Six Petitioners
Kealoha Pisciotta, Mauna Kea Anaina Hou
Deborah J. Ward
E. Kalani Flores & B. Pualani Case, Flores-Case ‘Ohana
Clarence Kūkauakahi Ching
Paul K. Neves
Marti Townsend, KAHEA

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAI`I

In Re Conservation District Use Permit HA-3568 for the Thirty Meter Telescopes on the Northern Plateau in the Mauna Kea Conservation District, Ka‘ohe, Hamakua District, Hawai`i TMK (3) 4-4-015:009	)	DLNR File No. HA-11-05 PETITIONERS’ COMBINED RESPONSES TO APPLICANT UNIVERSITY OF HAWAI‘I’S EXCEPTIONS TO THE HEARING OFFICER’S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER; CERTIFICATE OF SERVICE

PETITIONERS’ COMBINED RESPONSES TO APPLICANT UNIVERSITY OF HAWAI‘I’S EXCEPTIONS TO THE HEARING OFFICER’S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

I. INTRODUCTION

Pursuant to Minute Order No. 20 dated December 7, 2012, Petitioners, Kealoha Pisciotta, President of Mauna Kea Anaina Hou (MKAH), Deborah J. Ward, E. Kalani Flores and B. Pualani Case of the Flores-Case ‘Ohana, Clarence Kūkauakahi Ching, Paul K. Neves, and Marti Townsend, representing KAHEA, file this Combined Response to the Applicant’s, the University of Hawai‘i at Hilo, Exceptions to the Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order (Response).

Petitioners (Pet.) respectfully submit that the Report submitted by Hearings Officer (HO) contains substantial factual and legal errors and omissions that the Board of Land and Natural Resources (BLNR/ Board) must correct and clarify before making its final decision on the Thirty-Meter Telescope Corporation's conservation district use application (CDUA) submitted by the Applicant (App.), the University of Hawai'i (University/UH/UHH). These errors and omissions result from the reproduction of inaccurate, irrelevant, unsubstantiated, unsupported, and misleading information from UHH's Proposed Findings of Fact, Conclusions of Law and Decision and Order (11/18/2011) in the Report without regard for verifying their accuracy. As a result, the Report is unreliable and is not properly based on the entire record and argumentation from both sides.

UHH's Exceptions to the errors and omissions in HO's Report derive from errors and omissions in UHH's initially submitted Proposed Findings of Fact (FOF) and Conclusions of Law (COL). In other words, the HO Report reproduced grammatical errors from UHH's submission, which UHH is now attempting to correct. While Petitioners have no objection to correcting typos, we want to draw attention to the absurdity of a situation in which one party's Exceptions (UHH's) consist in large part of corrections to their *own* submissions. The HO Report's identical replication of UHH's typos is a symptom of HO's uncritical adoption of UHH's proposed FOFs, COL, and, consequently, decision to approve the TMT-CDUA. As detailed below, UHH Exceptions further attempt to distort the record with "clarifications" that are unsubstantiated and clearly at odds with the facts of these proceedings.

II. RESPONSES

A. UHH'S ERRONEOUS "CLARIFICATIONS"

The Applicant takes exception to HO FOF 12 and COLs 222 & 223, which are replicated from Applicant's Proposed FOF 12 and COLs 290 & 291. Despite pretenses to clarifying the Report, UHH's Exceptions are attempts to insert inaccurate information into the record. Specifically, UHH attempts to revise records of BLNR's previous actions regarding CDUP HA-3568. **Petitioners object to UHH's proposed new text and it should <u>not</u> be considered for inclusion into the Report for the following reasons:**

1) UHH cannot assert that BLNR's February 25, 2011 vote was only a "preliminary ruling" on whether to approve CDUA HA-3568. The BLNR made a decision to approve CDUP HA-3568 for the Applicant/University of Hawaii. *see* Exhibit A-319.

2) As a result of approving this CDUP, the Applicant was subject to all conditions as noted in this CDUP. The Applicant is also attempting to dictate the actions of the BLNR by misconstruing the language of Condition No. 21. The reference to a "*final decision"* being rendered by the Board is specific to a contested case, not in regards to the approval of a permit.

3) Any new text inclusive of the entire sentence and paragraph that references "no appeal was requested" is irrelevant to the Report and to this contested case.

The Petitioners object to the Applicant's proposed new text and it should <u>not</u> be considered for inclusion into the Report after HO COL 223 and within 226 based upon on the following points:

1) The Applicant attempts to insert inaccurate information into the record under false pretenses of clarifying HO COL 226, which is also Applicant's COL 294.

2) The Applicant is also attempting to erroneously discount that BLNR took a vote to approve CDUA HA-3568 February 25, 2011. *see* Exhibit A-319.

3) UHH's proposed additions to HO COL 223 and 226 misinterprets Petitioner's due process objection. It is not that no hearing was afforded to Petitioners but rather that

BLNR made a decision prior to conducting a contested case hearing, prior to *hearing* all of the evidence. Petitioners made timely requests for a contested case hearing. When a request for contested case hearing is submitted, no decision (or decision-making) may take place until there is a decision on standing and on whether to conduct a contested case. For the same reason that a court does not decide the merits of a case before hearing the evidence, the BLNR erred in voting to approve the TMT CDUA *before* considering the evidence presented through a contested case hearing. To be clear, a contested case hearing on a CDUA is not an appeal; it is not a motion to reconsider. It is a hearing conducted *prior* to any decision. A contested case is provided to those persons whose interests may be adversely affected by the proposed action so that they may present evidence of the potential harm and allow the decision-maker to modify the proposal, set conditions, or deny the proposal. The right arises under both State administrative law and under constitutional due process. *See* Petitioners' Response to UHH's FOF/COLs at 5.

