Improvements. The Lessee shall not at any time during the term construct, place, maintain and install on the premises any building, structure or improvement of any kind and description except with the prior written approval of the Board and upon those conditions the Board may impose, unless otherwise

provided in this lease. The Lessee shall own these improvements until the expiration or other termination of the lease, at which time the ownership shall at the option of the Lessor, remain and become the property of the Lessor or shall be removed by Lessee at Lessee's sole cost and expense.

Upon termination and/or expiration of the lease and if desired by the Lessor, the Lessee at its expense, shall remove any and all improvements installed or constructed upon the premises and restore said premises to a condition satisfactory to the Lessor.

9. Repairs to improvements. The Lessee shall, at its own expense, keep, repair, and maintain all buildings and improvements now existing or hereafter constructed or installed on the premises in good order, condition and repair, reasonable wear and tear excepted.

10. Liens. The Lessee shall not commit or suffer any act or neglect which results in the premises, any improvement, or the leasehold estate of the Lessee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this lease, and shall indemnify, defend, and hold the Lessor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses.

11. Character of use. The Lessee shall use or allow the premises leased to be used solely for a scientific complex, including without limitation thereof ~~telescopes, other research and educational facilities and public service facilities, and as~~ a science reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex.

Activities inimical to said scientific ~~and educational~~ complex shall include light and dust interference to observatory operation and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

12. Assignments, etc. The Lessee shall not sublease, subrent, transfer, assign, or permit any other person to occupy or use the premises or any portion or transfer or assign this

lease or any interest therein, either voluntarily or by operation of law, without the prior written approval of the Board.

13. Indemnity. The Lessee shall be responsible for damages or injury caused by Lessee's concessionaires and sublessees or Lessee's agents, officers, and employees in the course of their employment to the extent that the Lessee's liability for such damage or injury has been determined by a court or otherwise agreed to by Lessee, and the Lessee shall pay for such damages and injury to the extent permitted by law and approved by the Hawaii Legislature. ~~The Lessee shall indemnify, defend, and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of Lessee relating to Lessee's use, occupancy, maintenance, or enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the premises and sidewalks, roadways and parking areas adjacent thereto in Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.~~

14. Costs of litigation. In case the Lessor shall, without any fault on Lessor's part, be made a party to any litigation commenced by or against the Lessee (other than condemnation proceedings), the Lessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Lessor; furthermore, the Lessee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the premises, or in the collection of delinquent rental, taxes, and any and all other charges.

15. Breach. Time is of the essence in this agreement and if the Lessee shall become bankrupt, or shall abandon the premises, or if this lease and premises shall be attached or taken by operation of law, or if Lessee shall fail to observe

and perform any of the covenants, terms, and conditions contained in this lease and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Lessee at its last known address and to each holder of record having a security interest in the premises, the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, terminate this lease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of the Lessor, all buildings and improvements shall remain and become the property of the Lessor or shall be removed by Lessee; furthermore, Lessor shall retain all rent paid in advance to be applied to any damages.

16. Condemnation. If at any time, during the term of this lease, any portion of the premises should be condemned, or required for public purposes by any county or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority (a) the value of growing crops, if any, which Lessee is not permitted to harvest and (b) the proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease; provided, that the Lessee may, in the alternative, remove and relocate its improvements to the remainder of the lands occupied by the Lessee. The Lessee shall not by reason of the condemnation be entitled to any claim against the Lessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee shall not be exclusive of any other to which Lessee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the premises was leased, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability; provided, that Lessee may remove the permanent improvements constructed, erected and placed by it within any reasonable period allowed by the Lessor.

17. Right to enter. The Lessor or the County and

their agents or representatives shall have the right to enter and cross any portion of the premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, the Lessor or the County shall not interfere unreasonably with the Lessee or Lessee's use and enjoyment of the premises.

18. Extension of time. Notwithstanding any provision contained in this lease, when applicable, the Board may for good cause shown, allow additional time beyond the time or times specified in this lease for the Lessee to comply, observe, and perform any of the lease terms, conditions, and covenants.

19. Quiet enjoyment. The Lessor covenants and agrees with the Lessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Lessee to be observed and performed, the Lessee shall and may have, hold, possess, and enjoy the premises for the term of the lease, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through, or under it.

20. Surrender or termination. The Lessee shall, at the end of the term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition, together with all improvements existing or constructed thereon or Lessee shall remove such improvements, at the option of the Lessor. Furthermore, upon the expiration, termination, and/or revocation of this lease, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Board may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the lease.

21. Non-warranty. The Lessor does not warrant the conditions of the premises, as the same are being leased as is.

22. Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Lessee shall not allow

the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Lessee's business, ~~and then only after where the written notice is given to Lessee has provided~~ Lessor with a list that contains ~~of~~ the identity of such materials used or stored by Lessee or its approved Sublessees in the ordinary course of their business and in compliance with all applicable federal and state regulations ~~and upon Lessor's consent which consent may be withheld at Lessor's sole and absolute discretion.~~ - If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

Lessee agrees to be responsible for any damages and claims resulting from the release of hazardous material on the premises caused by the Lessee's concessionaires and sublessees or Lessee's agents, officers, and employees in the course of their employment. These covenants shall survive the expiration or earlier termination of the lease.

~~Lessee agrees to indemnify, defend, and hold Lessor harmless, from any damages and claims resulting from the release of hazardous materials on the premises occurring while Lessee is in possession, or elsewhere if caused by Lessee or persons acting under Lessee. These covenants shall survive the expiration or earlier termination of the lease.~~

For the purpose of this lease "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

23. Hawaii law. This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

24. Exhibits - Incorporation in lease. All exhibits referred to are attached to this lease and hereby are deemed incorporated by reference.

25. Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this lease.

26. Partial invalidity. If any term, provision, covenant or condition of this lease should be held to be invalid, void or unenforceable, the remainder of this lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

27. Withdrawal. The Lessor shall have the right to withdraw the premises, or any portion, at any time during the term of this lease upon giving reasonable notice and without compensation, except as otherwise provided in the lease, for public uses or purposes, including residential, commercial, industrial, or resort developments, for constructing new roads or extensions, or changes in line or grade of existing roads, for rights of way and easements of all kinds, and shall be subject to the right of the Board to remove soil, rock or gravel as may be necessary for the construction of roads and rights of way within or without the premises; provided, that upon the withdrawal, or upon the taking which causes any portion of the land originally leased to become unusable for the specific use or uses for which it was leased, the rent shall be reduced in proportion to the value of the land withdrawn or made unusable, and if any permanent improvement constructed upon the land by the Lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value shall be paid based upon the unexpired term of the lease.

28. Termination by either party. The Lessor and Lessee, by mutual agreement, may terminate this lease at any time without cause, provided that the Lessor and the Lessee are not in breach of any condition herein at the time of the mutual agreement to terminate. This provision can be waived by the parties provided such waiver is in writing and signed by both parties.

29. Non-use and abandonment. If the Lessee shall, at

any time for a continuous period of one (1) year, fail or cease to use, or abandon all or any portion of said premises, this lease shall cease and terminate.

30. Building construction. All building construction shall be in full compliance with all laws, rules and regulations of the federal, state, and county governments and in accordance with plans and specifications submitted to and approved by the Chairperson prior to commencement of construction.

31. Clearances. The Lessee shall be responsible for obtaining all necessary federal, state or county clearances.

32. Time of essence Time is of the essence in all provisions of this lease.

33. Historic preservation. In the event any historic properties or burial sites, as defined in section 6E-2, Hawaii Revised Statutes, are found on the premises, the Lessee and the Lessee's agents, employees and representatives shall immediately stop all land utilization and/or work and contact the Historic Preservation Office in compliance with Chapter 6E, Hawaii Revised Statutes.

34. Removal of trash. The Lessee shall be responsible for the removal of all illegally dumped trash upon the premises within ninety (90) days from the date of execution of the lease and shall so notify the Lessor in writing at the end of ninety (90) days.

35. Phase I environmental site assessment. Prior to termination or revocation of the subject lease, Lessee shall conduct a Phase I environmental site assessment of all observatory sites within the Mauna Kea Science Reserve and conduct a complete abatement and disposal of any such sites, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Failure to comply with the provisions of this paragraph shall not extend the term of this lease or automatically prevent termination or revocation of the lease. The Board, at its sole option, may refuse to approve termination or revocation, unless this evaluation and abatement provision has been performed. In addition or in the alternative, the Board may, at its sole option if Lessee does not do so, arrange for performance of the provisions of this

paragraph, all costs and expenses of such performance to be charged to and paid by Lessee.

36. Survey and boundary stakeout. The Lessee shall be solely responsible for any survey and boundary stakeout of the leased premises.

