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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

Case No. BLNR-CC-16-002

**THE UNIVERSITY OF HAWAI'I AT
HILO AND TMT INTERNATIONAL
OBSERVATORY, LLC'S JOINT BRIEF
IN RESPONSE TO CINDY FREITAS'
EXCEPTIONS TO HEARING
OFFICER'S PROPOSED FINDINGS OF**

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2017 SEP 11 A 11:30

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

**THE UNIVERSITY OF HAWAI‘I AT HILO AND
TMT INTERNATIONAL OBSERVATORY, LLC’S JOINT BRIEF
IN RESPONSE TO CINDY FREITAS’ EXCEPTIONS TO HEARING OFFICER’S
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND
ORDER FILED AS DOCUMENT 783 ON JULY 26, 2017 [DOC. 811]**

The University of Hawai‘i at Hilo (“UH Hilo”) and Intervenor TMT International Observatory, LLC (“TIO”) jointly submit the following brief in response to Opposing Intervenor Cindy Freitas’ (“C. Freitas”) *Exceptions to Hearing Officer’s Proposed Findings of Fact, Conclusions of Law and Decision and Order*, filed August 21, 2017 [Doc. 811] (“C. Freitas’ Exceptions”) pursuant to Hawaii 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

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

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

¹ The Hawai‘i Supreme Court has held that a hearing officer’s recommendations can serve as the agency’s “proposal for decision” under HRS § 91-11. *See White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1146 (1982); *see also County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015)

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

HRS §91-11 (emphasis added).

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

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

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

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

due weight should be accorded to the final State determination . . .
unless [the] decision deviates from the credibility determination of
a witness whom only the [hearing officer] observed testify.
Traditional notions of deference owed to the fact finder compel

this conclusion. The State Review Officer is in no better position than the district court or an appellate court to weigh the competing credibility of witnesses observed only by the Hearing Officer. This standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that a [hearing officer] who receives live testimony is in the best position to determine issues of credibility.

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

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

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

III. GENERAL OBJECTIONS TO C. FREITAS' EXCEPTIONS

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

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

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

Ultimately, it is evident that C. 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 C. Freitas. That position is not supported by the law.

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

In addition to the general objections in Appendix A, UH Hilo and TIO respond to C. Freitas' Exceptions below. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections. Pursuant to Minute Order No. 103 [Doc. 784] and HAR § 13-1-42(b), UH Hilo and TIO object to all unsupported assertions in C. Freitas' Exceptions, and BLNR should disregard all such unsupported assertions.

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

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

IV. SPECIFIC OBJECTIONS TO C. FREITAS' EXCEPTIONS

C. FREITAS GENERAL EXCEPTIONS

I Cindy Freitas take exception to the HO Repeating the same ERROR that the Hawai'i Supreme Court just found unlawful. See Supreme Court of Hawaii Decisions 2015 Mauna Kea Anaina Hou v. Board of Land and Natural Resources.

I take exception to the HO's Proposed FOF/COL/D&O in whole, because the HO failed to review, consider, to take into account or to rule upon Petitioners proposed FOF/COL/D&O.

UH/TIO JOINT RESPONSE:

C. Freitas' general exceptions vaguely imply that the Hearing Officer's consideration of the evidence was biased and/or otherwise insufficient because the Hearing Officer ignored the evidence presented by the Petitioners and Opposing Intervenors. C. Freitas also implicitly contends that the Hearing Officer failed to comply with HRS § 91-12 by not explicitly ruling on each proposed finding of fact submitted by the Petitioners and Opposing Intervenors.

First, C. Freitas' general exceptions fail to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) Set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) Identify that part of the hearing officer's report and recommended order to which objections are made; or (3) State all grounds for exceptions to a ruling, finding, conclusion, or recommendations. As such, these exceptions should be disregarded.

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

More accurately, C. Freitas' contention is that the Hearing Officer improperly weighed the testimony and evidence presented by the University, TIO, and PUEO over that presented by the Petitioners and Opposing Intervenors. However, it is well-established that credibility determinations are the exclusive providence of the trier-of-fact. As the finder of fact, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the weight and value of evidence, whether it be credible, not credible, or more or less credible than other evidence. C. Freitas' Exception attempts to improperly portray the Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty

to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawaii 308, 321, 926 P.2d 599, 612 (1996) (“[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].”). The underlying principle being that “the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence.” *Wilton v. State*, 116 Hawaii 106, 119, 170 P.3d 357, 370 (2007)(citation omitted).

Third, a plain reading of HRS § 91-12 demonstrates that it is inapplicable to the HO FOF/COL. HRS § 91-12 governs decisions rendered by agencies, not by hearing officers. Moreover, the law pertaining to submitting proposed findings is clear that “[i]t is not indispensable that there be a separate ruling on each proposed finding of fact.” *Outdoor Circle v. Harold K.L. Castle Trust Estate*, 675 P.2d 784, 792, 4 Haw.App. 633, 644 (1983) (citations omitted); *see also Mitchell v. BWK Joint Venture*, 57 Haw. 535, 542, 560 P.2d 1292, 1296 (1977) (holding that a separate ruling on each party’s proposed findings is not required by HRS § 91-12). Additionally, notwithstanding that HRS § 91-12 is inapplicable to the HO FOF/COL, the Hearing Officer did rule on intervenor findings. *See* HO Decision at 7; *see also* HO COL 4, 5, and 6.

C. FREITAS EXCEPTION NO. 1

HO FOF 18 is identical to LTHH and TIO FOF 19 except HO inserted "I am a" ... till, Ex. S-2. Therefore, HO failed to consider other fact that are relevant.

C. Freitas then quoted her entire written direct testimony (“WDT”). In the interest of saving space, said testimony has been omitted.

HO FOF NO. 18:

Cindy Freitas ("**C. Freitas**") is a native Hawaiian practitioner. In her words: "I am a Native Hawaiian, descended of the native inhabitants of Hawai'i prior to 1778 and born and raised in Hawai'i my entire life. I learned my cultural religion practices though [sic] my families Lineage. My grandmother and grandfather is the strongest mentor for me in my growing up and raised me in a traditional cultural way. We would go to the mountain and do prayers ("Pule") for many different things." Cindy Freitas Amended Written Direct Testimony, Ex. S-2. During the contested case proceeding, C. Freitas represented herself *pro se*.

UH/TIO JOINT RESPONSE:

HO FOF 18 quotes directly from C. Freitas' WDT to the extent necessary to introduce her as a party. The balance of C. Freitas' WDT is not relevant in the context of an introduction and the substantive issues raised therein are addressed elsewhere in the HO's Proposed Order.

This exception mischaracterizes the HO FOF/COL in that it implies that the Hearing Officer ignored C. Freitas' relevant testimony. This is not the case. *See* HO FOF 560 (noting that C. Freitas related her concerns regarding the protocols for invasive species management); HO FOF 799 (noting that C. Freitas testified that she conducts cultural practices on Mauna Kea, including the summit area); HO FOF 853 and 1004 (noting C. Freitas' testimony regarding the Manitowoc 2250 crane); HO FOF 873 (noting C. Freitas' testimony that the TMT Project will negatively impact the aquifer due to the possibility of oil leaks); HO FOF 1005 (noting C. Freitas' general concerns regarding the use of heavy machinery on unpaved roads and the potential risk for landslides or other damage to the roads).

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

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

For these reasons, HO FOF 18 is accurate and supported by the evidence in the record and the citations therein.

C. FREITAS EXCEPTION NO. 2

HO FOF 40 failed to consider other fact that is relevant by the Hawai'i Supreme Court opinion.

But the similarity between the HO and the UHH and TIO decision gives the appearance that less than full consideration was given to the "voluminous legal and factual materials presented in the contested case hearing. Such similarity given the appearance that HO already prejudged the case and that the ultimate determination of the merits had moved in predestined grooves" *Cinderella*, 425 F.2d at 590.**HO FOF NO. 40:**

On December 2, 2015, the Hawai'i Supreme Court vacated the circuit court's order and final judgment because the Board acted improperly when it issued the CDUP before holding the contested case hearing. *MKAHI*, 136 Hawai'i at 399, 363 P.3d at 247. The matter was remanded to the circuit court to further remand to the Board "so that a contested case hearing can be conducted before the board or a new hearing officer, or for other proceedings consistent with this opinion." *Id.*

UH/TIO JOINT RESPONSE:

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

Moreover, Exception No. 2 is inaccurate and false in its assertion that the HO FOF/COL give the appearance that less than full consideration was given to testimony and evidence presented by the Petitioners and Opposing Intervenors. *See* HO FOF 139, 214, 227-28, 235, 238-44, 283-84, 319-21, 342-44, 353, 355, 361-423, 448, 459-61, 463, 490-91, 510, 514, 516, 537-40, 558-60, 608, 618-20, 626-29, 659-669, 685, 692, 694, 698, 700-01, 711, 724-25, 731-32, 736, 753-54, 758-62, 770-829, 852-53, 865-73, 875-76, 878-80, 894-96, 911-19, 939, 950, 953, 960-61, 967-80, 987-89, 992-93, 1000-07, 1012, 1017-25, 1028-32, 1043-46.

Further, it is well-established that findings that are adverse to a party – even findings that are adopted verbatim from proposed findings of an opposing party – do not, without more,

establish bias or impropriety. *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). Moreover, 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).

C. FREITAS EXCEPTION NO. 3

HO FOF 48. The HO violated the Sunshine rule and due process by hold a pre-hearing conference on May 16, 2016 (Minute Order 5 Doc.16) with not contacting C. Freitas who later found out in May 2016 for the upcoming pre-hearing conference set for June 17, 2017 which I attended to inter as a party (Minute Order 8 Doc. 49) as a de nova.

HO FOF NO. 48:

Counsels for the UHH, Tim Lui-Kwan, Esq. and Gary Takeuchi, Esq. and MKAH Petitioners, Wurdeman, participated in the May 16, 2016 pre-hearing conference, held at the DLNR office in the Kalanimoku Board Room located on the first floor, Makai side, of the Kalanimoku Building at 1151 Punchbowl Street, Honolulu, Hawai‘i. Items discussed included continuing the conference to a future date in Hilo, the record on remand, location of future conferences and the contested case hearing, and setting motions to intervene. No objections to the pre-hearing conference or timeliness of notice were raised. Vol. i, Tr. 5/16/16.

UH/TIO JOINT RESPONSE:²

² C. Freitas’ Exceptions 3 – 27 pertain primarily to procedural matters. In large part, these exceptions appear to challenge the Hearing Officer’s rulings on various procedural motions made throughout these proceedings, and to the extent they attempt to do so, said Exceptions are inappropriate, untimely and/or improper as having been waived. Nevertheless, without conceding anything about the propriety of these exceptions, UH/TIO will address C. Freitas’ exceptions to procedural findings as follows.

C. Freitas' Exception has no bearing on the substance of HO FOF 48 as a factual finding. HO FOF is an accurate statement summarizing the content of the May 16, 2016 pre-hearing conference. C. Freitas does not support or substantiate Exception No. 3 with citations to the "Sunshine rule," other legal authority, or the record. Additionally, it strains credulity to suggest that the Hearing Officer was required to provide notice to C. Freitas *before* she had even requested to intervene as a party. C. Freitas did not move to intervene until June 2, 2016. *See Request from Cindy Freitas to be Admitted as a Party to the Contested Case Hearing* [Doc. 64]. Absent precognition, it was impossible for the Hearing Officer to have provided notice to C. Freitas of the May 16, 2016 pre-hearing conference because it took place two weeks before C. Freitas had requested to participate in the proceeding. It is ridiculous to suggest that due process rights are owed to individuals who have yet not been admitted as parties – much less individuals who have not even moved to intervene.

Moreover, C. Freitas' citation to the "Sunshine rule" is incorrect. The Sunshine Law does not apply to boards exercising adjudicatory functions, such as conducting a contested case hearing pursuant to HRS § 91-9. *See Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw. App. 633, 641, 675 P.2d 784, 790 (1983) (noting that the Sunshine Law does not apply to adjudicatory functions of administrative agencies other than the Land Use Commission). The State of Hawai'i Office of Information Practices has previously acknowledged that the definition of "adjudicatory functions" includes the contested case hearing as a whole, not just the deliberative process. OIP Opinion Letter, No. 04-14 at 3 (August 27, 2004). C. Freitas was not entitled to notice of the May 16, 2016 pre-hearing conference.

C. FREITAS EXCEPTION NO. 4

HO FOF 64, and 65 violated HAR 13-1-34, that HO responded to the pleadings 10 months later

HO FOF NOS. 64 & 65:

64. *See* Appendix A for a summary of all pre-hearing motions filed by July 18, 2016.

65. *See* Appendix B for a summary of all pre-hearing motions filed between July 19, 2016 and October 20, 2016.

UH/TIO JOINT RESPONSE:

C. Freitas' exceptions have no bearing on the substance of HO FOF Nos. 64 and 65 as findings of fact supported by the record.

C. Freitas' citation to HAR § 13-1-34 is incorrect as nowhere in HAR § 13-1-34 – or any other legal authority – is there a specified time frame in which the Hearing Officer was required to respond to motions.³ *See* Minute Order No. 39 at 3 [Doc. 406] (“No authority mandates a deadline for issuing orders on motions in contested cases.... The fact that the Hearing Officer has not yet ruled on two motions is not evidence of an appearance of impropriety.”) Moreover, the authority of a hearings officer with regard to ruling on motions under section 13-1-32 is fairly broad: “The presiding officer shall have the power to . . . rule on objections or motions . . . and

³ HAR § 13-1-34 states in its entirety:

(a) All motions other than those made during a hearing shall be made in writing, shall state the relief sought, and shall be accompanied by an affidavit, or declaration, or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for filing all motions and opposing memoranda, if any.

(b) Copies of all motions, affidavits, declarations, and memoranda shall be served on all other parties to the hearing within the time set by the presiding officer. The original shall be filed with the board with certificate of service.

(c) Failure to serve or file an affidavit, declaration, or memorandum in opposition to a motion or failure to appear at the hearing on the motion, if held, shall be deemed a waiver of objection to the granting or denial of the motion.

dispose of other matters that normally and properly arise in the course of a hearing authorized by law that are necessary for the orderly and just conduct of a hearing.”