4) UHH's proposed COL 226 mischaracterizes Petitioners' due process claims and misinterprets the law, and therefore should not be adopted. Petitioners have been denied due process in this contested case hearing precisely because "The BLNR must still vote again on the matter." Quoting UHH's Exceptions at 7. This CCH is not an appeal or a motion for reconsideration. Yet, Petitioners are now forced to convince the Board to change its vote. As explained below, it is this "vote again" situation that violates the process due Petitioners under HAR § 13-1 and HRS § 91.

The contested case hearing (CCH) is the process by which the BLNR ensures compliance with the laws governing their decisions, where the proposed action affects the rights of interested parties. Pursuant to Haw. Rev. Stat. § 91, a CCH is a quasi-judicial evidentiary process held prior to an agency decision. *See* HRS §§ 91-1-1, 3, 5, 6, and 14, HAR § 13-1-29. This hearing provides interested persons an opportunity to be heard, present evidence of potential harm, and challenge the assertions of the Applicant for the purpose of informing the outcome of the BLNR's decision. A CCH is not a motion to reconsider or a hearing where interested persons are saddled with the task of changing the minds of decision-makers after they have decided to approve an application. (HRS §§ 91-11, 91-12 and 91-14). Indeed, where the BLNR has made a

decision before hearing all of the evidence from the CCH, the procedural due process rights of the interested parties have been violated.

If the parties disagree with the outcome (i.e. if parties believe the administrative remedy failed) they then have a right to seek judicial review of the agency's decision. This means interested persons participating in a CCH are relieved (and the courts as well) of initially carrying the burden of costly and difficult court proceedings. As provided in Haw. Rev. Stat. § 91-9(5) interested persons are not required to be lawyers, nor are they required to be represented by lawyers. In this way, a CCH is a people's process that is meant to be accessible to non-lawyers.

Petitioners affirm their original objection - that BLNR erred by entering a decision prior to a decision on standing and on whether to conduct a contested case. For the same reason that a court does not decide the merits of a case before hearing the evidence, BLNR cannot vote to approve a CDUP before deciding whether Petitioners have standing to participate in a contested case hearing and before a contested case has occurred.

Haw. Rev. Stat. § 91-10(1) provides basic "rules of evidence" for a CCH: "…any oral or documentary evidence may be received, but every agency as a matter of policy provide for the exclusion of *irrelevant, immaterial, or unduly repetitious* evidence and no sanction shall be impose or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence…*" Id.* (emphasis added). Inclusion of irrelevant evidence detracts from BLNR's obligation to properly apply the conservation district rules and all relevant laws to the facts of UHH's proposal. *See* Petitioners Response to UHH FOF/COL at 5. UHH

attempts to distract from the fundamental miscarriage of process in this case by introducing the irrelevant concept of a "preliminary" hearing into the Board's Rules of Practice and Procedure. UHH cites no authority for this so-called "preliminary" hearing because no such citation exists. The word "preliminary" is not found anywhere in Subchapter 5 of the Board's Rules of Practice and Procedure. This is to say, BLNR does not hold "preliminary" hearings. Rather, as outlined in Subchapter 5, the Board holds a public hearing, and then when warranted, it holds a contested case hearing, and then only after all the evidence has been submitted and considered may the Board issue a decision. This one decision is the only decision the Board is authorized to issue.

For these reasons, Petitioners object to UHH's attempt to improperly supplement the HO report as outlined in section B of UHH's Exceptions. This section should not be included in the final report.

In addition, Petitioners reassert their original objection that BLNR erred by conducting its decision making public hearing regarding the TMT in the Mauna Kea Conservation District on the island of O`ahu rather than on Hawai`i Island in the county in which the proposed action is located. Under HAR § 13-5-40(b), all hearings relating to a Conservation District (such as the CDUA for TMT) be held in the county in which the land is located. *Id.* This includes hearings "[o]n all applications determined by the chairperson that the scope of proposed use, or the public interest requires a public hearing on the [conservation district use] application." HAR § 13-5-40(a)(4). BLNR's February 25, 2011 was a "public hearing" in which the Board voted on whether to grant the TMT-CDUA for Mauna Kea conservation district, located on the island of Hawai'i Island, not on O'ahu. HO FOF 17 at 3. Pursuant to HAR § 13-5-40(b), Petitioners object to the BLNR conducting its February 25, 2011 hearing in Honolulu, rather than on

Hawai‘i Island. Conducting the hearing on O‘ahu places an undue financial burden on five of the six Petitioners who live on Hawai‘i Island and are forced to pay for flights and accommodations in order to attend the meeting on O‘ahu. Thus, the procedural due process rights of the interested parties have been violated.

B. UHH ATTEMPTS TO REVISE PERMIT CONDITIONS

The Petitioners object to UHH's attempt to change the conditions set forth in the previously approved CDUP. Therefore, the proposed new text should <u>not</u> be considered for inclusion into any of the conditions, including, but not limited to Nos. 4, 10[1], 12, 17, based upon on the following points;

1) The BLNR made a decision on February 25, 2011 to approve CDUP HA-3568 for the Applicant/UHH.

2) As a result of approving this CDUP, the Applicant was subject to all conditions as noted in this CDUP.

3) In the plain reading of the law, these conditions are very clear and further clarification is not needed.

The Applicant's response regarding Condition No. 12 is yet another example of the confusion caused by the Applicant's insistence that The University of Hawaii at Hilo is the Applicant, when in fact, the TMT Corporation is an unnamed party. The Applicant attempts to revise Condition No. 12 to state, "UHH will provide OCCL and BLNR a copy of **TMT's** annual report to OMKM." (emphasis added in Applicant's response) As such, it would appear that the

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[1] It would practically impossible to restore the access road on Pu‘u Poli‘ahu to its natural state because the landscape consists of various different colors of cinder that cannot be replicated and/or obtained from elsewhere. Likewise, it would be practically impossible for the "re-naturalization" of the Batch Plant Staging Area upon completion of TMT Project construction because the adjacent landscape consists of pahoehoe and other lava attributes that cannot be replicated.

