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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO MEHANA KIHOI'S EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS

OF LAW [DOC. 830]; APPENDIX A; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO MEHANA KIHOI'S EXCEPTIONS TO HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW

The University of Hawai'i at Hilo ("**UH Hilo**") and Intervenor TMT International Observatory, LLC ("**TIO**") jointly submit the following brief in response to Mehana Kihoi's ("**Kihoi**") Exceptions to Hearing Officer's Proposed Findings of Fact, Conclusions of Law [Doc. 830] filed August 21, 2017 ("**Kihoi's Exceptions**") pursuant to Hawai'i Administrative Rules ("**HAR**") § 13-1-43.

I. INTRODUCTION

On July 26, 2017, after presiding over forty-four days of testimony from October 2016 through early March 2017, and reviewing hundreds of exhibits, Judge (Ret.) Riki May Amano ("**Hearing Officer**") issued her detailed Proposed Findings of Fact, Conclusions of Law and Decision and Order [Doc. 783] ("**HO FOF/COL**"). The Hearing Officer recommended that the Conservation District Use Application HA-3568 ("**CDUA**") for the Thirty Meter Telescope ("**TMT**") Project and the attached TMT Management Plan be approved subject to a number of conditions stated therein. *See* HO FOF/COL at 260-263.

The Board of Land and Natural Resources ("**BLNR**") issued Minute Order No. 103 on July 28, 2017 [Doc. 784]. Pursuant to Minute Order No. 103, the parties to the Contested Case Hearing ("**CCH**") were given until no later than August 21, 2017 at 4:00 p.m. to file exceptions to the HO FOF/COL. Minute Order No. 103 expressly required the following for any exceptions:

> The exceptions shall: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken (2) identify that part of the recommendations to which objections are

> made; and (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

Minute Order No. 103 at 1; *see also* HAR § 13-1-42(b).

Minute Order No. 103 also gave the parties to the CCH until September 11, 2017 at 4:00 p.m. to file any responsive briefs. Minute Order No. 103 expressly required the following for any responsive briefs:

> The responsive briefs shall: (1) answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and (2) state the facts and reasons why the recommendations should be affirmed.

Minute Order No. 103 at 2; *see also* HAR § 13-1-43(b).

The BLNR has scheduled oral arguments on the CDUA for September 20, 2017 at 9:00 a.m. *See* Minute Order No. 103 at 2.

II. STANDARD OF REVIEW

Kihoi and the other Petitioners/Opposing Intervenors do not state a position on the applicable standard that BLNR must review the HO FOF/COL. Hawai'i Revised Statutes ("**HRS**") § 91-11 sets out the procedure that is to be followed by an agency where a hearing officer has been employed:

> **Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision[[1]] containing a

[1] The Hawai'i Supreme Court has held that a hearing officer's recommendations can serve as the agency's "proposal for decision" under HRS § 91-11. *See White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1146 (1982); *see also County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in

> statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, ***who shall personally consider the whole record or such portions thereof as may be cited by the parties.***

HRS §91-11 (emphasis added).

The Hawai'i Supreme Court has stated that "[t]he general rule is that if an agency making a decision has not heard the evidence, it must at least consider the evidence produced at a hearing conducted by an examiner or a hearing officer." *White,* 54 Haw. at 13, 501 P.2d at 361. Quoting from the Revised Model State Administrative Procedure Act, Fourth Tentative Draft (1961) ("**RMSAPA**"), the Hawai'i Supreme Court explained that this requirement "is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at the very least receiving briefs and hearing oral argument. It is intended to preclude signing on the dotted line." *Id.* at 14, 501 P.2d at 362 (citation and internal quotations omitted).

The Hawai'i Intermediate Court of Appeals ("**ICA**") described the "function and effect of the hearing officer's recommendations" in *Feliciano v. Board of Trustees of Employees' Retirement System*, 4 Haw. App. 26, 659 P.2d 77 (1983). The ICA explained that the recommendations are "to provide guidance" and an agency is "not bound by those findings or recommendations." *Id.* at 34, 659 P.2d at 82. Indeed, an agency, after review of the reliable, probative and substantial evidence in the proceeding, may reject a hearing officer's

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appropriate cases, to adopt those findings); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (holding that there is nothing untoward about a trial court adopting a party's proposed findings of fact and conclusions of law as its own).

recommendations and "ma[ke] its own findings and conclusions based on the same evidence." *Id.*

Therefore, BLNR must determine whether the reliable, probative, and substantial evidence in the record as a whole supports approval of the CDUA. However, and notwithstanding that it is not binding, BLNR should give due consideration to, and be guided by, the HO's FOF/COL, particularly her determinations on the credibility of the witnesses that appeared before her. The RMSAPA provides that "[i]n reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses." RMSAPA § 415(b) (October 15, 2010). Section 415(b) of the RMSAPA is consistent with the well-settled legal principle that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawai'i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted); *see also* Haw. R. Civ. P. 52(b) (providing that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses").

