1070. Frankel also acknowledged that in his former position as an attorney for the Native Hawaiian Legal Corporation, he represented some of the Petitioners to this contested case, specifically Flores and Ching, in other matters. Tr. 1/11/17 at 36-39.

CONCLUSIONS OF LAW

I. INTRODUCTION

1. This contested case hearing requires the BLNR to consider whether the proposed land use as provided in the CDUA for the TMT Project, complies with:

   (1) the statutory and regulatory requirements for a development within the Conservation District;

   (2) Article XII, Section 7 of the Hawai‘i State Constitution and *Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n State of Hawai‘i,* 94 Hawai‘i 31, 7 P.3d. 1068 (2000); and, **if applicable,**

   (3) Article XI, Section 1 of the Hawai‘i State Constitution and the public trust doctrine.

2. In evaluating whether the proposed land use for the TMT Project is consistent with the statutory and regulatory requirements for a development within the Conservation District, the BLNR is required to consider and apply the eight criteria set forth in HAR § 13-5-30(c).

3. The following issues are not material or relevant to this proceeding:

   a. the sovereignty of the Kingdom of Hawai‘i or any other issues relating to the purported existence of the Kingdom of Hawai‘i;

   b. challenges to the legal status of the State of Hawai‘i; and

   c. challenges to the State’s ownership of and title to, the lands related to this contested case hearing. Minute Order No. 19 [Doc. 281]

4. If any statement denominated a COL is more properly considered a FOF, then it should be treated as a FOF; and conversely, if any statement denominated as a FOF is more properly considered a COL, then it should be treated as a COL.

5. Certain facts set forth within specified criteria addressed herein may apply to one or more criteria, issue, or legal standard. To the extent such facts or findings are addressed within a particular heading or section below does not limit it to that heading or section, but instead all such facts or findings are incorporated by reference for each applicable criteria section, as if specifically set forth within that heading or section.

6. The Hearing Officer and the BLNR considered the testimony of all witnesses at the evidentiary hearings and all exhibits received into evidence. The mere fact that a

particular witness' testimony or exhibit may not be specifically referred to below does not and shall not be construed to mean that said testimony or exhibit was not considered. Rather, specific reference to said witness testimony or exhibit was excluded because, after due consideration of said testimony or exhibit, it was determined to be: (i) immaterial, (ii) irrelevant, (iii) contrary to law, (iv) less credible or persuasive, and/or (v) cumulative of other testimonies or exhibits specifically referred to below.

II. JURISDICTION AND STANDING

A. JURISDICTION

7. This contested case is before the BLNR pursuant to the Supreme Court of Hawai'i's December 2, 2015 opinion in *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 (2015) and, consequently, the Circuit Court of the Third Circuit, State of Hawai'i's Order for Remand filed February 22, 2016, in Civil No. 13-1- 0349.

8. The CDUA for the TMT Project involves land designated in the Resource subzone of the Conservation District.

9. The BLNR has jurisdiction and authority over lands designated in the Resource subzone of the Conservation District pursuant to HRS Chapter 183C, and HAR chapters 13-1 and 13-5.

10. The BLNR has the authority and jurisdiction, pursuant to HRS chapter 183C to act upon and approve a CDUA.

11. The BLNR has authority and jurisdiction to conduct this contested case hearing pursuant to HRS Chapter 183C, HRS § 91-9, and HAR § 13-1-28.

12. The BLNR has the authority and jurisdiction to approve the CDUA for the TMT Project as a conditional use of the Conservation District.

13. The State of Hawai'i is the lawful government of the Hawaiian Islands. *See State v. Kaulia*, 128 Hawai'i 479, 487, 291 P.2d 377, 385 (2013).

14. The State of Hawai'i's title to ceded land is unclouded; it holds title in such lands in "absolute fee," and by extension, the BLNR has jurisdiction over the land subject to this Proceeding. *Hawai'i v. Office of Hawaiian Affairs*, 556 U.S. 163, 174 (2009); HRS § 183C-3.

15. The BLNR lacks subject matter jurisdiction to consider issues relating to the overthrow of the Kingdom of Hawai'i and the legality of the annexation of the Hawaiian Islands by the United States, as those issues are nonjusticiable political questions. *See Baker v. Carr,* 369 U.S. 186, 212 (1962); *Sai v. Clinton*, 778 F.Supp.2d 1, 6 (D.D.C. 2011), *aff'd sub nom. Sai v. Obama*, No. 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011).

16. Even if these issues were justiciable, the BLNR has no statutory authority to adjudicate

these issues. *See* HRS § 183C-3 (Powers and duties of the board and department).

B. STANDING OF THE PARTIES

17. HAR § 13-1-2 defines "Petitioner" as "the person or agency on whose behalf a petition or application is made," and a "Person" as "appropriate individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies."

18. HAR §§ 13-1-31(b) and (c) set forth the standards for admission of persons and agencies as parties in a contested case proceeding.

19. HAR § 13-1-31(b) sets forth the standard for the mandatory admission of persons or agencies as parties:

> The following persons or agencies shall be admitted as parties:
>
> (1) All government agencies whose jurisdiction includes the land in question shall be admitted as parties upon timely application.
>
> (2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted upon timely application.

