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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF Contested Case Hearing Re Conservation District Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Ka'ohe Mauka, Hāmakua, Hawai'i, TMK (3) 4-4-015:009	Case No. BLNR-CC-16-002 **THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO JOSEPH KUALII LINDSEY CAMARA'S EXCEPTIONS TO THE HEARING OFFICER'S**

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED AUGUST 21, 2017 [DOC. 818]; APPENDICES A–B; CERTIFICATE OF SERVICE

THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL OBSERVATORY, LLC'S JOINT BRIEF IN RESPONSE TO JOSEPH KUALII LINDSEY CAMARA'S EXCEPTIONS TO THE HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER, FILED AUGUST 21, 2017 [DOC. 818]

Applicant THE UNIVERSITY OF HAWAI'I AT HILO ("**UH Hilo**") and TMT INTERNATIONAL OBSERVATORY, LLC ("**TIO**"), through their respective counsel, jointly submit this brief in response to Joseph Kualii Lindsay Camara's ("**Camara**") *Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Decision and Order*, filed August 21, 2017 [Doc. 818] ("**Camara's Exceptions**") pursuant to Hawai'i Administrative Rules ("**HAR**") § 13-1-43.

I. INTRODUCTION

On July 26, 2017, after presiding over forty-four days of testimony from October 2016 through early March 2017, and reviewing hundreds of exhibits, Judge (Ret.) Riki May Amano ("**Hearing Officer**") issued her detailed Proposed Findings of Fact, Conclusions of Law and Decision and Order [Doc. 783] ("**HO FOF/COL**"). The Hearing Officer recommended that the Conservation District Use Application HA-3568 ("**CDUA**") for the Thirty Meter Telescope ("**TMT**") Project and the attached TMT Management Plan be approved subject to a number of conditions stated therein. *See* HO FOF/COL at 260-263.

The Board of Land and Natural Resources ("**BLNR**") issued Minute Order No. 103 on July 28, 2017 [Doc. 784]. Pursuant to Minute Order No. 103, the parties to the Contested Case Hearing ("**CCH**") were given until no later than August 21, 2017 at 4:00 p.m. to file exceptions

to the HO FOF/COL. Minute Order No. 103 expressly required the following for any exceptions:

> The exceptions shall: (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken (2) identify that part of the recommendations to which objections are made; and (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendation. The grounds not cited or specifically urged are waived.

Minute Order No. 103 at 1; *see also* HAR § 13-1-42(b).

Minute Order No. 103 also gave the parties to the CCH until September 11, 2017 at 4:00 p.m. to file any responsive briefs. Minute Order No. 103 expressly required the following for any responsive briefs:

> The responsive briefs shall: (1) answer specifically the points of procedure, fact, law, or policy to which exceptions were taken; and (2) state the facts and reasons why the recommendations should be affirmed.

Minute Order No. 103 at 2; *see also* HAR § 13-1-43(b).

The BLNR has scheduled oral arguments on the CDUA for September 20, 2017 at 9:00 a.m. *See* Minute Order No. 103 at 2.

II. STANDARD OF REVIEW

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

HRS §91-11 (emphasis added).

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

The Hawai'i Intermediate Court of Appeals ("**ICA**") described the "function and effect of the hearing officer's recommendations" in *Feliciano v. Board of Trustees of Employees'*

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[1] The Hawai'i Supreme Court has held that a hearing officer's recommendations can serve as the agency's "proposal for decision" under HRS § 91-11. *See White v. Board of Education*, 54 Haw. 10, 14, 501 P.2d 358, 362 (1972); *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 408, 652 P.2d 1143, 1146 (1982); *see also County of Lake v. Pahl*, 28 N.E.3d 1092 (Ind. Ct. App. 2015) (holding that it is not uncommon or per se improper for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party); *Ivie v. Smith*, 439 S.W.3d 189 (Mo. 2014) (holding that while trial courts must act independently in making findings of fact and conclusions of law, it is not error for trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings); *East Coast Paving & Sealcoating, Inc. v. North Allegheny School Dist.*, 111 A.3d 220 (Pa. Commw. Ct. 2015) (holding that there is nothing untoward about a trial court adopting a party's proposed findings of fact and conclusions of law as its own).

