

FLORES-CASE 'OHANA
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Petitioners pro se

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
A Contested Case Hearing Re)	
Conservation District Use Application)	FLORES-CASE 'OHANA'S MOTION TO
(CDUA) HA-3568 for the Thirty Meter)	RECONSIDER MINUTE ORDER NO. 44
Telescope at the Mauna Kea Science)	AND NOTICE OF SPOILIATION OF
Reserve, Ka'ohē, Hamakua District,)	EVIDENCE; MEMORANDUM IN
Island of Hawai'i, TMK (3) 4-4-015:009)	SUPPORT OF MOTION; EXHIBIT "A";
)	CERTIFICATE OF SERVICE
)	
)	Hearing Officer: Hon. Riki May Amano (ret.)

FLORES-CASE 'OHANA'S MOTION TO RECONSIDER MINUTE ORDER NO. 44
AND NOTICE OF SPOILIATION OF EVIDENCE

Petitioner, E. KALANI FLORES, pro se, representing the FLORES-CASE 'OHANA, respectfully submits this Motion to Reconsider Minute Order ("MO") No. 44 and Notice of Spoliation of Evidence ("Motion"). This motion is made pursuant to Hawai'i Administrative Rules ("HAR") §§ 13-1-32, 34, 35, and 38 as well as Hawai'i Revised Statutes ("HRS") §§ 91-9, 10, 11, and 12.

DATED: Pu'ukapu, Hawai'i, April 26, 2017



E. Kalani Flores
Representing Flores-Case 'Ohana

Received
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
State of Hawaii
2017 April 26

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

In the Matter of:)	Case No. BLNR-CC-16-002
A Contested Case Hearing Re)	
Conservation District Use Application)	MEMORANDUM IN SUPPORT OF
(CDUA) HA-3568 for the Thirty Meter)	MOTION
Telescope at the Mauna Kea Science)	
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Island of Hawai'i, TMK (3) 4-4-015:009)	
)	

MEMORANDUM IN SUPPORT OF MOTION

The FLORES-CASE 'OHANA previously submitted Motion to Admit Exhibits and Written Direct Testimony Into Evidence (Feb. 28, 2017) and Motion to Admit First Supplemental Exhibits Into Evidence (Mar. 8, 2017) to admit into evidence the written direct testimony of its witnesses and the exhibits introduced therein during the contested case hearing pursuant to HRS § 91-10 governing the admissibility of evidence in agency proceedings. The FLORES-CASE 'OHANA responds to MO No. 44 for reconsideration with reasons as to why the exhibits referenced in Exhibit "A" should be admitted into the record as evidence.

1) The FLORES-CASE 'OHANA submitted all exhibits and all motions to admit these items into evidence by the date of March 9, 2017 as specified by the Hearing Officer. Contrary to the arguments set forth by the counsel of the University of Hawai'i at Hilo ("UHH") and Thirty Meter Telescope International Observatory, LLC ("TIO"), the Hearing Officer did NOT specify that all exhibits had to be submitted before the last hearing date. Since a written minute order regarding the process for admittance of exhibits into evidence was NEVER issued, we relied solely upon the oral instructions of the Hearing Officer which was eventually issued on the last day of hearing. As noted in MO No. 44;

PROCESS. At the close of hearing on March 2, 2017, the last day of witness testimonies, a process for moving exhibits and written testimonies into evidence was established:

March 9, 2017	Deadline for Motions to move exhibits into evidence.
March 15, 2017	Deadline for responses, oppositions, joinders, etc. to Motions.

We argue that UHH's and TIO's objections for denial of acceptance into evidence based upon the filing date after March 2, 2017 should be dismissed as such denials would violate our rights of due process.

2) The FLORES-CASE 'OHANA further argues that many of UHH's and TIO's objections for denial are frivolous and go beyond the guidelines set forth in HAR §13-1-35 as it pertains to "the exclusion of immaterial, irrelevant, or unduly repetitious evidence as provided by law with a view of doing substantial justice." **The FLORES-CASE 'OHANA asserts that ALL of its exhibits submitted for consideration are material and relevant to this contested case hearing and are NOT unduly repetitious.** Furthermore, HRS §§ 91-9 and 10 provide for the right of parties to submit evidence as noted below: (emphasis in bold)

§ 91-9 (c) **Opportunities shall be afforded all parties to present evidence** and argument on all issues involved.

