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

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AND COASTAL LANDS

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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Case No. BLNR-CC-16-002

**THE UNIVERSITY OF HAWAI'I AT  
HILO AND TMT INTERNATIONAL  
OBSERVATORY, LLC'S JOINT BRIEF  
IN RESPONSE TO TIFFNIE  
KAKALIA'S JOINDER TO  
MAUANKEA ANAINA HOU AND MS.  
PISCIOTTA, FLORES-CASE 'OHANA,  
TEMPLE OF LONO AND KAHEA**

**RESPONSE TO HEARING OFFICER  
RIKI MAE AMANO'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW, DECISION AND ORDER,  
FILED AUGUST 21, 2017 [DOC. 812];  
APPENDICES A–B; CERTIFICATE OF  
SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL  
OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO TIFFNIE KAKALIA'S  
JOINDER TO MAUANKEA ANAINA HOU AND MS. PISCIOTTA, FLORES-CASE  
'OHANA, TEMPLE OF LONO AND KAHEA RESPONSE TO HEARING OFFICER  
RIKI MAE AMANO'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,  
DECISION AND ORDER, FILED AUGUST 21, 2017 [DOC. 812]**

Applicant THE UNIVERSITY OF HAWAI'I AT HILO (“UH Hilo”) and TMT INTERNATIONAL OBSERVATORY, LLC (“TIO”), through their respective counsel, hereby jointly submit this brief in response to Tiffnie Kakalia’s (“Kakalia”) *Joinder to Mauankea Anaina Hou and Ms. Pisciotta, Flores-Case 'Ohana, Temple of Lono and KAHEA Response to Hearing Officer Riki Mae Amano's Proposed Findings of Fact, Conclusions of Law, Decision and Order*, filed August 21, 2017 [Doc. 812] (“Kakalia’s Exceptions”).

**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**

Kakalia 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<sup>1</sup>] 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 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’*

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<sup>1</sup> 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).

*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. GENERAL OBJECTIONS TO KAKALIA'S EXCEPTIONS**

UH Hilo and TIO generally object to Kakalia'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, Kakalia'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 Kakalia herself.

UH Hilo and TIO object to each of the points in Kakalia'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 Kakalia'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 Kakalia'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 Kakalia'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; Kakalia'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.

UHH and TIO also object to Kakalia'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 Kakalia 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 Kakalia. That position is not supported by the law

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



extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO have prepared a table of specific responses and objections to Kakalia’s Exceptions, which is attached hereto as **Appendix B**. 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 Kakalia’s Exceptions, and BLNR should disregard all such unsupported assertions.

The FOF/COL and page numbers referenced herein follow those as provided in Kakalia’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.

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IV. 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 Kakalia'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 [Docs. 816 & 813, respectively].

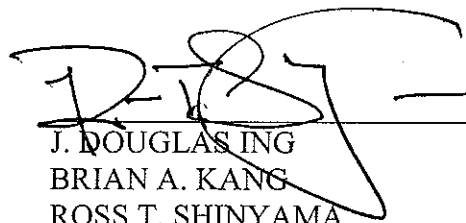
DATED: Honolulu, Hawai'i, September 11, 2017.



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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. <i>See</i> 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.

**Appendix B**

**Summary Table of Responses to Kakalia's Response to Hearing Officer Riki Mae Amano's Proposed FOF/COL**

<b>Response Line<sup>2</sup></b>	<b>Page</b>	<b>Exception</b>	<b>Response</b>
1	Unpaginated	The eighth criterion found at HAR § 13-5-30(C)(8) states that, "THE PROPOSED LAND USE WILL NOT BE MATERIALLY DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE."	Not in dispute. HO FOF 966.
3	Unpaginated	The burden of proof rests with the Petitioners. The BLNR rules provide that "[t]he applicant shall have the burden of demonstrating that a proposed land use is consistent with" the criteria set forth in HAR § 13-5-30(c). As the party proposing a land use in the Conservation District, UH Hilo is clearly the "applicant" in this matter.	Inaccurate/false to the extent that the term "Petitioners" has been used consistently throughout the proceeding, as well as in the Hearing Officer's Proposed FOF/COL, to refer to Mauna Kea Anaina Hou, Kealoha Pisciotto, Clarence Kukauakahi Ching, the Flores-Case 'Ohana, Paul Neves, Deborah Ward, and KAHEA.
4	Unpaginated	The burden of proof is satisfied with a preponderance of the evidence. HAR § 13-1-35(k) similarly provides: "The party initiating the proceeding and, in the case of proceedings on alleged violations of law, the department, shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The quantum of proof shall be a preponderance of the evidence." (emphasis added)	Incomplete. A more complete discussion on the burden of proof is in HO COL 77-81.
5	Unpaginated	"The rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial	Not in dispute. HO COL 79.

<sup>2</sup> Exceptions were not numbered, so reference to specific responses will be keyed to response line.

		<p>proceedings." Price v. Zoning Bd. of Appeals, 77 Hawai'i 168, 176 n.8, 883 P.2d 629, 637 n.8 (1994).</p>	
6	Unpaginated	<p>This means, for example, that hearsay which would be inadmissible in court proceedings is nonetheless admissible in administrative hearings. In construing the HAPA (and specifically, HRS § 91-10), the Hawai'i Supreme Court noted that the act's mandate that "[a]ny oral or documentary evidence may be received" by an agency must be liberally construed. Dependents of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 482, 510 P.2d 89, 92 (1973). The court in Cazimero observed that the legislative history of HAPA also supported the liberal admission of evidence, as the history indicated "that the direction chosen [by the Legislature] was towards the admission of any and all evidence [in administrative hearings] limited only by considerations of relevancy, materiality and repetition." Id. at 482-83, 510 P.2d at 92 (emphasis added).</p>	Not in dispute. HO COL 48-50.
7	Unpaginated	<p>The standard for determining relevancy in agency proceedings under Chapter 91 is that of Haw. R. Evid. Id. (HRE) 401. See Loui v. Bd. of Med. Examiners, 78 Hawai'i 21, 31, 889 P.2d 705, 715 (1995). HRE Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." HRE 401 (emphasis added); Loui, 78 Hawai'i at 31, 889 P.2d at 715 (quoting Rule 401).</p>	Not in dispute. HO COL 51.
8	Unpaginated	<p>Because the rules of evidence applied in administrative hearings are more relaxed than in court proceedings, doubts about admissibility are to be resolved in favor of admitting the evidence: W]hen an agency is faced with evidence of doubtful admissibility, it is preferable that it allow the admission of such evidence rather than to exclude the same, for the very practical reason stated in Donnelly Garment Co. v. National Labor Relations Board, 123 F.2d 215, 224 (8th Cir. 1941), as follows: "If the record on review contains not only all evidence which was clearly admissible, but</p>	Not in dispute. HO COL 52