20. HAR § 13-1-31(c) sets forth the standard for the discretionary admission of persons or agencies as parties:

> Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a party when it appears that:
>
> (1) The position of the requestor is substantially the same as the position of a party already admitted to the proceedings; and
>
> (2) The admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable.

21. HAR § 13-1-10 sets out the standard for who can appear in a representative capacity in proceedings before the BLNR. It states in relevant part:

> (a) A person may appear in the person's own behalf, a partner

may represent the partnership, an officer, trustee, or authorized employee of a corporation may represent the corporation, trust or association, and an officer or employee of an agency may represent the agency in any proceeding before the board.

(b) A person may be represented by counsel in any proceeding under these rules.

(c) A person shall not be represented in any proceeding before the board or a Hearing Officer except as stated in subsections (a) or (b).

22. Standing is an aspect of justiciability focusing on the party seeking a forum rather than the issues the party wants adjudicated. *Life of the Land v. Land Use Comm.*, 63 Haw. 166, 172 (1981).

23. The Hawai‘i Supreme Court has been liberal in recognizing standing in land use cases. *Id.*

C. TIO'S STANDING

24. Several of the parties challenged TIO's standing as a party, particularly in light of the Circuit Court's decision to vacate BLNR's consent to the sublease between TIO and the University. *See, e.g.*, [Docs. 427 and 429]. However, TIO's admission as an intervenor was not predicated on the status of the sublease consent. Rather, TIO's motion to intervene was granted "due to TIO's substantial interest in the subject matter and because TIO's participation will substantially assist the Hearing Officer in her decision making." Minute Order 13 at 4 [Doc. No. 115]. TIO still has a valid sublease with the University and will be the entity responsible for building and operating the TMT Observatory, if it is built. Thus, TIO continues to maintain a substantial interest in the subject matter. Moreover, TIO's participation has substantially helped the Hearing Officer in her decision making. Therefore, TIO is properly a party to the contested case hearing.

D. HEARING OFFICER WITNESSES

25. Pursuant to Minute Order No. 41 [Doc. 446], on January 26, 2017, the Hearing Officer scheduled the testimony of the remaining witnesses that had yet to testify at the contested case hearing.

26. On January 26, 2017, Holi was given a hearing date for her live testimony to be scheduled in February 2017. Ms. Holi subsequently testified on February 23, 2017.

27. No other Hearing Officer Witness appeared on January 26, 2017 and, as a result, no other Hearing Officer Witness was given a hearing date for their live testimony.

28. Prior to the close of the contested case hearing on March 2, 2017, none of the Hearing Officer Witnesses other than Holi provided the Hearing Officer with their availability to testify nor did they request to testify after they were not given a hearing date for their live

testimony on January 26, 2017.

29. On April 20, 2017, Minute Order No. 44 [Doc. 553] was issued to address the admission of documentary evidence. In that Minute Order, the Hearing Officer noted that Holi was the only Hearing Officer witness to testify during the hearing.

30. On April 24, 2017, TIO filed its *Motion for Clarification, or in the Alternative, Reconsideration Re: Minute Order No. 44 [Doc. No. 553]*, requesting confirmation that the remaining Hearing Officer witnesses, Kealamakia., McIntosh, and West, had waived any right to testify at the contested case hearing or to claim they were deprived of an opportunity to provide their position and information as part of these proceedings. [Doc. 555]. TIO's motion was served by e-mail and certified mail on Hearing Officer Witnesses Kealamakia, McIntosh, and West.

31. On April 24, 2017, UH Hilo filed its substantive joinder to TIO's motion for clarification, in which UH Hilo argued that the Hearing Officer witnesses had ample notice and opportunity to formally raise an objection or otherwise make a claim there were precluded from testifying or presenting evidence at the hearing, if that is what they believed. [Doc. 556]. UH Hilo also served its substantive joinder on Hearing Officer Witnesses Kealamakia, McIntosh, and West by email and certified mail.

32. Hearing Officer Witnesses Kealamakia, McIntosh, and West did not file any response to either TIO's motion for clarification or UH Hilo's joinder.

33. On May 8, 2017, TIO and UH Hilo filed proof of service of the motion for clarification and substantive joinder, respectively, confirming receipt by certified mail by Hearing Officer Witnesses Kealamakia, McIntosh, and West. [Docs. 625 & 626].

34. On May 23, 2017, Minute Order No. 51 was issued to address, in part, *Motion for Clarification, or in the Alternative, Reconsideration Re: Minute Order No. 44* [Doc. 433]. In that Minute Order, the Hearing Officer ordered that Minute Order 44 will be amended to reflect that Hearing Officer Witnesses Kealamakia, McIntosh, and West have waived any right to testify at the contested case hearing or to claim they have been deprived of an opportunity to provide their position and information as part of these proceedings.

35. Minute Order No. 44 was subsequently amended as noted in Minute Order No. 51. [Doc. 649].

III. DENIAL OF OUTSTANDING MOTIONS

36. Any motions made by any party, either oral or written, that have not been specifically addressed herein and that have not yet been specifically ruled upon are hereby denied.

37. All motions to stay the CDUP pending appeal are denied as premature and pursuant to HRS § 91-14(c) which clearly states that there is no stay of an agency decision unless the court hearing the appeal orders the stay.

