

YUKLIN ALULI 1428
415-C Uluniu Street
Kailua, Hawai'i 96734
Tel. (808) 262-5900
email: yuklin@kailualaw.com

Dexter K. Kaiama 4249
111 Hekili Street, #A1607
Kailua, Hawai'i 96734
Tel. (808) 284-5675
email: cdexk@hotmail.com

Co-Counsel for Petitioner
KAHEA: The Hawaiian Environmental Alliance,
a domestic non-profit Corporation

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
)	
A Contested Case Hearing Re)	KAHEA: THE ENVIRONMENTAL
Conservation District Use Permit)	ALLIANCE'S SIXTH SUPPLEMENTAL
(COUP) HA-3568 for the Thirty Meter)	EXHIBIT DESIGNATION; EXHIBIT
Telescope at the Mauna Kea Science)	B.53 [David Kimo Frankel - Written
Reserve, Kaohe Mauka, Hamakua)	Direct Testimony]; CERTIFICATE OF
District, Island of Hawai'i, TMK (3) 4-4-)	SERVICE
015:009)	
)	
)	Hearing Officer: Riki J. Amano.
)	
)	
)	
)	

**KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE SIXTH
SUPPLEMENTAL EXHIBIT DESIGNATION; EXHIBIT B.53
[DAVID KIMO FRANKEL - WRITTEN DIRECT TESTIMONY]**

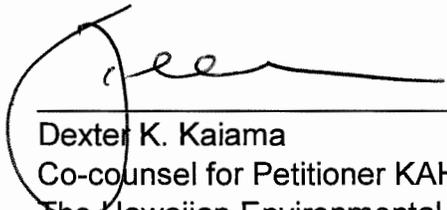
COMES NOW KAHEA: THE ENVIRONMENTAL ALLIANCE, by and through its
above-named counsel, and hereby submits its Sixth Supplemental Exhibit (Exhibit B.53)
Designation.

Exhibit No.	Description	Rec'd Into Evidence
B.53	David Kimo Frankel - Written Direct Testimony	

DATED: Kailua, Hawaii, 1/4/17

131

Yuklin Aluli
 Co-counsel for Petitioner KAHEA
 The Hawaiian Environmental Alliance,
 a domestic non-profit Corporation



Dexter K. Kaiama
 Co-counsel for Petitioner KAHEA
 The Hawaiian Environmental Alliance,
 a domestic non-profit Corporation

Testimony of David Kimo Frankel

Q Please state your name.

A David Kimo Frankel

Q What qualifies you to respond to the testimony of David Callies?

I graduated from the William S. Richardson School of Law at the University of Hawai'i in 1992. I was there the same time as Ian Sandison and worked on the law review with Ian's current wife. I received the American Jurisprudence Awards for Academic Excellence in Real Property I, Constitutional Law I, Torts I, and Criminal Procedure, as well as West Publishing Company's Award for Outstanding Academic Achievement. The UH Law Review published three of my articles. *Enforcement of Environmental Laws in Hawaii*, 16 UH Law Review 85 (Summer 1994); *The Hawaii Supreme Court: An Overview*, 14 UH Law Review 5 (Summer 1992); and *An Analysis of Hawaii's Superfund Law, 1990*, 13 UH Law Review 301 (Summer 1991). The Hawai'i Supreme Court cited the first one as "scholarly writing." *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 416, 235 P.3d 1103, 1128 (2010).

In 1993, I received a master's degree in urban and regional planning. My focus was in land use and environmental planning. As part of the practicum program, I was the primary author of *Hawaii's Conservation District: A Review of the Permitting Process*, A Report to the State of Hawaii Department of Land and Natural Resources, Fall 1992.

I have written a book: PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAI'I (Dolphin Press, 1997).