	<p>also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided. <i>Cazimero v. Kohala Sugar Co.</i>, 54 Haw. 479, 483, 510 P.2d 89, 93 (1973).</p>		
9	<p>The liberal standard of the admissibility of evidence in administrative hearings is also reflected in the established rule that even when ostensibly irrelevant or incompetent evidence is admitted during a hearing, the admission of such evidence alone is not grounds for reversal if there is "substantial evidence in the record to sustain the agency's determination" and the aggrieved party is not prejudiced. <i>Shorba v. Board of Education</i>, 59 Haw. 388, 398, 583 P.2d 313-19 (1978). Stated another way, unless an aggrieved party can show prejudice resulting from the admission of ostensibly irrelevant or incompetent evidence, admission of such evidence alone is not grounds for reversal. <i>Id.</i></p>	Unpaginated	Not in dispute. HO COL 53
10	<p>Although the admission of evidence in administrative hearings is less formal than those governing judicial proceedings, the Hearing Officer still has the authority to limit or entirely exclude evidence that does not meet the basic criteria of relevancy, materiality and avoidance of repetition. HRS § 91-10(1). "[T]he 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." <i>See Hawaii i Prince Hotel Waikiki Corp. v. City &amp; County of Honolulu</i>, 89 Hawai'i 381, 390, 974 P.2d 21, 30 (1999) (quoting <i>State v. Pioneer Mill Co.</i>, 64 Haw. 168, 179, 637 P.2d 1131, 1139 (1981)).</p>	Unpaginated	Not in dispute. HO COL 54, 58.
11	<p>In <i>Ka Paakai o Ka Aina v. Land Use Commission</i>, the Hawaii Supreme Court provided a three-step analysis for the protection of Native Hawaiian rights which called for agencies to make specific findings and conclusions regarding the identity and scope of</p>	Unpaginated	Not in dispute, but a more thorough discussion is in HO COL 108-110.

			valued resources, the extent those resources will be affected; and the feasible action to reasonably protect those resources. ( <i>Ka Paakai o Ka Aina v. Land Use Comm'n</i> , 94 Hawaii 31, 7 P3d 1068 (2000) (“ <i>Ka Paakai</i> ”); HO FOF/COL 108, p. 212)	
12	Unpaginated		In <i>State v. Pratt</i> , the Hawaii Supreme Court required the balancing of all parties’ respective interests as consideration of the totality of the circumstances. ( <i>State v. Pratt</i> , 127 Hawaii 206, 277 P.3d 300 (2012) (“ <i>Pratt</i> ”); HO FOF/COL 105, p. 212)	Not in dispute, but a more thorough discussion is in HO COL 105-107.
13	Unpaginated		In <i>Morimoto v. BLNR</i> , the Hawaii Supreme Court was concerned with offsetting the threat of “unbridled discretion” and required that BLNR “incorporate any representations” as a condition of the CDUP. ( <i>Morimoto v. BLNR</i> , 107 Hawaii 296, 113 P.3d at 180 (“ <i>Morimoto</i> ”); HO FOF/ COL 111, p. 213)	Not in dispute, but a more thorough discussion is in HO COL 111-112.
14	Unpaginated		The Petitioners did not provide any study, research or reliable statistic showing that increased stress on the public from development on pristine sacred land of Maunakea would not be materially detrimental to public health, safety, and welfare.	Presumably, Kakalia is referring to the University when she uses the term “Petitioners”.  Inaccurate/false. See, e.g., HO FOF 273-284 (scientific value of the TMT Observatory); HO FOF 285-288 (economic benefits of the TMT Observatory); HO FOF 294-315 (educational and employment opportunities); HO FOF 316-354 (mitigation measures).  HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
15	Unpaginated		The Final EIS submitted by the Petitioners stated that less than half (twenty-nine) of only sixty-six individuals contacted responded to the Cultural Impact Assessment (CIA) community input process, and only sixteen of those were interviewed. (Final	Presumably, Kakalia is referring to the University.  Misleading. Certain individuals, including



	EIS Sec. 3.2, 3-10; HO FOF/COL 226, p.47)		<p>parties to this proceeding, actively boycotted the University's ongoing consultation efforts. HO FOF 245.</p> <p>Mischaracterization. The substantial evidence of the history of the TMT Project supports the finding that sufficient and significant consultation occurred. HO FOF 222-245.</p> <p>HO COL 391 is accurate and supported by the evidence in the record and the citations therein.</p>
16	<p>During those CIA interviews, it was recognized that a substantial minority of the twenty-nine interviewed felt that mitigation measures would "compensate for the perceived impacts." (Final EIS Sec. 3.2, 3-24; HO FOF/COL 236 p.48)</p>	Unpaginated	<p>Misleading. The mitigation measures currently proposed in the CDUA are area-wide mitigation measures, including formally and legally binding the University to the commitment that this will be the last new area on the mountain where a telescope project will be contemplated or sought. The mitigation measures go beyond simply addressing the impact of the TMT Project, but will substantially mitigate existing area impacts of the astronomy sites on Mauna Kea as a whole. See HO FOF 316-345.</p> <p>Unsupported/unsubstantiated.</p> <p>Mischaracterization. Public opinion surveys referenced in the hearing demonstrated a majority of citizens supported the construction of the TMT Project. See Ex. I-1.</p>
17	<p>Generalized opinions that "culture and astronomy can co-exist" are misconstrued as being specific and favorable to the TMT Project fail to recognize the qualified responses given by members of the public. (Final EIS Sec. 3.2, 3-24.)</p>	Unpaginated	

