CLARENCE KUKAUAKAHI CHING, PRO SE
64-823 Mamalahoa Highway
Kamuela, HI 96743
kahiwaL@cs.com

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI'I

A Contested Case Hearing Re:
Conservation District Use Application HA-3568 for the Thirty Meter Telescope on the Northern Plateau in the Mauna Kea Conservation District, Ka'ohe, Hamakua District, Island of Hawai'i
TMK (3) 4-4-015:009

DLNR File No. HA-CC 16-002
(CDUA HA-3568)

CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017, COS

CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017.

COMES NOW CLARENCE KUKAUAKAHI CHING, Pro Se, and files CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017.

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DISCLAIMERS, OBJECTIONS, RESERVATIONS, JOINDERS, AND INCORPORATIONS

These Disclaimers, objections, reservations, joiners, and incorporations are filed on behalf of Pro Se Petitioner CLARENCE KUKAUAKAHI CHING as a part of his RESPONSE to the Findings of Fact, Conclusions of Law, and Proposed Decision and Order (FOF/COL, D & O) of Applicant UH-Hilo and its co-filer, TMT International Observatory LLC (TIO) and the HEARING OFFICER'S PROPOSED FOF/COL AND DECISION AND ORDER of JULY 26, 2017. I take EXCEPTION to all issues addressed or contained in Hearing Officers PROPOSED FOF COL D & O that conflict with my obvious, oppositional positions.

I incorporate by reference CLARENCE KUKAUAKAHI CHING'S complete set of FOF COL, D & O and all oppositional (anti-TMT) party and witness exhibits and written and oral testimonies of Contested Case Hearing-2 (2016/2017) and Contested Case Hearing-1 (2011-2013) and other records, documents, exhibits, etc., into my position.

Any statements construed as a Finding of Fact (FOF) that is more appropriately deemed a Conclusion of Law (COL) should be treated as a COL. Conversely any COL that is more appropriately deemed a FOF, should be treated as a FOF.

I have used the terms Native Hawaiian with a capital "N' and the small "n" interchangeably. We assert our rights as Native Hawaiians, native Hawaiians and Kanaka Maoli under county, state, federal and international laws (including Human Rights and Civil Rights under the United Nations (UN) and the UN Declaration on the Rights of Indigenous Peoples and customary international legal standards relating to the human and civil rights of all peoples.

I reassert my positions regarding the relevant issues as they are laid out in my original Petitions and I reassert my written and oral objections contained in the entire hearing etc., including my Motions and Joinders.

I incorporate by reference the entire Na Leo video recordings of the five months of evidentiary hearings. See naleo.tv and search the subject "TMT Contested Case Hearing." I reserve the right to select Na Leo's video recordings as the standard position in case of conflicts with the transcripted record. The transcripted record, on cursory examination, reveals myriad errors of elementary nature. It is a shame that such costly transcripts are so mistake laden!

I also incorporate by reference all of the oppositional (anti-TMT) Pro Se Parties' FOF COL, D & O and again reassert our common position that we were "rushed" through this process, which, in turn, provided advantages and bias to the pro-TMT folks who were able to operate satisfactorily because of their heavy-duty resources. While it is evident that we were unreasonably "rushed," the solidarity of our common positions, I'm sure, will assist our survival through this biased process, and given enough time to review, answer, defend, record, and/or to adequately address any of our positions regarding the facts, legal conclusions and other relevant information contained throughout the entire preceding.

I take exception to the fact that the HO did not provide the Parties with a reasonable opportunity to be heard

in a meaningful time and in a meaningful manner, thus violating our due process rights. For Example: the HO did not apply the applicable rules under HRS Section 91, which affirms that the HO can change provisions of a contested case hearing provided that all Parties are consulted and consent. The HO should have, and did not, sought agreement with all Parties regarding scheduling the contested case hearing dates. This oversight cost me and some of my cohorts the services of a topnotch attorney—and forced us into pro se status. While it is true that we agreed that we could handle the vagaries of pro se responsibilities, did we really have a choice (when many of us live at hermit standards?)

The HO did not work with Petitioners and their Legal Council so that all Parties could reasonably participate in this contested case hearing. Our lawyer (Mr, Naiwi Wurderman) was not able to continue to represent us in this CCH because of the HO's inflexible attitude towards scheduling. Mr. Wurdeman had other clients and court commitments and even though he tried to be flexible and had given the HO ample notice regarding his scheduling conflict dates, the HO played hard-nosed with Mr. Wurdeman. She did not work with the Parties to ensure they could participate given their work and or travel schedules either. Many were faced with the prospect of choosing to work or be at the hearing to defend their rights, and this CCH went on for months and presented great challenges to all of the Pro Se Parties who were forced into the non-disclosed TMT construction time table. Many pro se parties had to basically give up their rights to be heard in a meaningful time and in a meaningful manner. This situation was totally unacceptable, unreasonable, and biased.

I join with the Temple of Lono (TOL) represented by Lanny Sinkin, K.A.H.E.A. represented by Attorneys Yuklin Aluli and Dexter Kaiama, MEHANA KIHOI, J. DEBORAH WARD, PAUL NEVES, the CASE-FLORES OHANA, CINDY FREITAS, J. LEINA'ALA SLEIGHTHOLM, WILLIAM FREITAS, KEALOHA PISCIOTTA AND MAUNA KEA ANAINA HOU and TIFFNIE KAKALIA, and all of their documents, exhibits, witness' oral and written testimonies, including any supplements, and FOF COL, D & O, and the multitude of filings, of MO's by the H.O and BLNR, including ones that were obviously made long after the fact and thus rendered moot. Some of the dispositive Motions could have changed the outcome of this proceeding and so by failing to rule on the them in a timely manner, means that our due process rights again have been violated. Further, by ruling on them now means the record of this case is not in fact completed as is defined by the law. This also admits biases, and borders on contempt for the Pro Se Petitioners, to inundate them with Minute Order after Minute Oder with only 5 days to file Motions for Reconsideration, while simultaneously holding us to deadlines for filing our Responses and previously, our collective FOF COL, D & O.

This Party considered the testimonies of all witnesses at the evidentiary hearings, all exhibits received in particular, and if there is no mention of any particular issue, subject, etc., it is not an indication that a waiver is intended. No waiver is intended. And all rights are reserved whether addressed in my responses or not. The mere volume of material is excessive - and the time set to read, analyze and/or respond to them is beyond my sole ability.

The mere fact that a particular witness' testimony or exhibit may not be specifically referred to at any time does not and shall not be construed to mean that said testimony or exhibit was not considered.

DISCUSSION

This Contested Case Hearing (Contested Case Hearing-2) is based on Conservation District Use Application HA-3568 (CDUA) filed on September 2, 2009, for the Thirty Meter Telescope Project (TMT) to be located on Area E, the northern plateau, the Mauna Kea Science Reserve, on Mauna Kea, Ka'ohe mauka [sic], Hamakua, Hawai'i, TMK (3) 4-4-015:00, by the University of Hawaii at Hilo, an entity of University of Hawaii (hereinafter referred to as "The University" or "Applicant"), pursuant to chapter 183C of the Hawaii Revised Statutes (hereinafter "HRS") and chapter 13-5 of the Hawaii Administrative Rules (hereinafter "HAR"). The total area of the parcel is 11,288 acres and the area of the proposed use is 8.7 acres.

Contested Case Hearing-2 was required to take place after Contested Case Hearing-1 took place a number of years ago.

On February 25, 2011, the board granted the permit with conditions, one of which was that a contested case be conducted, before granting the requested contested case hearing.

That Hearing took place after BLNR had approved the CDUA and issued a Conservation District Use Permit (CDUP) for the construction of the TMT.

