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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	)	<b>KAHEA: THE HAWAIIAN</b>
Conservation District Use Permit	)	<b>ENVIRONMENTAL ALLIANCE'S MOTION</b>
(COUP) HA-3568 for the Thirty Meter	)	<b>FOR RECONSIDERATION OF MINUTE</b>
Telescope at the Mauna Kea Science	)	<b>ORDER NO. 44; MEMORANDUM IN</b>
Reserve, Kahohe Mauka, Hamakua	)	<b>SUPPORT OF MOTION; EXHIBITS "A-</b>
District, Island of Hawai'i, TMK (3) 4-4-	)	<b>E"; CERTIFICATE OF SERVICE</b>
015:009	)	
	)	
	)	Hearings Officer: Riki Amano
	)	
	)	

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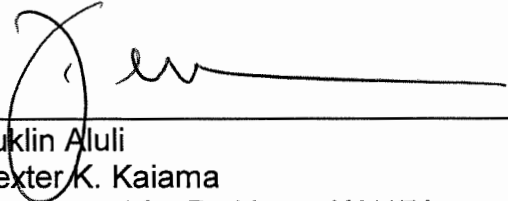
**KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE'S  
MOTION FOR RECONSIDERATION OF MINUTE ORDER NO. 44**

KAHEA: The Hawaiian Environmental Alliance ("KAHEA"), by and through its  
counsel Yuklin Aluli and Dexter K. Kaiama, hereby submits its Motion for  
Reconsideration of Minute Order No. 44 in this administrative proceeding. This motion

Received  
Office of Conservation and Coastal Lands  
Department of Land and Natural Resources  
State of Hawaii  
2017 April 28 2:54 pm

is made pursuant to Hawai'i Administrative Rules ("HAR") §§ 13-1-32, 34, 35 and 38 as well as HAR §§ 91-9, 10 11 and 12.

DATED: Kailua, Hawaii, 4/28/17.



\_\_\_\_\_  
Yuklin Aluli  
Dexter K. Kaiama  
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	)	MEMORANDUM IN SUPPORT
Conservation District Use Permit	)	OF MOTION
(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	)	
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**MEMORANDUM IN SUPPORT OF MOTION**

KAHEA: The Hawaiian Environmental Alliance ("KAHEA") submits its motion, memorandum in support and exhibits ("A-E") in response to and for reconsideration of Minute Order ("MO") No. 44 concerning the exclusion of KAHEA Exhibit B.53 (the Written Direct Testimony of David Kimo Frankel) into evidence in this administrative hearing. KAHEA submits that exclusion of Mr. Frankel's written direct testimony (Exhibit No. 53) is contrary to Hawai'i Revised Statutes ("HRS"), Chapter 91, applicable Hawai'i Administrative Rules, Hawai'i Supreme and/or Appellate court decisions and is tantamount to reversible error.

**I. STATEMENT OF FACTS**

On January 5, 2017, KAHEA, along with Mauna Kea Ainana Hou ("MKAH"), Kealoha Pisciotto, Clarence Kukauakahi Ching, the Flores-Case Ohana, Deborah J. Ward and Paul Neves (Collectively referred to as "MKAH Hui"), filed its Notice Confirming Witnesses for January 9 and 10, 2017 Contested Case Hearing (See, Exhibit "A"). By this filing, the Hearings Officer, contested case hearings administrative staff and parties to this proceedings were notified of witness David Kimo Frankel and his written direct testimony (Exhibit No. B.53).

Also on January 5, 2017, KAHEA separately filed its Sixth Supplemental Exhibit Designation, notifying all parties to this proceedings of David Kimo Frankel's (Exhibit No. B.53) written direct testimony (See, Exhibit "B"). A copy of Mr. Frankel's signed (12/31/2016) wdt was attached to KAHEA'S Sixth Supplemental Exhibit Designation.

On January 9, 2017, KAHEA as part of the MKAH Hui, filed its Notice Confirming Witnesses for January 11, 2017 Contested Case Hearing (See, Exhibit "C"). Again, by this filing, the Hearings Officer, contested case hearings administrative staff and parties to this proceedings were notified of witness David Kimo Frankel and his written direct testimony (Exhibit No. B.53).

