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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 OPPOSING INTERVENOR HARRY FERGERSTROM'S EXCEPTION TO THE

ENTIRE PROCESS AND CONCLUSIONS, RECOMMENDATIONS [DOC. 805]; APPENDIX A; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO OPPOSING INTERVENOR HARRY FERGERSTROM'S EXCEPTION TO THE ENTIRE PROCESS AND CONCLUSIONS, RECOMMENDATIONS [DOC. 805]

The University of Hawai'i at Hilo ("**UH Hilo**") and Intervenor TMT International Observatory, LLC ("**TIO**") jointly submit the following brief in response to Opposing Intervenor Harry Fergerstrom's ("**Fergerstrom**") *Exception to the Entire Process and Conclusions, Recommendations*, filed August 21, 2017 [Doc. 805] ("**Fergerstrom'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

Fergerstrom 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

> 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,

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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).

probative and substantial evidence in the proceeding, may reject a hearing officer's 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 FERGERSTROM'S EXCEPTIONS

UH Hilo and TIO generally object to Fergerstrom's Exceptions to the extent that they do not comply with Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b).

UH Hilo and TIO object to each of the points in Fergerstrom'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 Fergerstrom'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 Fergerstrom'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 Fergerstrom'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; Fergerstrom's ability to make such a challenge expired long ago, and he 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 Fergerstrom'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 Fergerstrom 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 Fergerstrom. That position is not supported by the law.

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

In addition to the general objections in Appendix A, UH Hilo and TIO respond to Fergerstrom's Exceptions below. 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 Fergerstrom's Exceptions, and BLNR should disregard all such unsupported assertions.

The FOF/COL and page numbers referenced herein follow those as provided in Fergerstrom'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 FERGERSTROM'S EXCEPTIONS

A. Fergerstrom's vague "exception" apparently relating to the procedures in this matter should be summarily denied

Fergerstrom's "exception" "to the way this entire process has been conducted" does not cite any specific findings or conclusions from the HO FOF/COL; fails to comply with Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b); fails to provide any factual or legal basis; and is too vague and ambiguous to address in any detail. To the extent that this "exception" objects to any or all of the procedures ordered by the Hearing Officer or BLNR in this matter, Fergerstrom fails to raise any evidence or authority that the procedures violated any of the substantial rights of the parties, did not comport with applicable law, or were otherwise improper. Accordingly, to the extent that BLNR considers this broad and vague "exception," it should be denied.

B. Fergerstrom's "exception" apparently relating to NHPA Section 106 should be denied

Fergerstrom's exception that "The [Hearing Officer] conclusions and recommendations all could have been addressed thru [sic] the 106 consultation process," appears to refer to Section 106 of the National Historic Preservation Act ("**NHPA Section 106**"). As Fergerstrom plainly fails to comply with the requirements of Minute Order No. 103 and HAR § 13-1-42(b) with

respect to this exception, it should also be summarily denied. Assuming BLNR considers the substance of this exception, however, it should still be denied.

As noted by the Hearing Officer, NHPA Section 106 generally requires federal agencies having jurisdiction over a proposed federal or federally-assisted undertaking to take into account the effect of the undertaking on any historic property prior to the expenditure of federal funds. *See* 54 U.S.C. § 306108; HO COL 438. As determined by the Hearing Officer, NHPA Section 106 applies to federal agencies and private projects that use federal funding. HO FOF 567 (citing Tr. 12/20/16 at 136:22 – 137:3 (Rechtman)).

An "undertaking" for purposes of NHPA Section 106 means:

> ...a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –
>
> (1) those carried out by or on behalf of the Federal agency;
>
> (2) those carried out with Federal assistance;
>
> (3) those requiring a Federal permit, license, or approval; and
>
> (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320; 36 CFR § 800.16(y); HO COL 440.

The head of an applicable federal agency (in this case, the National Science Foundation ("**NSF**")) "shall determine whether the proposed Federal action is an undertaking," and the agency head "shall afford the [federal] Advisory Council [on Historic Preservation] a reasonable opportunity to comment on such undertakings." 36 CFR § 800.3(a); 54 U.S.C. §§ 300303, 306108; HO COL 438 – 443.

The Hearing Officer determined that the NSF concluded that its activities and funding relating to the TMT Project did not constitute an "undertaking" requiring review under NHPA Section 106, and the federal Advisory Council on Historic Preservation "[saw] no basis for

objecting to NSF's conclusions." HO COL 443 – 444 (citing Exhibits A-124, A-125 and A-126). That is because, as the Hearing Officer found, although NSF previously awarded a planning grant to TMT Corporation, the grant specifically stated that no funds were to be used for construction, and TIO has not applied for any construction funding from NSF. FOF 568 (citing Tr. 1/3/17 at 33:17 – 19, 88:7 – 90:25, 228:2 – 15 (Dr. Sanders); Ex. A-126). Further, the Hearing Officer determined that NSF was not involved in the design of the TMT Observatory and NSF has stated that it has made no commitment to the construction of the TMT Observatory. FOF 568 (citing Tr. 1/3/17 at 88:10 – 25, 227:18 – 25, 177:9 – 20 (Dr. Sanders); Ex. A-125).