Other jurisdictions have gone even further and held that a hearing officer's credibility determinations are entitled to deference so long as the record supports the determination. In *Amanda J. ex rel. Annette J. v. Clark County School Dist.*, 267 F.3d 877 (9th Cir. 2001), the Ninth Circuit was confronted with the question of whether to affirm the State Review Officer's decision to deviate from the hearing officer's credibility determination of a witness. Joining its colleagues in the Second, Third, Fourth, and Tenth Circuits, the Ninth Circuit held that

> due weight should be accorded to the final State determination . . . unless [the] decision deviates from the credibility determination of a witness whom only the [hearing officer] observed testify. **Traditional notions of deference owed to the fact finder compel this conclusion. The State Review Officer is in no better position than the district court or an appellate court to weigh**

> **the competing credibility of witnesses observed only by the Hearing Officer.** This standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that **a [hearing officer] who receives live testimony is in the best position to determine issues of credibility.**

Id. at 889 (emphases added); *see Doyle v. Arlington Cty Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1992) (holding that where two state administrative decisions differ only with respect to the credibility of a witnesses, the hearing officer is entitled to be considered prima facie correct); *Karl by Karl v. Board of Educ. of Geneseo Cent. School Dist.*, 736 F.2d 873, 877 (2d Cir. 1984) ("There is no principle of administrative law which, absent a disagreement between a hearing officer and reviewing agency over demeanor evidence, obviates the need for deference to an agency's final decision where such deference is otherwise appropriate."); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520-29 (3d Cir. 1995) ("[C]redibility-based findings [of the hearing officer] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."); *O'Toole v. Olathe Dist. Schs. Unified Sch Dist. No. 233*, 144 F.3d 692, 699 (10th Cir. 1998) ("[W]e will give due weight to the reviewing officer's decision on the issues with which he disagreed with the hearing officer, unless the hearing officer's decisions involved credibility determination and assuming, of course, that the record supports the reviewing officer's decision."); *see also McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 824 (Tenn. Ct. App. 2005) (holding that if credibility plays a pivotal role, then the hearings officers' or administrative judge's credibility determinations are entitled to substantial deference); *Stejskal v. Dep't. of Administrative Svcs.*, 665 N.W.2d 576, 581 (Neb. 2003) (holding that agencies may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed

their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility).

Consequently, BLNR should consider and give due regard to the Hearing Officer's credibility determinations so long as those determinations are supported by the reliable, probative, and substantial evidence in the whole record. *See* HRS § 91-14 (providing that administrative findings, conclusions, decisions and orders must be supported by "the reliable, probative, and substantial evidence in the whole record").

III. GENERAL OBJECTIONS TO KIHOI'S EXCEPTIONS

UH Hilo and TIO generally object to Kihoi's Exceptions to the extent that they do not comply with Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b). In many instances, Kihoi's Exceptions do not cite to specific findings or conclusions in the HO FOF/COL, and instead cite to findings or conclusions proposed by UH Hilo and TIO, and/or cite to findings or conclusions proposed by Kihoi herself.

UH Hilo and TIO object to each of the points in Kihoi's Exceptions to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence in the record. UH Hilo and TIO also object to Kihoi's Exceptions to the extent they assert alleged "findings" or "conclusions" that are beyond the scope of issues set forth in Minute Order No. 19 [Doc. 281] or beyond the scope of the authority delegated by BLNR to the Hearing Officer, or by the legislature to BLNR for these proceedings.

UH Hilo and TIO further object to Kihoi's Exceptions to the extent that they raise procedural issues that were previously raised (in some cases, multiple times by multiple parties and through multiple motions for reconsideration) during the course of the CCH, and the arguments were previously fully briefed, considered and rejected by the Hearing Officer or

BLNR.

UH Hilo and TIO further object to Kihoi's Exceptions to the extent they seek to challenge the Final Environmental Impact Statement ("**FEIS**") for the TMT Project. This proceeding is not an EIS challenge; Kihoi's ability to make such a challenge expired long ago, and she cannot use this proceeding to reopen the FEIS approval process. This proceeding pertains only to the CDUA and is entirely governed by applicable constitutional law, HRS Chapter 183, and the Conservation District rules, HAR Title 13, Chapter 5 that are genuinely at issue here.

UH Hilo and TIO also object to Kihoi's Exceptions to the extent they are not supported by the record and/or applicable legal authority. As set forth in the HO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in HAR § 13-5-30(c). The record also shows that the TMT Project is consistent with UH Hilo's and BLNR's obligations under the public trust doctrine, to the extent applicable, as well as under *Ka Pa'akai*, and Article XI, section I and Article XII, section 7 of the Hawai'i Constitution.

Ultimately, it is evident that Kihoi is categorically opposed to the construction of the TMT Project regardless of whether or not it satisfies the legal criteria applicable to the CDUA. No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to Kihoi. That position is not supported by the law.

Appendix A contains general objections to Kihoi's Exceptions, which UH Hilo and TIO hereby incorporate by reference into their response to each of Kihoi's Exceptions, to the extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO respond to Kihoi's Exceptions below. Additionally, to the extent Kihoi has adopted exceptions contained in

Petitioners K. Pisciotta, Mauna Kea Anaina Hou, D. Ward, P. Neves, K. Kanaele, L. Sleightholm, B. Kealoha, C. Freitas, Mehana Kihoi's (collectively "**MKAH, et al.**") *Exceptions to Hearing Officer Riki May Amano's Findings of Fact, Conclusions of Law, and Decision and Order*, filed August 21, 2017 [Doc. 815] ("**MKAH Exceptions**"), UH Hilo and TIO incorporate its responses to the MKAH Exceptions. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections. Pursuant to Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b), UH Hilo and TIO object to all unsupported assertions in Kihoi's Exceptions, and BLNR should disregard all such unsupported assertions.