C. FREITAS EXCEPTION NO. 5

Pre-Hearing Filings filed by July 18, 2016

C. Freitas fact that the Motion out of Time filed August 22, 2016 (Doc. 227). Hearing Officer Denied by Minute Order No. 92 (Doc. 764 filed 7/13/17). The Hearing Officer, untimely Denied the Motion out of Time after 10 months later it was filed. The Hearing officer setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 5 is positing as the sentences are incomplete and do not convey a coherent thought.

The Hearing Officer specifically found, as stated in Minute Order No. 92, that C. Freitas’ “Motion has no legal or factual basis. More importantly, the issue of transcript availability was undertaken many times following the daily evidentiary portion of the contested case hearing, during ‘housekeeping’ discussions. A motion was not required to raise the subject.” The Hearing Officer also provided 5 days for any party to file a motion for reconsideration. No motion for reconsider Minute Order No. 92 was filed.

C. FREITAS EXCEPTION NO. 6

Pre-Hearing Filing after July 18, 2016

C. Freitas fact that Memorandum in Support (Doc. 259 filed 9/12/16). Hearing Officer Granted in part, denied in part by Minute order No 45 (Doc. 590, filed 5/2/17). The Hearing officer, again untimely Granted in part, denied in part by 8 months later that it was filed. The Hearing officer again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 6 is positing as the sentences are incomplete and do not convey a coherent thought.

As stated in Minute Order No. 45, the substance of the underlying Request for Further Status Conference was addressed:

To the extent that the Request and related documents sought a conference to discuss scheduling of the contested case hearing, the October 3rd hearing satisfied those requests. To the extent that the Request and related documents sought scheduling and deadlines for the contested case hearing, the resulting schedule and deadlines established at the October 3rd hearing satisfied those requests. To the extent that the Request and related documents sought a specific schedule and deadlines similar to one that was set in the previous contested case hearing of this case, those requests were denied in favor of the schedule and deadlines established on October 3rd.

In addition, Minute Order No. 45 provided the parties with 5 days to move for reconsideration. No such motion was filed.

C. FREITAS EXCEPTION NO. 7

C. Freitas fact that the Motion to Amend Doc. 274 Site Visit filed September 21, 2016 (Doc. 278). Hearing Officer Denied by Minute Order No. 95 (Doc. 767 filed 7/14/17). The Hearing officer, again untimely Denied Motion by 10 months later that it was filed. The Hearing officer again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 7 is positing as the sentences are incomplete and do not convey a coherent thought.

As stated in Minute Order No. 95, C. Freitas' Motion to Amend Doc. 274 "is almost an exact duplicate of Ms. Freitas' Site Visit Proposal (Doc. 220) that was already considered . . . [m]ore importantly, this Motion is untimely having been filed on September 21, 2016."

C. FREITAS EXCEPTION NO. 8

C. Freitas fact that the Motion to Amend Doc. 281 Minute Order No. 19 filed September 26, 2016 (Doc 284). Hearing Officer Denied by Minute Order No. 54 (Doc. 656, filed 5.29/17). The Hearing officer, again untimely Denied Motion by 8 months later that it was filed. The Hearing officer again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 8 is positing as the sentences are incomplete and do not convey a coherent thought.

Moreover, inasmuch as Minute Order No. 19 was an order granting PUEO's Motion to Set Issues, the parties were all given an opportunity to respond to said motion, as well as to respond to the proposed minute order granting the motion. As noted in Minute Order No. 54, "[t]he Freitas Motion seeks 'correction' of Minute Order No. 19 but the basis is not stated. (Doc. 283). It is unclear why Freitas believes reconsideration is in order."

C. FREITAS EXCEPTION NO. 9

C. Freitas fact that the Motion to Object to Phone Call by Michael Cain on 9/23/16 that was instructed by Hearing Officer Judge Riki Amano (Ret.) filed September 26, 2016 (Doc. 285). Hearing Officer Ordered that the non-motions submissions specified do not warrant decisions and none shall be issued. Minute Order No. 100 (Doc. 774, filed 7/17/17). The Hearing officer, again untimely did not warrant the Motion by 10 months later that it was filed. The Hearing officer violated my due process by law.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 9 is positing as the sentences are incomplete and do not convey a coherent thought.

Moreover, as noted in Minute Order No. 100, the Motion to Object to Phone Call by Michael Cain on 9/23/16 was received on 9/24/16. As such, said filing was untimely as well.

C. FREITAS EXCEPTION NO. 10

C. Freitas fact that the Motion for Extension of Time for Filing of Motions, Witness and Exhibit Lists and Direct Testimonies and Pre-Hearing Statement filed October 4, 2016 (Doc. 305). Hearing Officer Denied by Minute Order No. 56 (Doc. 660, filed 5/29/17). The Hearing officer, again untimely Denied Motion by 7 months later that it was filed. The Hearing officer, again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 10 is positing as the sentences are incomplete and do not convey a coherent thought.

Moreover, as stated in Minute Order No. 56 with regard to various motions ruled upon, including C. Freitas' Motion for Extension of Time for Filing of Motions, Witness and Exhibit Lists and Direct Testimonies and Pre-Hearing Statement (Doc. 305), "[t]he relief sought by Movants are moot and/or lack good cause to be granted."

C. FREITAS EXCEPTION NO. 11

C. Freitas fact that the Objection to Minute Order No. that Hearing Officer Order on October 3, 2016 filed October 7, 2016 (Doc. 331). Hearing Officer Ordered that the non-motion submissions specified do not warrant decisions and none shall be issued. Minute Order No. 100 (Doc. 774, filed 7/17/17). The Hearing officer, again untimely did not warrant the Objection by 9 months later that it was filed. The Hearing officer violated my due process by law.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 11 is positing as the sentences are incomplete and do not convey a coherent thought.

C. FREITAS EXCEPTION NO. 12

C. Freitas fact that Motion to Dismiss Contested Case Hearing filed on October 18, 2016 (Doc. 391). Hearing Officer Denied by Minute Order No. 62 (Doc. 685, filed 6/4/17). The Hearing officer, again untimely Denied Motion my 8 months later that it was filed. The Hearing officer, again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 12 is positing as the sentences are incomplete and do not convey a coherent thought.

As to the merits of said Motion, the Hearing Officer held that “[t]he Hawai’i Supreme Court remanded this matter for the purpose of having a new contested case hearing. The contested case hearing arises from the application for the permit. Voiding the permit issued prior to the remand does not operate to negate the underlying application.”

C. FREITAS EXCEPTION NO. 13

Post-Hearing filings (Including Motion to Admit Evidence)

Hearing Officer has err in her decision in Minute Order 44. (Doc. 649)

C. Freitas filed Motion to Admit Exhibits and Written Direct Testimony into Evidence on February 26, 2017 (Doc. 481). Minute Order No 44 (Doc. 553, filed 4/20/17) Granted in part, denied in part as follows:

1. Exhibits S-1 8b 1 and S18b 2 was uplouded in the Document Libruary on 2/12/17 Seventh Exhibit List.
2. Exhibit S-18L was uplouded in to the Document Libruary on 2/12/17 Seventh Exhibit List.
3. Exhibit S-19; S-20; S-22; S-23; S-24; S-25, These exhibit are relevant to this proceeding due to no ruling was done at this time and it was upload in a timely manner in 2016. The Hearing Officer base her decision on UHH objection which is bais and not taking into consideration that the records was not close til July 25, 2017 Minute order 102 (Doc. 782) also see Doc. 569 filed on April 26, 2017 by Temple of Lono.
4. Exhibit S-28e was upload into the Document Libruary on 1/18/17 as Sixth supplemental Exhibit.
5. Exhibits S-29; S-29a; S-29b; S-30; S-30a; S-31a; S-31b; S-31c are the same answer as #3 (above).

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 13 is positing as C. Freitas does not explain what the “err” is. Moreover, Exception No. 13 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer’s report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Further, the Hearing Officer has broad discretion to rule on evidentiary issues. *See* HAR § 13-1-35. With regard to item nos. 1 and 2: C. Freitas filed a Motion to Reconsideration to Minute Order 44 on April 26, 2017 (Doc. No. 571). Said Motion for Reconsideration was granted in part and denied in part by Minute Order No. 51 (Doc. No. 647), wherein the Hearing Officer stated that she “found Exhibit 18L after being directed to Cindy Freitas Seventh Supplemental Exhibit List, filed on 2/12/2017,” and as such, Exhibit 18L was admitted into evidence. However, with regard to Exhibits 18b 1 and 18b 2, the Hearing Officer “was unable to locate those exhibits in the Documents Library” “[d]espite further searching.” With regard to item nos. 3 and 5, the Hearing Officer ruled on the proposed exhibits listed therein, stating that they were either legal argument and therefore, not evidence, or that they were duplicative of existing exhibits.

C. FREITAS EXCEPTION NO. 14

The BLNR has erred in there decision.

C. Freitas filed a Joinder (Doc. 529, filed 3/22/17) Temple's Motion to BLNR to Dismiss HA-3568 filed on 3/19/17, see Doc. 516.

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 14 is positing as C. Freitas does not identify what BLNR decision she is referring to. Moreover, Exception No. 14 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) Identify that part of the hearing officer’s report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Presumably, C. Freitas is referring to Minute Order No. 87 [Doc. 87], which denied the Temple of Lono’s (the “Temple”) *Motion to Board of Land and Natural Resources to Dismiss*

HA-3568 [Doc. 516], which sought to dismiss the CDUP application for failure to consider the criminal desecration statute, Hawaii Revised Statutes section 711-1107. BLNR properly found that it does not have jurisdiction to adjudicate violations of the Hawaii Penal Code. Moreover, even if it did, said claim of desecration fails as a matter of law. UH-TIO COL 392-407.

C. FREITAS EXCEPTION NO. 15

Hearing Officer has erred in her decision C. Freitas, W. Freitas, and Ching;s Joinder feed 3/25/17 (Doc. 548) to Temple's Motion for Proctectiver Order filed March 24, 2017. Hearing Officer Denied by Minute Order No. 76 (Doc. 708, filed 6/11/17) see Doc. 548.

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 15 is positing as C. Freitas does not identify how the Hearing Officer erred in issuing Minute Order No. 76 [Doc. 708]. Moreover, Exception No. 14 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Further, C. Freitas provides no support or authority for her general conclusion that the Hearing Officer erred in issuing Minute Order No. 76. The Temple's *Motion for Protective Order* [Doc. 546] essentially claimed that it should be relieved of any obligation to respond to objections to testimony and exhibits being moved into evidence. The Temple claimed that it was not given sufficient time to respond to said objections. The Hearing Officer properly held in Minute Order No. 76, that "[a]bsolution from filing responses to objections is nonsensical and, in this situation, inconsistent with the Temple of Lono's Joinder in Mauna Kea Anaina Hou Motion Requesting Time to Respond to Exhibits Objections and Related matters."

C. FREITAS EXCEPTION NO. 16

C. Freitas Motion for Reconsideration of Minute order 43 filed on 4/25/17 (Doc. 557). Hearing officer again Denied by Minute Order No. 50 (Doc. 646, filed 5/23/17). This shows that there is a bias and due process by law violation.

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 16 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, Exception No. 14 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Presumably, C. Freitas is suggesting that by denying her Motion for Reconsideration, the Hearing Officer has evidenced her bias and has violated C. Freitas' due process rights. C. Freitas cites no authority or factual support for such claims.

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"). Additionally, 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 parties 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).

Further, 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 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).

Moreover, the Hearing Officer properly denied the Motion for Reconsideration, noting that, “[t]he deadlines do not violate parties’ due process rights; Numerous reminders about

deadlines for proposed D&Os, FOF/COLs were given; the deadlines were reasonably expanded” Minute Order No. 50 at 7 (emphasis in original). The Hearing Officer also noted generally that “[t]he deadlines for filing the proposed D&Os, FOF/COLs and the responses thereto, set out in Minute Order No. 43, were not decided in isolation or arbitrarily. The entire contested case proceeding, the hearing, and other factors were considered.” *Id.* at 9. Finally, with regard to the argument that C. Freitas did not have an opportunity to review the hearing transcripts, the Hearing Officer stated that “[t]here is no authority cited and further, it is not the practice of any tribunal of record to allow such review and correction. Deposition transcripts are often reviewed by deponents and corrections, if any are attached to the transcripts. But this is not the same for transcripts of proceedings like hearings or trials; such transcripts are not reviewed and stand as the state of the record.” *Id.* at 12.

C. FREITAS EXCEPTION NO. 17

C. Freitas fact that the Motion for Extention of Time for Filing of Motions, Witness and Exhibit Lists and Direct Testimonies and Pre-Hearing Statement filed October 4, 2016 (Doc. 305). Hearing Officer Denied by Minute Order No. 56 (Doc. 660, filed 5/29/17). The Hearing officer, again untimely Denied Motion by 7 months later that it was filed. The Hearing officer, again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 17 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, Exception No. 17 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer’s report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Minute Order No. 56, properly denied the Motion for Extension of Time, noting that said Motion was filed after the October 3, 2016 pre-hearing conference and was “essentially a continuation of Movant’s complaints about starting the contested case hearing in October 2016, despite repeat announcements that such would be the case.” Minute Order No. 56 at 3. As such, the Hearing Officer held that “[t]he relief sought by Movant[] [is] moot and/or lack[s] good cause to be granted.” Id. at 4.

C. FREITAS EXCEPTION NO. 18

HO FOF 62 violated HAR 13-1-31.1 that this contested case started on May 16, 2016. (Minute Order 5) without all the parties nor the STANDING PROCESS should have been the first thing to address.

§13-1-31 Parties.

(a) Except as otherwise provided in section 13-1-31.1, parties to a contested case shall be determined within a reasonable time following the ten-day period following the board meeting, the presiding officer shall notify all persons and agencies, including the applicant or alleged violator, as the case may be, who timely petitioned for the contested case hearing of the date and time for a hearing to determine whether any or all of the persons and agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to the admission of any requestor as a party to the contested case. Without a hearing, an applicant or an alleged violator shall be a party.

