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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO WILLIAM FREITAS'S EXCEPTIONS TO HEARING OFFICER RIKI MAY

AMANO'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, FILED AUGUST 21, 2017 [DOC. 815]; APPENDICES A–B; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO WILLIAM FREITAS'S EXCEPTIONS TO HEARING OFFICER RIKI MAY AMANO'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, FILED AUGUST 21, 2017 [DOC.815]

Applicant UNIVERSITY OF HAWAI'I AT HILO ("**UH Hilo**") and TMT INTERNATIONAL OBSERVATORY, LLC ("**TIO**"), through their respective counsel, jointly submit this Response to William Freitas's ("**W. Freitas**") *Exceptions to Hearing Officer Riki May Amano's Findings of Fact, Conclusions of Law, and Decision and Order*, filed August 21, 2017 [Doc. 815] ("**W. Freitas'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

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

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

[1] The Hawai'i Supreme Court has held that a hearing officer's recommendations can serve as the agency's "proposal for decision" under HRS § 91-11. *See White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d

> 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.***

Haw. Rev. Stat. §91-11 (emphasis added).

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

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

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1143, 1146 (1982); *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).

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, the BLNR must determine whether the reliable, probative, and substantial evidence in the whole record 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, the BLNR should consider and give due regard to the Hearing Officer's credibility determinations so long as it finds that 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 WILLIAM FREITAS'S EXCEPTIONS

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

UH Hilo and TIO object to each of the points in W. Freitas'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. UH Hilo and TIO also object to W. Freitas's Exceptions to the extent they assert alleged "findings" that are beyond the scope of issues set forth in Minute Order No. 19 [Doc. 281].

UH Hilo and TIO object to each of the points in W. Freitas'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 W. Freitas'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 W. Freitas'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 W. Freitas'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; W. Freitas's ability to make such a challenge expired long ago, and he cannot use this proceeding to reopen the FEIS approval process. This proceeding pertains only to the CDUA and is entirely governed by applicable constitutional law, HRS Chapter 183, and the Conservation District rules, HAR Title 13, Chapter 5 that are genuinely at issue here.

UH Hilo and TIO also object to W. Freitas's Exceptions to they 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, 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 W. Freitas 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 W. Freitas. That position is not supported by the law.

Appendix A contains general objections to W. Freitas's Exceptions, which UH Hilo and TIO hereby incorporate by reference into their response to each of W. Freitas'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 W. Freitas'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 W. Freitas's Exceptions, and BLNR should disregard all such unsupported assertions. Unsupported assertions in the introduction of W. Freitas's Exceptions are addressed through the responses to specific findings in Appendix B.

The FOF/COL and page numbers referenced herein follow those as provided in W. Freitas'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 W. Freitas' 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. *See* Minute Order No. 19 [Doc. 281].
Lack of Jurisdiction	The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
Mischaracterization.	The Exception mischaracterizes legal authority or the contents of the record.
Misleading. Partial quotation.	The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
Misleading. Presented out of context.	The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
Misrepresentation	The Exception affirmatively misrepresents legal authority or the contents of the record.

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

Appendix B

Summary Table of Responses to W. Freitas's Exceptions

Exception #[2]	Page	Exception	Response	Resp. Line
1	1-9	Exception to Entire Scope of HO FOF/COL. Allegation that the HO FOF/COL did not provide participants with a fair chance to be meaningfully heard because W. Freitas feels that: a. His entire testimony about traditional and customary practices on Mauna Kea generally and on the TMT site was not meaningfully engaged;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made; nor does it state the grounds for this otherwise unsubstantiated assertion. 1.a. While W. Freitas's exact proposed language may not have been used in the HO FOF/COL, the HO FOF/COL makes clear that all evidence received into the record was duly considered. HO FOF/COL at 7. Moreover, W. Freitas's testimony as set forth in the record and his proposed FOF, to the extent that they were consistent with the evidence in the record, listed below were incorporated into the HO's FOF/COL. *See* HO FOF 19, 608, 658, 685, 687, 688, 786, 800, 801, 1007.	1.
		b. His spiritual practices are dismissed by the Hearing Officer as merely political acts (FOF 687-88; UH/TIO 630);	Mischaracterization of the HO FOF/COL; citation does not support the proposition. The FOFs cited do not dismiss W. Freitas's practices outright, but note that based on the evidence adduced at the hearing, W. Freitas's construction of the ahu on or near the TMT site within the last two years appears	1.b

[2] The numbering in his Exceptions is not in order and duplicate numbers are sometimes used. Accordingly, the "Exception #" referred to is the Exception # used by W. Freitas on the page that is referenced in the "Page" column.

Exception #[2]	Page	Exception	Response	Resp. Line
			to be, at least in part, for the purpose of protesting the TMT Project. *See* HO FOF 687-88. The general practice of constructing an ahu has not been characterized as political in nature; however, in light of the context surrounding the ahu constructed by W. Freitas on Mauna Kea, including placement and timing, the evidence supports the Hearing Officer's finding that it was done at least in part for political purposes. *See* HO FOF 658, 685 and the citations to the record therein. Indeed, based on W. Freitas's own testimony, the installation of an ahu in 2015 was an act of protest to the TMT Project and the permit at issue in this proceeding. W. Freitas cannot sincerely argue that the ahu is a traditional and customary practice, or the reasonable exercise thereof, particularly because he concedes that the ahu was built for the purpose of blocking construction and he admits that he conducted no practices on Mauna Kea prior to building the ahu on the TMT site in 2015, the same time that he began actively opposing the Project. HO FOF 658, 685, 687, 688, 786, 801; Tr. 3/2/17 at 184:22-188:14; 194:20-194:24, 199:2-199:22, 201:12-202:4, 252:12-253:12, 259:4-266:22, 268:13-269:13.	
		c. It is absurd that the Hearing Officer could listen to 5 months of testimony and reproduce the same decision that as that of the first contested case;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL	1.c

Exception #[2]	Page	Exception	Response	Resp. Line
			to which objections are made. As set forth therein, the Hearing Officer considered all the evidence presented, and the resulting HO FOF/COL amply supported by evidence in the record. HO FOF/COL at 7. Although W. Freitas alleges that the Hearing Officer's adoption of portions of the joint UH-TIO FOF/COL is evidence that W. Freitas was not afforded a meaningful opportunity to be heard, this argument has been uniformly rejected in other jurisdictions. *See 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). It is well established that an adverse ruling does not evidence bias. *See Jou v. Dai-Tokyo Royal*	

Exception #[2]	Page	Exception	Response	Resp. Line
			State Ins. Co., 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."); *James W. Glover, Ltd. v. Fong*, 39 Hawai'i 308, 316 (1952) (stating that "mere adverse rulings, even if erroneous[,]" would not constitute a "basis for disqualification"). The Hearing Officer accepting proposed findings of fact or conclusions, even if adopted verbatim, does not establish Hearing Officer bias. *See generally, Kumar v. Kumar*, 2014 WL 1632111, at *8 (Haw. Ct. App. 2014) (holding that a court's substantial adoption of a proposed decree did not establish an appearance of impartiality, *i.e.*, bias). In the context of civil proceedings, it is widely accepted that a trial judge may adopt a parties proposed findings it total or in part. *See, e.g.*, *Howard v. Howard*, 259 P.2d 41, 42 (Cal.App. 2 Dist. 1953) (stating that courts may adopt proposed finding in total or in part); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 376 (Colo. 1994) (holding that the adoption of a proposed FOF/COL is not necessarily improper, and that "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel.") (citations omitted).	
		d. His testimony was engaged only in a cut-and-paste fashion from his written direct testimony ("**WDT**") or oral testimony at the hearing;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made.	1.d

Exception #[2]	Page	Exception	Response	Resp. Line
			See Response Line 1.a	
		e. The Hearing Officer reproduced UH-TIO Proposed Findings of Fact, Conclusions of Law and Decision and Order ("**UH-TIO FOF/COL**");	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made. W. Freitas misinterprets the law. Procedural due process ensures that a party is afforded "an opportunity to be heard in a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 237 (2015). It does not ensure that a party is able to dictate the direction or outcome of the proceedings or that the fact-finder rule in favor of any particular party. Multiple cases in Hawai'i have held that merely ruling against a party does not deprive that party of due process. *See Onaka v. Onaka*, 112 Hawai'i 374, 380, 146 P.3d 89, 95 (2006) (holding that the trial court in a divorce action did not violate the due process rights of the defendant when it denied the defendant's two motions to continue trial due to her pregnancy and that while the defendant had a qualified right to be present, she did not have a fundamental right to have trial commence at the time of her choosing); *State v. Karwacki*, 1 Haw.App. 157, 159, 616 P.2d 226, 228 (1980) (holding that the trial court did not deny the	1.e

Exception #[2]	Page	Exception	Response	Resp. Line
			defendant due process by denying the defendant's Motion for Deferred Acceptance of Guilty Plea and Motion to Reconsider); *Simmons v. Administrative Director of Courts*, 88 Hawai'i 55, 65, 961 P.2d 620, 630 (1998) (holding that the Administrative Driver's License Revocation Office's practice of denying all prehearing subpoena requests for witnesses other than law enforcement officials submitting sworn statements does not violate an arrestee's right to due process). Although W. Freitas alleges that the Hearing Officer's adoption of portions of the joint UH/TIO FOF/COL is evidence that W. Freitas was not afforded a meaningful opportunity to be heard, this argument has been uniformly rejected in other jurisdictions. *See 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	

Exception #[2]	Page	Exception	Response	Resp. Line
			its own). The Hawai'i Supreme Court's holding in *In re Guardianship of Carlsmith* is consistent with the rationale from other jurisdictions that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to *present their objections*." 113 Haw. 236, 240, 151 P.3d 717, 721 (2007) (emphasis added; citations omitted). Here, W. Freitas was plainly afforded an opportunity to present W. Freitas's objections. These objections, and the objections of other Petitioners/Opposing Intervenors, are acknowledged throughout the HO FOF/COL. Furthermore, the HO added numerous FOF and COL that were not proposed UH and TIO. W. Freitas's claim that W. Freitas's due process rights have been violated simply because the Hearing Officer has ruled against W. Freitas is a misinterpretation of the law and facts. Such argument is improper and should be rejected. W. Freitas also argues that, by ruling against him and adopting the majority UH Hilo's and TIO's joint proposed FOF/COL, the Hearing Officer demonstrated bias. W. Freitas's assertions are insufficient to overcome the "presumption of honesty and integrity" in favor of the Hearing	

Exception #[2]	Page	Exception	Response	Resp. Line
			Officer and establish bias. *Sifagaloa v. Board of Trustees of the Employment Retirement System*, 74 Haw. 181, 193, 840 P.2d 367, 372 (1992). It is well established that an adverse ruling does not evidence bias. *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."); *James W. Glover, Ltd. v. Fong*, 39 Hawai'i 308, 316 (1952) (stating that "mere adverse rulings, even if erroneous[,]" would not constitute a "basis for disqualification"). The Hearing Officer accepting proposed findings of fact or conclusions, even if adopted verbatim, does not establish Hearing Officer bias. *See generally, Kumar v. Kumar*, 2014 WL 1632111, at *8 (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 party's proposed findings in total or in part. *See, e.g., Howard v. Howard*, 259 P.2d 41, 42 (Cal.App. 2 Dist. 1953) (stating that courts may adopt proposed finding in total or in part); *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352, 376 (Colo. 1994) (holding that the adoption of a proposed FOF/COL is not necessarily improper, and that "[F]indings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel.") (citations omitted).	

