



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Higher Education
Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs
February 6, 2009 at 4:00pm
by
Rose Tseng
Chancellor, University of Hawai'i at Hilo

SB 502 RELATING TO THE UNIVERSITY OF HAWAII

Chairs Tokuda, Hee and Members of the Committees:

There is no doubt that Mauna Kea, particularly the summit region, is a special place. Mauna Kea contains an alpine environment in a tropical region, which is rare on the planet; it is one of the most culturally significant and archaeologically important places in the Hawaiian Islands; and it is recognized globally as a premier center for astronomical research. Mauna Kea is visited by those exercising traditional cultural practices, researchers in a variety of disciplines, astronomers, recreational users, educators, tourists and island residents. While each comes to visit, enjoy, and contemplate Mauna Kea in their own way, many do not realize how they, individually and collectively, may impact the mountain. The University is seeking express rule-making authority for the purpose of enabling the University to better manage these uses and activities and protect Mauna Kea's unique cultural and natural resources.

It is important to understand the land classification system and agencies responsible for managing the lands to protect the resources. For example, the upper region of Mauna Kea is zoned conservation district lands and is divided into three types of land designations. Beginning at the summit is the Mauna Kea Science Reserve (11,288 acres) and the Mauna Kea Ice Age Natural Area Reserve (3,893.5 acres). Surrounding these two parcels is the Mauna Kea Forest Reserve (52,500 acres). The Mauna Kea Science Reserve was originally classified Forest Reserve lands. In 1968 the Science Reserve was established when it was removed from the Forest Reserve by the Board of Land and Natural Resources (Land Board) and leased to the University for 65 years to be used as a scientific complex.

The Department of Land and Natural Resources (DLNR) is mandated to protect the resources on its lands and has adopted administrative rules governing the use of lands within both the Forest Reserve and the Natural Area Reserves System. There have not, however, been any administrative rules adopted to specifically cover uses within the Mauna Kea Science Reserve.

The University understands the need and accepts its responsibility to protect the resources on the lands it uses on Mauna Kea, including lands comprising the following: (1) the Mauna Kea Science Reserve, (2) Hale Pohaku, and (3) the Mauna Kea Access Road above Hale Pohaku. While the University believes it has the implied authority to promulgate rules, it nevertheless feels there is a need to eliminate any ambiguity and uncertainty regarding rule making and seeks express statutory authority to adopt administrative rules. The authority to adopt administrative rules is expected to help the University more effectively and efficiently carry out its management obligations under the Land Board's lease of the Mauna Kea lands to the University. The University has completed and submitted to the DLNR a Mauna Kea Comprehensive Management Plan (CMP) that is designed to protect and preserve the natural and cultural resources on and within the University's Mauna Kea lands. The University will be seeking the Land Board's approval for the CMP, which will require the University to carry out a variety of oversight and management functions and responsibilities. Having rule making authority will enable the University to more efficiently carry out these CMP functions and responsibilities.

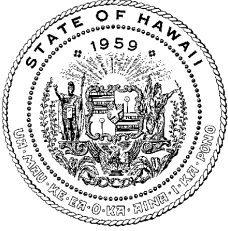
Moreover, granting the University the authority to assess and collect administrative fines should enable the University to more effectively enforce such rules. In adopting such rules, the University will be required to address and resolve any conflicts with other applicable statutes or rules.

This bill also proposes to establish a Mauna Kea management special fund. This is viewed as an affirmation of the University's commitment to improving the conditions on Mauna Kea. This fund would afford the University the necessary flexibility to better carry out its management responsibilities, particularly under the CMP. The CMP clearly articulates an overall management strategy, with sufficient specific component plans, that is designed to protect Mauna Kea's unique cultural and natural resources. The CMP was developed using an integrated approach drawing upon the Hawaiian approach to managing natural and cultural resources, as well as contemporary science based management tools. The CMP also applies an adaptive management practice, which is a systematic process for continually improving management policies and practices for resource protection by learning from outcomes of past and current management activities. Just as the CMP is designed to continually evolve and improve, the University's ability to fund any measures or activities to implement such improvements needs to be assured and preserved. Having such a fund will help provide this assurance and protection. A special fund will also assist the University in accounting for and keeping track of the benefits and costs relating specifically to Mauna Kea.