HO FOF NO. 62:

Following the Second Pre-Hearing Conference on June 17, 2016, the Hearing Officer found that the following people and entities had standing to participate as parties in the contested case hearing:

University of Hawai‘i-Hilo

Mauna Kea Anaina Hou, Kealoha Pisciotta

Clarence Kukauakahi C. Freitas

Flores-Case `Ohana

Deborah J. Ward

Paul K. Neves

Kahea: The Hawaiian Environmental Alliance
TMT International Observatory, LLC
Perpetuating Unique Educational Opportunities, Inc.
Mehana Kihoi
C.M. Kaho'okahi Kanuha
Harry Fergerstrom
Joseph Kualii Lindsey Camara
Jennifer Leina'ala Sleightholm
Maelani Lee
Cindy Freitas
William K. Freitas
Richard Maele Deleon
Temple of Lono by Lanny Sinkin
Kalikolehua Kanaele
Stephanie-Malia Tabbada
Tiffnie Kakalia
Glen Kila
Dwight J. Vicente
Brannon Kamahana Kealoha
Doc. 115 (Minute Order No. 13).

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 18 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, HAR § 13-1-31.1⁴ is inapplicable to this proceeding as

⁴ HAR § 13-1-31.1 states:

this contested case concerned the issuance of a Conservation District Use Permit, not alleged violations. To the extent Exception No. 18 is attempting to contend that the Hearing Officer failed to comply with HAR § 13-1-31, C. Freitas does not identify any error in the Hearing Officer's process. *See* HO FOF 46-56.

C. FREITAS EXCEPTION NO. 19

1-10 FOF 71 setting the issues to have PUEO filed a Motion to Set the Issues has violated my due process rights. Due to the nature of limited issues' Freitas fact that the Objection to Minute Order No. _ that Hearing Officer Order on October 3, 2016 filed October 7, 2016 (Doc. 331). Hearing Officer Ordered that the non-motion submissions specified do not warrant decisions and none shall be issued. Minute Order No. 100 (Doc. 774, filed 7/17/17). The Hearing officer, again untimely did not warrant the Objection by 9 months later that it was filed. The Hearing officer violated my due process by law and Chapter 13 and HAR 13-1-34.

HO FOF NO. 71:

On July 18, 2016, PUEO filed a Motion to Set the Issues, requesting that the Hearing Officer identify the specific issues to be addressed during the contested case hearing. [Doc. 99]. As summarized in Appendix A, multiple pleadings were filed both opposing and supporting PUEO's motion.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 19 is positing as the sentences are incomplete and do not convey a coherent thought.

To the extent C. Freitas is claiming that the Hearing Officer's ruling in Minute Order No. 19 violated her due process rights, such claim is unsupported with either citations to legal

Notwithstanding the provisions of section 13-1-29(b) and section 13-1-31, when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator, provided that the petition is made in accordance with the provisions of section 13-1-29(a). No person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings.

authority or to the record. With regard to what appears to be her objection to Minute Order No. 100, disposing of C. Freitas' Objection to Minute Order No. ___ that Hearing Officer Order on October 3, 2016 (Doc. No. 331), Minute Order No. 100 explains that Doc. No. 331, among others, "do[es] not seem to warrant [a] decision[] because [it is] not [a] motion[] and/or not directed to [a] filed motion[]." Minute Order No. 100 further stated that "[a] party, who believes it appropriate, may file a motion to reconsider using the procedure set out herein," and set a deadline of five days from the date of the Minute Order No. 100 to file motions for reconsideration. As C. Freitas did not move for reconsideration, she has waived any objection she may allege was contained in Doc. No. 331 and is therefore estopped from raising such objection.

C. FREITAS EXCEPTION NO. 20

HO FOF 77, 78, 79, 80, 81 and 82. The HO has violated my due process rights and HAR 13-1-34 in the issue of the Site Visit to Mauna Kea on September 26, 2016.

HO FOF NO. 77:

During the hearing on August 12, 2016, a site visit to Mauna Kea was scheduled for September 26, 2016. Minute Order No. 16. [Doc. 238]. Parties were given ten days from August 23, 2016 to respond to the proposed site visit.

HO FOF NO. 78:

On August 17, 2016, the following parties submitted site visit proposals and/or designations: W. Freitas, UH Hilo, Sleightholm, TIO, Petitioners, Fergerstrom, and C. Freitas. [Doc. 214-220]. On August 22, 2016, TIO filed Objections to the Petitioners' and C. Freitas' site visit recommendations. [Doc. 229 and 230]. On September 9, 2016, PUEO filed its site visit designation. [Doc. 255]. On September 14, 2016, Kihoi filed her site visit proposal. [Doc. 260].

HO FOF NO. 79

At the August 29, 2016 pre-hearing conference, September 26, 2016 was set as the date for the Mauna Kea site visit. Minute Order No. 21 [Doc. 344].

HO FOF NO. 80

On September 19, 2016, Minute Order No. 18 was issued which designated the individuals approved to attend the site visit to Mauna Kea, as well as the logistics for the site visit. Minute Order No. 18 [Doc. 274]. A summary of the multiple pleadings that were filed in response to Minute Order No. 18 is contained in Appendix B.

HO FOF NO. 81

A site visit to Mauna Kea took place on September 26, 2016. Minute Order No. 16 [Doc. 238]. The site visit was conducted pursuant to an order regarding site visit. Minute Order No. 18 [Doc. 274]. The following sites were visited: the Batch Plant; the proposed Thirty-Meter Telescope site; and the Summit Loop road near the Keck Observatory. At the proposed Thirty Meter Telescope site, there was a demonstration of a red helium balloon attached to a 187-foot rope.

HO FOF NO. 82

The Hearing Officer had a reasonable period of time and conditions for viewing the general landscape and areas proposed for the TMT Project, and the site visit is considered reasonable and appropriate for the purposes of the case.

UH/TIO JOINT RESPONSE:

It is unclear what Exception No. 20 is positing as the sentences are incomplete and do not convey a coherent thought.

C. Freitas states no factual or legal basis for objecting to the above-listed proposed findings. C. Freitas' citation to HAR § 13-1-34 is incorrect as HAR § 13-1-34 merely provides the procedure by which parties may file motions during a contested case proceeding.⁵

⁵ HAR § 13-1-34 states in its entirety:

(a) All motions other than those made during a hearing shall be made in writing, shall state the relief sought, and shall be accompanied by an affidavit, or declaration, or memorandum setting forth the grounds upon which they are based. The presiding officer shall set the time for filing all motions and opposing memoranda, if any.

(b) Copies of all motions, affidavits, declarations, and memoranda shall be served on all other parties to the hearing within the time set by the presiding officer. The original shall be filed with the board with certificate of service.

Additionally, is it not even clear what C. Freitas is claiming as the basis for her denial of due process claim, as C. Freitas was allowed to participate in the September 26, 2016 site visit.

C. FREITAS EXCEPTION NO. 21

C. Freitas fact that the Motion to Amend Doc. 274 Site Visit filed September 21, 2016 (Doc. 278). Hearing Officer Denied by Minute Order No. 95 (Doc. 767 filed 7/14/17). The Hearing officer, again untimely Denied Motion by 10 months later that it was filed. The Hearing officer again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 21 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, Exception No. 21 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

As noted by the Hearing Officer in Minute Order No. 95, the Motion to Amend Doc. 274 "is almost an exact duplicate of Ms. Freitas' Site Visit Proposal (Doc. 220) that was already considered. More importantly, this Motion is untimely having been filed on September 21, 2016." Minute Order No. 94 at 2.

C. FREITAS EXCEPTION NO. 22

(c) Failure to serve or file an affidavit, declaration, or memorandum in opposition to a motion or failure to appear at the hearing on the motion, if held, shall be deemed a waiver of objection to the granting or denial of the motion.

C. Freitas fact that the Motion to Amend Doe. 281 Minute Order No. 19 filed September 26, 2016 (Doc 284). Hearing Officer Denied by Minute Order No. 54 (Doc. 656, filed 5.29/17). The Hearing officer, again untimely Denied Motion by 8 months later that it was filed. The Hearing officer again setting for such filing violated HAR 13-1-34

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 22 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, Exception No. 22 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) Set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) Identify that part of the hearing officer's report and recommended order to which objections are made; or (3) State all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

With regard to C. Freitas' argument regarding the timeliness of the Hearing Officer's ruling, see the UH/TIO Joint Response to C. Freitas' Exception No. 5, above. As stated in Minute Order No. 54, denying the Motion to Amend Doc. 281 Minute Order No. 19, "[t]he Freitas Motion seeks 'correction' of Minute Order No. 19 but the basis is not stated. (Doc. 283) It is unclear why Freitas believes reconsideration is in order." Minute Order No. 54 at 3.

C. FREITAS EXCEPTION NO. 23

C. Freitas fact that the Objection to September 26, 2016 on Mauna Kea filed on September 27, 2016 (Doc 290) have violated by due process rights as well as my Article 12 Section and Chapter 1. This Objection was not denied or granted by the HO due to the fact that it was MISSED. In Minute Order 54 Doc 656 filed on 5/29/17 should have been address in this Minute Order and as well as the appendix A, B, C, and D, which again was MISSED.

UH/TIO JOINT RESPONSE:

See generally, Response to Exception No. 4 regarding rulings on motions.

It is unclear what Exception No. 23 is positing as the sentences are incomplete and do not convey a coherent thought. Moreover, Exception No. 23 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

C. Freitas' Objection to September 26, 2016 Site Visit on Mauna Kea was filed a day later on September 27, 2016. It essentially repeated the same issues C. Freitas had raised during the filing period leading up to the site visit. Moreover, said Objection did not state what relief C. Freitas was seeking. Moreover, as said Objection was neither a motion nor an objection to a specific motion, it did not warrant a response by the Hearing Officer. *See* UH/TIO Joint Response to C. Freitas Exception No. 4, *supra*.

C. FREITAS EXCEPTION NO. 24

C. Freitas fact that Motion to Dismiss Contested Case Hearing filed on October 18, 2016 (Doc. 391). Hearing Officer Denied by Minute Order No. 62 (Doc. 685, filed 6/4/17). The Hearing officer, again untimely Denied Motion by 8 months later that it was filed. The Hearing officer, again setting for such filing violated HAR 13-1-34.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 12.

C. FREITAS EXCEPTION NO. 25

HO FOF 101 was based on the length of the cross-examination by all and yet the HO changes the rule to imposed a 30- minute time limit on cross-examination, subject to extension of time for good cause shown has showed a bias and a due process violation to the Petitioners and HRS 91-10 #3. Parties object to HO 30-minute time limit on cross-examination. Flores Tr. 10/31/2016: V6: P12: L12-25 and Page 13: L1-12; Ching Tr. 10/31/16; V6: P13: L15-16; Case Tr. 10/31/16: V6: P20: L6-25 and Page 21: L1-15; Mr. Freitas Tr. 10/31/16: V6: p21: 119-25 and P22: L1-25; Fergerstrom Tr. 10/31/16: V6: P13: L17; Kaiama Tr. 10/31/16: V6: P13: L19-25 and P14: L1-13; Ward Tr. 10/31/16:

V6: P14: L15-24; Sinkin Tr. 10/31/16: V6: P15: L1-25 and P16: L1-7; Pisciotta Tr. 10/31/16: V6: P16: L11-25 and P17: L1-4; Kanaele Tr. 10/30/16: V6: P17: L9-25 and P18: L1-4; Mr. Kealoha Tr. 10/31/16: V6: P39: L3-25.

HO FOF NO. 101:

Based on the length of the cross-examinations conducted by the Petitioners and Opposing Intervenors over the first five days of the evidentiary hearing, and pursuant to HAR § 13-1-32(h), on October 31, 2016, a 30-minute time limit was imposed on cross examinations, subject to extensions of time for good cause shown. Tr. 10/31/16 at 11:23-12:6. Throughout the proceeding, the Hearing Officer would warn parties when they had reached or exceeded the 30-minute limit. Upon a showing of good cause, the Hearing Officer would afford extensions of time for further cross-examination. *See, e.g.*, (Rechtman) Tr. 12/20/16 at 172:18-22 (giving W. Freitas approximately an hour and a half to cross-examine Rechtman); *see also* Tr. 11/16/16 at 209:13-209:14; Tr. 12/1/16 at 142:22-144:7, 150:21-150:25; Tr. 12/2/16 at 85:10-85:13, 89:5-89:11; (Nagata) Tr. 12/8/16 at 157:14-159:13, 221:18-221:24; (Nagata) Tr. 12/13/16 at 31:17-31:21, 39:15-41:22.

UH/TIO JOINT RESPONSE:

C. Freitas cites no authority for her assertion that the 30-minute time limit on cross-examination, subject to extension for good cause shown, “showed a bias and a due process violation.” C. Freitas has not explained how her due process rights were affected by this time limit. The 30-minute limit on cross examination was well within the Hearing Officer’s authority under HAR § 13-1-32, which states in part that the parties’ right to conduct cross-examinations is “subject to limitations by the presiding officer,” and that “the presiding officer may limit the . . . extent of direct or cross examination or the time for testimony upon a particular issue.” Moreover, the ruling was not biased, inasmuch as the 30-minute cross-examination time limit applied to all parties, including UH and TIO. Moreover, the Hearing Officer permitted many of the Petitioners and Opposing Intervenors to go beyond this time limit when there was good reason to do so.

C. FREITAS EXCEPTION NO. 26

HO FOF 116 failed to consider scheduling a Respond to the Objection.

HO set the deadline of March 9, 2017 for parties to file written motions to move Written Direct Testimonies and exhibits into evidence. March 16, 2017 was set as the deadline for any objections but there were no responds to the objection schedule. There was voluminous objection by UHH, TMT and TIO that created a situation in whether and when to respond to the objections. See Temple of Lono Motion for Protective Order filed on 2/24/17 (Doc 546).

HO FOF NO. 116:

On March 1, 2017, a deadline of March 9, 2017 was set for parties to file written motions to move Written Direct Testimonies and exhibits into evidence that had already been introduced or referred to in the evidentiary portion of the contested case hearing. No new exhibits were to be included if not previously introduced or referred to before the close of the evidentiary hearing on March 2, 2017. March 16, 2017 was set as the deadline for any objections if a party believed the exhibits sought to be moved into evidence were not "appropriate, or grounded, or relevant". Tr. 3/1/17 at 253:10-253:21. See Appendix D for a summary of all evidentiary motions and post-hearing filings.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 15.

