

WATANABE ING LLP
A Limited Liability Law Partnership

J. DOUGLAS ING 1538
BRIAN A. KANG 6495
ROSS T. SHINYAMA 8830
First Hawaiian Center
999 Bishop Street, Suite 1250
Honolulu, Hawaii 96813
Telephone No.: (808) 544-8300
Facsimile No.: (808) 544-8399
douging@wik.com
bkang@wik.com
rshinyama@wik.com

Attorneys for
TMT INTERNATIONAL OBSERVATORY, LLC

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2017 SEP 11 A 11:17

DEPT. OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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'ohē Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

TMT INTERNATIONAL
OBSERVATORY, LLC'S RESPONSE TO
INTERVENOR PERPETUATING
UNIQUE EDUCATIONAL
OPPORTUNITIES' EXCEPTIONS TO
THE HEARING OFFICER'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER,
FILED JULY 26, 2017 [DOC. 814];
CERTIFICATE OF SERVICE

**TMT INTERNATIONAL OBSERVATORY, LLC'S
RESPONSE TO INTERVENOR PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES' EXCEPTIONS TO THE
HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION AND ORDER, FILED JULY 26, 2017 [DOC. 814]**

Intervenor TMT International Observatory, LLC ("TIO") submits the following response to Intervenor Perpetuating Unique Educational Opportunities' Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision and Order, Filed July 26, 2017 [Doc. 814] ("PUEO'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

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 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

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 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).

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 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. RESPONSE TO PUEO’S EXCEPTIONS

A. Development of ‘Imiloa Uka / Kai

PUEO recommends that BLNR supplement and incorporate additional language in the Hearing Officer’s proposed additional condition No. 2 (“**HO Proposed Additional Condition No. 2**”), which currently states that UHH, OMKM and TIO shall implement: “Working with the ‘Imiloa Astronomy Center and OMKM to develop informational exhibits for visitors regarding

the natural, cultural and archaeological resources of Mauna Kea”. HO FOF/COL at 261. PUEO requests that the HO Proposed Condition No. 2 be supplemented to reflect planning for the proposed future development of an envisioned ‘Imiloa Uka component in tandem with ‘Imiloa Kai (“**‘Imiloa Uka / Kai**”):

PUEO recommends the following additional language be supplemented and incorporated into the final Decision and Order:

In order to develop a Hawaiian cultural footprint for the future of Maunakea, the UH Hilo and TIO/TMT will collaboratively work towards the future development of an ‘Imiloa Uka component in tandem with ‘Imiloa Kai. Both of these joint facilities will collectively provide:

- A. Space for Hawaiian practitioners' cultural practices regarding the sacred aspects of Maunakea and other sacred Hawaiian places;
- B. Hawaiian navigation past, present and future;
- C. Retail facilities for the sale of native Hawaiian crafts, literature and clothing to visitors from around the world;
- D. A mauka extension of Ka Haku ‘Ula ‘O Ke‘elikolani Hawaiian Language College and the Hawai‘i Community College Hawaiian Studies program to facilitate a Hawaiian Learning Center and Language/Culture development on Maunakea for students, visitors, the general public and especially astronomers;
- E. An International Education, Peace and Cultural Amphitheater designed to provide a forum for the discussion of world peace, religion, governance and the future of mankind on Earth and in the Cosmos, as well as a place for halaus to practice; and
- F. Implementation and extension of ocean-based educational opportunities designed to teach navigation and sailing skills, vessel construction and repair and other oceangoing skills.

PUEO’s Exceptions at 2.

TIO’s understanding – consistent with its general understanding of the intent of existing HO Proposed Condition No. 2 – is that PUEO’s proposed additional language regarding ‘Imiloa Uka / Kai requires the parties to plan collaboratively in good faith towards the future, aspirational development of ‘Imiloa Uka / Kai, but does not require TIO to provide funding in

connection with the actual planning or development of 'Imiloa Uka / Kai or any other facility envisioned through these collaborative efforts. Rather, any potential funding for the planning and development of any facility envisioned through these efforts will be sought from separate sources.

With the foregoing understanding of the intent of PUEO's requested language to supplement HO Proposed Additional Condition No. 2 as noted above, TIO has no objections to PUEO's exception on this issue.