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		f. The Hearing Officer relied on experts from the Applicant and TIO;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made. This Exception also mischaracterizes the record and the contents of the Hearing Officer's ruling regarding expert witnesses. Upon receiving objections from Petitioners/Opposing Intervenors, the Hearing Officer determined that no one would be formally qualified as experts in this contested case hearing. Instead, it was agreed that the background, education, experience, etc. of a particular witness would go to the weight of his/her testimony. Tr. 10/20/16 at 52:24-53:21. "[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." *See Hawai'i Prince Hotel Waikiki Corp. v. City & Cnty. of Honolulu*, 89 Hawai'i 381, 390, 974 P.2d 21, 30 (1999) (quoting *State v. Pioneer Mill Co.*, 64 Haw. 168, 179, 637 P.2d 1131, 1139 (1981)). As the presiding officer of the evidentiary hearing, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, determine whether it is credible, not credible, or more or less	1.f

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			credible than other evidence. W. Freitas attempts improperly to portray the Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact]."). The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawai'i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted). This Exception does not cite to anything in the record to show that the Hearing Officer's credibility determinations are not supported by the reliable, probative, and substantial evidence in the whole record.	
		g. The Hearing Officer did not use any of Petitioners' or Opposing Intervenors's witnesses to discredit UH Hilo or TIO experts;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. *See* Reponses Line 1.f.	1.g

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		h. The Hearing Officer failed to grasp a key legal issue: that the Project requires an EIS that is comprehensive and current;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. W. Freitas's claim that the EIS must be updated is unsubstantiated/unsupported, and is fundamentally inaccurate. This proceeding relates 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. Minute Order No. 19 [Doc. 281]. This proceeding is not an EIS challenge proceeding; such challenges must be timely made under the applicable EIS authorities. W. Freitas's ability to make such a challenge under those authorities expired long ago, and he cannot use this proceeding to reopen the separate EIS approval process. HO FOF 212-213. Notwithstanding that the sufficiency of the FEIS was previously addressed in the EIS proceedings and is not at issue in this proceeding, there is no evidence in the record that Project impacts have substantially changed over time such that a further environmental review would be necessary. *See Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373 (1989) (providing that the "rule of reason" is the standard that governs an agency's decision whether to prepare a SEIS. A SEIS is not needed every time new information comes to light	1.h

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			after the EIS is finalized. "To require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.") With respect to religious and traditional and customary practices on Mauna Kea in particular, the HO found that the Project will not cause significant adverse impacts to practices established pre- and post-2015, and that Petitioners and Opposing Intervenors have been and will continue to be able to exercise their traditional and customary practices on Mauna Kea. HO COL 203, 343, 346; HO FOF 803, 816, 812, 831, 833. Furthermore, UH Hilo/TIO documented and disclosed the extent and development of religious, traditional and customary practices and sites since the EIS was approved. HO FOF 152, 563-670, 671-854; HO COL 194, 203, 205, 208, 329-390; *see also* Ex. A-1/R-1 at 4-6 (ahu construction, among other practices, was considered and assessed in the CDUA and TMT FEIS); Ex. A-3/R-3 § 3.2; Ex. A-5/R-5, Apps. D, E & F.	
		i. The EIS fails to engage the ritual actions of a generation of youth whose spirituality is *now* deeply connected to Mauna Kea and the EIS fails to address changed circumstances;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. *See* Response Line 1.h.	1.i

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		j. The conditions of approval were nearly the same as those proposed as a result of the 2011 hearing;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. The HO FOF/COL is based on the evidence in the record in this contested case proceeding. *See* Response Line 1.c. The documents, filings, and evidence from the 2011 contested care hearing are not in evidence or part of the record in this contested case hearing. The mere fact that the HO FOF/COL is similar to the decision in the prior contested case hearing in this case does not render the Hearing Officer's decision erroneous or evidence bias. This Exception does not cite to anything in the record to show that the proposed conditions are not supported by the reliable, probative, and substantial evidence in the whole record. *See* Response Line 1.e. Moreover, neither W. Freitas nor any of the Petitioners and Opposing Intervenors proposed *any* conditions of approval either in their proposed FOF/COL or in their Exceptions.	i.j
		k. The Hearing Officer disregarded the numerous and substantive corrections W. Freitas made to the UH-TIO FOF/COL;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. W. Freitas also fails to identify any alleged "substantive corrections" he proposed to the UH-TIO FOF/COL that he claims the Hearing Officer "disregarded."	1.k

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		l. The Hearing Officer mischaracterized Greg Johnson's testimony to claim that the hearing represented meaningful consultation;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. HO FOF 240 is accurate and supported by the evidence in the record and the citations therein.	1.l
		m. The Hearing Officer FOF/COL fail to discuss the key religious and traditional practices that have developed on Mauna Kea since the last contested case hearing, such as Kapu Aloha;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. Inaccurate/False. Practices and sites considered to be religious since the EIS was approved have been documented. *See, e.g.*, HO FOF 152, 563-670, 671-854; HO COL 194, 203, 205, 208, 329-390.	1.m
		n. The Hearing Officer fails to understand the role of existing ahu on the TMT site, debasing the religious traditions of our ancestors by calling them political acts;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. The credible and substantial evidence demonstrates that there are no known ahu or historical features near the TMT Project area (other than those recently constructed in protest of the TMT Project). *See* HO FOF 359.c; 687. W. Freitas failed to present any evidence that building ahu in order to stop a project is a traditional and customary practice, or the reasonable exercise thereof.	1.n

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		o. The Hearing Officer gave greater weight to the testimony of the archaeologist witnesses than to Greg Johnson's testimony; in an effort to avoid triggering the changed circumstances of HRS § 343-2 to avoid an updated CMP;	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. *See* Response Line 1.f; Response Line 1.h. W. Freitas's claim that the CMP must be updated is unsubstantiated/unsupported. The citation to HRS § 343-2 does not support this proposition.	1.o
		p. Because of the above, W. Freitas asks the Board to order a new CMP done by an independent analyst with experience in cultural and ethnographic methodologies for the purpose of completing the FEIS and adjusting its mitigation measures, or to recuse itself from decision-making authority on this matter. The Board has demonstrated its failure to comprehend and/or a commitment to uphold State constitutional mandates.	Irrelevant/Inapplicable. The CMP and FEIS are not at issue in this contested case proceeding. *See* Response Line 1.h. Citations to the concurrence in *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Hawai'i 376, 363 P.3d 224 (2015) are misplaced as the concurrence is not controlling law.	1.p
		q. Further asks the State Supreme Court to invalidate the permit and (1) remand the case for an updated CMP/CDUA (Supplemental EIS) to be considered by an independent commission or by the Court as regards to its significance for the State constitutional protections for traditional and customary practices and/or (2) review the testimony for the last 5 months and create its own FOF/COL/DO.	Lack of jurisdiction. This proceeding is not before the Hawai'i Supreme Court and the Board has no authority to direct the Hawai'i Supreme Court to take any particular action.	1.q
2	9-10	EXCEPTION to the many errors the HO reproduces by copying directly from the UH/TIO document and failing	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not	2.

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		to consider my Response document; meaningful consideration of this document might have changed her legal conclusions and decision orders. This failure does not meet the requirement of adversarial testing mandated by the State Supreme Court for this Contested Case Hearing. The multitude of inaccurate and blatantly egregious mistakes regarding witness testimony must be noted first in the UH/TIO FOF/COL/DO, which were then reproduced by the HO in her FOF/COL/DO (see citations below for proof): both documents must be viewed with heightened scrutiny and suspicion. Note: All FOF and COL's referenced are from Hearing Officer's FOF/COL/DO unless otherwise stated (UH/TIO's original citations are also noted to demonstrate the HO's extensive reliance on the Applicant's documents). Unlike the Hearing Officer, I acknowledge that what follows is largely a reproduction of my Response document, with the hope that the errors it contains are corrected, that the facts and conclusions of law it presents are considered meaningfully, and that the Hearing Officer's reliance on both the UH/TIO document and UH/TIO witnesses White, Rechtman, Collins and Nees, is clear and apparent. The following, then, provides support for my unequivocal position that the FOF/COL/DO issued by Hearing Officer Amano DOES NOT MEET the judicially mandated requirements for due process as outlined in Mauna Kea Anaina Hou (2015).	identify any specific portion of the HO FOF/COL which objections are made.	
1	10	1. FOF 770 (cf. UH/TIO 715): WRONG HO asserts that Greg Johnson, a witness for me, is not "an expert in land use planning or environmental review." This is not true.	Unsupported/unsubstantiated; Not in Evidence. Professor Johnson has no training related to land	3.

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		Professor Johnson has written extensively, including in peer-reviewed publications, about permitting issues around land use and environmental assessments in Hawai'i, including as they are handled by the DLNR. For two examples (more can be found in his WDT) please see: 1.1. 2014 "Bone Deep Indigeneity: Theorizing Hawaiian Care for the State and its Broken Apparatuses." In Performing Indigeneity, edited by H. Glenn Penny and Laura Graham (University of Nebraska Press), 247-272. Invited and peer reviewed. 1.2. 2013 "Varieties of Hawaiian Establishment: Recognized Voices, Routinized Charisma, and Church Desecration." In Varieties of Religious Establishment, edited by Winnifred Sullivan and Lori Beaman (Ashgate Press), 55-71. Invited and peer reviewed.	use planning or environmental review. There is no evidence in the record to support any expertise in land use planning or environmental review. Johnson's WDT, Ex. T-1 provides that his study and work focuses on the intersection of religion and law in the context of living indigenous traditions. Ex. T-1 at 1-2. Although referenced in Johnson's WDT, neither of the articles used to support this assertion were filed or referenced during his testimony and are therefore not evidence in this proceeding. Johnson also testified that he is not an expert in law and that his testimony was not giving a legal opinion. Vol. 37, Tr. 02/16/17 84:7-13.	
2	10-11	2. FOF 771 (cf. UH/TIO 716). WRONG According to the HO, and using the precise language of UH/TIO, "Prof. Johnson was present on Mauna Kea on June 22, 2015 when the first two ahu on the TMT Project site were installed in the middle of the access roadway to the TMT Project site." Professor Johnson was not on Mauna Kea on June 22, 2015; he states in his WDT that he was on Mauna Kea on the evening of June 23" and did not visit the summit on that trip.	UH and TIO do not dispute the correction to the typo of the date and that Johnson was not present when the ahu were constructed. Johnson's WDT states that he visited Mauna Kea on June *24 and 25*, 2015, not June *23*. Ex. T-1 at 3; Vol. 37, Tr. 02/16/17 at 20:13-21:22.	4.
3	11	3. FOF 771 (cf. UH/TIO 716). WRONG According to HO, and using the precise language of UH/TIO, when referring to testimony of Professor Johnson, they state that he "confirms and corroborates the evidence that no prior ahu or religious practice occurred at that specific	HO FOF 771 does not assert that Johnson made the statement that "no religious practice previously took place at site." The quoted language is the HO's FOF based on Johnson's testimony, which is accurately represented as supported by the citations	5.

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		location prior to its designation as the TMT Project site." Professor Johnson did not testify that "no religious practice previously took place at site."	to the record in FOF 771.	
4	11	4. FOF 771 (cf. UH/TIO 716). WRONG AND MISCONSTRUED According to HO, and using the precise language of UH/TIO, the FOF states with regard to Professor Johnson that: "He also testified that members of the native Hawaiian community disagree about the status and meaning of the ahu, as some of the stones came from the Kona shoreline. and not from the surrounding summit area, thus breaking protocol. Ex. T-1 at 5." 4a. Mr. Freitas testified that the stones came from Kanaloa not from Kona Vol.44, p.261:1 4. 4b. The argument advanced by HO and UH/TIO completely inverts Professor Johnson's analysis. He argued that internal disputes of this nature, the example of stone provenance included, are precisely the kinds of struggles that animate tradition and are evidence to him as a scholar of religion of the living quality of religious traditions. His discussion reads: I should note here a point about internal division in the Native Hawaiian community regarding the ahu. Some members of the community have expressed disagreement about the status and meaning of the ahu. To cite one example, I have heard some practitioners express anxiety about the fact that the pohaku (stones) for one of the ahu came from the Kona shoreline, far from the realm of the summit, thus confusing an important ritual distinction. As a scholar of religion, I understand such internal tensions to be parallel to those...that configure the terrain	4.a. UH Hilo and TIO do not dispute that W. Freitas testified that the stones came from Kanaloa, but Johnson's WDT does in fact state that the stones came from the Kona shoreline. Ex. T-1 at 5. Therefore, FOF 771 is accurate as to Johnson's testimony. 4.b. *See* Response Line 1.f.	6.

