



640 N. A'ohoku Place, Room 203, Hilo, Hawai'i 96720

Telephone: (808) 933-0734 Fax: (808) 933-3208

Mailing Address: 200 W. Kawili Street, Hilo, Hawai'i 96720

Minutes Regular Meeting

Mauna Kea Management Board
Monday, March 7, 2005

Kūkahau'ula, Room 131
640 N. A'ohoku Place
Hilo, Hawai'i 96720

Attending

MKMB: Chair Rob Pacheco, 1st Vice Chair Barry Taniguchi, 2nd Vice Chair/Secretary Jim Kennedy, Arthur Hoke, Ron Terry, Harry Yada

Kahū Ku Mauna: Ed Stevens

OMKM: Stephanie Nagata and William Stormont

Others: Doug Arnott, Cory Harden, Ron Koehler, Mike Maberry, Don Pakele, Brenda Rew, Antony Schinckel, Charles Stanton, Deborah Ward, and Momi Wheeler

I. CALL TO ORDER

Chair Rob Pacheco called the Mauna Kea Management Board (MKMB) meeting to order on March 7, 2005 at 10:00 a.m.

II. APPROVAL OF MINUTES

It was moved by Arthur Hoke and seconded by Harry Yada that the minutes of the February 9, 2005 meeting of the MKMB be accepted. The motion was carried unanimously.

III. DIRECTOR'S REPORT

A. Legislative Update

S.B. No. 1474.

To recap, this bill was introduced by Senator Lorraine Inouye. The original bill directs the state auditor to conduct studies to evaluate UH approval and decision-making procedures and assure they address community concerns. It also calls for a study of the feasibility and necessity of creating a Mauna Kea Science Reserve authority.

This bill was heard on February 15 before the Committees on Water, Land and Agriculture and Higher Education. Testimony was presented by the Office of Mauna Kea Management (OMKM); University System; Kealoha Pisciotto on behalf of Mauna Kea Anaina Hou, Royal Order of Kamehameha I, and Clarence Ching; Deborah Ward for Sierra Club; and Cha Smith for Kahea.

The Office provided testimony relating to the inaccuracies in the bill. At the end of the testimony, Chair Kokubun tasked Senators Inouye's and Hee's staff with incorporating the amendments that were proposed in testimony. The committee passed the measure with amendments.

Director Stormont stated he confirmed with Mr. Bill Kikuchi of Senator Inouye's staff, the afternoon of the hearing, as well as the following day, that amendments suggested in the hearing would be incorporated. Mr. Kikuchi assured Director Stormont the amendments would be incorporated. If differences still existed, it was up to Director Stormont, Ms. Ward, and Ms. Pisciotto to sit down together to make sure they were in agreement with the language of the bill.

On February 17 the Office received a call from Senator Kokubun's office asking if OMKM had a chance to review the changes to the bill. Director Stormont stated he had not and asked that a copy be faxed to the office. Director Stormont's review noted that none of the suggested amendments proposed by the Office and only one of the two changes proposed by others were incorporated into the bill. With assistance from Senator Kokubun's staff the proposed amendments were worked into the bill. The amended bill was passed out of joint committees and moved on to Ways and Means (WAM).

It was heard by WAM on March 1 and passed with no amendments. There was no testimony taken at that time. S.B. 1474 will be heard by the full Senate later this week. If it passes out of the Senate, it will then cross over to the House.

S.B. No. 904.

This bill requests authorizing the University to promulgate administrative rules and regulations regarding public activities on the mountain.

The bill was heard on February 15. Peter Young, Chairperson for the Department of Land and Natural Resources (DLNR) testified that the University should have the authority to promulgate administrative rules specific to Mauna Kea. Deputy Attorney General Sonia Faust was also present stating that from a legal standpoint, this is probably the best course of action to take.

At the hearing on February 8, Senator Norman Sakamoto asked that the bill contain language specific to Mauna Kea. OMKM's testimony on February 15 included specific examples of why it was necessary to have administrative rules governing what the public can and cannot do on Mauna Kea as well as on other lands leased by the University.