B. Educational Programs.

PUEO recommends that BLNR insert an additional condition in the final decision and order as follows:

Development of a plan to implement and extend early entry programs for at-risk children of Hawaiian ancestry and other at-risk youth in the community at UH Hilo. This early entry program will provide educational opportunities in STEM-related and other curriculum such as the following:

- A. Astronomy math, science, engineering, environmental science and technical support careers at astronomy facilities;
- B. Hawaiian language and culture;
- C. Navigation;
- D. Geology;
- E. Biology (including but not limited to botany and agriculture);
- F. Religion;
- G. Law Enforcement/criminal justice;
- H. New disciplines of learning dependent on career fields needed; and
- I. On the job training as necessary.

PUEO's Exceptions at 3.

As noted by the Hearing Officer, TIO has committed to a Community Benefits Package

(“CBP”), and TIO, to date, has remitted \$2.5 million pursuant to the CBP, for among other programs, sixty scholarships, \$100,000 in small grants for classroom projects, and \$400,000 for the STEM Grant Learning Partnership Program. HO FOF 309-312. TIO has committed to providing \$1 million annually for this program, and the Hearing Officer’s proposed additional condition No. 10 requires TIO to continue the \$1 million annual funding (adjusted for inflation) for the CBP. HO FOF 522; HO FOF/COL at 261. Thus, TIO believes that the Hearing Officer properly recognized that TIO is already providing (and will be required to provide) substantial educational opportunities in STEM-related and other curricula in educational institutions. *See* HO FOF 309-312, 435, 522; HO COL 135, 217.

In light of the foregoing, TIO – to the extent that PUEO’s additional proposed condition is intended to apply to TIO – does not object to this proposed exception and additional condition, with the understanding that, while the proposed condition requires the parties to work in good faith to develop a plan for STEM-related and other curricula for at-risk children of Hawaiian ancestry and other at-risk youth, it does not require TIO to provide funding for any plan developed in fulfillment of the proposed condition. TIO’s understanding is that any potential funding for the actual implementation of the plan developed through these collaborative efforts may be funded through applications for funds already established for such purposes, such as the THINK Fund.

With the foregoing understanding of the intent of PUEO’s proposed additional condition relating to STEM-related education and curricula for at-risk children of Hawaiian ancestry and other youth, TIO has no objections to PUEO’s exception and proposed additional condition on this issue.

C. Cross-Cultural Activities.

PUEO recommends that BLNR insert an additional condition in the final decision and

order as follows:

The UH Hilo shall develop and plan to implement a cooperative fellowship program between personnel working at the astronomy facilities on Maunakea and Hawaiian communities related to navigation, astronomy, and Hawaiian culture.

PUEO's Exceptions at 3.

As this proposed additional condition does not require TIO to directly take specific action, TIO does not take a position on the adoption of this proposed additional condition. If this proposed additional condition is adopted by BLNR, however, TIO intends to work cooperatively with UH Hilo to the extent that TIO is affected by any plan and is able to assist in the implementation of the plan.

D. Management of Access to the Summit.

PUEO recommends that BLNR insert an additional condition in the final decision and order as follows:

OMKM and the Kahu Ku Mauna Council, after reasonable public input, shall develop a plan and protocols in the next two years to manage general access to the summit of Maunakea. The plan should include a proposal for informing and vetting all who plan to conduct any commercial activities on the summit.

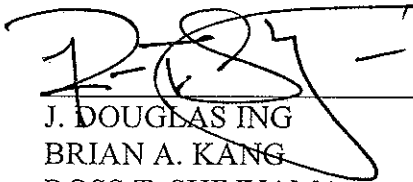
PUEO's Exceptions at 4.

As this proposed additional condition does not require TIO to directly take specific action, TIO does not take a position on the adoption of this proposed additional condition. TIO notes, however, that if BLNR adopts this proposed additional condition, TIO reserves the right to comment during the development of the plan, and TIO believes that OMKM and the Kahu Ku Mauna Council should ensure that any plans and protocols for general access to the summit should be consistent with applicable law, including Article XII, Section 7 of the Hawai'i State Constitution.

IV. CONCLUSION

For the reasons set forth herein, TIO respectfully requests that BLNR consider and adopt PUEO's Exceptions consistent with the foregoing, and otherwise 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.

A handwritten signature in black ink, appearing to read 'J. Douglas Ing', is written over a horizontal line. The signature is stylized and somewhat illegible.