Upon appeal to the Hawai'i Supreme Court, the Court found that BLNR had "placed the cart before the horse" by issuing the CDUP before it granted the request for a contested case hearing despite also staying construction of the TMT until after completion of the contested case hearing. Ex. A059

The Court concluded that:

> For the foregoing reasons, this court vacates the circuit court's May 5, 2014 Decision and Order Affirming Board of Land and Natural Resources, State of Hawaii's Findings of Fact, Conclusions of Law and Decision and Order Granting Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve Dated April 12, 2013, and final judgment thereon. This matter is remanded to the circuit court to further remand to BLNR for proceedings consistent with this opinion, so that a contested case hearing can be conducted before the Board or a new hearing officer, or for other proceedings consistent with this opinion. Mauna Kea Anaina Hou v BLNR, SCAP-14-0000873, December 2, 2015, at 58.
>
> Pursuant to the opinion of the Supreme Court filed on December 2, 2015 in Mauna Kea Anaina Hou et al vs. Board of Land and Natural Resources et al 136 Hawaii 376 (2015) and the Judgment on Appeal filed by the Supreme Court on December 29, 2015 and Order of Remand filed by the Third Circuit Court on February 22, 2016, Contested Case Hearing-2 began in 2016 and continues to the present.
>
> Retired 3rd Circuit Judge Riki May Amano was appointed as the Hearing Officer (HO). It began with a meeting held in Honolulu following a defective notice.

The HO Violated the Rules of HAR §13-1-29 By Adding New Parties to the Supreme Court Remanded Contested Case Hearing-2

After Contested Case Hearing-1 was completed, and an appeal to the Hawai'i Supreme Court was completed, the Court remanded the matter back to BLNR to conduct a new "contested case hearing before the Board or a new hearing officer, or for other proceedings." Ibid at 58.

The Parties of Contested Case Hearing-1 had complied with all rule requirements necessary to petition for, to qualify for, and to participate in Contested Case Hearing-1. The applicable rules as stated in HAR §13-1-28 , is as follows:

1) The board shall hold a contested case hearing upon its own motion or on a written petition of a governmental agency or any interested person.

2) The contested case hearing shall be held after any public hearing (on the same subject matter).

3) Any procedure in a contested case hearing may be modified or waived by stipulation of the parties.

HAR §13-1-28 Contested case hearings.

(a) When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person.
(b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter.
(c) Any procedure in a contested case may be modified or waived by stipulation of the parties.
[Eff 9/7/82; am and comp 2/27/09] (Auth: HRS §§91-2, 91-9, 171-6) (Imp: HRS §91-9)

To be more specific, HAR §13-1-29 describes the process further:

1) Unless the board holds a contested case hearing on its own motion, others must request a contested case hearing and petition the board to hold a contested case hearing.
2) An oral or written request for a contested case hearing must be made at the board meeting or hearing in which the subject matter is addressed.
3) Additionally, a written petition must be filed with the board within 10 days.
4) The 10-day requirement for request and written petition may be waived.

HAR §13-1-29 Request for hearing

(a) On its own motion, the board may hold a contested case hearing. Others must both request a contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.

The HO, in this Contested Case Hearing-2, added a number of parties, in addition to the initial parties of Contested Case Hearing-1 that were participants in the Supreme Court appeal, to participate in Contested Case Hearing-2 The accusation here, is that the HO didn't comply with the requirements of HAR §13-1-29 to do what she did.

One of the requirements is that "an oral or written request for a contested case hearing must be made at the board meeting or hearing in which the subject matter is addressed." This requirement was NOT met. While it may be argued that the 10-day rule may be waived for allowing later parties to enter the process, the rule does NOT waive the requirement that an oral or written request at the meeting is required to be made.

The HO violated HAR §13-1-29 when she added "new" parties that failed to meet the statutory requirements to participate in Contested Case Hearing-2.

The HO's Notice of First Pre-Hearing Conference was Defective

FOF 40 (modified)
The issuance of Minute Order 5, Document 016, filed on May 9, 2017, that set a pre-hearing conference on May16, 2016, violated the 15-day rule. The 7 day period from the time of filing to the date of the pre-hearing conference is a gross violation of the necessary 15 days required.

That the location of the pre-hearing conference set in Honolulu, O'ahu, not on the Island of Hawai'i, meant that most of the Petitioners would not and could not, due to financial restraints (especially Mr. Ching, who had been determined to have "pauper" status, who wanted to be present and couldn't afford it) be present (although he, Mr. Ching, was represented by counsel). This was reversible error.
Minute Order 5 Doc 738, filed June 13, 2017 at 5.

From the beginning of Contested Case Hearing-2 to the present, the Parties have suffered from a myriad of irregularities stemming from actions of the HO, most of them based upon violations of the statutory rules applicable to validly carry out a legitimate contested case hearing. Although the lack of compliance to the statutory rules were at times neutralized by complying with them anyway, other situations could not be remedied because the time to act had passed.

The HO Violated HAR §13-1-32.4 Records on File with Board

One of the rules that the HO put into place was that no evidence, document, testimony, etc., of Contested Case Hearing-1 would be allowed in the Record of Contested Case Hearing-2. This Party believes that the HO's adoption of this rule violated §13-1-32.4 that all records (including prior contested cases) directly relating to the CDUA **shall be** part of the Record of the contested case hearing. (Emphasis added)

HAR §13-1-32.4 Records on file with board
Records directly relating to the application that are on file with the board, including, but not limited to the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such record. [Eff and comp 2/27/09] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-9, 171-6)

Despite this rule, that all records directly relating to the CDUA shall be part of the record, that this party believes the HO has violated, the HO claims that she did consider them, which she did not. This is a blatant misrepresentation. See the HO's statement:

"The following Findings of Fact (FOF), Conclusions of Law (COL), and Decision and Order are based on the records maintained by the Department of Land and Natural Resources (DLNR) in CDUA HA-3568 and the witness testimonies and exhibits presented during the evidentiary hearing for this contested case. The hearing was held from October 20, 2016 through March 2, 2017. Exhibits were received into evidence after the hearing." Doc 783, July 26, 2017 at 7.

The HO Committed Another Error in Denying Admission Into Evidence that Met the Requirements for Admission

FOF 107
The description of the relevant procedure for the cutoff of exhibit submissions and moving them into evidence is somewhat, but not totally, correct. A significant portion of the procedure is the cutoff date for exhibit submissions, that Applicant and TMT International Observatory LLC have wrong.

The following discussion also illustrates another example of Hearing Officer's putting rules in place, then changing them at will, without consultation with the parties and getting their consent, to have those rules modified.

On March 2, 2017, the Hearing Officer stated the relevant procedure: "So if you have things coming up today or yesterday or last week and didn't have time to move it into the document library so that it could be uploaded, do that **before March 9th**. Because then on March 9th, you're going to move everything that is in the document library for you into evidence." (Emphasis added) Tr. 3/2/2017, Vol. 44, at 288, lines 4-11

Flora of Mauna Kea—http://www.malamamaunakea.org/environment/flora was included and discussed in Clarence Kukauakahi Ching's WDT Supplement filed on January 5, 2017. Ex. B.19d, at 8. (actual pages were not numbered).

In his WDT Supplement filed on January 5, 2017, Mr. Ching identified and stated: "However, going to Office of Mauna Kea Management's website (http://www.malamamaunakea.org/environment/flora) at the bottom of the page, the following is found: "A survey of lichens on the summit of Maunakea identified 21 species (plus five possible other species). Around half of the lichen species found on Maunakea are **endemic** (found only in Hawai'i), two of which (Pseudephebe pubescens and Umbilicaria pacifica) are limited to Maunakea alone. The remaining species are indigenous to the Hawaiian Islands." (Emphasis added) Ex.B.19d, p at 7-8

Ex. B.19i Flora of Mauna Kea (http://www.malamamaunakea.org/environment/flora) was filed on March 8, 2017, before the deadline of March 9, 2017. Ex. B.19i

In Document 649, Minute Order 44, despite total compliance with the Hearing Officer's "rule," and upon the mistakenly-based objections of the Applicant and TMT International Observatory LLC, the Hearing Officer "Denied in consideration of TIO and U.H.H. objecting" and further stating : "Untimely. Mr. Ching did not identify or produce Exhibit B.19i until March 8, 2017, after the close of testimony portion of the CCH on March 2, 2017." But Mr. Ching did **identify** the item and cited it in his WDT Supplement—and **timely filed** it. (emphasis added) Minute Order 44, Document 649, at 36.
Ex B.19i, March 3, 2017, at 8. (pages are not numbered)

Despite Mr. Ching's full compliance with "the rule," the non-admission into evidence of Ex. B.19i was either Hearing Officer's irreversible error or, in the alternative, the result of another irregular rule change (without consultation and consent) as incorrectly encouraged by Applicant University of Hawai'i Hilo and Intervenor TMT International Observatory LLC in their uninformed and irregular objections.
Doc 738,June 13, 2017, at 6.