Retirement System, 4 Haw. App. 26, 659 P.2d 77 (1983). The ICA explained that the recommendations are "to provide guidance" and an agency is "not bound by those findings or recommendations." *Id.* at 34, 659 P.2d at 82. Indeed, an agency, after review of the reliable, probative and substantial evidence in the proceeding, may reject a hearing officer's recommendations and "ma[ke] its own findings and conclusions based on the same evidence." *Id.*

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

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

decision to deviate from the hearing officer's credibility determination of a witness. Joining its colleagues in the Second, Third, Fourth, and Tenth Circuits, the Ninth Circuit held that

> due weight should be accorded to the final State determination . . . unless [the] decision deviates from the credibility determination of a witness whom only the [hearing officer] observed testify. **Traditional notions of deference owed to the fact finder compel this conclusion. The State Review Officer is in no better position than the district court or an appellate court to weigh the competing credibility of witnesses observed only by the Hearing Officer.** This standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that **a [hearing officer] who receives live testimony is in the best position to determine issues of credibility.**

Id. at 889 (emphases added); *see Doyle v. Arlington Cty Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1992) (holding that where two state administrative decisions differ only with respect to the credibility of a witnesses, the hearing officer is entitled to be considered prima facie correct); *Karl by Karl v. Board of Educ. of Geneseo Cent. School Dist.*, 736 F.2d 873, 877 (2d Cir. 1984) ("There is no principle of administrative law which, absent a disagreement between a hearing officer and reviewing agency over demeanor evidence, obviates the need for deference to an agency's final decision where such deference is otherwise appropriate."); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520-29 (3d Cir. 1995) ("[C]redibility-based findings [of the hearing officer] deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."); *O'Toole v. Olathe Dist. Schs. Unified Sch Dist. No. 233*, 144 F.3d 692, 699 (10th Cir. 1998) ("[W]e will give due weight to the reviewing officer's decision on the issues with which he disagreed with the hearing officer, unless the hearing officer's decisions involved credibility determination and assuming, of course, that the record supports the reviewing officer's decision."); *see also McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 824 (Tenn. Ct. App.

2005) (holding that if credibility plays a pivotal role, then the hearings officers' or administrative judge's credibility determinations are entitled to substantial deference); *Stejskal v. Dep't. of Administrative Svcs.*, 665 N.W.2d 576, 581 (Neb. 2003) (holding that agencies may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility).

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

III. GENERAL OBJECTIONS TO CAMARA'S EXCEPTIONS

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

UH Hilo and TIO object to each of the points in Camara's Exceptions to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence in the record. UH Hilo and TIO also object to Camara's Exceptions to the extent they assert alleged "findings" or "conclusions" that are beyond the scope of issues set forth in Minute Order No. 19 [Doc. 281] or beyond the scope of the authority delegated by BLNR to the Hearing Officer, or by the legislature to BLNR for these proceedings

UH Hilo and TIO further object to Camara's Exceptions to the extent that they raise procedural issues that were previously raised (in some cases, multiple times by multiple parties and through multiple motions for reconsideration) during the course of the CCH, and the

arguments were previously fully briefed, considered and rejected by the Hearing Officer or BLNR.

UH Hilo and TIO further object to Camara's Exceptions to the extent they seek to challenge the Final Environmental Impact Statement ("**FEIS**") for the TMT Project. This proceeding is not an EIS challenge; Camara's ability to make such a challenge expired long ago, and he cannot use this proceeding to reopen the FEIS approval process. This proceeding pertains only to the CDUA and is entirely governed by applicable constitutional law, HRS Chapter 183, and the Conservation District rules, HAR Title 13, Chapter 5 that are genuinely at issue here.

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

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

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

In addition to the general objections in Appendix A, UH Hilo and TIO have prepared a table of specific responses and objections to Camara's Exceptions, which is attached hereto as

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

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

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

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IV. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO's Pre-Hearing Statement, the testimony of UH Hilo's and TIO's witnesses, UH Hilo's and TIO's evidence, the examination of the Petitioners' and Opposing Intervenors' witnesses, and in UH Hilo's and TIO's other filings, and the HO FOF/COL, UH Hilo and TIO respectfully jointly request that the BLNR reject Camara's Exceptions, and adopt the HO FOF/COL as revised to reflect UH Hilo's and TIO's respective proposed exceptions filed on August 21, 2017 [Docs. 816 & 813, respectively].