Applicant is acknowledging that, in fact, the UHH was not the appropriate applicant, but instead, the TMT Corporation was actually the appropriate entity to have submitted the CDUA for this proposed project.

As the Petitioners have pointed out, The University of Hawai`i is the only Applicant named on the Conservation District Use Application for the proposed TMT Project. Pet. FOF 1256. Because the record provides no evidence of an Operational Agreement or any other legal document between the Applicant and TMT, there is no mechanism for BLNR to require the TMT Corporation to comply with permit terms and conditions. Pet FOF/COL 1084. Thus the Applicant, is inappropriately seeking to change the conditions of the approved permit, contrary to the Board's specific directives.

C. CORRECTIONS TO UHH'S OWN FOFs/COLs CASTS DOUBT ON THE RELIABILITY OF THE HO REPORT

The Applicant is taking exceptions to their own Findings of Fact and Conclusions of Law that were actually copied verbatim by the Hearing Officer into the Report. The Applicant's proposed corrections of typographical, grammatical, and citation errors to the HO FOFs/COLs are actually corrections to their *own* FOFs/COLs. As noted, HO FOFs 138, 144, 317, and 328[2] are identical to UHH Proposed FOFs 147, 151, 330, and 341. Likewise, HO COLs 44, 94, 213, 214, and 215 are respectively App. COLs 91, 159, 281, 282, and 283. Also, UHH Exceptions suggest a correction to HO COL 189 even though the cited text is not found at this citation in the HO Report.

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[2] Contrary to HO FOF 328, Figures 4.1 (Exhibit A-311 at 4-2) and 5.1 (Exhibit A-28 at 5-5) are competent and credible evidence that specific cultural resources and historic properties were omitted from the CDUA document resulting in it being inaccurate and incomplete.

The Applicant is affirming that their own findings of fact are unsupported by evidence in the record evidence when they take exception to HO FOF 155 even though it is exactly the same as their own App. FOF 163. In addition, the Applicant admits, "*The cited record evidence, and particularly the Nagata testimony, demonstrates that certain aspects of this finding are incorrect.*" The Petitioners have also previously identified such examples of errors associated with the Applicant's proposed FOFs and COLs that were inserted into the HO Report without any verification for accuracy.

The confusion over the process outlined in HO FOF 155/App. FOF 163 highlights the extent to which UHH's "management" of telescope construction on Mauna Kea is self-serving and inconsistent with the law. HO FOF 155 asserts that the BOR and UHH President retain project approval authority over all major developments in the MKSR. Neither the HO FOF 155, nor the Applicant's proposed revision of its own App. FOF 163 are correct. By law, BLNR retains project approval authority through the permitting process. HRS § 183C-3(7).

HO FOF 155 also asserts that future projects in the MKSR will have some relationship to the Master Plan, but the Master Plan was neither reviewed nor adopted by the BLNR, and therefore it has no relevance to the CDUA. *See* Nagata Tr. 8/17/11 at 124. Moreover, assertions that the Master Plan assures compliance with *unapproved* guidelines is patently absurd.

> A key feature of this process is the opportunity for community input and review of the overall design of a proposed observatory using the Master Plan's facility development guidelines . . . generally facilities should be designed to avoid existing habitat areas, archaeological sites, limit visual impacts, design measures to blend in with the landscape and to minimize development of new infrastructure by locating existing roads and utilities.

Nagata Tr. 8/17/11 at 112-13.

Contrary to Ms. Nagata's assertions, the TMT facility has *not* been designed to avoid existing habitat areas, archaeological sites, limit visual impacts, design measures to blend in with the landscape and to minimize development of new infrastructure by locating on existing roads and utilities. The opposite is true. *See* Petitioners' Exceptions *inter alia.* Further, despite UHH representations that implementation of the Comprehensive Management Plan (CMP) would prevent the TMT Project would resulting in the same "significant, substantial, and adverse" impact caused by the other telescopes in the Mauna Kea Conservation District, the CMP relies on the same decision-making process and indeed the same decision-maker -- UHH -- that has caused the current, legally unacceptable, state of "significant, substantial, and adverse" impact on the natural, cultural and historical resources of this sacred conservation district. UHH cannot legitimately claim the construction of the TMT should be seen as simply an incremental increase to the existing substantial, adverse impact on Mauna Kea when UHH has been and continues to be the primary proponent of all the destructive telescope activity on the mountain.

For these reasons, HO FOF 155 and all references to UHH's "master plan" should be removed from the record.

These examples highlight the numerous errors found in UHH's Proposed FOFs and COLs that were subsequently inserted into the HO's Report without any verification for accuracy. The extensive duplication between the UHH's and HO's findings and conclusions, including **errors** in those findings and conclusions, casts serious doubts on the reliability of the HO Report. Given the extent to which the HO Report repeatedly copied and adopted UHH's proposed FOFs and COLs without verifying the facts in the record, the Board cannot rely on the HO's report as a basis for its decision. **The Board should direct staff to initiate a fresh review**

of the record and draft a clean, substantiated document of finding of facts, conclusions of law, and decision and order for the Board's consideration.

D. UHH'S CHALLENGES TO NATIVE HAWAIIAN PETITIONERS' RIGHTS ARE IRRELEVANT AND FRIVOLOUS

UHH's proposed supplementation to HO FOF 370 and COL 203 as well as proposed revisions to HO COLs 192 and 196 should be rejected.