18	Unpaginated	<p>The opinions of well-recognized, respected and qualified individuals testifying on behalf of the Contestants have been repeatedly dismissed on the basis that the individuals do not provide studies, statistics or factual evidence that objectively shows the TMT project negatively impacting public health, safety, and welfare.</p>	<p>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. Kakalia's Exceptions attempt to 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 <i>State v. Buch</i>, 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." <i>Wilton v. State</i>, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007)(citation omitted).</p>
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See Response 18 regarding credibility determinations; *see also* HO FOF 970 (finding that Dr. Taualii's testimony is insufficient to support a finding that the TMT Project will have materially detrimental impacts on the physical health of native Hawaiians, or the general public, as it is based on her unpublished research, limited in scope, and identifies many factors that ostensible impacts cultural identity); HO FOF 973 (finding that Dr. Meyer's testimony/theory is not supported by any empirical data and Dr. Meyer did not otherwise establish the validity of her theory); HO FOF 976-77 (noting that Professor Kaholokula has not done any research, nor is aware of any research, regarding the TMT Project's impact on the health and wellbeing of native Hawaiians, and that Professor Kaholokula admitted that his opinions are not based on any studies or analyses); HO FOF 978 (noting that Perreira does not specialize in trauma care, is not currently a member of the American Psychotherapists Association, and admitted that her views stem from her family's beliefs); HO FOF 626 (Teale acknowledged that although she opined that the archaeology studies were incomplete, she has not read all of the studies); HO FOF 624 (noting the Teale presented no evidence that the TMT Project would impact her cultural

<p>practices); HO FOF 868 (noting that Teale did not provide any scientific or empirical data to support her claims that the TMT Project would negatively impact the water resources in Mauna Kea).</p>		
<p><i>See</i> Response 18 regarding credibility determinations; <i>see also</i> HO FOF 970 (finding that Dr. Taualii’s testimony is insufficient to support a finding that the TMT Project will have materially detrimental impacts on the physical health of native Hawaiians, or the general public, as it is based on her unpublished research, limited in scope, and identifies many factors that ostensible impacts cultural identity).</p> <p>HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p>	<p>As an example, Dr. Taualii testified that “she conducted statistical research, which found that desecration of sacred spaces negatively impacts the cultural identity and health of native Hawaiians. Dr. Taualii also testified that the TMT Project would further contribute to these negative impacts and cause damage to the physical health of native Hawaiians yet the testimony was characterized as “research on a causal link between alleged “desecration” to a sacred space and the impact upon cultural identity and health of native Hawaiians despite the fact that Dr. Taualii is recognized as “holding a doctorate in Health Services, with expertise in public health informatics, epidemiology, genetics and Indigenous health” and “leading expert in health for Native Hawaiians”. (Ex.B. 04a; HO/FOF 968 p.182; Tr. 1/24/17 at 11:9-15:22; HO/COL 283 p. 233)</p>	<p>Unpaginated</p>
<p><i>See</i> Response 18 regarding credibility determinations; <i>see also</i> HO FOF 973 (finding that Dr. Meyer’s testimony/theory is not supported by any empirical data and Dr. Meyer did not otherwise establish the validity of her theory)</p> <p>HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p>	<p>As another example, Dr. Aluli Meyer testified that the “TMT Project will have a substantial adverse impact on Hawaiian culture and cultural practices or public health, safety, and wellness, yet the testimony was not concluded by the HO despite the fact that Dr. Aluli Meyer holds a Doctorate from Harvard University in the field of Indigenous Epistemology or Philosophy of Knowledge, is a 30+ year practitioner of hooponono [healing process through ritualizing communication], is a scholar-practitioner of Hawaiian knowledge, and is the Director of Indigenous Education at the University of Hawaii West Oahu whose job is to assist the University of Hawaii to become a clearly definitive and inspiring Indigenous serving higher education system. (WDT of Dr.</p>	<p>Unpaginated</p>

21	Unpaginated	<p>Manulani Aluli Meyer; Ex. B.05a; HO/FOF 973 p. 183)</p> <p>In yet another example, Professor Kaholokula testified that “the desecration of Mauna Kea is detrimental to the health and wellbeing of native Hawaiians yet the testimony was characterized as “testimony regarding the ostensible psychological impact upon native Hawaiians from the activities on Mauna Kea despite the fact that Dr. Kaholokula is recognized as the Chair and Professor of Native Hawaiian Health at the John A. Burns School of Medicine, University of Hawaii at Manoa. Holds a PhD in clinical psychology, completed a clinical health psychology post-doctoral fellowship at Tripler Army Medical Center, and holds a license to practice in Hawaii. Has over 20 years of clinical and research experience regarding issues of Native Hawaiian health, to include mental and physical health. Has over 50 scientific publications specific to Native Hawaiian and Pacific Islander health in national and international peer-reviewed journals and provided numerous keynotes, talks, and consultation on Native Hawaiian and Pacific Islander health nationally and internationally. Sits on several boards of organizations whose mission is focused on either Native Hawaiians or public health issues to include Queen’s Health Systems and Papa Ola Lokahi Native Hawaiian Health Board. Is a member of a Native Hawaiian cultural group known as Halemua o Kualii and has been involved in various Hawaiian cultural practices (e.g., hula and lua) throughout his life. (Tr. 2/23/17 at 121:13-123-123:9; Ex. F-7b (Statement of Prof. Kaholokula); HO/FOF 967 p.184; HO/COL 284 p.233)</p>	<p>.See Response 18 regarding credibility determinations; <i>see also</i> HO FOF 976-77 (noting that Professor Kaholokula has not done any research, nor is aware of any research, regarding the TMT Project’s impact on the health and wellbeing of native Hawaiians, and that Professor Kaholokula admitted that his opinions are not based on any studies or analyses)</p> <p>HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p>
22	Unpaginated	<p>Another example, Perreira testified that the “TMT Project would affect native Hawaiians psychologically yet the testimony was not included in HO/COL despite the fact that Perreira is recognized as a clinical psychologist and has particular interests and expertise in individual, family, community and national trauma exposure, identification of symptoms, diagnosis and treatment of discrete and complex traumas associated with physical, emotional,</p>	<p>.See Response 18 regarding credibility determinations; <i>see also</i> HO FOF 978 (noting that Perreira does not specialize in trauma care, is not currently a member of the American Psychotherapists Association, and admitted that her views stem from her family’s beliefs)</p>

