

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  
[isandison@carlsmith.com](mailto:isandison@carlsmith.com)  
[tluikwan@carlsmith.com](mailto:tluikwan@carlsmith.com)  
[JPM@carlsmith.com](mailto:JPM@carlsmith.com)

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'ohe Mauka, Hāmakua,  
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

UNIVERSITY OF HAWAI'I AT HILO'S  
**OPPOSITION TO KAHEA: THE  
ENVIRONMENTAL ALLIANCE'S  
MOTION TO PERMIT LIVE  
TESTIMONY OF REBUTTAL  
WITNESS BRIAN CRUZ FILED  
FEBRUARY 13, 2017 [DOC 459];  
CERTIFICATE OF SERVICE**

**UNIVERSITY OF HAWAI'I AT HILO'S OPPOSITION TO KAHEA: THE  
ENVIRONMENTAL ALLIANCE'S MOTION TO PERMIT LIVE TESTIMONY  
OF REBUTTAL WITNESS BRIAN CRUZ FILED FEBRUARY 13, 2017 [DOC 459]**

Applicant UNIVERSITY OF HAWAII AT HILO (“**University**”), through counsel,  
submits its *Opposition to Kahea: The Environmental Alliance's Motion to Permit Live Testimony  
of Rebuttal Witness Brian Cruz* filed February 13, 2017 [Doc 459] (“**Motion**”). The University  
opposes the Motion on the grounds that The Hawaiian Environmental Alliance (“**KAHEA**”) has  
failed to demonstrate how Mr. Brian Cruz’s (“**Mr. Cruz**”) testimony is relevant, material, and

non-repetitious. The University respectfully requests that pursuant to the authority delegated to the Hearing Officer under Haw. Admin R. (“**HAR**”) § 13-1-32(h), the Hearing Officer deny the Motion.

## **I. INTRODUCTION**

The Motion seeks leave to present “the live testimony of Brian Cruz and submission of his written direct testimony and exhibits related to his written and requested live testimony[.]” Motion at 1. According to the Motion, Mr. Cruz is one of the authors of the Preliminary Draft Report for Review - Cultural Impact Assessment for the Thirty Meter Telescope (TMT) Observatory Project and Hale Pohaku Mid-Level Support Facilities Project, Maunakea, Ka’ohe Mauka, Hāmakua District, Hawai‘i Island (“**Draft CIA**”). KAHEA represents that if called, Mr. Cruz will testify that: (1) the Draft CIA included a “no further development” recommendation for Mauna Kea; (2) the TMT Draft Environmental Impact Statement (“**Draft EIS**”) does not contain a “no further development” recommendation; and (3) the “no further development” recommendation does appear in the TMT Final Environmental Impact Statement (“**FEIS**”). KAHEA posits that such testimony supports the inference that the FEIS is inadequate because comments could not be made on the recommendation during the public hearings and which then further supports the inference that intentional data manipulation designed to circumvent the laws and rules of the environmental review process had occurred. Motion at 8.

As a preliminary matter, KAHEA lacks good cause for calling Mr. Cruz at this stage of the proceedings. KAHEA has been aware from the onset of these hearings that the FEIS was one of the main supporting documents in the University’s case-in-chief; yet, as evidenced by its filings, KAHEA chose only to designate Mr. Cruz as a rebuttal witness. Nothing prevented KAHEA from identifying Mr. Cruz as a direct witness based on the scope of testimony presented. The University should have been timely provided with his materials.

Even if Mr. Cruz could somehow not have been previously identified, Mr. Cruz's testimony is unnecessary, unduly repetitious, duplicative and will provide no new material or relevant evidence that is not already in the record. The Hearing Officer does not need Mr. Cruz to testify as to the contents of the existing documents. The documents speak for themselves. Whether or not the "no further development" recommendation appears in a particular document can be ascertained easily from a review of the documents, so it would speak for itself. Moreover, Mr. James Hayes ("**Mr. Hayes**") has already testified to the fact that the cited reference was not in the Draft EIS. KAHEA's Motion also makes clear that Mr. Cruz was not involved in Parsons Brinkerhoff's decision to omit the recommendation prior to publication of the Draft EIS. Thus, any testimony offered by Mr. Cruz concerning the alleged motives for such omission would be based solely on speculation, which Hawai'i courts have consistently held is properly excludable. *See First Insurance Co. v. International Harvester*, 66 Haw. 185, 193, 659 P.2d 64, 70 (1983); *Friedrich v. Department of Transportation*, 60 Haw. 32, 38, 586 P.2d 1037, 1041 (1978); *Bachran v. Morishige*, 52 Haw. 61, 67, 469 P.2d 808, 812 (1970); *Cozine v. Hawaiian Catamaran, Ltd.*, 49 Haw. 77, 92-93, 412 P.2d 669, 681 (1966).