37. Other conditions etc. The Lessor and Lessee agree that the lease shall be subject to the following Special Conditions:

a. The lease shall be subject to all existing subleases entered into by the Lessee and approved by the Lessor pursuant to General Lease No. S-4191 dated June 21, 1968 and which subleases shall remain in full force and effect until December 31, 2033 (provided that this lease also remains in effect), or until such time as the subleases are earlier terminated or otherwise renegotiated;

b. The demised premises are within the State Land Use (SLU) Conservation District and all uses shall comply with the rules and regulations of the State Conservation District including but not limited to Hawaii Revised Statutes ("HRS") Chapter 183C and Hawaii Administrative Rules ("HAR") Chapter 13-5;

c. Lessee shall comply with State rules and regulations related to historic preservation including but not limited to HRS Chapter 6E, and HAR Chapters 13-197, 13-198, 13-275 through 13-284 and 13-300, and any amendments of or supplements to such historic preservation regulations;

ed. The demised premises shall be managed pursuant to management plans approved by the BLNR, including the Mauna Kea Comprehensive Management Plan and sub plans - Natural Resources Management Plan, Cultural Resources Management Plan, Decommissioning Plan and Public Access Plan, and any amendments of or supplements to management plans approved by the Board of Land and Natural Resources for the demised premises;

de. All fees, including any from existing or future subleases, collected by the Lessee for the use of ceded lands pursuant to Act 132 (SLH 2009) shall be deposited into the Mauna Kea Lands Management Special Fund. The

amount to be deposited shall be net of the funds required by law to be transferred to the Office of Hawaiian Affairs for the use of ceded lands;

ef. All public and commercial activities, including recreational activities, shall be governed by administrative rules promulgated pursuant to the authority granted Lessee by Act 132 (SLH 2009). In addition, Lessee shall consult with the Office of Hawaiian Affairs and Division of Forestry and Wildlife of the Department of Land and Natural Resources on the development of administrative rules in compliance with Act 132 (SLH 2009);

fg. The Constitution of the State of Hawaii mandates the protection of recognized customary and traditional native Hawaiian rights subject to State regulation. The lease shall be subject to the right of Native Hawaiians to exercise protected traditional and customary practices within the demised premises as provided under the laws of the State of Hawaii;

gh. The Lessee has established a management structure to manage the demised premises which structure includes the Office of Mauna Kea Management at the University of Hawaii at Hilo, the volunteer community-based Mauna Kea Management Board and the Kahu Kū Mauna advisory council on Hawaiian cultural matters. Any changes in the management structure shall be made in consultation with the Board of Land and Natural Resources as provided by the Mauna Kea Comprehensive Management Plan; and,

hi. In the event Lessor exercises its right of withdrawal to any portion of the premises pursuant to paragraph 27 of the lease, it shall use its best efforts to avoid impacting any existing or continuing telescope or observatory uses including those uses under subleases entered into by the Lessee with third parties and approved by the Board of Land and Natural Resources; provided, however, upon the withdrawal or taking of land on which any permanent improvements have been constructed by Lessee or Sublessee, the value to be paid by Lessor pursuant to paragraph 27 shall also include the cost of decommissioning such improvements including site restoration as required in the Decommissioning Plan approved by the Board of Land and Natural Resources in March 2010.

j. Should this lease be rendered or declared invalid, illegal, or unenforceable by a court of competent jurisdiction, such invalidation shall cause, without further action, General Lease S-4191 dated June 21, 1968 to be revived in its entirety for the duration of the term therein, unless and until the parties subsequently agree otherwise. The parties expressly acknowledge that it is their respective intent that this lease shall be replaced in its entirety by General Lease S-4191 dated June 21, 1968 should this lease be declared invalid, illegal, or unenforceable. The parties agree this is reasonable in view of the parties' respective interests.

Definitions.

1. The use of any gender shall include all genders, and if there is more than one lessee, then all words used in the singular shall extend to and include the plural.

2. As used in this lease, unless clearly repugnant to the context:

(a) "Chairperson" means the Chairperson of the Board of Land and Natural Resources of the State of Hawaii or his successor.

(b) "Lessee" means and includes the Lessee, its officers, employees, invitees, successors or permitted assigns.

(c) "Holder of record of a security interest" means a person who is the owner or possessor of a security interest in the land leased and who has filed with the Department of Land and Natural Resources and with the Bureau of Conveyances of the State of Hawaii a copy of this interest.

(d) "Premises" means the land leased and all buildings and improvements now or hereinafter constructed and installed on the land leased.

(e) "Waste" includes, but is not limited to, (1) permitting the premises, or any portion, to become unduly eroded or failure to take proper precautions or make reasonable effort to prevent or correct the erosion; (2) permitting a substantial increase in noxious weeds in uncultivated portions of the

premises; and (3) failure to employ all of the usable portions of the premises.

(f) "Days" shall mean calendar days unless otherwise specified. _____

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

Approved by the Board
of Land and Natural
Resources at its meeting
held on _____.

By _____
Chairperson
Board of Land and
Natural Resources

LESSOR

Its _____

Its _____

LESSEE

APPROVED AS TO FORM:

Deputy Attorney General

Dated: _____

STATE OF HAWAII)
) SS.
COUNTY OF)

On this _____ day of _____, 20_____,
before me appeared _____,
and _____, to me
personally known, who, being by me duly sworn, did say that they
are the _____ and _____,
respectively of _____,
and that said instrument was signed in behalf of said
_____ by authority of its _____,
and the said _____ and _____
acknowledged said instrument to be the free act and deed of said
.

Notary Public, State of Hawaii

My commission expires: _____

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STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-_____

THIS LEASE, made this _____ day of _____, 20____, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor," by its Board of Land and Natural Resources, called the "Board," and UNIVERSITY OF HAWAII, a body corporate, whose address is 2444 Dole Street, Honolulu, Hawai'i 96822, hereinafter referred to as the "Lessee."

WITNESSETH:

The Lessor, pursuant to Section 171-95(a)(2), Hawaii Revised Statutes, and for and in consideration of the terms, covenants and conditions herein contained, all on the part of the Lessee to be kept, observed and performed, does lease unto the Lessee, and the Lessee does lease from the Lessor the premises identified as "Hale Pohaku Mid-Level Facilities", the _____ more particularly described in Exhibit "A" and as shown on the map marked Exhibit "B," attached hereto and made parts hereof.

TO HAVE AND TO HOLD the leased premises unto the Lessee for the term of Sixty-five (65) years, commencing on the _____ day of _____, 2013, up to and including the _____ day of _____, 2078, unless sooner terminated as hereinafter provided.

The annual rent shall be gratis.

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas, coal,

phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of the Lessee's permitted activities on the premises and not for sale to others. (b) All surface and ground waters appurtenant to the premises and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the premises required in the exercise of this right reserved; provided, however, that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph, just compensation shall be paid to the Lessee for any of Lessee's improvements taken.

2. Ownership of improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of ~~this lease~~ General Lease No. S-5529, and excluding those improvements constructed by the Lessee and its sublessees during the term of General Lease No. S-5529 and this lease unless provided otherwise.

SUBJECT TO the rights of native tenants and to regulatory rights and ownership rights (if any) of the State of Hawaii established pursuant to state law including Chapter 6E, Hawaii Revised Statutes, over prehistoric or historic remains found in, on, or under the land.

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR AS FOLLOWS:

1. Taxes, assessments, etc. The Lessee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description as to which the premises or any part, or any improvements, or the Lessor or Lessee, are now or may be assessed or become liable by authority of law during the term of this lease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only those installments, together with interest, which becomes due and payable during the term of this lease.

2. Utility services. The Lessee shall be responsible for obtaining any utility services and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which the premises or any part, or any improvements, or the Lessor or Lessee may become liable for during the term, whether assessed to or payable by the Lessor or Lessee.

3. Covenant against discrimination. The use and enjoyment of the premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

4. Sanitation. The Lessee shall keep the premises and improvements in a strictly clean, sanitary and orderly condition.

5. Waste and unlawful, improper or offensive use of premises. The Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the premises or any part, nor, without the prior written consent of the Lessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

6. Compliance with laws. The Lessee shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force.

7. Inspection of premises. The Lessee shall permit the Lessor and its agents, at all reasonable times during the lease term, to enter the premises and examine the state of its repair and condition.

8. Improvements. The Lessee shall not at any time during the term construct, place, maintain and install on the premises any building, structure or improvement of any kind and description except with the prior written approval of the Board and upon those conditions the Board may impose, unless otherwise

provided in this lease. The Lessee shall own these improvements until the expiration or other termination of the lease, at which time the ownership shall at the option of the Lessor, remain and become the property of the Lessor or shall be removed by Lessee at Lessee's sole cost and expense.

Upon termination and/or expiration of the lease and if desired by the Lessor, the Lessee at its expense, shall remove any and all improvements installed or constructed upon the premises and restore said premises to a condition satisfactory to the Lessor.

9. Repairs to improvements. The Lessee shall, at its own expense, keep, repair, and maintain all buildings and improvements now existing or hereafter constructed or installed on the premises in good order, condition and repair, reasonable wear and tear excepted.