UHH's exceptions and other arguments against Hawaiian Petitioners' constitutional rights are untimely and fail logic, the facts established in the record, and governing case law. More egregiously, it points to UHH's disingenuous ploy to attack the standing of Hawaiian Petitioners to raise issues concerning native Hawaiian constitutional protections. UHH's proposed supplementation to HO FOF 370 and proposed revisions to COLs 192 and 196 should be rejected for the following reasons: 1) *Hanapi* is irrelevant and inapplicable to this civil action and the CDUA criteria; 2) HO's conclusion that unrefuted testimony is sufficient to establish that Petitioners are "native Hawaiian" is consistent with case law; 3) UHH's proposed evidentiary burden is impracticable for Native Hawaiian petitioners and this Board; 4) Petitioners *have* met the first prong of *Hanapi*; 5) the doctrine of collateral estoppel precludes UHH's challenges because Hawaiian Petitioners have been found to be "native Hawaiian cultural practitioners" in previous legal actions; and, 6) UHH's exceptions concerning Petitioners' standing as Native Hawaiian cultural practitioners are frivolous, untimely, and contrary to the purpose of the contested case hearing - determining the legal rights, duties, and privileges of the parties. HAR 13-1-2 (defining "contested case hearing").

First, *Hanapi* is inapplicable to civil permitting actions and irrelevant to contested case proceedings that are concerned with compliance with the eight criteria for a CDUP, and not

constitutional protections. UHH agreed that the "*sole issue* for resolution in any contested case hearing relating to a CDUA is whether the applicant has met the requirements for a [CDUP]." UHH Prehearing Conference Statement at 6 (5/9/2011). *Hanapi* addresses a criminal standard for raising constitutional protections for native Hawaiian traditional and customary usages, *not* criteria state agencies must apply in determining whether granting a permit will impact those native Hawaiian rights. *Hanapi* is irrelevant to these proceedings.

Hanapi concerned the burdens imposed on criminal defendants attempting to raise constitutional protections under Article XII, section 7 as a defense to criminal charges. To ensure that criminal prosecutors are not overly burdened by the requirement that they prove every element of a criminal charge, defendants are required to present affirmative evidence meeting the three prongs described in *Hanapi*. *State v. Hanapi*, 89 Haw. 177, 186, 970 P.2d 485, 494 (1998). In our civil context, however, the legal question is whether the preponderance of the evidence shows that BLNR may appropriately grant UHH a CDUP without violating its obligations as a state agency to ensure that Native Hawaiian traditional and customary rights are protected to the extent feasible. *Ka Pa'akai*, 94 Haw. 31, 47, 7 P.3d 1068, 1084 (2000). This obligation has been clarified in the water law context, "simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice; permit applicants bear an affirmative burden of demonstrating that a proposed use will not impact traditional and customary Native Hawaiian rights and practices." D. Kapu'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawaii Water Law*, 33 U. Haw. L. Rev. 537, 567 (2011). The Hawai'i Supreme Court also clarified that civil and criminal tests for native Hawaiian constitutional protections are distinct. *State v. Pratt,* 127 Haw. 206, 207, 277 P.3d 300, 301 (2012). As

discussed below, the record is not devoid of evidence of Hawaiian Petitioners' traditional and customary practices and status as Native Hawaiians *and even if it was*, the *lack* of findings would mean that the TMT CDUA must be *denied* because "simply pointing to an empty record and claiming no impact to indigenous rights will no longer suffice [to support the grant of a permit to use public trust resources.]" Sproat *supra* at 567.

Second, UHH misstates relevant standards and burdens established under *Hanapi* and *PASH*. The HO appropriately recognizes in COL 192 that Hawaiian Petitioners' unchallenged testimony is sufficient to satisfy the first factor of the *Hanapi* analysis. The *Hanapi* court found this factor satisfied because: "[i]n this case, it is *uncontroverted* that Hanapi is a 'descendant of native Hawaiians who inhabited the islands prior to 1778." *State v. Hanapi*, 89 Haw. 177, 187, 970 P.2d 485, 495 (1998) (emphasis added). Likewise in *PASH*:

> [t]hrough *unrefuted* testimony, PASH sufficiently demonstrated that its members, as 'native Hawaiians who have exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands.
> *PASH*, 79 Haw. 425, 434, 903 P.2d 1246, 1255 (1995) (emphasis added).

Consistent with both *PASH* and *Hanapi*, the Hawaiian Petitioners in this case presented uncontroverted, unrefuted testimony and other representations which established that they are "native Hawaiians" under the meaning of Article XII, section 7. Contrary to UHH's interpretation of *Hanapi* and *PASH,* no further evidence is needed.

Third, UHH insists that the many and unrefuted assertions from the Hawaiian Petitioners that they are native Hawaiian does not qualify as "evidence" that they descend from Hawaiian inhabitants of the Hawaiian Islands in 1778. UHH's Exceptions at 3, 9-10. Such an interpretation of the requirements for claiming Article XII, Section 7 rights would result in

impracticable burdens for Native Hawaiians and this Board. In UHH's desired procedure, current and future Native Hawaiian petitioners - as well as this Board - would be burdened with processing elevated evidentiary requirements *even where the issue is not disputed*. Native Hawaiians and the Board could foreseeably be required to procure and review genealogical records dating back to 1778, to recite genealogical creation stories, such as the Kumulipo, in order to ensure their ancestry in these islands extends at least to 1778 and for the Board to listen and record those testimonies, and to obtain birth certificates from agencies that did not exist in 1778 or testimonies from deceased persons. Such burdens would overwhelm not only Native Hawaiian petitioners but this Board's public resources. This is why the standard of unrefuted testimony is proper and why UHH's exceptions should be rejected.

Fourth, even if *Hanapi* were applicable, Hawaiian Petitioners would be found to meet standards of evidence for demonstrating that they are "native Hawaiian." The *Hanapi* court found this factor satisfied because: "[i]n this case, it is *uncontroverted* that Hanapi is a 'descendant of native Hawaiians who inhabited the islands prior to 1778." *State v. Hanapi*, 89 Haw. 177, 187, 970 P.2d 485, 495 (1998) (emphasis added). UHH has introduced no evidence to controvert Hawaiian Petitioners' identifications as "Native Hawaiian" and "Kanaka Maoli"

numerous times during the proceedings.[3] UHH's proposed supplementation to HO's FOF 370 should be rejected because Hawaiian Petitioners *have* offered direct testimony and specific evidence indicating that their native Hawaiian genealogies extend prior to 1778 in compliance with requirements for claiming constitutional protections for their traditional and customary practices.