On January 10, 2017, KAHEA as part of the MKAH Hui, filed its First Amended Notice Confirming Witnesses for January 11, 2017 Contested Case Hearing (See, Exhibit "D"). Once again, by this filing, the Hearings Officer, contested case hearings administrative staff and parties to this proceedings were notified of witness David Kimo Frankel and his written direct testimony (Exhibit No. B.53).

On January 11, 2017 David Kimo Frankel did appear and provide live testimony in the contested case hearing and responded to cross-examination questions by parties appearing on January 11, 2017, including responding to cross-examination questions by counsel for University of Hawai'i Hilo (UHH) and the Thirty Meter Telescope (TMT). Significantly, at his live testimony, Mr. Frankel did provide his WDT (Exhibit No. B.53) and swore an oath to the Hearings Officer that he prepared Exhibit No. B.53 and that it was true and accurate to the best of his recollection.

On March 20, 2017 KAHEA filed (logged onto the Mauna Kea Documents Library as Document No. 517) an errata to its Motion to Admit Exhibits and Written Direct Testimony Into Evidence Filed February 21, 2017 (See, Exhibit "E") in order to correct its oversight in not listing Exhibit No. B.53 in its lists of written direct testimonies in the above Motion to Admit Exhibits and Written Direct Testimony Into Evidence. KAHEA submits that sufficient good cause was provided, in its filed errata, for admission of Exhibit No. B.53 into evidence. Furthermore, to its knowledge, no opposition has been filed either with respect to the admission of Exhibit No. B.53 into evidence or in opposition to KAHEA's errata filed herein on March 20, 2017.

**II. TIMELY AND SUFFICIENT NOTICE OF EXHIBIT NO. B.53 HAS BEEN PREVIOUSLY PROVIDED TO ALL PARTIES AND NO GOOD CAUSE EXISTS FOR ITS EVIDENTIARY EXCLUSION**

As conclusively shown above, notice of and Mr. Frankel's WDT, Exhibit No. B.53, was provided to the Hearing's Officer, the contested case administrative staff and parties to these proceedings, as of January 5, 2017 (See, Exhibits "A-B"). Additional notices of Exhibit B.53 were provided to all parties on January 9<sup>th</sup> and 10<sup>th</sup> 2017 (See, Exhibits "C-D"). Thereafter, Mr. Frankel did appear, affirm under oath his WDT (Exhibit No. B.53), provide live testimony and respond to cross-examination questions. Under any reasonable view of the circumstances, timely notice of Exhibit B.53, in these proceedings, cannot be denied.

Inclusion of Exhibit No. B.53 into evidence is consistent with Hawai'i Revised Statutes ("HRS") § 91-9 and 91-10 concerning the presentation of and governing the admissibility of evidence in agency proceedings as noted below:

§ 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[.]

**[Emphasis Added].**

Furthermore, prior appellate court decisions are consistent with and supports the inclusion of Exhibit No. B.53 into evidence as noted below:

"The rules of evidence governing administrative hearings are much less formal than those governing judicial proceedings, as long as evidence ... were relevant ... it was proper for the

Board to admit them." Loui v. Board of Medical Exmrs., 78 Haw. 21, 889 P.2d 705 (1995).

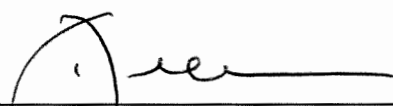
"The plain language of HRS § 91-10(1) does not provide for the exclusion of evidence of otherwise relevant evidence on the grounds of prejudice or potential compromise of the trier of fact's impartiality. Section 91-10(1) provides only for the exclusion of irrelevant, immaterial, or unduly repetitious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

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

KAHEA submits and strongly asserts that Exhibit No. B.53 is: (a) relevant, material, and not unduly repetitious; (b) consistent with applicable Hawaii Revised Statutes, Administrative Rules and case precedent affirming the liberal standard of the admissibility of evidence in administrative hearings; and (c) is in line with Hearings Officer's representations, in the contested case hearings, of the admissibility of exhibits subject to considerations of due weight to be given.

Based on the foregoing, KAHEA respectfully requests that the Hearing Officer grant this Motion for Reconsideration and admit Exhibit No. B.53 into evidence

DATED: Kailua, Hawaii, 4/28/17.