The HO Made It a Habit to Violate HRS §91-9

Another important rule that was continually disregarded by the HO, is HAR §91-9. This rule allows any changes in procedure (rules) to be modified or waived—by stipulation (consultation) and consent of the parties. Multiple rules and procedures were modified, regardless of wholesale objections of the Parties by the HO, without consultation and consent of the parties.

For example, the HO accused Party HENRY FERGERSTROM of not complying with her instruction to check and account for the documents during a lunch break. Whether Mr. Fergerstrom did or did not comply is immaterial. However, the HO, without consulting or getting consent of the parties, made a new rule that all parties, during the course of the hearing, would have to sign in and out of the hearing. This unilateral mandate was reacted to by numerous objections from the parties. Mr. Ching objected on the record and stated that he refused to abide by the HO's new rule and would not be signing in or out.

HRS §91-9 Contested cases; notice; hearing; records. ... in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.
* * *

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.
HRS §91-9

The HO, plain and simply, violated HRS §91-9.

In Violating HRS §91-9, the HO Also Violated HAR §13-1-28

In attempting to manage Contested Case Hearing-2, the HO used what she must have perceived to have been her powers, excessively. In actuality, she did not have the power that she assumed were hers to broker. In forcing her perceived authority on the Parties, she was actually violating HAR §13-1-28 and the parties' due process. The rule states that "any procedure in a contested case may be modified or waived by stipulation of the parties." It is the parties who have the power and authority to stipulate to modify any procedure—not the HO. It seems ridiculous that even with deputy attorneys general at her legal beck and call, the HO was led into this trap of inperceptions. The excessive violations of the rule is reversible error AND a violation of due process.

The rule is quoted for the record, below; HAR §13-1-28 Contested case hearings.
* * *

(c) Any procedure in a contested case may be modified or waived by stipulation of the parties.
[Eff 9/7/82; am and comp 2/27/09] (Auth: HRS §§91-2, 91-9, 171-6) (Imp: HRS §91-9)

The HO Violated HAR §13-1-32.4

Another rule that the HO put into place was that no evidence, document, testimony, etc. of Contested Case Hearing-1 would be allowed in the Record of Contested Case Hearing-2, that Contested Case Hearing-2 would start from scratch. This party believes that the HO's unilateral adoption of this rule that excluded all records of Contested Case Hearing-1 violated HAR §13-1-32.4. The HO did not consult with, or get the consent of, the parties in promulgating this rule that emasculated §13-1-32.4.

HAR§13-1-32.4 Records on file with board.
Records directly relating to the application that are on file with the board, including, but not limited to, the record of the public hearing (if held), shall be a part of the record of the contested case; provided, however, that any party may object, in the manner provided in section 13-1-35, to any part of such
record. [Eff and comp 2/27/09] (Auth: HRS §§91-2, 171-6) (Imp: HRS §§91-2, 91-9, 171-6)

The HO Violates Normally Accepted Court Procedures, Violating Due Process

In U.S. jurisprudence—as in a contested case hearing like this one—a proponent is normally expected to plead his case before the opponents are required to plead theirs. It is only fair and customary that the proponent pleads his case first, then the opponents, setting up counter arguments AFTER the proponent takes his first turn, can then plead their case. This process is very clear and evident as in the case of an appeal in the so-called "State of Hawaii," when a proponent/appellant files his or her Opening Brief first, then the opposition/appellee gets to knowingly file his or her Answering or Reply Brief—addressing all the issues that the proponent raises—with specificity. How else would the opposition have exact knowledge of how the proponent will plead his or her case, if the proponent doesn't do his or her pleading first?

In Contested Case Hearing-2, the HO required "all" parties to submit their witness' written direct testimonies simultaneously—with a deadline of October 11, 2016.

This process was detrimental to the parties opposing the granting of the CDUP—as they had to blindly anticipate the specific issues that the proponents were planning to submit. How can a party respond to specific issues of their opposition, the proponents, if they are to file their pleadings at the same time? This is an obvious example of a violation of due process.

The HO Seems to have Intentionally Violated HRS § 91-12

On page 7 of HO's FOF and COL et al, the HO states and disclaims:

"The Hearing Officer considered the testimony of all witnesses at the evidentiary hearings and all exhibits received into evidence. The mere fact that a particular witness testimony or exhibit may not be specifically referred to below does not and shall not be construed to mean that said testimony or exhibit was not considered. Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below." Doc 783, July 26, 2017 at 7.

For the purposes of this Contested Case Hearing-2, the position taken by the HO is a violation of due process and of compliance with HRS § 91-12. This is yet another example of the HO ignoring the satutory rules and the hard work of oppositional parties. It also shows disrespect and bias on her part.

The HO ignored (1) the collective Petitioners filings, motions, arguments. etc. submitted over a 5 month period (2) 55 days of evidentiary hearings and the information contained therein and (3) the Petitioners collective testimony and witness testimony (including over 74 witnesses). The HO excluded virtually all of Petitioners' Written Direct Testimony (hereafter WDT), witnesses WDT, oral testimony, objections etc, Exhibits, thousands of pages of documents and evidence submitted, and hundreds of motions, pleadings and/or objections etc. This is unacceptable!

The HO provided no rational explanation and or justification as to why she denied/ignored/or failed to consider most if not all of the information presented by the Petitioners to date, although she states that their not being specifically mentioned "does not and shall not be construed to mean that said testimony or exhibit was not considered. Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below."

What the HO did instead was to simple cut and paste the UH positions, arguments, FOF/COL, D&O, and in so doing repeated the same error the Supreme Court just found unlawful yet also reversible. (Emphasis added)

The statute relating to the conduct of Contested Case Hearings (hereafter CCH) regarding adverse FOFs, HRS §91-12, that states §91-12 Decisions and orders. Every decision and order adverse to a proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate

findings of fact and conclusions of law. If any party to the proceeding has filed proposed finding of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record. [L 1961, c 103, §12; Supp, §6C-12; HRS §91-12; am L 1980, c 232, §4; gen ch 1985] HRS § 91-12.

Interestingly, the Applicant and Intervenor TIO argue that the approximately 5,000 adverse Findings of Fact that have been lodged in this Contested Case Hearing-2 is too unwieldly for the HO to handle. They seem to suggest that the HO (as substitute for the agency) should not have to comply with the statute. Well, if the HO does not have to comply with the statute, then who should? Nobody else has supposedly read through all the submissions and analysed them—to be able to stand in for the HO in compliance with the statute.

BLNR should remand this document to the HO with instructions to comply with the statute. Failure to do so is to commit irreversible error.

The HO, During the Course of Contested Case Hearing-2, has had the Taint of the Errored Approval of the CDUA, as it Continues to be on the Public Record

The discussion covered in CLARENCE KUKAUAKAHI CHING'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, FILED AS DOC 667 ON MAY 30, 2017, specifically addresses this issue, and addresses it very well. The issue is both simple and complex at the same time—that the untimely 2-step approval of the CDUA and issuance of the CDUP on February 25, 2011, before BLNR's decision to grant a contested case hearing, has continued to be on the DLNR public record until Minute Order 36, as Document 376 on October 14, 2016, that revoked the CDUP, and only the CDUP, was filed. The CDUA continues on the public record, as it was not reversed or cancelled by any official remedial BLNR action or document as of this date.

The HO in Contested Case Hearing-2 has been exposed to the fact that BLNRs/DLNRs "official position" on the CDUA is that it, the CDUA, was approved as of February 25, 2011, and continues in the public record as being approved to this very day. This "blemish" on what should be a clean slate, that was probably contemplated by issuance of Minute Order 36 but which effort was not comprehensive enough, is a violation of the due process that should underlie this Contested Case Hearing-2 process. To have legally been remedied, BLNR should have given public notice of the action to take place at a duly held meeting, and a revocation action then taking place. Without any of these formalities taking place, including not being included in Minute Order 36, the occurrence of the CDUA approval in the public record is a major taint in the record and a violation of due process.