§ 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;

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, **and shall have the right to submit rebuttal evidence;**

Furthermore, previous case law requires a liberal policy on the adoption of evidence in regards to § 91-10 as noted below:

Administrative agencies in hearing contested cases must adopt a liberal policy toward admission of evidence, limited only by considerations of relevancy, materiality, and avoidance of undue repetition. [Dependents of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 510 P.2d 89 \(1973\).](#)

The admission of an exhibit consisting of responses to an opponent's informational requests cannot be held to have violated paragraph (1) of this section absent some showing by the opponent that the evidence was irrelevant, immaterial, or unduly repetitious. [In re Hawaiian Tel. Co., 65 Haw. 293, 651 P.2d 475 \(1982\)](#), overruled on other grounds, [Camara v. Aagsalud, 67 Haw. 212, 685 P.2d 794 \(1984\).](#)

In addition, previous case law stipulates that rules of evidence are less formal in administrative hearings as noted below:

The rules of evidence governing administrative hearings are much less formal than those governing judicial proceedings, and as long as evidence of appellant's conviction and the police reports were relevant as defined by [HRE Rule 401](#), it was proper for the Board to admit them. [Loui v. Board of Medical Exmrs., 78 Haw. 21, 889 P.2d 705 \(1995\)](#).

Likewise, previous case law doesn't allow for the exclusion of relevant evidence as noted below:

Plain language of HRS § 91-10(1) does not provide for the exclusion of otherwise relevant evidence on grounds of prejudice or potential compromise of the trier of fact's impartiality. Section 91-10(1) provides only for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. [In re Wai'ola O Moloka'i, Inc., 103 Haw. 401, 83 P.3d 664 \(2004\)](#).

3) The FLORES-CASE 'OHANA argues that the validity of several of the primary documents submitted by the UHH are NOT the actual and true documents as asserted. It has also been found that some of their documents have technical problems in which some images do NOT properly display on certain pages. In part, it is for these reasons that alternate copies of these documents were submitted by the Mauna Kea Hui petitioners ("petitioners") including Mauna Kea Anaina Hou and Kealoha Pisciotta, Clarence Kukauakahi Ching, Paul K. Neves, Deborah J. Ward, Flores-Case 'Ohana, and KAHEA: The Hawaiian Environmental Alliance. As such, the admitting of these documents would NOT be considered unduly repetitious. The submittal of alternate copies is in alignment with the oral instructions of the Hearing Officer when the matter regarding such discrepancies were brought forth during the hearings. As such, we were instructed to submit our own alternative copies. An example of such discrepancies was brought to the attention of the Hearing Officer in the response filed on March 16, 2017 by the FLORES-CASE 'OHANA regarding Exhibits A-9 and A-48. Likewise, due to these discrepancies in UHH's documents, references to these documents during the direct testimony and cross-examination were cited using the exhibit numbers submitted by the petitioners. Thus, if these exhibits are not entered into evidence, how would we reconcile these citations referenced in the written direct testimony, cross-examination, and transcripts?

4) Furthermore, confusion surrounding the exhibits originally submitted collectively by the petitioners was further exacerbated when exhibits in the online Evidentiary Hearing Submittals site maintained by the Hawai'i State Office of Conservation and Coastal Lands ("OCCL") staff

were prematurely separated out into individual listings and moved during mid-stream of the hearing (early January 2017) into another section entitled “Hearing Submittals, Pau”. Instead, this separation should NOT have occurred until after all petitioners had filed their motions to admit their exhibits into evidence as this led to further confusion and exhibits were listed incorrectly with the wrong petitioners.