		psychological, spiritual and medical conditions or disorders who over the past 20 years, has worked professionally, in Hawaii rural communities, in the field of community mental health as a mentor, teacher, counselor, consultant and now clinical psychologist. (Tr. 2/23/17 at 191:1-4; WDT of Tammie Noelani Perreira Ex. O.14; HO/FOF 978 p. 185)	HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.
23	Unpaginated	Another example, "Teal testified that the TMT Project is having trauma related impacts upon the community, including a surge of heart attacks, stroke and other impacts from stress, especially among cultural practitioners associated with Mauna Kea., yet the testimony was not included in HO/COL despite the fact that Teal holds a Master's Degree in public health from the University of Hawai'i at Mānoa. (Ex. B.15a (WDT Teal); Ex. B.15b; HO/FOF 979 p. 185)	See Response 18 regarding credibility determinations.; <i>see also</i> HO FOF 626 (Teale acknowledged that although she opined that the archaeology studies were incomplete, she has not read all of the studies); HO FOF 624 (noting the Teale presented no evidence that the TMT Project would impact her cultural practices); HO FOF 868 (noting that Teale did not provide any scientific or empirical data to support her claims that the TMT Project would negatively impact the water resources in Mauna Kea).
24	Unpaginated	On the other hand, opinions of those testifying for the Applicants, or in the materials relied upon by the Applicants, are considered valid and worthy of broad application to the general public's health, safety and welfare.	HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.
25	Unpaginated	For example, the characterization of the 13N site for the TMT location as a "compromise" in a comment from Ed Stevens disregards his unequivocal response that, "there's no more room	See Response 18 regarding credibility determinations. HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein. Irrelevant/inapplicable to the extent the exception is to language in the FEIS. This proceeding is not an EIS challenge under

<p>for new telescopes on Maunakea,” and “we don’t want to see any more new construction.” The following statement by Stevens that “the site now picked for 13N would be my preference,” dismisses and downplays the qualification response Stevens gives, “if we have not other choice, and that telescope is going to be put up there.” (Final EIS Sec. 3.2, 3-25.)</p>	<p>HRS Chapter 343; Kakalia’s ability to make such a challenge expired long ago, and she cannot reopen the FEIS approval process through improper arguments under the statutes and rules governing the EIS process. This proceeding is entirely governed by the applicable constitutional law and the Conservation District rules that are genuinely at issue here.</p>
<p>26</p> <p>Unpaginated</p> <p>In yet another example, TMT witness Neese shared his opinion that, 565 P. 104 “the TMT Project would not result in a substantial adverse impact to such resources within the surrounding area, community or region.</p>	<p>Mischaracterization. Nees testified that the TMT Project would not result in a substantial adverse impact to cultural and historic resources present in the Mauna Kea Summit Region Historic District.</p> <p><i>See</i> Response 18 regarding credibility determinations. Nees has expertise in archaeology and is particularly familiar with the archaeological investigations on Mauna Kea. He has extensive experience in archaeology in Hawai’i, with over 26 years in physical anthropology, historic preservation, and archaeological monitoring. HO FOF 565.</p> <p>HO FOF 670 is accurate and supported by the evidence in the record and the citations therein.</p>
<p>27</p> <p>Unpaginated</p> <p>Another example, TMT witness Baybayan shared his opinion that, 705 P.129 “the highest level of desecration rests in actions that remove the opportunity and choices from the kind of future our youth can participate in and learn from. (Baybayan) Tr.11/02/16 at 12:9-16</p>	<p>Misleading to the extent exception suggests that the Hearing Officer made a determination on claims of desecration. <i>See</i> HO COL 399-413.</p>

28	Unpaginated	<p>Another example, TMT witness Tom Nance shared his opinion that, 855 P.164 “the TMT Project will have no significant or adverse impact on water resources.” WDT of Tom Nance, page 1; UHH Witness Statement 10.</p>	<p><i>See</i> Response 18 regarding credibility determinations. Nance is the president of Tom Nance Water Resources Engineering, which specializes in water resource development, well and water system design, and most aspects of hydrologic analyses. He received his B.S. in Mechanical Engineering from Stanford University in 1966, a master of science in Civil Engineering with a specialty in hydrology from Stanford University in 1970, and has done graduate work at both the University of Hawai‘i and the University of California at Berkeley. He has been working in the field of hydrology and water resource engineering for 44 years. He has been qualified as an expert in hydrology and water resource engineering on a number of occasions. HO FOF 855.</p> <p>HO FOF 882 is accurate and supported by the evidence in the record and the citations therein.</p>
29	Unpaginated	<p>The introduction of new elements that substantially alter the setting in which cultural practices take place, including visual elements, noise, traffic and human presence, are considered significant. (Final EIS Sec. 3.2, 3-23)</p>	<p><i>See</i> Response 25 regarding challenges to the FEIS.</p> <p>Misleading. Petitioners and Opposing Intervenor have not met their burden to show that they conduct any protected traditional and customary practices at the location of the TMT Project site. HO COL 352.</p>



				Inaccurate/false. The TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea (HO FOF 834-854); will not contribute to a noticeable increase in noise levels (HO FOF 994-1002). See Response 25 regarding challenges to the FEIS.
30	Unpaginated	Final EIS found that the average number of employees within the sacred space of Maunakea would increase, "from an average of 100 to an average of 130." (HO FOF/COL 257, p.52; Final EIS Sec. 3.2, 3-32)		
31	Unpaginated	The Petitioners did not provide any study, research or reliable statistic showing that a 30% increase would not be materially detrimental to the public health, safety, and welfare.		Presumably, Kakalia is referring to the University. HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
32	Unpaginated	The Hearing Officer failed to show by a preponderance of the evidence that the that the increased human presence in the Northern Plateau would not be materially detrimental to the public health, safety, and welfare.		Mischaracterization of the burden of proof. See HO COL 77-81. HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
33	Unpaginated	The HO failed to show by a preponderance of the evidence that the Petitioners have met their burden to show that the TMT Project is not materially detrimental to the public health, safety, and welfare.		Mischaracterization of the burden of proof. See HO COL 77-81. HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
34	Unpaginated	Numerous public health professionals testified under oath that the desecration or development of Maunakea as a result of the TMT project would result in undue stress and negative health impacts		Lack of jurisdiction to the extent the Proposed COL purports to stand for the proposition that the TMT Project