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

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Appendix A

General Responses to Petitioners'/Opposing Intervenors' Exceptions	
Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b)	The Exception should be disregarded because it fails to (1) set forth specifically the questions of procedure, fact, law, or policy, to which exceptions are taken; (2) identify that part of the hearing officer's report and recommended order to which objections are made; or (3) state all grounds for exceptions to a ruling, finding, conclusion, or recommendations. The grounds not cited or specifically urged are waived.
Citation does not support the proposition.	The citation offered by Petitioners/Opposing Intervenors does not support the Exception.
Estoppel/Improper Reconsideration	The Exception or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling,
Inaccurate/False	The Exception or a portion thereof is inaccurate or false.
Incomplete.	The Exception is materially incomplete.
Irrelevant/Inapplicable.	The information in the Exception is irrelevant or inapplicable in this contested case proceeding. *See* Minute Order No. 19 [Doc. 281].
Lack of Jurisdiction	The Exception exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
Mischaracterization.	The Exception mischaracterizes legal authority or the contents of the record.
Misleading. Partial quotation.	The Exception contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
Misleading. Presented out of context.	The Exception presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
Misrepresentation	The Exception affirmatively misrepresents legal authority or the contents of the record.

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

Appendix B

Summary Table of Responses to Camara's Exception to the Hearing Officer's Proposed FOF/COL

Exception #	Page	Exception to FOF/COL	Response
1	1	The Hearings Officer's bias in support of the applicant (UH) and TIO are readily apparent in many forms.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). Throughout this proceeding, Petitioners and Opposing Intervenors have repeated allegations of bias, filing numerous motions seeking recusal or disqualification of the Hearing Officer. Each of these motions has been denied by the BLNR or the Hearing Officer herself. *See* Minute Order Nos. 4 [Doc. 14], 9 [Doc. 63], 14 [Doc. 124], 17 [Doc. 245], 39 [Doc. 406], 46 [Doc. 595], and 47 [Doc. 605]. J. Camara failed to establish any evidence of bias, other than his own speculative and unfounded arguments.
2	1	One example of bias is the extensive copying and pasting directly from applicant and TIO FOF. This practice is so prevalent that the bulk of the HO FOF are indistinguishable from UH/TIO and need not be cited in my exceptions. a. By using the exact words of UH/TIO, not only was the content copied, but also the implied viewpoints and perspectives and the context in which they were presented. These viewpoints are adversarial to petitioners and by copying them directly from the applicant, the HO displays that she is not an impartial, fair or objective judge in this matter.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). Throughout this proceeding, Petitioners and Opposing Intervenors have repeated allegations of bias, filing numerous motions seeking recusal or disqualification of the Hearing Officer. Each of these motions has been denied by the BLNR or the Hearing Officer herself. *See* Minute Order Nos. 4 [Doc. 14], 9 [Doc. 63], 14 [Doc. 124], 17 [Doc. 245], 39 [Doc. 406], 46 [Doc. 595], and