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

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE  
OHANA; DEBORAH J. WARD; PAUL K. NEVES; and  
KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE,  
a domestic non-profit Corporation

RECEIVED  
OFFICE OF CONSERVATION  
AND COASTAL LANDS

2017 JAN -5 P 1:55

Petitioners

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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	)	
(CDUA) HA-3568 for the Thirty Meter	)	MAUNA KEA ANAINA HOU and
Telescope at the Mauna Kea Science	)	KEALOHA PISCIOTTA; CLARENCE
Reserve, Ka'ohe, Hamakua District,	)	KUKAUAKAHI CHING; FLORES-
Island of Hawai'i, TMK (3) 4-4-015:009	)	CASE OHANA; DEBORAH J. WARD;
	)	PAUL K. NEVES; and KAHEA: THE
	)	ENVIRONMENTAL ALLIANCE'S
	)	NOTICE CONFIRMING WITNESSES
	)	FOR JANUARY 9 AND 10, 2017
	)	CONTESTED CASE HEARINGS;
	)	CERTIFICATE OF SERVICE
	)	
	)	
	)	HEARING OFFICER: Hon. Riki May
	)	Amano (Ret.)

**MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA;  
DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE  
ENVIRONMENTAL ALLIANCE'S NOTICE CONFIRMING WITNESSES  
FOR JANUARY 9 AND 10, 2017 CONTESTED CASE HEARINGS**

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE  
KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K.  
NEVES; and KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit

EXHIBIT     A

Corporation (Collectively referred to as "MK Hui"), intends to call the following witnesses on the dates identified:

January 9, 2017

Laulani Teale  
Routh Aloua  
Ku Kahakalau

January 10, 2017

David Kimo Frankel  
Clarence Kukauakahi Ching

The above-named witnesses are expected to offer into evidence their designated exhibits as identified below:

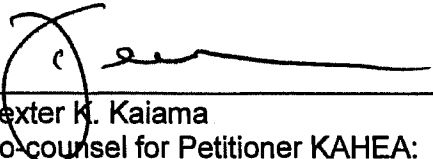
<b>Name of Witness</b>	<b>Exhibit No.</b>
Laulani Teale	B.15a
	B.15b
	B.15c

Routh Aloua	B.24a
	B.24b
Ku Kahakalau	B.06a
	B.06b
David Kimo Frankel	B.53
Clarence Kukauakahi Ching	B.19a
	B.19b
	B.19c
	B.19d



MK Hui reserves the right to call the above-named witnesses out of order and subject to their respective availabilities.

DATED: Kailua, Hawaii, 6/4/17

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

151  
Kealoha Pisciotto, Petitioner and for  
Petitioners Mauna Kea Anaina Hou,  
and Paul K. Neves

151  
E. Kalani Flores, for Petitioners  
Flores-Case Ohana

151  
Clarence Kukauakahi Ching,  
Petitioner

151  
Deborah J. Ward, Petitioner

**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:

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*University of Hawai'i at Hilo*

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Deborah J. Ward  
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Kealoha Pisciotta and Mauna Kea  
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J. Leina'ala Sleightholm  
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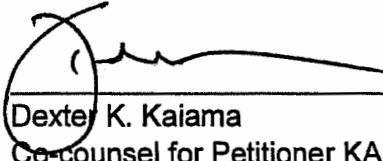
Cindy Freitas  
hanahanai@hawaii.rr.com

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

DATED:

Kailua, Hawaii,

1/4/17



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

151

Kealoha Pisciotto, Petitioner and for  
Petitioners Mauna Kea Anaina Hou,  
and Paul K. Neves

151

E. Kalani Flores, for Petitioners  
Flores-Case Ohana

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Clarence Kukauakahi Ching,  
Petitioner

151

Deborah J. Ward, Petitioner

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Co-Counsel for Petitioner  
KAHEA: The Hawaiian Environmental Alliance,  
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AND COASTAL LANDS

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DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

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, Kahohe Mauka, Hamakua	)	Direct Testimony]; CERTIFICATE OF
District, Island of Hawai'i, TMK (3) 4-4-	)	SERVICE
015:009	)	
	)	
	)	Hearing Officer: Riki J. Amano.
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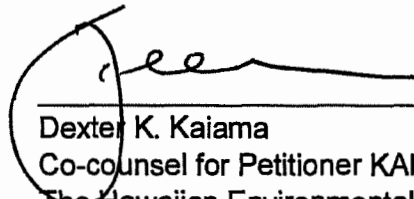
**KAHEA: THE HAWAIIAN-ENVIRONMENTAL ALLIANCE SIXTH  
SUPPLEMENTAL EXHIBIT DESIGNATION; EXHIBIT B.53  
[DAVID KIMO FRANKEL - WRITTEN DIRECT TESTIMONY]**

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 *Waiāhole* 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-19<sup>1</sup> and HRS § 206E-7<sup>2</sup> reveals that the PLDC's exemptions were far more sweeping. To the lay person

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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).

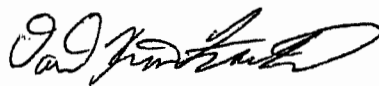
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**Q     What is David Callies' opinion as to how intensely the conservation district can be developed?**

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 )  
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*Witness for the Hearings Officer*

DATED:

Kailua, Hawaii,

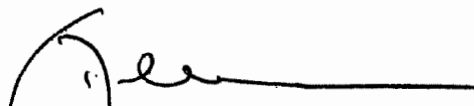
1/4/17

1-5 1

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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

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE  
OHANA; DEBORAH J. WARD; PAUL K. NEVES; and  
KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE,  
a domestic non-profit Corporation

Petitioners

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STATE OF HAWAII

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	)	MAUNA KEA ANAINA HOU and
(CDUA) HA-3568 for the Thirty Meter	)	KEALOHA PISCIOTTA; CLARENCE
Telescope at the Mauna Kea Science	)	KUKAUAKAHI CHING; FLORES-
Reserve, Ka'ohe, Hamakua District,	)	CASE OHANA; DEBORAH J. WARD;
Island of Hawai'i, TMK (3) 4-4-015:009	)	PAUL K. NEVES; and KAHEA: THE
	)	ENVIRONMENTAL ALLIANCE'S
	)	NOTICE CONFIRMING WITNESSES
	)	FOR JANUARY 11, 2017
	)	CONTESTED CASE HEARINGS;
	)	CERTIFICATE OF SERVICE
	)	
	)	HEARING OFFICER: Hon. Riki May
	)	Amano (Ret.)
	)	
	)	

**MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA;  
DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE  
ENVIRONMENTAL ALLIANCE'S NOTICE CONFIRMING  
WITNESSES FOR JANUARY 11, 2017 CONTESTED CASE HEARINGS**

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE  
KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K.  
NEVES; and KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit

EXHIBIT C

Corporation (Collectively referred to as "MK Hui"), by this Notice Confirming Witnesses For January 11, 2017 Contested Case Hearings, intends to call the following witnesses on the dates identified:

January 11, 2017

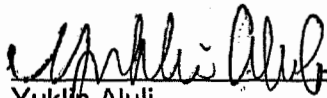
David Kimo Frankel  
Narissa Spies  
David James Vicente  
Kapulei Flores

The above-named witnesses are expected to offer into evidence their designated exhibits as identified below:

Name of Witness	Exhibit No.	Presenter
David Kimo Frankel	B.53	KAHEA
Kapulei Flores	B.23a B.23b	Flores-Case Ohana
Narissa P. Spies	B.52a B.52b B.52c B.52d	Deborah Ward
David James Vincente	B.09a B.09b	Deborah Ward

MK Hui reserves the right to call the above-named witnesses out of order and subject to their respective availabilities.

DATED: Kailua, Hawaii, 1-8-17

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

151

---

Kealoha Pisciotta, Petitioner and for  
Petitioners Mauna Kea Anaina Hou,  
and Paul K. Neves

151

---

E. Kalani Flores, for Petitioners  
Flores-Case Ohana

151

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Clarence Kukauakahi Ching,  
Petitioner

151

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Deborah J. Ward, Petitioner

**BOARD OF LAND AND NATURAL RESOURCES**

**STATE OF HAWAII**

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A Contested Case Hearing Re: ) **CERTIFICATE OF SERVICE**  
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Reserve, Kahohe Mauka, Hamakua )  
District, Island of Hawai'i, TMK (3) 4-4-015:009 )

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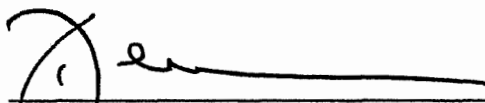
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*Witness for the Hearings Officer*



DATED: Kailua, Hawaii,

1/8/17



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

/s/

Kealoha Pisciotto, Petitioner and for  
Petitioners Mauna Kea Anaina Hou,  
and Paul K. Neves

/s/

E. Kalani Flores, for Petitioners  
Flores-Case Ohana

/s/

Clarence Kukauakahi Ching,  
Petitioner

/s/

Deborah J. Ward, Petitioner

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE  
OHANA; DEBORAH J. WARD; PAUL K. NEVES; and  
KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE,  
a domestic non-profit Corporation

Petitioners

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DEPT. OF LAND &  
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STATE OF HAWAII

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	)	MAUNA KEA ANAINA HOU and
(CDUA) HA-3568 for the Thirty Meter	)	KEALOHA PISCIOTTA; CLARENCE
Telescope at the Mauna Kea Science	)	KUKAUAKAHI CHING; FLORES-
Reserve, Ka'ohe, Hamakua District,	)	CASE OHANA; DEBORAH J. WARD;
Island of Hawai'i, TMK (3) 4-4-015:009	)	PAUL K. NEVES; and KAHEA: THE
	)	ENVIRONMENTAL ALLIANCE'S
	)	FIRST AMENDED NOTICE
	)	CONFIRMING WITNESSES FOR
	)	JANUARY 11, 2017 CONTESTED
	)	CASE HEARINGS; CERTIFICATE OF
	)	SERVICE
	)	
	)	
	)	HEARING OFFICER: Hon. Riki May
	)	Amano (Ret.)
	)	

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA;  
CLARENCE KUKAUAKAHI CHING; FLORES-CASE OHANA;  
DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE  
ENVIRONMENTAL ALLIANCE'S FIRST AMENDED NOTICE CONFIRMING  
WITNESSES FOR JANUARY 11, 2017 CONTESTED CASE HEARINGS

MAUNA KEA ANAINA HOU and KEALOHA PISCIOTTA; CLARENCE  
KUKAUAKAHI CHING; FLORES-CASE OHANA; DEBORAH J. WARD; PAUL K.  
NEVES; and KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit

EXHIBIT D

Corporation (Collectively referred to as "MK Hui"), intends to call the following witnesses  
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January 11, 2017

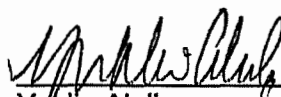
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Kapulei Flores  
E. Kalani Flores

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Narissa P. Spies	B.52a B.52b B.52c B.52d	Deborah Ward / Mauna Kea Anaina Hou
David James Vicente	B.09a B.09b	Deborah Ward / Mauna Kea Anaina Hou
E. Kalani Flores	B.02a - B.02x	Self

MK Hui, as well as Petitioner/witnesses listed herein, reserves the right to call the  
above-named witnesses out of order and subject to their respective availabilities.

DATED: Kailua, Hawaii, 1-9-17.



Yuklin Aluli

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

151  
Kealoha Pisciotto, Petitioner and for  
Petitioners Mauna Kea Anaina Hou,  
and Paul K. Neves

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E. Kalani Flores, for Petitioners  
Flores-Case Ohana

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Clarence Kukauakahi Ching,  
Petitioner

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Deborah J. Ward, Petitioner

# 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 )

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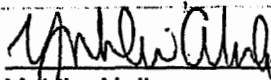
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*Witness for the Hearings Officer*

DATED: Kailua, Hawaii, 1-9-17



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Co-counsel for Petitioner KAHEA  
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E. Kalani Flores, for Petitioners  
Flores-Case Ohana

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Clarence Kukauakahi Ching,  
Petitioner

KS

Deborah J. Ward, Petitioner

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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	)	<b>ERRATA TO KAHEA: THE HAWAIIAN</b>
Conservation District Use Permit	)	<b>ENVIRONMENTAL ALLIANCE'S MOTION</b>
(COUP) HA-3568 for the Thirty Meter	)	<b>TO ADMIT EXHIBITS AND WRITTEN</b>
Telescope at the Mauna Kea Science	)	<b>DIRECT TESTIMONY INTO EVIDENCE</b>
Reserve, Kahohe Mauka, Hamakua	)	<b>FILED FEBRUARY 21, 2017;</b>
District, Island of Hawai'i, TMK (3) 4-4-	)	<b>CERTIFICATE OF SERVICE</b>
015:009	)	
	)	
	)	Hearings Officer: Honorable Riki Amano
	)	(Retired)
	)	

**ERRATA TO KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE'S  
MOTION TO ADMIT EXHIBITS AND WRITTEN DIRECT  
TESTIMONY INTO EVIDENCE FILED FEBRUARY 21, 2017**

KAHEA: The Hawaiian Environmental Alliance ("KAHEA"), by and through its  
counsel Yuklin Aluli and Dexter K. Kaiama, hereby submits an errata to its Motion to  
Admit Exhibits and Written Direct Testimony Into Evidence ("Motion") filed herein on  
February 21, 2017. Through an oversight, the written direct testimony of David Kimo

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Department of Land and Natural Resources  
State of Hawaii  
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EXHIBIT "E"

Frankel was omitted. With sincere apologies to Hearings Officer Amano, and the parties and administrative personnel to this proceedings, this errata is respectfully submitted to correct and add the following written direct testimony for admission to this proceeding:

**WRITTEN DIRECT TESTIMONY**

Ex. No.	Description
B.53	David Kimo Frankel, Esq.

Alternatively, KAHEA respectfully supplements its pleading to admit the written direct testimony of David Kimo Frankel pursuant to Hawai'i Administrative Rules ("HAR") §§ 13-1-32, 34, and 35.

On February 16, 2017, KAHEA: The Hawaiian Environmental Alliance ("KAHEA") rested its case in the above entitled matter. KAHEA now moves to admit into evidence the written direct testimony ("WDT") of its witnesses and the exhibits introduced therein during the contested case hearing. The proposed evidence is in accordance with Hawai'i Revised Statutes ("HRS") § 91-10 governing the admissibility of evidence in agency proceedings:

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[.]

HRS § 91-10(l) (emphases added). The evidence presented by KAHEA is relevant, material, and is not privileged or unduly repetitious, and is therefore admissible under the liberal standard of the admissibility of evidence in administrative hearings.

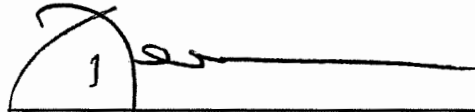


Therefore, pursuant to HRS § 91-10, KAHEA moves to admit into the record the following testimony and documentary evidence:

Additionally, KAHEA respectfully submits that the admission of the Mr. Frankel's written direct testimony, while admittedly unwise, amounts to a harmless error that will not result in an undue prejudice to any of parties. Mr. Frankel's written direct testimony was previously filed in these proceedings (prior to his live testimony on or about January 11, 2017), he did testify before Judge Amano and, as part of his testimony, he did produce and swear that he wrote and that his written direct testimony was accurate to the best of his recollection. Under the totality of the circumstances, KAHEA respectfully submits there is good cause for the admission of David Kimo Frankel's (Exhibit B.53) written direct testimony

Based on the foregoing, KAHEA respectfully requests that the Hearing Officer grant this Motion.

DATED: Kailua, Hawaii, 3/20/17.

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

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STATE OF HAWAII

Contested Case Hearing Re Conservation  
District Use Application (CDUA) HA-3568  
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Kea Science Reserve, Ka'ohe Mauka,  
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02

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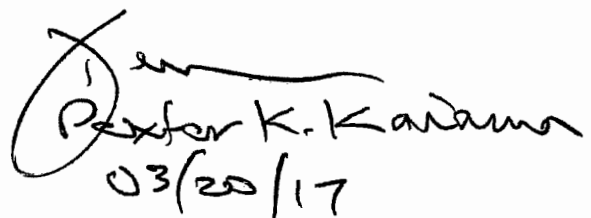
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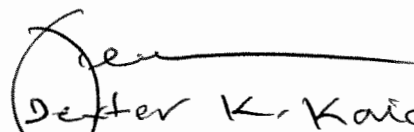
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