Without a separate special fund dedicated to Mauna Kea, the statutes establishing one or more of the University's special or revolving funds (such as the real property and facilities fund established pursuant to HRS section 304A-2274) would need to be amended so that funds arising from all Mauna Kea related activities could be deposited

and expended from the fund. Creating such a niche in an existing fund used by the entire University system (and not just for Mauna Kea) could pose some challenges. Part of such an amendment to other statutes would need to include the ability of the University to deposit and expend monies collected by the University as administrative fines.

The University supports passage of this bill. Thank you for your thoughtful consideration.



DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

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Statement of
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Department of Business, Economic Development & Tourism
before the

SENATE COMMITTEE ON HIGHER EDUCATION
and the
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE AND HAWAIIAN AFFAIRS

Friday, February 6, 2009

4:00 p.m.

State Capitol, Conference Room 229

in consideration of

SB 502

RELATING TO THE UNIVERSITY OF HAWAII.

Chair Tokuda, Chair Hee, Vice Chair Sakamoto, Vice Chair Tokuda, and members of the Committees. The department concurs with the concept behind SB 502, especially as it pertains to the ability of Hawaii to support and advance astronomical research in our State.

The department supports the intention to give the University of Hawaii the ability to establish and enforce rules governing public behavior on lands over which the University has jurisdiction, such as the Mauna Kea Science Reserve. It is a matter of vital importance to both the local astronomy community and the people of Hawaii that the University be given the power to institute such rules. Establishing order and predictability

relating to the operation of the Science Reserve will enhance both the ability of astronomers to conduct world-class research atop Mauna Kea, as well as the confidence of institutions and individuals who wish to support and advance Hawaii's pioneering contributions to this field.

The proposed legislation also pays due regard to the concerns of local citizens, and admonishes the University's Board of Regents to work with such individuals and groups to assure that the development of rules is carried out in a culturally and community sensitive manner.

As such, we believe this legislation is a very positive step forward to help ensure Hawaii's continued role as a global leader in astronomical research.

Thank you for the opportunity to testify on this bill.



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**S.B. 502 Mauna Kea
Room 229, 4:00 p.m.
February 6, 2009**

Aloha Chairpersons Hee and Tokuda, and members of the Senate Committees on Higher Education and Water, Land, Ocean, and Hawaiian Affairs,

KAHEA strongly opposes the passage of SB 502 to grant the University of Hawaii authority over the ecologically significant and culturally sacred lands of Mauna Kea. The University must not be granted any authority over Mauna Kea because:

- Mauna Kea lands leased by the University are ceded lands. Granting this authority to the University will violate the Supreme Court's ruling in OHA v. HCDCH.
- Mauna Kea lands are public trust lands that must be managed by the state's landlord, the Department of Land and Natural Resources, not the University, who is a mere lease-holder. State law requires that public trust lands be leased at fair market value for the benefit of the people of Hawaii, not the lease-holder.
- The University's activities on Mauna Kea have exploited, destroyed, and desecrated irreplaceable natural and cultural resources on the summit.
- The University promises to use this authority to limit public access, regulate when and how Hawaiians worship, and expand telescope construction on the summit, while at the same severely limiting public oversight of decisions made about the summit.

SB 502 seeks to transfer ceded lands out of the public lands trust

With this bill, the Lingle Administration is seeking to transfer ceded lands protected by the public lands trust from the Department of Land and Natural Resources (DLNR) to the University of Hawaii. This should not be allowed because it is exact same type of land transfer deemed illegal by the Hawaii Supreme Court in January 2008 in OHA v. HCDCH.

The "Mauna Kea lands" identified in this bill are all ceded lands. Ceded lands are the lands improperly taken from the Hawaiian Kingdom during the overthrow of 1893 and transferred to the State of Hawaii at statehood on the condition that these lands were held in trust. The Supreme Court recognized the fundamental importance of this exchange, finding that "[a]s a condition of its admission into the Union, the State of Hawaii agreed to hold certain lands granted to the State by the United States in a public land trust for five purposes." (OHA v. HCDCH, citing Admission Act of March 18, 1959).