Lastly, KAHEA should not be allowed to circumvent the laws and rules of the environmental review process by attempting to convert this contested case hearing on the University's Conservation District Use Application ("**CDUA**") into a public hearing or legal challenge on the FEIS. The time to challenge the FEIS has passed. The documents speak for themselves and provide additional information for the decision makers in this entirely separate permit process to consider. As its Motion demonstrates, KAHEA is fully aware of the public hearing requirement and legal challenge procedures for the FEIS, yet opted not to participate. This proceeding is not the proper forum for KAHEA to attempt to litigate issues that have

already passed the time to legally challenge after acceptance by the Governor.

## II. ARGUMENT

### A. KAHEA HAS ALWAYS DESIGNATED MR. CRUZ AS A REBUTTAL WITNESS

It is disingenuous for KAHEA to characterize Mr. Cruz as a properly identified direct witness and blame the Hearing Officer for not allowing Mr. Cruz to testify on January 30, 2017. KAHEA, along with all other parties, was responsible for submitting its initial list of direct witnesses on July 18, 2016 and its final list on October 11, 2016. Pursuant to the June 18 deadline, KAHEA, along with Mauna Kea Anaina Hou, Kealoha Pisciotta, Clarence Kukauakahi Ching, and Paul Neves (collectively “**Petitioners**”), submitted *Petitioners Mauna Kea Anaina Hou, Et Al.’s Witness List* [Doc. 103]. Mr. Cruz is not listed. On October 11, 2016, Petitioners also filed *Petitioners’ Collective Final Witness List*. Again, Mr. Cruz was not listed. As the Motion admits, Mr. Cruz was not listed as a potential witness until October 14, 2016, when he was then listed solely as a *rebuttal* witness in the *Collective Statement of Petitioners’ Designation of Witnesses and Notice of Production of Witnesses for Cross-Examination*. As such, Petitioners did not meet the deadline for written direct testimony for Mr. Cruz nor did it identify any relevant exhibits by that October 11, 2016 deadline. The inclusion of Mr. Cruz in *Petitioners’ Notice Confirming Witnesses for January 19, 23-26, and 30-31, 2017 Contested Case Hearings* cannot and does not cure KAHEA’s failure to timely disclose Mr. Cruz as a direct witness and provide his written direct testimony and exhibits. KAHEA should not be allowed to circumvent the October 11, 2016 deadline applicable to all parties for *direct* witnesses by simply re-designating Mr. Cruz as a *rebuttal* witness.

KAHEA has been aware since the inception of this contested case that the CDUA, which is the subject of these proceedings, relies in part on the materials and analysis contained in the

FEIS. There is no reason - nor does the Motion attempt to provide a reason - why Mr. Cruz was not properly identified as a direct witness from the beginning.

B. PROFFERED TESTIMONY IS IMMATERIAL, IRRELEVANT, AND REPETITIOUS

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*). Thus, although "parties must be allowed the opportunity to present evidence in a contested case[.]" this right "is limited by considerations of relevancy, materiality, and repetition." *Application of Hawaii Elec. Light Co., Inc.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984). Mr. Cruz's proffered testimony runs afoul of all three considerations.

First, Mr. Cruz's testimony is repetitious. KAHEA proffers that, if called to testify, Mr. Cruz would testify that as an author of the Draft CIA, he had included a recommendation for "no further development" on Mauna Kea, and that such recommendation was removed from the Draft EIS and then added back to the FEIS. However, KAHEA has not only failed to demonstrate any need to call Mr. Cruz to simply read from the documents to confirm what is or is not in those documents. The documents speak for themselves, and the Hearing Officer can see for herself whether the "no further development" recommendations are present in the Draft CIA,

Draft EIS, and FEIS.

Even if testimony as to whether the “no further development” recommendation is in the documents were necessary, the Motion admits that Mr. Hayes already has provided that testimony. “Mr. Hayes acknowledged that the . . . Recommendation, included in the [Draft-CIA], and omitted from the [Draft EIS], was included in the [FEIS][.]” Motion at 3. Mr. Cruz’s proposed simple point is already in the record and can be given as much weight as it deserves. To restate it would clearly be duplicative testimony.