Fifth, UHH's challenge to the status of Hawaiian Petitioners Neves, Pisciotta, and Ching as "Hawaiian cultural practitioners" is precluded by prior litigation. *See* In the Matter of Conservation District Use Application for the University of Hawai'i Institute of Astronomy, BLNR FOF, COL, DnO, DLNR File No. HA-02-06 (2004) (hereinafter "Keck CCH"). In the Keck CCH, these Hawaiian Petitioners were found to be Hawaiian. To "prevent[] inconsistent results, prevent[] a multiplicity of suits, and promot[e] finality and judicial economy[,]" courts adhere to doctrines of collateral estoppel and *res judicata*. *Dorrance v. Lee*, 90 Haw. 143,

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[3] Clarence Kukauakahi Ching is a Native Hawaiian and traditional subsistence practitioner. Exhibit E-01 Ching WDT at 3; Ching Sept, 30, 2011 Tr. at 81: 19-20. On September 30, 2011, Ching testified to his genealogy as a Native Hawaiian with ancestors in Hawai'i prior to 1778 and to genealogical connections to ali'i who resided on Hawai'i island prior to 1778. *See* Ching, Tr. Sept. 30, 2011, 81: 23-25; 82: 1-7. Pisciotta described her lineal descendancy from the Kamahukilani line of Native Hawaiians. Exhibit C-01, 1. Pisciotta is president of Mauna Kea Anaina Hou (MKAH), an organization of Native Hawaiian cultural practitioners, who have genealogical ties and/or who engage in traditional and customary practices related to Mauna Kea. Exhibit A-320, 6; Exhibit C-01 at 1. She is a descendant of Native Hawaiians buried in the summit regions of Mauna Kea, including modern burials as well, such as her Aunty Kamahukilani. Exhibit C-01, 1. Paul K. Neves is a Native Hawaiian practitioner of hula and kumu hula. Exhibit F-01, Neves, WDT at 1). Paul Neves' explained that he is kanaka maoli, a "native person." Neves, Tr. Sept. 30, 2011, 38:13 and 40:11. Kalani Flores testified that he is a "kanaka maoli cultural practitioner" with ancestral ties to Hawai'i. Flores, Tr. Sept. 30, 2011, 104: 15-16; Flores, Tr. 9/26/11, 25:4. Members of the Flores-Case 'Ohana also asserted that they are Kanaka Maoli (Native Hawaiian). Exhibit A-318 at 3.

148-49, 976 P.2d 904, 909-10 (1999). Collateral estoppel precludes subsequent suits between parties or their privies "on a *different* cause of action and prevents [them] from relitigating *any issue* that was actually litigated and finally decided in the earlier action." *Id.* 90 Haw. at 148, 976 P.2d at 909 (emphasis in original). Neves, Pisciotta, and Ching participated in contested case proceedings to determine whether to grant a CDUA to UHH's Institute for Astronomy (IfA) for the Keck Outrigger Telescopes. During those proceedings, parties presented evidence and the HO (Michael Gibson of Ashford & Wriston, LLC) assessed that evidence and submitted findings that were adopted by BLNR. Keck CCH at i-ii ("Petitioner Clarence Ching ('Ching') is a Hawaiian cultural practitioner", "Paul Neves, a member of ROOK I, is a Hawaiian cultural practitioner", "Kealoha Pisciotta, a member of MKAH, is a Hawaiian cultural practitioner"). The issue of whether Neves, Pisciotta, and Ching are "native Hawaiian cultural practitioners" has already been determined and this Board need not do so again. *See* Keck CCH FOF 289 ("Interveners who are Hawaiian cultural practitioners referred to Mauna Kea as "sacred." Fergerstrom Tr., 2/25/03, p 97:12-16; Pisciotta Tr., 2/25/03 at 158:11-12; 163:25; 164:20-23;165:20; Neves Tr., 2/25/03; 143:21-22; Ching Tr., 2/24/03 at 177:17; Ching WDT at 2-3; Fergerstrom Tr., 2/25/03, p 97:12-16; 99:14; 102:3; 103:9").

Sixth, UHH's insistence that Hawaiian Petitioners must retroactively demonstrate that they supplied evidence on their native Hawaiian identity - an issue that is not in dispute - is frivolous, untimely, frustrates the *purpose* of the contested case (determining the legal rights, duties, and privileges of Petitioners) and is contrary to due process. Initially, UHH stipulated to the expertise of the Hawaiian Petitioners in cultural practices related to Mauna Kea and did not timely contest representations of their native Hawaiian traditional and customary practices.

Later, UHH asserted that "standing" is not standing as a native Hawaiian cultural practitioner and that "cultural practices related to Mauna Kea" are not "traditional and customary" practices related to Mauna Kea. *See* UHH Comments on Petitioners' Combined Proposed FOFs, COLs, and DnO at 94

UHH had many prior opportunities to challenge Hawaiian Petitioners' Native Hawaiian identity, but did not. Pursuant to Minute Order No. 1, parties were to submit a prehearing conference statement of "the issues to be decided at any contested case hearing[.]" Minute Order No. 1 at 1. UHH did not object to Petitioners' standing as parties in the prehearing conference pursuant to Minute Order 1. Notice of Standing and Prehearing Conference, 4/15/2011. On May 9, 2011, UHH filed a Prehearing Conference Statement that stated that "the sole issue for resolution in any contested case hearing relating to a CDUA is whether the applicant has met the requirements for a [CDUP]." UHH Prehearing Conference Statement at 6. Also on May 9, 2011, UHH filed a Reply Brief on the Issue of Standing in the Contested Case Hearing for CDUP HA-3568, which did not contest Hawaiian Petitioners' standing nor whether they may assert constitutional protections. UHH Reply Brief on Standing at 4-7. Nor did their May 31, 2011 Opening Brief mention *Hanapi* or allege that Hawaiian Petitioners are not "native Hawaiian." On May 13, 2011, HO's Minute Order No. 6 confirmed:

> Petitions for a contested case hearing were timely filed. …[a] hearing was held on the issue of standing on May 13, 2011. . .[t]here were no objections to the petitioners of Ward, Ching, KAHEA and MKAH. . . . There was no objection to Paul K. Neves (Neves) as an individual. . . Either E. Kalani Flores or B. Pualani Case may act as the representative of the Flores-Case 'Ohana . . . Based on the record, the briefs, the representations and agreements made at the hearing on standing and the arguments of the Applicant and Petitioners.