The Hawaii Supreme Court held in OHA v. HCDCH that because ceded lands are held in trust for the Hawaiian people and because the state and federal governments have both expressed a



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commitment to reconcile the injustice of the overthrow, "ceded lands should be preserved pending a reconciliation between the United States and the native Hawaiian people. Without an injunction, the ceded lands are at risk of being alienated and, as previously stated, once the ceded lands are sold or transferred from the public lands trust, they will not be available to satisfy the unrelinquished claims of native Hawaiians and will, as discussed more fully infra, undoubtedly have a negative impact on the contemplated reconciliation efforts." (OHA v. HCDCH) The transfer of Mauna Kea lands proposed in this bill is precisely the type of alienation that the Supreme Court anticipated and sought to prevent with the ceded lands injunction.

In addition to violating the Supreme Court's injunction against the transfer of ceded lands, this bill would also undermine the state's authority over public trust lands by handing over management authority to the leaseholder. As required by law, the DLNR is the state's landlord and is responsible for managing and overseeing all ceded lands and all conservation lands in the State. See, HRS sec. 171-3. Yet, this bill proposes to transfer the responsibility of managing the ceded lands of Mauna Kea from DLNR to the leaseholder by granting the University "authority to manage and control public activities on the Mauna Kea lands." Doing so would establish a precedent of giving the leaseholder – the developer – control over public trust lands. This not only turns the landlord-leaseholder relationship on its head, it violates the prohibition against the "wholesale delegation" of agency authority to a third party, as articulated in Kapa`akai v. LUC.

The University profits from Mauna Kea at the public's expense

For 30 years the University has profited from allowing foreign countries and corporations to exploit Mauna Kea, while only paying \$1.00 per year in lease rent to the State. The University and the foreign entities that own and operate telescopes atop Mauna Kea have failed to pay "fair market" rent to the State, as required by HRS sec. 171-17, 18. This means state taxpayers have been subsidizing foreign government investments on our public lands.

The University, as well as the foreign countries and corporations on Mauna Kea, owe the state taxpayers 30 years of back-rent for violating HRS 171. Unfortunately, SB 502 does not require compliance with state law, payment of back-rent, or provide any relief to the taxpayers. Surprisingly, during this time of debilitating economic crisis, the University is proposing to establish a special fund that would allow the University to pocket all of the profits from the use of Mauna Kea lands, bypassing the general fund altogether. The University is literally seeking the Legislature's approval to rob the people of Hawaii.

Unfortunately, the University has never accounted for the profits it has gained from its destructive use of Mauna Kea, so the people of Hawaii do not even know how much has been stolen by the University. According to a report to the UH Board of Regents in 1994, however, the University enjoyed at least \$60 million annually in benefits from its use of Mauna Kea. In 2001, the University admitted to the Legislature that the work conducted on Mauna Kea earned at least \$8 million a year just from the patent-lease contracts with defense contractors like Raytheon.

Rather than allow the University to further burden and steal from Hawaii's peoples, this Legislature should require a financial audit of all telescope activity currently conducted on the sacred summit of Mauna Kea. With this accounting, the State can accurately assess the value of the University's astronomy program and determine how best to balance the financial needs of the University, the fragile natural and cultural resources of the mountain, and the people of the Hawaii.

The University desecrates and destroys Mauna Kea

Multiple reports, audits, and lawsuits have confirmed that the University's telescope activities have violated the law and continue to destroy the natural and cultural resources of Mauna Kea. Mauna Kea's Hawaiian alpine desert is unlike any other place in the world. It is home to many Hawaiian endemic species - some are found only on Mauna Kea! This includes: 11 species of insects, such as the Wekiu bug; endangered birds, Palila (Hawaiian Honeycreeper) and Uau (Hawaiian Petrel); and the rare plant, Ahinahina (Mauna Kea Silversword). Mauna Kea lands are designated conservation and water shed lands for the purpose of protecting these imperiled cultural and natural resources, not telescope construction. The construction of so many telescopes in such a fragile environment destroys rare habitat and speeds the introduction of invasive species. The Wekiu bug, which lives only on the high elevation cinder cones of Mauna Kea, has lost 90% of its habitat to telescope development.