C. FREITAS EXCEPTION NO. 27

HO FOF 117, 118, and 120 failed to consider voluminous legal and factual materials presented in the contested case hearing that the transcript was made available will trigger the 30 days to file Finding of Fact and Conclusions of Law. Parties Objected to 30 days to file Finding of Fact Conclusion of Law. Pisciotta Tr. 3/1/17: V43: P259: L12-16; C. Freitas Tr. 3/1/17: V43: P260: L10-22.

HO FOF NO. 117:

On March 1, 2017, a discussion about the availability of copies of the transcripts of the proceedings in select libraries was held. In addition, the Hearing Officer advised that the parties would be required to submit any proposed findings of fact and conclusions of law within thirty days from when the transcripts were made available. Tr. 3/1/17 at 256:2-256:9.

HO FOF NO. 118:

On April 19, 2017, Minute Order No. 43 was issued informing parties that complete copies of the transcripts were available for reviewing at five locations. Minute Order No. 43 [Doc. 552]. Minute Order No. 43 established the deadline of May 30, 2017 for any proposed decision and order, findings of fact and conclusions of law. Minute Order No. 43 [Doc. 552].

HO FOF NO. 120:

On April 20, 2017, Minute Order No. 44 was issued, ruling on all submitted motions to admit evidence. Minute Order No. 44 [Doc. 553].

UH/TIO JOINT RESPONSE:

In as much as Exception No. 27 is in essence an objection to Minute Orders 43 and 44, Exception No. 27 fails to comply with Minute Order No. 103 and HAR § 13-1-42(b), which required that the exceptions: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. Objections to Minute Orders are inappropriate and untimely.

Section 13-1-38 of the Hawaii Administrative Rules states that proposed findings of fact and conclusions of law may be filed "not later than **ten days** after the transcript is prepared and available, unless the presiding officer shall otherwise prescribe." Haw. Admin. R. § 13-1-38 (emphasis added). In this case, the Hearing Officer gave the parties **42 days** to submit their proposed findings of fact/conclusions of law. The transcripts were made publicly available on April 18, 2017. The deadline for submission of proposed findings of fact/conclusions of law was May 30, 2017. Clearly, the voluminous testimony and materials were taken into consideration by the Hearing Officer in setting this deadline.

C. FREITAS EXCEPTION NO. 28

HO FOF 123 failed to consider that the General Lease will not allow University to use the leased land as follows:

12. OBJECTS OF ANTIQUITY. The Lessee shall not appropriate, damage, remove, excavate, disfigure, deface or destroy any object of antiquity, prehistoric ruin or monument of historical value.

Ishibashi Tr. 11/16/17 Pages 163 to 175 all lines; Mr. HO Tr. 2/22/17: V39: P97: L16-25, P98: L1-25 and P99: L1-15.

HO FOF NO. 123:

The General Lease allows the University to use the leased land as follows:

4. Specified Use. The land hereby leased shall be used by the Lessee as a scientific complex, including without limitation thereof an observatory, and as a scientific reserve being more specifically a buffer zone to prevent the intrusion of activities inimical to said scientific complex. Activities inimical to said scientific-complex shall include light and dust interference to observatory operation and certain types of electric or electronic installation on the demised lands, but shall not necessarily be limited to the foregoing.

Ex. B.17f at 3-4.

UH/TIO JOINT RESPONSE:

HO FOF 123 accurately cites the appropriate lease provision regarding specified use. Section 12, as cited by C. Freitas, is not applicable, as there is no evidence that any “object of antiquity, prehistoric ruin or monument of historical value” will be negatively impacted by the project. *See* HO FOF No. 318 (the proposed location at site 13N “is more than 200 feet from known historic properties”).

C. FREITAS EXCEPTION NO. 29

HO FOF 129 are identical to UHH and TIC' FOF 120. Therefore, HO failed to consider other fact that is relevant. That the proposal TMT will continue to put a cumulative impact to the near the Kukauhau'ula Historic Property. Ex. A-1: P 7- 13 .

HO FOF NO. 129:

The past construction of these observatories has had cumulative impacts on cultural, archaeological, and historic resources that are considered substantial, significant, and adverse. Ex. A-3/R-3 at 3-214.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 29 does not appear to contest any part of HO FOF 129. Moreover, the exhibit cited therein does not support the proposition that “TMT will continue to put a cumulative impact to the near Kukauhau'ula Historic Property.” Contrary to C. Freitas'

assertion that the Hearing Officer has “failed to consider” testimony regarding TMT’s contribution to the cumulative impact, the Hearing Officer’s proposed findings of fact expressly recognized witness testimony, opining that the “TMT project would add to the impacts of existing observatories that are ‘substantial, adverse and significant.’” HO FOF 1019. However, even considering the impact of the TMT project “[i]n the context of the existing summit area cumulative impacts – and under the assumption that such cumulative impacts will continue,” the Hearing Officer found that “the TMT Project does not create or cause substantial adverse impacts to existing natural resources in the applicable area. The existing uses and resources are already committed to astronomical uses and objectives, and otherwise based upon commitments of the CDUA and University proposals, several facilities will be removed thereby significantly reducing substantial existing adverse impacts on the more sensitive and visible summit ridge areas within the Astronomy Precinct.” HO FOF 183.

C. FREITAS EXCEPTION NO. 30

HO FOF 130 are identical to UHH and TIO FOF 121. Therefore, HO failed to consider other fact that is relevant. The TMT stands 187 in height there for the visual statement on CDUA Ex. A-1-page 7.8 Table 7.5 state TMT will be visual at the height of 164 are incorrect by 23 feet more will cause a cumulative impact as it is.

See CDUA Ex. A-1: P 7-1 to 7-17; Nagata Tr. 12/12/16: V15:P167: L9-11; Dr. Fujikane Tr. 1/9/17: V23:P.224: L1-21; Marti Townsend WDT B.03a

HO FOF NO. 130:

Existing astronomical observatories are prominent visual elements in the summit area of Mauna Kea. At least one of the existing observatories on the summit ridge is visible from approximately 43 percent of Hawai‘i Island. According to 2000 U.S. Census data, 72 percent of the Island’s population reside within that viewshed area. At the summit ridge, the existing observatories obscure portions of the 360-degree panoramic view from the summit area. Overall, the existing level of the cumulative visual impact from past observatory construction projects at the summit ridge area has been considered to be substantial, significant, and adverse. Ex. A-3/R-3 at 3-217 to 3-218; Tr. 11/15/16 at 24:1-8; Ex. A-5/R-5, App. M at 50-54; Ex. A-54 at 50-54.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 30 does not address the substance of HO FOF 130. Moreover, the significance of visual impact is not measured by the height of the project, but by its overall visibility from various vantage points and whether it will obstruct any significant viewplanes. As stated in HO FOF 851: "[t]he TMT Project's visual impact is perceived by some to be significant. In the context of the existing observatories, and the fact that the TMT Observatory will not block or substantially obstruct the identified views and viewplanes of Mauna Kea which is the applicable significance criterion in HAR § 11-200-12, the Project's visual impact will be less than significant." "The TMT Project will add a visual element to the summit of Mauna Kea, but it will be one such element among many. The incremental increase in cumulative visual impact due to the TMT Project will be less than significant. Therefore, the TMT Project will not have a substantial adverse impact on the visual resources of Mauna Kea." HO FOF 854.

C. FREITAS EXCEPTION NO. 31

HO FOF 131 are identical to UHH and TIO FOF 122.

There for other relevant fact that should be consider that building the TMT will continue to cause substantial cumulative impact to the existing area. Flores Tr. 1/30/17: V32: P38: L19-25 and P39: L1-19: Flores WDT B.02a.

HO FOF NO. 131:

Development of the existing observatories also significantly modified the preexisting terrain. The tops of certain pu'u, or cinder cones, were flattened to accommodate the foundations for observatory facilities. Some materials removed from the pu'u were pushed over the sides of the cinder cones, creating steeper slopes that are more susceptible to disturbance. Consequently, the existing level of cumulative impact from preexisting observatories on geology, soils, and slope stability is considered to be substantial, significant, and adverse. Ex. A-3/R-3 at 3-218 to 3-219.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 31 is contrary to the evidence presented, viewed within the appropriate legal framework. As stated in HO FOF 183, "[t]he existing uses and resources are already committed to astronomical uses and objectives and otherwise based upon commitments of the CDUA and University proposals, several facilities will be removed thereby significantly reducing substantial existing adverse impacts on the more sensitive and visible summit ridge areas within the Astronomy Precinct." Consequently, "the TMT Project does not create or cause substantial adverse impacts to existing natural resources in the applicable area." *Id.* Moreover, "[i]t is undisputed that without the TMT Project, the cumulative effects of astronomical development and other uses in the summit area of Mauna Kea have previously resulted in impacts that are substantial, significant and adverse . . . [t]he TMT Observatory will not tip the balance of any existing impact from a level that is currently less than significant to a significant level." HO FOF 186-187.

C. FREITAS EXCEPTION NO. 32

HO FOF 184 are identical to UHH and TIO FOF 174. Therefore, HO failed to consider other fact that is relevant. The 2000 Master Plan states, "Class A amendment would be major amendments for proposals and require approval by Board of Regents".

New Projects not identified in the Master Plan with site coverage over 2,000 -square feet or a building envelop over 24,000 cubic feet (40' x 50' x 12);

Major expansions of existing facility sites not anticipated in the Master Plan (more than 50% of existing floor area or 2,000 square feet, whichever is greater);

Improvement identified in the Master Plan which require significant changes in size or location;

New utility alignments and corridors.

The TMT Project excess the Master Plan Class A Amendments.

Table F-3: Summary of Buildings

Project Component	Gross Floor Area (square feet)	Net Floor Area (square feet)	Height (feet above finished grade)
Observatory Dome	34,304	31,400	26.5 (fixed enclosure) 183.7 (top of dome)
Support Building	18,376	15,961	26

Source: TMT Observatory Corporation, July 17, 2010.

The TMT Project excess the Master Plan Class A Amendments.

Ex. A-48: PXI-14 to XI23; C. Freitas FOF 281, 282 and 283. Nagata Tr. 12/12/16;
V15:P246: L15-17; Ex. A-1 P B-9.

HO FOF NO. 184:

The Design Review process involves four phases. Under Phase I, the developer is provided an orientation of the Master Plan's goals and objectives, overview of the design review process, and design guidelines. Under Phase II, schematics or conceptual drawings of the proposed project's design are reviewed (Schematic Design). MKMB as a whole reviews the outcome of Phase II, and, if it has no objections, the process is allowed to move to Phase III (Design Development). Under Phase III, a review of detailed drawings is performed, including, site plans, floor plans, and elevation plans. MKMB reviews the design outcome of Phase III. If there are no objections, the developer can move to Phase IV (Construction Documents Review) and begin preparing its construction drawings. WDT Nagata at 7; Exhibit A-48 at XI-10 to XI-39; Exhibit A-52; (Nagata) Tr. 12/8/16 at 34:9-34:17.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 32 is misleading as the cited language is taken out of context. The 2000 Master Plan states that "Amendments [to the Master Plan] would be required for large new facilities and major renovations only if they are not anticipated in the Master Plan. Projects identified in the Master Plan would not require plan amendments unless there are significant changes in design or location that have major impacts on the plan itself or the environment." Master Plan at XI-14. A "Next Generation Large Telescope" "of 25 m. aperture or greater" was specifically contemplated by the Master Plan. Master Plan at IX-27. The reference to projects

“with site coverage over 2,000 square feet or a building envelop over 24,000 cubic feet” as an example of a Class A amendment that would be considered a major amendment for proposals, is stated only as an example, and is limited to “[n]ew projects not identified in the Master Plan.”

Master Plan at XI-14.

C. FREITAS EXCEPTION NO. 33

HO FOF 260 are identical to UHH and TIO FOF 252. Therefore, HO failed to consider other fact that is relevant. The footprint of the TMT project will be disturbed by construction, including the access road and all underground utilities. SIHP No. -16172 is located about 225 feet north of the proposed TMT Observatory site And consists of a single upright with several support stones. SIHP No. -16167 is located approximately 500 feet east of the Access Way and about 1,300 feet southeast of the proposed TMT Observatory site and consists of one, possibly two, uprights placed in a bedrock crack. In 1995, the site was revisited and both stones were found in a vertical position. SIHP No. -16166 is approximately 350 feet east of the Access Way and 1,600 feet southeast of the proposed TMT Observatory site and is a multi-feature shrine with a total of eight, possibly nine uprights arranged in two groups. When the site was revisited in 1999 it was noted that several The Batch plant hasn't been studied carefully. In addition to the shrines, a terrace of unknown function (SIHP No. -21449) was documented in 2005; it is located in Area E approximately 200 feet east of the

Access Way and 700 feet south of the proposed TMT Observatory site. Sanders Tr. 1/3/17: V20: P230: L22-25 and P 231: LI See C. Freitas FOF 162 and163; Ex A-1: PA-1 and A-2.

HO FOF NO. 260:

The footprint of the TMT Observatory dome, support building, parking area, and area disturbed during construction will be roughly five acres. A half-acre portion of this has previously been disturbed by the existing 4-wheel drive road and site testing equipment; the original disturbance occurred during site testing in the 1960s, and site testing was also performed in this area for the TMT Project in the 2000s. Ex. C-2 (WDT Dr. Sanders) at 7. Additional areas (outside of the TMT Project site, the access way, and Hale Pōhaku) will be temporarily utilized for construction. Tr. 01/04/17 at 17:16-18:6; 36:3-15. The total construction acreage footprint for the TMT Project (including the TMT Project site, access way, Batch Plant, underground utilities, and use of the facilities at Hale Pōhaku) is approximately 12.5 acres. Tr. 01/04/17 at 50:11-51:3.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas' Exception No. 33 has no bearing on HO FOF No. 260. Exception No. 33 merely states that the proposed location for the TMT Project may be several hundred feet from several SIHP sites. There is no evidence that the TMT Project will actually affect those sites. See HO FOF Nos. 601-605.