Also at the February 15 hearing Senator Lorraine Inouye raised questions regarding language with respect to fines and fees that may be collected in the event there is a contested case. There was some confusion regarding types of fees and under what circumstances they could be collected. During the discussion it became apparent that in the event there was a contested case, attorney fees could be collected. Senator Inouye asked that language that could result in the collection of attorney fees be removed. The committee members agreed. Language regarding fines in general was left in. However, when Senate Draft 1 was released language relating to fines was removed and it did not contain language specific to Mauna Kea as requested by Senator Sakamoto. Director Stormont stated what was heard and agreed to at the committee hearing, and what actually came out of committee were two different things. Senate Draft 1 will be heard by the full Senate.

Discussion

Chair Pacheco asked if language pertained only to contested cases or were they fines for violations. Director Stormont clarified it was fines for violations.

Barry Taniguchi asked which committees heard the bill. Director Stormont replied it was first heard by Higher Education followed by Judiciary. It came out of Senator Clayton Hee's Higher Education committee without the fine language. The Office's testimony before the Judiciary committee requested the fine language be reinserted, but it passed unamended out of Judiciary.

Chair Pacheco asked if the fine language was removed just to keep the bill moving forward. Director Stormont replied that was his impression. Chair Pacheco stated there seems to be a lot of confusion about this bill. Based on some of the testimony given, maybe he doesn't understand the intent of the bill.

Director Stormont responded that for those who have been involved in the development of this bill, the content is pretty straightforward, but to others it may not be. The bill asks that the University be given the authority to manage real property that it owns, leases, or otherwise under its control and to control public activity thereon. The language in the bill states there is a need to govern the types of public activities that can or cannot take place.

Ron Terry asked if this bill relates to SB 1474. Opponents are saying that the University should not manage the mountain but it is the responsibility of DLNR. If you accept that premise, then it may not be appropriate for the University to create administrative rules to help manage the mountain because it should not be managing the mountain in the first place. Dr. Terry stated he tried to read all the testimony, and that is what he understood to be the basis for opposing arguments.

Director Stormont replied yes. The University is complying with the Auditor's 1998 report and the Master Plan both of which state the University needed to develop rules that govern what the public can and cannot do. OMKM's testimony included explanations regarding the current situation with respect to conservation district regulations and how those regulations are limited.

OMKM's testimony also included background information explaining how the status of the Science Reserve changed when it was pulled out of the Forest Reserve System at the time it was leased to the University. Forest Reserve regulations do not apply because of the modifications to the Conservation District regulations. Those changes no longer cover activities only uses. An explanation was given about the difference between use vs. activity.

Confusion resulted when testimony was given opposing S.B. 904 Senate Draft 1. Those testimonies mention the bill was an end-run around pending litigation and is meant to fast track construction of at least five more telescopes. S.B. 904 has nothing to do with development issues, it simply provides the University the authority to put administrative rules in place that would govern what can and cannot be done, for example, camping and riding a bicycle in an inappropriate area. The bill would allow the University to develop comprehensive cultural and natural resource protection and public safety measures. Development issues do not enter into the picture at all. Those are still governed by conservation district regulations. The Office will continue to try to ensure clarity among the lawmakers as to what our intention is and why we need rules.

Mr. Taniguchi asked, if UH is not given authority to promulgate administrative rules, does the present situation continue? If DLNR is not able to provide enforcement, can anyone do whatever they want to do on the mountain? Director Stormont replied it would be status quo. Mr. Taniguchi added there is no administrative mechanism now other than DLNR which may not be able to do it anyway. So, those who are saying that we should not have these rules are pretty much saying we should have the status quo. Director Stormont replied that was correct. Chair Pacheco asked what would DLNR be losing by this bill. Director Stormont's response was nothing and that DLNR stated so in its testimony.

