

MINUTES  
FOR THE MEETING OF THE  
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: December 16, 2015  
TIME: 9:30 a.m.  
PLACE: DLNR Board Room  
Kalanimoku Bldg.  
1151 Punchbowl St., Room 132  
Honolulu, Hawaii 96813

Chairperson Suzanne Case called the meeting of the Commission on Water Resource Management to order at 9:31 a.m.

The following were in attendance:

**MEMBERS:** Ms. Suzanne Case, Mr. Jonathan Starr, Mr. Milton Pavao,  
Mr. William Balfour, Jr., Mr. Michael Buck, Dr. Kamana Beamer, PhD

**EXCUSED:** Dr. Virginia Pressler, M.D.

**STAFF:** Jeffrey Pearson, P. E., Roy Hardy, Dean Uyeno, Lenore Ohye, Charley Ice,  
Neal Fujii, Jeremy Kimura, Rebecca Alakai, Bob Chenet, Jonas Burgon

**COUNSEL:** Linda Chow, Esq. (Item B2)  
Colin Lau, Esq. (Items B3 and B4)

**OTHERS:** David Schulmeister (Atty. for MPU), Stephen Anthony (United States Geological  
Survey), Natasha Baldauf (Atty. – DHHL), Matthew Dvonch (Atty. – DHHL/AG),  
Sherry Broder (OHA), Kaleo Manuel (DHHL), Jonathan Scheuer (DHHL), Clay  
Rumbaoa (MPU), David Frankel (NHLC)

Chairperson Suzanne Case stated that they will be withdrawing Item B1 from the Agenda which will be taken up at the next meeting.

Chairperson Case said there are three sets of minutes to approve and asked for any comments on Item A1, A2 or A3.

Commissioner Starr said although a good attempt has been made to produce minutes that are better than some have been in the past, he will not be voting for their acceptance because he really feels strongly that this body should have and require verbatim transcript or some form of electronic or verbatim searchable minutes because of the importance of what we do and the fact that much that has occurred in the past has gone to litigation and without a true record of it that really muddies the process down the road.

Chair Case said, "Duly noted".

Commissioner Milton Pavao said he brought it up earlier but missed the last Commission meeting, and asked if a motion was made that there would be verbatim minutes and asked if that changed. Chair Case said that the staff was asked to make sure it was very detailed, which they made a strong effort to do.

Approved by Commission on  
Water Resource Management  
at the meeting held on

1.28.16

**A. APPROVAL OF MINUTES**

- 1. August 17, 2015

**MOTION: (Balfour/Pavao)**

To approve the August 17, 2015 minutes.

MINUTES APPROVED (Aye 5 - Opposed/Starr)

- 2. September 16, 2015 (Chair Case, Commissioners Pavao, Starr, Balfour, Pressler/ Not at September 16 meeting: Buck, Beamer)

**MOTION: (Balfour/Pavao)**

To approve the August 17, 2015 minutes.

MINUTES APPROVED (Aye 4 - Opposed/Starr)

- 3. October 20, 2015 Chair Case, Commissioners Starr, Buck, Beamer, Balfour; Not at October 20 meeting: Pavao, Pressler

**MOTION: (Pavao /Balfour)**

To approve the October 20 minutes.

MINUTES APPROVED (Aye 4 - Opposed/Starr)

**B. ACTION ITEMS**

- 2. **Defer Decision Making for Applications for New Ground Water Use Permits and Department of Hawaiian Home Lands Request for Mediation and Staff Request to Delegate Authority to Chair to Appoint a Mediator and Affirm the Chair’s Authority to Extend Deadlines for the following competing Ground Water Use Permit Applications (GWUPAs):**

**Molokai Public Utilities, Inc. (MPU)  
 Maui Department of Water Supply (MDWS)  
 Department of Hawaiian Home Lands (DHHL)**

**GWUPA No. 973 MPU Well No. 0901-001, TMK (2) 5-2-012:029, New Use of 1.026 mgd; GWUPA No.499 MDWS Well No. 0801-003, TMK (2) 5-2-012:029, Increase of 0.384 mgd for a new modified total of 0.900 mgd; GWUPA No. 448, DHHL Well Nos. 0801-001 & 002, TMK (2)5-2-010:003, Increase of 0.270 mgd for a new modified total of 0.637 mgd Kualapuu Ground Water Management Area, Molokai**

STAFF PRESENTATION by Charley Ice

Charley Ice distributed handouts to the Commissioners: 1) copy of letter from Cades-Schutte dated December 16, 2015, and 2) copy of letter from Department of the Corporation Counsel, County of Maui.