C. FREITAS EXCEPTION NO. 34

HO FOF 262 are identical to UHH and TIO FOF 254. Therefore, HO failed to consider other fact that is relevant. The TMT Access Way will have 30,000 cubic yards raw MATERIAL taken out and only 3,000 cubic yards will be use. The locations of two traditional shrines — SIHP Nos. -16164 and -16165 — were originally recorded in 1982 at some distance from the disturbed area; their locations were verified during the survey for the TMT Project. Both shrines are more than 500 feet west of the Batch Plant Staging Area. C. Freitas Tr. 2/21/17: V38: P98: L21-25 and P99: L1-5; Ex S-31 b; Ex A-1: PA-2

HO FOF NO. 262:

The TMT Access Way will include a road and utility services to the TMT Observatory from existing services. Currently, utility services exist along the Mauna Kea Access Road Loop to a point near the intersection of the Mauna Kea Loop Road and the SMA road. The proposed Access Way will start at that point and extend to the TMT Observatory following either the existing 4-wheel drive road or the wider roads that serve the SMA facility. The Access Way that the TMT Project has proposed is limited to a single lane (reduced from a previous design of two lanes) over the southernmost portion of the Access Way (i.e., the portion that crosses Pu'u Hau'oki and through the SMA); the remainder is two lanes. The vast majority of the Access Way route follows and goes over an existing single-lane, 4-wheel drive road that was previously developed for access to and testing of the 13N site in the 1960s. A portion of the route was graded during construction of the SMA facility as well. Construction will not require a widening of the access roads. Ex. C-2 (WDT Dr. Sanders) at 8; Tr. 10/25/16 at 134:4-135:8, 178; (Dr. Sanders) Tr. 1/3/17 at 46:21-25.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 34 is not germane to the substance of HO FOF No. 262. With regard to the identification of shrines designated SIHP Nos. 16164 and 16165, there is no indication that either will be impacted by the TMT Project.

C. FREITAS EXCEPTION NO. 35

HO FOF 267b are identical to UHH and TIO FOF 259. Therefore, HO failed to consider other fact that are relevant. The Batch Plant Staging Area are in the alpine stone desert. The plant community in the alpine stone desert consists of several species of mosses and lichens, and a limited number of vascular plants as follows:

- a. The highest densities and diversity of the 21-known species of lichens.
 - b. The 12 species of mosses reported to be present in the alpine stone desert.
 - c. Six species are reported from the summit region: two Hawaiian endemic grasses, Hawaiian bentgrass (*Agrostis sandwicensis*) and pili uka (*Trisetum glomeratum*); two naturally occurring ferns, „iwa„iwa (*Asplenium adiantum-nigrum*) and Douglas" bladderfern (*Cystopteris douglasii*); and two exotic daisies, Hairy cars ear (*Hypochoeris radicata*) and common dandelion (*Taraxacum officinale*).
- Eric Hansen, M.S. WDT B.09a; Hansen Tr. 1/19/19: V27: P158: L1-25 and P159: L1-9.

HO FOF NO. 267:

During construction, additional areas will temporarily be utilized and/or disturbed. Base yards required for the construction of the telescope and observatory will include the following:

- a. Port Staging Area: An existing warehouse and/or yard near the port where the TMT Project components are received.
- b. Batch Plant Staging Area: A roughly 4-acre area northwest of where the Mauna Kea Access Road forks near the summit that will primarily be used for storing bulk materials and a concrete batch plant, as this area has been used in the past during construction of other observatories.
- c. TMT Observatory and Headquarters sites: The areas within the TMT Observatory and Headquarters sites not occupied by structures will also be utilized as staging areas during construction of those facilities.

Id. at 10.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 35 presents information taken out of context. The statistics regarding species of lichens, mosses and plant life refer to the Alpine Stone Desert generally.

Evidence indicates that with regard to the immediate area of the proposed project site, “[t]here are no unique plants within the proposed project site,” and “[t]here are no endangered or threatened species of flora in the TMT Project area.” HO FOF Nos. 532 & 533.

C. FREITAS EXCEPTION NO. 36

HO FOF.289 are identical to UHH and TIO FOF 279 except HO inserted WDT Dr. Sanders. Therefore, HO failed to consider other fact that are relevant. Due to the expected increase of heavy traffic during construction there is a chance for more rapid deterioration of the unpaved portions of Mauna Kea Access Road surface and disturbed areas. Construction activities will take place 12-15 hours a day, seven days a week will cause a substantial adverse impact.

HO FOF NO. 289:

The TMT Observatory construction crew will average 50 to 60 crew members through the life of construction; during certain phases, a crew of more than 100 will be working at the site. Construction is expected to take place six days a week, 10 hours a day; however, some special operations or construction phases will require longer work hours. It is also expected that winter weather conditions at the TMT Observatory site will interrupt construction at times. Ex. C-2 (WDT Dr. Sanders) at 11.

UH/TIO JOINT RESPONSE:

See Response to General Exceptions regarding Hearing Officer’s credibility determinations; *see also* HO FOF 1015.

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas provides no support for her claim that “[c]onstruction activities will take place 12-15 hours a day, seven days a week will cause a substantial adverse impact.” The Hearing Officer recognized C. Freitas’ “general concerns regarding the use of heavy machinery on unpaved roads, and the potential risk for landslides or other damage to the roads.” HO FOF No. 1005. However, the access road “will be paved where it is adjacent to, but upwind of, sensitive wekiu bug habitat” which “will reduce the generation of dust” such that “the potential impact to the wekiu bug is less than significant.” HO FOF 554.

C. FREITAS EXCEPTION NO. 37

HO FOF 290 are identical to UHH and TIO FOF 280. Therefore, HO failed to consider other fact that are relevant. The Batch Plant is only 4 acres and there will be a decommission of another observatory as well as the TMT Project. Dr. Sanders appears that he doesn't know on the details when both TMT Project happens and decommission of observatory. Sanders also stated that the batch plant hasn't been studied carefully. Sanders Tr. 1/3/17: V20: P230: L 22-25 and P231: Ll; Sanders Tr. 1/3/17: V20: P45: L14-18.

HO FOF NO. 290:

During construction of the TMT Project, as it has been used in the past for the construction of other observatories, the Batch Plant Staging Area will be used primarily for storing bulk materials and as a concrete batch plant. Roughly four acres of the Batch Plant Staging Area will be used by TMT construction activities. TMT construction activities at the Batch Plant will be done in compliance with all existing laws and regulations. Upon completion of construction of the TMT Observatory, the Batch Plant Staging Area will be partially restored. *Id.* at 10; Vol. 3, Tr. 10/25/16 at 136:5-24; Ex. A-1/R-1 at 1-13.

UH/TIO JOINT RESPONSE:

See Response to General Exceptions regarding Hearing Officer's credibility determinations. Dr. Sanders was called to testify regarding the design of TMT. *See* Tr. 1/3/17 at 17:18-22. Dr. Sanders' educational background and experience support the finding that he is a credible witness with regard to that subject-matter. Dr. Sanders has been the project manager for TMT since 2004 and has his Ph.D. from M.I. T (Ex. C-2). It was agreed by all parties 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.

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 37 cites Dr. Sanders' testimony out of context. The question presented to Dr. Sanders pertained to "possible synergistic effect" of trying to decommission more than one site while building the TMT and whether that might exceed the limitations of the

current planned batch plant, necessitating expansion. Dr. Sanders answered “I don’t think that’s a serious issue, but it hasn’t been studied carefully.” Tr. 01/03/17 at 230:16 – 231:1. There is no evidence that simultaneous decommissioning during the construction of the TMT Project will exceed the physical capabilities of the Batch Plant.

C. FREITAS EXCEPTION NO. 38

HO FOF 291 are identical to UHH and TIO FOF 281. Therefore, HO failed to consider other fact that are relevant. Mauna kea where strong winds are frequently combined with ice storms, which greatly increases both the weight on the crane structure and the wind cross section. Dr. Sanders also agree that direct effect is a potential to affect the stability and the structure integrity of the crane, while the indirect effects are wind forces causing the load on the hook to move suddenly. Ex A-1-page B-11; Sanders Tr. 1/4/17: V21: P38: L13-17.

HO FOF NO. 291:

During all operations with heavy equipment, the TMT construction manager will monitor the weather and decide when any shutdowns will be necessary. Vol. 21, Tr. 01/04/17 at 35:19- 36:2. Crane operators will monitor all safety procedures and will be trained on proper operating methods. Vol. 21, Tr. 01/04/17 at 36:2-42:24.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas’ Exception No. 38 does not address the substance of HO FOF No. 291. Moreover, the reference to Dr. Sanders’ testimony is misleading and taken out of context. While recognizing possible risks involved with the use of a large construction crane, Dr. Sanders stated that “[a]ny use of a large crane is something where you have to be very careful and use the best possible safety practices.” Tr. 01/04/17 at 38:6-8; see also 01/04/17 at 38:9-25.

Further, Exception No. 38 is misleading as C. Freitas acknowledged that the cranes come with a wind measuring device and that the Manitowoc 2250 product guide instructs operators to

lower and secure the boom when certain wind speeds are exceeded. Tr. 02/21/17 at 139:3-140:16.

C. FREITAS EXCEPTION NO. 39

1-10 FOF 337 are identical to UHH and TIO FOF 322 except HO inserted Vol 12 and Nees. Therefore, HO failed to consider other fact that are relevant. Although the Batch Plant are in the alpine stone desert there will be 21 known species of lichens, 12 species of mosses and vascular plants that will be destroyed if TMT Project should use the Batch Plant area. The TMT Project cannot restore those species it will cause a substantial adverse impact. Ex A-1 page 3-5.

HO FOF NO. 337:

At the conclusion of construction of the TMT Observatory, a portion of the Batch Plant Staging Area will be restored. Page A-9 of App. A to Ex. B of Ex. A-1/R-1; Vol. 12, (Nees) Tr. 12/05/16 at 62:10-15.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 35.

C. FREITAS EXCEPTION NO. 40

HO FOF 341 are identical to UHH and TIO FOF 326 except HO inserted training, Vol 21, 20 and Dr. Sanders. Therefore, HO failed to consider other fact that are relevant. Mr. Ishibashi was hired as employee for OMKM and Mr. Klasner has given Mr. Ishibashi the training although he has been train for one-hour orientation, Mr. Ishibashi has knocked over an upright stone (ahu). Therefore, Mr. Ishibashi has desecrated a cultural structure, that Mr. Ishibashi was hired to protect. Ishibashi Tr. 11/16/17: V9: P165: L1-25; Dr. Kahakalau WDT Ex B.06a.

HO FOF NO. 341:

The TMT Project will institute a Cultural and Natural Resources Training Program that all TMT Project staff and all construction workers will be required to attend annually. The training is approximately 1-hour and is considered sufficient to convey a sense of the need to be respectful to cultural and natural resources. Vol. 21, Tr. 01/04/17 at 63:14-22; 65:25- 66:5. The content of the training program will be determined by OMKM. The program is intended to educate attendees on the sensitive natural, cultural, archaeological, and historic resources of Mauna Kea, the cultural practices exercised on Mauna Kea, and the measures to prevent potential impact to such resources. Ex. C-2 (WDT Dr. Sanders) at 16; Vol. 20, (Dr. Sanders) Tr. 1/3/17 at 210:23-211:1, 212:2-11. Workers who have not taken the training will not be allowed to work on Mauna Kea. Vol. 20, (Dr. Sanders) Tr. 1/3/17 at 212:12-16.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas’ Exception No. 40 is misleading and presents information out of context. It does not directly address the substance of HO FOF 341. Exception No. 40 mischaracterizes Mr. Ishibashi’s testimony to suggest that cultural training was inadequate and ineffective. It assumes without basis or support that Mr. Ishibashi “desecrated a cultural structure”. However, Mr. Ishibashi testified that based on his own personal observations, the structure in question – an upright stone – “was a new stone that just wen’ pop up. It was one stone standing up, and that was the only one, that was new, though, it wasn’t an old stone.” Tr. 11/16/17 at 164:13-15.

C. FREITAS EXCEPTION NO. 41

1-10 FOF 347 are identical to UHH and T1O FOF 322 except HO inserted Vol 21. Therefore, HO failed to consider other fact that are relevant. The excess landscape materials that will be removed from the TMT Project will be used to restore the decommissioning observatory that will expire by 2033. The material may not be enough, to restore TMT Project by 2033. Ex A-1 page 4-42.

Table 4-14: Number of Observatories by 2033

Observatory	Count
Observatories to Remain or be Replaced in the Astronomy Precinct by 2033	
Optical/infrared: CFHT, UH 2.2m, Gemini, IRTF, UHH 0.9m, Keck, and Subaru	7
Submillimeter/radio: One of the three submillimeter observatories (SMA, JCMT, or CSO)	1
Observatories Estimated to be Removed and Not Replaced by 2033	
UKIRT and VLBA	
Two of the three radio telescopes (SMA, JCMT, or CSO)	
New Observatory on a New Site in the Astronomy Precinct by 2033	
Thirty Meter Telescope	1
Total Observatories in the MKSR by 2033	9

Table 4-13: Current Number of Observatories

Observatory	Count
Current Observatories in the Astronomy Precinct	
Optical/infrared: CFHT, UH 2.2m, Gemini, IRTF, UHH 0.9m, Keck, Subaru, and UKIRT	8
Submillimeter/Radio: SMA, JCMT, and CSO	3
Current Observatories in MKSR but outside Astronomy Precinct	
Radio: VLBA	1
Total Observatories Currently in the MKSR	12

HO FOF NO. 347:

Excess landscape materials removed from the site during construction will be stored at the Batch Plant so that they can be used to restore the TMT Project site as best as possible upon decommissioning. Vol. 21, Tr. 01/04/17 at 58:16-24.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas cites no authority to support her assertion that "[t]he material may not be enough to restore TMT Project by 2033." The citation to Exhibit A-1 does not support this proposition. Moreover, Exception No. 41 is misleading to the extent that it improperly implies that the material stored at the Batch Plant will be the only material used to restore the TMT Project site upon decommissioning.

C. FREITAS EXCEPTION NO. 42

HO FOF 462 failed to consider other facts that are relevant. The proposed TMT Project will have a substantial adverse impact on natural resources in the area. C. Freitas Amended WDT S-2a at 2-3.

HO FOF NO. 462:

White testified that because of the proposed mitigation measures the construction and operation of the TMT Project will not have a substantial adverse impact on natural resources in the area. WDT White at 7-8.