IV. AUTHORITY OF HEARING OFFICER

38. Under HAR Title 13, Chapter 1, a Hearing Officer has broad authority over the conduct of a contested case hearing including, but not limited to, powers to: examine witnesses; certify to official acts; issue subpoenas; rule on offers of proof; receive relevant evidence; hold conferences; rule on objections or motions; fix times for submitting documents and briefs; limit rebuttal evidence; limit the number of witnesses; limit the extent of direct or cross examination, or the time for testimony upon a particular issue to "avoid unnecessary or repetitive evidence"; and "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." HAR § 13-1-32.

40. The Hearing Officer may also "exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice." HAR § 13-1-35(a).

41. Under the BLNR rules, a Hearing Officer also has the authority to formulate or simplify the issues and determine "such other matters as may expedite the orderly conduct and disposition of the proceeding as permitted by law." HAR § 13-1-36(a).

42. A Hearing Officer has discretion in exercising the authority vested under HAR Title 13, Chapter 1 to implement the generally more flexible procedures typical for an administrative proceeding, if those procedures do not affect the substantial rights of the parties. *See Cariaga v. Del Monte Corp.*, 65 Haw. 404, 409, 652 P.2d 1143, 1147 (1982) ("The administrative tribunal or agency has been created to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes.") *See also Application of Wind Power Pac. Investors–III,* 67 Haw. 342, 343, 686 P.2d 831, 832-33 (1984) (refusing to reverse a Public Utilities Commission decision based on procedural irregularities because the irregularities complained of did not prejudice the substantial rights of the appellant) (citing HRS § 91–14(g)); *Survivors of Timothy Freitas, Dec. v. Pac. Contractors Co.*, 1 Haw. App. 77, 85, 613 P.2d 927, 933 (1980) (finding that the Labor and Industrial Relations Appeals Board's failure to state whether it had applied presumption that claim was for covered work injury did not prejudice substantial rights where there was no reasonable doubt that employee's fatal accident was not work connected) (citing HRS § 91–14(g)).

43. Throughout the course of the contested case hearing, accusations of bias and prejudice were freely advanced by Petitioners and Opposing Intervenors. Adverse rulings, without more, are insufficient to establish bias or prejudice of an administrative officer. *See Peters v. Jamieson*, 48 Hawai'i 247, 264, 397 P.2d 575, 586 (1964) ("We adhere to the rule that mere erroneous or adverse rulings by the trial judge do not spell bias or prejudice and cannot be made the basis for disqualification.")

44. It is well-established that "pro se litigants are not excused from following court rules," *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 382 (9th Cir. 1997), and that they

"must follow the same rules of procedure that govern other litigants," *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled on other grounds* (citation omitted). In this Contested Case Hearing the *pro se* status of the Petitioners and Opposing Intervenors was fully considered throughout this matter in establishing and administering procedures and processes for the hearing to ensure that all parties were afforded due process.

45. As set forth in the findings of fact above, reasonable procedures within the scope of authority were set under HAR Title 13, Chapter 1 to expedite the orderly conduct and disposition of this proceeding for all parties, while also ensuring that all parties had an opportunity to present evidence and argument on all material issues without prejudicing any substantial rights.

V. EVIDENTIARY STANDARDS

46. Under HRS § 91-10(1):

> "Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be 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. The agencies shall give effect to the rules of privilege recognized by law[.]"

47. Consistent with the Hawai‘i Administrative Procedures Act, HRS Chapter 91 ("**HAPA**"), the administrative rules governing procedures before the BLNR broadly provide that the Hearing Officer "may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice." HAR § 13-1-35.

48. "The rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial proceedings." *Price v. Zoning Bd. of Appeals*, 77 Hawai` 168, 176 n.8, 883 P.2d 629, 637 n.8 (1994). This means, for example, that hearsay which would be inadmissible in court proceedings is nonetheless admissible in administrative hearings.

49. In construing the HAPA (and specifically, HRS § 91-10), the Hawai‘i Supreme Court noted that the act’s mandate that "[a]ny oral or documentary evidence may be received" by an agency must be liberally construed. *Dependents of Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 482, 510 P.2d 89, 92 (1973).

50. The court in *Cazimero* observed that the legislative history of HAPA also supported the liberal admission of evidence, as the history indicated "that the direction chosen [by the Legislature] was towards the admission of *any and all evidence* [in administrative hearings] limited *only* by considerations of relevancy, materiality and repetition." *Id.* at 482-83, 510 P.2d at 92 (emphasis added).

51. The standard for determining relevancy in agency proceedings under Chapter 91 is that of Haw. R. Evid. *Id.* (HRE) 401. *See Loui v. Bd. of Med. Examiners*, 78 Hawai`i 21, 31, 889 P.2d 705, 715 (1995). HRE Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of *any fact that is of consequence* to the determination of the action more probable than it would be without the evidence." HRE 401 (emphasis added); *Loui*, 78 Hawai`i at 31, 889 P.2d at 715 (quoting Rule 401).

52. Because the rules of evidence applied in administrative hearings are more relaxed than in court proceedings, doubts about admissibility are to be resolved in favor of admitting the evidence:

> [W]hen an agency is faced with evidence of doubtful admissibility, it is preferable that it allow the admission of such evidence rather than to exclude the same, for the very practical reason stated in *Donnelly Garment Co. v. National Labor Relations Board*, 123 F.2d 215, 224 (8th Cir. 1941), as follows: "If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.
>
> *Cazimero v. Kohala Sugar Co*., 54 Haw. 479, 483, 510 P.2d 89, 93 (1973).