		<p>on the public in their professional opinion.</p>	<p>constitutes “desecration” under HRS § 711-1107. <i>See</i> HO COL 399-413.</p> <p><i>See</i> Response 18 regarding credibility determinations.</p> <p>HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p>
35	Unpaginated	<p>The HO adopted the Applicant’s arguments which did not affirmatively show that no public health impacts would result and instead focused on discrediting these recognized public health experts by dismissing any information presented as mere opinion.</p>	<p>It is well established that an adverse ruling does not evidence bias. <i>See Jou v. Dai-Tokyo Royal State Ins. Co.</i>, 116 Hawai‘i 159, 165, 172 P.3d 471, 477 (2007) (“It is well-settled that mere adverse rulings are insufficient to establish bias.”); <i>James W. Glover, Ltd. v. Fong</i>, 39 Hawai‘i 308, 316 (1952) (stating that “mere adverse rulings, even if erroneous[,]” would not constitute a “basis for disqualification”).</p> <p>Additionally, the Hearing Officer accepting proposed findings of fact or conclusions, even if adopted verbatim, does not establish Hearing Officer bias. <i>See generally, Kumar v. Kumar</i>, 2014 WL 1632111, at *8 (Ct. App. 2014) (holding that a court’s substantial adoption of a proposed decree did not establish an appearance of impartiality, i.e., bias). In the context of civil proceedings, it is widely accepted that a trial judge may adopt a parties proposed findings if total or in part. <i>See, e.g., Howard v. Howard</i>, 259 P.2d 41, 42 (Cal.App. 2 Dist. 1953)</p>

			(stating that courts may adopt proposed finding in total or in part); <i>American Water Development, Inc. v. City of Alamosa</i> , 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).  HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
36	Unpaginated	This disregard for well-recognized, credentialed, professional public health experts shows bias toward the continued development and desecration of Maunakea.	<b>See</b> Response 18 regarding credibility determinations.  HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.
37	Unpaginated	The HO’s dismissal of expert public health professionals’ opinions and acceptance of non-public health professionals’ opinions on the topic of public health is an example of unbridled discretion and bias for the development of the TMT Project.	<b>See</b> Response 18 regarding credibility determinations.  HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.
38	Unpaginated	The HO’s adoption of the Applicants’ dismissal of public health experts opinions and references to public health impacts and resulting conclusion omit public health impacts in the second step of the Ka Paakai framework.	<b>See</b> Response 35 regarding adopting a party’s proposed findings of fact.  <b>See</b> Response 18 regarding credibility determinations.  HO FOF 1015 is accurate and supported

39	Unpaginated	<p>The HO correctly relied on sufficient evidence for the first step in the Ka Paakai analysis; namely evidence to make specific findings and conclusions as to the identity and scope of cultural, historical, and natural resources in the TMT Project area. (HO COL/FOF, p. 213)</p>	<p>by the evidence in the record and the citations therein.</p> <p>Inaccurate/false. The contested case hearing and its 44 days of testimony and 71 witnesses are part of the assessment required of BLNR under <i>Ka Pa 'akai</i>. Not in dispute.</p>
40	Unpaginated	<p>However, the HO's investigation fell short of applying the second step of the Ka Paakai analytical framework to make specific findings and conclusions as to the "extent to which resources - including traditional and customary native Hawaiian rights - will be affected or impaired by the proposed action." (HO COL/FOF, p. 213)</p>	<p>Unsupported/unsubstantiated.</p> <p>Inaccurate/false. The Hearing Officer, through consideration of the CDUA and through the testimony and evidence in this proceeding, conducted a thorough review and analysis of the extent to which traditional and customary native Hawaiian rights will be affected or impaired by the TMT Project. HO COL 344.</p> <p>Irrelevant/inapplicable. Petitioners and Opposing Intervenor did not offer reliable, probative, substantial, and credible evidence or testimony sufficient to establish that any of their cultural or religious practices were conducted at the proposed TMT site. HO COL 343</p> <p>Inaccurate/false. The contested case hearing and its 44 days of testimony and</p>

41	Unpaginated	The public health impacts, not just the environmental impacts, should be considered when identifying the extent of impacts that mitigation measures will be based upon.	71 witnesses are part of the assessment required of BLNR under <i>Ka Pa 'akai</i> . Unsupported/unsubstantiated.
42	Unpaginated	While the Applicant did provide the HO with evidence to show impacts to the extent of the impacts from an environmental perspective, the Applicant did not produce any evidence that showed the extent that the TMT Project would affect or impair the resource from a public health, safety, and welfare perspective.	Misleading Inaccurate/false. HO FOF 966-1016.
43	Unpaginated	The Contestants witnesses are highly regarded, credentialed experts in the field of public health, yet the HO relied upon characterization of those testimonies as mere opinions.	Mischaracterization. The Applicant provided evidence demonstrating that the TMT Project would <i>not</i> be materially detrimental to the public health, safety, and welfare. <i>See</i> HO FOF 966-1016. <i>See</i> Response 18 regarding credibility determinations; <i>see also</i> Responses 19-23 regarding the Hearing Officer's determinations that the testimony of Dr. Taulii, Dr. Meyer, Prof. Kaholokula, Perreira, and Teale were unsupported, unsubstantiated, and thus not credible.
44	Unpaginated	If the HO was correct to disregard the opinions of highly regarded experts due to the fact that more substantial evidence of the extent to impacts on public health in the form of studies, statistics and the like, then it is necessary for the Applicant to show the same to meet the preponderance of the evidence.	HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein. <i>See</i> Response 18 regarding credibility determinations; <i>see also</i> Responses 19-23 regarding the Hearing Officer's determinations that the testimony of Dr. Taulii, Dr. Meyer, Prof. Kaholokula, Perreira, and Teale were unsupported, unsubstantiated, and thus not credible. HO FOF 1015 is accurate and supported by the evidence in the record and the evidence therein.