Charley Ice said he has three applications for new water use permits for the Kualapuu Aquifer System area on Molokai. Mr. Ice reported that there is a very lengthy history as indicated in the timeline without going into a lot of detail.

It goes back to 1997 when we had some of the first applications come in but for a variety of reasons they've been delayed until this point. We had a contested case hearing in 1998, which concluded in the December 2000 Decision and Order, which was then appealed and at that point we had Kaluakoi closing the hotel and golf course. There wasn't any resolution until December 2007 when the Supreme Court made its ruling, which was followed in May 2008 that Molokai Ranch was going to walk away from this whole thing and not reapply.

The PUC got involved at that point to increase the rates so that Molokai Ranch can balance the cost and revenues. That was concluded in 2010. The new management at the Molokai Ranch, which had acquired Kaluakoi back in 2001 reapplied in December 2012 and staff didn't find that it was actually complete and reviewable until about June 2014. At that point, it seemed that there were some potential solutions in the wings so it was held back from normal proceedings. And with the new deputy now we have decided to proceed and are glad to get the vehicle moving again.

In March 2015, staff had an outreach session on Molokai for the Water Resource Protection Plan Update and there was considerable amount of interest in resolving the issues concerning Well 17 and the other pending applications.

So staff has that rolling again and are happy to be able to get that started. We did have the parties come together and they have expressed interest in seeing the results of the United States Geological Survey Modelling Report, which has been underway. The Chair issued an Order to extend the review period, comment, and objection deadlines from the public notice of all these three new water use permit applications. We also have a request for mediation to see if we might be able to get through some of these issues earlier.

The extension goes to March 14 of next year. The mediation, because of the rules that we have, is sort of short timeline here. Position statements should be filed by agencies by January 3<sup>rd</sup>, and you may actually have two of these in your handouts. And within 15 days, that would be January 18, staff would have to appoint a mediator, and then the mediation needs to begin by February 2<sup>nd</sup>. At that point I think we're still looking towards receiving the United States Geological Survey study and having the opportunity to review that in some detail and to digest that and see how that may affect the parties' interests.

Staff has been considering making sure that this complex set of multiple issues and multiple parties gets a full exposure so staff is contemplating going to Molokai and having a presentation on the United States Geological Survey study as well to provide as a fuller background of all issues that have come up over this time. We will see how that unfolds with time. There's also some rumors that some of the applications may change so there's a lot of interesting things that could unfold in the next month or two.

Staff pointed out that this was otherwise going to contested case because there are competing uses and we define that in the submittal here on page 8, you'll see a table that explains how we have competing uses not only in the sense of sustainable yield but perhaps more importantly the fact that there's interference between wells and so that's part of the reason why the United States Geological Survey Report is going to be important.

**STAFF RECOMMENDATION:**

That the Commission:

1. Affirm the authority of the Chair, pursuant to HAR §13-167-26m, to extend deadlines for “objections” and to allow the mediation to commence after the USGS study is release. This will allow the parties a full opportunity try to mediate the issues raised by the three groundwater use applications, GWUPAs (448, 299 & 973).
2. Approve medication as requested by the DHHL petition and delegate authority to the Chair to appoint a mediator, as allowed by HAR §13-167-83, to provide for proceeding with the understanding that the mediation will not commence until after the USGS study is released and the parties have an opportunity to review.
3. Pursuant to HAR §13-167-84, allow any affected state or county agency to file positon papers within 30 days of the filing of the DHHL petition for mediation. The deadline for filing would be January 3, 2016.
4. Defer decision making on the three pending GWUPAs (448, 499, & 973) until after the March 14, 2016 extended deadline has passed and the mediator submits a written report containing recommendations to the Commission for its consideration.

Commissioner Milton Pavao asked how many wells are we talking about.

Mr. Ice said DHHL has two, Maui County has one and Molokai Ranch has one. Actually it’s Molokai Public Utilities which serves the west end and Kualapuu.

Commissioner Pavao asked if they are in the same aquifer system.