53. The liberal standard of the admissibility of evidence in administrative hearings is also reflected in the established rule that even when ostensibly irrelevant or incompetent evidence is admitted during a hearing, the admission of such evidence alone is not grounds for reversal if there is "substantial evidence in the record to sustain the agency's determination" and the aggrieved party is not prejudiced. *Shorba v. Board of Education*, 59 Haw. 388, 398, 583 P.2d 313-19 (1978). Stated another way, unless an aggrieved party can show prejudice resulting from the admission of ostensibly irrelevant or incompetent evidence, admission of such evidence alone is not grounds for reversal. *Id.*

54. Although the admission of evidence in administrative hearings is less formal than those governing judicial proceedings, the Hearing Officer still has the authority to limit or entirely exclude evidence that does not meet the basic criteria of relevancy, materiality and avoidance of repetition. HRS § 91-10(1).

55. As reflected in the record, the Hearing Officer provided numerous notices and reminders to the parties that testimony and other evidence had to meet the basic evidentiary standards of relevancy, materiality and avoidance of repetition. *See, e.g.*, Tr. 08/29/16 at 45:20-46:2 (requiring offer of proof for all witnesses prior to testimony); Tr. 10/25/16 at 49:3-50:1 (repeatedly sustaining objections to repetitious questions and requesting party to ask another question); Tr. 10/26/16 at 64:18-21 (instructing questioning party that questions have to be designed to lead to a material point); Tr. 10/27/16 at 52:21-22 (noting that Hearing Officer must have information to make a decision on the relevancy

and materiality of evidence); Tr. 12/01/16 at 143:1-13 (reminding party that Hearing Officer will allow relevant testimony beyond time limits, but will not permit time to be wasted); Tr. 01/23/17 at 157:18-22 (reminding party that "we had many discussions" about issues that are material to the hearing).

56. As reflected in the findings of fact above, the Hearing Officer's factual determinations fully considered the admissibility of evidence under the liberal standards in contested case hearings, while also limiting or excluding evidence that did not meet the basic criteria of relevancy, materiality, and avoidance of repetition.

57. None of the witnesses in this proceeding were formally received or qualified as expert witnesses because the Hearing Officer determined at the outset that such designation was unnecessary given the informality of the proceedings and the ability of the Hearing Officer to ascribe appropriate weight, if any, to each witness' testimony; the written direct testimony of each witness was admitted into evidence for consideration; the Hawai'i Rules of Evidence did not govern the proceedings; and under the authorities cited above, the rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial proceedings.

58. "[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 & County 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)).

59. As with the testimony of any witness, a Hearing Officer can believe or disbelieve the testimony of a witness claiming to have expertise in one or more areas, in whole or in part, and to give such testimony the weight the Hearing Officer deems appropriate.

60. Determining the weight, if any, to be given to the opinions and testimony of a witness claiming subject matter expertise is within the discretion of the Hearing Officer, just as it is within the discretion of the Hearing Officer to determine the weight to be given the testimony of any witness.

61. In addition, even though a witness represents that he or she has expertise in one or more areas, such proffered "expert" testimony – as with all admissible and reliable evidence -- must also meet the basic requirement that such evidence is material, relevant and non-repetitious. HAR § 13-1-35.

62. As reflected in the findings of fact above, determinations regarding the admissibility, weight and credibility of the testimony and opinions of the various witnesses in this matter were fully weighed and considered in conjunction with the evidence received on a witness-by-witness basis to determine whether such testimony and opinions are logical, credible, persuasive, and supported by evidence.

VI. CROSS EXAMINATION PROCEDURES

63. The Hearing Officer may limit the "extent of direct or cross examination or the time for

testimony upon a particular issue" to avoid repetitive or unnecessary evidence. HAR § 13-1-32(h).

64. Based on the Hearing Officer's inherent discretion, the parties were permitted considerable latitude to conduct cross examination (including extensive "friendly" cross examination) of all witnesses who appeared in this matter. Cross-examination was properly and reasonably limited where appropriate to avoid repetitive, unnecessary and irrelevant evidence.

65. On October 31, 2016 (after observing the parties' cross examinations over the first five hearing days in which a total of two witnesses had completed their testimony) a thirty-minute time limit on cross examinations was established, subject to extensions of the time limit for good cause shown. The time limit was imposed pursuant to HAR § 13-1-32(h), in order to avoid repetitive or unnecessary evidence, and is consistent with due process. *See Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*, 87 Hawai'i 217, 243, 953 P.2d 1315, 1341 (1998) ("Determination of the specific procedures to satisfy due process requires a balancing of several factors."); *Martin v. C. Brewer & Co., Ltd.*, Civ. No. 03-1- 0186, 2013 WL 639320, at *6 (Haw. Ct. App. Feb. 21, 2013) ("The Circuit Court did not abuse its discretion by imposing time limits on the presentation of evidence and cross-examination of Defendant's witnesses.")

VII. REBUTTAL WITNESSES

66. A party's right to submit rebuttal evidence is not absolute and is "subject to limitations" by the Hearing Officer. HAR § 13-1-32(g).