The CDUA process is determined by a two-step procedure.

Findings of Fact

914. BLNR advised UHH, Mauna Kea Anaina Hou, Deborah Ward (Chairperson of Sierra Club, Hawai'i Chapter), Miwa Tamanaha (Executive Director of KAHEA), Fred D. Stone, and Clarence Kukauakahi Ching that BLNR would "consider" the application [CDUA] at its regularly-scheduled meeting on February 25, 2011.
* * *
Mauna Kea Anaina Hou v Bd.of Land & Nat.Res., 136Hawaii376, 363P.3d224 (2015), at 9.

915. On February 25, 2011, BLNR's Chair began BLNR's regularly-scheduled public board meeting. Ibid at 9.

916. In its decision of Mauna Kea Anaina Hou v Bd.of Land & Nat.Res., the Hawai'i Supreme Court, in discussing this transaction, said: "BLNR then voted unanimously to [1] approve the application and [2] issue a permit." Ibid at 12

917. [T]hat this condition would commence with construction also suggests that even without construction, the application had been [1] approved and [2] a permit had been issued. Ibid at 36

918. BLNR argues that when it [1] approved the CDUA and [2] issued the CDUP at the February 25, 2011 meeting, a request for a contested case hearing was not perfected. Ibid at 56

919. "BLNR put the cart before the horse when it approved [issued] the permit before the contested case hearing was held." Ibid at 33

920. By Minute Order 36, filed as Document 376 on October 14, 2016, the Board issued its Order Voiding Permit - CDUP HA-3568 that was issued in February 2011. "The Board now declares and affirms the CDUP HA-3568 is void." Minute Order 36

Conclusions of Law

- BLNR's decision to [1] approve the CDUA and [2] issue the CDUP was made at the duly held regularly-scheduled public board meeting on February 25, 2011. FOF 914-920
- BLNR made its decision in a two-step process, 1) BLNR approved the CDUA, and 2) BLNR issued the CDUP. FOF 914-920
- BLNR [1] approved the CDUA AND [2] issued the CDUP. FOF 914-920
- On October 14, 2016, the Board [BLNR] declared and affirmed the CDUP HA-3568 is void. FOF 914-920
- On October 14, 2016, BLNR voided only the CDUP. FOF 914-920
- On October 14, 2016, BLNR DID NOT void the approved CDUA. FOF 914-920

- The approved CDUA continues to exist on the Record. FOF 914-920

- With the continued existence of the duly "approved CDUA" on its (BLNR/DLNR) books (in the Record), and is, at present, conducting this "Contested Case Hearing,"the approved CDUA continues to be deliberated with "the cart before the horse" status on the Record. FOF 914-920

- While BLNR on October 14, 2016, in Minute Order 36 voided the second part of the October 14, 2016 two-step decision to 2) issue the CDUP, the first part of the two-step decision, 1) to approve the CDUA, continues to be in place, like the CDUP was, as discussed in the deliberations of the Hawai'i Supreme Court in Mauna Kea Ananina Hou et v. BLNR et al, that revoked the CDUP, continuing the "cart before the horse" [sic][ir] reversible error that the Supreme Court's rationale in revoking the issued CDUP was founded upon, AND continues to be fully alive in the Record. FOF 914-920

- The World and the Hearing Officer on this Contested Case Hearing are on notice that the pre-determined outcome of this Contested Case Hearing, as the present Record indicates, is, by BLNR's official indication, that it will illegally grant the applied-for CDUP. This is reversible error!
  FOF 914-920 103-106

- This Contested Case Hearing need not look any further to decide that the [sic][ir] reversible error of BLNR/DLNR's official position of "approving the CDUA" continues at BLNR/DLNR (the cart before the horse), AND that further consideration of the outcome of this CDUA/CDUP Contested Case Hearing process, must be a denial. FOF 914-920 Doc 667, May 30, 2017, at 103-104.

TMT Internationa Observatory LLC (TIO)—If It Were the Real Sublessor, by Revocation of BLNR's Consent to the Sublease, Which effectively Revokes the Sublease, is Now in Violation of It's Decommissioning Plan, as the Loss of the Sublease was a Trigger, Resulting in TIO Being Out of Compliance, and that Should be Disqualified for Issuance of a CDUP

Between the now un-reversed approval of the CDUA and issuance of the CDUP on February 25, 2011 (stayed during the on-going Contested Case Hearing-1), and the revocation of the TMT Sublease Consent on January 6, 2017, TIO (that many don't agree was legitimate) was allowed, by interim permit, to make certain improvements on and around and to do geophysical drilling on Area E, the proposed TMT site.

By conditions of the Decommissioning Subplan and the TMT Sublease, a termination of the sublease triggered the process of Decommissioning. In my knowledge, NONE of the steps leading to a decommissioning has yet taken place. TIO is in default and violation of the terms of the Decommissioning Subplan and the now revoked Sublease, TIO should be disqualified for granting of a CDUP as a result of the Contested Case Hearing-2 process.

FOF 331

The Decommission Plan is a plan to plan a decommissioning. There is nothing that the TMT will be agreeing with other than to agree to participate in a Plan to Decommission at some future date that will be triggered by termination of the General Lease, termination of a Sublease or TMT's decision to end operations. The process starts with the filing of a Notice of Intent.

The decision of the 3rd Circuit Court appeal of E. Kalani Flores v. BLNR, Civil No. 14-1-324, vacated the Consent to the TMT Sublease and Non-Exclusive Easement Agreement between TIO and UH-Hilo, effective on January 6, 2017. Ex B.19h, filed on January 27, 2017.

However, the TMT Sublease has been effectively terminated (by revocation of BLNR's Consent by the 3rd Circuit Court). Ex. B.19h, at 15-16.

The TMT Sublease states:

AGREEMENT

10. Effect of Termination or Expiration: Decommissioning. Upon termination or expiration of this Sublease, Sublessee shall at Sublessor's sole option and at Sublessee's sole cost and expense either (a) surrender the Subleased Premises with all improvements existing or constructed thereon, or (b) decommission and remove the TMT Facilities and restore the land in accordance with the CMP and the Decommissioning Plan for Mauna Kea observatories. Ex. B.02f, at 8

The Decommissioning Plan states:

1.2 Observatory Decommissioning Process

* * *

Decommissioning is initiated when a sublessee decides to cease operation due to changing priorities, lack of funding, or obsolescence; when the sublease expires; or if UH **revokes a sublease** (See Section 5.1). Ex. A013, p.3

* * *

4.2 Site Decommissioning Plan

A Site Decommissioning Plan (SDP) documents the condition of the site, outlines an approach to decommissioning, and proposes a plan for site restoration, if applicable. Each SDP shall be developed in stages consisting of the four components: (1) a Notice of Intent, ... Ex. A013, p.18

TIO, according to the requirements of the TMT Sublease and the Decommissioning Plan, is now in Non-Compliance to its requirements. The Non-Compliance to the requirements of the TMT Sublease AND the Decommissioning Plan should disqualify TMT Observatory Corporation (the real 3rd Party Beneficiary) AND TMT International Observatory LLC (the pretender corporation) from being granted a CDUP. The TMT Observatory AND TMT International Observatory LLC are disqualified from being granted a CDUP.

The HO's Setting of the Deadline for Filing of Findings of Fact, Conclusions of Law, Decision and Order Without Regard to Closing the Evidentiary Record was a Violation of Due Process

The HO set the deadline for Findings of Fact, Conclusions of Law, Decision and Order on May 30, 2017.

The record was still open on May 30, 2017, and a backlog of minute orders and decisions on pending motions were grossly back-logged.

Minute Order 102, filed on July 25, 2017, gave notice that "the record in the above-titled contested case is closed, effective as of the filing of this Minute Order," namely July 25, 2017.