Mr. Ice said they are all fairly close together.

Commissioner Pavao asked if they’re designated.

Mr. Ice replied yes.

Commissioner Pavao asked what kind of GPMs you are talking about.

Mr. Ice said the amount for Department of Hawaiian Home Lands, which is the earliest set of wells, have an existing permit for about a third of the million gallons, a little more than that, and they’ve asked for an additional amount to about half a million. Department of Water Supply has an existing permit for about half a million and they are asking for a larger amount and finally the application for Maui Public Utilities is just over one million. So we are actually still well below the sustainable yield except that there’s an additional reservation for the Department of Hawaiian Home Lands for nearly three (3) million gallons per day.

Commissioner Pavao asked if all these systems are public water systems.

Mr. Ice said yes, by the Department of Health’s definition, and asked if he should go into the questions at this point.

Commissioner Jonathan Starr said he’ll have questions but will wait until the end of the presentation and testimony.

Commissioner Mike Buck asked about Item 2 mediation recommends that after the United States Geological Survey study is released, assuming that's released not published because there's a release date of early 2016 and published date of 2017.

Mr. Ice said that that was his understanding; Steve Anthony is here if you have questions.

Commissioner Buck again asked if it was checked if they are willing to release for publication.

Mr. Ice thought the typical thing is they can release it for parties who are involved in a case like this but it won't be published for the public.

Commissioner Buck asked Mr. Ice if he doubled check with him if they would be able to. He just wants to make sure we're clear about that because that triggers the release of the data and it seems like an important starting point.

Mr. Ice said he thinks that it's true, it appears to him that at the very least we need to actually open the mediation and whether or not we had an opportunity to discuss it fully at that point. We may simply need to continue the mediation until we had an opportunity to see the report.

Commissioner Buck said he is just reacting to Mr. Ice's specific recommendation that mediation will not commence until after the United States Geological Survey study is released. So he wants to know what that means.

Mr. Ice said to be fair we would want the mediation to hold up, we have to open it because of the timeline in the rules, we have to open it up by February 2<sup>nd</sup> but it doesn't mean that we actually need to begin having a lot of discussion about this until such time as we're comfortable with the understanding what the USGS report says. Does that answer your question?

Commissioner Buck replied, no it doesn't; he's just reacting to the specific recommendation that a) you need the mediation to not commence until after the United States Geological Survey study is released early and whatever timeframe after the release for the parties have time to look at it, that's all.

Mr. Ice supposed that "commenced" can be looked at it a couple of different ways.

Deputy Jeff Pearson asked if we could we defer to Steve Anthony on this.

Commissioner Buck said he wondered if staff asked him. I'm just reacting directly to staff's recommendation.

Mr. Ice said yes, we have asked.

Chair Suzanne Case said technically the point is that to allow the mediation to commence, actually legally it has to commence by a certain date and but that we may want to change this language. I want the mediation as much as possible to take in that data. Is that correct?

Mr. Ice said there are a number of issues involved in the mediation and so we will open the door for people to discuss a number of things and it seems on this particular matter they want to be sure they can digest it.

Chair Case said maybe we should say to allow the mediation to commence and to continue, after the United States Geological Survey study is released.

Mr. Ice answered, that sounds like a good suggestion.

Commissioner Jonathan Starr said he was going to hold his comments until after the public had an opportunity to weigh in but since we're making amendments already, he would like to begin his commentary now. This issue which has been dormant for many years ever since the State Supreme Court overturned the State Commission on Water Resource Management's two rulings in Kukui Molokai and Waiola has been sitting for a decade or so, one of them quite a bit longer than a decade. Out of the blue, and I was told by our deputy that he was under orders from above and I don't know if that's from God, or from where, that this must be rushed and settled, there shall not be contested cases and so there will be mediation and then some arbitrary and capricious deadlines were suddenly thrust on the parties. We don't know who all the parties are but we're supposed to rush, rush, rush, to get this under mediation and get it settled without the public having had a hearing and with fake deadlines and irregardless of the fact that everyone had agreed previously that nothing would happen, no action would happen until the United States Geological Survey was completed which in the pass has always meant published. This really seems to be something that's going haywire from the get-go instead of doing what the process is. And this was remanded to this Commission; it was not remanded to staff or a mediator. This Commission has not even been briefed on the issue. There has been no public meeting about this, it's not been out in the community, I would wonder whether any of the commissioners has ever even read Kukui or Waiola, those two remands and overturned were sent to us, the Commission, but it's never been distributed by the Commission.

