

CARLSMITH BALL LLP

IAN L. SANDISON 5597
TIM LUI-KWAN 2271
JOHN P. MANAUT. 3989
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2016 AUG - 1 P 4: 01

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

CASE NO. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO'S **OBJECTIONS TO
IMMATERIAL, IRRELEVANT AND
UNDULY REPETITIOUS WITNESS
TESTIMONY; DECLARATION OF
COUNSEL; EXHIBIT "1"; CERTIFICATE
OF SERVICE**

**THE UNIVERSITY OF HAWAI'I AT HILO'S OBJECTIONS TO IMMATERIAL,
IRRELEVANT AND UNDULY REPETITIOUS WITNESS TESTIMONY**

Pursuant to Minute Order 13, Applicant UNIVERSITY OF HAWAI'I AT HILO (the "University") submits its objections to the inclusion of immaterial, irrelevant, duplicative and repetitious witness testimony in the upcoming evidentiary hearing on the merits. The University respectfully requests that the Board of Land and Natural Resources ("Board"), through its Hearing Officer, issue an order limiting the introduction of immaterial, irrelevant, and duplicative witness testimony pursuant to its express authority to "limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue" "[t]o avoid unnecessary or repetitive evidence[.]" Haw. Admin R. ("HAR") § 13-1-32(h).

I. BACKGROUND

On June 17, 2016, a hearing was held to evaluate the multiple motions, applications, or petitions submitted by non-parties requesting to intervene in this proceeding. After considering the record and arguments presented, the Hearing Officer found that eighteen (18) of the applicants met the requirements of HAR § 13-1-31 and their respective requests to intervene were granted. As a result, twenty-five (25) parties, exclusive of the University, are now participating in this proceeding, twenty-three (23) of which oppose the granting of the Conservation District Use Application (“**CDUA**”) (referred to collectively as the “**Opposing Parties**”).¹

At the hearing, the Hearing Officer set a deadline of July 18, 2016 for parties to submit their respective witness lists, providing the names of their anticipated witnesses and the subject-matter of their testimony. This deadline was confirmed in Minute Order No. 13, filed on July 21, 2016 [Doc. 115], with the Department of Land and Natural Resources (“**DLNR**”). To date, the University has received witness lists from 16 of the Opposing Parties, which combined, propose a total of 79 witnesses (the “**Proposed Witnesses**”). *See* Exhibit 1. By this Objection, the University requests that, in the interest of justice and efficiency, the Hearing Officer exercise its discretion to exclude immaterial, irrelevant, and unduly repetitious witnesses from providing testimony and to limit admitted witnesses’ testimony to only such topics and subject-matter that are relevant to the issue in this proceeding (*i.e.* whether the proposed use in the CDUA comports

¹ The Opposing Parties are comprised of the original Petitioners: Mauna Kea Anaina Hou, Kealoha Pisciotta, Clarence Kukauakahi Ching, Flores-Case Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance; along with newly admitted parties: Mehana Kihoi, C.M. Kaho’okahi Kanuha, Harry Fergerstrom, Joseph Kualii Lindsey Camara, Jennifer Leina’alo Sleightholm, Maelani Lee, Cindy Freitas, Richard Maele DeLeon, Temple of Lono, Kalikolehua Kanaele, Stephanie-Malia: Tabbada, Tiffnie Kakalia, Glen Kila, Dwight J. Vicente, and Brannon Kamahana Kealoha.

with the standards for conservation district use permits and non-duplicative.

II. STANDARDS

A. PREHEARING CONFERENCE; EXCHANGE OF EXHIBITS; BRIEFS.

Under HAR § 13-1-36, the Hearing Officer may:

hold or cause to be held pre-hearing conferences with the parties for the purpose of formulating or **simplifying the issues, written testimony**, setting of schedules, exchanging names or witnesses, **limitation of number of witnesses, and such other matters as may expedite the orderly conduct and disposition of the proceeding as permitted by law.**

HAR § 13-1-36(a) (emphasis added).