10. Liens. The Lessee shall not commit or suffer any act or neglect which results in the premises, any improvement, or the leasehold estate of the Lessee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this lease, and shall indemnify, defend, and hold the Lessor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses.

11. Character of use. The Lessee shall use or allow the premises leased to be used solely for permanent mid-level facilities, construction camp, visitor information and comfort stations purposes as well as existing facilities purposes that support the scientific and educational complex within the Mauna Kea Science Reserve.

12. Assignments, etc. The Lessee shall not sublease, subrent, transfer, assign, or permit any other person to occupy or use the premises or any portion or transfer or assign this lease or any interest therein, either voluntarily or by operation of law, without the prior written approval of the Board.

13. Indemnity. The Lessee shall be responsible for damages or injury caused by Lessee's concessionaires and sublessees or Lessee's agents, officers, and employees in the

course of their employment to the extent that the Lessee's liability for such damage or injury has been determined by a court or otherwise agreed to by Lessee, and the Lessee shall pay for such damages and injury to the extent permitted by law and approved by the Hawaii Legislature. ~~The Lessee shall indemnify, defend, and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of Lessee relating to Lessee's use, occupancy, maintenance, or enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the premises and sidewalks, roadways and parking areas adjacent thereto in Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.~~

14. Costs of litigation. In case the Lessor shall, without any fault on Lessor's part, be made a party to any litigation commenced by or against the Lessee (other than condemnation proceedings), the Lessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Lessor; furthermore, the Lessee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the premises, or in the collection of delinquent rental, taxes, and any and all other charges.

15. Breach. Time is of the essence in this agreement and if the Lessee shall become bankrupt, or shall abandon the premises, or if this lease and premises shall be attached or taken by operation of law, or if Lessee shall fail to observe and perform any of the covenants, terms, and conditions contained in this lease and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Lessee at its last known address and to each holder of record having a

security interest in the premises, the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, terminate this lease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of the Lessor, all buildings and improvements shall remain and become the property of the Lessor or shall be removed by Lessee; furthermore, Lessor shall retain all rent paid in advance to be applied to any damages.

16. Condemnation. If at any time, during the term of this lease, any portion of the premises should be condemned, or required for public purposes by any county or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority (a) the value of growing crops, if any, which Lessee is not permitted to harvest and (b) the proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease; provided, that the Lessee may, in the alternative, remove and relocate its improvements to the remainder of the lands occupied by the Lessee. The Lessee shall not by reason of the condemnation be entitled to any claim against the Lessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee shall not be exclusive of any other to which Lessee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the premises was leased, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability; provided, that Lessee may remove the permanent improvements constructed, erected and placed by it within any reasonable period allowed by the Lessor.

17. Right to enter. The Lessor or the County and their agents or representatives shall have the right to enter and cross any portion of the premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, the Lessor or the County shall not interfere unreasonably with the Lessee or Lessee's use and enjoyment of the premises.

18. Extension of time. Notwithstanding any provision contained in this lease, when applicable, the Board may for good cause shown, allow additional time beyond the time or times specified in this lease for the Lessee to comply, observe, and perform any of the lease terms, conditions, and covenants.

19. Quiet enjoyment. The Lessor covenants and agrees with the Lessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Lessee to be observed and performed, the Lessee shall and may have, hold, possess, and enjoy the premises for the term of the lease, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through, or under it.

20. Surrender or termination. The Lessee shall, at the end of the term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition, together with all improvements existing or constructed thereon or Lessee shall remove such improvements, at the option of the Lessor. Furthermore, upon the expiration, termination, and/or revocation of this lease, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Board may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the lease.

21. Non-warranty. The Lessor does not warrant the conditions of the premises, as the same are being leased as is.

22. Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Lessee's business, ~~and then only after~~ where the written notice is given to Lessee has provided the Lessor with a list that provides of the identity of such

materials used or stored by Lessee or its approved Sublessees or Concessionaires in the ordinary course of their business and in compliance with all applicable federal and state regulations ~~and upon Lessor's consent which consent may be withheld at Lessor's sole and absolute discretion.~~ If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

Lessee agrees to be responsible for any damages and claims resulting from the release of hazardous material on the premises caused by the Lessee's concessionaires and sublessees or Lessee's agents, officers, and employees in the course of their employment. These covenants shall survive the expiration or earlier termination of the lease.

~~Lessee agrees to indemnify, defend, and hold Lessor harmless, from any damages and claims resulting from the release of hazardous materials on the premises occurring while Lessee is in possession, or elsewhere if caused by Lessee or persons acting under Lessee. These covenants shall survive the expiration or earlier termination of the lease.~~

For the purpose of this lease "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

23. Hawaii law. This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

24. Exhibits - Incorporation in lease. All exhibits referred to are attached to this lease and hereby are deemed incorporated by reference.

25. Headings. The article and paragraph headings

herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this lease.

26. Partial invalidity. If any term, provision, covenant or condition of this lease should be held to be invalid, void or unenforceable, the remainder of this lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

27. Withdrawal. The Lessor shall have the right to withdraw the premises, or any portion, at any time during the term of this lease upon giving reasonable notice and without compensation, except as otherwise provided in the lease, for public uses or purposes, including residential, commercial, industrial, or resort developments, for constructing new roads or extensions, or changes in line or grade of existing roads, for rights of way and easements of all kinds, and shall be subject to the right of the Board to remove soil, rock or gravel as may be necessary for the construction of roads and rights of way within or without the premises; provided, that upon the withdrawal, or upon the taking which causes any portion of the land originally leased to become unusable for the specific use or uses for which it was leased, the rent shall be reduced in proportion to the value of the land withdrawn or made unusable, and if any permanent improvement constructed upon the land by the Lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value shall be paid based upon the unexpired term of the lease.

28. Termination by either party. The Lessor and Lessee, by mutual agreement, may terminate this lease at any time without cause, provided that the Lessor and the Lessee are not in breach of any condition herein at the time of the mutual agreement to terminate. This provision can be waived by the parties provided such waiver is in writing and signed by both parties.

29. Non-use and abandonment. If the Lessee shall, at any time for a continuous period of one (1) year, fail or cease to use, or abandon all or any portion of said premises, this lease shall cease and terminate.

30. Building construction. All building construction shall be in full compliance with all laws, rules and regulations

of the federal, state, and county governments and in accordance with plans and specifications submitted to and approved by the Chairperson prior to commencement of construction.

31. Clearances. The Lessee shall be responsible for obtaining all necessary federal, state or county clearances.

32. Time of essence Time is of the essence in all provisions of this lease.

33. Historic preservation. In the event any historic properties or burial sites, as defined in section 6E-2, Hawaii Revised Statutes, are found on the premises, the Lessee and the Lessee's agents, employees and representatives shall immediately stop all land utilization and/or work and contact the Historic Preservation Office in compliance with Chapter 6E, Hawaii Revised Statutes.

34. Removal of trash. The Lessee shall be responsible for the removal of all illegally dumped trash upon the premises within ninety (90) days from the date of execution of the lease and shall so notify the Lessor in writing at the end of ninety (90) days.

35. Phase I environmental site assessment. Prior to termination or revocation of the subject lease, Lessee shall conduct a Phase I environmental site assessment and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Failure to comply with the provisions of this paragraph shall not extend the term of this lease or automatically prevent termination or revocation of the lease. The Board, at its sole option, may refuse to approve termination or revocation, unless this evaluation and abatement provision has been performed. In addition or in the alternative, the Board may, at its sole option if Lessee does not do so, arrange for performance of the provisions of this paragraph, all costs and expenses of such performance to be charged to and paid by Lessee.

36. Survey and boundary stakeout. The Lessee shall be solely responsible for any survey and boundary stakeout of the leased premises.