Harry Yada stated there is a question regarding whether DLNR can develop rules. DLNR does not have the authority because it is under lease to UH. Mr. Taniguchi replied that is what he meant, status quo, so the University cannot do anything but yet those saying we should do something are testifying against giving us the authority to administrate.

Dr. Terry replied he believes those opposing the University are looking for a more radical solution and they consider this to be a "band aid" approach. They think that it is necessary to get to the root of the problem, a process which should not lead through the University. Mr. Taniguchi commented it appears they do not want the University to take steps to try to resolve management issues now but wait three, four or five years when things might change.

Chair Pacheco pointed out that Debbie Ward had presented testimony. Ms. Ward was present at many of our meetings when we discussed problems with rules and enforcement on the mountain. He said her testimony on this bill is very confusing. Chair Pacheco asked Ms. Ward how she sees this bill as an end-run. How do you mix rule making with the development issues on the mountain?

Ms. Ward replied there is an entirely different legal point of view regarding the University's request to make rules. That point of view is that DLNR cannot give up its authority to make rules. The University should go to DLNR if it wants to promulgate rules for its use of Conservation District use lands. By abrogating its responsibilities, DLNR is in error because it is giving up its Ka pa'akai and PASH rights that are endowed to it by a Supreme Court ruling. Their understanding is that UH has chosen not to submit its master plan for ratification before the Land Board. As a result, it does not actually have the authority to promulgate these rules or carry it out on its own. This is why S.B. 904 is being submitted.

This contrasting point of view is that the University should be approaching DLNR with a management plan that would manage the mountain after the year 2000. Following approval by the Land Board, the University should then request or propose rules that the Board would approve. Asking the Legislature to grant the University authority takes away a constitutionally derived right. This is what she refers to as an end-run around DLNR. Ms. Ward stated the current administration at DLNR may not realize or fully understand the laws governing that department.

Mr. Stevens stated that the issue of not having the Master Plan approved by DLNR keeps coming up. If it is an issue we should address maybe we should take care of it. Mr. Taniguchi suggested sending a written request to legal counsel to look into this issue.

Chair Pacheco believes the conflict over who should manage the mountain is centered on philosophical differences. The mountain is leased by DLNR to the University and there are people who are not in favor of this arrangement. One of the problems is the way the laws governing conservation districts under leasehold changed. Currently the University has the lease and this Office is directed to manage the mountain, but there does not appear to be a legal means to develop rules because of the way the laws changed. DLNR has limited jurisdiction over public activities on the mountain because of the lease situation. That is why this bill was introduced. It is not about the University trying to grab power; it is trying to do its job of managing the mountain. This is why the Board exists. Chair Pacheco added he would have thought that those who testified against this bill would be in favor of it because it would have given the Board and Office clear authority to manage the mountain. This bill is not about construction development issues but rather it is about how to manage the natural resources for public use and commercial activities. Chair Pacheco stated he was disappointed in how this was turning out and believed people were using this bill for political purposes. Mr. Taniguchi agreed with Chair Pacheco's comments.

Dr. Terry thanked Ms. Ward for clarifying her organization's position. He also asked her one question about Ka pa'akai and PASH rights. Because of the lease to the University and what you consider DLNR's improper abrogation of its rights, do you believe those obligations are extinguished or do you think the University has taken on the Ka pa'akai and PASH responsibilities?

Ms. Ward replied it is somewhat questionable. She thought it is one of the reasons there needs to be clarification about who is in charge of making the rules. The law clearly states that DLNR is in charge of making the rules. Ms. Ward added she understands what Chair Pacheco is saying, and the fact is that when administrative rules changed in 1994 it complicated matters. She still thinks that it is DLNR's problem. DLNR needs to amend its rules to deal with rather than abrogate its responsibilities to another or possibly multiple entities. If the University is given the authority then everybody who has a lease on conservation land can do the same thing. It is still DLNR's responsibility to amend its rules such that it can help a lessee manage in a way that is functional. Ms. Ward stated she is very sympathetic with Director Stormont's situation. It seems that with this particular situation, it is conservation district use land and there was tremendous effort in the early '80s to make sure that public recreational rights were respected and the public was given full access. Yet now it seems the public is seen as the violator while astronomers, who are doing essentially the same thing, going up the mountain during periods of high snow, are within their rights. Anybody who is not an astronomer is not within their rights.