J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA

Attorneys for
TMT INTERNATIONAL OBSERVATORY
LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē Mauka,
Hāmākua, 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:

Michael Cain
Office of Conservation and Coastal
Lands
1151 Punchbowl, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
Custodian of the Records
(ORIGINAL + DIGITAL COPY)

Office of Conservation and
Coastal Lands
dlnr.maunakea@hawaii.gov

Mehana Kihoi
PO Box 393
Honaunau, HI 96726
uhiwai@live.com

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via email & U.S. mail)

C. M. Kaho'okahi Kanuha
77-6504 Maile St
Kailua Kona, HI 96740
Kahookahi.kukiaimauna@gmail.com

Carlsmith Ball LLP
Ian Sandison, Tim Lui-Kwan, John P.
Manaut, Lindsay N. McAneeley
1001 Bishop Street
ASB Tower, Suite 2200
Honolulu, HI 96813
isandison@carlsmith.com
tluikwan@carlsmith.com
jpm@carlsmith.com
lmcaneeley@carlsmith.com
*Counsel for the Applicant University
of Hawai'i at Hilo*

Lanny Alan Sinkin
P. O. Box 833
Bismarck, North Dakota 58502-0833
lanny.sinkin@gmail.com
*Representative for The Temple of
Lono*

Maelani Lee
PO Box 1054
Waianae, HI 96792
maelanilee@yahoo.com

J. Leina'ala Sleightholm
P.O. Box 383035
Waikoloa, HI 96738
leinaala.mauna@gmail.com

Kalikolehua Kanaele
4 Spring Street
Hilo, HI 96720
akulele@yahoo.com

Torkildson, Katz, Moore,
Hetherington & Harris
Attn: Lincoln S. T. Ashida
120 Pauahi Street, Suite 312
Hilo, HI 96720-3084
lsa@torkildson.com
njc@torkildson.com
*Counsel for Perpetuating Unique
Educational Opportunities (PUEO)*

Dwight J. Vicente
2608 Ainaola Drive
Hilo, Hawaiian Kingdom
dwightjvicente@gmail.com
(via email & U.S. mail)

Stephanie-Malia:Tabbada
P O Box 194,
Naalehu, HI 96772
s.tabbada@hawaiiantel.net
(via email & U.S. mail)

Brannon Kamahana Kealoha
89-564 Mokiawe Street
Nanakuli, HI 96792
brannonk@hawaii.edu

Joseph Kualii Lindsey Camara
kualiic@hotmail.com

William Freitas
PO Box 4650
Kailua Kona, HI 96745
pohaku7@yahoo.com

Flores-Case 'Ohana
E. Kalani Flores
ekflores@hawaiiintel.net

Tiffnie Kakalia
549 E. Kahaopea St.
Hilo, HI 96720
tiffniekakalia@gmail.com

Paul K. Neves
kealiikea@yahoo.com

Kealoha Pisciotta and Mauna Kea
Anaina Hou
keomaivg@gmail.com

Deborah J. Ward
cordylinecolor@gmail.com

Cindy Freitas
PO Box 4650
Kailua Kona, HI 96745
hanahanai@hawaii.rr.com

Glen Kila
89-530 Mokiawe Street
Waianae, HI 96792
makakila@gmail.com

B. Pualani Case
puacase@hawaiiintel.net

Clarence Kukauakahi Ching
kahiwaL@cs.com

Yuklin Aluli, Esq.
415-C Uluniu Street
Kailua, Hawaii 96734
yuklin@kailualaw.com
Co-Counsel for Petitioner
KAHEA: The Hawaiian
Environmental Alliance, a domestic
non-profit Corporation

Wilma H. Holi
P.O. Box 368
Hanapepe, HI 96716
Witness for the Hearing Officer
w_holi@hotmail.com

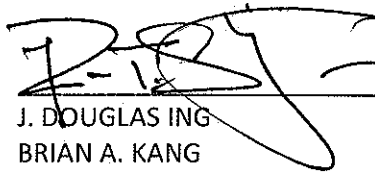
Ivy McIntosh
67-1236 Panale'a Street
Kamuela, Hawaii 96743
3popoki@gmail.com
Witness for the Hearing Officer

Moses Kealamakia Jr.
1059 Puku Street
Hilo, Hawaii 96720
mkealama@yahoo.com
Witness for the Hearing Officer

Crystal F. West
P.O. Box 193
Kapaau, Hawaii 96755
crystalinx@yahoo.com

Dexter K. Kaiama, Esq.
111 Hekili Street, #A1607
Kailua, Hawaii 96734
cdexk@hotmail.com
Co-Counsel for Petitioner
KAHEA: The Hawaiian
Environmental Alliance, a domestic
non-profit Corporation

DATED: Honolulu, Hawaii, September 11, 2017 .



J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA
SUMMER H. KAI AWE

Attorneys for TMT INTERNATIONAL OBSERVATORY LLC