67. Under HAR § 13-1-35(a), "[t]he [hearing] officer may exercise discretion in the admission or rejection of evidence and the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice."

68. It is well established that "the introduction of evidence in rebuttal and in surrebuttal is a matter within the discretion of the trial court[.]" *Takayama v. Kaiser Foundation Hosp.*, 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996) (citing *Yorita v. Okumoto*, 3 Haw.App. 148, 156, 643 P.2d 820, 826 (1982)).

69. In addition, as a general rule with respect to the admission of rebuttal evidence, "in the interests of expediency and limiting surprise, all evidence in support of a party's position should be presented when the issue it addresses is first presented." *Takayama*, 82 Hawai'i at 497, 923 P.2d at 914.

70. Although a party is not required "to call every conceivable witness who might contradict a potential defense witness," it is also generally true that "[a] party cannot, as a matter of right, offer in rebuttal evidence which was proper or should have been introduced in chief, even though it tends to contradict the adverse party's evidence and, while the court may in its discretion admit such evidence, it may and generally should decline to admit the evidence." *Takayama*, 82 Hawai'i at 497, 923 P.2d at 914 (emphasis added) (quoting *Gassen v. Woy*, 785 S.W.2d 601, 605 (Mo. Ct. App. 1990)).

71. As reflected in the findings of fact above, and based on sound discretion, certain witnesses proposed or sought to be called as rebuttal witnesses in this proceeding were properly precluded from testifying.

VIII. OFFICIAL NOTICE

72. The DLNR's Rules of Practice and Procedure provide that during contested case proceedings, "[o]fficial notice may be taken of such matters as may be judicially noticed by the courts of the State of Hawai‘i." HAR § 13-1-35(i).

73. HRE Rule 201 provides that judicial notice is properly taken of "adjudicative facts." "Adjudicative facts" are "the kind of facts that are ordinarily decided by the trier of fact . . .." *Estate of Herbert*, 90 Hawai‘i at 466, 979 P.2d at 62 (citations omitted).

74. Under HRE Rule 201, "if requested by a party and supplied with the necessary information," "[a] court *shall* take judicial notice" of a fact that "is not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." HRE 201(b), (d) (emphasis added). If a court is supplied with the necessary information and the information meets the criteria stated in the Rule, judicial notice is mandatory.

75. Judicial notice of certain adjudicative facts was taken in this proceeding.

76. Judicial notice of certain representations in this proceeding was not accepted because those representations did not meet the standard under HRE Rule 201.

IX. LEGAL FRAMEWORK

A. BURDEN OF PROOF

77. The BLNR rules provide that "[t]he applicant shall have the burden of demonstrating that a proposed land use is consistent with" the criteria set forth in HAR § 13-5-30(c). As the party proposing a land use in the Conservation District, UH Hilo is clearly the "applicant" in this matter.

78. HAPA states that, "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." HRS § 91-10(5).

79. HAR § 13-1-35(k) similarly provides:

> "The party initiating the proceeding and, in the case of proceedings on alleged violations of law, the department, shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The quantum of proof shall be a **preponderance of the evidence**." (emphasis added)

80. A "proceeding" is defined as:

> "…the board's consideration of the relevant facts and applicable law and action thereon with respect to a particular subject within the board's jurisdiction, initiated by a filing or submittal or request or a board's notice or order, and shall include but not be limited to:
>
> * * *
>
> (3) Petitions or applications for the granting or declaring of any right, privilege, authority, or relief under or from any provision of law or any rule or requirement made pursuant to authority granted by law . . . ."
>
> HAR § 13-1-2.

81. UH Hilo has the initial burden of proof in showing that its CDUA warrants approval upon consideration of the criteria in HAR § 13-5-30(c).

82. Petitioners and Opposing Intervenors are required to carry the burden of proof on issues asserted by them. In particular, to the extent that Petitioners and Opposing Intervenors are claiming to assert native Hawaiian rights based on customary and traditional practices, the burden is on them to establish that the claimed right is constitutionally protected as a customary and traditional native Hawaiian practice. The standards for establishing constitutional protection of practices that are claimed to be customary and traditional are set forth in *State v. Hanapi*, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998) and *State v. Pratt*, 127 Hawai'i 206, 277 P.3d 300 (2012), and are discussed in detail below.

B. STATE CONSTITUTIONAL AUTHORITY

83. Article XI, section 1 of the Hawai'i State Constitution provides:

> "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."

84. Article XI, section 9 of the Hawai'i State Constitution provides:

> "Each Person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. . ."

85. Article XII, section 7 of the Hawai'i State Constitution provides:

> "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the rights of the State to regulate such rights."

86. In explaining this proviso, the framers of Article XII, section 7 explained that, while the state has the power and obligation to protect native Hawaiian traditional and customary practices, the state also has the power to regulate those rights: "Your Committee did not intend these rights to be indiscriminate or abusive to others. While your Committee recognizes that, historically and presently, native Hawaiians have a deep love and respect for the land, called aloha aina, reasonable regulation is necessary to prevent possible abuse as well as interference with these rights." Stand. Comm. Rep. No. 57, reprinted in 1 *Proceedings of the Constitutional Convention of Hawai‘i of 1978*, at 639.

C. STATUTE AND ADMINISTRATIVE RULES

87. Under Hawai‘i’s Land Use Law, HRS Chapter 205, the Conservation District is defined to include:

> …areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space and areas whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept.
>
> HRS § 205-2(e).

88. The DLNR administers public lands "through appropriate management and use" within the Conservation District pursuant to Chapter 183C of the Hawai‘i Revised Statutes. Chapter 183C articulates this public policy:

> The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State’s fragile natural ecosystems and the sustainability of the State’s water supply. It is therefore, the intent of the legislature to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

HRS § 183C-1.

89. In evaluating the merits of a proposed land use in the Conservation District, the Board shall consider the following eight criteria found in HAR § 13-5-30(c):

1. The proposed land use is consistent with the purpose of the conservation district;

2. The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;

3. The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;

4. The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;

5. The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;

6. The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;

7. Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and

8. The proposed land use will not be materially detrimental to the public health, safety, and welfare.

90. Conservation District lands are categorized into subzones. HAR § 13-5-10.

91. The TMT Project is proposed to be located in the Resource subzone. The Resource subzone includes, *inter alia*, lands (1) necessary for providing future parkland and lands presently used for national, state, county, or private parks; (2) suitable for growing and harvesting of commercial timber or other forest products; and (3) suitable for outdoor recreational uses. HAR § 13-5-13.

92. Under the version of HAR § 13-5-13 that was in effect when the CDUA was submitted to the BLNR, the stated objective of the Resource subzone was to develop, with proper management, areas to ensure sustained use of the natural resources of areas within that subzone. Under the recently amended version of that Section, the stated objective of the Resource subzone is to ensure, with proper management, the sustainable use of the natural resources of those areas.

93. Identified permissible land uses in the Resource subzone include, among others, the following: (1) aquaculture; (2) artificial reefs; (3) sustainable commercial forestry; (4) marine construction, such as dredging and filling; (5) mining and extraction of natural

resources; and (7) single family residences. HAR § 13-5-24.

94. Astronomy facilities are expressly identified as permissible land uses in the Resource subzone (R-3). HAR § 13-5-24.

95. The legislature specifically enacted statutes intended to ensure that land development in the State is "for those uses for which they are best suited[.]" S. Stand. Comm. Rep. 104, 1961 Senate Journal 1027; *accord* HRS § 183C-3 (giving DLNR the authority to zone and define land use within conservation districts).

96. In so doing, the legislature specifically defined "land use" as including "[t]he construction, reconstruction, demolition, or alteration of any structure, building, or facility on land[.]" HRS § 183C-2; *accord* HAR § 13-5-2. In keeping with the legislative intent and specific delegation of authority, DLNR identified astronomy facilities within the Resource subzone. HAR § 13-5-24(a), (c).

97. In other words, when the governing administrative rules and the legislative intent and plain language of the statute are read together, it is clear that astronomy facilities were identified by DLNR precisely because they are uses for which land within the Resource subzone is "best suited." *See, e.g.*, S. Stand. Comm. Rep. 104, 1961 Senate Journal 1027; *accord* HRS § 183C-3; HAR § 13-5-24(a).

98. Astronomy 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.

D. CASE LAW

i. PASH

99. In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995) ("***PASH***"), the Hawai'i Supreme Court stated:

> "The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights . . . necessarily allows the State to permit development that interferes with such rights in certain circumstances . . . Nevertheless, the State is obligated to protect the reasonable exercise of customary and traditionally exercised rights of Hawaiians to the extent feasible."
>
> *PASH,* 79 Hawai'i at 450 n.43, 903 P.2d at 1271 n.43 (citations omitted).

100. Under *PASH,* to fall within the protection of Hawai'i law, Hawaiian customary usage must have been established in practice by November 25, 1892. *Id.* at 447, 903 P.2d at 1268. Moreover, the ancient Hawaiian usage must be based on actual traditional practice in a particular area of undeveloped land, and cannot be based on assumptions or conjecture. *Id.* at 449, 903 P.2d at 1270. *See also Id.* at 447, 903 P.2d at 1268 ("We stress

that unreasonable or non-traditional uses are not permitted under today's ruling.").

101. The State therefore retains the responsibility to reconcile competing interests under article XII, Section 7, and the Court in *PASH* recognized that even certain traditional and customary practices may be subject to regulation. *See id* at 447, 903 P.2d at 1268 (citing *United States v. Winans*, 198 U.S. 371, 379 (1905) (noting that the trial court held that it would not be justified in issuing process to compel land owner to permit native Americans to make a camping ground while engaged in fishing permitted by treaty). *See, also Id.* at 447 n. 38, 903 P.2d at 1268 no. 38 (citing *Lyng v. Northwest Cemetery Protective Ass'n.*, 485 U.S. 439 (1988) (holding that attempts by religious practitioners to exclude all other uses, including timber harvesting, from sacred areas of public lands unreasonable traditional practice); *Oregon v. Smith*, 494 U.S. 872 (1990) (holding that the use of the hallucinogenic drug peyote unreasonable traditional practice)).