Minute Order No. 6 at 1-2.

UHH did not challenge Petitioners' compliance with *Hanapi* standards until July 12, 2011 (UHH Reply Brief at 47), more than a month after the commencement of the contested case hearing. UHH then reasserted this claim in their closing arguments at the CCH. At that time, UHH alleged Hawaiian Petitioners "have not met their burden proof that the project would violate or interfere with their constitutionally protected traditional rights." Lui-Kwan, Tr. 9/30/11 at 151: 25 and 152: 1-25.

Because UHH did not object or challenge Petitioners standing or other assertions contained their petitions then UHH waived its right to challenge Petitioner on those specific issues after the fact. In this case it means UHH waived its rights to claim the Petitioner have not met their burden under *Hanapi.* By failing to comply with Minute Orders requiring that all parties provide a statement outlining all of the issue to be decided in this contested case hearing, each person or parties positions on those issues and who has the burden of proof on what issue and why, UHH attempted to shift the burden of proof from themselves as Applicant onto the Petitioners.

The Petitioners were not afforded due notice with regards to the *Hanapi* test because UHH elected to wait to raise this challenge until after the standing hearing. Consequently, Petitioners were not given the "reasonable notice" guaranteed by compliance with contested case hearing procedures. "Reasonable notice" in a contested case proceeding under HRS § 91-9(b) "provides individuals whose legal rights are adjudicated in an administrative proceeding as complete a forewarning as possible of the issues they must meet and the facts alleged against them. Unless the agency is unable to do so, *the notice* must in function constitute a bill of particulars -- i.e., it *must reveal the facts and circumstances at the heart of the proceeding. Its*

objective is clearly to provide for basic procedural fairness . . . ." State v. Gustafson, 55 Haw. 65,74; 515 P.2d 1256, 1261-62 (1973) (J. Levinson, dissenting) (emphasis added). UHH should have raised its challenge to Hawaiian Petitioners during the standing hearing when the substantial interests of each and every party seeking standing in a contested case hearing is brought. By failing to bring these critical questions concerning Hawaiian Petitioners' constitutional protections as native Hawaiians in violation of "reasonable notice" requirements, UHH has *created* an alleged-lack of evidence concerning these issues in the present proceedings. This tactic fails both because it frustrates the contested case's *purpose* of determining the "legal rights, duties, or privileges of [Petitioners]" (HAR § 13-1-2) *and* because Hawaiian Petitioners *have* provided extensive evidence of their native Hawaiian ancestry and traditional and customary practices. All Petitioners provided extensive commentary in their petitions outlining their "substantial interests" distinct from that of the general public, how those interests would be impacted by board action, remedies sought and explanations as to how their participation could assist decision making. Hawaiian Petitioners specifically outlined traditional and customary cultural and religious practices exercised by Hawaiian Petitioners on and around the Mauna Kea Conservation District, as is required under HAR § 13-1-29. *See* Petitioners' Exceptions at 79-89. The record contains substantial evidence of Petitioners' Native Hawaiian traditional and customary practices and expert documents that likewise identify such practices as constitutionally protected Native Hawaiian traditional and customary practices.

The impropriety of UHH's Exceptions concerning Petitioners' *Hanapi* factors is underlined by their decision *to stipulate* to Hawaiian Petitioners' as experts in cultural practices related to Mauna Kea as noted in the record, "Applicant is prepared to stipulate to the five

Petitioner witnesses, that's Mr. Paul Neves, Clarence Ching, Ms. Pua Case, Mr. Kalani Flores and Ms. Kealoha Pisciotta may be recognized as experts to their cultural practices related to Mauna Kea. That's an offer we have". *See* T. Lui-Kwan, Tr. Aug. 25, 2011 at 28. Petitioners accepted UHH's "offer" in good faith and refrained from making unduly duplicative representations of their cultural practices.

Contrary to HO COL 196, relevant facts and reliable and probative evidence was presented in the Hawaiian Petitioners' testimonies and the Applicant's exhibits to substantiate that traditional and customary practices of viewplane alignments as well as other practices associated with Mauna Kea are entitled to constitutional protection. *See* Pet. FOF/COL 244-255 at 33-34; 358-361; 363-366 at 52; 749; 756-827 at 104-113; Exhibit A-21, Appendixes N & I.

In addition, UHH misrepresents the relevance of *State v. Pratt*, 127 Hawai'i 206, 277 P. 3d300 (2012) to this case and its impact on the outcome of this contested case hearing.