Most recently, the Third circuit court affirmed that DLNR rules and regulations do require DLNR to complete a comprehensive management plan for the conservation of the entire summit of Mauna Kea before permitting any further telescope construction. This ruling followed a court-ordered federal environmental impact statement (EIS) in 2005, which confirmed that the impacts of the telescope industry on the delicate cultural and natural resources of Mauna Kea have been "substantial, adverse and significant," all of which are conditions that bar the DLNR from issuing any permits for construction in a conservation district.

Furthermore, in multiple reviews of the University's activities on the summit, the Hawaii State Auditor found that the University's management and the DLNR's oversight of Mauna Kea has been "inadequate to ensure the protection of natural resources, and neglected ...the cultural value of Mauna Kea." Their report further stated that the University's Institute for Astronomy "focused primarily on the development of Mauna Kea and tied the benefits gained to its research program," and that its focus on telescope construction has been "at the expense of neglecting the site's natural resources."

The University seeks to limit public access and expand destructive activities

Through this proposed legislation and its own version of a yet "management plan," the University is seeking to undermine the management of the ceded lands and natural and cultural

HO'OKAHI NO KA 'AIWA A ME NA KANAKA

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resources on Mauna Kea, while consolidating its control over the summit. The primary purpose of managing the conservation district on the sacred summit of Mauna Kea must be the protection of the natural and cultural resources found on these ceded lands.

Unfortunately, as outlined in its management plan, the University will not be protecting the natural and cultural resources of the mountain. The plan does not control telescope construction in any way. Instead, it proposes to limit public access, charge user fees, and dictate whether and how Hawaiians worship on the summit. The proposal includes blocking the only road to the summit; this road is a public road built with tax-payer funds that should not be gated for the benefit of a few astronomers. As a telling example of the University's audacity, SB 502 proposes that the University "board of regents shall be exempt from the public notice, public hearing, and gubernatorial approval requirements of chapter 91," when establishing fees for use of summit. Given the University's track record of harm and desecration on the summit, the Legislature should not grant the University any authority to manage or regulate the sacred summit of Mauna Kea. Please hold SB 502.

Mahalo,



Marti Townsend
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LATE

SENATE COMMITTEE ON EDUCATION AND HOUSING SENATE COMMITTEE ON ENERGY AND ENVIRONMENT

February 6, 2009, 1:15 P.M.

(Testimony is 2 pages long)

TESTIMONY IN OPPOSITION TO SB 502

Chair Sakamoto, Chair Gabbard, and members of the Committees:

The Sierra Club, Hawai'i Chapter, with 5500 dues paying members statewide, submits the following testimony in opposition to SB 502, authorizing the University of Hawai'i to manage Mauna Kea lands.

There have been repeated findings -- both in an Environmental Impact Statement and by the State Auditor -- that the University has consistently failed to protect the cultural and natural resources of Mauna Kea in the furtherance of unregulated astronomy development. The keys to the kingdom should not now be given to an institution that has a thirty-year proven track record of failure.

It should also be noted the University's request is a back-door attempt to avoid years of adverse litigation. There has been a judicial determination that DLNR failed to develop a comprehensive management plan for Mauna Kea that protects the natural and cultural resources of this sacred mountain. In other words, DLNR has a non-transferable fiduciary duty to protect the environment and Native Hawaiian rights. Rather than allowing DLNR to develop a management plan -- with public comment and community participation -- the University is now attempting to seize control of Mauna Kea and institute its own plan. `Auwe! Talk about having the fox guard the henhouse.

Please defer this measure. Thank you for the opportunity to testify.

Joint Testimony
In Opposition
To

S.B. 502/H.B. 1370

And

S.B. 992/H.B. 1174

The Senate Committee on Land, Water and Oceans and Higher Education

February 6, 2009 at 4:00 p.m. in Room 229

The following testimony IN OPPOSITON to S.B. 502 is submitted on behalf of the following parties:

Ms. Kealoha Pisciotta, President of Mauna Kea Anaina Hou,

Ms. Debbie Ward and Nelson Ho, Co-Chairs of Mauna Kea Issues Committees,
Sierra Club Hawai`i Island Chapter,

Ali`i `Ai Moku, Mr. Paul K. Neves of the Royal Order of Kamehameha I, Moku of
Mamalahoia Heiau Helu `Elua, and

Mr. Clarence Ku Ching (individual Native Hawaiian Practitioner).