102. Thus, the Hawai'i Supreme Court recognized in *PASH* that the rights granted under Article XII, Section 7 are not absolute, and the "State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed." *Id.* at 451, 903 P.2d at 1272.

ii. Hanapi

103. In *State v. Hanap*i, 89 Hawai'i 177, 970 P.2d 485 (1998) ("***Hanapi***"), the Hawai'i Supreme Court ruled that a person claiming constitutional protection for a right under *PASH* has the burden of proving the existence of such a right.

103A. *Hanapi* was a criminal prosecution. In a CDUA, under *Ka Pa'akai o Ka 'Āina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000) ("***Ka Pa'akai***"), the BLNR, prior to granting a permit, must establish what protected traditional and customary rights might be affected by the project, even if there is no opposition to the permit and no one comes forward to claim any rights. In the context of the present application, where exhaustive efforts were made to investigate and determine the extent of traditional and customary practices even before the application was filed, and a contested case hearing has been held, *Hanapi*'s burden of proof should apply to any new claims of traditional and customary rights asserted by a party or other individual that were not previously identified by the applicant. In other words, it is the claimant's burden to present evidence sufficient to establish the existence of the right; it is not the applicant's burden to negate the claimed right.

104. To prove the existence of a right that is entitled to constitutional protection under *PASH*, the party claiming that right must show, at a minimum, the following three factors:

> First, he or she must qualify as a "native Hawaiian" within the guidelines set out in *PASH*...*PASH* stated that those persons who are "descendants of native Hawaiians who inhabited the island prior to 1778," and who assert otherwise valid customary and traditional Hawaiian rights are entitled to [constitutional]

protection, regardless of their blood quantum.

> Second, once [a person claiming a *PASH* right] qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice…
>
> Finally, a [person] claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property."

Hanapi, 89 Hawai‘i at 177, 970 P.2d at 494 (citations and emphasis omitted).

105. Under the Hawai‘i Supreme Court's holding in *Hanapi*, "[t]o establish the existence of a traditional or customary native Hawaiian practice, . . . there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice." *Id.* at 187, 970 P.2d at 495 (footnote omitted).

iii. Pratt

106. In *State v. Pratt*, 127 Hawai‘i 206, 277 P.3d 300 (2012) ("***Pratt***") the Hawai‘i Supreme Court held that even if a person meets all three elements of the *Hanapi* test, the rights articulated in article XII, section 7 are not absolute and are explicitly "subject to the right of the State to regulate such rights." *Id.* at 214, 277 P.2d at 308.

107. The Court observed that "A common thread tying all of these cases together [*i.e.*, *PASH; Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Haw. 1, 656 P.2d 745 (1982); and *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992)] is an attempt to balance the protections afforded to Native Hawaiians in the State, while also considering countervailing interests." *Pratt*, 127 Hawai‘i at 215, 277 P.2d at 309.

108. Under *Pratt*, the balancing of interests must consider the *totality of the circumstances*, including *all* of the parties' respective interests. *Id.* at 217, 277 P.3d at 311.

iv. Ka Pa‘akai

109. In *Ka Pa‘akai o Ka ‘Āina v. Land Use Comm'n*, 94 Hawai‘i 31, 7 P.3d 1068 (2000) ("***Ka Pa‘akai***"), the Hawai‘i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" *Id.* at 46-47, 7 P.3d at 1083-84.

110. Under *Ka Pa‘akai*, an agency, in order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, must examine, and make specific findings and conclusions as to:

> (1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native

Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (footnotes omitted).

111. A *Ka Pa'akai* analysis may be conducted by an agency within the context of a contested case hearing. *See generally, Id.* (analyzing the Land Use Commission's findings of fact and conclusions of law following contested case hearing).

v. Morimoto

112. In *Morimoto v. BLNR*, 107 Hawai'i 296, 113 P.3d 172 (2005) ("***Morimoto***"), the Hawai'i Supreme Court held:

> [W]hen an applicant submits its application for a CDUP, the public and interested parties know that BLNR will evaluate the application in accordance with the eight criteria in HAR § 13-5-30(c), that BLNR will look to any draft EIS or EA that must be submitted as part of the application, and that BLNR will incorporate any representations in the EIS or EA (relevant to mitigation) as a condition of the CDUP. These rules provide sufficient guidance to CDUP applicants and the public, offsetting the threat of "unbridled discretion."
>
> *Morimoto*, 107 Hawai'i at 304, 113 P.3d at 180 (citation omitted).

113. BLNR may properly consider mitigation measures in an EIS when reviewing an application for a CDUP to determine if it is consistent with the criteria set forth in HAR § 13-5-30(c). *Id.* at 302-04, 113 P.3d at 178-80.

vi. Mauna Kea Anaina Hou

114. In *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai'i 376, 363 P.3d 224 ("***Mauna Kea Anaina Hou***"), the Hawai'i Supreme Court held that where a party is entitled to a contested case hearing before the BLNR on a CDUA, due process requires that the contested case hearing be held prior to the BLNR voting on the issuance of a CDUP.

vii. Kilakila 'O Haleakalā

115. In *Kilakila 'O Haleakalā v. Bd. of Land and Natural Resources*, 138 Hawai'i 383, 382 P.3d 195 (2016) ("*Kilakila*"), the Hawai'i Supreme Court affirmed the BLNR's findings and conclusions with respect to the issuance of a CDUP for a proposed advanced solar telescope in the general subzone of the conservation district near the summit of Haleakalā and within the 18.166-acre Haleakalā High Altitude Observatory ("**HHAO**").