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		of all religions. Simply put, the status of the stones would not have been debated had the matter not been significant. Indeed, I take such disputes to be evidence of the religious and traditional status of the ahu. Stones, like bread and wine, tend not to rise to the level of debate unless it really matters. See Johnson WDT at p. 5.		
5	12-13	5. FOF 772 (cf. UH/T1O 717). MISCONSTRUED AND INACCURATE According to HO, and using the precise language of UH/TIO: "Prof. Johnson argues that the presence of new ahu constructed on the TMT Project site, after the site was known and the project heavily opposed, triggers a requirement for a new EIS. Tr. 2/16/17 at 17:4-17, 28:3-21; 53:14-18. This argument, however, is unsupported under Hawaii law and would produce an absurd result. The purposes of HRS Chapters 343 and 6E are to inventory existing conditions at the time that the studies are done. To provide protection to these new structures placed after the project site is known and in direct and obvious protest of that project would allow persons who oppose a proposed project to stop it simply by placing a stone in the area or initiating a new practice that incorporates recognized traditional practices from other areas on the island." Professor Johnson pointed to the ahu as examples of customary and traditional practices not addressed by the EIS and related documents, particularly in the context of heightened religious activity in Hawai'i over the past several decades and on Mauna Kea in particular. As addressed below, Professor Johnson's point was to argue that such practices stand in continuity with a long history of such practices in Hawaii wherein religions sensibilities are	Unsupported/Unsubstantiated; Lack of Jurisdiction. W. Freitas's interpretation remains unsupported by the evidence in the record. Irrelevant/Inapplicable. Challenges to the EIS are not part of this contested case proceeding and neither W. Freitas nor Professor Johnson timely challenged approval of the FEIS in the appropriate proceeding. HO FOF 212-213; *see* Response Line 1.h. The assertion that the new ahu and recent (since 2015) use of the TMT site triggers a new EIS requirement is not credible and unsupported/unsubstantiated by the evidence in the record and legal authorities. *See* Response Line 1.h. Regarding the ahu as a political protest, see Response Line 1.b.	7.

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		catalyzed and acted upon in the context of threats to sacred sites. It is precisely through the actions on Mauna Kea described by Professor Johnson, including those engaged in the spirit of kapu aloha, that Hawaiian religious life is expressed and maintained in the contemporary moment. If such a perspective is regarded as absurd, then the State of Hawai'i should abandon the pretense of affording Hawaiian traditions the protections that its own constitutional demands.		
6	13	6. FOF 773 (cf. UH/TIO 718). WRONG According to HO, and using the precise language of UH/TIO: "While Prof. Johnson opined that requiring a permit to build an ahu might be considered offensive to some from a religious perspective, he agreed the State has a right to regulate cultural practices." This is not what Professor Johnson opined. He testified that the state "stipulates" that it has this right (94:14-15).	Not in dispute that Johnson testified that the State stipulates that it has the right to regulate cultural practices. As expressly provided in the Hawai'i State Constitution, the State in fact has that right. *See* HO COL 105.	8.
7	13	7. FOF 774 (Cf. UH/TIO 719-7120). MISCONSTRUED: According to HO, and using language nearly identical to that of UH/TIO, "Prof. Johnson conceded that protesters standing in the access road for the purpose of blocking traffic do pose a safety and health risk." Professor Johnson answered a general question about safety in roads per se (Tr. 02/16/17 at 94:7-11) but then contextualized the particular actions that day by referring to the Protectors' religious motivations for standing in that road at that time. Health and safety concerns must be balanced with reasons Intervenors would be in the road, including a felt sacred duty to protect the mauna (92:11-15).	Unsupported/Unsubstantiated; Not in Evidence; Misrepresentation of the Law. There is no evidence in the record to support Johnson's/W. Freitas's position. It is Johnson's testimony that health and safety concerns should be balanced with the reasons persons may be a threat to health and safety, however, the law does not require that health and safety concerns be balanced. The State has a right to exercise its police powers when there are threats to the public health, safety, and welfare, period. *See State v. Ewing*, 81 Hawai'i 156, 914 P.2d 549 (App. 1996) ("The police power of the State is broad and	9.

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			extends to the public safety, health, and welfare."); *State v. Lee*, 55 Haw. 505, 513, 523 P.2d 315, 319 (1974) (holding statutes "reasonably related to the preservation of public health, safety, morals or general welfare of the public" are within the State's legitimate exercise of the police power).	
8	13-14	8. FOF: 777 (Cf. UH/TIO 722). WRONG According to HO, and using language similar to that of UH/TIO, there is no evidence {Professor Johnson] conducted or reviewed any peer reviewed studies concerning impacts to native Hawaiian practitioners on the mountain. Ex. T-1 at 3. This FOF is completely inaccurate. Professor Johnson testified regarding his ongoing research concerning Mauna Kea that was and continues to be sponsored by several entities. Results include numerous academic lectures, including for the American Academy of Religion, and the peer reviewed chapter, "Materalising and Performing Hawaiian Religion(s) on Mauna Kea," in The Handbook of Indigenous Religion(s) (Leiden: Brill Publishers, 2017). Other related publications are active and currently under peer review.	Despite W. Freitas's response, HO FOF 777 remains accurate. By W. Freitas's own admission, Johnson's publications have not yet been peer reviewed, but are currently undergoing that process. W. Freitas equates research that is "sponsored" to research that is peer-reviewed but they are not the same.	10.
9	14	9. FOF: 783 MISCONSTRUED HO, using language similar to that of UH/TIO, misquotes Mr. Fujiyoshi's response to the opinion poll that Mr. Ashida asked questions about: He did NOT say that he is unaware of this poll (Tr.44 page 139:14; Tr. 44 page 141:1). On redirect by Mr. Freitas, Mr. Fujiyoshi was asked whether he thought the poll was inaccurate because it was online and he answered, "Yes" (Tr.44 at 178).	Unsupported/Unsubstantiated; Not in evidence. Fujiyoshi testified that he did not know if he was aware about this particular poll or not. However, Fujiyoshi did not respond in the affirmative to W. Freitas's question about whether or not the poll was inaccurate. In fact, Fujiyoshi did not respond to that question at all and it was stricken from the record. Vol. 44, Tr. 03/02/17 at 178:9-23.	11.
10	14-16	10. FOF 878: MISLEADING AND/OR WRONG Following UHH/TIO FOF 817, HO combined and	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not	12.

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		misconstrued the cross-examination of witnesses Mr. Perry White and Mr. Tom Nance by William Freitas. Both HO and UH/TIO state, "William Freitas claimed that chemicals from Mauna Kea were leaching into the water source at Kiholo Bay, however, he admitted to not seeing a water study confirming the identity of the aquifer feeding Kiholo Bay. He admitted that his claim of contamination came only from his own "logic."" Tr. 3/2/17 at 254:20-258:15, 278:3-279:25. The fact is I testified that Kiholo was a special place mainly because of my Hawaiian name (Freitas WDT) given by my uncle "Jack Paulo" and the knowledge of the fresh waters that flow from Mauna Kea to Kiholo that he gathered and I tasted. TR. 3/2/17 255:1-5" UHH/TIO's witness Mr. Perry White attested to Kiholo being a special place, with a view of Mauna Kea and his knowledge of the waters that flow from the mauna to Kiholo, water that is vital to feed the "limu" that Native Hawaiians gather. Tr. 10/25/16 at 24:20-25, 26:1-5, 26:25, 27:1-3, 27:15 18. UHH/TIO's witness Mr. Nance attested to not knowing where lava tubes, aqueducts, cracks and crevices would be in or around the proposed TMT site where water seeps into the ground. Tr. 12/13/16 at 124:10-12 Upon cross-examination by Ms. Pisciotta, Mr. Nance testified that he does not have a Ph.D. in Hydrology. Tr. 12/13/16 Cross-examination by Ms. Ward demonstrated that Mr. Nance was to be paid by Carlsmith to review the EIS and to testify to his opinion. This opinion must be regarded with suspicion and caution, as his experience is primarily in building water wells with an engineering degree and he stated that he has "no" affiliation to the USGS (United	identify the correct portion of the HO FOF/COL which objections are made. W. Freitas refers to HO FOF 878 rather than 876. Nonetheless, HO FOF 876 is accurate and supported by the evidence in the record and citations therein. The reliable, probative, substantial, and credible evidence demonstrates that the TMT Project will not have a substantial adverse impact on the water resources and hydrology of Mauna Kea, including Lake Waiau and the groundwater underlying Mauna Kea. HO FOF 855-882.	

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		States Geographic Survey) pertaining to their report on high level groundwater on Mauna Kea. Tr. 12/13/16 at 129:1-5. Regarding a water study in the area of Kiholo, UH counsel, Mr. Manaut, asked me if I had read the water study report. I answered that I had ancestral knowledge of the origins of the waters that flow from Mauna Kea to Kiholo Bay. TIO counsel, Mr. Ing, cross-examined me referring to Freitas WDT T-3 which was "not" introduced as the WDT I would be testifying on. He proceeded to cross on the wrong WDT referring to "tons of mercury" that have already contaminated Mauna Kea. Tr. 3/2/17 at 254:24-25, 256:1-25, 257:1-25, 258:1-15. Never under oath did I testify to what HO has cited in FOF 878. I, William Freitas, testified to my experience of Kiholo before any development, and to my ancestral knowledge of the fresh waters that flow into the area of Kiholo from Mauna Kea. I have tasted the fresh waters of Kiholo. I have viewed Mauna Kea when no Observatories were built on it. I live and protect My Mauna A Wakea now in this time. In sum, the number of blatant errors and mischaracterizations made in HO Amano's document are complete and totally egregious. The fact that I could identify multiple and significant errors in just my short section of testimony, and that these errors went uncorrected and unaddressed by the HO, must cause the BLNR, and, in the case of further judicial oversight, Justices of the Court, to regard the entire HO record with doubt and suspicion, especially since it reproduces the errors of the UH/TIO FOF/COL/DO, as I demonstrated		

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		in my response to that document. Simply stated, the HO's FOF/COL/DO is not a document of integrity or an honest accounting of the record.		
3	16	3. EXCEPTION: HO characterizes my involvement in the construction of three ahu on the summit area of Mauna Kea, including on the site of the proposed telescope, as merely political actions. In response to Hearing Officer Amano's Finding of Facts, Conclusion of Law and Decision Order and its misrepresentation of my intentions and kuleana, I, William Freitas, would like to highlight certain testimony I offered regarding my religious and spiritual practice on Mauna Kea for the specific purpose of countering HO's assertion that the hearing has considered "the totality of facts and circumstances relating to Petitioners' and Opposing Intervenors' asserted practices" (COL 359), and thus meets its constitutional mandate. When Hearing Officer Amano copied and pasted much of UH/TIO's FOF/COL/DO, she clearly did not read or in any way meaningfully consider my response to UH/TIO's document. In the following testimony, I highlight my sincere spiritual commitment to Mauna Kea and testify under oath as to the religious traditional and customary practices I engage in on the summit area generally and on the potential construction site specifically.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify the correct portion of the HO FOF/COL which objections are made; the Exception mischaracterizes the HO FOF/COL and is not credible. The HO FOF/COL acknowledges that building the ahu may have been a religious, spiritual or modern cultural practice, but states that based on the evidence presented, W. Freitas's involvement in the building of certain ahu near the TMT site within the last two years appears to be, at least in part, for the purpose of protesting the TMT Project. *See* HO FOF 687-688. This is supported by, among other things, W. Freitas's own testimony that he conducted no practices on Mauna Kea prior to building the ahu on the TMT site in 2015, the same time that he began actively opposing the Project. HO FOF 685, 688, 800-801. *See* Response Line 1.a; Response Line 1.b.	13.
	16	(W. Freitas FOF 186). Mr. Freitas testifies that his practices on Mauna Kea are traditional and customary.	*See* Response Line 1.a; Response Line 1.b. W. Freitas's testimony was considered and incorporated into the HO FOF/COL. Merely asserting that certain practices are traditional and customary as provided under article XII, section 7	14.