5) In addition, several of the exhibits were misidentified in the Evidentiary Hearing Submittals. The Petitioners’ Collective Exhibit List (dated Oct. 11, 2016) included the following:

B.37a	MKSR Master Plan (2000)
B.37b	MKSR Master Plan Appendix (2000)
B.38	Mauna Kea CMP (2009)
B.39	CRMP - CMP Sub-Plan
B.40	NRMP - CMP Sub-Plan (2009)
B.41	Public Access Plan - CMP Sub-Plan
B.42	Decommissioning Plan - CMP Sub-Plan (2010)
B.43	CMP Implementation Plan (2010)

The FLORES-CASE ‘OHANA and KAHEA also included this listing of exhibits in both of their initial motions to admit exhibits and written direct testimonies into evidence.

However, it seems that somehow part way through the hearings, the numbering had changed from B.37a, B.37b, B.38, B.39, B.40, B.41, B.42 respectfully to B.37, B.38, B.39, B.40, B.41, B.42, B.43. After the FLORES-CASE ‘OHANA filed its initial motion (dated Feb. 28, 2017) to admit exhibits into evidence, the inconsistencies in the numbering of exhibits was discovered. As such, the FLORES-CASE ‘OHANA filed its first supplemental motion (dated Mar. 8, 2017) to admit these same exhibits into evidence to reflect these changes in the numbering in order to preserve our right to have these exhibits entered into evidence. It is noted that on page 28 in MO No. 44, Hearing Officer “Received” these exhibits into evidence as there were no objections filed by any parties in regards to this particular listing noted below:

B.37	MKSR Master Plan (2000)
B.38	MKSR Master Plan Appendix (2000)
B.39	Mauna Kea CMP (Jan. 2009)
B.40	CRMP - CMP Sub-Plan
B.41	NRMP - CMP Sub-Plan (2009)
B.42	Public Access Plan - CMP Sub-Plan
B.43	Decommissioning Plan - CMP Sub-Plan (2010)

This matter is being brought to the attention of the Hearing Officer so that this matter could be resolved with clarity.

5) Another matter that needs further clarification is the status of Exhibits Doc R-1 to R-8. It's unclear if these exhibits have been moved into evidence or not? Most parties were under the impression at the onset of the pre-hearing conferences that the Hearing Officer had designated them as primary exhibits and they would later be moved into evidence. As such, references and citations to these particular exhibits were made by several parties in their written direct testimony and cross-examination. However, there's no reference in MO 44 to them being received into evidence. Thus, if these exhibits are not entered into evidence, how would we reconcile these citations referenced in the written direct testimony, cross-examination, and transcripts?

6) The integrity of the exhibits filed for this contested case hearing have been further comprised with the act of **spoliation of evidence** in these proceedings. There is sufficient evidence to demonstrate that exhibits have been switched subsequent to their original filings. Case in point, Exhibits R-7 and R-8 were originally filed as a "draft" unsigned copy of the OCCL Staff Report (dated Feb. 25, 2011). That matter was further deliberated upon in the cross examination of Samuel Lemmo, OCCL Administrator. However, subsequent to this hearing date of February 27, 2017, Exhibits Doc R-7 and R-8 were switched with totally different copies. This matter can be verified by copies that were previously downloaded as compared to what is presently on file.

In addition, it appears that Exhibits B.30 to B.36 are NOT the original documents filed and they were instead later switched and replaced respectfully with Exhibits Doc R-1 to R-8.

B.30	CDUA HA-3568
B.31	TMT FEIS Summary Sheet
B.32	TMT FEIS Vol. 1
B.33	TMT FEIS Vol. 2
B.34	TMT FEIS Vol. 3
B.35	DLNR-OCCL CDUA HA-3568 Report
B.36	DLNR-OCCL Exhibits

7) The FLORES-CASE ‘OHANA demands a full disclosure and listing of exhibits such as Doc R-7 and R-8 that were switched after the initial documents were filed in the Evidentiary Hearing Submittals. The disclosure should include date exhibits were switched, individuals involved, reasons for switches, authorization for such action, and other such information regarding the spoliation of the evidence in this contested case hearing. In addition, a listing should be provided that outlines which exhibits such as Exhibits B.30 to B.36 and others that were substituted with other copies of documents not originally filed by parties. Once these improprieties have been sorted out, we request the right to have our original exhibits resubmitted and refilled. We’re also demanding corrective action in this matter.