First, *Pratt* clarified that civil and criminal tests for claiming Article XII, Section 7 constitutional protections for Native Hawaiian traditional and customs are distinct. *See* Petitioners' Exceptions to HO COL 16 at 78. In *Pratt,* the Hawai'i Supreme Court stated:

> [This] court has examined the [Article XII, section 7] privilege in the civil context, considering the right to enter private land to gather traditional plants (*Kalipi v. Hawaiian Trust Co., Ltd.,* 66 Haw. 1, 656 P.2d 745 (1982)), the right to contest the State's sale of 'ceded' lands (*Pele Defense Fund v. Paty* (*PDF*), 73 Haw. 578, 837 P.2d 1247 (1992)), and the right to participate in county-level Planning Commission hearings regarding land use (*Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995)). The court has also examined this privilege in the criminal context. In our most recent case on this topic, *State v. Hanapi,* 89 Hawai'i 177, 970 P.2d 485 (1998), we held that a criminal defendant asserting this privilege as a defense to criminal charges must satisfy, 'at minimum', the following three-prong test: (1) the defendant must be 'native Hawaiian"'according to the criteria established in *PASH*, (2) the claimed right must be 'constitutionally protected as a customary or

> traditional native Hawaiian practice,' and (3) the conduct must occur on undeveloped property. *Id.* at 185–86, 970 P.2d at 493–94. In that case, we held that Hanapi had not satisfied this test, so the court's analysis stopped there. *Id.* at 187, 970 P.2d at 495.
>
> Today's case picks up where *Hanapi* left off, and requires the court to articulate the analysis the courts must undertake when a defendant has made the 'minimum' showing from *Hanapi.*

State v. Pratt, 127 Haw. 206, 207, 277 P.3d 300, 301 (2012) (citations in original).

As Petitioners point out in their Exceptions to HO COL 16, *Pratt* clarifies that *Hanapi* is not applicable to this civil proceeding. The *Pratt* case is a criminal case and does not apply in this instant case, UHH's persistent application of criminal standards of proof is in error. Petitioners object to UHH's proposed supplementation to COL 203 because: 1) Hawaiian Petitioners have repeatedly provided extensive testimony and documentations. *See* Pet. Proposed FOF/COL, Pet. Responses to UHH's FOF/COL, and Petitioners Exceptions. Hawaiian Petitioners have met all three of the *Hanapi* prongs, the *PASH* tests, and *Pratt* as well, even if *Pratt* did apply. Therefore, contrary to the UHH assertions, Hawaiian Petitioners "activities" *do* fall under those native Hawaiian constitutionally protected rights and the BLNR is mandated to affirmatively protect said rights.

UHH misinterprets *Hanapi* and *State v. Pratt* which are also irrelevant to these proceedings. **UHH's proposed supplementation to HO FOF 370 and COL 203 as well as proposed revisions to HO COL 192 and 196 should <u>not</u> be considered for inclusion into the Report because they are irrelevant.**

E. UHH ATTEMPTS TO INSERT INACCURATE AND IRRELEVANT INFORMATION INTO THE RECORD

The Petitioners object to the Applicant's proposed correction to HO FOF 261 and it should <u>not</u> be considered for inclusion into the Report.

First, it is important to note UHH cited the wrong dates. The new rules governing the Conservation Districts of Hawaii were approved on November 23, 2011, when Governor Abercrombie approved the rule package consistent with the requirements of HRS §91-3(c). See, HAR §13-5 at 5-51. This is nine months after the Board considered the TMT CDUA and initiated this contested case proceeding. The date referenced by UHH in its Exceptions was simply the Board advancing the proposed rule amendments from the DLNR staff to the Governor.

Second, the law does not support UHH's new proposed finding of fact. Haw. Rev. Stat. §1-3 clearly states "No law has any retrospective operation, unless otherwise expressed or obviously intended." Neither the Board nor the CDUA rule amendments themselves are expressly authorized to impose retroactive determinations. See, Haw. Rev. Stat. Chap. 91, Haw. Admin. R. 13-1. Thus, there is no authority upon which to justify retroactively applying the new rules to the TMT CDUA submitted under the old rules.

Third, the record does not support UHH's new proposed finding of fact. The Board never considered the TMT's CDUA in terms of the newly proposed draft rules, even though those draft rules had been in development for a full year prior to the TMT's application approval on February 25, 2011. S*ee,* BLNR Minutes 2/25/11 and BLNR Minutes 8/23/11. At the time the TMT CDUA was taken up by the Board, the draft revisions to the conservation district rules had undergone its second major revision and just completed a second full round of statewide public hearings. Indeed, the last public hearing on the proposed rule changes was held on February 9, 2011, where the public again expressed considerable opposition to a wide variety of proposed changes. Two weeks later, when the Board voted on the TMT CDUA, there was no guarantee that rule changes under consideration at the time would be rule changes ultimately enacted. It

would have been premature for the Board to consider applying the proposed draft rules to the TMT CDUA.

Fourth, retroactively applying rule amendments introduces considerable uncertainty into the application process. UHH seeks to have rules not in effect at the time that a permit application was filed and considered by the Board to now govern the evaluation of that application. To do so, would set a dangerous precedent. This is because adopting UHH's approach would mean a landowner could submit an application for a permit from BLNR, spend a significant amount of money to comply with all the requirements of the rules as written and then still not receive a permit because the Administration amends the regulations in way that renders the application moot. The purpose of rules is to give certainty -- to applicants, the Board, and the public -- about what is expected, what would is allowed and not allowed, and what are the consequences of noncompliance. Following UHH's suggestion would set a precedent that rules can be changed mid-process, which completely undermines the purpose of rules. Such a dangerous precedent must be avoided.

Finally, UHH is in control of the timing of the TMT CDUA. If UHH would rather have its application judged under the new regulations, then it could withdraw its permit application and resubmit it under the new rules.

The rules in effect at the time the TMT CDUA was submitted and considered by the Board were those approved in 1994. This 1994 version of the conservation district rules are the rules that must govern any decisions made about the TMT's permit application by the Board or any court of law. Thus, the Petitioners object to the Applicant's proposed correction to HO FOF 261 and it should <u>not</u> be considered for inclusion in the Report.

F. EVIDENTIARY STANDARDS ALREADY ADDRESSED IN THE HEARING OFFICER'S REPORT

The Petitioners object to UHH's attempt to add a paragraph to the HO's Conclusions of Law regarding the evidentiary standards applied in this case. UHH claims that evidentiary standards were left out of the HO's Report. However, UHH is extremely mistaken on this point. The HO's report addresses the evidentiary standard applied in this case in two places. First, in the introduction, the HO's report makes clear that evidence was assessed for inclusion in the report based on whether it was "repetitious," "supported by the reliable and/or probative evience" (sic), "immaterial, superfluous, and/or irrelevant to the material facts, issues, and/or law of this case." HO Report at 1. Second, in the conclusions of law, the HO's report clearly outlines the "Legal Framework" for his decision. This section details that the Applicant holds the burden of proving it complies with the eight criteria of the regulations by a preponderance of evidence. HO Report at 83.