That the prematurely set deadline was set almost 2 months before the record was closed is a travesty. It is an impossibility to require the filing of a key document like the Findings of Fact, Conclusions of Law, Decision and Order when evidence continues to mount and the record is not closed. The HO certainly showed bad judgment in sticking strictly to the rule when she was armed with powers that could have made the process much more palatable.

While it should not have taken a genius to realize that there would be mass conflict to be reckoned with by the parties that were caught between a rock and a hard place—a creative HO would have been more resourceful than Judge Amano. That Amano "missed" the phrase—"unless the presiding officer shall otherwise prescribe" that could have really smoothed out the process is tragedic.

Actually, the actions pending were more connected with the oppositional parties of the contested case. To have intentionally allowed such a situation to happen, when it could have been avoided, was probably another indicator of the HO's bias that continued to be exhibited from time-to-time, and much too often.

The wayward rule, HAR §13-1-38, and a good-faith exercise of compliance with, potentially did a lot of harm—the result definitely being a violation of due process:

HAR §13-1-38 Decisions and orders.
(a) After all evidence has been taken, the parties may submit, within the time set by the presiding officer, a proposed decision and order which shall include proposed findings of facts and conclusions of law. A party to the proceedings may submit a proposed decision and order which shall include proposed findings of fact and conclusions of law. The proposals shall be filed with the board and mailed to each party to the proceeding not later than ten days after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe.
* * *

C. TIO's Standing

25. Several of the parties challenged TIO's standing as a party, particularly in light of the Circuit Court's decision to vacate BLNR's consent to the sublease between TIO and the University. See, e.g., [Docs. 427 and 429]. However, TIO's admission as an intervenor was not predicated on the status of the sublease consent. Rather, TIO's motion to intervene was granted "due to TIO's substantial interest in the subject matter and because TIO's participation will substantially assist the Hearing Officer in her decision making."

Minute Order 13 at 4 [Doc. No. 115]. TIO still has a valid sublease with the University and will be the entity responsible for building and operating the TMT Observatory, if it is built. Thus, TIO continues to maintain a substantial interest in the subject matter. Moreover, TIO's participation has substantially helped the Hearing Officer in her decision making. Therefore, TIO is properly a party to the contested case hearing.

EXCEPTION: The above Finding of Fact is only partly true. It is also partly false.
The following are false—"Rather, TIO's motion to intervene was granted due to TIO's substantial interest in the subject matter .... TIO still has a valid sublease with the University and will be the entity responsible for building and operating the TMT Observatory, if it is built. Thus, TIO continues to maintain a substantial interest in the subject matter."

Findings of Fact

904. The Chair of BLNR/DLNR's Consent to the TMT Sublease was revoked by the Third Circuit Court on appeal on January 6, 2017. Ex. B.19h

905. The Scientific Cooperation Agreement executed between Applicant University and the stranger corporation TMT International Observatory LLC was effective until the termination of the TMT Sublease.

Conclusions of Law

• The revocation of BLNR's/DLNR's Consent to the TMT Sublease by the Third Circuit Court essentially revokes the TMT Sublease. FOF 900-905

• The revocation of BLNR's/DLNR's Consent to the TMT Sublease by the Third Circuit Court essentially revokes the TMT Sublease and essentially revokes the Scientific Cooperative Agreement executed between Applicant University and the stranger corporation TMT International Observatory LLC.
FOF 900-905 Doc 667, May 30, 2017, p 101-102

The 3rd Circuit Court revoked BLNR's Consent to the TMT Sublease that in essence revoked the Sublease. While it may be argued that the Sublease continues to be intact—without BLNR's Consent, it is worthless, and has no legal effect. If anything, TIO has a document in hand that **does not** signify any substantial interest in the issue at hand! TIO DOES NOT have any substantial interest in the subject matter!

This also invalidates Minute Order 13—as it is a defective order.

The HO's remaining rationale—that ... "TIO's participation has substantially helped the Hearing Officer in her decision making" hangs by a thread, which leaves the HO essentially grasping at straws!

vi. CDUA Reference to TMT Corporation and TIO

427. Petitioners and Opposing Intervenors argued that the CDUA should be voided because it references the TMT Corporation rather than TIO.

EXCEPTION: In 2010, when the CDUA was initially submitted and until 2014 (when TMT International Observatory LLC (TIO) was incorporated and forced onto the scene)—TMT Observatory Corporation (TMT) was the properly designated 3rd Party Beneficiary of the CDUA. In 2014, TIO, essentially made up of different parties than TMT, was forced onto the scene by a conspiracy of actions taking place by TMT, TIO, UH-Hilo, and DLNR/BLNR—with the substitution of TIO as Sublessee to the TMT Sublease, and subsequent actions of TIO as if it were "the" genuine designated 3rd Party Beneficiary. To add to the confusion, TMT was hired on occasion to do work for TIO at Area E (the proposed TMT site) and in other operations. Corporations, as a rule, operate at arms length with each other and all transactions take place with and by legal documentation. There was no legal supporting documentation for substitution offered and/or admitted into the Contested Case Hearing-1 Record. So, following 2014, and before the initiation of this Contested Case Hearing-2, either the CDUA should have been amended to reflect the alleged substitution or that the herein-named parties conspired to treat the substitution as being legally made—by acquiescing to misrepresentation, deceit, or fraud. The Financial Documents of TMT and TIO, in evidence, bear out some of these alleged facts. Instead, the evidence shows that there occurred micro-managing and further attempts to artificially substantiate the Record by Carlsmith & Ball, attorneys for Applicant UH-Hilo.

The following excerpts from TIO's 2014 Financial Statements help to fill in the voids of the HOs FOF:

1. Description of the TMT International Observatory,

LLC TMT International Observatory, LLC (TIO), a Limited Liability Company, was formed in the state of Delaware in 2014 by the California Institute of Technology (Caltech), the University of California (UC), the National Institute of Natural Sciences (NINS) and the National Astronomical Observatories of China, Chinese Academy of Sciences (NAOC), hereinafter collectively called "the Members" for the purpose of providing for the observation and collection of images and information from deep space to advance human knowledge of astronomy and the origins of the universe by and through the execution of the Thirty Meter Telescope Project hereinafter called the "TIO Project". TIO is responsible for the execution of the TIO Project through the construction, commissioning and operation of an observatory. Each of the Member [sic] has signed the Limited Liability Company Agreement of TIO (Company Agreement) and a Contribution Agreement with TIO. B.47

Prior to establishment of TIO in May 2014, the pre-construction activities were managed by TMT Observatory Corporation (TMT Corp), a not-for-profit public benefit corporation, formed by Caltech and UC. Since May 2014, TMT Corp managed the in-kind construction contributions of Caltech and UC. In 2014, TIO also entered into a Personnel Administrative Agreement with TMT Corp under which TMT Corp provides labor and support services to TIO. B.47

From Ching's Exceptions to the Applicant's FOF and COL, the following helps clarify the situation further:

FOF 206 and 207

Although TMT Observatory Corporation is the designated 3rd Party Beneficiary of the CDUA, there are minimal facts of it included in these 2 FOFs. TMT International Observatory LLC (a stranger corporation to the CDUA), by a conspiracy of TMT Observatory Corporation, TMT International Observatory LLC, the University of Hawai'i System, including University of Hawai'i at Hilo, and BLNR/DLNR, was allowed to be the Sublessee of the now revoked BLNR Consent to the so-called TMT Sublease.

* * *

TMT Observatory Corporation (TMT) is a non-profit public benefit corporation whose purpose is to conduct fundamental research and development and foster scientific interaction between educational and research institutions and to further college and university educational research in astronomy. TMT was founded by The Regents of the University of California (UC) and the California Institute of Technolog y (Caltech), hereinafter collectively called "founding members" for the initial purpose of developing the design of a giant segmented mirror telescope, the Thirty Meter Telescope, with the goal of constructing, commissioning and operating an observatory. [TMT Observatory Corporation, Financial Statements, September 30, 2014 and 2013] Ex. B.19a, p.3-4

To have these Notes side-by-side will probably be very helpful to those who have had a difficult time understanding that these are 2 independent and different corporations and that they have been operating together [simultaneously] since TIO was incorporated in 2014.