UH/TIO JOINT RESPONSE:

See Response to General Exceptions regarding Hearing Officer's credibility determinations. The Hearing Officer relied on testimony from multiple witnesses, in addition to the testimony from White, in finding that the TMT Project will not have a substantial adverse impact to existing natural resources within the surrounding area, community, or region. Such finding was also based, in part, on the FEIS, CDUA, and the testimony of Dr. Smith (see HO FOF 526-534), Dr. Sanders (see HO FOF 550-553), Mr. Hayes (see HO FOF 554), Mr. Nees

(see HO FOF 565, 601), Mr. Rechtman (see HO FOF 566, 604), and Mr. Nance (see HO FOF 855).

Exception No. 42 mischaracterizes the extent to which the HO FOF/COL considered the testimony and evidence presented by Petitioners and Opposing Intervenors. HO FOF 537-40, 558-60, 608, 618-20, 626-29, 660-70, 685, 692, 694, 698, 700-1, 725, 731-32, 736, 753, 758-62, 770-829, 853, 865-73, 875-80, 894-96.

C. Freitas cites no authority or evidence in support of her Exception No. 42 other than her own unsubstantiated written direct testimony. HO FOF No. 462 is consistent with other evidence presented indicating that the TMT Project will not result in a substantial adverse impact on the natural resources in the area. HO FOF 565, 751, 833, 882, 892 and 897.

C. FREITAS EXCEPTION NO. 43

HO FOF 465 are identical to UHH and TIO FOF 386 except HO inserted White. Therefore, HO did not consider other fact that are relevant. However, 13-5-24(4) and 13-5-25-R-34D-1) clarify that use of a resource subzone for an astronomy facility not only requires an approved management plan but also requires a board permit. Kehaunani Abad, PHD WDT B.08a.

HO FOF NO. 465:

The Conservation District is divided into various subzones, some more restrictive than others. Uses that are not appropriate in the most restrictive subzone may be appropriate in the Resource subzone. (White) Tr. 10/20/16 at 60:15-61:1.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

HO COL 97 addresses the issue raised by C. Freitas in Exception No. 43 (“[a]stronomy facilities in the Resource subzone require a BLNR permit and an approved management plan. HAR § 13-5-24. Under the recently amended version of HAR § 13-5-24, a management plan ‘approved simultaneously with the permit’ is required”).

C. FREITAS EXCEPTION NO. 44

HO FOF 489 are identical to UHH and TIO FOF 412. Therefore, HO did not consider other fact that are relevant. Nagata admitted, that the CMP was never updated. Flores admitted, that CMP should have been updated by April of 2014. Nagata Tr. 12/12/16: V15: P174: L4-14; Flores Tr. 1/30/17: V32: P77: L16-25 and P78: L1-8; Ex B-39.

HO FOF NO. 489:

The TMT Management Plan will govern the TMT Project construction, operation and decommissioning. The TMT Management Plan will be updated every five years based on: (1) updates to the Mauna Kea CMP and sub-plans; (2) relevant new or modified laws, regulations, and policies; (3) results from the regular monitoring and reporting done by the TMT Project and OMKM; and (4) modifications to the operation of the TMT Observatory. Ex. A-1/R-1, Ex. B at 5-2.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

Exception No. 44 is inaccurate. Nagata testified that the CMP is updated every year when OMKM reports back to the Land Board on implementation of the CMP to reflect everything that was done from the first year the CMP was implemented. Tr. 12/12/16 at 180:8-181:1.

C. FREITAS EXCEPTION NO. 45

HO FOF 476 are identical to U1-11-1 and TIO FOF 400. Therefore, HO did not consider other fact that are relevant. Flores states that there is no list of who will you consult with. Nagata testified that she does not have a list to consult with. Flores Tr. 1/30/17: V32: P 42: L1-25, P43: LI -25, and P44: L1-4; Nagata Tr. 12/12/16: V15: P121: L7-225 and P122: L1-25.

HO FOF NO. 476:

The evidence presented at the hearing, and addressed further below, shows that the CMP, with its sub-plans, is a comprehensive plan for carrying out multiple land uses in the designated subzone. The CMP that was previously approved by the BLNR is still fully applicable and was in place and approved by the BLNR when the CDUA for the TMT Project was presented to the BLNR for approval.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas’ Exception No. 45 does not address the substance of HO FOF 476. Moreover, it mischaracterizes the testimony of Stephanie Nagata. When asked if OMKM had developed a list of “individuals, families, or organizations who should be consulted when individual development projects are proposed or when other issues arise that may be a concern,” she testified that the compilation of said list is “an on-going process”, explaining that “there would always be some other individuals and families or organizations that could be added to a list.” Tr. 12/12/16 at 120:22-25 and 121:11 – 122:4. Moreover, the reliable, probative, and substantial evidence in the whole record demonstrates that significant and appropriate consultation regarding the TMT Project has been and continues to be conducted. *See* HO FOF 222-245; Ex. R-5, Appx. D (Cultural Impact Assessment Report).

C. FREITAS EXCEPTION NO. 46

HO FOF 509 are identical to UHH and TIO 440 except 1-10 inserted Hayes. Therefore, HO did not consider other fact that are relevant. TMT will significantly add to the substantial adverse impact to the natural resources. TMT mitigating is to decorate the building inside with furnish spiritual attributes of Mauna Kea. How can that be mitigating anything they destroyed by decorating? Flores Tr. 1/30/17: V32: P91: L16-15 and P92: L1-3.

HO FOF NO. 509:

The TMT Observatory will not significantly add to or burden the balance of any existing impact from a level that is currently less than significant to a significant level within the Astronomy Precinct. Tr. 10/25/16 at p. 181:6-10 (Hayes). This means that the TMT Project itself will not cause substantial adverse impacts. When taken in conjunction with its proposed mitigation and applicable management and decommissioning plans, the overall effect of the TMT Project will be either neutral or provide for lesser overall impacts than current existing uses in the Astronomy Precinct.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

See Responses to Exception Nos. 29, 31 and 42. Moreover, the characterization of mitigation efforts as "to decorate the building inside with furnish spiritual attributes of Mauna Kea" is patently inaccurate in the face of overwhelming evidence to the contrary. Section II.K of the HO Proposed FOF addresses the mitigation measures in detail.

C. FREITAS EXCEPTION NO. 47

HO FOF 511 are identical to UHH and TIO 444. Therefore, HO did not consider other fact that are relevant issues that the CDUA failed in the building of the TMT Project was not supporting documents or information for the BLNR. The 2000 Master Plan states that major project needs to be Amended and TMT Project is considered major project. Ex S-31c; S-31d; S-31e.

HO FOF NO. 511:

The CDUA and supporting documents provide sufficient information for the BLNR to consider whether the "proposed land use" itself will cause "substantial adverse impact to existing natural resources within the surrounding area, community, or region[.]" HAR § 13-5-30(c)(4).

UH/TIO JOINT RESPONSE:

See Response to Exception No. 44.

C. FREITAS EXCEPTION NO. 48

HO FOF 512 are identical to UHH and TIO 448. Therefore, HO did not consider other fact that are relevant. UH Hilo has shown a sufficient level of impact on natural resources, within the MKSR due to poor management. 1/9/17: V23: P220: L22-24.

HO FOF NO. 512:

Under HAR § 13-5-30(c)(4), UH Hilo has provided sufficient information to show the level of impacts on natural resources within the MKSR would be substantially the same even in the absence of the TMT Project within the MKSR.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

It is unclear what C. Freitas' specific objection to HO FOF No. 512 is. The testimony she cites has no bearing on the proposed finding. Candace Fujikane is describing a diversion of water from Houppokane. Said testimony has nothing to do with the TMT Project's potential impact on natural resources.

UH Hilo presented sufficient evidence to support the Hearing Officer's findings that the TMT Project will not cause substantial adverse impact to existing natural resources within the surrounding area, community and region. *See* HO FOF 508-897.

C. FREITAS EXCEPTION NO. 49

HO FOF 798 did not consider other fact that are relevant issue that describes TMT Project to cause substantial adverse impact to the existing natural resources that is stated in C. Freitas WDT Ex. S-2a page 2-3; C. Freitas Tr. 2/21/17: V38: P105: L24-25 and P.106: L 1-12.

HO FOF NO. 798:

Opposing Intervenor Cindy Freitas describes herself as "a Native American, descended of the native inhabitants of Hawai'i prior to 1778 and born and raised in Hawai'i my entire life. Amended WDT of Cindy Freitas, at 1; Ex. S-2-a. In her words: "I learned my cultural traditional customary religion practices though my families Lineage. [sic] My grandmother and grandfather is the strongest mentor for me in my growing up and raised me in a traditional cultural way. We would go to the mountain and do prayers ("Pule") for many different things. Also I have witness things beyond my understanding till I got older and mostly my grandparents also made sure that we do not desecrate any thing on land, ocean or any were else to be respectful of your surroundings. [sic] My grandparent would speak the manaleo style (Old Hawaiian language) which tried to teach the next generation but because of the influence of time we only learn a little of the language She would take us to the mountain and learn to plant our food, raise our livestock and take care of the land so that the land would take care of the people in their culture practices.

We were thought in the Ahupua'a style (from the ocean to the mountain). While we work mostly in the middle of the Ahupua'a we would also go to the ocean and fish as well. My grandparents would always tell us to pule first before we fish and also give a ho'okupu (is a gift of abundance of mountain food that we bring) and leave it on a rock at the ocean shore line and ask for permission to fish and be safe. Then our catch would be a bounce so that we share with the people that live close to us. We also leave a fish on a rock when we get to the mountain for ho'okupu as well. [sic] As I grew I never forgot my upbringing. Now with a family of my own I teach them also the cultural customary traditional religion practices as well and we as parents learn though our children. [sic] I have enrolled my 2 girls as Kula Kaiapuni O Kona in the early 2000 and we grew with the school with all kinds of chants, pule and protocols. Today the school is

name Ehunuikaimalino and located at Konawaena location. Though this school I have learn also so much cultural customary religion practices as well. [sic] As for Mauna Kea and everywhere else in the world I have deep respect for the natural resources and native plants and things that live within the earth. Today because of the fast development we as people need to keep our natural resources and help to save what is there."

Amended WDT of Cindy Freitas, at 1; Ex. S-2-a.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

It is unclear what specifically C. Freitas' is objecting to in HO FOF 798, as this finding was quoted directly from her written direct testimony. To the extent she appears to be arguing that the Hearing Officer should have included portions of her WDT that pertained to the TMT Project's "substantial adverse impact" on the area's natural resources, this proposition, as explained in UH/TIO's Joint Response to C. Freitas' Exception No. 42, goes against the weight of the evidence presented in this case that the TMT Project will **not** have a substantial adverse impact on the area's natural resources. *See* Response to General Exceptions regarding Hearing Officer's credibility determinations; HO FOF 508-897.

C. FREITAS EXCEPTION NO. 50

HO FOF 681 are identical to UHH and TIO FOF 621 except HO inserted "Hawaiian traditional and customary practices. These various materials include:". Therefore, HO did not consider other fact that are relevant. All plans should be updated to meet today's issues as follows:

- a. CMP approved April 2009.
- b. CRMP approved October 2009.
- c. Mauna Kea-Ka Piko Kaulana o Ka "Aina" May 2010.
- d. 2000 Master Plan approved 2000
- e. FEIS for TMT Project May 2010
- f. CIA produce for TMT FEIS May 2010
- g. AIS for the Mauna Kea Summit Region 2010
- h. CDUA 2010
- i. TMT Management Plan 2009
- j. TMT Draft Historic Preservation Plan 2009
- k. TMT Historical and Archaeological Site Plan 2009

- l. Mauna Kea Historic Preservation Plan Management Components 2000
- m. Archaeological Assessment Report for Hale Pohaku 2000
- n. Final Environmental Assessment for the CMP April 2009
- o. Final MS for the MKSR and Final AIS for Astronomy Precinct January 2010

BLNR or DLNR should have done an independent analysis such as Kapa'akai so information could be used to update a land utilization zones map and inventory. Flores Tr. 1/30/17: V32: P160: L19-23.

HO FOF NO. 681:

Numerous research studies, plans, and impact assessments have been prepared in recent times documenting the cultural practices and resources on Mauna Kea, including native Hawaiian traditional and customary practices. These various materials include:

- a. the CMP, which provides information and management actions to protect, preserve, and enhance the cultural resources and native Hawaiian traditional and customary practices of Mauna Kea within the UH Management Area (Ex. A-9);
- b. the CRMP, which provides an overview of cultural resources and was formulated to ensure that the University fulfills its mandate to preserve and protect cultural resources and native Hawaiian traditional and customary practices within the UH Management Area (Ex. A-11);
- c. "Mauna Kea-Ka Piko Kaulana o ka 'Āina" (meaning "Mauna Kea-The Famous Summit of the Land"), which provides a review of historic records and information collected through oral history interviews with kūpuna and kama'āina pertaining to Mauna Kea (Ex. A-5/R-5 at App. F);
- d. the Mauna Kea Master Plan, which includes an Oral History and Consultation Study and Archival Literature Research (Ex. A-48, App. I) and a CIA (Ex. A-48, App. N; Ex. A-5, App. E);
- e. the FEIS for the TMT Project including all public comment letters and responses (Ex. A-3/R-3);
- f. the CIA produced for the TMT FEIS (Ex. A-5/R-5 App. D);
- g. the AIS for the Mauna Kea Summit Region produced for the TMT FEIS (Ex. A-5/R-5 at App. G);
- h. the TMT Cдуа (Ex. A-1/R-1);
- i. the TMT Management Plan (Ex. A-1/R-1 at Ex. B);
- j. the TMT Draft Historic Preservation Plan (Ex. A-1/R-1 at Ex. B, App. A);
- k. the TMT Historical and Archaeological Site Plan (Ex. A-1/R-1 at Ex. B,

App. C);

l. the Mauna Kea Historic Preservation Plan Management Components (Ex. A-48 at App. F);

m. the Archaeological Assessment Report for Hale Pōhaku (Ex. A-5/R-5 at App. H);

n. the Final Environmental Assessment for the CMP (Ex. A-51);

o. the Final AIS for the Mauna Kea Access Road Corridor (Ex. A-56); and

p. the Final AIS for the MKSR and the Final AIS for the Astronomy Precinct [Ex. A-55; see also (Nees) Tr. 12/05/16 at 49:10-12 (Mr. Nees confirming the AIS for MKSR and Astronomy Precinct, respectively, included the TMT Project site but were not performed specifically for the TMT Project)].