My litigation experience has involved Hawaii's state land use law, conservation district law, coastal zone management act, environmental impact statement law, historic preservation law, public land law, administrative procedures act, subdivision codes, public trust doctrine, and public nuisance law. I successfully litigated the following cases that resulted in published appellate decisions: *Leslie v. Bd of Appeals of the County of Hawai'i*, 109 Hawai'i 384, 126 P.3d 1071 (2006) (planning director violated provisions of Hawaii's Coastal Zone Management Act and the Hawai'i County Subdivision Control Code); *Kaleikini v. Thielen*, 124 Hawai'i 1, 237 P.3d 1067 (2010) (Board of Land and Natural Resources chair violated the Hawai'i Administrative Procedures Act in a case involving historic preservation); *Kaleikini v. Yoshioka*, 124 Hawai'i 53, 283 P.3d 60 (2012) (the State Historic Preservation Division and the City violated the historic preservation law in approving rail project); *Kaleikini v. Yoshioka*, 129 Hawai'i 454, 283 P.3d 252 (2013) (awarding fees pursuant to the private attorney general doctrine); *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 277 P.3d 279 (2012) (the political question doctrine does not bar a court from determining whether the State is constitutionally obligated to provide sufficient funds for the Department of Hawaiian Home Lands' administrative and operating expenses); *Hall v. Department of Land and*

Natural Resources, 128 Hawai'i 455, 290 P.3d 525 (ICA 2012) (the State Historic Preservation Division violated the historic preservation law when it allowed Church to avoid preparing an archaeological inventory survey); *Kilakila 'O Haleakalā v. Bd of Land & Natural Res.*, 131 Hawai'i 193, 317 P.3d 27 (2013) (the Board of Land and Natural Resources erred in authorizing a 142 foot tall building in the conservation district without first providing for a contested case hearing); *Blake v. County of Kaua'i Planning Comm'n*, 131 Hawai'i 123, 315 P.3d 749 (2013) ("final agency action" has occurred and case is ripe even though project requires approval from other agencies).

I have reviewed the testimony of David Callies and am familiar with his writings.

Q How would you describe David Callies' ideological orientation?

David Callies has his biases – as we all do. David Callies' pro-development bias is well known. I can give you many examples.

He worked for the Land Use Research Foundation, which describes itself as "the only Hawaii based organization devoted exclusively to promoting the interests of the development community, particularly in the areas of land use laws, regulations, and public policy." He was identified as an attorney on the briefs for LURF in *In re Water Use Permit Applications*, 94 Hawai'i 97, 110, 9 P.3d 409, 422 (2000), *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n*, 79 Hawai'i 425, 429, 903 P.2d 1246, 1250 (1995) and in *Unite Here! Local 5 v. City & Cnty. of Honolulu*, 123 Hawai'i 150, 154, 231 P.3d 423, 427 (2010).

He joined in an amicus brief filed by some of the most right-wing organizations in the nation, including the National Federation of Independent Business Small Business Legal Center, Cato Institute, Goldwater Institute, Mountain States Legal Foundation, and the Rutherford Institute.

In 2008, he described the Hawai'i Supreme Court's decision about the public trust doctrine in the *Waiāhole* case as regrettable and said that the court "substitut[ed] a tortured version of the public trust doctrine for our statutory framework and ignor[ed] planning mandates contained in the Water Code. The result is a virtual destruction of private rights in water." He has written that the Hawai'i Supreme Court's public trust analysis "in Waiahole was not prudent." *Water Regulation, Land Use and the Environment*, 30 Hawaii L. Rev. 49, 75.

In June 2010, Callies described his views to Michael Levine of Civil Beat:

He thinks that it's "outrageous" that private landowners have been coerced into providing access to public beaches across their properties for free — rather than forcing the government to condemn an easement and compensate them.

He said conservatives need to take a more active role in shaping the Hawaii Supreme Court, which is where the most contentious land disputes are ultimately

decided. In the 15 years since Ronald Moon became the court's chief justice, Callies said, the usual suspects in anti-development lawsuits — Hawaii Sierra Club, Earthjustice, Office of Hawaiian Affairs and Native Hawaiian Legal Corporation — have won 76 percent of cases they've been party to. The first two environmental advocacy groups have been victorious in 90 percent of their cases, Callies said, and 89 percent of those were overturned lower court decisions.