B. EVIDENCE

Hawai‘i Revised Statutes (“HRS”) § 91-10(1) provides that “any oral or documentary evidence may be received [in contested cases], but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence[.]” Under HAR § 13-1-35(a), “[t]he presiding 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.” (Emphasis added). Additionally, HAR § 13-1-32(h) authorizes the presiding officer to “**limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue**” “[t]o avoid unnecessary or repetitive evidence[.]” (Emphasis added).

III. IMMATERIAL, IRRELEVANT AND UNDULY REPETITIOUS TESTIMONY SHOULD BE EXCLUDED

Although the rules of evidence governing administrative hearings are less formal than those governing judicial proceedings, they still require that evidence presented before an agency comport with the basic limitations of relevancy, materiality, and repetition as defined in the Hawai‘i Rules of Evidence (“HRE”). See *Loui v. Bd. of Med. Examiners*, 78 Hawai‘i 21, 31,

889 P.2d 705, 715 (1995) (holding that because HRS § 91-10(1) provides for the exclusion of irrelevant evidence, HRE Rule 401, which defines relevant evidence, applies to administrative hearings); *see also Dependents of Cazimero v. Kohala Sugar Co.*, 54 Hawai'i 479, 482-83, 510 P.2d 89, 92 (1973) (holding that any and all evidence should be admitted during the administrative hearing limited only by considerations of *relevancy, materiality, and repetition*). Under HRS § 91-10(1), HAR § 13-1-35(a) authorizes the presiding officer to “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 § 13-1-32(h) also authorizes presiding officers to “limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue” “[t]o avoid unnecessary or repetitive evidence[.]”

The sole issue for resolution in this proceeding is whether or not the University's proposed land use is consistent with the criteria for approval of a CDUA as set forth in HAR § 13-5-30(c). Given the number of proposed witnesses—many of whom have no relevance to these proceedings—the contested hearing proceeding will quickly become inundated and overwhelmed with immaterial, irrelevant and unduly repetitious testimony if the Hearing Officer does not adopt the University's requested limitations. To date, the Opposing Parties have submitted 79 names of prospective witnesses, approximately three times the number of witness submitted by the University. This imbalance is not the result of zealous advocacy on behalf of the Opposing Parties nor does it suggest a lack of evidence on the side of the University. Rather, many of witnesses identified by the Opposing Parties appear to be included for the sole purpose of distracting from the issues at hand, intentionally delaying the approval process and possibly harassment. Moreover, the subject matter of the testimony of the Opposing Parties' 79 proposed

witnesses is not discernible from their witness lists. Therefore, the University reserves the right to file additional motions and/or make further objections once the Opposing Parties provide the written direct testimony for those witnesses.

Indicative of the Opposing Parties' improper motives is the inclusion of several governmental officials in the lists of proposed witnesses. For example, the Opposing Parties have indicated that they intend to call Governor David Ige, among other public officials, to testify as a witness. *See* Exhibit 1. There is no reason why Governor Ige should be called as a witness in this proceeding. Governor Ige was not in office when the University submitted its application to DLNR or even when the previous contested hearing took place. There also is no indication that he is able to testify to any of the eight criteria set forth in HAR § 13-5-30(c). Calling Governor Ige and other public officials to testify would serve no purpose other than to harass those witnesses and further politicize this proceeding by raising nonjusticiable issues related to, *inter alia*, sovereignty and the validity of the State of Hawai'i that are beyond the jurisdiction of the Board.² An order excluding immaterial, irrelevant, and unduly repetitious witness testimony, especially from public officials who have no relevant testimony to offer, is critical to maintaining the integrity of this contested hearing proceeding.