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			of the Hawai'i State Constitution does not make them so; evidence is required to show that the specific requirements of such a designation are met, and the reliable, probative and substantial evidence in this case does not support a finding that Mr. Freitas's practices amount to traditional and customary practices, particularly since they did not commence until 2015. *See, e.g.*, HO FOF 685, 687-68, 801. W. Freitas's points are not supported any citation to the record and no evidence was presented that customary and traditional practices occur within the area E location site of the TMT Observatory. W. Freitas did not provide any evidence that he conducts any customary and traditional practices within the specific area E location site of the TMT Observatory. There is no reliable, probative, substantial and credible evidence or testimony sufficient to establish that any customary and traditional practices were or are conducted at the five-acre site on which the TMT Observatory is proposed to be built. HO FOF 671-854; HO COL 194, 203, 205, 208, 329-390. W. Freitas has not made a showing that his practices on Mauna Kea, including the building of the two ahu, are traditional and customary native Hawaiian practices, or a reasonable exercise thereof. Moreover, he did not begin his practices on Mauna Kea until 2015. HO FOF 685, 688.	

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	17	(W. Freitas FOF 178). Mr. Freitas describes the purpose for building the ahu: "It was built to give prayers and offerings in protection and forgiveness for those who desecrated the area."	*See* Response Line 1.a; Response Line 1.b; Response Line 14. W. Freitasalso testified that the ahu were constructed to block access to construction vehicles. The substantial evidence in the record supports the HO's FOF on this issue.	15.
	17	(W. Freitas FOF 179). Mr. Freitas testifies that ahu at the proposed TMT site were intended to gives prayers of protection of workers who built the access road.	*See* Response Line 1.a; Response Line 1.b; Response Line 14. W. Freitas also testified that the ahu were constructed to block access to construction vehicles. The substantial evidence in the record supports the HO's FOF on this issue.	16.
	17	(W. Freitas FOF 180). Mr. Freitas testified that oli (chants), mele (songs), and prayers were performed at Ahu o Kauakoko prior to its destruction.	*See* Response Line 1.a; Response Line 1.b; Response Line 14.	17.
	17	(W. Freitas FOF 185). Mr. Freitas affirms that his "spiritual, religious, cultural and traditional values" will be injured by the proposed development.	*See* Response Line 1.a; Response Line 1.b; Response Line 14. Unsupported/unsubstantiated. *See* Response Line 1.h (HO FOF that Petitioners' and Opposing Intervenors' practices can continue if the Project is built and not significantly adversely impacted).	18.
	17-18	After devoting myself to this process for a year and under threat, duress, and coercion, but always in good faith, I now see how HO Amano misrepresents my position and the testimony of my witnesses. My kapu aloha is strained. Among the serious faults of the HO is a categorical refusal to address key testimony regard the status of living tradition in Hawai'i and on Mauna Kea in particular, including with regard to my traditional and customary practices on the mauna. Most specifically,	*See* Response Line 1.a; Response Line 1.b; Response Line 14. W. Freitas misinterprets the law. Due process requires "an opportunity to be heard at a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Hawai'i 376, 380, 363 P.3d 224, 237 (2015). It does not require that the agency adopt a particular party's FOF and interpretations.	19.

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		HO mischaracterizes my ceremonial actions at the proposed TMT site as merely "political," (see FOF 687-88, 786; see UH/TIO 630) with an implied intent only to thwart construction of the project. Such a caricature of my beliefs and practices is hurtful to me and bespeaks a failure on the part of the HO to take ongoing traditional and customary practices seriously. Indeed, complete disregard for the religious character of the ahus I helped construct and consecrate is starkly indicative of the way the Applicant and the HO have failed to adequately assess and address traditional practices in the project area and on the mauna more generally. Meaningful consultation require open ears and eyes. How can adequate mitigation measures be proposed for that which has not been seen or heard or validated? The treatment of my religious practices by the Applicant and the HO perpetuates an unfortunate legacy with regard to faulty, incomplete, and stale consultation measures, including as represented in the core documents upon which the CDUA relies. Until and unless these deficiencies of due diligence, due process, consultative accountability, and responsibility to the State Constitution and the ideals it espouses and protects are rectified by means of a revised or supplemental EIS, this permitting process will remain a farce and a black eye on the face of this state. Fairness and the appearance of fairness, as demanded by the State Supreme Court, remain elusive in this permitting process. I urge the BLNR to bear witness to my struggle to be heard and to have my rights acknowledged and protected.	*See* Response Line 1.e. As W. Freitas acknowledges, the evidentiary portion of this contested case proceeding was lengthy. It lasted nearly 6 months with 44 full hearing days. W. Freitas most certainly had a meaningful opportunity to be heard. *See* Response Line 1.e.	

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	18	Let me remind you that I am open to consultation: (W. Freitas FOF 193). When asked by Ms. Kakalia if he had been consulted by Kahuku Mauna or any other entity about religious practices and the ahu, Mr. Freitas responded that he had not.	*See* Response Line 1.a. W. Freitas's testimony was considered. Misleading. Presented out of context, as Mr. Freitas did not begin his practices on Mauna Kea until April 2015, the same time that he began actively opposing the Project. HO FOF 685, 688, 801. *See* Response Line 13. The record shows that there was substantial consultation with native Hawaiian practitioners with regards to the cultural and religious impacts of the Project. HO FOF 222-245. Furthermore, W. Freitas's own witness testified that the contested case proceeding is part of the ongoing consultation process. HO FOF 240.	20.
	18	(W. Freitas FOF 194). When asked by Ms. Kakalia if he was open to consultation regarding his religious practices and the ahu, he replied in the affirmative.	*See* Response Line 20.	21.
4	18	4. EXCEPTION to HO's COL 396-397, concluding that proper consultation was performed for the FEIS, which the HO deems to be "current" and that no "changed circumstances" warrant a revised EIS. I refuse to accept this Conclusion of Law and argue that: 1. DOCUMENTS FOUNDATIONAL TO THE PERMITTING PROCESS ARE STALE AND MUST BE UPDATED; THE CDUA RELIES ON STALE RESEARCH AS REPRESENTED BY THE FEIS AND CMP.	Irrelevant/Inapplicable. Challenges to the EIS are not part of this contested case proceeding. The time to challenge the FEIS has long passed. W. Freitas did not challenge approval of the EIS. HO FOF 212-213; *see* Response Line 1.h.	22.

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1a	18	1a . The Applicant has the burden of proof in establishing that they meet the eight criteria of HAR § 13-5-30(c).	Not in dispute.	23.
1b	18-19	1b. The Applicant has a duty, set forth directly by the State Supreme Court of Hawai'i in *Kapa'akai O Ka'Aina v. Land Use Comm'n* (Supreme Court of Hawai'i September 11, 2000, Decided NO. 21124 NO. 21162) to take seriously the traditional and customary practices of Native Hawaiians: On appeal, the court vacated the decision. In making its administrative findings, appellee failed to ensure that legitimate customary and traditional practices of native Hawaiians were protected to the extent feasible. By failing to make such findings appellee abused its discretion in arbitrarily and capriciously delegating its authority to consider the effect of the proposed development on such rights to the party seeking the petition. Therefore, the court remanded the matter to allow appellee to discharge its duty to consider the effect of the proposed development on the legitimate customary and traditional practices of native Hawaiians. [94 Haw. 31, *31; 7 P.3d 1068, **1068; 2000 Haw. LEXIS 302, ***1] I, William Freitas, in both my own testimony (Freitas WDT) and in my cross examination of the many other religious and spiritual practitioners who testified in this contested case hearing, revealed the much larger scope and extent of such practices than the FEIS accounts for in 2010. This range and scope of practices is not represented or addressed by the CDUA; instead it is summarily dismissed and repeatedly relegated to "a few practitioners," without any solid research to make this	Evidence presented regarding traditional and customary practices was considered and discussed in a number of places in the HO FOF/COL. *See* Response Lines 1.a, 1.h & 14; *see, e.g.*, HO FOF 671-833.	24.

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		finding.		
1c	19-20	1c. In order to meet the mandated statutory requirements with regard to the protections afforded traditional and customary practice, the CDUA relies on data from the FEIS. This data, in turn, is utterly stale. Following the exact language of UH/TIO, HO asserts that the FEIS stands as reliable and current. From COL 397 (UH/TIO 390): "Petitioners and Opposing Intervenors have not credibly shown any intervening changed environmental circumstances here, and there are no facts in the record suggesting any such materially changed circumstances exist." See my testimony cited above for evidence of the many spiritual, traditional and customary practices that have changed since the FEIS was approved. The cumulative and detailed testimony of the many Petitioners and Intervenors in the contested case hearing is further evidence the BLNR must consider in evaluating the integrity of the FEIS. It must be pointed out that the purpose of the hearing has been precisely to evaluate the integrity of the permitting process, including the documents upon which it relies. According to Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai`i 376, 363 P.3d 224 (2015), the purpose of the hearing is to provide a "rigorous adversarial process" regarding the CDUA permit for the TMT project (p.4). The Court remanded for a new contested case hearing precisely because this process had not occurred: "the permit itself was issued before evidence was taken and subject to adversarial testing before a neutral hearing officer" (p.5). In other words, the purpose of the contested case hearing is to	*See* Response Line 1.h & Response Line 24. Unsupported, unsubstantiated, and a mischaracterization of the law and decision in *Mauna Kea Anaina Hou.*	25.

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		adjudicate the integrity of the permit and the procedural mandates regarding it. The hearing itself is not the proper venue for creating a new Cultural Management Plan or for assessing the depth and scope of Cultural Resources; the Hearing Officer is not a cultural anthropologist, nor did any of the parties who examined witnesses have such training. The need for updated meaningful consultation was certainly revealed by the scope of traditional and customary practices and ahus on the manna as testified to throughout the contested case hearing, but the hearing record does not and cannot stand in for a proper cultural consultation study.		
1d	20-21	1d. WRONG AND MISLEADING HO and Applicant state that the time period for challenging the validity of the FEIS ended on August 7, 2010 (HO COL 394; UH/TIO COL 388). However, again using identical language, HO and UH/TIO also acknowledge that "[a]bsent intervening changed environmental circumstances," one is not allowed a challenge to this document (HO COL 396; UH/TIO COL 389; emphasis added). HO and Applicant cite a federal case to make this assertion: Absent intervening changed environmental circumstances, no one is allowed a "second chance at administrative and judicial review when they failed to timely appeal the original" EIS. *See Oregon Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 847 (9th Cir. 1987). The central point to be made here is that Hawai'i state law does consider cultural practices to be "environmental circumstances" and it is my contention and that of my	*See* Response Line 1.h; HO COL 201-203 (finding that cultural practices and resources were considered together with the environmental and natural resources in the FEIS).	26.