Fortunately, there are individuals, such as Archaeologist Robert Rechtman, witness for TIO, who is able to help unravel the somewhat confusing situation. He was able to work for both corporations—at the same time. And, even he had trouble deciding which corporation he was working with at any one particular time. His testimony, when cross examined by Intervenor Ching went like this:

> Ching: So when you dealt with TMT Observatory Corporation, and also later on when you dealt with TMT International Observatory LLC, you dealt both times with the same person, Paul Gillet, is that correct?
>
> Rechtman: He was my contact, yes.
>
> Ching: When you dealt with Paul Gillet, how did you know whether you were dealing with him for TMT Observatory Corporation or for TMT International Observatory LLC?
>
> Rechtman: I personally don't know the distinction, so I didn't, ...It didn't occur to me to know that whether who...which entity I was dealing with.

So, to understand their actual roles:

TMT Observatory Corporation (TMT) IS the designated beneficiary of the TMT CDUA. Because there has been no Amended CDUA filed—TMT International Observatory LLC (TIO) is NOT the 3rd Party Beneficiary. Unless there are documents that assign, or otherwise transfer, the rights that is TMT's, TIO cannot be the valid Sublessee of any Sublease—at present or in the future—unless the Players conspire to do things otherwise, which they did with the TMT Sublease.

There was no Amended CDUA, nor were there any Assignment or other document that made the legal transfer. Therefore, TIO as the Sublessee of the TMT Sublease was not legal.

Doc 738, June 13, 2017, p 13–14

An additional discussion of the above with more specific citations as denominated in Clarence Kukauakahi Ching's Proposed Findings of Fact, Conclusions of Law and Order follows:

Two separate corporate entities—TMT Observatory Corporation and TMT International Observatory LLC—exist and operate simultaneously.

Findings of Fact

871. Robert Rechtman is the Chief Operating Officer and principal archaeologist of ASM Affiliates. Tr. December 20, 2016, Vol. 19, p.37

872. ASM Affiliates, as negotiated by and through Robert Rechtman, was contracted by TMT Observatory Corporation to conduct archaeological studies and prepare reports. Tr. December 20, 2016, Vol. 19, p.62

873. ASM Affiliates, for TMT Observatory Corporation, did a report in 2013 and two reconnaissance studies in 2015. Tr. December 20, 2016, Vol. 19, p.62

874. ASM Affiliates, through its CEO Robert Rechtman, worked with TMT Observatory Corporation contact person, Paul Gillet. Tr. December 20, 2016, Vol. 19, p.62

875. ASM Affiliates, as negotiated by and through Robert Rechtman, was contracted by Thirty Meter Telescope Corporation [sic, should have been TMT International Observatory LLC] to conduct archaeological monitoring for geotechnical boring, grading of the groundbreaking ceremony pad, conducting two field reconnaissance studies and for evaluating a find spot and implementing protection measures around that find spot. Tr. December 20, 2016, Vol. 19, p.63

876. ASM Affiliates conducted archaeological monitoring for geotechnical boring in 2013, monitored the grading of the groundbreaking ceremony pad, conducted two field reconnaissance studies, evaluated a find spot and implemented protection measures around that find spot in December 2015 for TMT International Observatory LLC. Tr. December 20, 1016, Vol. 19, p.63

877. ASM Affiliates, through its CEO Robert Rechtman, worked with TMT International Observatory LLC contact person, Paul Gillet and a person whose first name was Pratheep. Tr. December 20, 2016, Vol. 19, p.64

878. ASM Affiliates CEO Robert Rechtman, at overlapping times, worked with TMT Observatory Corporation AND TMT International Observatory LLC contact person Paul Gillet—who dually represented both the TMT Observatory Corporation and the TMT International Observatory LLC relative to ASM Affiliates dual contracts with both TMT Observatory Corporation AND TMT International Observatory LLC. Tr. December 20, 2016, Vol 19, p.64

879. ASM Affiliates CEO Robert Rechtman had difficulties deciding which corporate entity, TMT Observatory Corporation OR TMT International Observatory LLC, he was dealing with at any particular time when dealing with dual contact person—for both TMT Observatory Corporation OR TMT International Observatory LLC—at any particular time. Tr. December 20, 2016, Vol. 19, p.64

880. ASM Affiliates, through CEO Robert Rechtman, worked with two corporations, TMT Observatory Corporation AND TMT International Observatory LLC, during the same period. Tr. December 20, 2016, Vol. 19, p.61-64

881. Attorney Douglas Ing, attorney for both TMT Observatory Corporation AND TMT International Observatory LLC, mentions both corporations (TMT Observatory Corporation AND TMT International Observatory LLC simultaneously). "He can't say it was valid for purposes of either TMT or TIO being untimely..." Tr. June 17, 2016, Vol. II, p.15

882. Attorney Douglas Ing stated that TMT Observatory Corporation AND TMT International Observatory LLC are two different corporations. Tr. June 17, 2016, Vol. II, p.23

883. Attorney Douglas Ing stated that the people involved in either the TMT Observatory Corporation OR TMT International Observatory LLC are not the same people. Tr. June 17, 2016, Vol. II, p.23

884. Attorney Richard Wurdeman states that "two separate entities"—TMT Observatory Corporation AND TMT International Observatory LLC—are being discussed. Tr. June 17, 2016, Vol. II, p.17

885. Attorney Richard Wurdeman compares one entity, TMT Observatory Corporation, with the other entity, TMT International Observatory LLC. Tr. June 17, 2016, Vol. II, p.20

886. Attorney Richard Wurdeman says TMT International Observatory LLC "is not the party upon which the application was brought." Tr. June 17, 2016, Vol. II, p.21

Conclusions of Law

• TMT Observatory Corporation (TMT) AND TMT International Observatory LLC (TIO) are two separate and distinct corporations that exist and operate simultaneously. FOF 871-886

• TMT International Observatory LLC (TIO) did not supplant TMT Observatory Corporation (TMT) for purposes of the CDUP (HA-3568). FOF 871-886

The Applicant and TMT International Observatory LLC, with consent of BLNR/DLNR, have erroneously and intentionally attempted to switch the genuine Third Party Beneficiary that is TMT Observatory Corporation to the stranger corporation, TMT International Observatory LLC.

Findings of Fact

887. A Letter of Intent between Caltech, University of California, the Canadian University and the National Astronomy Observatory of Japan was executed in 2011. Tr. December 19, 2016, Vol. 18, p.12

888. Witness for the Applicant, Edward Stone, testified that the Letter of Intent stated that "this group of six institutions would work together to essentially establish the TIO (TMT International Observatory LLC)" that included a master agreement and a company agreement which defined the nature of this LLC, and the voting nature ... and the commitments ... for each partner, which became official in 2014 when things were transferred from TMT Observatory Corporation to TMT International Observatory LLC. Tr. December 19, 2016, Vol. 18, p.12

889. The CDUA provides that if a CDUP is granted, that it should be granted to TMT Observatory Corporation (TMT) (A03). Tr. January 24, 2017, Vol. 29, p.205; Ex. A-001

890. The TMT Observatory Corporation was designated as the Third Party Beneficiary when, and if, the CDUA were approved and the CDUP granted. Ex. A001

891. Witness for the Applicant, Edward Stone, testified that both the TMT Observatory Corporation and TMT International Observatory LLC continued to exist, TMT International Observatory LLC did not replace TMT Observatory Corporation, but that their roles had changed. Tr. December 19, 2016, Vol. 18, p.21

892. Witness for the Applicant, Perry White, testified that he didn't know whether the former TMT Observatory Corporation had morphed into TMT International Observatory LLC as he had written in his WDT. Tr. October 20, 2016, Vol. 1, p. 116

893. Witness for the Applicant, Perry White, admitted that he did not reference TIO (TMT International Observatory LLC) in his written testimony in the contested case hearing of 2011. Tr. October 20, 2016, Vol. 1, p.168

894. Witness for the Applicant, Perry White, testified that he did not know of the legal documents by which TMT Observatory Corporation was transitioned into TMT International Observatory LLC as his WDT stated, and that he was only repeating what he had been told. Tr. October 20, 2016, Vol. 1, p.116 and 117