116. The Court held that the BLNR properly analyzed all eight criteria under HAR § 13-5-30(c), and that the evidence supported BLNR's findings and conclusions with respect to the five criteria in HAR § 13-5-30(c) at issue on appeal: HAR § 13-5-30(c)(1), (2), (4), (5), and (6). *Id.* at 402-08, 382 P.3d at 214-20.

117. With respect to HAR § 13-5-30(c)(1) and (2) ("The proposed land use is consistent with the purpose of the conservation district" and "The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur"), the Court held that BLNR, regardless of a telescope's physical characteristics, may properly determine that a telescope is consistent with the purpose of the conservation district and applicable subzone since the BLNR rules specifically permit astronomy facilities in certain subzones and "do not specify a limit as to size, appearance, or other characteristics" of an astronomy facility. *Kilakila*, 138 Hawai‘i at 408, 382 P.3d at 220. The Court further held that BLNR may properly conclude that a telescope complies with the broad purposes of the statutes and rules regulating conservation districts, including BLNR's mandate to manage natural and cultural resources to "promote their long-term sustainability and the public health, safety, and welfare". *Id.*

118. With respect to HAR § 13-5-30(c)(4) ("The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community or region"), the Court held that:

    a. While the BLNR was required to consider the findings of the project EIS, "it was not bound by these findings and still retained discretion over its decision." *Kilakila*, 138 Hawai‘i at 402, 382 P.3d at 214 (citing *Mauna Kea Power Co. v. Bd. Of Land & Natural Res.*, 76 Hawai‘i 259, 265, 874 P.2d 1084, 1090 (1994) (affirming the BLNR's decision despite conflicting conclusions in EIS));

    b. The impacts of a project must be viewed within the context of the applicable area. *Id.* at 403, 382 P.3d at 215 (upholding the BLNR's analysis that the impact of the ATST Telescope on cultural and visual resources would be incremental and not substantial because the ATST Telescope "must be viewed in the context of the HO," which housed astronomy facilities since the 1950s, was created specifically for astronomy uses, and currently housed eleven facilities.);

    c. The BLNR may consider that the level of impacts on natural resources of a project would be substantially the same even in the absence of the project;

    d. The BLNR may consider the various mitigating measures proposed for a project including the compact design of the telescope, creating a native Hawaiian working group, setting aside areas solely for use by native Hawaiians, removing unused facilities, and decommissioning the ATST Telescope within 50 years. *Id.* at 404, 382 P.3d at 216); and

    e. The BLNR may consider the scientific, cultural, and educational benefits of a project as mitigating effects under HAR § 13-5-30(c)(4) (*i.e.*, the "scientific,

economic, and educational benefits" of the ATST Telescope, the expected "advancement of scientific knowledge" and the opportunity to "foster a better understanding of the relationships between native Hawaiian culture and science"), even if those factors are not specifically set forth in HAR § 13-5- 30(c) *Id.*

119. With respect to HAR § 13-5-30(c)(5) ("The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels"), the Court held that under this criterion, the BLNR may focus its analysis on the permitted land use within the context of a specific area within a Conservation District designated for similar uses (*i.e.*, the Court concluded that the BLNR's interpretation of its own rule as limiting its consideration only to the "locality" of the telescope site and the HO area as the "surrounding area" was not clearly erroneous because the telescope would be located in a small subsection of the HO site, which is a clearly defined, specialized area set aside for astronomical purposes, is the only site within Haleakalā used for that purpose, and the BLNR was not required to consider the broader "surrounding area" of Haleakalā National Park). *Id.* at 406-07, 382 P.3d at 218- 19.

120. With respect to HAR § 13-5-30(c)(6) ("The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable"), the Court held that even though the BLNR may conclude that a project, standing alone, does not "enhance the natural beauty or open space characteristics" of a specific site, the BLNR may properly consider whether the project is similar to existing facilities (and thus will preserve the existing physical and environmental aspects of the land), and the BLNR may also properly consider the project's mitigation commitments in determining whether the proposed land use meets this criteria.

X. DISCUSSION AND CONCLUSIONS

A. THE TMT PROJECT SATISFIES THE EIGHT CRITERIA OF HAR § 13- 5-30(C)

121. HAR § 13-5-30(c) states that "[i]n evaluating the merits of a proposed land use, the department or board shall apply the following criteria," and enumerates the list of eight criteria quoted above.

122. As set forth herein, the TMT Project satisfies the eight criteria for a BLNR-approved CDUP under HAR § 13-5-30(c). WDT White at 13; Ex. A-31; (White) Tr. 10/20/16 at 218:3- 28:5; (White) Tr. 10/24/16 at 24:17-23.

123. Many of the Petitioners, Opposing Intervenors, and their witnesses claimed during their testimonies that the TMT Project does not comply with the eight criteria in HAR § 13-5-30. However, in offering their respective testimonies, the Petitioners, Opposing Intervenors, and their witnesses repeatedly admitted that they did not even consider or read the Hawai'i Supreme Court's recent decision in *Kilakila 'o Haleakalā v. Board of Land and Natural Resources*, 138 Hawai'i 383, 382 P.3d 195 (2016), which extensively