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		witness Professor Johnson that "religious life on the mountain has been catalyzed, magnified, and otherwise intensified since the time of the CDUA. This is true of religious activity on the mountain in general and it is specifically true of religious practices at the proposed TMT site itself. These reasons...warrant review and revision of the CDUA and the accompanying EIS, with particular attention to consultation with affected practitioners and those they serve" (Freitas FOF 47)		
1e	21	1e. This contested case hearing in toto, and my testimony about spiritual and religious practices on Mauna Kea specifically, have demonstrated that environmental circumstances have in fact changed since the EIS was completed in 2010, particularly as regards traditional and customary practices. Traditional and customary practices are, by law and statute, recognized in Hawai'i as "environmental" factors to be considered in an EIS. According to HRS §343-2 "Definitions:" "Environmental impact statement" or "statement" means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects. (emphasis added)	*See* Response Line 1.h.	27.
1f	22	1f. The remedy the BLNR must provide is, at minimum, a supplemental EIS to address the changed environmental circumstances that have occurred since the original EIS	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL	28.

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		document was completed in 2010. (emphases in the following citations are added)	to which objections are made. *See* Response Line 1.h.	
1.f.1	22	1.f.1 Regarding this statuatory requirement see: http:i/oeqc2.doh.hawaii.gov/OEQC_Guidance/2012-GUIDE-to-the-Implementation-and-Practice-of-the-HEPA.pdf 4.1.3 Supplemental Environmental Impact Statements ...HEPA says that acceptance of an EIS satisfies the requirements of this chapter and no further EIS shall be required for that action, HRS 343-5(g). The Hawaii Supreme Court has held, however, that a supplemental EIS is required where there have been substantive changes in environmental effects. Unite Here! Local 5 v. City and County of Honolulu and Kuilima Resort. The criteria when a supplemental EIS needs to be prepared, namely, when there are changes in size, scope, location, intensity, use or timing, are set forth in Section 11-200-26, HAR.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made. W. Freitas merely duplicates text from OEQC guidance documents. *See* Response Line 1.h.	29.
1.f.2	22-23	1.f.2 From HAR 11-200-26: HAR Title 11, Chapter 200 EIS Rules SUBCHAPTER 2 "Supplemental statement" means an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things. [Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-2, 343-6) SUBCHAPTER 6 DETERMINATION OF SIGNIFICANCE	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. W. Freitas merely duplicates the HAR related to Chapter 343. Moreover, as the excerpted HAR text states, not any and every change in circumstances warrant a supplemental statement; rather a supplemental statement is only required when "an action" [i.e. the proposed project, here TMT] has "changed substantively" such that it is essentially a "different action". W.Freitas points to no evidence to support	30.

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		§11-200-9 Assessment of agency actions and applicant actions. (a) For agency actions, except those actions exempt from the preparation of an environmental assessment pursuant to section 343-5, HRS, or section 11-200-8, the proposing agency shall: (1) Seek, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county's general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals which the proposing agency reasonably believes to be affected; §11-200-12 Significance criteria. (a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an action. (b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it: (1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resource (4) Substantially affects the economic welfare, social welfare, and cultural practices of the community or State; (5) Substantially affects public health;	a finding that the TMT Project that was the subject of the approved FEIS has "changed substantively" and is now essentially a "different action" than that originally approved in the FEIS. Because there has been "no change in the proposed action," the FEIS continues to be valid. *See* Response Line 1.h.	

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		[Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-2, 343-6) SUBCHAPTER 10 SUPPLEMENTAL STATEMENTS §11-200-26 General provisions. A statement that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action, among other things. A statement that is accepted with respect to a particular action shall satisfy the requirements of this chapter and no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or timing, among other things. If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed shall no longer be valid because an essentially different action would be under consideration and a supplemental statement shall be prepared and reviewed as provided by this chapter. As long as there is no change in a proposed action resulting in individual or cumulative impacts not originally disclosed, the statement associated with that action shall be deemed to comply with this chapter [Eff 12/6/85; am and comp AUG 31 1996] (Auth: HRS §343-5, 343-6) (Imp: HRS §343-5, 343-6) While Applicants argue that they did disclose and anticipate significant individual impacts to "those who hold the opinion that any disturbance of Maunakea by someone other than a Native Hawaiian is significant and unmitigatible," they did not make any effort to document		

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		the true extent and development of such practices and religious sites over the last SEVEN YEARS since the FEIS was approved.		
1g	24	1g. MISLEADING While HO makes passing reference to yearly updates from Pacific Consulting Services Inc. (FOF 654, verbatim from UH/TIO FOF 594), nowhere are these updates reflected in the the FEIS (specifically in the the Cultural Resources Management Plan, one of its four sub-plans). Instead, the most recent data regarding traditional and customary practice is treated with only minimal attention in the Archeological Inventory Survey of 2010. The type of assessment done by PCSI was focused on archeological data and conducted by an archeologist (Collins WDT), not a cultural anthropologist with training in ethnography. The in-depth data the FEIS employs relating to traditional and customary practice was collected beginning over 20 years ago: "This work was undertaken as a part of ongoing archival and oral historical research conducted by Kumu Pono Associates LLC, since 1996, and builds upon the accounts published by Maly in 1997, 1999, 2002, and 2003." (Maly, KPA Study HiMK67-OMKM (033005b) p.v) Maly's report, commissioned by Stephanie Nagata on behalf of the University of Hawai`i-Office of Mauna Kea Management, formed the basis for the Cultural Resources Management Plan for the OMKM (see page 42 describing Maly's interviews with 22 informants and cultural practitioners for his oral history (1999)). The FEIS summary of Potential Environmental Impacts, as well as the mitigation measures directed toward reducing them to below significant levels, was based on this	Nonsensical; Mischaracterization. Updates would not appear in the original CRMP because they are created after the CRMP. The updates are just that. HO FOF 654 and the citations supporting it are accurate. *See* Response Line 1.h; Response Line 30. Furthermore, this contested case proceeding allowed BLNR to obtain information about the extent and development of religious, traditional and customary practices and sites on Mauna Kea. *See* HO FOF 152, 563-670, 671-854; HO COL 194, 203, 205, 208, 329-390; *see also* Ex. A-1/R-1 at 4-6; Ex. A-3/R-3 § 3.2; Ex. A-5/R-5, Apps. D, E & F.	31.

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		outdated—if historically rich—research.		
1h	24-25	1h. It should be noted that Kepa Maly became concerned about how his research was being used as the basis for a draft EIS. In Kepa Maly's "LETTER OF PROTEST TO GROUP 70 INTERNATIONAL," a cultural consultation group, (October 14, 1999) Maly asserts: The lack of cultural-historical information in the draft "master plan/development plan update," specifically, the cursory manner in which you have addressed the information documented in the oral historical study lacks sensitivity and integrity (I have seen drafts 1 & 2, I understand that a third draft is out). People are desperately trying to understand the traditions and on-going cultural-spiritual significance of Mauna Kea....In the past, every client that I have worked with always provided me with a copy of the resulting EIS/EA — involving me in the EIS development phases to ensure that the documentation was accurately represented; and asked me to participate in any agency/public review meetings. The goal being to provide a summary of the documentation reported and answer questions that might be raised about the work I did. Instead, I only recently learned that you took the same cultural component of the "master plan/development plan update" and incorporated it into your "draft EIS." Further more [sic], I am being called and told that you have been meeting with Hawaiians and other interested groups, presenting your version of the research I prepared...In closing, I think back to the MKAC meeting of December 1, 1998, in which Pua Kanahele looked directly at you and the co-chairs, and asked "Why did you ask us here? You've	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL which objections are made. *See* Response Line 1.h (response re EIS claims).	32.

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		already made up your minds about what you are going to do." I can't help but think that she had a depth of vision that eluded me. I naively believed that you would approach this process with cultural sensitivity, integrity, and compassion. The above observations, along with the recent flack about disclosure of burial sites on Mauna Kea (via the web) have dismissed any room for sensitivity, integrity, and compassion in this process. (http: /www.envirowatch.org/MKIetter.htm)(emphases added) In summary, the author of the research that forms the basis for the cultural component of the FEIS calls into question the misrepresentation of his data from the very outset of its public release in the context of management and development of the Mauna Kea Science Reserve. Thus, a new ethnographic study must be conducted to accurately reflect both the foundational cultural study initially done by Maly and to reflect the ongoing traditional and customary practices occurring on the mountain today.		
1i	25-26	1i. In FOF 684 (verbatim from UH/TIO FOF 624), HO asserts that there are no known customary and traditional practices in Area E where the applicants are seeking a permit to build the Thirty Meter Telescope. WRONG AND NEGLIGENT As this contested case demonstrated, a preponderance of testimony from cultural, religious, and spiritual practitioners revealed a set of robust traditional and customary practices in and around the proposed TMT site, as well as practices on the summit, mountain, and island that would be significantly affected by the construction and operation of the TMT project. A	HO FOF 684 is accurate and supported by the evidence in the record and the citations therein. W.Freitas does not identify any specific evidence to support this Exception, or otherwise demonstrate with probative, reliable and credible evidence that certain practices within Area E meet the legal requirements for classification as a traditional and customary as provided under article XII, section 7 of the Hawaii State Constitution. *See* Response Line 14; Response Line 1.h;	33.

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		new and revised EIS must be conducted with recognized ethnographic methods and consultative best practices to document the scope, location, and type of traditional and customary practice on the Mauna Kea, including the mountain generally, the summit, and the proposed TMT site specifically.	Response Line 30.	
1j	26	1j. FOF 654 (verbatim from UH/TIO FOF 594). MISLEADING AND/OR WRONG According to HO, PCSI conducts ongoing monitoring at archeological and historic sites on UHH managed lands by "returning to the sites once a year." Further, "the entire MKSR is surveyed once every five years." If this were true, some form of supplemental EIS statement would have been incorporated into the FEIS, as circumstances regarding traditional and customary practices and the cultural landscape (including the ahus) have changed in the SEVEN YEARS since the FEIS was approved.	HO FOF 654 is accurate and supported by the evidence in the record and the citations therein. No evidence was presented by any party to the contrary. Ongoing monitoring does not require the republication of a final EIS in and of itself, nor the supplementation of a FEIS. *See* Response Line 1.h; Response Line 30.	34.
1k	26-29	lk. FOF 608 (verbatim from UH/TIO FOF 549, with the addition of "Opposing Intervenor"). MISLEADING/AND OR WRONG; UH/TIO PROVIDE FURTHER EVIDENCE THROUGH THEIR OWN WITNESS TESTIMONY OF THE DEMONSTRATED NEED FOR A NEW EIS According to HO: "Opposing Intervenor William Freitas asserts that there were two stones near the groundbreaking site that were dislodged. Mr. Rechtman testifies the stones were not in the area that was bulldozed...The stones are not near SIHP 21448 or SIHP 16172 or find spots 2005.08 or 2005.06...The stones were in the vicinity of the boundary of the TMT project site; The TMT site is indicated by a large block in the middle of the pink area on the map identified as	Unsupported. The arguments set forth in this Exception do not support the assertion that a new EIS is required. The evidence in the record amply supports the conclusion that the FEIS was sufficient, and was not timely challenged. W.Freitas has not demonstrated with probative, reliable and credible evidence that the legal requirements for a supplemental EIS exist. *See* Response Line 1.h; Response Line 30. The archaeological work done for the TMT project was in compliance with HRS Chapter 6E. *See* Nees WDT at 8.	35.