Second, Mr. Cruz’s testimony is irrelevant and immaterial. The Motion asserts, without basis, that the omission of the recommendations from the Draft EIS constitutes “intentional data manipulation.” Motion at 8. KAHEA’s attorney argument based on speculation and rhetoric is not a proper basis for allowing Mr. Cruz’s rebuttal testimony. Mr. Cruz is not an author of the Draft EIS or FEIS. More importantly, KAHEA admits in its Motion that the alleged removal of the recommendations from the Draft EIS was done “[w]ithout Mr. Cruz’s consent or cooperation.” *Id.* at 7. Thus, Mr. Cruz lacks any personal knowledge and has no foundation to testify as to rationale for the alleged removal of the recommendations from the Draft EIS or why the recommendations were included in the FEIS. Any additional testimony by Mr. Cruz on that matter would be pure speculation and is thus, improper.

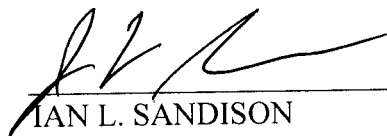
Lastly, the primary purpose of Mr. Cruz’s testimony is to question the validity of “the environmental review process.” *Id.* at 8. The time to challenge the FEIS has passed, and KAHEA is time-barred from raising such a challenge now. Thus, KAHEA’s present challenge to the FEIS through Mr. Cruz’s rebuttal testimony is untimely and irrelevant to these proceedings. That Mr. Cruz’s testimony would be based on pure conjecture and speculation only compounds the procedural defect of KAHEA’s Motion. As the Hawai‘i Supreme Court

succinctly stated, “a purely speculative answer to an otherwise irrelevant question does not bootstrap the question into relevance.” *State v. Cordeiro*, 99 Hawai‘i 390, 423, 56 P.3d 692, 725 (2002). KAHEA should not be allowed to call Mr. Cruz and ask irrelevant questions regarding Mr. Cruz’s theories regarding his recommendation.

### **III. CONCLUSION**

KAHEA has not demonstrated that its request to identify Mr. Cruz was appropriate or timely and that his testimony is relevant, material, and non-duplicative. Therefore, the Motion should be denied.

DATED: Honolulu, Hawai‘i, February 20, 2017.



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IAN L. SANDISON  
TIM LUI-KWAN  
JOHN P. MANAUT

Attorneys for Applicant  
UNIVERSITY OF HAWAI‘I AT HILO

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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:

DLNR Office of Conservation and Coastal  
Lands ("OCCL")  
[dlnr.maunakea@hawaii.gov](mailto:dlnr.maunakea@hawaii.gov)

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

DAVE M. LOUIE, ESQ.  
CLIFFORD K. HIGA, ESQ.  
NICHOLAS R. MONLUX, ESQ.  
Kobayashi Sugita & Goda, LLP  
[dml@ksglaw.com](mailto:dml@ksglaw.com)  
[ckh@ksglaw.com](mailto:ckh@ksglaw.com)  
[nrm@ksglaw.com](mailto:nrm@ksglaw.com)  
*Special Deputy Attorneys General for*  
*ATTORNEY GENERAL DOUGLAS S. CHIN,*  
*THE DEPARTMENT OF THE ATTORNEY*  
*GENERAL, and DEPUTY ATTORNEYS*  
*GENERAL IN THEIR CAPACITY AS*  
*COUNSEL FOR THE BOARD OF LAND AND*  
*NATURAL RESOURCES and HEARING*  
*OFFICER*

WILLIAM J. WYNHOFF, ESQ.  
Deputy Attorney General  
[bill.j.wynhoff@hawaii.gov](mailto:bill.j.wynhoff@hawaii.gov)  
*Counsel for the BOARD OF LAND AND*  
*NATURAL RESOURCES*



J. DOUGLAS ING, ESQ.  
[douging@wik.com](mailto:douging@wik.com)  
ROSS T. SHINYAMA, ESQ.  
[rshinyama@wik.com](mailto:rshinyama@wik.com)  
SUMMER H. KAIawe, ESQ.  
[skaiawe@wik.com](mailto:skaiawe@wik.com)  
Watanabe Ing LLP  
*Counsel for TMT INTERNATIONAL  
OBSERVATORY, LLC*

JOSEPH KUALII LINDSEY CAMARA  
[kualiic@hotmail.com](mailto:kualiic@hotmail.com)

HARRY FERGERSTROM  
P.O. Box 951  
Kurtistown, HI 96760  
[hankhawaiian@yahoo.com](mailto:hankhawaiian@yahoo.com)  
*(via email & U.S. mail)*

WILLIAM FREITAS  
[pohaku7@yahoo.com](mailto:pohaku7@yahoo.com)