"Is that a level playing field?" he asked. "You be the judge."

He helped the developer 1250 Oceanside Partners on its infamous Hokulia project. He opposed the Save Sandy Beach Initiative. He has condemned the Hawai'i Supreme Court's decisions in the PASH, *Waiāhole* and Turtle Bay cases. He supported the Public Land Development Corporation.

Q How does the Hawai'i Supreme Court view David Callies' opinions and arguments?

When Herman Lum was the chief justice of the Hawai'i Supreme Court, the court tended to agree with his viewpoint. In the decades since then, however, the Hawai'i Supreme Court has repeatedly rebuffed the arguments made by David Callies. It rejected the arguments that he raised in *Waiāhole*, *PASH* and in *Unite Here!*.

Q Has David Callies ever been wrong?

Sure. We all make mistakes. He claimed that the exemptions provided to the Public Land Development Corporation were the same as those provided to the Hawaii Community Development Authority. He was wrong – as previously pointed out by former HCDA executive director Tony Ching. In fact, a careful reading of HRS § 171C-19¹ and HRS § 206E-7² reveals that the PLDC's exemptions were far more sweeping. To the lay person

1

Notwithstanding section 171-42 and except as otherwise noted in this chapter, projects pursuant to this chapter shall be exempt from all statutes, ordinances, charter provisions, and rules of any government agency relating to special improvement district assessments or requirements; land use, zoning, and construction standards for subdivisions, development, and improvement of land; and the construction, improvement, and sale of homes thereon; provided that the public land planning activities of the corporation shall be coordinated with the county planning departments and the county land use plans, policies, and ordinances.

2

The authority shall establish community development rules under chapter 91 on health, safety, building, planning, zoning, and land use which, upon final adoption of a community development plan, shall supersede all other inconsistent ordinances and rules relating to the use, zoning, planning, and development of land and construction thereon. Rules adopted under this section shall follow existing law, rules, ordinances, and regulations as closely as is consistent with standards meeting minimum requirements of good design, pleasant amenities, health, safety, and coordinated development. The authority may, in the community development plan or by a community development rule, provide that lands within a community development district shall not be developed beyond existing uses or that improvements thereon shall not be demolished or substantially reconstructed, or provide other restrictions on the use of the lands.

the difference might seem subtle, but the difference is quite significant legally. HCDA can develop rules that supersede inconsistent ordinances. In fact, HCDA's rules are quite comprehensive, consisting of approximately 150 pages. PLDC projects, on the other hand, were automatically exempt. The difference between the two is radical. Under the HCDA model, planning and zoning laws are superseded only to the extent that the laws are inconsistent with the rules. Under the PLDC, all the provisions of the land use laws would not apply – all of them.

He also incorrectly assumed that Turtle Bay had all its discretionary permits. Actually, the Turtle Bay project needed to obtain subdivision approval, which is a discretionary approval. Sections 4-403 and 4-404 of the Subdivision Rules and Regulations of the City and County of Honolulu show that the decision to approve a subdivision is a discretionary one.

Q What does the Hawai'i Supreme Court say about Callies' opinion that the public trust doctrine is exclusively connected to water?

The court disagrees. Here is what the court wrote more than a decade ago:

The **scope** of Hawai'i's Public Trust Doctrine is set forth in article XI, section 1 of the Hawai'i Constitution and 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. All public natural resources are held in trust by the State for the benefit of the people.

Morgan v. Planning Dep't, 104 Hawai'i 173, 184 n.12, 86 P.3d 982, 993 (2004) (emphasis added). Although they did not need reach the issue, in their concurring opinion in this case, two justices of the Hawai'i Supreme Court observed:

The public trust doctrine under the Hawai'i Constitution, and the principles that it embodies, applies to the conservation land--the summit of Mauna Kea--involved in this case. This conclusion is supported by the plain language of Article XI, Section 1, the historical context under which this provision was ratified, and this court's precedents.