37. Other conditions etc. The Lessor and Lessee agree that the lease shall be subject to the following Special Conditions:

a. The demised premises are within the State Land Use (SLU) Conservation District and all uses shall comply with the rules and regulations of the State Conservation District including but not limited to Hawaii Revised Statutes ("HRS") Chapter 183C and Hawaii Administrative Rules ("HAR") Chapter 13-5;

b. Lessee shall comply with State rules and regulations related to historic preservation including but not limited to HRS Chapter 6E, and HAR Chapters 13-197, 13-198, 13-275 through 13-284 and 13-300, and any amendments of or supplements to such historic preservation regulations;

c. The demised premises shall be managed pursuant to management plans approved by the BLNR, including the Mauna Kea Comprehensive Management Plan and sub plans - Natural Resources Management Plan, Cultural Resources Management Plan, Decommissioning Plan and Public Access Plan, and any amendments of or supplements to management plans approved by the Board of Land and Natural Resources for the demised premises;

d. All fees, including any from existing or future subleases, collected by the Lessee for the use of ceded lands pursuant to Act 132 (SLH 2009) shall be deposited into the Mauna Kea Lands Management Special Fund. The amount to be deposited shall be net of the funds required by law to be transferred to the Office of Hawaiian Affairs for the use of ceded lands;

e. All public and commercial activities, including recreational activities, shall be governed by administrative rules promulgated pursuant to the authority granted Lessee by Act 132 (SLH 2009). In addition, Lessee shall consult with the Office of Hawaiian Affairs and Division of Forestry and Wildlife of the Department of Land and Natural Resources on the development of administrative rules in compliance with Act 132 (SLH 2009);

f. The Constitution of the State of Hawaii mandates the protection of recognized customary and traditional native

Hawaiian rights subject to State regulation. The lease shall be subject to the right of Native Hawaiians to exercise protected traditional and customary practices within the demised premises as provided under the laws of the State of Hawaii;

g. The Lessee has established a management structure to manage the demised premises which structure includes the Office of Mauna Kea Management at the University of Hawaii at Hilo, the volunteer community-based Mauna Kea Management Board and the Kahu Kū Mauna advisory council on Hawaiian cultural matters. Any changes in the management structure shall be made in consultation with the Board of Land and Natural Resources as provided by the Mauna Kea Comprehensive Management Plan.

h. Should this lease be rendered or declared invalid, illegal, or unenforceable by a court of competent jurisdiction, such invalidation shall cause, without further action, General Lease S-5529 dated February 28, 1986 to be revived in its entirety for the duration of the term therein, unless and until the parties subsequently agree otherwise. The parties expressly acknowledge that it is their respective intent that this lease shall be replaced in its entirety by General Lease S-5529 dated February 28, 1986 should this lease be declared invalid, illegal, or unenforceable. The parties agree this is reasonable in view of the parties' respective interests.

Definitions.

1. The use of any gender shall include all genders, and if there is more than one lessee, then all words used in the singular shall extend to and include the plural.

2. As used in this lease, unless clearly repugnant to the context:

(a) "Chairperson" means the Chairperson of the Board of Land and Natural Resources of the State of Hawaii or his successor.

(b) "Lessee" means and includes the Lessee, its officers, employees, invitees, successors or permitted assigns.

(c) "Holder of record of a security interest" means a person who is the owner or possessor of a security interest in the land leased and who has filed with the Department of Land and Natural Resources and with the Bureau of Conveyances of the State of Hawaii a copy of this interest.

(d) "Premises" means the land leased and all buildings and improvements now or hereinafter constructed and installed on the land leased.

(e) "Waste" includes, but is not limited to, (1) permitting the premises, or any portion, to become unduly eroded or failure to take proper precautions or make reasonable effort to prevent or correct the erosion; (2) permitting a substantial increase in noxious weeds in uncultivated portions of the premises; and (3) failure to employ all of the usable portions of the premises.

(f) "Days" shall mean calendar days unless otherwise specified. _____

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on _____.

By _____
Chairperson
Board of Land and
Natural Resources

LESSOR

Its _____

Its _____

LESSEE

APPROVED AS TO FORM:

Deputy Attorney General

Dated: _____

STATE OF HAWAII)
) SS.
COUNTY OF)

On this _____ day of _____, 20_____,
before me appeared _____
and _____, to me
personally known, who, being by me duly sworn, did say that they
are the _____ and _____,
respectively of _____,
and that said instrument was signed in behalf of said
_____ by authority of its _____,
and the said _____ and _____
acknowledged said instrument to be the free act and deed of said
.

Notary Public, State of Hawaii

My commission expires: _____

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

DIVISION OF FORESTRY AND WILDLIFE
19 EAST KAWILI STREET
HILO, HAWAII 96720
PH: (808)974-4221 FAX: 808)974-4226

WILLIAM J. AHL, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
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
LAND
STATE PARKS

October 3, 2013

MEMORANDUM

TO: Kevin E. Moore, State Lands Assistant Administrator

THRU: Roger Imoto, Administrator Division of Forestry and Wildlife *me*

FROM: Lisa Hadway, Branch Manager Hawaii Island Division of Forestry and Wildlife *LH*

SUBJECT: Mutual Cancellation of General Lease No. S-4191, S-5529, and Amendment and Restatement of Grant of Term Easement to the University of Hawaii.

The Division of Forestry and Wildlife (DOFAW) Hawaii Branch provides the following comments regarding the proposed mutual cancellation of General Lease No. S-4191, S-5529, and the amendment and restatement of grant of term easement S-4697 to the University of Hawaii:

1. It is unclear from the document what the status of the Forest Reserve designation is for all the areas affected by this action. DOFAW requests that this be clarified prior to the reissuance of the lease. If the areas are still technically within the Forest Reserve, we request that all procedures necessary be completed and the area formally removed from the designation.
2. It is noted on page 7 of the document that HELCO was granted a non-exclusive easement for power and communication lines extending from the Saddle Road to the Mauna Kea summit. Though approved by the Board of Land and Natural Resources on September 27, 1985, we do not believe the terms of this easement have been completed. To our knowledge, the corridor has not been formally surveyed and submitted to Land Division. This should be completed prior to the lease being reissued.
3. The improvement of the Saddle Road and the draw of one of the most accessible high elevation volcanoes on earth has caused there to be an ever increasing number of visitors to the area. The result of this has stressed the existing visitors' facilities. There is

EXHIBIT G

UH General Lease

October 3, 2013

Page two

inadequate parking and inadequate space with commercial activities and public use overlapping. UH should develop a master plan for the Hale Pohaku Visitor Station that takes into account current needs and future growth of use. We have received requests from the University of Hawaii to expand parking into the Mauna Kea Forest Reserve, but feel it would be better to develop a plan, rather than deal with the current shortage of space in a piece-meal manner.

4. DOFAW is under a federal court order to remove sheep from Palila critical habitat on Mauna Kea. The GL area could serve as a reservoir for animals above the critical habitat. DOFAW and UH will need to work cooperatively to ensure that these animals are removed and do not impact the court order.

Thank you for the opportunity for input. Please contact Lisa Hadway at (808)974-2221 or lisa.j.hadway@hawaii.gov if you have questions about these comments.



October 23, 2013

Mr. Kevin E. Moore,
Assistant Administrator, Land Division
Department of Land and Natural Resources
P.O. Box 621
1151 Punchbowl Street
Honolulu, Hawai'i 96809-0621

Subject: Request for Issuance of New Master Leases for (a) the Mauna Kea Science Reserve and (b) the Hale Pōhaku Mid-Level Facilities, and an Amendment of the Grant of Easement for the Mauna Kea Observatory Access Road; Lessee: University of Hawaii; TMK 3/4-4-015:01 (port.), 09 and 12; Kaohe, Hāmākua, Island, County and State of Hawaii

Dear Mr. Moore:

In its memo dated October 3, 2013, the Division of Forestry and Wildlife ("DOFAW") submitted four comments on the above-referenced request by the University of Hawai'i ("University"). However, we understand that DOFAW's first comment requesting clarification of whether any portions of the leased areas are still within the designated Forest Reserve has been answered by your explanation in the October 3, 2013 email and transmission of the 1997 Executive Order providing for the withdrawal of the leased area from the Mauna Kea Forest Reserve. We provide the following item-by-item responses to the DOFAW's remaining three comments:

Comment

It is noted on page 7 of the document that HELCO was granted a non-exclusive easement for power and communication lines extending from the Saddle Road to the Mauna Kea summit. Though approved by the Board of Land and Natural Resources on September 27, 1985, we do not believe the terms of this easement have been completed. To our knowledge, the corridor has not been formally surveyed and submitted to Land Division. This should be completed prior to the lease being reissued.

Response. A survey of the corridor was conducted in 2011 and will be submitted to the Land Division prior to the lease being reissued. However, we understand that HELCO may be requesting certain changes or adjustments to the survey before it is finalized.

Comment

The improvement of the Saddle Road and the draw of one of the most accessible high elevation volcanoes on earth has caused there to be an ever increasing number of visitors to the area. The result of this has stressed the existing visitors' facilities. There is inadequate parking and inadequate space with commercial activities and public use overlapping. UH should develop a master plan for the Hale Pohaku Visitor Station that takes into account

200 West Kāwili Street
Hilo, HI 96720-4091
Telephone: (808) 974-7444
Fax: (808) 974-7622
Web: hilo.hawaii.edu

current needs and future growth of use. We have received requests from the University of Hawaii to expand parking into the Mauna Kea Forest Reserve, but feel it would be better to develop a plan, rather than deal with the current shortage of space in a piece-meal manner.

Response. Over the past few years with the improvements to the Saddle Road the University has observed an increase in the number of independent vehicles coming onto its managed lands. This increase, in addition to the Visitor information Station having outgrown its physical space to accommodate current and future levels of growth of visitors, was also recognized in the Comprehensive Management Plan (CMP) and sub-plans. In response to this growing demand and the University's responsibility for implementing the CMP and sub-plans, the University's is planning, pending the release of CIP funds appropriated from by the 2013 State Legislature, to study and design infrastructure improvements including a parking and a visitor traffic pattern (CMP management action ACT 2).