The contested hearing process is one in which procedures are put in place that "are designed to ensure that the record is fully developed and subjected to adversarial testing[.]" *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 391, 363 P.3d 224, 239 (2015). It is not a forum for grandstanding on political questions that are beyond both the scope of this proceeding and the jurisdiction of the Board. A record cannot be properly developed

² Such intentions are also indicated in Temple of Lono Opposition to PUEO Motion to Set the Issues [Doc. 119] at 7, which asserts that "[t]he treaties, laws, and standards for establishing a government's existence can be applied to the relevant facts to determine whether the Kingdom meets the requirements as a matter of law."

without the limitations of relevancy, materiality, and repetition. Without those safeguards, the record becomes a convoluted transcript of immaterial, irrelevant, and unduly repetitious testimony. And any testimony that could have been edifying or helpful gets drowned out in a cacophony of unnecessary distractions. The University understands that there are parties with serious questions regarding whether or not the eight criteria contained in HAR § 13-5-30(c) are satisfied. In filing this objection, the University is not seeking to limit any party's right to present relevant, non-duplicative evidence or hinder any party's opportunity to be heard with respect to legitimate and relevant points pertaining to the eight criteria. What the University is asking, and what is consistent with doing substantial justice, is that an order excluding immaterial, irrelevant, and unduly repetitious witness testimony be issued, so that this contested hearing process can properly function to allow for a full and fair consideration of the *relevant* evidence in a timely manner.

IV. CONCLUSION

The University respectfully requests the Board effectuate the purpose behind HAR §§ 13-1-32(h) and 13-1-35(a), and avoid admitting immaterial, irrelevant, and unduly repetitious witness testimony evidence to the detriment of the contested hearing proceeding. The Hearing Officer has absolute discretion and authority to "limit the number of witnesses, the extent of direct or cross examination or the time for testimony upon a particular issue" "[t]o avoid unnecessary or repetitive evidence[.]" HAR § 13-1-32(h). The University reserves the right to file motions and to make further objections on these grounds once the parties have submitted their witnesses' written direct testimony.

DATED: Honolulu, Hawai'i, August 1, 2016.



IAN L. SANDISON

TIM LUI-KWAN

JOHN P. MANAUT

Attorneys for Applicant

UNIVERSITY OF HAWAI'I AT HILO

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

CASE NO. BLNR-CC-16-002

DECLARATION OF COUNSEL;
EXHIBIT "1"

DECLARATION OF COUNSEL

I, IAN L. SANDISON, declare:

1. I am a partner at the law firm of Carlsmith Ball LLP, counsel for UNIVERSITY OF HAWAI'I AT HILO, in the above-caption matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon my personal knowledge
3. Attached hereto as **Exhibit 1** is a true and correct inventory, prepared by Carlsmith Ball LLP, of the proposed witnesses for the twenty-three (23) intervening parties that oppose the granting of the Conservation District Use Application as contained in the witness lists submitted in the instant proceeding on July 18, 2016.

This declaration is made upon personal knowledge and is filed pursuant to Rule 7(b) of the Rules of the Circuit Courts of the State of Hawai'i. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 1st day of August, 2016.



IAN L. SANDISON

EXHIBIT 1

EXHIBIT 1

No.	Calling Party	Witness	Area of Testimony
1.	Mauna Kea Anaina Hou, Et Al	Davianna McGregor, PhD	
2.	Mauana Kea Anaina Hou, Et Al	Manulani Aluli- Meyer, Ed.D.	
3.	Mauana Kea Anaina Hou, Et Al	Ku Kahakalau, Ph.D.	
4.	Mauana Kea Anaina Hou, Et Al	Marie Alohalani Brown, Ph.D.	
5.	Mauana Kea Anaina Hou, Et Al	Jon Osorio, Ph.D.	
6.	Mauana Kea Anaina Hou, Et Al	Peter Mills, Ph.D.	
7.	Mauana Kea Anaina Hou, Et Al	Ron Englund, Ph.D.	
8.	Mauana Kea Anaina Hou, Et Al	Eric Hansen, M.S.	
9.	Mauana Kea Anaina Hou, Et Al	Mililani B. Trask, Esq.	
10.	Mauana Kea Anaina Hou, Et Al	Kehaunani Abad, Ph.D.	
11.	Mauana Kea Anaina Hou, Et Al	Kepa Maly	
12.	Mauana Kea Anaina Hou, Et Al	Dr. David K. Liu	
13.	Mauana Kea Anaina Hou, Et Al	Kealoha Pisciotta	
14.	Mauana Kea Anaina Hou, Et Al	Laulani Teale	
15.	Mauana Kea Anaina Hou, Et Al	Keomailani Van Gogh	
16.	Mauana Kea Anaina Hou, Et Al	Deborah Ward	
17.	Mauana Kea Anaina Hou, Et Al	Paul K. Neves	
18.	Mauana Kea Anaina Hou, Et Al	Clarence Kukauakahi Ching	
19.	Mauana Kea Anaina Hou, Et Al	E. Kalani Flores	