Mr. Yada stated he empathized with the contrasting views, but felt this matter could not be resolved during this meeting. Chair Pacheco stated he just wanted clarification on the testimony.

Director Stormont concluded by stating both bills will cross over to the House sometime this week. Hearings in the House will be scheduled next week. The Office is tracking both bills.

B. Update on the Transfer of Mauna Kea Support Services (MKSS)

A draft of a plan to transfer MKSS from the Institute for Astronomy (IfA) to OMKM is currently undergoing internal review. The initiative to transfer has received strong support from the University System.

C. Update on the Visitor Information Station (VIS) Renovations

It was reported at the December 16, 2004 Board meeting that the Mauna Kea Observatories Outreach Committee was developing a short-term renovation plan for the VIS. Director Stormont reported the plan is being finalized. Project costs are running higher than the \$75,000 estimate. The committee will be asking observatory directors for additional funds.

There will be no change to the footprint of the building. Most of the modifications will be internal, including relocating the First Light Book Store away and separate from the exhibit area, and placing a model of the summit in the middle of the station. The plan also includes storing the telescopes in a secured location outside the building. The renovation will be done in two stages one in the Spring, and the other in the Fall of 2005.

Mr. Stevens asked if an auditorium was included in the plan and if there would be improvements made to the parking lot. Director Stormont replied no, but the long-term plan includes the addition of a separate room that

would be used for audio-visual presentations. The immediate renovation will separate the theater area from the book store.

D. Smithsonian Submillimeter Array's (SMA) Minor Alterations to its Generator Building

Director Stormont reported that SMA requested clarification on the process for handling a request to make minor modifications to a building that is attached to its hanger facility. This building was designed to house a backup generator. The requested changes include enlarging the opening for an existing louvered vent, adding an additional louvered vent to the east wall, and installing a ventilation pipe (this pipe was included in the construction plans that was approved by DLNR when it issued a CDUP for the project). OMKM views these changes as very minor and does not believe it requires Board action. DLNR was asked to review the proposed modifications and stated the proposal did not require any action on its part. The Office asked if this required a formal proposal and approval by the Board. If Board action is not required, is the Office authorized to notify SMA to proceed?

Discussion

Mr. Taniguchi stated he reviewed the material and felt the project is insignificant. He felt the Board should establish criteria which the Office could use to determine whether a project required Board action. If a proposal met the criteria OMKM should be authorized to grant the approval. Mr. Stevens concurred, adding this project is so insignificant OMKM should be allowed to use its own discretion. Dr. Terry also agreed because bringing these types of project to the Board is time consuming and the Office has limited staff resources.

Chair Pacheco asked if DLNR included criteria in the lease agreements. Director Stormont replied there are some general guidelines. Arthur Hoke questioned if this is a situation where an observatory thinks it should inquire because it is not sure if this activity falls within its lease agreement. Mr. Taniguchi felt observatories should always inquire. The issue here is whether an activity triggers the need to submit a formal proposal requiring Board action, or whether OMKM can review a project, and if insignificant, give its approval. A formal proposal to the Board is an involved process. Mr. Hoke agreed that OMKM should be given the authority to make decisions, but he was not willing to give observatories the right to decide if they should or should not come to the Office and Board.

Dr. Kennedy stated that historically the Board has been asked to give advice. It is clear from the sub-leases that if observatories are contemplating any changes to the exterior of its facilities they are required to get a ruling from OMKM as to whether or not they need approval. His concern is that historically this Board has looked at every case. If the Board is going to alter that procedure and establish a threshold, then it should be done formally as an action. Dr. Kennedy also pointed out the actual authority rests not with the Board, but with the Office.