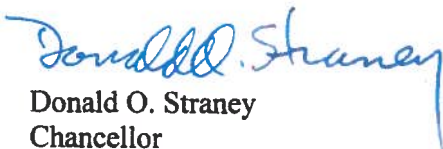
Comment

DOFAW is under a federal court order to remove sheep from Palila critical habitat on Mauna Kea. The GL area could serve as a reservoir for animals above the critical habitat. DOFAW and UH will need to work cooperatively to ensure that these animals are removed and do not impact the court order.

Response. The University understands DLNR is under a federal court order to remove sheep from Palila critical habitat. The University is also concerned about sheep on its lands especially because the Mid-level facilities at Hale Pohaku is part of the Palila critical habitat. The University looks forward to working with DLNR on the issue of sheep removal.

The University appreciates your assistance on this matter and we look forward to working with the Department and its several divisions in carrying out our management responsibilities under the CMP and its subplans adopted by the Board of Land and Natural Resources for the UH Management Areas of Mauna Kea. Please feel free to contact me at 808-974-7444 or by email at dstraney@hawaii.edu if you have any questions or require additional information regarding this request.

Sincerely,


Donald O. Straney
Chancellor

cc: John C. Holzman, Chair, University of Hawai'i Board of Regents

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



RECEIVED
LAND DIVISION

2013 OCT -8 AM 10:04

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
ESTHER KIA'AINA
FIRST DEPUTY
WILLIAM M. TAM
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
LAND
STATE PARKS

**HISTORIC PRESERVATION DIVISION
DEPARTMENT OF LAND AND NATURAL RESOURCES**

601 Kamokila Boulevard, Suite 555
Kapolei, HI 96806

October 4, 2013

Mr. Kevin E. Moore
DLNR – Land Division
PO Box 621
Honolulu, Hawai'i 96809

LOG NO: 2013.5389
DOC NO: 1309SN21
Archaeology

Dear Mr. Moore:

**SUBJECT: Chapter 6E-8 Historic Preservation Review –
Mutual Cancellation of Three General Leases (No. S-4191, S-5529, and S4697) to UH for the
Mauna Kea Science Reserve and the Issuance of a New Direct Lease for 45 Years
Ka'ohē Ahupua'a, Hāmākua District, Island of Hawai'i
TMK: (3) 4-4-015:001 por., 009 and 012**

Thank you for the opportunity to review the aforementioned application that was received in our office on September 16, 2013. The applicant (the University of Hawai'i) is requesting a mutual cancellation of General Lease No. S-4191 for the Mauna Kea Science Reserve; a mutual cancellation of General Lease No. S-5529 for the Hale Pōhaku Mid-Level Facilities; and the extension, amendment and restatement of a Grant of term easement S-4697 to extend the easement term and lease by 45 years and to update the easement instrument with approved provisions as set forth by the Department of the Attorney General.

Numerous letters from our office have indicated that Mauna Kea is a location of significant cultural importance for the Native Hawaiian community and a known site for traditional cultural practices. Any proposed project or continued use of this site will have an impact on its cultural significance and traditional cultural practices. The proposed action will be a very sensitive subject and one that deserves the utmost consideration as to the long term cumulative effects of such action on the numerous environmental and cultural resources of this area and spiritual connections that this site has to the Native Hawaiian community. Several sites located within the district have been determined to be Traditional Cultural Properties. The entire summit area has been determined to be eligible for the National Register of Historic Places (NRHP) as the Mauna Kea Summit Region Historic District (SIHP Site 50-10-23-26869) and has been determined significant under all four National Historic Register criteria and criterion "e" of the Hawai'i Administrative Rules, Chapter 13-275-6. The long term cumulative effects of future development and the continued use of this Historic District as it relates to this proposed action must be taken into consideration.

A number of interested parties have identified themselves and we are currently in consultation with these parties. Copies of the application have been shared with these parties and SHPD is waiting for these responses, which will be forwarded to your office. Pursuant to HAR 13-275-8 (e) (2), SHPD recommends that the applicant pursue due diligence and ensure that extensive and appropriate consultation and public outreach take place in order to fully address all of the potential effects that this proposed action will have. Until such time that a record of consultation has been submitted, SHPD cannot comment at this time and we look forward to continued consultation in order to provide an appropriate determination of effect for the current proposed action.

Please contact Sean Nāleimaile at (808) 933-7651 or Sean.P.Naleimaile@hawaii.gov if you have any questions or concerns regarding this letter.

Aloha,

Theresa K. Donham
Archaeology Branch Chief and
Deputy State Historic Preservation Officer

EXHIBIT I



October 23, 2013

Mr. Kevin E. Moore,
Assistant Administrator, Land Division
Department of Land and Natural Resources
P.O. Box 621
1151 Punchbowl Street
Honolulu, Hawai'i 96809-0621

Subject: Request for Issuance of New Master Leases for (a) the Mauna Kea Science Reserve and (b) the Hale Pōhaku Mid-Level Facilities, and an Amendment of the Grant of Easement for the Mauna Kea Observatory Access Road; Lessee: University of Hawaii; TMK 3/4-4-015:01 (port.), 09 and 12; Kahohe, Hāmākua, Island, County and State of Hawaii

Dear Mr. Moore:

In comments dated October 4, 2013 to the University's above-described request, the State Historic Preservation Division ("SHPD") recommended that the University pursue consultation and public outreach on the potential effects of renewing or extending the term of the existing leases pursuant to HAR §13-275-8 ("Mitigation").

As clarified in the University's response to the comments submitted by the Office of Hawaiian Affairs, the University is not seeking in this request authorization for the construction of additional facilities or the approval of new uses. The requested renewal of the existing leases is limited to those uses which have been previously assessed pursuant to HRS Chapter 343 and approved by the Board of Land and Natural Resources ("BLNR") as required by HRS Chapter 183C or the earlier preceding regulations covering permits and uses within the SLU Conservation District. Since mitigation commitments addressing potential impacts on historic properties by existing uses within the UH Management Areas were the subject of extensive consultation and public outreach in the BLNR's adoption in April 2009 of the *Mauna Kea Comprehensive Management Plan* ("CMP"), the recommendations in SHPD's comments have already been undertaken by the University's implementation of the *Cultural Resource Management Plan for the University of Hawaii Management Areas on Mauna Kea* ("CRMP") that was approved as a subplan of the CMP by BLNR at a public meeting in Hilo on March 25, 2010.

The UH Management Areas of Mauna Kea that constitute the current leasehold premises have been the subject of extensive archaeological surveys and investigations including those documented, more recently, in the following reports: *Archaeological Inventory Survey of the Mauna Kea Science Reserve* (McCoy & Nees, August 2010), *Archaeological Inventory Survey of the Astronomy Precinct in the Mauna Kea Science Reserve* (McCoy & Nees, January 2010), *Archaeological Inventory Survey of the Mauna Kea Access Road Management Corridor* (McCoy & Nees, February 2010), *Archaeological Inventory Survey for the Thirty-Meter Telescope (TMT)*

Observatory Project (Hammatt, January 2011) and *Architectural Inventory Survey of Hale Pohaku Rest Houses 1 and 2 and Comfort Station* (PCSI, February 2010). All of the subject archaeological inventory survey ("AIS") reports have been previously reviewed and accepted by SHPD including mitigation requirements addressing the potential effects of the current uses on significant historic properties and cultural resources. Any new facility or uses within the UH Management Areas would have to be reviewed by SHPD pursuant to HRS Chapter 6E and its historic preservation regulations. However, the renewal or extension of the current leases requested by the University would not include any new facilities and uses that were not previously subject to the State's historic preservation review process.

Ongoing consultation and public participation is a cornerstone of the management objectives and actions described in the CRMP. While the Department of Land and Natural Resources retains ultimate authority and jurisdiction over historic properties on public lands, the University is responsible for overseeing and implementing management activities on its Mauna Kea leaseholds through its Hilo-based Office of Mauna Kea Management ("OMKM"). As described in the CRMP, the OMKM is advised by the Mauna Kea Management Board ("MKMB") and native Hawaiian advisory council, Kahu Kū Mauna. The CRMP describes measures for proactively protecting Mauna Kea's cultural and natural resources beyond the expiration of the current leases.

The extension of the current leases would allow the University to continue management activities on the mountain beyond the December 31, 2033 date on which the current leases terminate. This would be done using funds from the University, including, but not limited to, monies paid by the operators of facilities that conduct research on the mountain. If the lease extension that we are requesting is not granted, the University's funding of those management activities will necessarily cease as it will no longer have a legal presence on Mauna Kea. If that occurs, the Land Board may be forced to reduce its cultural resource management activities or to divert funds from an already extended SHPD budget. Therefore, the University believes that the requested renewal or extension of the current leases would advance and promote current management efforts for the effective and long-term protection of Mauna Kea's cultural resources.

The University appreciates your assistance on this matter and we look forward to working with the Department and its several divisions in carrying out our management responsibilities under the CMP and its subplans adopted by the BLNR for the UH Management Areas of Mauna Kea. Please feel free to contact me at 808-974-7444 or by email at dstranev@hawaii.edu if you have any questions or require additional information regarding this request.