Ex. A-3/R-3 at 3-8 to 3-10.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

It is unclear what C. Freitas means by "All plans should be updated to meet today's issues." To the extent C. Freitas is contending that a *Ka Pa 'akai* analysis has not been conducted, such contention is unsupported and unsubstantiated. The contested case hearing and its 44 days of testimony and 71 witnesses are part of the assessment required of BLNR under *Ka Pa 'akai*.

C. FREITAS EXCEPTION NO. 51

HO FOF 691 are identical to UHH and TIO FOF 634 except HO inserted place and Rechtman. Therefore, HO failed to consider other fact that are relevant. A ho'okupu is an offering to my ancestors who came before me and in honor we put a ho'okupu (offering) to knowledge them. By taking away the ho'okupu has destroyed the connection between me and my ancestors that cannot be captured again. The intent has cause me great grief in me. Therefore, the Desecration has been done in 2017 (new evidence) and 2015 at the 3.0 and 3.5-mile marker on the submit and it continues today. Unfortunately, the DLNR has response to inquiry that all document received are being filed. (APPENDIX A) However, only exceptions and responsive briefs will be uploaded to the document library. A violation of HAR 13-1-39.

HO FOF NO. 691:

A ho‘okupu (offering) is something that is left at a place by somebody to commemorate something (sometimes consisting of one or two rocks stacked on each other). (Rechtman) Tr. 12/20/16 at 107:25-108:2, 109:14-18. Not all ho‘okupu are considered native Hawaiian cultural offerings but some are considered other than traditional. (Rechtman) Tr. 12/20/16 at 108:3-6.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

The Hearing Officer does not have jurisdiction to adjudicate claims of desecration. *See* HO COL 399-413. Moreover, evidence of the alleged incident in 2017 is not in the record of the instant proceeding. C. Freitas does not explain how DLNR has violated HAR 13-1-39⁶, nor is it clear how HAR § 13-1-39 is relevant to Exception No. 51.

C. FREITAS EXCEPTION NO. 52

HO FOF 872 are identical to UHH and TIO FOF 813 except HO inserted Rosier til. She feels. Therefore, HO failed to consider other fact that are relevant. Rosier referred to oil leaks during pre-construction activities for TMT Project. Equipment wasn't in used on a consistent basis for a long enough period the oil tends to be under pressure at that point it leaks. Rosier Tr. 2/16/17: V37: P57:L20- 25 and P58: L1-7; Tr. 2/16/17: V37: P44: L6-10; Rosier WDT Amended S-17a.

HO FOF NO. 872:

⁶ HAR § 13-1-39 states:

(a) Upon a motion of a party, the board may reconsider a decision it has made on the merits only if the party can show that:

(1) New information not previously available would affect the result; or

(2) A substantial injustice would occur.

(b) In either case, a motion for reconsideration shall be made not later than five business days after the decision or not less than fourteen days prior to any deadline established by law for the disposition of the subject matter, whichever is earlier.

Susan Rosier, appearing on behalf of C. Freitas, referred to alleged oil leaks occurring during pre-construction activities for the TMT Project. Ex. S-17a; Tr. 2/16/17 at 223:22-248:19; Tr. 2/21/17 at 32:22-72:21. Rosier was a mechanic assistant for over 33 years. In the late 1980's and 1990's, along with her husband, Alan Freitas, and Henry Akima, she moved all the heavy equipment for union shops on Maui. WDT of Susan Rosier, page 1. She feels that mechanical malfunctions may lead to oil leaks from heavy machinery used during construction of the TMT Project, and that the possibility of such leaks is heightened by the harsh conditions present on Mauna Kea (increasing the likelihood of hose malfunctions, etc.). *Id.*

UH/TIO JOINT RESPONSE:

See Response to General Exceptions regarding Hearing Officer's credibility determinations; *see also* HO FOF 987 (noting that the testimony regarding allegations of oil leaks were refuted by Dr. Sanders who testified that some of the alleged oil leaks were just moisture from condensation and that any alleged leaks were addressed appropriately).

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. FREITAS EXCEPTION NO. 53

HO FOF 923 are identical to UHH and TIO FOF 873 except HO deleted The TMT til the end of sentence. Therefore, HO failed to consider other facts that are relevant. Overall the existing level of cumulative visual impacts from the past projects at the summit is substantial, significant and adverse. If the TMT is built the TMT project would represent an additional increment. Cumulative impact is the sum of increments, essentially, and would add to the cumulative impact that is substantial, significant and adverse. Hayes Tr. 10/25/16: V3: P 155: L10-23.

HO FOF NO. 923:

The visual landscape in the summit area of Mauna Kea has already been substantially altered and impacted. Ex. A-1/R-1 at 7-1 to 7-2; WDT Hayes at 4-5. It will remain so with or without the TMT Project.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 53 is misleading as Mr. Hayes' testimony is taken out of context. Mr. Hayes' testimony in response to the following line of questions was as follows:

A. And what was the quote again?

Q. Overall the existing level of cumulative visual impacts from the past projects at the summit is considered to be substantial, significant and adverse.

A. Yes.

Q. If the TMT is built, would the TMT add to the cumulative visual impact that has already been described by you as substantial, significant and adverse?

A. The TMT project would represent an additional increment, yes.

Q. So it would add to the cumulative visual impact of astronomy development?

A. It would be an increment of impact, yes.

Q. What is the difference between increment and cumulative?

A. So cumulative impacts is the sum of increments, essentially.

Q. So the TMT would add to the cumulative visual impact that you have already stated is substantial, significant and adverse?

A Yes.

10/25/16 at 155:9 – 156:6.

C. FREITAS EXCEPTION NO. 54 Further, Exception No. 53 mischaracterizes the impact of the TMT Project. In the context of the existing summit area cumulative impacts - and under the assumption that such cumulative impacts will continue - the TMT project does not create or cause substantial adverse impacts to existing natural resources in the applicable area. See, e.g., HO COL 183.

HO FOF 925 are identical to U1-1H and TIO FOF 876. Therefore, HO did not consider other fact that are relevant. There TMT failed to mitigate and appropriate measure and condition, however Mr. White admit that an 18 story will impact the view between one cultural site to another cultural site. White Tr. 10/20/16: VI: P76: L9-24.

HO FOF NO. 925:

Even with some potential environmental or visual impacts to the Conservation District, the TMT Project incorporates appropriate measures and conditions to mitigate the project's adverse impacts. WDT Hayes at 7-22.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas’ Exception No. 54 is misleading and presented out of context. Mr. White clarified that “when I say impact, it would be visible from some of those heights, so if you were trying to look between them, it’s conceivable that it would be in the way. It would be more certain that if you were standing at one, and looking in the direction on the others that you might see the facility. This is the way you see the existing observatories from those sites.” Tr.

10/20/16 at 76:25 – 77:7.

C. FREITAS EXCEPTION NO. 55

HO FOF 929 are identical to UHH and TIO FOF 881. Therefore, HO did not consider other fact that are relevant. The TMT design plan are not consistent with the 2000 Master Plan. Ex S-31 c, S-31d and S-3 1 e.

HO FOF NO. 929:

Design of the TMT Project is consistent with (and in many aspects, improves upon) the design of the other existing telescopes within the Astronomy Precinct, which also includes various support buildings, roads and other facilities. Ex. A-1/R-1 at 4-30 to 4-31.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

C. Freitas’ Exception No. 55 is contrary to the language of the 2000 Master Plan itself, which contemplated the construction of a large Next Generation telescope like TMT. As stated in the CDUA:

The *2000 Master Plan* includes a discussion of a large “Next Generation Large Telescope (NGLT) telescope such as the TMT. The *2000 Master Plan* recognizes that the size of such facilities makes the visual considerations very important to siting and design, and recommends siting such a facility within Area E of the Astronomy Precinct because it

would “minimize its visibility.” The proposed TMT site is in accord with this recommendation.

Ex. A-1, Section 7 at 7-2 (emphasis added in bold).

C. FREITAS EXCEPTION NO. 56

HO FOF 930 are identical to UHH and TIO FOF 882. Therefore, HO did not consider other fact that are relevant. The TMT size, dimension and dome structure exceeds the dimension in the 2000 Master Plan which states in the Amendment Procedures that over 2,000 square feet or a building envelop over 24,0000 cubic feet. Ex. S-31d

HO FOF NO. 930:

The **size**, dimensions and dome structure were conceived to minimize and enhance the natural beauty of the surrounding areas to the extent practicable. Ex. A-1/R-1 at 4-30.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer’s adoption of certain findings of fact.

See Response to Exception No. 32.

Moreover, Dr. Sanders testified that the TMT’s design plan is generally consistent with the 2000 Master Plan:

Q: (By Mr. Freitas): In your A packet, A-23, which is the TMT Management Plan, Page 4-23, PDF file 185 states:

The TMT has complied with the design guidelines presented in the 2000 Master Plan, and the Master Plan Project.

So did TMT's design plan comply with the master plan, is the question?

A: Generally, it's consistent with the plan and complies with it.

Tr. 01/04/17 at 15:7-16

C. FREITAS EXCEPTION NO. 57

HO FOF 932 are identical to UHH and TIO FOF 884. Therefore, HO did not consider other fact that are relevant. The viewpoints did no considered the substantial adverse impact of existing observatory, adding another observatory will only add to the existing impacts. White Tr. 10/20/16: VI: P76: L22-23.

HO FOF NO. 932:

The structural design considered ways to minimize visual impacts to optimize viewpoints around the facility. Ex. A-1/R-1 at 7-13.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 57 mischaracterizes Mr. White's testimony and presents it out of context. Mr. White testified, in response to the following question:

Q Is it still your testimony that all of the impacts do not add to the already significant substantial and cumulative impact in the Historic District?

A I think what we were trying to point out here is that when you take the TMT project together with all of the other actions that the University is taking within its managed lands, then there's not a net worsening. It's not that there's no change, it's that there are positive changes as well. The removal of structures over time as well as the addition of structures over time.

Tr. 10/20/16 at 77:8-19.

C. FREITAS EXCEPTION NO. 58

HO FOF 935 are identical to UHH and TIO FOF 890. Therefore, HO did not consider other fact that are relevant. The TMT Project will not preserve the existing physical and environmental aspects of the land cause it will only add to the cumulative impact.

HO FOF NO. 935:

The TMT Project will be consistent with and will preserve the existing physical and environmental aspects of the land directly and through the numerous mitigation commitments. The objective of the resource subzone is to ensure, with proper management, the sustainable use of the natural resources of those areas. HAR § 13-5-13.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas cites no authority or evidence in support of her Exception No. 58. Moreover, the substance of her Exception is addressed by Response to Exception No. 57.

C. FREITAS EXCEPTION NO. 59

HO FOF 987 are identical to UHF! and TIO 972 except HO inserted Munroe WDT S-14a partially the HO failed to consider other facts that are relevant. Munroe has observed at the Glover Construction location at Hakalau, they had a waterproof liner first and then the absorbent material which was all black on top of that. And when the equipment is parked, it goes on top of that, and that's what holds it down. TMT were not using their best management practices on Mauna Kea. N. Munroe Tr. 2/16/17: V37: P178: L11-25, Page 179: L1-5.

HO FOF NO. 987:

There have been allegations of oil leaks from heavy machinery at the project site by party C. Freitas, and her witnesses, Rosier and Munroe. Dr. Sanders testified that some of the alleged oil leaks were just moisture from condensation. He further testified that all of the alleged leaks were addressed appropriately. A drip pan is placed next to each piece of machinery to catch oil leaks. Any oil that spattered to the ground was removed by removing the material, dirt, and rocks around the drip pan. The amount of material was very small and fit in a Ziploc bag. (Dr. Sanders) Tr. 1/3/17 at 23:22-25:16.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

N. Munroe's testimony, as cited by C. Freitas in support of her Exception No. 59, is not credible. The drip trays and absorbent pads in Ex. S-14e and S-14f are standard construction drip pans and equipment used for heavy equipment. Munroe did not research those equipment prior to making her allegations, but has some knowledge that they are used for that purpose. Tr. 02/16/17 at 214:2-215:17, *see* Response to General Exceptions regarding Hearing Officer's credibility determinations, *see also* HO FOF 987 (noting that the testimony regarding allegations of oil leaks were refuted by Dr. Sanders who testified that some of the alleged oil leaks were just moisture from condensation and that any alleged leaks were addressed appropriately).

C. FREITAS EXCEPTION NO. 60

HO FOF 988 failed to consider other facts that are relevant to the detrimental to the public health, safety, and welfare. In Nanci Munroe Amended WDT S-14a, about the facts in her words:

C. Freitas then quoted the entirety of Ms. Munroe's WDT. For the sake of brevity, that quote is not included herein.

HO FOF NO. 988:

Nanci Munroe, a witness called by Opposing Intervenor C. Freitas, is someone who has joined protectors of Mauna A Wakea. In her words:

"I was born in Portland, Oregon & raised in Tucson, Arizona. I moved to Hawai'i in August 1976 to attend college at the University of Hawaii at Hilo. I enrolled in prerequisite courses for the Dental Hygiene Program at University of Hawai'i at Manoa, as well as classes in Hawaiian language with Pua Kanahole & Hawaiian studies with Auntie Edith Kanaka'ole, who gave me the Hawaiian name of Nohea. I was hired at GTE Hawaiian Telephone Company in Hilo on April 24, 1979. I was accepted into the dental hygiene program in Vancouver, Washington in August of 1979, but declined. I was able to continue attending classes part-time at UH-Hilo from which eventually earned an Associate of Arts degree in Liberal Arts in 1984 at a point for which I would have only required 15 more credit hours to earn a Bachelor's degree. I retired from Hawaiian Telcom in Honolulu on August 10, 2012 with over 33 years of service. Since then I also have done some part-time work for Laulima Title Search & Claims.