All these things seem to be sending us on a path to failure. And when you look back and try to understand why TMT disaster happened, or Superferry happened or other stuff has happened over the years, why stuff is allowed to start off on the wrong track, skip a step and then fester for a decade and then be suddenly given the bums rush. This seems to be a perfect example of that and I for one would like to see it happen. I don't want to see it going through endless litigation; I don't want to be a party to kicking it down the road. I want to see all sides, being able to work, whether it's with us or even using a mediator which I have no problem to do but we have to let it ripen in the process. There's a reason why this Commission exists and that is to do the process and make sure it is done in a way that the community and the commissioners and the water code all given respect and I don't see this happening. I'll have quite a bit more to add a little later in the meeting but right now I would like to finish the presentations and testimony, but I do not like what I've been hearing. I've been hearing it from the community; I've been hearing it from the parties. I think United States Geological Survey should be given the time they need to do things in their legal and correct process instead of them feeling that they need to be rushed for some political reason that maybe doesn't really truly affect them. Thank you.

Commissioner Starr added, "I apologize if I'm a bit harsh but I feel strongly on this."

Commissioner Kamana Beamer said for housekeeping, for the ease of reading for him, because with Commissioner Starr and you laid out a really extensive history with these two petition permits, I don't know if we can have a key of acronyms. As I was reading through I had to go back too many times to check what acronyms was attached to what, that would be super helpful.

Chair Case said to repeat the phrase instead of using acronyms. In the long run it will add a few pages to our documentation but it would make it much more readable for anyone. Chair Case said you'd

want it to be understandable for any member of the public and it would be better not to use acronyms.

Commissioner Pavao said maybe he's really slow this morning or the stress of this morning got to him but he asked if it could be explained the relationship between the United States Geological Survey study, which is basically scientific data, scientific information, and asked what are you going to mediate? What is it that a study needs to be done and then you're going to mediate. The study's going to be scientific information, right? So how can you mediate scientific information?

Charley Ice responded that he think the parties are concerned about the interference between the pumpage of the wells.

Commissioner Pavao interjected, "I understand that."

Mr. Ice said they will try to clarify maybe what some of the limitations are on the pumpage on any of those wells in terms of how they affect the others. At that point, the parties may choose to revise their applications or to somehow modify how they are approaching this so that we can avoid having that kind of direct confrontation. So it's a scientific base for understanding better where we stand on it.

Commissioner Pavao asked if the mediation is to allocate the water within the realms of the United States Geological Survey studies without any detrimental impact of either party, and asked "is that correct?"

Mr. Ice said that would be his assumption. The petition for mediation did not really specify but obviously the competition between the sources is the main reason why we would be here otherwise. He assumed that was what was intended.

Commissioner Pavao said, so basically the United States Geological Survey study is going to set the boundaries. How far can you go, how much can you pump?

Mr. Ice said, yes, I think that's fair.

Commissioner Mike Buck said he wanted a place marker, he doesn't have the history on Molokai as Commissioner Starr said there is a lot of stuff and homework. The other comment made by Commissioner Pavao is we need to make decisions on the best science we have. He is in favor of mediation. I think we need to not just enter into mediation but in terms of reference for specific mediation cases to allow the mediator and the parties to at least have understood where the Commission's thoughts may be at this time. Commissioner Buck thought Commissioner Pavao's question about what are mediating we do have our priority public trust resources, we know what those are, we know what the law is, and so once we have the best science one of the questions is going to be probably not enough water for everyone the commission needs to make its decision based on its legal mandates and mediation process should not replace that. I think it's very clear in all our mediation cases and again, I prefer mediation over contested cases that we need to be a little more specific as we enter mediation but with some specific terms of reference for the parties and mediator of the expectations of the commissioners are. It would be a waste of everyone's time for the mediation to go one path and come up here and we have to make a decision and so as we begin to explore the further use of mediation I think that's just a placeholder I want to put in but I'm still kind of uncertain and look forward to testimony because I need to get up to speed. What exactly are we mediating? Once the Commission, the Commission staff has the best available science, we have a

legal mandate based on our priority public trust resources and 174C-2 on how we make the decisions and the question is that a decision that should come from mediation or come from the Commission.