Thus, the Hearing Officer properly determined that "NHPA Section 106 is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA" (HO COL 448) because: there was no federal nexus for the TMT Project requiring or allowing NHPA Section 106 compliance; consultation under NHPA Section 106 was not required nor allowed for the TMT Project; and neither TIO nor UH Hilo had an obligation or the authority to engage in a NHPA Section 106 review of the TMT Project nor determine whether the TMT Project or NSF's activities and funding constituted an undertaking under NHPA Section 106. *See* HO FOF 567 (citing Tr. 12/20/16 at 211:1 – 11 (Rechtman)); HO FOF 569 (citing Exs. A-124, A-125 and A-126; Tr. 12/19/16 at 30:2 – 31:7, 227:13 – 228:15 (Dr. Stone); Tr. 1/3/17 at 33:14 – 19, 88:8 – 90:6 (Dr. Sanders)); HO COL 446 – 447.

As Fergerstrom fails to cite any evidence or authority to dispute the reliable, probative, substantial, and credible evidence in the record (or the Hearing Officer's findings and conclusions) with respect to NHPA Section 106, his exception on this issue must be denied. Given Fergerstrom's vague reference to the "106 consultation process," to the extent that this "exception" is intended to refer to any other law or "process," in addition to, or other than,

NHPA Section 106, BLNR should deem the exception waived and denied.

C. Fergerstrom's "exception" relating to the application of, and compliance with, unspecified "federal law" should be denied

Finally, Fergerstrom appears to argue that applicant UH Hilo is not complying with unspecified "Federal Laws," but, as with his other "exceptions," Fergerstrom fails to comply with the requirements of Minute Order No. 103 and HAR § 13-1-42(b), and his exception on this issue should be summarily denied. Assuming BLNR considers the substance of this "exception," however, it should still be denied.

To the extent this "exception" is intended to apply to NHPA Section 106, the exception must be denied for the reasons stated in Section IV.B., *supra*.

In addition to NHPA Section 106 discussed above, Petitioners and Opposing Intervenors claimed in this proceeding that the evaluation of the cumulative impacts and proposed mitigation measures of the TMT Project should be guided by the approach applied by federal agencies pursuant to the federal National Environmental Policy Act ("**NEPA**"), which governs the preparation of environmental impact statements and other procedures by *federal agencies* to assess the environmental effects of proposed *federal action*. *See* 42 U.S.C. § 4331; HO COL 449. To the extent this "exception" is intended to apply to NEPA, the exception must be denied.

By its terms, NEPA only applies to environmental impact statements and related procedures by *federal* agencies to assess environmental effects of proposed *federal* action, and the Hearing Officer properly determined that there was no federal nexus with the TMT Project that required NEPA compliance. HO FOF 567 (citing Tr. 10/25/16 at 139:12 – 40:14, 157:2 – 162:4, 182:6 – 183:25 (Hayes)). Moreover, since it is clear that NEPA does not apply to the TMT Project (and none of the parties argued otherwise), the Hearing Officer properly rejected the Petitioners' and Opposing Intervenors' argument that NEPA should "guide" the approach for

the evaluation of the TMT Project' cumulative impacts:

> 450. Although none of the Petitioners and Opposing Intervenors claimed in this proceeding that the TMT Project is subject to NEPA (and the Hearing Officer affirmatively concludes that the TMT Project is not subject to NEPA), the Petitioners and Opposing Intervenors claimed that the evaluation of the cumulative impacts and proposed mitigation measures of the TMT Project should be guided by the approach applied by federal agencies pursuant to NEPA. *See* Ex. B.01s.
>
> 451. Inasmuch as NEPA does not apply to the TMT Project and the preparation of the EIS and other documents related to the project, and does not apply to the analysis of the cumulative impacts and proposed mitigation measures at issue in this proceeding, NEPA (and the approach employed by federal agencies under NEPA) is irrelevant and immaterial to the issue before the BLNR of whether or not to grant the CDUA.

HO COL 450-451.

As Fergerstrom fails to cite any evidence or authority to dispute the Hearing Officer's findings and conclusions (nor the reliable, probative and substantial evidence in the record) on this issue, his exception – to the extent it is applicable to NEPA – must be denied.

To the extent that Fergerstrom's broad and vague "exception" relating to the application of, and compliance with, "federal laws" is intended to raise any other issue relating to the application of (or compliance with) federal law relating to UH Hilo, TIO, Department of Land and Natural Resources, BLNR and/or in any manner related to the TMT Project, the exception should be deemed waived and denied by failure to comply with Minute Order No. 103 and HAR § 13-1-42(b).

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 BLNR reject Fergerstrom's Exceptions in its entirety, 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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