8) Based upon the foregoing, the FLORES-CASE ‘OHANA respectfully requests that the Hearing Officer reassess the deadline for submittal of the proposed decision order, findings of fact, and conclusions of law until these matters have been adequately resolved. Following a resolution in this matter, then the deadlines noted in MO No. 43 should be further extended based upon the amount of time necessary to resolve these matters as it pertains to determining what exhibits are actually being admitted into evidence. This issue is further elaborated upon in the FLORES-CASE ‘OHANA’s Motion to Reconsider MO No. 43 as it is contended that MO 43 was prematurely issued before the issues pertaining to the admittance of evidence has been finalized. These matters directly impact and impede upon our due process in the compilation of facts and information into our documents if the citations are inaccurately identified or if the exhibits originally filed have been switched and substituted with different copies as the result of the noted spoliation of evidence. In this case, the OCCL was assigned the responsibility to

receive, file, and post online in the Evidentiary Hearing Submittals and Contested Case Documents Library all documents, motions, exhibits, etc. filed by respective parties in this contested case hearing pertaining to CDUA HA-3568. Parties have a right of due process and an expectation that such evidence included into the record is accurate.

9) The FLORES-CASE 'OHANA objects to the unreasonable amount of time of only 5 business day given to respond to MO 44 especially due to the "volume, extent and complexity of the exhibits" as explicitly noted by the Hearing Officer. For most parties, those business days were curtailed to just 3-4 days because the instructions for submittals of responses to MOs 43 and 44 have changed from electronic receipt to instead an original copy being submitted to OCCL's office in Honolulu by the deadline. During the entire course of the contested case hearing, the deadline of the submittal of motions was based upon the electronic receipt by OCCL. However, this has drastically changed for the issuance of MOs 43 and 44.

DATED: Pu'ukapu, Hawai'i, April 26, 2017



E. Kalani Flores
Representing Flores-Case 'Ohana

EXHIBIT “A”

The FLORES-CASE ‘OHANA asserts that ALL of its exhibits submitted for consideration are material and relevant to this contested case hearing and are NOT unduly repetitious. Additional reasons to receive the following exhibits into evidence that were “Denied” are also provided below.

Exhibit No.	Description	Reasons to Receive Into Evidence
B.02ab	Chapter 13-5 (older version)	The older version of Chapter 13-5 is NOT superfluous as proclaimed by UHH. These set of rules were in place at the time CDUA HA-3568 was submitted. However, Chapter 13-5 were subsequently revised as noted below in Exhibit B.02as. Without the older version, it would not be possible to highlight the incompleteness of CDUA HA-3568 that was NOT updated to be in compliance with the 2011 version.
B.02ac	Chapter 13-5 (2011 version)	UHH’s objection is disputed as Chapter 13-5 is clearly material and relevant to this hearing as noted in the comment above.
B.02ad	Chapter 13-5 Amendments	UHH’s objection is disputed as Chapter 13-5 is clearly material and relevant to this hearing as noted in the comment above. In addition, this exhibit is actually a OCCL staff report that highlights the differences between older and 2011 versions.
B.28	CMP (April 2009)	This is NOT a duplicate of A-9 which is actually an older version dated January 2009
B.30	CDUA HA-3568	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-1.
B.31	TMT FEIS Summary Sheet	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-2.
B.32	TMT FEIS Vol. 1	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-3.
B.33	TMT FEIS Vol. 2	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-4.