Chair Pacheco asked how this project differs from other requests the Board ruled insignificant. Director Stormont explained that some of the other projects were actual physical additions to the exterior of a building. This is an existing facility with changes to only the placement and size of the vents. The SMA came to the Office asking how to proceed with this project. The Master Plan did not provide adequate guidelines for handling these very small, minor modifications to existing facilities.

Dr. Terry stated one possible solution is to have every project come to the attention of the Board in some manner. There could be the presumption by OMKM stating it is an insignificant project. If a board member disagrees, then at the next meeting there would be an opportunity for him/her to bring it up. Mr. Stevens agreed there is a need to keep information flowing to keep abreast with what is happening. It would be better to have the Office scrutinize the proposal, make a determination then present it to the Board.

Chair Pacheco stated because of the Sunshine Law, the Board must follow rules on when and how it takes action. He recommended the Office report back to the Board with a recommendation. Mr. Yada stated a process has been established by which we approve a project insignificant. He felt the issue here is what constitutes a project and the criteria should focus on how to make that determination. Mr. Yada added he would not classify this request as a "project".

Director Stormont concluded that the Office will look into establishing criteria. The Office will also develop a list of standard conditions that would be imposed in these types of projects. For this request, SMA will be allowed to go ahead with the activities proposed.

E. Design Review Process

Mr. Taniguchi asked what was happening with the Design Review Process (DRP) and if the Board was supposed to be given minutes to review.

Director Stormont stated there has been no movement on that since the last meeting, with respect to the Outrigger project. As reported at the last two meetings, the third phase in the DRP did take place. The minutes have not yet been distributed to members of the Design Review Committee (DRC) for their review. Director Stormont explained he has not had a chance to do it since he has been working on other issues. After the DRC reviews the minutes Kahu Kū Mauna Council will have a chance to review it before bringing it to the Board. Feedback from the Council can be presented at the same time the Board is asked to review the minutes.

IV. COMMITTEE REPORTS

A. Kahu Kū Mauna

No report.

B. Committee Reports

Environment

The Environment Committee met on February 15. Dr. Terry reported that the discussion focused on the role of the committee and history on what has happened to date. Many of the invited members were able to make the meeting. The next meeting will be scheduled during the week of April 11.

Hawaiian Culture

Director Stormont reported a meeting to continue with the process of interviewing practitioners was scheduled for March 5. The meeting was postponed because several committee members could not attend. A new date has not been set.

V. OLD BUSINESS

A. IfA's Request to Install a Seeing Tower at the 13 North Site

Director Stormont gave a recap of this project. OMKM reviewed the proposal based on guidelines in the Master plan for reviewing Minor projects. OMKM recommends the Board approve the project with conditions and pending approval of a Departmental Permit from DLNR.

Action

It was moved by Arthur Hoke and seconded by Barry Taniguchi to adopt OMKM's recommendation to approve the project with conditions and pending approval of a Departmental Permit from DLNR.

Discussions

Mr. Stevens stated that at the last meeting he had several concerns. Since then Associate Director Nagata, as well as Dr. Bob McLaren provided the information he asked for. Mr. Stevens has no further concerns and Kahu Kū Mauna has no objections to this proposal.

Ms. Cory Harden, a member of the Sierra Club speaking as an individual, stated she understands the IfA applied for a conservation district use permit (CDUP) without first going to this Board. This project should have come to this Board and there should have been an environmental review before applying for a CDUP. She also understood that the IfA went for a very broad permit so if the initial tests are positive, they can actually go ahead and start work on the telescope. With the recent environmental impact statement completed by the National Aeronautics and Space Administration (NASA), the cumulative impact of past, present, and future activities in the various areas have been called substantial at worst and significant. Even if the telescopes were taken down, the mountain cannot be fully restored.