Sincerely,


Donald Straney
Chancellor

cc: John C. Holzman, Chair, UH Board of Regents



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

RECEIVED
LAND DIVISION
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DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

October 3, 2013

Kevin E. Moore
State Lands Assistant Administrator
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Re: Mutual Cancellation of General Lease No. S-4191 to the University of Hawaii (UH) for the Mauna Kea Science Reserve and Issuance of a New Direct Lease to UH for Mauna Kea Science Reserve Purposes; Mutual Cancellation of General Lease No. S-5529 to UH for the Hale Pohaku Mid-Level Facilities and Issuance of New Direct Lease to UH for Hale Pohaku Mid-Level Facilities Purposes; Extension, Amendment and Restatement of Grant of Term Easement S-4697 to UH to Extend the Easement Term by Approximately 45 years and Update the Easement Instrument with Current Provisions Approved by the Department of the Attorney General, Kaohe, Hamakua, Island of Hawai'i, Tax Map Keys: 3d/ 4-4-15:01 por., 09 & 12

Aloha mai e Mr. Moore,

Mahalo for the opportunity to review and comment on the proposed cancellation of current leases, the reissuance of two new 65-year leases and the extension of an existing easement to the Board of Regents of the University of Hawai'i (BOR) for a total of 11,300 acres of land in Mauna Kea Science Reserve. We appreciate the additional time that was afforded to the Office of Hawaiian Affairs (OHA) to conduct a thorough review of the proposed leases and easement extension.

The Office of Hawaiian Affairs (OHA) is the constitutionally-established body responsible for protecting and promoting the rights of Native Hawaiians.¹ OHA has substantive obligations to protect the cultural and natural resources of Hawai'i for its beneficiaries.² Accordingly, OHA is required to (1) 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

¹ HAW. CONST. ART. XII SEC. 5

² See HRS Chapter 10.

and Hawaiians; (2) assess the policies and practices of other agencies impacting native Hawaiians and Hawaiians; and (3) conduct advocacy efforts for native Hawaiians and Hawaiians.³

With regards to the matter at hand, OHA notes that the area subject to the proposed leases and amended easement hold particular significance for OHA and its beneficiaries. For example, the singular cultural importance of this area is reflected in numerous recorded myths, mele and traditional histories regarding its character as an “abode of the gods,” as the hiapo of human kind, and as a jumping off area for ancient Hawaiian souls; in archaeological evidence indicating ancient trails, the construction of ahu and kuahu, as well as the practice of specialized traditional skills such as adze-making; and in modern traditional practices by those with lineal and cultural ties to the area.⁴ The subject area also constitutes “ceded” lands, acquired through the illegal overthrow of the Kingdom of Hawai‘i, to which Native Hawaiians have never relinquished their claims.⁵ Finally, the 11,300 acres of land in the subject area are public lands trust lands classified under section 5(b) of the Admissions Act, the revenues from which must be dedicated to specific purposes including the betterment of Native Hawaiians.⁶

Given these responsibilities and understandings, OHA offers the following comments on the proposed new leases and easement amendment.

1. The action proposed should not be categorically exempted from the environmental review requirements of HRS Chapter 343.

OHA notes that the execution of leases or easements for public lands, which include lands within the Mauna Kea Science Reserve, constitutes an action triggering the environmental review requirements of HRS Chapter 343.⁷ OHA understands that the submittal proposes to nevertheless exempt the leases from environmental review requirements based on its position that the leases constitute “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.”⁸ However, the nature of the proposed leases, which expressly contemplate the construction of new structures and facilities, and which would allow the continuation of construction and maintenance activities in a particularly sensitive area over a much longer time than previously anticipated, would appear to be an “expansion or change in use” prohibiting application of the claimed categorical exemption. In addition, given the breadth of actions encompassed by the entire project (for which the subject leases and easement extension are but one preliminary phase), the extended timeline of such actions, and the particularly sensitive nature of the subject area, OHA believes that the likelihood of significant impacts would also prohibit the application of any exemption category to this proposal. Accordingly, OHA urges staff to reconsider its position on exempting the proposed

³ HRS § 10-3.

⁴ PATRICK C. MCCOY, ET. AL., A CULTURAL RESOURCE MANAGEMENT PLAN FOR THE UNIVERSITY OF HAWAI‘I MANAGEMENT AREAS ON MAUNA KEA KA‘OHE AHUPUA‘A, HĀMĀKUA DISTRICT, ISLAND OF HAWAI‘I TMK: (3)(4)-4-012, 015: A SUB-PLAN FOR THE MAUNA KEA COMPREHENSIVE MANAGEMENT PLAN 2-6 – 2-50 (2009).

⁵ See, e.g., House Concurrent Resolution No. 6 (Reg. Sess. 2013).

⁶ See also Art. XII Sec. 4 (“The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution . . . shall be held by the State as a public trust for native Hawaiians and the general public.”)

⁷ HAR § 11-200-5(c).

⁸ HAR § 11-200-8(a)(1).

leases from an environmental assessment or environmental impact statement, and to follow the environmental review procedures as required under HRS Chapter 343.

- a. All component actions of the proposed leases and easement extension, including the extension and execution of current and new telescope facility subleases, should be evaluated as a single action for environmental review purposes under HRS Chapter 343.

As a preliminary matter, it is important to note that HRS Chapter 343 and rules promulgated thereunder require groups of actions to be evaluated as a single action, when “component actions are phases . . . of a larger total undertaking,” or when “[a]n individual project is a necessary precedent for a larger project.”⁹ Here, the express language of the submittal notes that the proposed leases are “part of a multi-phase project,” and that the leases are necessary “to provide the basis for developing sublease agreements with current and . . . any potential future telescope projects.”¹⁰ Accordingly, all phases of this proposal—including the construction and maintenance of new telescope-related facilities for which these leases are a “necessary precedent”—should be considered, when evaluating the applicability of environmental review under HRS Chapter 343.¹¹

- b. The proposed leases, contemplating future construction and maintenance activities over an expanded period of 45 additional years, constitute a “change in use” that prohibits the application of the claimed categorical exemption for “existing structures, facilities, equipment, or topographical features involving negligible or no expansion of use[.]”

As noted above, the categorical exemption class claimed in exempting the proposed leases from environmental review requirements applies only to actions involving “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.”¹² However, the justification behind the issuance of these leases expressly includes the need “to provide the basis for developing sublease agreements with current and . . . any potential future telescope projects.”¹³ While the proposed leases do not specifically identify such future telescope projects, the Mauna Kea Science Reserve Master Plan provides a specific list of numerous telescope projects proposed for the subject area until 2020, several of which have not yet taken place and which would appear to constitute the very “future telescope projects” for which these proposed leases are allegedly necessary.¹⁴ Such telescope projects clearly contemplate structures that are not currently in existence, and further constitute an “expansion or change of use beyond that previously existing.” The proposed leases, and the planned projects for which they are a necessary precedent, therefore cannot be considered categorically exempt from environmental review as an existing use of existing structures.

⁹ HAR § 11-200-7.

¹⁰ Draft Mauna Kea Submittal page 5.

¹¹ See Draft Mauna Kea Submittal, page 5 and Exhibit B.

¹² HAR § 11-200-8(a)(1) (emphasis added).

¹³ Draft Mauna Kea Submittal page 5 (emphasis added).

¹⁴ UNIVERSITY OF HAWAI‘I BOARD OF REGENTS, MAUNA KEA SCIENCE RESERVE MASTER PLAN IX-45 (2000) available at
http://www.malamamaunakea.org/uploads/management/plans/MasterPlan_MaunaKeaScienceReserve_2000.pdf.

In addition, given that the current, existing uses of the subject area are for telescope projects expressly limited to 2033, new leases that would expand such telescope uses over four additional decades—an entire generation’s lifetime—further constitute an “expansion of use” that is beyond the scope of the claimed categorical exemption.

OHA therefore urges DLNR staff to reconsider its recommendation that the Board of Land and Natural Resources (“BLNR”) find the proposed leases categorically exempt from the environmental review requirements under HRS Chapter 343.

- c. The likelihood of significant impacts from the cumulative impact of current and future development activities over the course of 65 years, in the particularly sensitive ecological and cultural environment of Mauna Kea, prohibits the application of any categorical exemption to the proposed leases and easement extension.

Even if the proposed leases and easement extension did constitute “existing uses” of “existing facilities, structures, equipment, or topographical features,” the likelihood of significant impacts from continuing existing activities over 65 years (45 years beyond what current leases would permit), especially in the particularly sensitive environment of the Mauna Kea summit, appears to prohibit the use of any categorical exemption class to avoid environmental review requirements under HRS chapter 343.