The above named parties are the Plaintiffs in the recent Third Circuit Court case regarding the management of Mauna Kea. The court found in favor of the Plaintiffs and against the University of Hawai`i (UH) and the Board of Land and Natural Resources (BLNR).

Aloha Pumehana, Chairman Hee, Chairwoman Tokuda, and Members of the Senate Committees on Land, Water and Oceans, and Higher Education,

We wish the record to reflect that we support KAHEA's testimony on S.B. 502/H.B. 1174. Although we are specifically testifying in opposition to S.B. 502 before this committee, we are STORNGLY OPPOSED to all four (4) versions of the University's Mauna Kea bills, including S.B. 992, H.B. 1174, and H.B. 1370.

WE ARE STRONGLY OPPOSED TO S.B. 502 FOR THE FOLLOWING REASONS:

1. S.B. 502 interferes with on-going litigation on the current regulations governing Mauna Kea

Mauna Kea Anaina Hou, The Royal Order of Kamehameha I, Sierra Club Hawaii Island Chapter, and Clarence Ku Ching are plaintiffs in CASE NUMBER against the University of Hawaii and the Board of Land and Natural Resources for violation of the regulations protecting Mauna Kea as a conservation district. This lawsuit is currently on review before the Intermediate Court of Appeals after the University appealed the lower court ruling against them. Though the University only recently withdrew its appeal from the ICA, counterclaims that go to the fundamental merits of this issue remain before the ICA.

Passage of S.B. 502 will interfere with this judicial review by attempting to fundamentally alter the regulatory framework governing the management of Mauna Kea. In fact, this is precisely why the University is advocating for S.B. 502. The University and its attorney, Lisa Munger (also attorney for the Hawaii Superferry Inc.), recognize that they are unlikely to prevail on an appeal of the current laws protecting Mauna Kea. Thus, they are seeking to drastically change those laws to better favor their interests.

As a general principle, the Legislature should not make new law that will affect pending litigation. In this specific situation, we, the plaintiffs, have dedicated more than 10 years of our lives to this judicial review process based on the regulatory framework this body saw fit to create. Passing SB 502 would interfere with this judicial process and compromise the overall efforts to ensure that the sacred summit of Mauna Kea is protected. Therefore, we ask that S.B. 502 not be passed.

2. S.B. 502 Violates the Hawaii Supreme Court Injunction on the Transfer of Ceded Lands

S.B. 502 is a back-door transfer of the Ceded Lands of Mauna Kea, which is in direct contravention of the Hawai'i State Supreme Court's holding in OHA v. HCDCH, 2008. The Hawaii Supreme Court barred the transfer of all ceded lands until a formal reconciliation between the State of Hawaii, the U.S. federal government, and the Native Hawaiian people is reached, in order to prevent the premature alienation of the land trust established by the Admissions Act of 1959. Transferring land out of DLNR's control - even to another branch of the state government - violates the Supreme Court ruling because DLNR is the only state entity with the constitutional and statutory obligation to manage ceded lands. This is to say that transferring ceded lands to the University of Hawaii - an entity with absolutely no legal obligations to protect the public land trust - is no different than transferring ceded lands to a private developer.

Legislators should understand that the passage of any proposal to allow the DLNR to transfer the ceded lands of Mauna Kea to the University will result in additional litigation based on the standing injunction issued in OHA v. HDCDH.

3. S.B. 502 robs the public land trust and the public coffers

S.B. 502 proposes to establish a special fund that would allow the UH to collect revenue from the exploitation of Mauna Kea, without paying fair market rent for the use of ceded lands. Hawai`i Revised Statutes 171-18 requires the Board of Land and Natural Resources collect "fair-market" lease rent from third parties leasing public lands. For more than 30 years, the UH has allowed foreign governments and corporations to construct lucrative observatories on the summit of Mauna Kea at the cost of only \$1.00 per year. In other words, the taxpayers have been saddled with the burden of subsidizing foreign direct investment (foreign astronomy infrastructure and development) on public lands for over 30 years. This is not only illegal, but morally outrageous considering the current economic crisis facing the Nation and the State.