Ms. Harden urged Board members that if the IfA is supposed to go to this Board before going to DLNR then that should have taken place. "If there is supposed to be an environmental review that is open to the public"[sic]. There have been decades of mismanagement and public support for protection of the mountain is growing. Ms. Harden urged Board members to do everything possible and fulfill their responsibilities to protect Mauna Kea.

Dr. Kennedy replied the Board of Land and Natural Resources' process is a totally separate and different track with different rules and regulations. He also did not believe there is any requirement that the action come through this Office or Board before going to DLNR. Mr. Taniguchi added the DLNR and University processes can occur on parallel tracks, with each entity having approval authority for the project. For example, if DLNR granted IfA a CDUP and the Board said no, the developer cannot proceed with the project. Director Stormont stated this particular project does not require a CDUP, instead it requires a Departmental Permit.

Ms. Harden asked if IfA needed approval from this Board before it can proceed with construction. Board members replied yes. Further, the IfA is only allowed to carry out construction activities that are specified in its proposal.

Dr. Kennedy mentioned the Outrigger Project process as an example. Mr. Taniguchi added that was why he asked about the status of the Design Review Process [for the Outrigger project]. As far as this Board is concerned, the Outrigger project is not a “slam dunk”. It still needs to go through the University’s review process.

Ms. Harden asked if DLNR and the Board’s processes were separate and if there is a time table that describes which should happen first. Chair Pacheco explained in some cases an applicant comes to the Board before it obtains its DLNR permit. The Board may rule on the project and impose the condition that the applicant must have the proper permit(s) from DLNR before it can proceed with the project. The DLNR and University procedures are completely separate processes. Chair Pacheco further explained this Board is an internal University entity and it exists to provide public input and oversight concerning the mountain.

Mr. Yada suggested clarifying the action by including in the full motion that the Board’s action was not intended to approve, condone or support the Next Generation Telescope. Dr. Terry clarified that the Board’s action certainly does not enable the telescope to be built, but rather it only allows IfA to install a seeing monitor so they can test the seeing conditions in the area.

Action

Both Arthur Hoke and Barry Taniguchi agreed with Harry Yada’s suggestion. The motion now reads: it was moved by Arthur Hoke and seconded by Barry Taniguchi to adopt OMKM’s recommendation to approve the project with conditions and pending approval of a Departmental Permit from DLNR. Further, the Board’s action to approve the seeing tower does not indicate nor imply that MKMB gives its approval for the development of the thirty meter telescope. The motion was carried unanimously.

B. Installation of Septic Tanks at Hale Pohaku

At the last meeting this project was classified a minor project and the Office was tasked with reviewing the project and submitting its findings and recommendations to the Board. Based on a review of the project’s scope and activities, OMKM recommends the Board approve the project as described with conditions.

Action

It was moved by Jim Kennedy and seconded by Barry Taniguchi to adopt OMKM’s recommendation to approve the project with conditions.

Discussion

Dr. Terry asked if the project no longer required the importation of backfill. Director Stormont replied that was correct. Chair Pacheco added that if it is necessary, one of the mitigation measures is that the backfill will be inspected before it is brought up to the mountain..

Ms. Ward encouraged Director Stormont to check with the Historic Preservation Division to make sure there are no archeological sites in the area that might be affected. Associate Director Nagata replied that DLNR issued a Site Plan Approval which included a condition that an archeologist be on site during excavation. IfA is working to secure an archeologist. Chair Pacheco added that Kahu Kū Mauna will also be notified when excavation work takes place.

Action

The motion was carried unanimously.

VI. ANNOUNCEMENTS

Ms. Ward introduced Mr. Charles Stanton, chair of the Mokuloa Group of the Sierra Club Hawaii Chapter.

VII. NEXT MEETING

The next scheduled meeting is Wednesday, April 6, 2005 at 10:00 a.m.

VIII. ADJOURNMENT

There being no further business, Chair Pacheco adjourned the regular meeting at 11:10 a.m.

Respectfully submitted:

Signed by James Kennedy _____
Dr. James Kennedy, Secretary, MKMB

April 6, 2005
Date