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		figure 2 in Ex. C-12 and Ex. C-12 at 3." Mr. Freitas questioned Mr. Rechtman as to his knowledge of standard archaeological procedures by asking who was responsible for reporting the two upright stones located in the project site for geological testing. Mr. Freitas also questioned the witness as to what happened to the two upright stones and if they were removed. Mr. Rechtman testified that he was not on site when a "woman archaeologist monitor" reported that two upright stones had been dislodged. Mr. Rechtman could not remember the "archaeological monitors name." Mr. Rechtman could not identify if the "two upright stones" were traditional cultural practices, even though UH/TIO's Ex. C-12 shows a picture of offerings placed at one of the stones. Mr. Rechtman testified that his cultural monitor reported to him that the OMKM's cultural and construction monitor Mr. Wally Ishibashi dislodged the two cultural upright stones. Tr. 12/20/16 155:1-25 156:1-25 157:1-2 The facts are clear that Mr. Rechtman, as a lead archaeologist with a cultural monitor on site, and OMKM's cultural and construction monitor for geotech drilling, Mr. Ishibashi, did not follow the procedural protocols demanded of them by law to protect and accurately report cultural properties. The CMP, therefore, does not reflect the Native Hawaiian practices on the site, as it should according to HRS 106 and Article 12, section 7 of the Hawaii State Constitution, including the protection the latter provides for traditional and customary religious rights of Native Hawaiians. Mr. Rechtman testified that when doing an archaeological	W. Freitas continues to ask for the TMT site to be surveyed for piko and placenta when the credible evidence in the record is clear that such items cannot be identified by a survey because, if they were even present on the site, they are biological and have likely deteriorated. HO FOF 623. With respect to burials, PCSI prepared a burial treatment plan for the entire MKSR and Mauna Kea Access Road Corridor, including the TMT Project site. The burial treatment plan was approved by the Hawai'i Island Burial Council and SHPD. HO FOF 224, 631; Ex. A-22 at 30; Ex. A-138; Ex. A-138a; Ex. A-139.	

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		survey of a site, his procedure is a "surface survey"; this means that a cursory visual inspection can result in a finding of "no" cultural properties or "Iwi" which then can then deem the site clear of any cultural properties. Mr. Rechtman testified that he wouldn't be able to determine if there are "Iwi" on the TMT site if a surface inspection does not reveal it. Tr. 12/20/16 145:14-23 Thus, Mr. Rechtman's testimony gives conclusive evidence that the integrity of the Archaeological Survey Inventory must be questioned. In particular, the proposed TMT project area must be reevaluated more thoroughly and with greater accuracy than a cursory visual inspection can provide for such traditional practices as burials, spreading of ashes, placing of piko or placenta, and other cultural ceremonial practices. What has been determined by Mr. Rechtman's testimony is that the SIHP site 21449 and SIHP site 16172 have been found to be "not significant;" this finding was based on prior "evidence" provided by archaeologist Mr. Pat McCoy who actually dug up "one" of these so called "Natural Terraces" (Fig. 16 Ex. C-12) and found nothing. That this purported "finding" was relied upon by Mr. Rechtman and Ms. Glennon to make a determination for thousands of these terraces, which can be or have been "Destroyed" by this TMT proposed development is nothing short of a heart-breaking travesty. I, William Freitas, am a "Pohaku Kane" and have knowledge given to me by my kupuna, mother, auntie's, uncle's and families who live these traditions of spiritual cultural practices. "Burials of Iwi" are always "Huna" or hidden, and knowledge of these practices is conveyed to the		

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		family of a district or area—to have knowledge of, to give Honor to, in spiritual prayer and through offerings. This is a "Fact" in the history of the culture of Native Hawaiians and our religious spiritual practices in this contested case, as testified to by Dr. Ku Kahakalau, Dr. Kalani Flores, Dr. Manulani Aluli-Meyer, Dr. Maile Taualii, Dr. Jonathan Osorio, Dr. Tammy Noelani Perreira, Dr. Joseph Keawe Aimoku Kaholokula, Dr. Noelani Goodyear-Kaopua, Dr. Mililani Trask, Ms. Pualani Case, Mr. Michael Lee, Ms. Hawane Rios, Ms. Ruth-Rebeccalynne Aloua, Ms. Pisciotta, Ms. Tiffany Kakalia, Mr. Nelson Ho, Mr. Keahi Tajon, Mr. Paul Neves, Ms. Debra Ward, Ms. Mehana Kihoi, Ms. Leinaala Sleightholm, Ms. Cindy Freitas, Mr. Sarah Kihoi, Kahuna Frank Nobriga, Mr. Joseph Camara, Mr. Kalikolehua Kanahele, Mr. Wiremu Carroll, Mr. Ronald Fujiyoshi, Ms. Wilma Holi, Mr. Hank Fergerstrom, Ms. Susan Rosier, Ms. Nancy Monroe, and Ms. Ward. I have witnessed these people in prayer and reverence in various places, and therewith witness Mr. Greg Johnson. A new EIS must consult with religious and spiritual practitioners today in order to meet the rigorous and principled definition of meaningful consultation.		
2	29	2. FOF 658 taken verbatim from UH/TIO FOF 598; COL 786, which exactly matches UH/TIO COL 732 MISLEADING AND WRONG HO and UH/TIO repeatedly dismiss the ahu built on the TMT site as a "political action." I am a religious and spiritual practitioner and my practice on Mauna Kea has certainly been affected by the TMT project, but my spiritual calling to the Mauna has been passed to me from my	*See* Response Line 1.a. The Hearing Officer duly considered all evidence in the record, and incorporated it where appropriate. The mere fact that the Hearing Officer did not agree with or adopt all or certain views of W. Freitas, or Professor Johnson or other witnesses's views does not render the HO FOF/COL erroneous. W. Freitas does not show through reliable, probative or credible	36.

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		ancestors. My practice is a living tradition. My witness, Professor Johnson, addressed this issue—the inseparability of traditional practices from the contexts in which they are expressed—in his WDT and during his testimony and cross-examination. Broadly, his argument also challenges the artificial separation of traditional and contemporary practices, a distinction that HO and UH/TIO advance in an attempt to relieve the CDUA of accounting for or meaningfully engaging my traditional practices. I am both contemporary and traditional, as are my practices.	evidence or legal authorities that the Hearing Officer erred in her FOF or COL. *See* Response Line 1.b. HO FOF 658 is accurate and supported by the evidence in the record and the citations therein. W. Freitas's claim that there is no distinction between protected traditional and customary rights and contemporary practices is not supported by established law. Moreover, merely asserting that certain practices are protected traditional and customary practices as provided under article XII, section 7 of the Hawai'i State Constitution does not make them so; evidence is required to show that the specific requirements of such a designation are met. *See* HO COL 333-336; 339-340; Response Line 14.	
2a	29-30	2a. Here I would like to contextualize my position by quoting from Professor Johnson's WDT (4-5), which I then follow with FOFs from my own testimony: Tradition is not a thing; it is a process. Living tradition draws upon the past but is necessarily constituted in the present. How could it be otherwise? This is not to dismiss the relevance of the past when assessing tradition, but to note that the past is most usefully understood as a model for present-day actions rather than as a set of rigidly codified practices and beliefs... Living traditions are necessarily of this world, not	*See* Response Line 36.	37.

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		only with reference to time but also with regard to context. The constituent parts of traditions cannot be disarticulated from on-the-ground circumstances. This means traditional practices take place—always and everywhere – in moments configured by political and legal realities. The history of humanity affords scholars of religion no exceptions to this rule. Thus tradition cannot be analyzed or meaningfully described without historical, cultural, geographic, political, and legal contextualization. Likewise, in order to be protected—as the State of Hawai'i Constitution demands (XII, sec. 7) – tradition must be recognized and protected in specific places, times, and jurisdictions. It is not enough for a state to profess to protect traditions in general; insofar as traditions do not exist in the abstract, neither does protection of them exist in the abstract, aside from mere gesture. Here a note on strife and tradition is warranted. For reasons outlined above, traditions frequently find expression in moments of conflict. Traditions, especially in their religious capacities, articulate ultimate concerns and deep values. These concerns and values rise to the surface when threatened. This dynamic is broadly true of all religions.... Therefore, the tendency of some scholars and courts alike to seek "pure" tradition outside of political contexts is misguided. In addition, and of profound importance to the instant case, it is mistaken to regard activities as non-traditional if they take place in moments of conflict. The fact that a religious structure, for example, is built in a moment of crisis does not diminish its standing as		

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		religious. Nor, for that matter, does tension within a community diminish the potentially religious quality of the community's actions and beliefs, no matter how divided. Indeed, internal strife is the very engine of religious traditions—people fight over the terms of their own traditions precisely because they care so deeply about them. Traditional Hawaiian religious practices should be understood in a similar manner, in the past and present. As is well known, many heiau and ahu were historically constructed in moments of struggle, frequently in anticipation of a battle or in commemoration of one (see, for example, Valerio Valeri, Kingship and Sacrifice: Ritual and Society in Ancient Hawaii, translated by Paula Wissing, The University of Chicago Press, 1985). In such moments, ancestors, deities, and other forces were called upon to assist the people. Aspects of Hawaiian religious life today follow this pattern. Tradition is manifest in action when catalyzed by circumstances, most especially when the very ground of tradition itself is threatened. Sacred places—e.g., places regarded as having ties to oral traditions, healing, burial, and worship practices—thus receive focused attention when threatened. In Hawai'i, as in many indigenous contexts, sacred places are often left unto themselves out of deference to their power and sanctity. If threatened, however, the opposite dynamic is triggered as practitioners exercise their kuleana (responsibility) to care for the sacred. This is how I understand expressions of living tradition on Mauna Kea today and it is the framework for my		

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		expert opinion that the ahu (altars) constructed on the TMT site in the days immediately prior to the mass protest of June 24, 2015, are expressions of living Hawaiian tradition and deserve protection as such. Acting in a manner fully consistent with historical traditions, a group of Native Hawaiian traditional practitioners constructed two ahu and conducted ceremonies at them. Subsequently, these same practitioners, and especially William Freitas, have taken on the responsibility to care for these religious sites through ministering to them with regular offerings and ceremony. In this way tradition has been sustained on Mauna Kea. What may appear to some as mere political opportunism is in fact an expression of deeply held traditional beliefs—evidence of sincere religious action in a moment of crisis.		
2b	31	2b. Freitas FOF 158 Mr. Freitas states that he continues to live with traditional customary cultural religious and spiritual practices of his Native Hawaiian ancestral people. He engages in practices shown to him by his Mom, Aunties, Uncles and Kupuna, including Hawaiian families that live these traditions and share with him hands on knowledge passed to them from generation to generation. He has witnessed Mauna a Wākea, pure as his ancestors saw it!	*See* Response Line 36.	38.
2c	31	2c. Freitas FOF 159 Mr. Freitas testified, "I learned things growing up in Kona, I learned about-- I watched my mom. My mom-- my mother was very versed in the ways of our kupuna, what you can do and what you cannot do. And she taught me a lot of things that needed to be done prior to stepping into areas. In fact, she	*See* Response Line 36.	39.

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		always said, do not go in those areas. I was always warned, do not go in those areas because I was too young to know. And I respected those things."		
2d	31	2d. Freitas FOF 165-7 Mr. Freitas continues to practice the traditions of his kupuna (ancestors and elders). Mr. Freitas is a spiritual/religious practitioner. Specifically, Mr. Freitas is a Pohaku Kane (specialist in rockwork), a calling that began at the age of five.	*See* Response Line 36; Response Line 13. The Exception is not credible. W. Freitas testified that he conducted no practices on Mauna Kea prior to building the ahu on the TMT site in 2015, the same time that he began actively opposing the Project. HO FOF 685, 688.	40.
2e	32	2e. Freitas FOF 168 Mr. Freitas's connection to pohaku has remained strong through his life, including several instances in recent years that eventually connected him with his current religious practices on Mauna Kea in which he focuses on helping young people in the practice of Kapu Aloha.	*See* Response Line 36; Response Line 13.	41.
2f	32	2f. Freitas FOF 169 William Freitas identified himself as a Pohaku Kane (Stone mason) who has been guided through "pohaku" to Mauna A Wakea by opportunities and events up to 2015, such as, (Exhibit T-3.j1 and T-03.j2) SIHP 21220 Ku'ula Stone (Fishing Shrine) for the Kipapa Ohana in Kona, in the area of Pahoehoe, known today as Magic Sands.	*See* Response Line 36; Response Line 13.	42.
2g	32	2g. FOF 685 (exactly the same as UH/TIO FOF 625) FOF 687 (verbatim from UH/TIO FOF 629) MISLEADING and MISCONSTRUED HO argues that Mr. Freitas' recent practices on the summit are not legitimate because they have developed together with his opposition to the TMT project. This is an impoverished understanding of how religious practices find continuity with past traditional forms of religious expression in times of crisis.	HO FOF 687 is accurate and supported by the evidence in the record and citations therein. *See* Response Line 36; Response Line 13.	43.