20.	Mauana Kea Anaina Hou, Et Al	Pualani Case	
21.	Mauana Kea Anaina Hou, Et Al	Hawane Rios	
22.	Mauana Kea Anaina Hou, Et Al	Kapulei Flores	
23.	Mauana Kea Anaina Hou, Et Al	Ruth Aloua	
24.	Mauana Kea Anaina Hou, Et Al	Diana LaRose	
25.	Mauana Kea Anaina Hou, Et Al	Candace Fujikane, Ph.D.	
26.	Mauana Kea Anaina Hou, Et Al	Marti Townsend, Esq.	
27.	Mauana Kea Anaina Hou, Et Al	Jesse Potter	
28.	Mauana Kea Anaina Hou, Et Al	Narrissa Spies, M.S.	
29.	Mauana Kea Anaina Hou, Et Al	David James Vincent, M.S.	
30.	Mauana Kea Anaina Hou, Et Al	Leslie Kondo, Esq.	
31.	Mauana Kea Anaina Hou, Et Al	Jan Yamane, Esq.	
32.	Mauana Kea Anaina Hou, Et Al	Marion Higa	
33.	Mauana Kea Anaina Hou, Et Al	Governor David Ige (and/or Governor's representative)	
34.	Mauana Kea Anaina Hou, Et Al	U.H. Chancellor David Lassner	
35.	Mauana Kea Anaina Hou, Et Al	U.H. Hilo Chancellor Donald Straney	
36.	Mauana Kea Anaina Hou, Et Al	BLNR Chair/DLNR Director Suzanne Case	
37.	Mauana Kea Anaina Hou, Et Al	Stanley Roehrig, Esq./BLNR Board Member	
38.	Mehana Kihoi	Keawe'aimoku Kaholokula	
39.	Mehana Kihoi	Ruth Aloua	
40.	Mehana Kihoi	Hawane Rios	
41.	Mehana Kihoi	Leina'ala Sleightholm	

42.	Mehana Kihoi	Sarah P. Kihoi	
43.	C.M. Kaho'okahi Kanuha	Dr. Keanu Sai	
44.	C.M. Kaho'okahi Kanuha	Kaleikoa Ka'eo	
45.	C.M. Kaho'okahi Kanuha	Council Member Dru Mamo Kanuha	
46.	Cindy Freitas	Mehana Kihoi	
47.	Cindy Freitas	Kuuipo Freitas	
48.	William K. Freitas	Ka'ipono Benson	
49.	William K. Freitas	Bruce Richards	
50.	William K. Freitas	Kala Freitas	
51.	William K. Freitas	Bronson K. Kobayashi	
52.	William K. Freitas	Joseph I. Henderson	
53.	William K. Freitas	La Kea Trask	
54.	William K. Freitas	Luana Neff	
55.	William K. Freitas	Greg Neff	
56.	William K. Freitas	Greg B. Johnson	
57.	William K. Freitas	Sally Promey	
58.	William K. Freitas	Ronald Fujioshi	
59.	William K. Freitas	Hualalai K. Keohulua	
60.	William K. Freitas	Alohilani O Tahiti Keohulua	
61.	William K. Freitas	Mehana Kihoe	
62.	William K. Freitas	E. Kalani Flores	
63.	Richard Maele DeLeon	Earl E. DeLeon	
64.	Richard Maele DeLeon	Alison Yahna	