Commissioner Buck continued, once the Commission staff has the best available science we have a legal mandate based on our priority public trust resources and 174C-2 how we make the decisions and the question is, is that a decision that should come from mediation or from the Commission?

Mr. Ice said that was very well said and invited the rest of the Commissioners to give some thoughts about this.

Commissioner Bill Balfour commented it's not we're not taking too much water out, it's the fact that we have wells too close together so they are infringing on each other. So really we have the water, to me the solution is move the wells out. Very simplistic. I realize it's a lot more than that but I mean it seems to me pretty straight forward. You can argue until the cows come home but in the final analysis you just got to move those wells further apart. Obviously that costs money and somebody gets gored and somebody doesn't but maybe you all have to move. You all have to move a hundred yards out or something on that order but I mean again that's very simplistic but again, am I missing something?

Mr. Ice said that's typically how they advise people too and there's been a fair amount of discussion about that. It's a costly thing to do so I think it's made it difficult for anyone to commit to moving in the absence of real science that people are thinking very seriously about. That's one of the reasons why the applications may actually change in the coming months.

Chair Case said it would be helpful to hear from United States Geological Survey at this point.

Roy Hardy clarified in response to Commissioner Balfour's question about if there's enough water in the aquifer of Kualapuu. Actually there isn't, if you look at the new uses that are being requested and page eight on the submittal that's what we intended to show in that table. Given what has been requested and it hasn't been all that clear as it has been changing over the past decade and so forth, what we have are requests that exceed the sustainable yield. Ground water numerical models are not. We would still be exceeding the Water Use Protection Plan's sustainable yield of five (5). So, that's point three we're making as far as the reason there's competing uses that there's not enough even without numerical ground water model.

Commissioner Balfour asked what we are drawing right now is -

Mr. Hardy said that's below.

Commissioner Balfour said we always want more, I understand that but as we stand right now because we have them so close together and they are all drawn from the same bucket, it's really a problem.

Mr. Hardy said that's the first point.

Commissioner Balfour continued that you got to do one thing at a time. First of all before you add you got to separate as far as he's concerned. He realize that everybody wants more, more, more, more but right now it's not working so you move out and if there's stuff left over than we'll argue who gets what and when. Again, that's over-simplistic, I understand, but I tend to be simple-minded so don't complicate it, just make it simple and let's get on with it.



Steve Anthony, Director of the United States Geological Survey, Pacific Islands Water Center, reported that they've been working on the study since 2008. This study is taking longer than many people wanted but the primary reason for that is trying to produce the best available science to inform decision making and some of the items we were waiting for and caused delay and the work they were doing was the update of the Rainfall Atlas that Dr. Tom Giambelluca produced for the State of Hawaii. As you know there has been some decline in rainfall that is shown through that work over time so it's important to include that. And that work was funded by the Water Commission and the update of the evapor-transformation maps and so with that information then we were able to run that through our water budget model and estimate ground water recharge. And so that estimate ground water recharge work was completed this past spring. We are now finishing up the calibration of our numerical ground water flow and transport models. And January we would be sitting down with the various ground water purveyors to simulate various scenarios of interest to the water purveyors on the island so they can better understand how the withdrawals from the various existing wells impact each other as well as wells from proposed wells. And we envision that with most of our projects that involve this type of work, there are several scenarios that are looked at and that takes some time we run a first set of scenarios, we provide feedback to folks then that forms a new set of scenarios that people want to look at and usually maybe, three times iterating with folks to come up with a set of scenarios that ultimately people are then feeling that their questions, their options have been simulated within the model results and provide them a better understanding of how the resource is stressed by the withdrawals how individual wells may be impacting each other and Commissioner Balfour is correct, one aspect would be looking at potential withdrawal sites that are not clustered together as the existing wells are.

Mr. Anthony said there were some questions earlier about, when would the United States Geological Survey results finals are released. Mr. Anthony said their work goes through an extensive review; peer review process and ultimate publication. Prior to that though, we are sharing the preliminary findings from these various scenarios to help in that process coming up a final set of scenarios that everyone is comfortable with. However, those results when they are shared are preliminary in nature subject to revision until that peer review and final publication takes place. Typically that takes a six month time period from when we stop playing with the model and we move into the final writing of the results and peer review and ultimate publications. So that's why you will see in the staff's submittal that we're looking at the end of 2016, maybe early 2017, when final results would be made available but I am anticipating again, beginning in January through March timeframe we would be meeting with a lot of purveyors and working on the scenarios and providing some feedbacks and of course share that with the community on Molokai.