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2h	32	2h. FOF 688 (verbatim from UH/TIO FOF 630), FOF 687, FOF 786 WRONG AND MISCONSTRUED According HO, hewing to prejudicial conjectures of UH/TIO, the construction of ahu on the summit area of Mauna Kea that I participated in were motivated by narrowly political commitments. The following sections (2i-2s) are my response to this incorrect and misconstrued claim, emphasizing my spiritual and religious motivations for building the ahu and worshipping at them.	*See* Response Line 36; Response Line 13. W. Freitas again admits that construction of the ahu was politically motivated.	44.
2i	32	2i. Freitas FOF 181 Mr. Freitas testified being involved in the construction of two ahu on the proposed TMT site on June 22nd and 23rd, 2015.	*See* Response Line 36; Response Line 13.	45.
2j	33	2j. Freitas FOF 182 Mr. Freitas testified that traditional cultural protocols were invoked and practiced in construction of ahu on TMT proposed site.	*See* Response Line 36; Response Line 13.	46.
2k	33	2k. Freitas FOF 188 Mr. Freitas testifies to the religious character and purpose of the ahu at the proposed TMT site: "And that is the real purpose. We didn't just build those things. The purpose was for the spirituality."	Incomplete; Misleading; Presented out of context. *See* Response Line 36; Response Line 13.	47.
2l	33	2l. Freitas FOF 189 Mr. Freitas testifies that prayer at ahu is an example of Kapu Aloha.	*See* Response Line 36; Response Line 13.	48.
2m	33	2m. Freitas FOF 190 Mr. Freitas affirms that Kapu Aloha is a central tenet of traditional Hawaiian religious practice.	*See* Response Line 36; Response Line 13. Misleading; presented out of context; misrepresentation. The fact that certain individuals may hold and/or express such religious or spiritual beliefs is not in dispute, but the legal impact of those beliefs is in dispute.	49.
2n	33	2n. Freitas FOF 191 Mr. Freitas testifies that his religious practices on Mauna Kea were not "made up" in	*See* Response Line 36; Response Line 13.	50.

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		order to thwart the TMT development.		
2o	33	2o. Freitas FOF 197 Mr. Freitas testified that "Ahu Ku Kia'i E Lua" was constructed out of intense necessity for prayers and offerings due to the continued effort of the DLNR, UHH, and TMT to desecrate sacred ground. See Exhibit T-3.b photo of "Ahu Ku Kia'i E Lua."	*See* Response Line 36; Response Line 13. Unsupported/Unsubstantiated; Not in Evidence; Not Credible; Lack of Jurisdiction. There is no credible evidence of desecration. BLNR does not have jurisdiction to adjudicate violations of the Hawai'i Penal Code. Even if it did, Petitioners' and Opposing Intervenors' claim of desecration fails as a matter of law. HO COL 399-413.	51.
2p	33	2p. Freitas FOF 198 Mr. Freitas identifies and describes the necessity of establishing a place for worship with prayers and offerings in traditional customary religious and spiritual practice to a sacred area that would be further desecrated in the proposed site of TMT by the construction of the telescope.	*See See* Response Line 36; Response Line 13; Response Line 51.	52.
2q	33	2q. Freitas FOF 262 Dr. Kahakalau testified that "those 'ahu were and continue to be constructed by Hawaiian practitioners in places that are very cautiously selected, no just a haphazard, but really with intense pule and with searching for truth and for light and for understanding and being driven by a kuleana to build that 'ahu, that comes from an ancestral guidance is what I would call it."	*See* Response Line 36; Response Line 13.	53.
2r	34	2r. Freitas FOF 263-265 Dr. Kahakalau continues: "When we build 'ahu, we are very, very selective. We don't just build 'ahu everywhere. And certain places people asked us to put 'ahu where we don't build 'ahu, because we don't feel it's the right spot to build them...So it's really something that as a practitioner you're taken very, very serious, and when you make the 'ahu, every	*See* Response Line 36; Response Line 13. Not credible. W. Freitas testified that these ahu were built to block the Project. *See* Response Line 1.b.	54.

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		rock is asked if it wants to come and be part of the 'ahu. When we built our school, we asked every pohaku that was part of the paia, you know, if it wanted to come because we gathered it from Mauna Kea, and we feel that that's how we need to treat those rocks, those pohaku...So the rocks are asked if they want to come. The person who builds it has to be very pono, clean inside and out so the cleansing ceremonies before you build an 'ahu, here is a kapu, I guess is the best way to put, when you build that 'ahu and throughout the life of that 'ahu there is kuleana, once you build that 'ahu, to malama it in every way."		
2s	34	2s. FOF 786 (same as UH/TIO FOF 732). WRONG AND MISUNDERSTOOD HO asserts: "The two ahu built and installed by W. Freitas and others on the access road in and near Area E in 2015 were placed for political or protest reasons to halt the TMT Project, and were not placed in accordance with any recognized traditional practice performed by W. Freitas or others at the locations of the two ahu within Area E." Specifically, HO states, W. Freitas . . . "had not been on the area where the two ahu were placed prior to 2015."	*See* Response Line 1.b; Response Line 13. HO FOF 786 is accurate and supported by the evidence in the record and citations therein. While W. Freitas asserts that there are other reasons for placing the ahu, he has presented no evidence, and there is none in the record, to contradict his own statements that the ahu were placed, at least in part, for the purpose of blocking construction vehicles.	55.
2.s.1	34-35	2.s.1 In the cross-examination of Mr. Freitas' witness Mr. Fujiyoshi by Ms. Kihoi, his answer to the question, "Do you believe that a person's spiritual connection to Mauna Kea should be measured by how long. (sic) That person has been physically familiar with this area?" was: "No. I think one's faith is by the depth of your commitment. And commitment cannot be just measured in terms of number of times that you have performed a ritual." Tr. 3/2/17 vol. 44 at 129.	*See* Response Line 36; Response Line 13.	56.

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2.s.2	35	2.s.2 Mr. Fujiyoshi's answer to the question by Ms. Kihoi, "Do you believe that a spiritual connection to Mauna Kea can be felt even if one has never physically visited the mountain?" was "Of course. I think we have heard much discussion that the mountain was so sacred that people who believed that wouldn't go up there. But it doesn't mean that they didn't believe the mountain was sacred. They believe that the depth was so great that they would respect that and not go up there." Tr. 3/2/17 vol. 44 at 129.	*See* Response Line 36; Response Line 13.	57.
2.s.3	35	2.s.3 My commitment can be seen in my experience as a cultural practitioner, my sincerity as witnessed during the entire contested case hearing, and in my continuing care of the ahus I supervised building even after they were constructed. The depth of the faith in the sacredness of Mauna Kea can be seen in the numbers and dedication of the Hawaiian cultural practitioners who have participated in this contested case hearing as Petitioners, Intervenors, witnesses and observers, as well as the number of protectors on Mauna Kea from the day of the ground-breaking ceremony until the present.	*See* Response Line 36; Response Line 13. W. Freitas's beliefs are not questioned; however, the legal impact of his beliefs is in dispute.	58.
3	35-36	3. FOF 966 (verbatim from UH/TIO FOF 938) MISCONSTRUED The Applicant states: "The eighth criterion of Haw. Admin. R. § 13-5-30 only states that a proposed land use should not be materially detrimental to the public health, safety, and welfare. It does not require that a proposed land use be affirmatively beneficial to public health, safety, or welfare." While the Applicant may not have to prove that the project will provide benefits, it is their burden to demonstrate that the project will cause no harm. In COL 278 (compare UH/TIO FOF	This Exception inaccurately argues that the eighth criterion imposes upon Applicant the burden to demonstrate the project "will cause *no* harm"; this is contrary to the plain language of the rules and unsupported by law. HO FOF 966 and COL 278 are accurate and supported by the evidence in the record and citations therein.	59.

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		939), HO states: "The TMT Project will not be materially detrimental to the public health, safety, and welfare." 1. It is entirely unclear how HO can reach this conclusion. While HO goes to extensive lengths to delegitimize research that has been conducted on possible deleterious health effects of the project on Native Hawaiians as testified to by at least five witnesses (FOF 968-970 [compare UH/TIO FOF 942], FOF 972-973 [compare UH/TIO FOF 949], FOF 974 [exactly matches UH/TIO FOF 951], FOF 978 [exactly matches UH/TIO FOF 954], FOF 979 and 868 [compare UH/TIO 955]), ultimately all parties point to the need for more extensive, well-funded, peer-reviewed research. HO presents no studies beyond a highly selective phone opinion poll (FOF 981 [same as UH/TIO FOF 58]). HO fails to weigh adequately the that fact that the Applicant bears the burden of proof, and that it is incumbent upon the Applicant to update this part of the CDUA to ensure it can meet the requirements of the eighth criterion of Haw. Admin. R. § 13-5-30 This dearth of data needs to be rectified before the permit can be approved, as it is the burden of the Applicant to prove the project will not cause significant harm.		
5	36-37	5. EXCEPTION: HO argues that, despite hearing five months of testimony and and all the various forms of evidence such a hearing has compiled, the mitigation measures developed by the last two hearing officers considering the TMT project are sufficient and meet all statutory demands without a single substantial change, particularly as relevant to traditional and customary	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made. The conclusion that the proposed mitigation measures are sufficient is supported by the	60.

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		practice on Mauna Kea SEVEN years following the FEIS. It is my contention that mitigation measures cannot address levels of impact (even, as in the case of Kilikila II (2016) a finding of serious long-term impact with little or no mitigatable measures advanced to bring impact levels "below significant") because the scope, location, and type of traditional and customary practices on Mauna Kea, including in and around the summit area and TMT site, are undocumented and unknown.	evidence in the record. HO FOF 316-318, 322-341, 345, 346-352; HO COL 111-112, 119, 123, 125, 140, 164, 172, 206, 208, 210-213, 220-221, 241-243, 249, 258. *See also* Response Lines 1.c., 1.h, 1.j & 30; HO COL 125 ("The BLNR has recognized that it may approve a proposed land use despite some environmental impacts to the Conservation District, provided that the project incorporates appropriate mitigation measures and conditions. *Findings of Fact, Conclusions of Law, Decision and Order, In re Conservation District Use Application for Hawaiian Electric Company, Inc. to Construct a 138-kV Transmission Line at Wa'ahila Ridge, Honolulu, Hawai'i*, DLNR File No. OA-2801 (June 28, 2002) ("**Wa'ahila Ridge**") at 64 n.13; *see also Morimoto v. BLNR*, 107 Hawai'i 296, 305-06, 113 P.3d 172,181-82; *Stop H-3 Ass'n v. State Dep't of Transp.*, 68 Haw. 154, 158, 706 P.2d 446, 449 (1985).")	
1a	37	1a. FOF 317 (verbatim from UH/TIO FOF 305) HO asserts that [t]he use of mitigation measures is a universally recognized and widely adopted means of lessening otherwise adverse impacts in land use projects."	*See* Response Line 60.	61.
1b	37	1b. Mitigation measures cannot address practices and ahus which are not documented or understood. This is precisely why the only mitigation measure offered by	*See* Response Line 60. As noted above and in the HO FOF/COL the practices that are now practiced on Mauna Kea and ahu that have appeared since	62.

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		UH/TIO and, following in lock-step, the HO, to benefit the religious and spiritual practitioners represented in this hearing (and the many others who could not attend the hearings regularly, whether due to the necessity of taking half a year or more off from their jobs to be present at hearings or to travel the distance necessary to attend) is four daytime shutdowns of the telescope. This is a paltry and insufficient mitigation measure and certainly is not based on any solid research concerning what mitigation measures, if any, could benefit practitioners such as myself.	the last hearing, and primarily since 2015, have been documented and considered through this contested case hearing as well as through the annual monitoring for archaeological and historic properties. *See* Response Lines 1.h & 31; HO COL 203, 340, 343, 346.	
1c	37-38	1c. WRONG FOF 517, 518, and 519 (which exactly match UH/TIO COL 457-459) The failure of the CDUA and CMP to understand properly or respect traditional and customary practices like those I regularly engage in is precisely why their proposed mitigation measures do not achieve what the Applicant claims. In FOF 518 (UH/TIO COL 458), HO states: Mitigation measures accepted in the approved TMT FEIS may be considered as part of the CDUA approval process. On the basis of the evidence presented, those measures are reasonable and accurate efforts to mitigate and lessen any cultural impacts in the Mauna Kea summit area as a whole which benefits would not otherwise exist without the TMT Project. In FOF 519 (UH/TIO COL 459), HO asserts: The approved and unchallenged FEIS for the TMT Project identifies several mitigation measures, both direct and indirect, that are aimed at ameliorating potential impacts on the environment and cultural practices. These measures mitigate the Project's potential impacts on the	Unsupported; mischaracterization. Argues, without evidentiary support that practices are traditional and customary practices, that survey of cultural practices is insufficient and appropriate mitigation measures cannot be determined based on the record before the Hearing Officer. The record and the law refute these arguments. *See* Response Lines 1.h, 14, 24, 30 & 60.	63.

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		environment and cultural practices so that the TMT Project will not create a substantial adverse impact to these areas. The mitigation measures directed toward ameliorating the impact on "environment and cultural practices" include "cultural and community outreach." A "[t]raining Program will be implemented to educate employees to understand, respect, and honor Maunakea's cultural landscape and cultural practices," and the telescope facility will be "furnished with items to provide a sense of place and acknowledge the cultural sensitivity and spiritual attributes of Maunakea" (FEIS pg S-12). Training employees and providing "sensitive" furnishings (what could these possibly be?) are in no way directed at reducing the level of impact on religious and spiritual practitioners the TMT project to "below significant." Without a comprehensive and current cultural survey of contemporary practitioners, appropriate mitigation measures cannot be ascertained.		
1d	38	Id. NOTE DISCREPANCY: FOF 517 (UH/TIO COL 457), CDUA, FEIS Pg. S-12 Perhaps aware of the paucity of mitigation measures proposed in the CDUA, in her FOF the HO adds a measure to her mitigation measures list that does not appear in the original CDUA or FEIS: "consultation with cultural practitioners." I have testified under oath that no one has offered to consult with me about my religious and spiritual practices on Mauna Kea, particularly in the Summit area. In sum, the mitigation measures do not contemplate what kinds of mitigation would be possible or necessary because they are based on stale, outdated and incomplete	HO FOF 517 is accurate and supported by the evidence in the record and the citations therein. *See also* Response Lines 60 & 62; Response Line 20 (HO FOF 240 (Johnson testifying that this contested case hearing is part of the ongoing consultation process)).	64.

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		studies of religious and cultural life on the mauna today.		
6	39-43	6. Exception to HO's Reliance on *Lyng* and *Kilakila* for her COL and recommendation for Permit Approval. Now I turn to the suspect legal basis of HO's position, with particular attention to two of the cases she relies upon, *Lyng* and *Kilakila*. Regarding the former, the jurisdiction of this contested case is the State of Hawai'i. It is therefore odd and alarming that the HO (as well as UH/TIO) relies on a tired, worn, and embarrassing federal decision (*Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)) in her attempt to deflect attention away from the necessity of the Applicant and the BLNR taking Native Hawaiian customary and traditional claims seriously (COL 100, 360, 364, and 377, which exactly match UH/TIO COL 102, 355, 359, and 372). *Lyng* is widely regarded as reactionary, short-sighted, and completely out-of-step with principles of fairness concerning indigenous religious claims and consultation rights (see, inter alia, W. Echohawk, In the Courts of the Conquerer: The Ten Worst Indian Law Cases Ever Decided). Justice Brennan, joined by Marshall and Blackmun, could see how misguided the decision was on constitutional grounds and how hastily and summarily it dismissed native claims that were clearly articulated in the EIS documents of the case. He wrote, Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I	Contrary to W. Freitas's argument, *Lyng* is a U.S. Supreme Court case, which is the law of the land and has binding legal effect in all United States jurisdictions, including Hawai'i. *Lyng* is a primary authority, given more persuasive value than the secondary sources cited by W. Freitas. Similarly, the majority opinion in the *Kilakila* case cited is controlling law. The excerpts of the dissenting (non-majority) opinion in that case, to which W. Freitas cites, however, are not controlling law.	65.

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		dissent...[B]y defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve -- and the Constitution demands -- more than this. He concludes, Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions, ante at 454 (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment. I dissent. (447) According to legal experts Kristen Carpenter and Amy Bowers, scholars remember Lyng for its extremely narrow formulation of the First Amendment, in which the Supreme Court found the Free Exercise Clause somehow inapplicable to the protection of Indian religious practices that occur at sacred sites. Others remark on Lyng 's extremely broad formulation of property rights, in which the government's ownership of the public lands gave it the right to destroy sacred sites located there. Lyng is also infamous for making a mockery of the federal Indian trust doctrine—serving as a stark example of the many instances where the government not only failed to		

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		protect, but actually sought to harm, Indians' most precious religious and cultural resources—and the Supreme Court allowed it to happen. (Bowers, Amy and Carpenter, Kristen A., Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association [July 1, 2011]. INDIAN LAW STORIES, Carole Goldberg, Kevin K. Washbur4, Philip P. Frickey, eds., Foundation Press; 2011, p. 400) The faulty jurisprudence of Lyng been supplanted by the federal government's vastly improved templates for and practices of consultation subsequent to administrative remedies such as Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (signed by President Clinton on November 6, 2000), the endorsement the United Nations Declaration on the Rights of Indigenous Peoples by President Obama on December 17, 2010, and by state- and county-level instruments, again with particular attention to consultative mechanisms. Well ahead of the curve, and responding to the undeniable cultural importance of the Hawaiian Renaissance of the 1960s and 1970s, Hawai'i amended its Constitution in 1978 by adding 12-7, which established an intent, means, and mandate for acknowledging Native Hawaiian traditional and customary rights. These provisions and the case law that has emerged subsequent to them are far more robust than Lyng for assessing the present contested case. By considering this case in the bright light of the State Constitution rather than in the dim haze of Lyng, the BLNR has an opportunity to honor Native Hawaiian		

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		customary and traditional rights in a way will illustrate how forward-thinking Hawai'i is with regard to its original people. In the effort to achieve fairness and the appearance thereof, it will be a mistake to invoke, as HO and UH/TIO have, the State Supreme Court's ruling in Kilakila (KILAKILA 'O HALEAKALA, Petitioner/Appellant-Appellant, v. BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAI`I, Respondents/Appellees-Appellees. Supreme Court of Hawai'i. SC WC-13-0003065 Decided: October 06, 2016). Relying on a Lyng-style justification, the Court in Kilakila affirmed the CDUA, notwithstanding the clarity of the FEIS in stating that traditional and customary rights would been violated. It needs to be pointed out that the facts in Kilakila are different from those in the instant case and, additionally, that the nature and scope of traditional and customary practices on the respective mauna are different. One cannot substitute the ruling in one telescope case for a ruling in the other. To do so, or even to argue that Kilakila governs considerations with regard to Mauna Kea, requires first that traditional and customary rights be assessed adequately through proper consultation measures. Short of that, the Hearing Officer simply did not have at her disposal an adequate factual record by means of which to apply the ruling of Kilakila to this contested permit.		

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		Insofar as Kilakila is parallel to this case, I draw the BLNR's attention to the dissenting opinion of Justice Wilson in that case The strength of the law resides in its fair application. Fair application of the law justifies faith in judicial decision-making. The decision in this case as to whether a $298 million dollar telescope providing unique benefits to scientific knowledge should be built in a location sacred to the Hawaiian community is one of great consequence deserving a fair decision—a decision arising from a process of fairness that the parties and our community can trust. The conservation district use permit (CDUP) sought by the University of Hawaii Institute for Astronomy (UHIfA) is subject to decision-making based on evidence presented at a contested case hearing—an adjudicative proceeding. A hallmark of due process to which all parties are entitled in this case is an impartial decision-maker who receives evidence subject to public view—an impartial decision-maker equally accessible to all parties, whose decision is based on the evidence and law, with no regard to which party may be the most powerful politically or economically. … [T]he Board granted the CDUP notwithstanding the conclusion of the Final Environmental Impact Statement that construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources. Justice Wilson continues: The absence of a reasonably clear factual analysis explaining the Board's departure from the conclusion of the Final Environmental Impact Statement also constitutes a basis for remand with instructions to		

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		provide such a rationale. (emphasis added) And concludes in his concurring opinion: … [T]he failure of the Board of Land and Natural Resources to supply with reasonable clarity a factual analysis in support of its departure from the finding of the FEIS that the construction and operation of the ATST telescope would cause major, adverse, and long-term direct impacts on traditional cultural resources require that the conservation district use permit be vacated. (emphasis added) In conclusion, it is profoundly unfortunate that the current state of First Amendment jurisprudence, including construals of Lyng, as noted above, does not allow for meaningful protection of indigenous religious sites per se. However, it is a testament to the State of Hawai'i that it has shown an enlightened way forward on such humanitarian issues by means of its constitutional provisions, land use laws, and administrative procedures that are designed to recognize and accommodate traditional and customary practices. It is my hope that the BLNR will make good on the promises embedded in these legal instruments and in doing so enable me and my community to feel that justice and fairness have prevailed in this context.		
7	43	7. EXCEPTION to HO's Decision Order Recommendation for Permit Approval. (COL 368, an exact and unretouched copy of UH/TIO COL 363). WRONG, DECEPTIVE, and DISSIMULATING. This Exception document began with a list of wrong and misleading findings of fact and conclusions of law set forth by HO. In the COL quoted	HO COL 368 is accurate and supported by the evidence in the record and the citations therein.	66.

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		below, HO, following the exact language of UH/TIO, provides a condensed summation of her position regarding the Petitioners' and Intervenors' legitimate and sincere testimony. HO's perfunctory dismissal of her legal mandates under the State Constitution of Hawai'i and statutory requirements reveals a disregard for the law. While UH/TIO may claim that Intervenors demonstrated a lack of respect for legal authority during the June 2015 protests, this hearing made clear that the focus of our efforts during those days was not to break the law but to: 1. Hold state authorities accountable for upholding their duty to allow Native Hawaiians and others for whom Mauna Kea is sacred to be heard; 2. To ensure that our due process rights protected; and 3. To protect of beloved and sacred Mauna A Wakea. In the words of the HO parroting UH/TIO: According to the evidence adduced in this proceeding, the Petitioners and Opposing Intervenors have not demonstrated a need to conduct or participate in religious ceremonies on the proposed TMT Project site; they have not identified practices that will be substantially interfered with; and the BLNR's approval of the TMT Project will not threaten practitioners with sanctions if they engage in religiously motivated conduct. Moreover, except for actual construction areas while the Project is being built (and, once it is completed, the TMT Observatory site), Petitioners, Opposing Intervenors, and everyone else will have continued access to the summit area of Mauna Kea, for religious practices and for any other permitted activity. (COL 368).		

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

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

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