45	Unpaginated	<p>If the only type of evidence qualified to show the extent of impacts of desecration of sacred spaces on public health are studies specific to the TMT Project, the one and only unpublished study under peer review mentioned in testimonies shows that there is a conclusive, statistical impact on public health even prior to the actual build-out of the TMT Project. (HO/FOF 976-978 p. 181-182)</p>	<p>citations therein.</p> <p>Inaccurate/false. Prof. Kaholokula testified that he has not done any research directly targeting the issue of the TMT Project, nor is he aware of any studies with regard to partitioning the cause of stress from TMT and Mauna Kea from all other stress-causing factors for native Hawaiians. He further testified that his opinions were not based on any definitive studies or analyses on specific individuals. (HO FOF 976-77). Perreira testified that her views were personal and represented only the views of her family. (HO FOF 978).</p> <p>See Response 18 regarding credibility determinations.</p> <p>HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p> <p>Mischaracterization. The witnesses presented by the Petitioners and Opposing Intervenor limited their testimony to the alleged impacts the TMT Project would have on native Hawaiian health. See HO FOF 967-68, 972, 975-76, 978-80, The Hearing Officer's evaluation of the TMT Project's potential impact on public health, safety, and welfare cannot merely focus on the alleged impact to native Hawaiians, See HO COL 285-89.</p>
46	Unpaginated	<p>Furthermore, if BLNR disregards the proposition that the only qualified evidence is that evidence which is specific to the TMT Project, even before the project has been built, then the recognized public health experts offering testimonies were aware of other studies related to public health (stress, cultural trauma, and other health impacts) that could show by the extent of the impacts to public health.</p>	

Inaccurate/false. Prof. Kaholokula testified that he has not done any research directly targeting the issue of the TMT Project, nor is he aware of any studies with regard to partitioning the cause of stress from TMT and Mauna Kea from all other stress-causing factors for native Hawaiians. He further testified that his opinions were not based on any definitive studies or analyses on specific individuals. (HO FOF 976-77). Perreira testified that her views were personal and represented only the views of her family. (HO FOF 978).

Inaccurate/false. Dr. Taualii testified that cultural identity and health are impacted by a variety of factors contributing to the colonialization, assimilation, and learned helplessness of native Hawaiians. *See* HO FOF 970.

*See* Response 18 regarding credibility determinations; *see also* Responses 19-23 regarding the Hearing Officer's determinations that the testimony of Dr. Taualii, Dr. Meyer, Prof. Kaholokula, Perreira, and Teale were unsupported, unsubstantiated, and thus not credible.

HO FOF 1015 is accurate and supported by the evidence in the record and the

47	Unpaginated	<p>Despite the Applicants' own document, the Final EIS, stating that the increased presence of human presence could be a significant impact to the cultural resources of a sacred place, the Applicant did not provide sufficient evidence that a minimum 30% increase in human presence would not materially impact public health. (HO FOF/COL 257, p.52)</p>	<p>citations therein. HO FOF 1015 is accurate and supported by the evidence in the record and the citations therein.</p>
48	Unpaginated	<p>Native Hawaiians are particularly impacted by the stress related to the desecration and increase in human presence on Maunakea.</p>	<p>Unsupported/unsubstantiated. <i>See</i> HO FOF 970, 973, 976-78.  Lack of jurisdiction to the extent the Proposed COL purports to stand for the proposition that the TMT Project constitutes "desecration" under HRS § 711-1107. <i>See</i> HO COL 399-413.</p>
49	Unpaginated	<p>In the Applicants' and HO's FOF and COL, the number of Native Hawaiians and other parties negatively affected by the TMT Project were trivialized, while the number of actual or misconstrued pro-TMT individuals were downplayed or represented as sufficient.</p>	<p>Unsupported/unsubstantiated.  <i>See</i> Response 18 regarding credibility determinations.  Mischaracterization. The Hearing Officer considered testimony and evidence presented by the Petitioners, as well as the testimony and evidence presented by the other opposing parties. <i>See</i> 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,</p>



50	Unpaginated	The FOF/COL does not provide sufficient evidence to show the extent of impacts on cultural resources on public health, safety and welfare before concluding that the mitigation measures were feasible actions to protect those resources, in accordance with the guidance provided by the Hawaii Supreme Court with the Ka Paakai analytical framework.	992-93, 1000-07, 1012, 1017-25, 1028-32, 1043-46. Misstates holding in <i>Ka Pa 'akai</i> . HO COL 108-110.
51	Unpaginated	Therefore, the mitigation measures are not valid.	Unsupported/unsubstantiated.
52	Unpaginated	Including mitigation measures as a condition of approving a CDUP ensures that "unbridled discretion" by government agencies is avoided, as stated in <i>Morimoto</i> .	Unsupported/unsubstantiated.  Inaccurate/false. Mitigation measures are a well-accepted means to lessen the impacts of a land use. <i>See</i> HO COL 123, 206,  Inaccurate/false. In <i>Morimoto</i> , the Supreme Court held that all mitigation measures set forth in an EIS must be made part of the conditions of the CDUP. <i>See</i> HO COL 211-12.
53	Unpaginated	As stated above, if the only type of evidence qualified to show the extent of impacts of desecration of sacred spaces on public health are studies specific to the TMT Project, the one and only unpublished study under peer review mentioned in testimonies shows that there is a conclusive, statistical impact on public health even prior to the actual build-out of the TMT Project. (HO/FOF 976-978 p. 181-182)	Inaccurate/false. Prof. Kaholokula testified that he has not done any research directly targeting the issue of the TMT Project, nor is he aware of any studies with regard to partitioning the cause of stress from TMT and Mauna Kea from all other stress-causing factors for native Hawaiians. He further testified that his opinions were not based on any definitive studies or analyses on specific individuals. (HO FOF 976-77). Perreira testified that her views were personal and represented

		only the views of her family. (HO FOF 978).
54	Unpaginated  The study was not made available in the record, but a recognized expert explaining the finding of a study under oath is reasonable evidence to show that evidence does or may exist that directly responds to specific public health impacts not currently considered by the existing mitigation measures.	Inaccurate/false. Prof. Kaholokula testified that he has not done any research directly targeting the issue of the TMT Project, nor is he aware of any studies with regard to partitioning the cause of stress from TMT and Mauna Kea from all other stress-causing factors for native Hawaiians. He further testified that his opinions were not based on any definitive studies or analyses on specific individuals. (HO FOF 976-77). Perreira testified that her views were personal and represented only the views of her family. (HO FOF 978).
55	Unpaginated  If BLNR disregards the HO's conclusions echoing the Applicant's implied argument that the only studies specific to the TMT Project should be evidence worthy of consideration - even before the project has been built - then BLNR should recognize other public health studies (stress, cultural trauma, and other health impacts) to understand what appropriate and valid mitigation measures would consist of.	Inaccurate/false. Prof. Kaholokula testified that he has not done any research directly targeting the issue of the TMT Project, nor is he aware of any studies with regard to partitioning the cause of stress from TMT and Mauna Kea from all other stress-causing factors for native Hawaiians. He further testified that his opinions were not based on any definitive studies or analyses on specific individuals. (HO FOF 976-77). Perreira testified that her views were personal and represented only the views of her family. (HO FOF 978).
56	Unpaginated  The Applicants and HO failed to show, even with the less	Inaccurate/false.