Mauna Kea Anaina Hou v. Bd. of Land & Natural Res., 136 Hawai'i 376, 407 363 P.3d 224, 255 (2015)(concurring opinion).

Q What is David Callies' opinion as to how intensely the conservation district can be developed?

Here is what he wrote in 2012:

Conservation districts are specially protected by the state, and are governed by the State Department of Land and Natural Resources ("DLNR"). The state seeks 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." Consequently, **virtually no structural development is permitted in the conservation district** (except an occasional single-family house, as noted below), a change from the practice of the LUC in the 1960s and 1970s when recreational facilities, resorts, and a college campus were developed on conservation district land.

40th Anniversary Of The Quiet Revolution In Zoning And Land Use Regulation: Article: It All Began In Hawai'i, 45 J. Marshall L. Rev. 317, 322.



Dec. 31, 2016

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of:) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re:) **CERTIFICATE OF SERVICE**
Conservation District Use Permit)
(COUP) HA-3568 for the Thirty Meter)
Telescope at the Mauna Kea Science)
Reserve, Kahohe Mauka, Hamakua)
District, Island of Hawai'i, TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was served on the following via email unless otherwise specified below:

Michael Cain
dlnr.maunakea@hawaii.gov
Custodian of the Records

Carlsmith Ball LLP
isandison@carlsmith.com
tluikwan@carlsmith.com
jpm@carlsmith.com
lmcaneley@carlsmith.com
*Counsels for Applicant
University of Hawai'i at Hilo*

C.M. Kaho'okahi Kanuha
kahookahi.kukiaimauna@gmail.com

E. Kalani Flores
ekflores@hawaiiantel.net

B. Pualani Case
puacase@hawaiiantel.net

Deborah J. Ward
cordylinecolor@gmail.com

Kealoha Pisciotta and Mauna Kea
Anaina Hou
keomaivg@gmail.com

J. Leina'ala Sleightholm
Leinaala.Mauna@gmail.com

Moses Kealamakia, Jr.
mkealama@yahoo.com
Witness for the Hearings Officer

Watanabe Ing LLP
First Haw'n Center, Suite1250
999 Bishop Street
Honolulu, HI 96813
rshinyama@wik.com
douging@wik.com
*Counsels for the TMT
International Observatory*

Mehana Kihoi
uhiwai@live.com

Joseph Kualii Lindsey Camara
kualii@hotmail.com

Torkildson Katz Moore
Hetherington & Harris
lsa@torkildson.com
njc@torkildson.com
*Counsels for Perpetuating
Unique Educational
Opportunities*

Harry Fergerstrom
P.O. Box 951
Kurtistown, HI 96760

Dwight J. Vincente
2608 Ainaola drive
Hilo, Hawaiian Kingdom

Kalikolehua Kanaele
akulele@yahoo.com

Stephanie-Malia Tabbada
s.tabbada@hawaiiantel.net

Tiffnie Kakalia
tiffniekakalia@gmail.com

Glen Kila
makakila@gmail.com

Brannon Kamahana Kealoha
brannonk@hawaii.edu

Clarence Kukauakahi Ching
kahiwaL@cs.com

William Freitas
pohaku7@yahoo.com

Paul K. Neves
Kealiikea@yahoo.com

Lanny Alan Sinkin
lanny.sinkin@gmail.com
Representative Temple of Lono

Cindy Freitas
hanahanai@hawaii.rr.com

Wilma H. Holi
P.O. Box 368
Hanapepe, HI 96716
Witness for the Hearings Officer

DATED:

Kailua, Hawaii,

1/4/17

1/4/17

Yuklin Aluli

Co-counsel for Petitioner KAHEA
The Hawaiian Environmental Alliance,
a domestic non-profit Corporation



Dexter K. Kaiama

Co-counsel for Petitioner KAHEA
The Hawaiian Environmental Alliance,
a domestic non-profit Corporation