The FOF/COL and page numbers referenced herein follow those as provided in Kihoi's Exceptions. References to the HO FOF/COL are denoted by the prefix "HO FOF" and "HO COL" for the numbered FOF or COL, respectively, in the HO FOF/COL.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms in the HO FOF/COL.

IV. RESPONSE TO KIHOI'S EXCEPTIONS

A. GENERAL EXCEPTIONS

Kihoi's General Exceptions argue without any support that the Hearing Officer ignored or excluded the evidence presented by the Petitioners and Opposing Intervenors and/or that the Hearing Officer's consideration of the evidence was biased and/or otherwise insufficient. Kihoi also erroneously contends that the Hearing Officer failed to comply with HRS § 91-12 by not explicitly ruling on each proposed finding of fact submitted by the Petitioners and Opposing Intervenors.

First, Kihoi's General Exceptions fail to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of

procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the Hearing Officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. As such, these exceptions should be disregarded.

Second, there is no indication from the HO FOF/COL that the Hearing Officer ignored, failed to consider or improperly excluded the testimony and evidence presented by the Petitioners and Opposing Intervenors. *See* HO FOF 139, 214, 227-28, 235, 238-44, 283-84, 319-21, 342-44, 353, 355, 361-423, 448, 459-61, 463, 490-91, 510, 514, 516, 537-40, 558-60, 608, 618-20, 626-29, 659-669, 685, 692, 694, 698, 700-01, 711, 724-25, 731-32, 736, 753-54, 758-62, 770-829, 852-53, 865-73, 875-76, 878-80, 894-96, 911-19, 939, 950, 953, 960-61, 967-80, 987-89, 992-93, 1000-07, 1012, 1017-25, 1028-32, 1043-46. Kihoi fails to identify any portion of the record that was not duly considered by the Hearing Officer or that would otherwise support this entirely unsupported contention.

To the extent that Kihoi contends that the Hearing Officer improperly weighed the testimony and evidence presented by UH Hilo, TIO, and PUEO over that presented by the Petitioners and Opposing Intervenors, that objection is also unfounded and mischaracterizes the record. It was determined that the background, education, experience, etc. of a particular witness would go to the weight of the witness's testimony. Tr. 10/20/16 at 52:24-53:21. Moreover, "the competence, credibility and weight" of the testimony of all witnesses (including witnesses who represent that they have expertise in one or more subject areas), "is exclusively in the province of the trier of fact." *See Hawai'i Prince Hotel Waikiki Corp. v. City & Cnty. of Honolulu*, 89 Hawai'i 381, 390, 974 P.2d 21, 30 (1999) (quoting *State v. Pioneer Mill Co.*, 64 Haw. 168, 179, 637 P.2d 1131, 1139 (1981)). As the presiding officer of the evidentiary hearing, it is the

Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, determine whether it is credible, not credible, or more or less credible than other evidence. Kihoi appears to argue that the Hearing Officer's credibility determinations evidence bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact]."). The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawai'i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted). Kihoi does not cite to anything in the record to show that the Hearing Officer's credibility determinations are not supported by the reliable, probative, and substantial evidence in the whole record.

It is also well established that an adverse ruling does not evidence bias. *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."); *James W. Glover, Ltd. v. Fong*, 39 Hawai'i 308, 316 (1952) (stating that "mere adverse rulings, even if erroneous[,]" would not constitute a "basis for disqualification"). The Hearing Officer accepting proposed findings of fact or conclusions, even if adopted verbatim, does not establish Hearing Officer bias. *See generally, Kumar v. Kumar*, 2014 WL 1632111, at *8 (Haw. Ct. App. 2014) (holding that a court's substantial adoption of a proposed decree did not establish an appearance of impartiality, *i.e.*, bias).

Third, a plain reading of HRS § 91-12 demonstrates that it is inapplicable to the HO FOF/COL. HRS § 91-12 governs decisions rendered by agencies, not by hearing officers. Moreover, the law pertaining to submitting proposed findings is clear that "[i]t is not indispensable that there be a separate ruling on each proposed finding of fact." *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 675 P.2d 784, 792, 4 Haw.App. 633, 644 (1983) (citations omitted); *see also Mitchell v. BWK Joint Venture*, 57 Haw. 535, 542, 560 P.2d 1292, 1296 (1977) (holding that a separate ruling on each party's proposed findings is not required by HRS § 91-12). In any event, the HO FOF/COL specifically states that "any proposed finding of fact submitted by the parties which is not specifically incorporated is rejected ..." for one or more enumerated reasons. HO FOF/COL at 7. Accordingly, it is fundamentally incorrect for Kihoi to claim that the Hearing Officer did not rule on all proposed findings of fact; there is simply nothing in the authority cited that indicates that the HO FOF/COL does not comply with applicable law.

Finally, to the extent Kihoi contends that the Hearing Officer ignored her proposed FOF, such contention is incorrect. While Kihoi's exact proposed language may not have been used in the HO FOF/COL, the HO FOF/COL makes clear that all evidence received into the record was duly considered. HO FOF/COL at 7. Moreover, Kihoi's testimony as set forth in the record and her proposed FOF, to the extent that they were consistent with the evidence in the record, were incorporated into the HO's FOF/COL. *See* HO FOF 698, 802-03, 916, and 980.

B. **HO FOF 11 – MEHANA KIHOI**

Kihoi takes exception to HO FOF 11, which is a description of Kihoi, claiming that it failed to consider other facts relevant to her interests. Notably, Kihoi does not dispute that FOF 11 contains accurate information and is supported by reliable, credible, and substantial evidence. In fact, the majority of HO FOF 11 contains a quotation from Kihoi's own Hearing Statement

(Exhibit F-1), detailing her interests. Instead, Kihoi's exception is based upon her belief that her interests should be detailed in 20 additional findings. This exception mischaracterizes the HO FOF/COL in that it implies that the Hearing Officer ignored Kihoi's relevant testimony. This is not the case. *See* HO FOF 698 (noting that Kihoi testified that building the TMT Project on Mauna Kea offends and is contrary to the beliefs of some members of the community); FOF 802-03 (describing Kihoi's background and practices on Mauna Kea); FOF 980 (noting Kihoi's testimony regarding her experience with domestic violence). Nothing in the applicable rules requires the level of detail that Kihoi is seeking. The purpose of HO FOF 11 (and the entire Section I of the HO Proposed Order) is to identify each of the parties, and HO FOF 11 sufficiently and accurately summarizes Kihoi's interests, which are not in dispute. The interests of efficiency and economy dictate against the inclusion of 20 additional findings. If such were allowed, the HO Proposed Order would have contained more than the 300+ pages already required to adequately evaluate the CDUP.

Further, it is the Hearing Officer's duty to only consider admissible evidence and disregard evidence that is inadmissible. *See State v. Antone*, 62 Haw. 346, 355, 615 P.2d 101, 108 ("[I]t is presumed that the presiding judge will have disregarded incompetent evidence and relied upon that which was competent.") (citations omitted). Therefore, to the extent that the findings of fact proposed by Kihoi concern the ownership of and title to the lands related to this contested case hearing, these proposed findings of fact were properly omitted as they are irrelevant pursuant to Minute Order No. 19 [Doc. 281].

Additionally, as the finder of fact, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, whether it be credible, not credible, or more or

less credible than other evidence. This exception attempts improperly to portray the Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawaii 308, 321, 926 P.2d 599, 612 (1996)("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].") The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007) (citation omitted). Therefore, to the extent Kihoi's proposed findings of fact involve credibility determinations, these findings were properly omitted as the Hearing Officer made her own credibility determination. *See* HO FOF 1015.

For these reasons, HO FOF 11 is accurate and supported by the evidence in the record and the citations therein.

C. HO FOF 40 – PROCEDURAL HISTORY

Kihoi takes exception to HO FOF 40, claiming that it "failed to consider other facts relevant by the Hawai'i Supreme Court opinion." However, it is unclear exactly what Kihoi is objecting to in HO FOF 40. HO FOF 40 provides that "the Hawai'i Supreme Court vacated the circuit court's order and final judgment because the Board acted improperly when it issued the CDUP before holding the contested case hearing" and "the matter was remanded to the circuit court to further remand to the Board 'so that a contested case hearing can be conducted before the board or a new hearing officer...." This is an accurate statement that succinctly characterizes the Hawaii Supreme Court's opinion in *Mauna Kea Anaina Hou v. BLNR*, and Kihoi does not

state how HO FOF 40 should be changed other than to claim that "less than full consideration" was given to the record.

Though it is unclear, Kihoi then appears to propose 14 findings. These 14 findings address the selection process of the Hearing Officer, notice provided for the pre-hearing conferences, the number of evidentiary hearing days, and the similarity of the CDUP applications between the first and second contested case hearings, among other things. Those matters, however, are accurately and sufficiently addressed in HO FOF Sections II. A. and II. B, which Kihoi does not appear to challenge. For instance, HO FOF 45 identifies the motions seeking to disqualify the Hearing Officer and the orders denying those motions; however, Kihoi does not challenge HO FOF 45.

Moreover, those 14 findings in Kihoi's Exceptions are simply reassertions of proposed findings that Kihoi had already proposed and the Hearing Officer had already reviewed and rejected. For instance, Kihoi reasserts her proposed finding of fact (number 12) regarding the credibility of James Hayes, verbatim, but does not further set forth the grounds for her disagreement with the Hearing Officer's conclusion that James Hayes was a credible witness, as required by HAR 13-1-42(b). In HO FOF 208-213, the Hearing Officer determined the project's compliance with HRS Chapter 343, and in HO FOF 222-245, determined there was evidence of substantial and extensive consultation for the project, based upon Hayes' credible testimony, among other things. Kihoi does not challenge these findings at all, thereby waiving these arguments.

For these reasons, HO FOF 40 is accurate and supported by the evidence in the record and the citations therein.

D. HO FOF 48 – FIRST PRE-HEARING CONFERENCE

Kihoi takes exception to HO FOF 48, reasserting that the notices for the first pre-hearing conference did not comply with HRS 91-9.5. However, HRS 91-9.5 does not apply to pre-hearing conferences, and this issue was already thoroughly addressed in proposed findings and objections submitted by the parties. For this reason, HO FOF 48 is accurate and supported by the evidence in the record and the citations therein.

E. HO FOF 62 - STANDING

Kihoi takes exception to HO FOF 62, claiming: (1) that the contested case began on May 16, 2016 without all the parties;" and (2) that PUEO should not have been admitted as a party in this proceeding.

First, it is not correct that the contested case improperly began without all parties. Kihoi cites to Minute Order No. 5 [Doc. 16], which scheduled a ***pre***-hearing conference on May 16, 2016. It is undisputed that all interested parties were subsequently allowed to file requests to intervene and fully participate in the contested case proceedings. Kihoi's standing was not contested and she was allowed to fully participate in the contested case hearing.

Second, HAR § 13-1-31 provides BLNR with authority to admit parties "if it finds that the requestor's participation will substantially assist the board in its decision making." In Minute Order No. 13 [Doc. 115], the hearing officer found that PUEO satisfied this standard. As evident in the HO FOF/COL, PUEO, a nonprofit formed by native Hawaiian cultural practitioners who support the pursuit of educational opportunities, did assist the hearing officer. *See* HO FOF 294-300, 699. If PUEO opposed the TMT, Kihoi would have no problem agreeing that PUEO's participation assisted the hearing officer. It is only because PUEO has a different perspective, as a native Hawaiian nonprofit, than Kihoi that she is challenging PUEO's participation. However, that is not the standard for admitting parties under HAR 13-1-31.

Instead, a different perspective adds depth of understanding, thereby satisfying the standard in HAR 13-1-31 to admit PUEO as a party.

Additionally, Kihoi incorrectly claims that the Hearing Officer failed to rule on any of Kihoi's motions in a timely manner, specifically her Motion for Reconsideration to Deny the Intervention of PUEO as a Party. Notwithstanding that no legal authority requires a hearing officer to rule on motions within a specific timeframe,[2] the Hearing Officer timely ruled on Kihoi's repeated motions seeking to deny PUEO's intervention. Kihoi filed her *Motion to Deny the Intervention of Perpetuating Unique Educational Opportunities as a Party to the Contested Case Hearing* [Doc. 98] on July 18, 2016, which was denied by oral ruling on August 5, 2016. Tr. 8/5/16 at 81:5-88:22. Kihoi then filed a *Motion for Reconsideration* [Doc. 209] on August 12, 2016, which was denied by oral ruling on August 29, 2016. Tr. 8/29/16 at 9:3-9:8. Kihoi then filed her **second** *Motion for Reconsideration* on October 15, 2016, which was then denied by Minute Order No. 60 [Doc. 683]. It is disingenuous for Kihoi to imply that Minute Order No. 60 was the Hearing Officer's sole disposition of Kihoi's *Motion to Deny the Intervention of Perpetuating Unique Educational Opportunities as a Party to the Contested Case Hearing*, when the record clearly shows that the motion had been already denied twice before Minute Order No. 60 was issued.

For these reasons, HO FOF 62 is accurate and supported by the evidence in the record and the citations therein.

F. HO FOF 71 – SETTING THE ISSUES

Kihoi takes exception to HO FOF 71, claiming that limiting the hearing to the eight

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[2] *See* Minute Order No. 39 at 3 [Doc. 406] ("No authority mandates a deadline for issuing orders on motions in contested cases.... The fact that the Hearing Officer has not yet ruled on two motions is not evidence of an appearance of impropriety.")

criteria in HAR 13-5-30(c) was error and that the hearing officer "failed to consider the genealogical, ancestral, and spiritual connection that many descendants may have to this unique and sacred location." Kihoi is incorrect in her assertions. In Minute Order No. 19, the Hearing Officer limited the issues to 3 different areas that she was required by law to consider in reviewing the CDUP:

a. Is the proposed land use, including the plans incorporated in the application, consistent with Chapter 183C of the Hawaii Revised Statutes, the eight criteria in HAR 13-5-30(c), and other applicable rules in HAR, Title 13, Chapter 5, Conservation District?

b. Is the proposed land use consistent with Article XII, Section 7 of the Hawaii State Constitution and *Ka Pa'akai O Ka'aina v. Land Use Comm'n, State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000)?

c. Is the proposed land use consistent with Article XI, Section 1 of the Hawaii State Constitution and the public trust doctrine?

Under the foregoing, the Hearing Officer considered more than just the eight criteria in HAR 13-5-30(c), including native Hawaiian cultural and spiritual practices. The Hearing Officer only excluded issues that were not relevant to the foregoing, including issues regarding the sovereignty of the Hawaiian kingdom pursuant to her authority to manage the contested case. *See* HO COL 38-41. Accordingly, the Hearing Officer took into account the other factors that Kihoi is raising in her Exceptions.

For this reason, HO FOF 81 and 82 are accurate and supported by the evidence in the record and the citations therein.

G. HO FOF 81, 82 – SITE VISIT

Kihoi takes exception to HO FOF 81 and 82, claiming that the site visit was "inaccurate, incomplete, and bias[ed]" and that "what was supposed to be a 4 hour visit, was completely

rushed and ended in 1.5." HO FOF 81, however, is simply a straightforward finding regarding the date the site visit took place and the areas visited during the site visit. There is nothing in HO FOF 81 that is inaccurate. Instead, Kihoi appears to take most issue with HO FOF 82, which provides that the hearing officer "had a reasonable period of time" and the site visit was "reasonable and appropriate for the purposes of the case." Kihoi's exceptions to HO FOF 82, however, do not contain one single evidentiary or record citation. She cites only her uncorroborated opinion that people should have been allowed to record video and take pictures at the site visit and that cultural protocol was not conducted during the site visit. However, it is undisputed that Kihoi did not attend the site visit and thus her representations are based off of hearsay and not her own personal knowledge. Moreover, although Kihoi was given an opportunity to testify, Kihoi did not relate these opinions that could have been then subjected to cross-examination. Kihoi's attempt to inject testimony into the record outside of the evidentiary hearing proceeding is improper.

Furthermore, the Hearing Officer is given full authority over the conduct of the hearing process, including the site visit. *See* HO COL 38-42. In her discretion, the Hearing Officer determined the scope and procedures for the site visit. As she expressly found, the Hearing Officer had a reasonable period of time and conditions for viewing the general landscape and areas proposed for the TMT Project. The site visit was reasonable and appropriate for purposes of this proceeding. *See* HO FOF 77-82.

For these reasons, HO FOF 81 is accurate and supported by the evidence in the record and the citations therein.

H. HO FOF 101 – EVIDENTIARY HEARING

Kihoi takes exception to HO FOF 101, claiming that it was biased and a violation of due

process to limit cross-examinations to 30 minutes. HAR 13-1-32(h), however, expressly provides the Hearing Officer with the authority to control the conduct of the hearing, including imposing time limits on witness examinations in order to avoid unnecessary or repetitive evidence. With a proceeding consisting of more than 70 witnesses and more than 20 parties, the Hearing Officer appropriately exercised her authority under this rule; imposition of this rule was necessary for the orderly administration of the proceeding and does not evidence any bias. Moreover, the Hearing Officer permitted cross-examination to go beyond this time limit when there was good cause shown. As such, Kihoi has not (nor is she able to) demonstrate that any relevant testimony was excluded due to the Hearing Officer's general enforcement of this time limit, or that any prejudice was suffered.

For these reasons, HO FOF 101 is accurate and supported by the evidence in the record and the citations therein.

I. HO FOF 117, 118, 120 – POST-HEARING

Kihoi takes exception to FOF 117, 118, and 120, claiming that the Hearing Officer "failed to consider the voluminous legal and factual arguments" and that there were objections to the 30-day period to file proposed findings and conclusions. Kihoi's unsupported and ambiguous argument ignores the fact that the Hearing Officer sat through 44 days of witness questions and answers, including questions from the Hearing Officer which demonstrated her detailed knowledge of the arguments and evidence presented. It ignores the fact that the Hearing Officer advised all parties on numerous occasions to begin reviewing the record and preparing findings and conclusions during the course of the hearing, without waiting until the last minute. It ignores the fact that the Hearing Officer exercised discretion and afforded the parties 41 days after the transcripts to submit proposed findings and conclusions, even though HAR 13-1-38(a)

prescribed a 10-day deadline. There is nothing inaccurate in HO FOF 117, 118, or 120, and there is nothing improper about the Hearing Officer's actions in providing the parties with significant notice and time to prepare findings and conclusions in this matter.

To the extent that Kihoi suggests that the Hearing Officer did not consider the parties' post-hearing submissions or that the Hearing Officer's adoption of substantial portions of UH-TIO's Joint Proposed FOF/COL was somehow improper, such contentions are unsupported by the record and legal authorities. First, as set forth therein, the Hearing Officer considered all the evidence presented, and the resulting HO FOF/COL are amply supported by evidence in the record. HO FOF/COL at 7. Second, the Hearing Officer accepting proposed findings of fact or conclusions, even if adopted verbatim, does not establish Hearing Officer bias. *See generally, Kumar v. Kumar*, 2014 WL 1632111, at *8 (Haw. Ct. App. 2014) (holding that a court's substantial adoption of a proposed decree did not establish an appearance of impartiality, *i.e.*, bias); *Howard v. Howard*, 259 P.2d 41, 42 (Cal.App. 2 Dist. 1953) (stating that courts may adopt proposed finding in total or in part); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 376 (Colo. 1994) (holding that the adoption of a proposed FOF/COL is not necessarily improper, and that "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel.") (citations omitted); *County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015)

(holding that there is nothing untoward about a trial court adopting a party's proposed findings of fact and conclusions of law as its own).

For these reasons, HO FOF 117, 118, and 120 are accurate and supported by the evidence in the record and the citations therein.

J. HO FOF 297 – EDUCATIONAL AND EMPLOYMENT OPPORTUNITIES

Kihoi takes exception to HO FOF 297, claiming that the hearing officer failed to take into account an alleged conflict of interest. Just as she asserted in her proposed findings and conclusions, Kihoi sets forth proposed findings regarding Keahi Warfield's nonprofit organization, Keaukaha One Youth ("KOYD"), which has leased property from Makani Kai (owned by the Roehrigs) since 2011; however, Kihoi's proposed findings are misleading, presented out of context, and are not material to this proceeding for a CDUP. Importantly, Kihoi neglects to mention that the Pauahi Foundation and the Hawaii Community Foundation, and not TIO, decides which local organizations receive THINK Fund monies. *See* Tr. 2/15/17 at 236:22-237:8. Accordingly, there is no conflict of interest in any educational or employment opportunities resulting from Mr. Warfield's testimony in this proceeding.

Moreover, as the finder of fact, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, whether it be credible, not credible, or more or less credible than other evidence. This Exception attempts improperly to portray the Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawaii 308, 321, 926 P.2d 599,

612 (1996)("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].") The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007)(citation omitted).

For these reasons, HO FOF 297 is accurate and supported by the evidence in the record and the citations therein.

K. HO FOF 341 – MITIGATION MEASURES

Kihoi takes exception to HO FOF 341, claiming that the Hearing Officer "failed to consider legal and factual arguments, and relevant material presented in the contested case hearing." As an initial matter, HO FOF 341 contains a description of the cultural and natural resources training that will be required of TMT project staff and construction workers. Kihoi does not "connect the dots" to explain what her exact objection is with HO FOF 341.

It appears that Kihoi is essentially taking exception with the fact that the Hearing Officer found certain witnesses to be credible, and other witnesses to lack credibility. In particular, Kihoi is asking that the testimony of Kalani Flores regarding impact of the project be given more weight. However, as the finder of fact, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, whether it be credible, not credible, or more or less credible than other evidence. Exception attempts improperly to portray the Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil

trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawaii 308, 321, 926 P.2d 599, 612 (1996) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].") The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007)(citation omitted).

The credible and substantial evidence in the record demonstrates that there will not be a substantial adverse impact to customary sites and/or alleged traditional and customary practices. *See* UHH-TIO FOF 503-610; 611-744; 775-795; UHH-TIO COL 177-217.

The conclusion that the proposed mitigation measures are sufficient is supported by the record. HO FOF 316-318, 322-341, 345, 346-352; HO COL 111-112, 119, 123, 125, 140, 164, 172, 206, 208, 210-213, 220-221, 241-243, 249, 258; HO COL 125 ("The BLNR has recognized that it may approve a proposed land use despite some environmental impacts to the Conservation District, provided that the project incorporates appropriate mitigation measures and conditions. *Findings of Fact, Conclusions of Law, Decision and Order, In re Conservation District Use Application for Hawaiian Electric Company, Inc. to Construct a 138-kV Transmission Line at Wa'ahila Ridge, Honolulu, Hawai'i*, DLNR File No. OA-2801 (June 28, 2002) ("**Wa'ahila Ridge**") at 64 n.13; *see also Morimoto v. BLNR*, 107 Hawai'i 296, 305-06, 113 P.3d 172,181-82; *Stop H-3 Ass'n v. State Dep't of Transp.*, 68 Haw. 154, 158, 706 P.2d 446, 449 (1985)."). For these reasons, HO FOF 340 is accurate and supported by the evidence in the record and the citations therein.

L. HO FOF 394 – MAUNA KEA IS SACRED

Kihoi takes exception to HO FOF 394, which contains a quotation from the testimony of

Hawane Rios, a witness called by Kihoi. Kihoi does not appear to dispute the substance of what is contained in HO FOF 394, but instead, is arguing that HO FOF 394 should contain another 10 paragraphs and almost 4 additional pages of quotations from Hawane Rios. Kihoi does not state why this information should be included, and a reasonable review of HO FOF 394 indicates that it contains an appropriate amount of information about Hawane Rios. Again, with a proceeding of more than 70 witnesses and more than 20 parties, the interests of efficiency and economy dictate against providing a 5-page biography of each and every witness presented.

The HO FOF/COL discusses at length many of the views presented through testimony at the CCH regarding the cultural and religious significance of Mauna Kea. *See* HO FOF 361-423. The fact that some may hold and/or express such religious or spiritual beliefs is not in dispute; however, it cannot be generalized as true for all people or even all Hawaiian people. The legal impact of such beliefs is also clearly in dispute.

For these reasons, HO FOF 394 is accurate and supported by the evidence in the record and the citations therein.

M. HO FOF 663 – ARCHAEOLOGICAL AND HISTORIC RESOURCES

Kihoi takes exception to HO FOF 663, claiming that it "mischaracterizes the testimony of Ms. Hawane Rios" and that there has been a "disregarding" of evidence from Ms. Rios. It is important to point out here that there is a significant difference between "disregarding" evidence, which did not happen in this proceeding, and making credibility determinations, which the Hearing Officer did in this case pursuant to her role and authority. The alleged observations of Ms. Rios through those from the "spirit realm" are not scientifically or logically verifiable and have not been supported by admissible, reliable, probative and substantial evidence. The Hearing Officer had the discretion to consider the credibility of all witnesses and the weight of

the evidence, and HO FOF 663 is supported by the reliable, probative and substantial evidence in the record.

N. HO FOF 684, 802, 803, 804 – CULTURAL RESOURCES AND PRACTICES

Kihoi takes exception to HO FOF 684, which stated that there are no known customary and traditional practices within the Area E location site of the TMT Observatory, and HO FOF 802, 803, and 804, which contained a description of Kihoi's testimony. There is nothing in these findings that is inaccurate. Nowhere in Kihoi's Exceptions does she identify with any specificity or record citations any customary and traditional practices occurring within the Area E location site of the TMT Observatory. Instead, Kihoi only makes general statements that there are practices occurring in the general summit region. However, merely asserting that certain practices are traditional and customary as provided under article XII, section 7 of the Hawai'i State Constitution does not make them so; evidence is required to show that the specific requirements of such a designation are met. *See State v. Hanapi*, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998) (noting that those who assert native Hawaiian rights based on customary and traditional practices have the burden to establish that the claimed rights are constitutionally protected under the three part test).

The credible and substantial evidence in the record demonstrates that Kihoi did not start conducting practices on Mauna Kea until 2012, and that Kihoi had never been to the proposed site of the TMT Observatory until the groundbreaking ceremony on October 7, 2014. Tr. 2/14/17 at 109:1-25, 120:1-121:6, 118:1-8. Additionally, Kihoi fails to identify any other witness whose sworn testimony indicates any kind of practice within the Area E location site of the TMT Observatory. Also, as with other witnesses, Kihoi's general dissatisfaction seems to stem from her belief that her testimony should have been described in a more lengthy fashion;

however, the findings regarding her testimony are sufficiently detailed and appropriate in light of the significant volume of testimony and witnesses in this proceeding.

For these reasons, HO FOF 684, 802-04 are accurate and supported by the evidence in the record and the citations therein.

O. HO COL 277, 278, 296, 297 – EIGHT CRITERIA OF HAR 13-5-30(C)

Kihoi takes exception to HO COL 277, 278, 296, and 297, which conclude that the TMT Project will not be materially detrimental to the public health, safety, and welfare. Kihoi restates testimony from witnesses who she thinks should have been afforded more credibility. However, Kihoi ignores the fact that many of the witnesses she is identifying did not provide any reliable, probative and substantial evidence on which the Hearing Officer could rely. For example, Dr. Taualii failed to provide the data on her study, was not aware of any peer review studies that supported her claims of trauma, and admitted that her own study was still undergoing the independent scrutiny of the peer review process. Tr. 1/24/17 at 37, 48, 132-137. Professor Kaolokua admitted that he did not perform any clinical examinations and was not aware of any studies regarding partitioning the source of alleged stress. Tr. 2/23/17 at 121-23, 143, 164-68, 175. Thus, the record supports the Hearing Officer's finding that Petitioners and Opposing Intervenors did not offer reliable, probative, substantial, or credible evidence, scientific or otherwise, to suggest that the TMT Project will be harmful to the health, safety, and welfare of native Hawaiians or anyone else. HO FOF 1015.

For these reasons, HO COL 277, 278, 296, and 297 are accurate and supported by the evidence in the record and the citations therein.

P. HO COL 305 – PUBLIC TRUST DOCTRINE

Kihoi takes exception to HO COL 305, which provides that the public trust doctrine does

not apply to consideration of the TMT Project. Kihoi ignores the fact that the public trust doctrine has not been expanded beyond water resources in Hawaii, and that the reliable, credible, and substantial evidence established that the TMT Project would not impair any water resource. HO COL 304. However, Kihoi's exception is otherwise irrelevant as the Hearing Officer properly found that even if the public trust doctrine were applicable, the reliable, credible, and substantial evidence established that the TMT Project is consistent with the public trust doctrine. *See* HO COL 306-315. For these reasons, HO COL 305 is accurate and supported by the evidence in the record and the citations therein.

V. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the testimony of UH Hilo's and TIO's witnesses, UH Hilo's and TIO's evidence, the examination of the Petitioners' and Opposing Intervenors' witnesses, and in UH Hilo's and TIO's other filings, and the HO FOF/COL, UH Hilo and TIO respectfully jointly request that the BLNR reject Kihoi's Exceptions, and adopt the HO FOF/COL as revised to reflect UH Hilo's and TIO's respective proposed exceptions filed on August 21, 2017.

DATED: Honolulu, Hawai'i, September 11, 2017.

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Appendix A

General Responses to Petitioners'/Opposing Intervenors' Exceptions	
Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b)	The Exception should be disregarded because it fails to (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. The grounds not cited or specifically urged are waived.
Citation does not support the proposition.	The citation offered by Petitioners/Opposing Intervenors does not support the Exception.
Estoppel/Improper Reconsideration	The Exception or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling,
Inaccurate/False	The Exception or a portion thereof is inaccurate or false.
Incomplete.	The Exception is materially incomplete.
Irrelevant/Inapplicable.	The information in the Exception is irrelevant or inapplicable in this contested case proceeding. *See* Minute Order No. 19 [Doc. 281].
Lack of Jurisdiction	The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
Mischaracterization.	The Exception mischaracterizes legal authority or the contents of the record.
Misleading. Partial quotation.	The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
Misleading. Presented out of context.	The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
Misrepresentation	The Exception affirmatively misrepresents legal authority or the contents of the record.

Not credible.	The Exception is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the Exception.
Not in dispute.	Either (1) the Exception is not at issue in this proceeding, or (2) standing alone, the Exception is not objectionable. The designation of any individual Exception as "not in dispute" does not and should not be construed as an admission of said Exception or a concession that said Exception should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts.
Not in evidence.	The Exception asserts "facts" and/or cites documents that are not in evidence.
Unsupported/Unsubstantiated	The Exception is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process.

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	BLNR Contested Case HA-16-002 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached document was served upon the following parties by the means indicated:

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