		stringent standard of a preponderance of the evidence, that there is no material detriment to public health or to what extent the impact of the TMT Project would have on the public health which would form the basis for effective assessment of the suggested mitigation measures.	HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.
57	Unpaginated	While the impacts to public health and extent of those impacts is unknown and therefore lacking in sufficient evidence to satisfy the Applicants' burden of proof, even if the existing evidence was presumed to be sufficient the current mitigation measures are inadequate.	Unsubstantiated.  Inaccurate/false.  HO FOF 345 is accurate and supported by the evidence in the record and the citations therein.  Unsubstantiated.
58	Unpaginated	UH commitments to decommission three telescopes before the TMT operational is questionable. (HO FOF/COL 169-176, p. 36-37)	Unsubstantiated.
59	Unpaginated	The supposed commitment to decommission, while connected to the creation of fund for that purpose, does not warrant unquestioning acceptance of Dr. McLaren's statement. (HO FOF/COL 169-176, p. 36-37)	Unsubstantiated.  Mischaracterization. The University submitted a letter to Governor Ige that legally bound it to its commitment to decommission three telescopes permanently before TMT can go into operation. Ex. A-39.
60	Unpaginated	As stated above, if professionals such as Dr. McLaren are taken at face value in responses under oath to questions to which they are reasonably expected to have expertise and/or management discretion due to their organizational position, then the courtesy to recognize professional opinions should be applied consistently regardless of the personal pro- or anti-TMT position.	Unsubstantiated.  Mischaracterization. The University submitted a letter to Governor Ige that legally bound it to its commitment to decommission three telescopes permanently before TMT can go into operation. Ex. A-39.
61	Unpaginated	Economic impacts are considered among the mitigating factors that may positively impact the public health, safety, or welfare.	Not in dispute.

	Specifically, the creation of jobs for “local youth” is cited as an example of positive impacts for the public. (HO FOF/COL 285-286, p. 57)	
62	Unpaginated Yet, only half of the 1,000 jobs currently provided by the astronomy industry are filled by locals, with most of these positions being technical or administrative in nature. Furthermore, Dr. Hasinger noted that “it is much better to hire local residents instead of mainland residents” as the mainland residents “typically leave after a few years of employment.” (HO FOF/COL 285-286, p. 57)	Inaccurate/false. The workforce currently has <i>more</i> than 50% local employees. HO FOF 286.
63	Unpaginated The unintended consequence on the public health of 500 positions occupied by temporary residents from the mainland is not addressed by the Applicant or the HO. The increased demand for housing by temporary residents which can be afforded at higher prices due to decent salaries afforded by 500 jobs in astronomy should be considered for the effects on public health. The struggle by local families to find full-time jobs with a reasonable salary and affordable housing is well-documented in the state of Hawaii, including by UHERO which is used as a source for the economic data on the astronomy industry.	Unsupported/unsubstantiated.  Facts regarding housing demand and housing prices not in evidence.
64	Unpaginated While Dr. Sanders opines that efforts will be made to increase the amount of locals filling the 500 mostly technical and administrative jobs that are currently occupied by temporary mainland residents, the “availability of a local workforce with the requisite skills is a very strong plus for the site.” (HO FOF/COL 288, p.58)	Incomplete. Locating the TMT Observatory on Mauna Kea is favored in that the availability of housing, quality schools and medical care, and opportunities for spousal employment are important factors in attracting and retaining long-term employees. HO FOF 288
65	Unpaginated Weight given to the Applicants’ witnesses testimonies opinions, particularly when those opinions appear to negate previous statements, is worth careful consideration and evaluation in light of the HO’s determination that no parties or witnesses would be formally designated as experts. (HO FOF/COL 100, p.22)	Mischaracterization. The Hearing Officer is still charged with determining the weight of each witnesses’ testimony. <i>See</i> Response 18 regarding credibility determinations.

66	Unpaginated	<p>On the topic of job creation, despite the first astronomical testing beginning in 1964 with the first "scar" (term used by kupuna and noted in the Final EIS to describe the visceral desecration of the sacred space) by the creation of the Mauna Kea Access Jeep Trail, Dr. Coleman testified that his was aware of only four Native Hawaiians holding astronomy degrees. (HO FOF/COL 127, p. 26 and 302, p. 61)</p>	<p>Unsupported/unsubstantiated. Irrelevant/inapplicable. Misleading to the extent the exception equates local people with native Hawaiians. Incomplete. Dr. Coleman testified that the TMT Project will allow the University to continue its astronomy outreach and teaching efforts, and aid in the quest to produce local astronomers. HO FOF 302. Irrelevant/inapplicable.</p>
67	Unpaginated	<p>Over the course of 53 years, on the Hawaiian island with the largest percentage of Native Hawaiians, only four Native Hawaiians are known to have astronomy degrees. If Dr. Coleman's integrity as a professional in this industry is not questioned, the importance of this information is critical for understanding the difference between the perceived and actual impacts related to the continued development of Maunakea.</p>	<p>Misleading to the extent the exception equates local people with native Hawaiians. Incomplete. Dr. Coleman testified that the TMT Project will allow the University to continue its astronomy outreach and teaching efforts, and aid in the quest to produce local astronomers. HO FOF 302. Unsupported/unsubstantiated.</p>
68	Unpaginated	<p>If the promise of local jobs, education, and other supposed benefits that may mitigate any public health issues can be taken at face value from individuals recognized in industries related to the subject matter to which they speak, the promise by public health professionals that the stress tied to desecration and development may exacerbate negative outcomes in public should be taken just as seriously.</p>	<p>See Response 18 regarding credibility determinations. See HO FOF 970, 973, 976-78.</p>
69	Unpaginated	<p>Finally, the mitigation measure that focuses on the training of the 140 TMT staff and other key involved in TMT management,</p>	<p>Unsupported/unsubstantiated.</p>