B.34	TMT FEIS Vol. 3	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-5.
B.35	DLNR-OCCL CDUA HA-3568 Report	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-7.
B.36	DLNR-OCCL Exhibits	This was an alternative copy. However, subsequent to the original filing of this exhibit, it was later switched and substituted with a different copy noted as Doc R-8.
B.37a/37	MKSR Master Plan (2000)	This is NOT a duplicate of A-48 which is actually an altered version. This exhibit was also assigned two different numbers.
B.37b/38	MKSR Master Plan Appendix (2000)	This is an alternative copy. This exhibit was also assigned two different numbers.
B.38/39	Mauna Kea CMP (2009)	This is an alternative copy. This exhibit was also assigned two different numbers.
B.39/40	CRMP - CMP Sub-Plan	This is an alternative copy. This exhibit was also assigned two different numbers.
B.40/41	NRMP - CMP Sub-Plan (2009)	This is an alternative copy. This exhibit was also assigned two different numbers.
B.41/42	Public Access Plan - CMP Sub-Plan	This is an alternative copy. This exhibit was also assigned two different numbers.
B.42/43	Decommissioning Plan - CMP Sub-Plan (2010)	This is an alternative copy. This exhibit was also assigned two different numbers.
B.70	Staff Report CDUA	This is an actual copy of the OCCL Staff Report that was submitted at the Feb. 25, 2011 BLNR meeting as Agenda Item K-1 and is NOT a duplicate of those exhibits that were originally filed as Doc R-7 & R-8. However, sometime after Feb. 27, 2017, exhibits Doc R-7 & R-8 were switched with different copies that are presently in the Evidentiary Hearing Submittals.
B.14	Pualani Kanahale transcript	Contrary to the objections of TIO and UH, this is not direct testimony. Instead it was submitted as rebuttal evidence as allowed per §91-10 (3).
B.26	Hawaii County General Plan 2005	Contrary to the objections of TIO and UH, the Hawaii County General Plan 2005 was referenced in the wdt of E.K. Flores (Exhibit B.02a) and parts of it were also included as Exhibit B.02s. Exhibit B.26 is

		the submittal of the General Plan in its entirety as a complete document.
B.27	Webpage	Contrary to the objections of TIO and UH, this webpage was actually presented in the cross-examination of Kalikolehua Kanaele by Kealoha Pisciotta. The Flores-Case ‘Ohana filed this exhibit on behalf Mauna Kea Anaina Hou and Kealoha Pisciotta.
B.81a	OMKM Hawaiian Culture	Contrary to the objections of TIO and UH, the OMKM and its management actions of the CMP for the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage that outlines some of these CMP management actions. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.81b	OMKM Historic Properties	Contrary to the objections of TIO and UH, the OMKM and its management actions of the CMP for the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage that outlines some of these CMP management actions. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.81c	OMKM CMP Policies	Contrary to the objections of TIO and UH, the OMKM and its management actions of the CMP for the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage that outlines some of these CMP management actions. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.81d	OMKM CMP	Contrary to the objections of TIO and UH, the OMKM and its management of the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage that provides online links to the actual CMP and Sub-Plans that affirms that UHH’s Exhibit A-9 is NOT the most current CMP. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).

B.81e	OMKM MKSR Master Plan	Contrary to the objections of TIO and UH, the OMKM and its management of the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage that provides online links to the actual Master Plan (2000) that affirms that UHH’s Exhibit A-48 is NOT an actual copy of this Master Plan. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.82a	Hawaiian Protocol	Contrary to the objections of TIO and UH, the OMKM and its management of the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.82b	Our Sacred Mountain	Contrary to the objections of TIO and UH, the OMKM and its management of the MKSR is referenced throughout the wdt of E.K. Flores (Exhibit B.02a). This is a copy of OMKM’s webpage. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.83	Imiloa – Cultural Significance	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.84	Astronomy Workforce Report	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.85a	HIEDB board	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.85b	HIEDB 2008 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.85c	HIEDB 2009 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.85d	HIEDB 2010 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.85e	HIEDB 2012 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).

B.86a	TMT 2010 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.86b	TMT 2011 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.86c	TMT 2012 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).
B.86d	TMT 2013 990	This exhibit is material and relevant. This exhibit is also submitted as rebuttal evidence as allowed per §91-10 (3).

BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII

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

BLNR Contested Case HA-16-002

Document title: FLORES-CASE 'OHANA'S MOTION TO
RECONSIDER MINUTE ORDER NO. 44 AND NOTICE
OF SPOILIATION OF EVIDENCE; MEMORANDUM IN
SUPPORT OF MOTION; EXHIBIT "A"; CERTIFICATE
OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by the means indicated below:

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