895. Witness for the Applicant, Perry White, admitted that he was advised, instructed, or should otherwise substitute TIO (TMT International Observatory LLC for TMT Observatory Corporation in his WDT by Carlsmith staff (applicant's attorney). Tr. October 20, 2016, Vol. 1, p.168

896. Witness for the Applicant, Perry White, apologized to have "introduced confusion into his WDT by referring to TIO (TMT International Observatory LLC) instead of TMT (TMT Observatory Corporation)." Tr. October 20, 2016, Vol. 1, p.119

897. Witness for the Applicant, Perry White, admitted that "it's confusing" that his mention of TIO (TMT International Observatory LLC) in his WDT when it was really TMT Observatory Corporation (TMT) that developed the TMT Management Plan in the CDUA (HA-3568). Tr. October 20, 2016, Vol. 1, p.167

898. Attorney for the Applicant, Ian Sandison, stated that "It's common knowledge that TIO (TMT International Observatory LLC) is successor in interest to the TMT Observatory Corporation" and that "Mr. White has explained is what has been explained to him ...." Tr. October 20, 2016, Vol. 1, p.120

899. Attorney for the Applicant, Ian Sandison, also stated that "TIO has assumed the obligation of its predecessor (assumably TMT Observatory Corporation, the real Third Party Beneficiary)." Tr. October 20, 2016, Vol. 1, p.120

Conclusions of Law

• The Applicant University's Attorney Carlsmith & Ball instructed the Applicant's witness Perry White to switch the name of TMT International Observatory LLC into his WDT in place of the name of the Third Party Beneficiary, TMT Observatory Corporation, as designated by the CDUA. FOF 887-899

• The Third Party Beneficiary designate TMT Observatory Corporation should have been the Sublessee of the TMT Sublease. FOF 887-899

• The Applicant University and the Chair of BLNR/DLNR should each have had actual knowledge that Third Party Beneficiary designate TMT Observatory Corporation should have been the rightful Sublessee on the TMT Sublease. FOF 887-899

• The Applicant University, as Sublessor, executed the TMT Sublease to the TMT International Observatory LLC as Sublessee. FOF 887-899

• The Applicant University, with knowledge that the Third Party Beneficiary designate TMT Observatory Corporation should have been the Sublessee on the TMT Sublease, but seemingly deliberately and intentionally otherwise executed the Sublease to the stranger corporation TMT International Observatory LLC to be that Sublessee, indicates that some kind of illegal behavior took place. FOF 887-899

• The BLNR/DLNR, as the agency of the Trustee of State of Hawai'i's so-called "ceded lands" with knowledge that the Third Party Beneficiary designate TMT Observatory Corporation should have been the Sublessee on the TMT Sublease, but seemingly deliberately and intentionally otherwise executed its Consent to the stranger

corporation TMT Interntional Observaory LLC to be that Sublessee, indicates that some kind of illegal behavior took place. FOF 887-899

• The Chair of BLNR's Consent to the TMT Sublease was revoked by the Circuit Court appeal decision dated Jan. 6, 2017, which effectively revoked the TMT Sublease. FOF 887-899

The Applicant has not submitted any testimony or other evidence to establish TMT International Observatory (TIO) as the real Third Party Beneficiary.

Findings of Fact

900. Upon being asked by Hearing Officer Amano whether "there be forthcoming testimony about that?" Mr. Sandison said: "Yes, there will." Tr. October 20, 2016, Vol. 1, p.120

901. Sam Lemmo, Administrator of OCCL, testified that there have been "no" amendments to the CDUA, or "any" assignment or other document of transfer of rights in order to execute the substitution of Third Party Beneficiary designate TMT Observatory Corporation by TMT International Observatory LLC or any other entity. Tr. January 24, 2017, Vol. 29, p.205,206

902. The TMT Sublease, that would provide the parcel of land on which to build the TMT observatory was executed by Applicant University to TMT International Observatory LLC (a stranger corporation to the CDUA) on July 28, 2014. Ex. B.02f

903. The TMT Sublease is presumed to have been consented to by the attachment of a unsigned "Consent," the original supposedly signed by the Chair of BLNR/DLNR. Ex. B.02f

904. The Chair of BLNR/DLNR's Consent to the TMT Sublease was revoked by the Third Circuit Court on appeal on January 6, 2017. Ex. B.19h

905. The Scientific Cooperation Agreement executed between Applicant University and the stranger corporation TMT International Observatory LLC was effective until the termination of the TMT Sublease.

Conclusions of Law

• The Applicant, TMT Observatory Corporation, TMT International Observatory LLC , and DLNR have seemingly conspired to engage in the improper substitution of the stranger corporation TMT International Observatory LLC for the CDUA designated TMT Observatory Corporation in TMT observatory transactions is indeed irregular—as the appearance of an improper TIO Sublease and an improper Scientific Cooperation Agreement that benefits TIO—and not TMT— is evidence that an illegality has probably taken place. FOF 900-905

• Applicant University, TMT Observatory Corporation, TMT International Observatory LLC and BLNR/ DLNR have engaged in irregular actions. FOF 900-905

• The revocation of BLNR's/DLNR's Consent to the TMT Sublease by the Third Circuit Court essentially revokes the TMT Sublease. FOF 900-905

• The revocation of BLNR's/DLNR's Consent to the TMT Sublease by the Third Circuit Court essentially revokes the TMT Sublease and essentially revokes the Scientific Cooperative Agreement executed between Applicant University and the stranger corporation TMT International Observatory LLC. FOF 900-905

Substantial evidence has been shown here that TMT Observatory Corporation is the real 3rd Party Beneficiary and that the TMT Sublease in which the TMT International Observatory LLC, as substituted for the real TMT Observatory Corporation was, without any supporting documents, highly irregular.

If the parties—TMT, TIO, UH-Hilo and BLNR/DLNR—agree that a substitution should have taken place legitimately, then the CDUA should have been amended or an assignment or transfer should have been executed to accomplish the task. Carlsmith, the attorneys for UH-Hilo and master-mind of the CDUA, in order to pull off the conspiracy, had to educate certain of the writers of the required documents to perfect its case and to meet its burden of proof to be granted approval of the CDUA and issuance of the CDUP, attempted to instruct the writers to craft their WDTs to reflect the conspiracy and/or craft strategies that would confuse cross examination. However, despite the intention to fix the Record, the true facts of what happened behind the closed doors of Carlsmith and Ball have come to light in the Record.

In the meantime, either the CDUA is stale and outmoded, and/or that the conspirators have been caught with their hands in the cookie jar in the commission of misrepresentation, deceit and/or fraud. Approval of the CDUA should be denied, or an amended CDUA filed. TMT, TIO, and UH-Hilo should be disqualified from being issued a CDUP on the original CDUA.

As for the members of the board of BLNR AND the staff of DLNR who allowed this circus to take place—the board members' appointments should be revoked and the staff of DLNR fired. And, most important, the legal advisors for BLNR/DLNR should be admonished and disciplined for allowing these irregularities to take place.

The HO, in Sizing up Mr. Ching's Credibility, has Placed Her Biases in Issue

428. Mr. Ching offered his opinions regarding, inter alia, TMT Corporation and TIO, and the alleged affect that the different entities had on the CDUA. Ex. B. 19a (Ching WDT) and B. 19d (Ching Supplemental WDT). Mr. Ching was at one time an attorney licensed to practice in the State of Hawai'i. Tr. 1/26/17 at 235:12-17. He was suspended from the practice of law for two years by the Hawai'i Supreme Court on or about April 14, 1993. Exs. C-41 and C-42. Per the Hawai'i Supreme Court's Order of Suspension, one of Mr. Ching's conditions of reinstatement is to successfully apply for and complete the Hawai'i bar. Ex. C-42 at 2. Mr. Ching did not present any evidence that he has successfully applied for and completed the Hawai'i bar examination since his suspension. Given the foregoing, the opinions of Mr. Ching were weighted accordingly. He was representing "no" client, and he made no claims to have been, at some time in the past, an attorney.

EXCEPTION: Of all the errors that the HO made in the Contested Case Hearing, this one is one of the most

egregious. Except when he was being represented by Attorney Richard Wurdeman, Mr. Ching acted totally Pro Se during the entire course of the Hearing. In other words, Mr. Ching acted on his own behalf. During the entire time of the Contested Case Hearing, Mr. Ching never professed to be an attorney, nor did he ever act as if he were one. He definitely didn't act as an attorney for any intervener or participant, nor did he act as his own attorney.

In fact, Mr. Ching, during his cross examination was asked whether any opinions he rendered were "legal" opinions. As can be expected, Mr. Ching's answer was "No." The only other possibility for rendering an opinion would have been as an expert witness. However, early on, the HO declared that no experts were to be found among the interveners and parties. So the mystery remains—why would Mr. Ching be required to be an attorney in good standing?

Did any of the other witnesses have to prove that he or she had to apply for and pass the bar exam in order to testify credibly? Does one have to be an attorney in good standing to participate in a Contested Case Hearing, even as Pro Se? One would think not. A Contested Case Hearing is a "people's" process and one does not need to be an attorney in good standing to participate.

Why were UH-Hilo, TIO, and the HO moved to complain about Mr. Ching's opinions? Most of Mr. Ching's activities in this Contested Case Hearing were to reveal significant facts that would assist the HO—and ultimately the BLNR—in making the ultimate decision of whether to grant or deny the CDUA, and issue a CDUP or not. Instead, the HO decided that she would weigh Mr. Ching's credibility so she (and the BLNR) could decide how to weigh the "facts." To think that Mr. Ching's facts should not be weighed as much, or as little, as UH-Hilo's and TIO's facts are an insult to rational and logical thinking. A fact is a fact!

Unfortunately, the HO does not reveal whether the weighing of Mr. Ching's credibility would be positive or negative, or to what measure it would be tasked. A glance at the videotape upon questioning by adverse attorneys reveal no hint of a lack of credibility.

As for Mr. Ching—it seems to be evident that Applicant UH-Hilo and proposed 3rd Party Beneficiary TIO, with the cooperation of the HO are acting as if they are stuck with a "weak" case—and they have to resort to these kinds of peripheral attacks in order to prevail.

431. Accordingly, although it is undisputed that TMT Corporation and TIO are different legal entities, that fact does not affect the validity of the CDUA.

EXCEPTION: The CDUA might have been valid upon its initial submission on September 2, 2010 when TMT Observatory Corporation (TMT) was in existence AND TIO (TMT International Observatory LLC) was not. However, in May 2014, TIO was incorporated and a campaign to "substitute" it for the initial designee, TMT, was begun. The Record indicates that there was never an Amended CDUA filed that would have legally supported the action, nor were any assignment or other transfer of rights executed to accomplish the task. The chasm created between the filing of the original CDUA in 2010 and the approval of the CDUA and subsequent issuance of the CDUP, without benefit of any supporting documents, but only by suspected, non-supported verbal instructions with conspiratorial intention and execution of TMT, TIO, UH-Hilo and BLNR/DLNR, surely has resulted in at least a degree of invalidity of the then-approved and now-revoked CDUP, a direct

product of the still-approved (to this day) CDUA. See extended discussion of these transactions in "vi. CDUA Reference to TMT Corporation and TIO" above.

432. TMT Corporation and TIO are different entities for the purposes of corporation law, but it was always contemplated that TMT's interests, assets and personnel would be transferred to TIO once a CDUP had been obtained and construction was to commence. That transfer took effect after the conclusion of the prior contested case hearing.

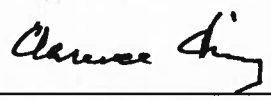
EXCEPTION: Transactions between distinctly different and separate, legal corporations, despite the fact that they are each represented by same legal counsel, normally takes place at arm's length. This is especially so when the "members" of the corporations are NOT identical. For instance, by TMT's being issued a very valuable CDUP according to the normal expectations of the proposed CDUA-CDUP transaction, a transfer of those very valuable rights from TMT to TIO, without due compensation, would have been a substantial and illegal transfer relative to TMT's members. Whether such a transaction may have been contemplated by the members of both corporations is not material, and the lack of proper documentation results in a very irregular transaction—surely a violation of accepted corporate practices. The transaction without documentation AND consideration would normally be totally illegal. That TMT, TIO, UH-Hilo, and BLNR/DLNR would intentionally participate in such a questionable maneuver without supporting documents is unbelievable and unpalatable in accepted, present-day legal processes. See extended discussion of these transactions in "vi. CDUA Reference to TMT Corporation and TIO" above.

433. Therefore, UH Hilo, as the applicant of the CDUA, was not required to resubmit the CDUA, reapply, or otherwise amend the CDUA to reflect the creation of TIO or the change from TMT Corporation to TIO.

EXCEPTION: The un-supported "substitution" of TIA for TMT in the execution of the TMT Sublease—without any supporting documents is a corporate "no-no." The fact that it was intentionally designed and allowed to happen without any supporting documents or amendment of the CDUA is a major clue to possible wrong-doing and corruption in the system. Not only does it appear that there is a symptom of wrong-doing, but the fact that all the major players, TMT, TIO, UH-Hilo, and BLNR/DLNR, in the transaction, conspiratorially intending to and causing it to happen is totally disconcerting. Such behavior seems to indicate a degree of misrepresentation, deceit and/or fraud in the system. It totally disrupts the system that is supposedly setup to be transparent and fair in all aspects of the public's business. Any, and all illegal, shortcuts surely violate acceptable and operational business practices that honest and prudent government demands.

DATED: August 21, 2017
at Kamuela, Hawai'i Island
so-called "State of Hawaii"

Respectfully submitted,



Clarence Kukauakahi Ching

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of CLARENCE KUKAUAKAHI CHING'S EXCEPTIONS TO HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017 was served on the following parties by email on August 21, 2017:

Michael Cain michael.cain@hawaii.gov,
Office of Conservation & Coastal Lands dlnr.maunakea@hawaii.gov,
Uncle Kalani Flores ekflores@hawaiiantel.net, Pua Case puacase@hawaiiantel.net,
cordylinecolor cordylinecolor@gmail.com, kealiikea kealiikea@yahoo.com,
Bianca Isaki bianca@kahea.org, Ian Sandison isandison@carlsmith.com,
tluikwan tluikwan@carlsmith.com, John P. (Pete) Manaut jpm@carlsmith.com,
Lindsay N. McAneeley lmcaneeley@carlsmith.com, T. Shinyama RShinyama@wik.com,
douging douging@wik.com, mehana kihoi uhiwai@live.com,
Kahookahi Kanuha kahookahi@gmail.com, Joseph Camara kualiic@hotmail.com,
lsa lsa@torkildson.com, njc njc@torkildson.com, leina'ala s leinaala.mauna@gmail.com,
Maelani Lee maelanilee@yahoo.com, Lanny Sinkin lanny.sinkin@gmail.com,
akulele akulele@yahoo.com, s.tabbada s.tabbada@hawaiiantel.net,
tiffniekakalia tiffniekakalia@gmail.com, Glen Kila makakila@gmail.com,
Brannon Kealoha brannonk@hawaii.edu, hanahanai hanahanai@hawaii.rr.com,
pohaku7 pohaku7@yahoo.com, Ivy McIntosh 3popoki@gmail.com,
Kealamakia Jr. mkealama@yahoo.com, Patricia Ikeda peheakeanila@gmail.com,
Yuklin Aluli yuklin@kailualaw.com, Dexter Kaiama cdexk@hotmail.com,
Kealoha Pisciotta keokea1@icloud.com, w_holi@hotmail.com

and by first class mail or hand-delivered on August 21, 2017 to:

1. Dwight J. Vicente 2608 Ainaola Drive Hilo, Hawaiian Kingdom

2. Harry Fergerstrom P.O. Box 951 Kurtistown, HI 96760

3. Michael Cain, Custodian of Records Conservation and Coastal Lands,
   1151 Punchbowl, Room 131 Honolulu, Hawai'i 96813

DATED: August 21, 2017
Kamuela, HI 96743

/s/
CLARENCE KUKAUAKAHI CHING