TIFFNIE KAKALIA  
[tiffniekakalia@gmail.com](mailto:tiffniekakalia@gmail.com)

BRANNON KAMAHANA KEALOHA  
[brannonk@hawaii.edu](mailto:brannonk@hawaii.edu)

GLEN KILA  
[makakila@gmail.com](mailto:makakila@gmail.com)

JENNIFER LEINA'ALA SLEIGHTHOLM  
[leinaala.mauna@gmail.com](mailto:leinaala.mauna@gmail.com)  
[leina.ala.s808@gmail.com](mailto:leina.ala.s808@gmail.com)

LANNY ALAN SINKIN  
[lanny.sinkin@gmail.com](mailto:lanny.sinkin@gmail.com)  
*Representative for the Temple of Lono*

MAUNA KEA ANAINA HOU  
c/o Kealoha Pisciotta  
[keomaivg@gmail.com](mailto:keomaivg@gmail.com)

LINCOLN S.T. ASHIDA, ESQ.  
[lsa@torkildson.com](mailto:lsa@torkildson.com)  
NEWTON J. CHU, ESQ.  
[njc@torkildson.com](mailto:njc@torkildson.com)  
Torkildson, Katz, Moore, Hetherington &  
Harris  
*Counsel for PERPETUATING UNIQUE  
EDUCATIONAL OPPORTUNITIES (PUEO)*

DWIGHT J. VICENTE  
2608 Ainaola Drive  
Hilo, HI 96720-3538  
[dwrightjvicente@gmail.com](mailto:dwrightjvicente@gmail.com)  
*(via email & U.S. mail)*

RICHARD L. DELEON  
[kekaukike@msn.com](mailto:kekaukike@msn.com)

CINDY FREITAS  
[hanahanai@hawaii.rr.com](mailto:hanahanai@hawaii.rr.com)

C. M. KAHO'OKAHI KANUHA  
[kahookahi.kukiaimauna@gmail.com](mailto:kahookahi.kukiaimauna@gmail.com)

KALIKOLEHUA KANA ELE  
[akulele@yahoo.com](mailto:akulele@yahoo.com)

MEHANA KIHOI  
[uhiwai@live.com](mailto:uhiwai@live.com)

STEPHANIE-MALIA: TABBADA  
[s.tabbada@hawaiiantel.net](mailto:s.tabbada@hawaiiantel.net)

DONNA H. KALAMA, ESQ.,  
Deputy Attorney General  
[donna.h.kalama@hawaii.gov](mailto:donna.h.kalama@hawaii.gov)  
*Counsel for the Honorable DAVID Y. IGE, and  
BLNR Members SUZANNE CASE and  
STANLEY ROEHRIG*

E. KALANI FLORES  
[ekflores@hawaiiantel.net](mailto:ekflores@hawaiiantel.net)

DEBORAH J. WARD  
[cordylinicolor@gmail.com](mailto:cordylinicolor@gmail.com)

YUKLIN ALULI, ESQ.  
Law Offices of Yuklin Aluli  
[yuklin@kailualaw.com](mailto:yuklin@kailualaw.com)  
DEXTER KAIAMA, ESQ.  
Law Offices of Dexter K. Kaiama  
[cdexk@hotmail.com](mailto:cdexk@hotmail.com)

*Counsel for KAHEA: THE ENVIRONMENTAL  
ALLIANCE*

IVY MCINTOSH  
[3popoki@gmail.com](mailto:3popoki@gmail.com)  
*Witness for the Hearing Officer*

PATRICIA P. IKEDA  
[peheakeanila@gmail.com](mailto:peheakeanila@gmail.com)  
*Witness for the Hearing Officer*

CLARENCE KUKAUAKAHI CHING  
[kahiwaL@cs.com](mailto:kahiwaL@cs.com)

B. PUALANI CASE  
[puacase@hawaiiantel.net](mailto:puacase@hawaiiantel.net)

PAUL K. NEVES  
[kealiikea@yahoo.com](mailto:kealiikea@yahoo.com)

WILMA H. HOLI  
P. O. Box 368  
Hanapepe, HI 96716  
*Witness for the Hearing Officer  
(no email; mailing address only)*

MOSES KEALAMAKIA JR.  
[mkealama@yahoo.com](mailto:mkealama@yahoo.com)  
*Witness for the Hearing Officer*

DATED: Honolulu, Hawai'i, February 20, 2017.



---

IAN L. SANDISON  
TIM LUI-KWAN  
JOHN P. MANAUT

Attorneys for Applicant  
UNIVERSITY OF HAWAI'I AT HILO