Under HRS Chapter 343 and its administrative rules, none of the categorical exemption classes for environmental review are applicable “when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant . . . may be significant in a particularly sensitive environment.”¹⁵ In the case at hand, the proposed leases contemplate the continued maintenance of existing structures and facilities, as well as the development of additional structures, over the course of 65 years—45 years beyond the 2033 end date for the current leases. Given previous findings that telescope projects and associated activities on Mauna Kea have in fact resulted in significant environmental impacts, there is a high likelihood that the continuation of such projects—and the implementation of new ones—cumulatively, over a period of 65 years, will also have significant environmental impacts. In addition, the particularly sensitive nature of the Mauna Kea summit—which includes essential habitat for endangered, endemic species, as well as cultural resources imbued with the singularly unique cultural significance of Mauna Kea—heightens the likelihood of significant environmental and cultural impacts over this time period.¹⁶

Insofar as the proposed leases and easement extension present a high likelihood of significant impacts from construction, maintenance, and associated activities—including impacts from wastewater discharge, vehicular traffic and hazardous material storage over a period of 65 years—OHA therefore again urges DLNR staff to refrain from recommending the use of any categorical exemption class, to avoid the environmental review requirements of HRS Chapter 343.

¹⁵ HAR § 11-200-8(b) (emphasis added); see also Civil No. 03-1-0289-02 (Oct. 10, 2003) (rejecting the application of Exemption Class No. 1 for a proposed lease agreement where “This Court finds that the proposal for a 30-year lease of any or all excess water that may exist after there finally is a determination of riparian and native Hawaiian rights to the said water from 33,000 acres of state land, as a matter of law, does not constitute a minimal or no significant effect on the environment”).

2. 65-year leases may constrain the state's ability to make best use of the Mauna Kea lands.

OHA urges DLNR staff to consider alternatives to the proposed 65-year leases for the subject area, which may unnecessarily tie the BLNR's hands in ensuring the best and most appropriate use of this culturally and ecologically invaluable area.

Should they be issued, the proposed 65-year leases will continue to bind the subject 11,300 acres of "ceded" lands for a particular use at the same, gratis lease rent for at least a generation. Mauna Kea is a particularly significant and sacred place to the Native Hawaiian people. Encumbering this culturally significant landscape with 65-year leases ties the hands of the community, particularly the Native Hawaiian community, in participating in the area's use and management. OHA notes in particular that the Native Hawaiian community has not consented or relinquished any claims to these ancestral lands, that were acquired only through the illegal overthrow of the Hawaiian Kingdom; the existence of such claims counsels particular respect and consideration for the interests of Native Hawaiians in this sensitive area.¹⁷

Furthermore, opportunities to better monetize the use of the existing astronomy facilities on Mauna Kea, or to provide for more productive and culturally appropriate uses of the subject area, may arise over the contemplated 65 years of the proposed leases. Should such leases be in place, the BLNR's ability to make sound decisions to adjust to these changes will be hamstrung for the remainder of the lease terms.

3. The BLNR's fiduciary duties counsel the inclusion of lease terms that better guarantee adequate compensation for the sublease and use of the Mauna Kea lands.

On a related note, OHA respectfully requests that any proposed new general lease for the Mauna Kea Science Reserve, Hale Pohaku, or any other Mauna Kea lands include conditions to assure adequate compensation for the sublease or use of such lands. According to the staff submittal, "[i]n some cases, the rent [UH] charged for the sublease was nominal at \$1.00 for the term of the sublease."¹⁸ OHA questions whether the BLNR is fulfilling its fiduciary duty to the public trust by allowing such nominal rent for subleases. Under Chapter 171, Hawai'i Revised Statutes, the BLNR is responsible for managing approximately 1.3 million acres of public lands and the State's natural and cultural resources, which are held in trust for present and future generations.¹⁹ The Hawai'i Supreme Court has held that the State should be held to the "high fiduciary duties normally owed by a trustee to its beneficiaries," and judged by "the most exacting fiduciary standards."²⁰

As a part of its obligations, the BLNR is expressly tasked with reviewing and approving sublease rents for any lands that it leases.²¹ By granting new general leases for Mauna Kea Lands without

¹⁷ House Concurrent Resolution No. 6 (Reg. Sess. 2013).

¹⁸ Draft Mauna Kea Submittal page 6.

¹⁹ HRS § 171-3; see also HAW. CONST. ART. XI SEC. 1.

²⁰ *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). In 2008 these same standards were applied to the public land trust. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.*, 117 Hawai'i 174, 177 P.3d 882 (2008).

²¹ HRS § 171-36(a)(6) (requiring BLNR approval and a right to review sublease rents and to adjust rental rates accordingly).

adequate conditions, the BLNR would essentially be supporting the continued issuance of subleases by the BOR for the nominal amount it has and continues to charge its sublessees, for periods spanning multiple generations. OHA seriously questions whether this allows the BLNR to meet its high fiduciary duties. Moreover, continuing to allow the BOR to issue nominal leases may particularly impact the Native Hawaiian community by depriving OHA of a pro rata share of fair market value of these lands. Therefore, it would be unreasonable for the BLNR to support or permit the continued issuance of subleases at less than present annual fair market value.

Given the past practice of the BOR issuing subleases at nominal rates far below fair market value, as well as the BOR's apparent ability to continue doing so under the proposed leases, OHA urges DLNR staff to amend its recommendation to ensure adequate special conditions on any sublease of BLNR-managed lands.

4. Conditions on the termination of the current leases for Mauna Kea lands should be fulfilled prior to the execution of a new lease to the same lessee.

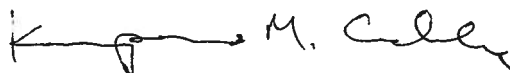
Finally, OHA urges DLNR staff to recommend that the BOR fulfill its obligations under the current leases for the Mauna Kea lands, prior to the cancellation of the current leases and the reissuance of similar leases for the subject area. Specifically, the completion of a Phase I environmental site assessment, as required under current lease terms, will provide the BLNR with important baseline information that could further inform its decision as to what conditions it should place in the new proposed leases.

Under lease term 35 of General Leases No. S-4191 and S-5529, the University of Hawai'i is responsible for conducting a Phase I environmental site assessment "[p]rior to termination or revocation of the subject lease." If the BLNR decides to enter into a mutual cancellation of the two current leases for Mauna Kea lands, it should consider requiring compliance with the current lease terms regarding the Phase I environmental site assessment. Although the lessee will remain the same across the terminated and reissued Mauna Kea leases, the Phase I assessment, as a requirement of the current lease terms, would provide the BLNR with an environmental baseline for a reissued 65-year lease—information that may be necessary for the imposition of more appropriate conditions in the proposed new leases.

Should you have any questions or concerns regarding the above comments, please have your staff contact us via Jonathan "Makana" Ching, Public Policy Advocate, by phone at (808)594-1835 or via e-mail at jonathanlc@oha.org.

Thank you very much for your consideration of this matter.

'O wau iho nō me ka 'oia'i'o,



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

Mr. Kevin E. Moore
Mauna Kea Lands Draft Submittal
October 3, 2013
Page 7

KMC;wt
Enclosures (5)

Cc: William Ailā, Jr., Chairperson, Board of Land & Natural Resources



October 23, 2013

Mr. Kevin E. Moore
Assistant Administrator, Land Division
Department of Land and Natural Resources
P.O. Box 621
1151 Punchbowl Street
Honolulu, Hawai'i 96809-0621

Subject: Request for Issuance of New Master Leases for (a) the Mauna Kea Science Reserve and (b) the Hale Pōhaku Mid-Level Facilities, and an Amendment of the Grant of Easement for the Mauna Kea Observatory Access Road; Lessee: University of Hawaii; TMK 3/4-4-015:01 (port.), 09 and 12; Kaohe, Hāmākua District, Island, County and State of Hawaii

Dear Mr. Moore:

On August 22, 2013, the University of Hawai'i ("UH") transmitted to you a request that the BLNR ("Board") extend the existing leases for the Mauna Kea Science Reserve (G.L. No. S-4191) and Hale Pōhaku Mid-Level Facilities (G.L. No. S-5529). In its request it asked that the existing leases be replaced by new 65-year General Leases for these two parcels. In addition, it asked that the Grant of Easement for the Mauna Kea Observatory Access Road (Easement No. S-4697) be modified to be coterminous with the new General Leases.

Comments received from the Office of Hawaiian Affairs (OHA) require us to more clearly explain the basis for our request and the reasons why it is consistent with the existing approvals and does not trigger the need for additional Chapter 343 review or new Conservation District Use authorization. The purpose of this letter is to clarify the intent of our request which demonstrates that the concerns that have been raised are unwarranted.

It appeared from some of the comments that further explanation is needed regarding the University's intent (and limitations) in connection with the lease and easement changes that we are seeking. Specifically, the Office of Hawaiian Affairs appeared to view our request for an extension of the University's tenure on the land it is presently leasing as an effort to obtain permission for development of additional astronomical facilities on the mountain and/or to do so without undergoing thorough review as required by Chapter 343, Hawai'i Revised Statutes. This section of our response highlights our understanding of the concerns that have been expressed and then goes on to explain why we believe they stem from a misunderstanding of

the substance of our request. We can only conclude that such concerns expressed by OHA are not warranted.