UHH's attempt to supplement the record with an explanation of the evidentiary standards that exceeds the actual standard as outlined in HRS § 91-10 and HAR §13-1-35(a) is not justified and should be rejected.

G. UHH'S ERRONEOUS "CORRECTIONS"

UHH's exception to HO COL 154 points to the omission of facts, corroborated by expert testimony, regarding harmful effects on the health of the native Hawaiians and the general community. UHH failed to demonstrate that it had conducted studies or consulted experts to determine the effect of the TMT Project on the health of the community at large or of Native Hawaiians on Hawai‘i island or beyond. In contrast, Petitioners provided two expert witnesses, Dr. J Kehaulani Kauanui and Dr. Kawika Liu, who attested to the impact on the health of native

Hawaiians. Expert witness, Dr. J. Kehaulani Kauanui, found no evidence in the record to demonstrate the health or wellbeing of the Native Hawaiian people was considered in the UH/ TMT analysis of the TMT projects impacts on the health and wellbeing of the people of Hawai`i. Pet FOF 979 citing Kauanui Tr. August 25, 2011, p. 104: 5-8. She clearly stated that the 1993 Apology Resolution correctly recognizes, "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land[.]" Pet FOF 796 citing Ex. B-20, Kauanui WDT at 2 (*citing* Joint Resolution, U.S. Public Law 203-150). Expert witness, Dr. Kawika Liu, testified that "adding to the historical trauma as well as the trauma of seeing one's ancestor, or as in that person's belief, I take this person as a proto-type practitioner, a lineal descendant seeing one's ancestor being desecrated will inevitably impact someone's health"…in the most basic way, that stress of even going through the hearing of it being in the system, which is not necessarily congruent with that person's belief system, may add to anxiety or depression, both of which are very under reported in the Native Hawaiian community". Liu Tr., 8/1/8/11 at 216:1-6, 9-14.

UHH's own consultants provided evidence corroborating the testimony of these witnesses. Based on the Native Hawaiian traditional cultural practices and beliefs associated with Mauna Kea, as documented in the Maly (1999) oral history and consultation study, the MKSRHD could perhaps even more appropriately be considered a special type of cultural landscape referred to by the National Park Service as ethnographic landscapes: "those landscapes imbued with such intangible meanings that they continue to be deemed significant or even sacred by contemporary people who have continuous ties to the site or area". Pet FOF 241 citing Ex. A-21, App. N, p. 45. Such an ethnographic landscape would seem to be embodied in the concept

of "cultural attachment" used by Maly (1999:27) to describe the connection of many Native Hawaiians to Mauna Kea. Pet FOF 242 citing Ex. A-21, App. N, p. 45

The Applicant's document states that "*Cultural Attachment*" embodies the tangible and intangible values of a culture. It is how a people identify with and personify the environment (both natural and manmade) around them. Cultural attachment is demonstrated in the intimate relationship (developed over generations of experiences) that a people of a particular culture share with their landscape--for example, the geographic feature, the natural phenomena and resources, and traditional sites, etc., that make up their surroundings. This attachment to environment bears direct relationship to their beliefs, practices, cultural evolution, and identity of a people. In Hawai`i, cultural attachment is manifest in the very core of Hawaiian spirituality and attachment to landscape. The creative forces of nature which gave birth to the islands (e.g., Hawai`i), the mountains (e.g. Mauna Kea) and all forms of nature, also gave birth to *na kanaka* (the people), thus in Hawaiian tradition, island and human kind share the same genealogy…" Pet FOF 243 citing (Ex. A-21, App. I, p. 27).

The Applicant must demonstrate by a preponderance of the evidence that the proposed land use will not be materially detrimental to public health. By failing to acknowledge the long-term health implications resulting from the desecration of Mauna Kea due to cultural attachments, both the Applicant and the Hearing Officer failed to address the proposed project's non-compliance with criterion eight.

III. CONCLUSION

Based upon the foregoing, the Petitioners' Combined Response to Applicant University of Hawai'i's Exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order (1/23/13), Petitioners' Combined Narrative & Detailed Exceptions to the Hearing Officer's Findings of Fact, Conclusions of Law, and Decision and Order (1/9/13), and Petitioners' Combined Proposed Findings of Fact, Conclusions of Law, and Decision and Order (12/5/11), the CDUA HA-3568 for the proposed Thirty Meter Telescope should not have been approved, thus the CDUP HA-3568 should be denied and/or revoked.

In issuing this permit, the Department and Board relied on the information and data that the Applicant provided in connection with this permit application. The Petitioners have provided relevant facts and reliable and probative evidence to demonstrate that subsequent to the issuance of this permit, such information and data proved to be false, incomplete and inaccurate. Thus, the CDUP HA-3568 should be denied and/or revoked, in addition, the Department should institute appropriate legal proceedings into this matter as stipulated in Condition No. 16 of this permit.

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BEFORE THE BOARD OF LAND AND NATURAL RESOURCES
OF THE STATE OF HAWAI'I

In Re Conservation District Use Permit Application HA-3568 for the Thirty Meter Telescopes on Northern Plateau in the Mauna Kea Conservation District, Ka`ohe, Hāmākua District, Hawai`i TMK (3) 4-4-015:009	)	DLNR File No. HA-11-05 (CDUA HA-3568)
	)	**CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that the following PETITIONERS' COMBINED RESPONSE TO APPLICANTS' EXCEPTIONS has been duly served on all parties and the hearing officer via personal delivery and/ or electronic mail to the following addresses:

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