* * *

On approximately April 14, 2015 I joined other protectors of Mauna A Wakea at Hale Pohaku in anticipation of resumption of work for the Thirty Meter Telescope project. I stayed most nights on the Mauna until approximately June 28, 2015. I began to document activities on the Mauna with my cell phone and shared on social media almost daily. I began a routine of regular site visits with others on Monday mornings to the location of the TMT Access Road to monitor any activity for which we may have been unaware of during the previous week. As security guards were always on duty at the top of the TMT Access Road preventing access to walk on the portion of the road which appeared to have been already ripped & graded, we would hike beyond the construction zone delineated by stanchions & wire over difficult terrain of both a'a & pahoehoe types of lava in order to view the equipment which had remained there from the initial attempts to create the road. There were two excavators & two bulldozers on the new TMT Access Road, and I was able to photograph each of these pieces of machinery with evidence of some type of dark, apparently liquid substance leaking from each of them. In addition, there was a large truck with a trailer type of rig on the Mauna Kea road from which the TMT Access Road began which had 2 very large "oil leaks" nearby. It is unknown what type of liquid was leaking from the equipment, whether it was some type of motor oil, transmission oil, or some other oil or fuel used in heavy machinery, I refer to them as "oil leaks". There were no mitigation measures visible. The four machines on the TMT Access Road each had some type of absorbent pad, or pads, held down with loose rocks, which to me would be best described as looking like training pads for puppies, or incontinence pads used on beds for medical patients. On at least one

bulldozer, the pad had been blown loose to the point that it was no longer effective in catching the oil, which then leaked onto the ground. One at least one bulldozer there were pads above the 'tractor' treads as well as below, indicating that the volume of leakage was more than what the upper pad could absorb, so an additional pad was required below. Under one of the excavators was some type of rectangular yellow tray which appeared to me to be similar to what may be used to drain oil into from an automobile during a regular oil change but on a larger scale."

WDT of Nanci Munroe of evidence of oily substance leaking from machinery at the site of the TMT Access Road in May & June of 2016; Ex. S-14.

UH/TIO JOINT RESPONSE:

The portion of Ms. Munroe's WDT which was not included as part of HO FOF 988 – pertaining to Ms. Munroe's participation in various community activities such as scouting, the Caledonian Society of Hawaii, Cavalry Episcopal Preschool in Kaneohe and the Leukemia & Lymphoma Society's "Light the Night Walk", are not relevant to the issues of health, safety and welfare as stated in C. Freitas' Exception No. 60.

The second portion of Ms. Munroe's WDT which was not included as part of HO FOF No. 988, pertains to Ms. Muroe's opinion that "best practices" were not being observed with regard to mitigating oil leaks from construction equipment. The Hearing Officer has addressed Ms. Munroe's testimony and opinion in HO FOF Nos. 990 and 991. *See also*, Response to Exception No. 59.

C. FREITAS EXCEPTION NO. 61

HO FOF 989 are identical to UHH and TIO FOF 973 except HO inserted MUNROE. Therefore, HO failed to consider other fact that are relevant. Under an excavator there were leaks and there was puppy pad being below it held down with rocks. With a best management practice, you would know that there are leaks of oil under any machinery that was at the pre-construction area at the TMT project. There is no plan in Ex-A-1 for oil spills. Munroe Tr. 2/16/17: V37: P 194: L6-9; Rosier Tr. 2/21/17: V38: P44: L1-10.

HO FOF NO. 989:

Munroe took photos related to the purported oil spills and of some absorbent material near heavy machinery which was established to collect oil, but apparently some had missed the pads. *See* Exs. S-14e, S-14f, S-14g, S-10, S-11, S-12; (Munroe) Tr. 02/16/17

at 189:2- 195:17. She could not identify the source of the fluid leak in one of the photos purportedly showing an oil leak (Ex. S-9). (Munroe) Tr. 02/16/17 at 213:24-214:1. Munroe took a sample of the alleged oil spills but never tested the sample. (Munroe) Tr. 02/16/17 at 189:2- 195:17. Munroe further testified that the oil spills were not located on the TMT Project site, but rather on the loop road at the very head of the TMT Access Way. (Munroe) Tr. 02/16/17 at 205:2-14, 206:1; *see* Exs. S-9, S-10, S-14c.

UH/TIO JOINT RESPONSE:

See Response to Exception Nos. 59 & 60.

C. FREITAS EXCEPTION NO. 62

HO FOF 990 are identical to UHH and TIO FOP 974 except HO inserted MUNROE. Therefore, HO failed to consider other fact that are relevant. The best management practices should have used liners under every equipment that when parked that liners will not blow away like the absorbent pads in Ex. S-14e and S-14f. There is no plan for oil spill cleanup in Ex. A-1. Munroe Tr. 2/16/17: V3;7: P217: L2-21.

HO FOF NO. 990:

The drip trays and absorbent pads in Ex. S-14e and S-14f are standard construction drip pans and equipment used for heavy equipment. Munroe did not research those equipment prior to making her allegations, but has some knowledge that they are used for that purpose. (Munroe) Tr. 02/16/17 at 214:2-215:17

UH/TIO JOINT RESPONSE:

See Response to Exception Nos. 59 & 60.

C. FREITAS EXCEPTION NO. 63

HO FOF 991 are identical to UHH and TIO FOF 975 except HO inserted MUNROE. Therefore, HO failed to consider other fact that are relevant. Although OMKM has set best management practices for construction activities there is no plan in Ex. A-1 for oil spill cleanup. Example of COS was leaking for 20 years before OMKM clean it up. Rosier Tr. 2/21/17: V38: P62: L11-25.

HO FOF NO. 991:

OMKM has a set of best management practices for construction activities and as part of the means and methods that the contractors will need to implement during construction. (Munroe) Tr. 02/16/17 at 213:19-23.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 63 incorrectly states that "there is no plan in Ex. A-1 for oil spill cleanup." Section 2.8.3 covers the handling and transport of hazardous materials, and contains a subsection pertaining to "Materials Storage/Waste Management Plan and Spill Prevention and Response Plan." Ex. A-1 at 2-29 – 2-30; *see also* HO FOF 987 (noting that the testimony regarding allegations of oil leaks were refuted by Dr. Sanders who testified that some of the alleged oil leaks were just moisture from condensation and that any alleged leaks were addressed appropriately).

C. FREITAS EXCEPTION NO. 64

HO FOF 992 are identical to UHH and TIO FOF 976 except HO inserted Rosier name. Therefore, HO failed to consider other fact that is relevant.

C. Freitas then quoted Ms. Rosier's Amended WDT in its entirety. Said quote is not reproduced herein in order to save space.

HO FOF NO. 992:

Rosier testified that she previously hauled equipment for Goodfellows and is familiar with hydraulic systems. She also testified that Goodfellows is a "really good" company. (Rosier) Tr. 02/16/17 at 244:6-9.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

Ms. Rosier's testimony regarding the potential for hydraulic fluid leaks from heavy equipment and the potential impacts on groundwater is speculative. While she has had experience working with heavy equipment, she has no personal knowledge of what practices are

and will be in place during construction of the TMT Project. *See* HO FOF 993 and 1015; *see also* Response to General Exceptions regarding Hearing Officer's credibility determinations.

C. FREITAS EXCEPTION NO. 64 [SIC]

HO FOF 993 are identical to UHH and TIO FOF 977 except HO inserted Rosier. Therefore, HO failed to consider other fact that is relevant. Rosier stated that oil goes into the ground, and we've had testimony here about the aquifer on the Mauna. It will be exposed. C. Freitas Tr. 2/21/17: V38: P84: L9-13; Rosier Tr. 2/16/17: V37: P230: L14-24

HO FOF NO. 993:

Rosier testified that the aquifer on Mauna Kea is going to be exposed to oil spill if the TMT Project is developed, however she presented no evidence to support that conclusory statement. (Rosier) Tr. 02/16/17 at 223:22-231:3.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. Freitas' Exception No. 64 [sic] does not address the critical fact that Ms. Rosier's testimony regarding groundwater contamination, is unsupported and conclusory. HO FOF No. 993 specifically notes that Ms. Rosier "presented no evidence to support [her] conclusory statement" regarding the exposure of groundwater to oil spill contamination. *See* HO FOF 1015; *see also* Response to General Exceptions regarding Hearing Officer's credibility determinations.

C. FREITAS EXCEPTION NO. 65

HO FOF 1007 are identical to UHH and TIO FOF 991 except HO inserted PRO. JOHNSON. Therefore, HO failed to consider other fact that are relevant. The 700 or more (charges were drop by the Third Circuit Court) protectors did not block the access road there were in pule, chanting. When there were told to move on the side they continue there pule, chanting on the side of the road. DLNR continue up the road. C. Freitas Tr. 2/21/17: V38: P137: L11-19; Prof. Johnson Tr. 2/16/17: V38: P20: L13-25 and P21: L1-18.

HO FOF NO. 1007:

Certain protestors blocked the access road by standing in the road, placing rocks in the road, and building ahu and rock walls in the road in 2015 for the purpose of halting

preconstruction activities and vehicular traffic. *See* Tr. 3/2/17 at 284:5-22; (Prof. Johnson) Tr. 02/16/17 at 92:2-10; (Munroe) Tr. 02/16/17 at 183:12-20; (Prof. Johnson) Tr. 02/16/17 at 94:7-11; Ex. A-157; Ex. A-158; Ex. A-159. W. Freitas admitted that ahu construction on the roadway created a public health and safety issue. Tr. 3/2/17 at 284:11-22. Similarly, Prof. Johnson admitted that persons standing in the middle of the road for the purpose of stopping vehicular traffic posed a health and safety concern. Tr. 2/16/17 at 94:7-11.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

The additional facts cited in C. Freitas' Exception No. 65 are not in the record of the instant proceeding, nor are they relevant to the matter before this Board.

C. FREITAS EXCEPTION NO. 66

HO FOF 1015 are identical to UHH and TIO FOF 999 except HO inserted Aluli and Prof. Therefore, HO failed to consider other fact that are relevant. All evidence in the Document Library <http://dInr.hawaii.govimk/evidencei> for all OPPOSING INTERVENORS and PETITIONERS has offered voluminous evidence presented in the contested case hearing that the TMT Project will cause harmful to the health, safety, and welfare of the native Hawaiians and the public.

HO FOF NO. 1015:

Considering all of the evidence, including but not limited to the testimonies of Dr. Taualii, Dr. Aluli Meyer; Prof. Kaholokula, Perreira, Teale, Townsend, Ward, Prof. Fujikane, C. Freitas, Fergerstrom, Munroe, Rosier, Kihoi, White, Hayes, Nance, Dr. Hasinger, and Dr. Sanders, and giving such evidence due weight, Petitioners and Opposing Intervenors have not offered reliable, probative, substantial, or credible evidence, scientific or otherwise, to suggest that the TMT Project will be harmful to the health, safety, and welfare of native Hawaiians or anyone else.

UH/TIO JOINT RESPONSE:

See Response to Exception No. 2 regarding Hearing Officer's adoption of certain findings of fact.

C. FREITAS EXCEPTION NO. 67

The Hearing Officer considered the testimony and

The Hearing Officer considered the testimony and evidence presented by Petitioners and Opposing Intervenors in finding that the TMT Project is not materially detrimental to the

public health, safety, and welfare. *See* Response to General Exceptions regarding Hearing Officer's credibility determinations; *see also*. HO FOF 970 (finding that Dr. Taulii's testimony is insufficient to support a finding that the TMT Project will have materially detrimental impacts on the physical health of native Hawaiians, or the general public, as it is based on her unpublished research, limited in scope, and identifies many factors that ostensible impacts cultural identity); HO FOF 973 (finding that Dr. Meyer's testimony/theory is not supported by any empirical data and Dr. Meyer did not otherwise established the validity of her theory); HO FOF 976-77 (noting that Professor Kaholokula has not done any research, nor is aware of any research, regarding the TMT Project's impact on the health and wellbeing of native Hawaiians, and that Professor Kaholokula admitted that his opinions are not based on any studies or analyses); HO FOF 978 (noting that Perreira does not specialize in trauma care, is not currently a member of the American Psychotherapists Association, and admitted that her views stem from her family's beliefs); HO FOF 626 (Teale acknowledged that although she opined that the archaeology studies were incomplete, she has not read all of the studies); HO FOF 624 (noting the Teale presented no evidence that the TMT Project would impact her cultural practices); HO FOF 868 (noting that Teale did not provide any scientific or empirical data to support her claims that the TMT Project would negatively impact the water resources in Mauna Kea).

HO FOF 1016 are identical to UI-11-1 and TIO FOF 1000 except HO inserted 1016. Therefore, 1-10 failed to consider other fact that are relevant. Based on factual findings of facts that was ignored throughout this process of voluminous evidence. But the similarity between the HO and the UHH and TIO decision gives the appearance that less than full consideration was given to. TMT Project will cause a substantial adverse impact to the cultural, environment and resources on Mauna A Wakea does not satisfied HAR 13-5-30(c)(8).

HO FOF NO. 1016:

Based on these factual findings, the TMT Project is not materially detrimental to the public health, safety, and welfare. Thus, the TMT Project satisfies Haw. Admin. R. § 13-5-30(c)(8).

UH/TIO JOINT RESPONSE:


See Response to Exception Nos. 2, 29, 31 and 42 .

V. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the testimony of UH Hilo's and TIO's witnesses, UH Hilo's and TIO's evidence, the examination of the Petitioners' and Opposing Intervenors' witnesses, and in UH Hilo's and TIO's other filings, and the HO FOF/COL, UH Hilo and TIO respectfully jointly

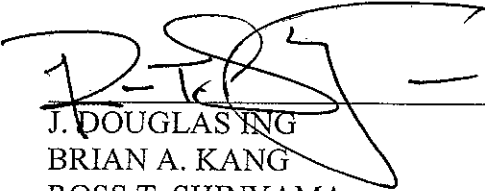
request that the BLNR reject C. Freitas' Exceptions, and adopt the HO FOF/COL as revised to reflect UH Hilo's and TIO's respective proposed exceptions filed on August 21, 2017 [Docs. 816 & 813, respectively].

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. <i>See</i> Minute Order No. 19 [Doc. 281].
Lack of Jurisdiction	The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
Mischaracterization.	The Exception mischaracterizes legal authority or the contents of the record.
Misleading. Partial quotation.	The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
Misleading. Presented out of context.	The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
Misrepresentation	The Exception affirmatively misrepresents legal authority or the contents of the record.

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

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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

BLNR Contested Case HA-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

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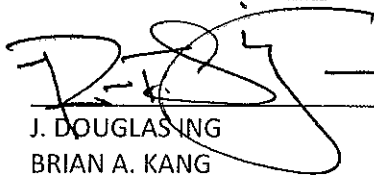
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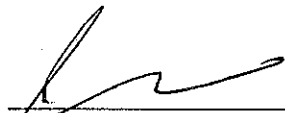
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