Moreover, the Legislature should not allow the BLNR to claim poverty as grounds for not adequately managing Mauna Kea lands, when that poverty is self-imposed. The BLNR would have sufficient funding to properly protect Mauna Kea and other conservation districts if it simply charged third parties sub-leasing public lands rent based the fair market value of the land.

4. The UH has violated the public trust and destroyed the natural and cultural resources of Mauna Kea

The UH cannot be granted any authority to manage the sacred and fragile summit of Mauna Kea because its purpose for being on the summit is not resource management, but rather resource exploitation. To be clear, the UH is the developer of Mauna Kea. Its presence on the summit has destroyed and desecrated the resources of Mauna Kea.

The desecration and destruction caused by UH's use of Mauna Kea is well document. Two reports by the State Auditor have found that UH's misuse and the BLNR's failed oversight is "inadequate to ensure the protection of natural resources, and neglected ...the cultural value of Mauna Kea." Their report further stated that the University's Institute for Astronomy "focused primarily on the development of Mauna Kea and tied the benefits gained to its research program," and that its focus on telescope construction has been "at the expense of neglecting the site's natural resources."

In 2005, an Environmental Impact Statement required by federal court order found that

the cumulative impact of telescope activities on Mauna Kea has had a "substantial, adverse, and significant" impact. According to the regulations protecting all conservation districts, permits cannot be issued for activities in conservation districts that have a substantial, adverse or significant impact on the natural and cultural resources of the area precisely because their protection is the purpose of the conservation district in the first place.

The State of Hawaii designated the entire summit of Mauna Kea to be a conservation district in order to protect its unique natural and cultural resources, not to facilitate telescope construction.

5. S.B. 502 creates a "fox guarding the hen house" situation on Mauna Kea

As we have repeatedly outlined over the last decade, UH is NOT the protector of Mauna Kea, it is the exploiter. In similar fashion, our concerns have been repeatedly confirmed by court rulings and official reports. Make no mistake, despite all of the rhetoric, today is no different than yesterday. The UH is advocating for the passage of S.B. 502 in order to streamline its ability to use and abuse the sacred summit of Mauna Kea. The Legislature will be complicit in this desecration and destruction if it passes this bill.

The UH has already outlined its plans for the summit under the management authority proposed in this bill. The UH plans to shutdown public access to the summit of Mauna Kea. The UH proposes to gate the only road to the summit and regulate who may enter and at what price. This road is a public road, paid for with taxpayer dollars. The summit itself has always been a public area. The UH has no right to create a gated community for astronomers on the public's sacred summit.

The UH also proposes regulate who may worship on the summit, when, where, and how. The UH plans to actively discriminate against people who wish to worship on the summit based on race. In an attempt to sidestep the constitutional rights of Native Hawaiian cultural practitioners, the UH proposal says people of Native Hawaiian ancestry will be "accommodated." Not only does this violate the Supreme Court rulings in both PASH and Kapa'akai, it also violates the fundamental rights of non-Hawaiian cultural practitioners. Understand that Native Hawaiians are not the only people who practice Hawaiian religion and engage in Hawaiian culture. Mauna Kea is a temple and access cannot be denied. Aloha knows no color.

The UH also proposes to remove decision-making from public oversight. The bill would authorize the UH Board of Regents to make decisions about Mauna Kea without any public notice, public hearing, or even gubernatorial oversight. What exactly is UH planning to do on the summit that it needs that much secrecy?

The one thing UH does not propose to do on the summit is limit the construction of future telescopes. The current plan UH is pressuring the BLNR to approve does not outline any standards for determining the carrying capacity of the summit, nor does it propose any kind of limit on the number of telescopes that can be built on the summit. Instead, it proposes to streamline the process for erecting new, larger, and more destructive structures on the summit. There are at least two massive telescopes already in line to further decimate Wekiu habitat, desecrate iwi kupuna, and possibly contaminate Hawaii Island's primary aquifer.

For these reasons, we strongly urge you to not pass S.B. 502.

In Aloha we remain,

Paul K. Neves, Ali`i `Aimoku, Royal Order of Kamehameha I,

Kealoha Pisciotta, Mauna Kea Anaina Hou

Debbie Ward and Nelson Ho, Sierra Club Hawai`i Chapter

Clarence Ku Ching