As expressed in its October 3, 2013, letter to you, the Office of Hawaiian Affairs understood that the University is requesting approval of new facilities as part of its lease application:

"... the nature of the proposed leases, which expressly contemplate the construction of new structures and facilities, and which would allow the continuation of construction and maintenance activities in a particularly sensitive area over a much longer time than previously anticipated, would appear to be an "expansion or change in use" prohibiting application of the claimed categorical exemption. In addition, given the breadth of actions encompassed by the entire project (for which the subject leases and easement extension are but one preliminary phase), the extended timeline of such actions, and the particularly sensitive nature of the subject area, OHA believes that the likelihood of significant impacts would also prohibit the application of any exemption category to this proposal."

The University is not seeking authorization for the construction of additional facilities and is not arguing that such facilities qualify for a categorical exemption.

OHA's letter also expressed several other beliefs that we believe stemmed from phrasing in our transmittal letter rather than the intent or substance of our actual application. One of these is the belief that what we are requesting is part of a group of actions that must be (and is not) evaluated together:

"Here, the express language of the submittal notes that the proposed leases are "part of a multi-phase project," and that the leases are necessary "to provide the basis for developing sublease agreements with current and ... any potential future telescope projects." Accordingly, all phases of this proposal-including the construction and maintenance of new telescope-related facilities for which these leases are a "necessary precedent"-should be considered, when evaluating the applicability of environmental review under HRS Chapter 343."

Another is that the University is seeking permission for future projects.

"However, the justification behind the issuance of these leases expressly includes the need "to provide the basis for developing sublease agreements with current and . . . any potential future telescope projects."

OHA's comments make the point that the transmittal letter refers to telescope projects that:

"...clearly contemplate structures that are not currently in existence, and further constitute an "expansion or change of use beyond that previously existing." The proposed leases, and the planned projects for which they are a necessary precedent, therefore cannot be considered categorically exempt from environmental review as an existing use of existing structures."

Then, expressing discomfort with the idea that the proposed leases qualify for a categorical exemption from the review requirements of Chapter 343, Hawai'i Revised Statutes, OHA takes the position that:

Even if the proposed leases and easement extension did constitute "existing uses" of "existing facilities, structures, equipment, or topographical features," the likelihood of significant impacts from continuing existing activities over 65 years (45 years beyond what current leases would permit), especially in the particularly sensitive environment of the Mauna Kea summit, appears to prohibit the use of any categorical exemption class to avoid environmental review requirements under HRS chapter 343.

After very carefully reviewing all of these concerns, we remain firmly convinced that granting the request described in our application is fully consistent with all environmental and land use laws and regulations and that the concerns that have been expressed stem from a misunderstanding of our intent rather than from any fundamental or real issue related to the proposal.

Accordingly, I hope that the following clarifications will assure you that we are correct in our judgment and will eliminate any concerns that may have arisen.

First and foremost, we are not seeking, through our request, permission to construct or operate astronomy facilities or undertake any other use that is not already in place or in possession of a Conservation District Use Permit or that have already been through the Chapter 343 process. All existing uses on Mauna Kea have fully complied with Chapter 343. Any future uses and/or facilities would require full and complete environmental impact review as provided for in the applicable laws and regulations.

Second, the lease extension we are seeking is intended to allow the University to continue management activities on the mountain beyond the December 31, 2033 date on which they must currently cease. This would be done using funds from the University, including, but not

limited to, monies paid by the operators of facilities that conduct research on the mountain. If the lease extension that we are requesting is not granted, UH funding of those management activities will necessarily cease as it will no longer have a legal presence on Mauna Kea. If that occurs, the Board will be forced to reduce its resource management activities or to fund them using alternate sources. As there is no assurance that such alternate sources of funds will be available, we believe a lease extension that carries with it an obligation for the University to provide funding is prudent.

Third, the lease extension we are requesting will allow the University to enter into meaningful sublease-extension negotiations with the owners/operators of already approved astronomical facilities. Doing this may allow some existing facilities to continue operation beyond the 2033 date, thereby diminishing the pressure to develop entirely new sites and will extend the usefulness of the entire MKSR science complex with a minimum of potentially disruptive new construction. Any sublease that extends the terms of occupancy for existing facilities beyond December 31, 2033, would require Board approval. The availability of an option to extend their existing subleases will, we believe, encourage those present sublessees who envision using their existing facilities on the mountain beyond the present termination date to renegotiate their subleases on terms that call for payment toward the funding of the management of Mauna Kea which their current subleases do not require.

Fourth, the lease extension will not allow the University to develop and/or operate any facilities that have not already been approved and obtained a Conservation District Use Permit. The Thirty Meter Telescope (TMT) is the last such project that has been authorized and is the only facility not yet in place that would be developed without seeking and obtaining additional authorizations from the Board. In addition, TMT is the only observatory currently anticipated to request a sublease extending beyond 2033, and no other observatory has made a request for a lease extension. No other new uses of Mauna Kea beyond 2033 are foreseeable at this time.

Apart from Chapter 343, the Office of Hawaiian Affairs raised other concerns. One of those is possible constraints on the State's ability to make the best use of the Mauna Kea lands:

"... the proposed 65-year leases will continue to bind the subject 11,300 acres of "ceded" lands for a particular use at the same, gratis lease rent for at least a generation. Mauna Kea is a particularly significant and sacred place to the Native Hawaiian people. Encumbering this culturally significant landscape with 65-year leases ties the hands of the community, particularly the Native Hawaiian community, in participating in the area's use and management."

The University acknowledges that new leases would commit only a very small portion (5 percent) of the Mauna Kea lands to certain uses as a "scientific complex", which uses have already been approved by the Board. The Board is not, however, permanently bound to the proposed leases. Paragraph 27 of the proposed leases provides that BLNR has the right to withdraw the premises, or any portion thereof, at any time during the term of the lease. This provision ensures that the proposed leases will not unduly constrain the State's ability to make the best use of the Mauna Kea lands, should another desired or better use arise.

Another concern raised by the Office of Hawaiian Affairs is adequate compensation for subleases:

"On a related note, OHA respectfully requests that any proposed new general lease for the Mauna Kea Science Reserve, Hale Pohaku, or any other Mauna Kea lands include conditions to assure adequate compensation for the sublease or use of such lands."

Good stewardship of the land requires adequately funded proactive management. A feature of the proposed leases, not covered by the current leases, are specific provisions incorporating recent management changes adopted by the Board for the proactive management of the Mauna Kea lands and the protection of its cultural and natural resources such as the CMP and its subplans, the Cultural Resource Management Plan, the Natural Resources Management Plan, the Public Access Plan and the Decommissioning Plan. As the University has previously stated, "UH anticipates that future subleases' rent will provide a significant portion of the funding required for UH to carry out its management and stewardship responsibilities." Although the current subleases are charged nominal rent, the new leases will provide the University with an opportunity to renegotiate the current subleases, included the payment of fees and cost reimbursements. Additionally, any new sublease granted under the new leases will have to conform to the requirements of Act 132, which requires, among other things, the payment of fees.

The final concern raised by the Office of Hawaiian affairs deals with a Phase I environmental site assessment:

"Finally, OHA urges DLNR staff to recommend that the BOR fulfill its obligations under the current leases for the Mauna Kea lands, prior to the cancellation of the current leases and the reissuance of similar leases for the subject area. Specifically, the completion of a Phase I environmental site assessment, as required under current lease terms, will provide the BLNR with important

baseline information that could further inform its decision as to what conditions it should place in the new proposed leases."

The current lease, General Lease No. S-4191, does not include a requirement to conduct a Phase I Environmental Assessment ("Phase I"). Such an assessment would only be required if the new leases are approved. The purpose of a Phase I is to determine the condition of the land prior to surrendering it to the Board of Land and Natural Resources. The University does not propose to surrender any land at this time. When the Mauna Kea lands, however, are returned to the State, a Phase I will be conducted. In addition, the 2009 CMP not only identified much of the same information that would be required by a Phase I, but was broader in coverage than a Phase I .

The Board of Regents have authorized UH Hilo to work with the Department of Land and Natural Resources on the terms and conditions for new 65-year leases for both the MKSR and Hale Pōhaku together with an appropriate amendment extending the term of the existing easement to be coterminous with the two new leases, and slightly modified versions of our previous suggestions relative to the required documents are provided in the attachments to this letter. Of course, the Board of Regents retains the decision-making authority on approval of the final documents

We greatly appreciate the Department's cooperation and assistance on this matter. We look forward to working with the Land Division and the BLNR in completing the process for developing mutually-acceptable terms for surrendering the existing leases and issuing the new leases. Please feel free to contact me at 808-974-7444 or by email at dstraney@hawaii.edu if you have any questions or require additional information regarding this request.

Sincerely,


Donald O. Straney
Chancellor

cc: John C. Holzman, Chair, University of Hawai'i Board of Regents