65.	Temple of Lono	Kahuna Palani Tamehemaha Kameheloha Anuumealani Nobriga	The traditional faith of the Hawaiian people and the relevance of that faith to the decision the Board of Land and Natural Resources is being asked to make regarding a CDUA for the Thirty Meter Telescope on Mauna Kea.
66.	Kalikolehua Kanaele	Tom Whitney	Sacredness of Mauna Kea and the participants
67.	Kalikolehua Kanaele	Kahu O TeRangi Ruwhiu	Mauna Kea belongs to the Kanaka Maoli of the Polynesian Triangle
68.	Kalikolehua Kanaele	Leighton Tseu	
69.	Tiffnie Kakalia	Dr. J. Keawe'aimoku Kaholokula, PhD	
70.	Tiffnie Kakalia	Dr. T. Noelani Pereira, Speed.	
71.	Tiffnie Kakalia	Kamahi Taejon	
72.	Brannon Kama Hana Kealoha	Kim Alamo Kalama	Kuku Kalama was western degrees in Education and is recognized in the fields of Hawaiian Language, Hula, Melee, Customs and Practices as an unique expert.
73.	Brannon Kama Hana Kealoha	Marie Alohalani Brown	Dr. Brown has systematically studied the dynamicity, evolution, and continuity of Ho'omana Hawai'i, Hawaiian Religious/Spiritual/Scientific practices.
74.	Brannon Kamahana Kealoha	Jimmy Medeiros	
75.	Brannon Kamahana Kealoha	Clarence Medeiros	
76.	Brannon Kamahana Kealoha	Glen Kila	
77.	Brannon Kamahana Kealoha	Donna Kealoha	
78.	Brannon Kamahana Kealoha	Palikapu Dedman	
79.	Brannon Kamahana Kealoha	Analu Josephides	

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

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

CASE NO. BLNR-CC-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

JUDGE RIKI MAY AMANO (Ret.)
rma3cc@yahoo.com
Hearing Officer

JULIE H. CHINA, Deputy Attorney General
julie.h.china@hawaii.gov
*Counsel for the BOARD OF LAND AND
NATURAL RESOURCES*

J. DOUGLAS ING, ESQ.
douging@wik.com
ROSS T. SHINYAMA, ESQ.
rshinyama@wik.com
*Counsel for TMT INTERNATIONAL
OBSERVATORY, LLC*

MICHAEL CAIN
Office of Conservation and Coastal Lands
1151 Punchbowl Street, Room 131
Honolulu, HI 96813
michael.cain@hawaii.gov
*Custodian of the Records
(original + digital copy)*

RICHARD NAIWIEHA WURDEMAN, ESQ.
rnwurdeman@rnwlaw.com
*Counsel for Petitioners MAUNA KEA ANAINA
HOU; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J.
WARD; PAUL K. NEVES; and KAHEA: THE
HAWAIIAN ENVIRONMENTAL ALLIANCE*

LINCOLN S.T. ASHIDA, ESQ.
isa@torkildson.com
NEWTON J. CHU, ESQ.
njc@torkildson.com
*Counsel for PERPETUATING UNIQUE
EDUCATIONAL OPPORTUNITIES (PUEO)*

JOSEPH KUALII LINDSEY CAMARA
kualiic@hotmail.com

HARRY FERGERSTROM
hankhawaiian@yahoo.com

WILLIAM FREITAS
pohaku7@yahoo.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

GLEN KILA
makakila@gmail.com

JENNIFER LEINA'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

LANNY ALAN SINKIN, ESQ.
lanny.sinkin@gmail.com

Representative for the Temple of Lono

RICHARD L. DELEON
kekaulike@msn.com

CINDY FREITAS
hanahanai@hawaii.rr.com

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

KALIKOLEHUA KANAEL
akulele@yahoo.com

MEHANA KIHAI
uhiwai@live.com

MAELANI LEE
maelanilee@yahoo.com

STEPHANIE-MALIA TABBADA
stabbada@hawaiiantel.net

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(no email; mailing address only)

DATED: Honolulu, Hawai'i, August 1, 2016.



IAN L. SANDISON

TIM LUI-KWAN

JOHN P. MANAUT

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO