

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

Approved by Commission on
Water Resource Management
at the meeting held on
April 17, 2014

DATE: March 19, 2014
TIME: 10:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.
1151 Punchbowl St., Room 132
Honolulu, Hawaii 96813

Chairperson William J. Aila, Jr. called the meeting of the Commission on Water Resource Management to order at 10:04 am.

The following were in attendance:

- MEMBERS:** Mr. William J. Aila Jr., Mr. William Balfour, Mr. Milton Pavao, Mr. Kamana Beamer, Mr. Jonathan Starr, Mr. Ted Yamamura, Ms. Linda Rosen
- STAFF:** William Tam, Roy Hardy, Lenore Ohye, Dean Uyeno, Paul Eyre, Jonas Burgon, Rebecca Alakai, Charley Ice, Robert Chenet, Neal Fujii, Malie Beach-Smith
- COUNSEL:** Colin Lau, Esq.
- OTHERS:** Jonathan Scheuer, Kaleo Manuel, Dan Purcell, Lisa Yang, Shae Kamakaala, Khara Jabola, Keani Rawlins Fernandez, 'Oln Campbell, Kawelau Wright, Matt Ka'ahue, Raeanne Cobb-Adams

A. APPROVAL OF MINUTES

January 22, 2014

MOTION: (Balfour / Pavao)
To approve the minutes.
UNANIMOUSLY APPROVED.

B. ANNOUNCEMENTS

Chair Aila welcomed Linda Rosen to the Water Commission ("Commission").

Commissioner Rosen said she was honored to serve on the Commission and reflected on the importance of land and water.

Deputy Director William Tam announced the meeting of the Nominating Committee and said a list of names had been sent to the Governor for selection. He thanked the members of the Nominating Committee for their time and diligence.

Deputy Tam handed out copies of the *Kauai Springs, Inc. v. Kauai Planning Commission* to the commissioners. He briefly discussed the case and the potential implications for the Commission.

Commissioner Pavao asked if the counties were required to consult with the local Department of Water Supply about water issues.

Deputy Tam explained that a private water source was used in the *Kauai* case. The Department of Water Supply was not involved.

C. WATER CONFERENCES AND REIMBURSEMENT POLICY

Deputy Tam named the upcoming water conferences and outlined the changes to the reimbursement policy.

Commissioner Starr asked if transportation and lodging would be reimbursed.

Deputy Tam explained that the policy, which was revised and adopted on October 16, 2013 included reimbursement for designated Hawaii conference fees, travel, meals and lodging. However, some commissioners have expressed interest in attending conferences outside of Hawaii. Currently, commissioners will *not* be reimbursed for mainland conferences.

Commissioner Pavao asked if staff attends mainland conferences.

Deputy Tam replied yes, for special training purposes. However, budget cuts have limited travel for staff.

Commissioner Pavao commented that the same travel policy for staff should also apply to commissioners.

Commissioner Starr said he would be going to the American Water Works Association (“AWWA”) Conference in Boston and would like to be reimbursed for his registration fee. He did not expect the Commission to pay for airfare and hotel, but asked if per diem could be provided.

Commissioner Rosen asked if the policy was subject to availability of funds.

Chair Aila replied “yes.”

Commissioner Beamer agreed that conference fees should be reimbursed. However, reimbursement for travel, meals and lodging should be subject to funding.

Commissioner Yamamura asked about the travel policy for staff.

Deputy Tam said staff submits a travel approval request, subject to approval by the Deputy and/or Chair.

Commissioner Pavao asked if per diem would also cover hotel and meals. He suggested the same per diem policy apply to the commissioners.

Deputy Tam said that travel requests will most likely be approved if the purpose of the travel is important to their work and funds are available.

Commissioner Pavao suggested that the Chair approve or deny all travel requests.

Commissioner Yamamura reiterated that the travel policy for staff should also apply to commission members.

Commissioner Beamer said it was important to attend conferences outside of Hawaii that would expand their knowledge base.

Deputy Tam commented that staff usually shares what they learned after they return from a conference. He agreed that mainland conferences provide a different and unique perspective.

Commissioner Pavao agreed with the idea of reporting what they learned after a conference.

Commissioner Rosen clarified that airfare, meals, and lodging would be covered by the new policy subject to the Chair's approval and the availability of funds.

Deputy Tam said mainland conferences are typically limited to one trip per year, per staff member. The same standard would apply to the commissioners.

MOTION: (Pavao / Yamamura)

To revise the policy on reimbursing members of the Commission on Water Resource Management to include reimbursement for conference fees, transportation, meals, and lodging in Hawaii and the mainland, subject to the Chair's approval and the availability of funds. Mainland conferences will be limited to one trip per year, per commission member.

UNANIMOUSLY APPROVED.

Commissioner Starr asked if the Hawaii Conservation Conference ("HCC") registration fee would be covered under this new policy.

Deputy Tam said the HCC is not currently on the list of designated Hawaii conferences but could be added to the list.

Commissioner Starr asked if staff would be presenting at the conference.

Deputy Tam said "yes."

Chair Aila said the HCC would not need to be formally added to the list, since the new reimbursement policy applies to all conferences, subject to approval and the availability of funds and the Chair's approval. It is the same policy used by staff.

D. REPORTS, UPDATES AND BRIEFINGS

- 1. Report on Keauhou (North Kona) site inspection with Hawaii County Council, February 18, 2014 (Kamana Beamer)**

Commissioner Beamer reported on his participation in a site visit with the National Park Service ("NPS") and the Hawaii County Council to understand the designation process for the Keauhou Aquifer. Many people in Kona are interested in the issue of designation and what it will mean for the community. The site inspection included a tour around the fish pond, a presentation by NPS and Jonathan Scheuer, and information from cultural practitioners. It was followed by a public meeting before the County Council. The meeting was held via video conference and connected every district of the Big Island. People offered testimony and expressed reservations about designation, inquired about water rights for the Department of Hawaiian Home Lands, and asked if existing water use permits would be rolled over if the aquifer was designated. Roy Hardy provided testimony and answered questions on behalf of the Water Commission.

Commissioner Starr commented on the importance of participation in these types of community meetings. He asked that the commissioners be notified about meetings and/or cancelled hearings.

Commissioner Pavao asked if the site inspection was purely informational.

Commissioner Beamer said the County Council might pass a resolution about designation. There was not a clear consensus about whether or not the County Council supports or opposes designation.

Dan Purcell asked the Commission to consider using video conferencing for its meetings.

Jonathan Scheuer testified on behalf of the NPS. He said the site inspection was intended to inform the County Council since they will eventually be asked to comment on the petition to designate. The NPS intends to coordinate a meeting/site visit with the Water Commission sometime in the fall.

Commissioner Starr expressed interest in a site visit.

Commissioner Balfour agreed that a site visit would be beneficial to the Commission.

Commissioner Beamer reiterated his desire to be notified about meetings and hearings.

Deputy Tam clarified that the Keauhou petition is not a contested case. Therefore, the commissioners are permitted to talk. In a contested case, the commissioners are acting as the judge and are therefore prohibited from having conversations related to the details of the case.

Commissioner Yamamura asked if it was appropriate for commissioners to attend hearings related to a contested case.

Deputy Tam recommended that the commissioners not attend since it could be viewed as a conflict of interest.

Commissioner Starr disagreed and said the commissioners should sit-in on the process as long as they avoid ex parte communication.

Commissioner Rosen asked for legal advice regarding attendance at contested case hearings. She noted the implication of facial expressions.

Commissioner Pavao agreed that the commissioners should not attend hearings related to a contested case.

Deputy Tam said that other members of boards have been disqualified from participating in decisions. Therefore, it is better to err on the side of caution.

Deputy AG Colin Lau agreed with Deputy Tam's opinion and said there is a risk of ex parte communication especially if the parties talk during breaks. The commissioners could run the risk of over-hearing conversations that could jeopardize their role in the case.

Commissioner Beamer asked about the difference between a contested case and a public meeting.

Deputy AG Lau said Chapter 92 (Sunshine Law) outlines permitted interactions of the Commission.

Commission Pavao asked about site visits.

Deputy AG Lau said a site visit should be noticed on the agenda. The public would be allowed to attend. Alternatively, the Commission could organize a Permitted Interaction Group ("PIG") between two members but no more than four.

Deputy Tam said the Commission would be organizing a two-day site visit to Keauhou in Kona.

Commissioner Pavao asked if the visit would examine the well sites.

Deputy Tam replied "yes."

Commissioner Pavao suggested that the hydrologists be invited to attend and comment on the geology of the aquifer. There are many unanswered questions.

Deputy Tam said there are pending studies that will help explain the dynamics.

Commissioner Beamer asked if the AG's office could provide guidance about permitted interactions with members of the community without jeopardizing their role as a decision maker.

Deputy AG Lau said there is difference between "contested case mode" and meetings where the sunshine law applies.

2. Update on Waimea, Kauai complaint and petition

In August 2013, the Commission received a petition to investigate "waste" and instream flow standards in Waimea, Kauai. A consultant has been identified to do a hydrologic examination and provide information about the system. The parties and

lawyers have met to identify the scope of the investigation. The scope of work is being revised to include their suggestions. There will be a formal site visit, which the commissioners will be invited to attend. The area under investigation is on public land.

Commissioner Starr said he was looking forward to the site visit.

3. Update on Statewide Water Use Reporting

Roy Hardy (Ground Water Program Manager, Commission on Water Resource Management) gave an update on the current status of statewide water use reporting using the online reporting system. Reporting allows staff to manage and ensure the sustainability of Hawaii's water resources. The Water Resources Information Management System ("WRIMS") went live in April 2013. Users can login and submit their water use report online, which has helped reduce staff time entering data. The system will also provide a graph of use and calculate the 12-month moving average. WRIMS can generate total use island wide so staff can see how much water is being pumped vs. what is available.

Commissioner Yamamura asked how reporting could be made mandatory.

Mr. Hardy said enforcement is crucial to mandatory reporting.

Commissioner Balfour agreed that reporting is imperative to managing water resources.

Commissioner Beamer asked if water usage could be broken down by aquifer.

Mr. Hardy replied "yes." WRIMS can also generate information based on user, reporter and landowner.

Deputy Tam said surface water reporting is now required. Users will be contacted personally through outreach efforts on each island.

Mr. Hardy went on to describe the various sectors and the water use reporting for each. About about 1/3 of the total number of wells are reporting statewide. About half of all the wells on Oahu are reporting.

Commissioner Starr asked if there was a mechanism for revoking a water use permit for failure to report.

Mr. Hardy said an enforcement policy is in the works. There are about 1,300 stream diversions statewide. Until recently, surface water users were not required to report. About 1/5 of surface water users are reporting. Staff is focusing on increasing reporting in water management areas. Outreach will also be conducted to encourage water users to start using the online reporting system.

Commissioner Pavao expressed concern about the lack of reporting in designated water management areas. He asked about fines.

Mr. Hardy said the Commission can fine up to \$5,000 per day for not reporting. The enforcement policy will help define the different mechanisms for imposing fines and violations.

Commissioner Starr said an enforcement policy needs to be put in place immediately. He made a motion to have staff prepare a draft enforcement policy.

Commissioner Rosen commented that fines may result in additional work for staff.

Dan Purcell suggested that students get involved in helping users report.

MOTION: (Starr / Beamer)

For the Water Commission staff to create a draft enforcement policy for water use reporting.

UNANIMOUSLY APPROVED.

Deputy Tam remarked that online reporting will help reduce work load for staff and make enforcement possible. An administrative process is being developed internally to help handle the enforcement issues.

Commissioner Beamer asked how fines are processed.

Deputy Tam explained that the goal is to keep the fines in-house and use them for resource management and restoration. Penalties that get put into the General Fund may not directly come back to the Commission.

4. Briefing: Water and the Public Trust

Deputy Tam presented an outline and materials related to the history of the public trust doctrine and water. Materials will also be available on the CWRM website. The public trust doctrine is a concept that evolved from Roman law. There are certain natural resources that are considered shared resources and cannot be appropriated for private use. Some things are inherently public and cannot be alienated from public review. The concept of the public trust came to Hawaii in 1896 in a case called *Oahu v. Oahu Railway* when the railway company tried to condemn Honolulu harbor for private use. The public trust doctrine provides that there are ultimate limits on the government's ability to transfer or impair certain critical natural resources on which the public depends now and in the future.

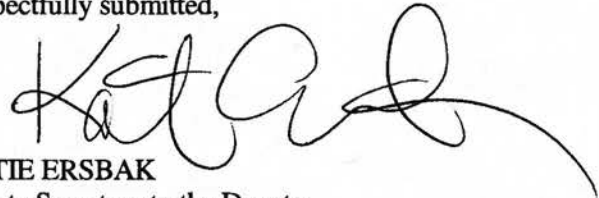
Hawaii water law has historically been a fight over surface water. The *McBryde* case prompted the Hawaii Supreme Court to revisit the public trust doctrine in Hawaii. Western law and traditional Hawaiian practices have been merged to define shared use. The public trust doctrine is a restriction on the misuse of an asset and is court created. The Water Commission has a public trust duty and a stewardship obligation to protect the resource for future generations.

Commissioner Starr commented on the public trust in the context of a contested case. Sometimes the parties have their own self-interest at heart.

Deputy Tam explained how the public trust doctrine relates to the Water Commission. The Commission must investigate the issues and not let the parties decide. The precautionary principle and public trust doctrine requires the Commission to anticipate and plan for changes in the future.

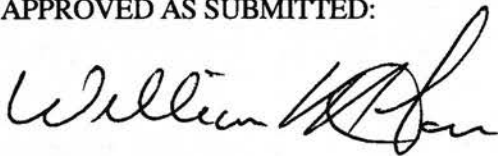
Chairperson William J. Aila, Jr. adjourned the meeting at 12:53 pm.

Respectfully submitted,



KATIE ERSBAK
Private Secretary to the Deputy

APPROVED AS SUBMITTED:



WILLIAM M. TAM
Deputy Director