70	Unpaginated	development or otherwise is wholly insufficient. The TMT training video developed for the purpose of educating staff about the cultural resources has been made available online recently. This video, roughly 45 minutes in length, includes 13 slides covered in less than seven minutes that "train" staff on the cultural resources of Maunakea. The training is more informational than instructional. ( <a href="http://www.malamamaunakea.org/about-us/maunakea-orientation">http://www.malamamaunakea.org/about-us/maunakea-orientation</a> )	TMT Training video not in evidence.
71	Unpaginated	If preservation and appropriate actions for and around cultural resources rely upon the information presented in the video, the public's concern that the Applicants will not properly care for the cultural resources is reasonable.	TMT Training video not in evidence.
72	Unpaginated	Using another universal example of a resource that almost any party can relate to - food - supports the concern for displayed by members of the public regarding the TMT Project. If the care of food resources for the entire population of Hawaii were dependent on a seven minute video, the duration alone may cause concern.	TMT Training video not in evidence.
73	Unpaginated	The duration of the training video, however, is far less of a concern than the content.	TMT Training video not in evidence.
74	Unpaginated	Again, if the care for the state's food resources were the topic instead of the state's cultural resources, the staff responsible for the state food supply would leave the training knowing what food is, what some group's favorite dishes are, along with a few short examples of why those foods are favorites of certain groups within the state. If the TMT training video was designed to train staff on how to manage food resources for the state instead of the cultural resources of the state, our entire food supply would be at risk.	TMT Training video not in evidence.
75	Unpaginated	Knowing what to look for for signs of food, how to care and manage food to protect from rot, pests, and other deleterious effects that could lead to serious public health issues would not be part of a training video if it were formulated to match the instructional quality of the training video used for TMT Project	TMT Training video not in evidence.

76	Unpaginated	staff. Similarly, for cultural resources training, the video leaves the viewer with some images of a few of the cultural resources along with some explanation that these resources are important for Native Hawaiians as there are traditional stories or moolelo tied to Maunakea. Other than a note that “candy wrappers and business cards or other forms of advertisements will be removed from cultural sites such as shrines,” the so-called training did not cover what to look for when identifying cultural resources, appropriate behaviors and management of those resources, how to properly protect said resources from other staff or visitors that may not be acting in accordance with appropriate protocols, etc.	TMT Training video not in evidence.
77	Unpaginated	To say the cultural resource training video is lacking is an understatement.	TMT Training video not in evidence.
78	Unpaginated	If the “mere opinions” contained in the testimonies from the Applicant witnesses is contrasted with the publicly available training video, the reliance on the HO findings of facts related to such testimonies should be reconsidered.	TMT Training video not in evidence.
79	Unpaginated	The lack of detailed, clear instructions for a cultural resource training from Applicants that include an educational institution and organization promising the height of educational opportunities as mitigating factors to all eight criteria is appalling, at best.	TMT Training video not in evidence.
80	Unpaginated	The findings and conclusions showing that the eighth criterion was successfully met by the Applicant is erroneous and the application should be denied for the following two reasons:	Unsupported/unsubstantiated. HO COL 127 is accurate and supported by the evidence in the record and the citations therein.
81	Unpaginated	First, merely discrediting the testimonies of recognized public health professionals does not satisfy the Applicants’ burden to show that the TMT Project is not materially detrimental to public health.	<b>See</b> Response 18 regarding credibility determinations; <i>see also</i> Responses 19-23 regarding the Hearing Officer’s determinations that the testimony of Dr. Taualii, Dr. Meyer, Prof. Kaholokula, Perreira, and Teale were unsupported,

82	Unpaginated	<p>Second, the existing mitigation measures are invalid because the BLNR does not have sufficient evidence to show extent of impact on public health, upon which valid mitigation measures would be based.</p>	<p>unsubstantiated, and thus not credible. Mischaracterization. The Hearing Officer did not merely rely upon the lack of credibility of the Petitioners/Opposing Intervenor and their witnesses. UH Hilo/TIO produced affirmative evidence that the TMT Project will not be materially detrimental to the public health, safety, and welfare. <i>See generally</i> HO FOF 966-1016; HO COL 277-297.</p> <p>Mischaracterization of holding in <i>Ka Pa 'akai</i>. HO COL 108-110.</p> <p>Inaccurate/false. Mitigation measures are a well-accepted means to lessen the impacts of a land use. <i>See</i> HO COL 123, 206,</p> <p>Inaccurate/false. In <i>Morimoto</i>, the Supreme Court held that all mitigation measures set forth in an EIS must be made part of the conditions of the CDUP. <i>See</i> HO COL 211-12.</p> <p>Unsupported/unsubstantiated.</p> <p>Inaccurate/false. Mitigation measures are a well-accepted means to lessen the impacts of a land use. <i>See</i> HO COL 123, 206,</p> <p>Inaccurate/false. In <i>Morimoto</i>, the Supreme Court held that all mitigation measures set forth in an EIS must be made</p>
83	Unpaginated	<p>Lastly, even if the impacts and extent of impacts to public health are considered sufficiently understood, the mitigation measures are inadequate.</p>	<p>Unsupported/unsubstantiated.</p> <p>Inaccurate/false. Mitigation measures are a well-accepted means to lessen the impacts of a land use. <i>See</i> HO COL 123, 206,</p> <p>Inaccurate/false. In <i>Morimoto</i>, the Supreme Court held that all mitigation measures set forth in an EIS must be made</p>



84	Unpaginated	<p>BLNR should deny the Applicant's CDUP until the Applicant can show by a preponderance of the evidence that the extent of the public health impacts specifically, as well as whether those health impacts are or can be appropriately mitigated by the measures offered.</p>	<p>part of the conditions of the CDUP. See HO COL 211-12.</p> <p>HO FOF 1016 is accurate and supported by the evidence in the record and the citations therein.</p> <p>Unsupported/unsubstantiated.</p> <p>Mischaracterization of holding in <i>Ka Pa 'akai</i>. HO COL 108-110.</p> <p>The reliable and probative evidence in the whole record demonstrates that the TMT Project satisfies HAR § 13-5-30(c)(8). See <i>generally</i> HO FOF 966-1016; HO COL 277-297.</p>
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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**

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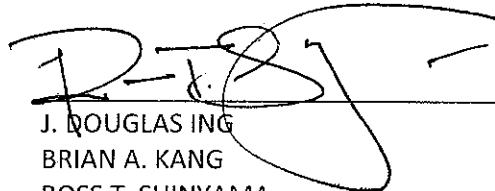
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