			47 [Doc. 605]. J. Camara failed to establish any evidence of bias, other than his own speculative and unfounded arguments. J. Camara argues that, by ruling against him and the "petitioners" and adopting the majority UH Hilo's and TIO's joint proposed FOF/COL, the Hearing Officer demonstrated bias. However, it is well established that an adverse ruling does not evidence bias. *See Jou v. Dai-Tokyo Royal State Ins. Co.*, 116 Hawai'i 159, 165, 172 P.3d 471, 477 (2007) ("It is well-settled that mere adverse rulings are insufficient to establish bias."); *James W. Glover, Ltd. v. Fong,* 39 Hawai'i 308, 316 (1952) (stating that "mere adverse rulings, even if erroneous[,]" would not constitute a "basis for disqualification"). The Hearing Officer adopting proposed findings of fact or conclusions of law, even if adopted verbatim, does not establish Hearing Officer bias. *See, Kumar v. Kumar*, 2014 WL 1632111, at *8 (Haw. Ct. App. 2014) (holding that a court's substantial adoption of a proposed decree did not establish an appearance of impartiality, *i.e.*, bias). In the context of civil proceedings, it is widely accepted that a trial judge may adopt a party's proposed findings of facts or conclusions of law in total or in part. *See, e.g., Howard v. Howard*, 259 P.2d 41, 42, 119 Cal.App.2d 122, 124 (Cal.App. 2 Dist. 1953) (stating that courts may adopt proposed finding *in toto* 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).
3	1	The Hearing officer repeatedly presented applicant and TIO evidence as fact while referring to petitioner evidence as "opinion" the way they "feel", diminishing weight and value of petitioner evidence in relation to applicant evidence.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b) because the Exception does not identify any specific portion of the HO FOF/COL to which objections are made. . J. Camara attempts to argue that, by summarizing petitioner testimony, rather than directly citing it, the Hearing Officer demonstrated bias. This argument is flawed. "[T]he competence, credibility and weight" of the testimony of all witnesses (including witnesses who represent that they have expertise in one or more subject areas), "is exclusively in the province of the trier of fact." *See Hawai'i Prince Hotel Waikiki Corp. v. City & Cnty. of Honolulu*, 89 Hawai'i 381, 390, 974 P.2d 21, 30 (1999) (quoting *State v. Pioneer Mill Co.*, 64 Haw. 168, 179, 637 P.2d 1131, 1139 (1981)). As the presiding officer of the evidentiary hearing, it is the Hearing Officer's duty to hear all evidence and to make determinations regarding the credibility of the evidence presented. This includes the duty to assign the evidence, determine whether it is credible, not credible, or more or less credible than other evidence). J. Camara attempts improperly to portray the

			Hearing Officer's credibility determinations as evidence of bias. This argument ignores the reality that it is squarely the Hearing Officer's duty to make such determinations. It is undisputed that determinations of credibility are best made by the presiding judge or jury in a criminal or civil trial and will not be disturbed on appeal. *See State v. Buch*, 83 Hawai'i 308, 321, 926 P.2d 599, 612 (1996) ("[I]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the providence of the [trier of fact].") The underlying principle being that "the fact finder is uniquely qualified to evaluate the credibility of witnesses and to weigh the evidence." *Wilton v. State*, 116 Hawai'i 106, 119, 170 P.3d 357, 370 (2007) (citation omitted). This Exception does not cite to anything in the record to show that the Hearing Officer's credibility determinations are not supported by the reliably, probative, and substantial evidence in the whole record.
4	1	The Hearing officer repeatedly directly cited testimony supporting the applicant while summarizing petitioner testimony. This allowed for the misrepresentation of petitioner viewpoints, omission of important facts, and taking petitioner comments out of context. a. The one mention of my testimony regarding water resources by the Hearing officer, came not from my findings of facts, but from UH/TIO joint findings of fact. The adversarial nature of their depiction of my testimony was copied verbatim by the Hearings officer. Her FOF #879 copies the entire UH/TIO FOF #819. b. Opposing Intervenor Camara testified to his belief that Mauna Kea holds an	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). *See* UH Hilo/TIO Response to J. Camara Exception #3. J. Camara's Exception #4 demonstrates that the Hearing Officer found that his testimony regarding water resources was not credible. Therefore, it was appropriate for the Hearing Officer to merely summarize his testimony, rather than recite it in detail.

		important water resource, but was unable to answer specific questions about Mauna Kea's hydrology. He admitted that he was not a hydrologist, and that there is not enough information about the Mauna Kea aquifer. He briefly reviewed the hydrology section of the FEIS for the TMT project and did not review the testimony of Nance. He was unaware of any existing water sources at the TMT Project site. Tr. 3/1/17 at 127:20130:4, 134:16-18, 140:19-141:17, 191:16- 192:2. c. This depiction does not capture my testimony. My own FOF and words on the subject were totally omitted, UH/TIOs inaccurate and adversarial summary of my testimony was presented by the Hearings officer as her own FOF which is misleading to the BLNR and others who may read her FOF.	
5	1	The bulk of the submitted findings of facts and conclusions of law of petitioners were omitted from the HO's proposed findings of facts and conclusions of law with no explanation or justification, in direct violation of HAR 91-12.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). HRS § 91-12 applies to the ultimate decision and order of the BLNR, not the recommendation of the Hearing Officer. HRS § 91-12 provides that, for every "**decision and order** . . . rendered by an **agency** in a contested case," the agency shall incorporate in its decision a ruling upon the proposed findings presented by a party to the proceeding. As evident, the requirement applies to a final decision and order, not the recommendation of a Hearing Officer (which is not a "decision and order"). Similarly, the corresponding BLNR administrative rule, HAR § 13-1-38, provides that "Every **decision and order** . . . rendered by the **board** in a contested case" shall incorporate a ruling upon proposed findings presented by a party to the proceeding. As evident, the rule applies to rulings of the

			BLNR, not recommendations of a Hearing Officer. Even if HRS § 91-12 applies to the recommendation of the Hearing Officer, it does not require that such recommendations provide an individual explanation of its ruling on each proposed FOF/COL. *See Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw.App. 633, 644, 675 P.2d 784, 792 (Ct. App. 1983); *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). Instead, the agency must only make its findings reasonably clear, so that the parties are not left to speculate as to the agency's ruling. *Id*; *see also*, *Dedman v. Board of Land and Natural Resources*, 740 P.2d 28, 35, 69 Haw. 255, 265 (1987). The Hawai'i Intermediate Court of Appeals has held that, if an agency does not adopt a parties proposed finding of fact, it is reasonably clear that the agency has rejected such proposals, thereby satisfying the requirements of HRS § 91-12. *See Outdoor Circle* at 645, 675 P.2d 784 at 792. Here, the Hearing Officer adopted certain proposed FOF/COL, and all others were therefore impliedly rejected. Accordingly, the HO FOF/COL is reasonably clear and satisfies HRS § 91-12. Note: It appears that J. Camara intended to reference "HRS 91-12" instead of "HAR 91-12."
6	2	By violating HAR 91-12 the HO is able to omit facts that do not fit into the	Fails to comply with Minute Order No. 103

		narrative of the applicant. In one such omission the HO included FOF #910 and omits a FOF #7 submitted by myself a. HO FOF #910 - The Mauna Kea Adze Quarry Complex "occupies an area of at least 4,800 acres." Ex. A5/R-5, App. D at 33. Archaeological evidence indicates that the Mauna Kea Adze Quarry was used by prehistoric Hawaiians for obtaining basalt to make stone implements. Ex. A9 at 3-15, n.9. The Adze Quarry Complex represents a physical disturbance of the summit area of Mauna Kea that is 774 times larger than the new disturbance proposed for the TMT Project. Compare Ex. A-5/R-5, App. D at 33 (noting the Adze Quarry Complex is at least 4,800 acres) with Ex. A-3/R-3 at S-6 (stating the TMT Project will disturb 8.7 acres, of which roughly 2.5 acres are previously disturbed). b. Camara FOF #7 - Preliminary engineering plans indicate that the total volume of excavated material ("cut" material) will be 64,000 cubic yards. (CDUP Application, R-1, p.B-3) c. HO FOF #910 makes the dubious assumption that the footprint of impact by traditional adze making is 774 times greater than that of the proposed TMT project, while omitting the fact that amount of proposed geologic material excavated from the TMT site would likely surpass the cumulative amount used for adze making over hundreds of years. d. The material excavated for the TMT site would be crushed and ground into fill, gravel and base coarse for cement. Stones used for adze become venerated cultural objects of great value that remained in families for generations, and are an important historical artifacts. e. This depiction of cultural tradition having more impact than an 18 story building is a biased view. The omission of opposing facts produces an imbalanced and inaccurate view of the two impacts in relationship to each other. f. In the HO's Conclusion and discussion IX, A., iv. The HO presents 43 conclusions in favor of the applicant and none which represent the viewpoints of petitioners. 40 of the 43 conclusions came directly from UH/TIO FOF.	and HAR § 13-1-42(b). *See* UH Hilo/TIO Response to J. Camara Exception #5. To the extent that this exception appears to argue that the Hearing Officer's determinations regarding the credibility of evidence demonstrates bias, see UH Hilo/TIO Response to J. Camara Exception #3. J. Camara argues that HO FOF 910 is based on the "dubious assumption" that the footprint of the Mauna Kea Adze Quarry (the "**Quarry**") is 774 times greater than that of the proposed TMT Project. J. Camara argues that the total volume of excavated material resulting from the TMT Project will be greater than that taken from the Quarry, arguing that this somehow demonstrates that HO FOF 910 is incorrect. J. Camara's argument is flawed because the volume of excavated material does not determine the footprint of a project. Even if the volume of material excavated for the TMT Project exceeded that excavated from the Quarry, this would not change the fact that the Quarry's footprint is 744 times larger than that of the TMT Project. UH Hilo also notes that J. Camara provides no evidence regarding the volume of material excavated from the Quarry.

7	2	The issue of Human Rights violations against protectors of Mauna Kea was largely omitted from the HO FOF.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). The BLNR does not have jurisdiction to adjudicate issues of Human Rights violations. Additionally, such issues are not relevant to the merits of the CDUA.
8	2	The United Nations Declaration of Rights of Indigenous Peoples (UNDRIP) define rights of Hawaiians to protect and maintain cultural and religious sites. These rights were ignored and not considered by the HO in her FOF, despite being provided with expert witness testimony on this subject.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). The BLNR does not have the authority to rule on issues related to the United Nations Declaration of Rights of Indigenous Peoples. Additionally, such issues are not relevant to the merits of the CDUA.
9	2	The issue of desecration is not sufficiently addressed by the HO. She relied totally on the opinion and view point of the applicant in this regard, even though Mauna Kea is a known religious site, burial and cultural landscape that will be forever altered by the proposed TMT development.	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). BLNR does not have jurisdiction to adjudicate violations of the Hawaii Penal Code. Even if it did, Petitioners' and Opposing Intervenors' claim of desecration fails as a matter of law. HO COL 399-413.
10	10	From the inception of the proposed TMT project there has been collusion of the applicant, TIO, BLNR, and the HO to frame the impacts of the project as "incremental" when by definition they are clearly cumulative. a. Omission of My FOF #16 is evidence of this strategic maneuvering away from impacts seen as cumulative "HAR 11-200- 2 defines "Cumulative impact" to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."	Fails to comply with Minute Order No. 103 and HAR § 13-1-42(b). J. Camara's assertions of collusion are false, unfounded and unsupported. The fact that the Hearing Officer declined to specifically include the provisions of HAR § 11-200-2 in the HO FOF/COL is not evidence of collusion. Additionally, former Governor Lingle's acceptance of the Final Environmental Impact Statement ("**FEIS**") for the TMT Project is not evidence of collusion.

		b. Further evidence of this is the inclusion of HO FOF# 923 without representing petitioner's views in this regard "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." c. Also omitted is this statement from the same witness Hayes express in my FOF #15 "In oral testimony on October 25 2016 Jim Hayes responded "yes" to the statement "So the TMT would add to the cumulative impact that you have already stated is substantial, significant and adverse." (Direct Testimony Jim Hayes, tr. Vol 3 p 156)" d. Governor Lingle's acceptance of the FEIS with a finding of no significant impact when there is extensive documentation of the cumulative impacts of astronomy development on Mauna Kea, show that the State has been actively involved in framing the impacts off the proposed TMT project as incremental as opposed to accurately identifying them as cumulative.	Moreover, the time to challenge the TMT Project FEIS has passed, and J. Camara failed to assert a challenge. *See* HO COL 392-398. Regarding item 10(b), the Hearing Officer's omission of the "petitioner's" views on an issue merely demonstrates that the Hearing Officer found such evidence to be not credible. *See* UH Hilo/TIO Response to J. Camara Exception #3. Regarding item 10(c), J. Camara's Proposed FOF #15 was properly omitted. Although Mr. Hayes did testify that the TMT project would add to the impacts on Mauna Kea, it was established TMT Project itself will not cause substantial adverse impacts to the natural resources of the surrounding area. *See* HO FOF 508-897, COL 178-221 (analysis of Criterion Four).

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

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

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