Chair Case asked if this was a public study, generally publically available.

Mr. Anthony said the results and all the work they do ultimately becomes publicly available. The work is funded by the Maui Department of Water Supply, by the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs.

Commissioner Starr wanted to know if in the normal course of the Feds, and you have a few of these models, at what stage would you consider the model to be released for use to the community and the public as well as the purveyors?

Mr. Anthony said it would be when it is published. In fact, when we are meeting with folks from that January to March time period all of our presentations would have a disclaimer on the bottom of each slide that would say this is preliminary information not to be sited, quoted, and the United States government cannot be held responsible because essentially it still needs to go through that final peer review process. But we do feel that it is helpful to share the information as that process is moving

along because there is feedback that's needed to ultimately to come off with a final set of scenarios that is valuable to the decision makers.

Commissioner Starr asked if there is any precedence about entities or parties prematurely using preliminary information and has that ever to your knowledge resulted in overturning court cases, lawsuits or any other kind of problems particularly if it got changed later.

Mr. Anthony said he cannot provide any specific examples but he's sure it's happened. In that, we can lay out that these caveats about provisional information shouldn't be cited but you couldn't stop people from moving forward with that information. You can caution them of the pitfalls. Most of the time the results don't change, some time they may though, and that's why we say it's not final until it's been approved by the Director of United States Geological Survey for publication released to the public.

Chair Case asked Mr. Anthony to describe a little more what the scenarios will tell everyone about the impact of withdrawals on other wells.

Mr. Anthony said the primary impacts that will occur when withdrawing water from the aquifer are going to be lowering water levels in the aquifer, changes in salinity, distribution in the aquifer, and the second nature impact relates to the discharge of fresh water of the near shore environment. Because when you take water out of the aquifer, you're taking water that is already naturally on its path to the near shore environment and so there is some production and discharge. So we will be quantifying what that production and discharge is what the change in water level and salinity is. Still challenges remain with that production in ground water discharge to the shore ends up being, is that change in discharge significant, detrimental to the environment, we will not be providing answers to that question that something that a lot more research is needed to really understand that. But we can quantify that amount of water that is produced at the shore.

Commissioner Buck said he's just intrigued that the preliminary model, you said you meet with the purveyors and people just plug in numbers to see – who runs those meetings, how does that work?

Mr. Anthony explained that it could work in a variety of ways. Sometimes those meeting are held by what we call cooperators, the folks who are held funding the study. Sometimes United States Geological Survey will do it if the cooperator does not want to hold the meeting themselves, then we'll step up and do that. In some situations we've had communities just ask us to come and present results. Generally speaking, the preliminary findings we're talking about are primarily shared first with the agencies that are funding that work. They are the first who need to hear about it. And then based on consultation with them, we decide who are the other stakeholders that need to be brought in into that discussion. And so in the case of this particular project on Molokai because we want to simulate the stresses that's going to occur on the aquifer, it's appropriate to bring in all the water purveyors because they're the folks that have the answer to with respect on how much water they're withdrawing today and how much they would like to withdraw in the future.

Commissioner Buck asked Mr. Ice if staff thought about how to integrate that process with this mediation process, at what role would the Commission have early on or it just seem your recommendation is separate, United States Geological Survey releases, the parties going mediation, I'm just trying to understand how all those pieces fit together.

Mr. Ice explained that in mediation we do not get to participate and we don't know exactly what they discuss. They report back to us and we report back to you.

Commissioner Buck said he understand that but looking for opportunities for models for more effective communication with the parties and the public. I just wonder if the staff has really thought about how to immigrate this type of process with this conflict – 10 years.

Mr. Ice said Steve (Anthony) mentioned there may be an opportunity to present this to people within the community there may be preliminary steps because I think those who are supporting the work need to make that final call as to whose appropriate people to be involved until it's publically published. But of course, a great deal of discussion can be held between the parties who are sort of involved in this over a long period of time for them to try to sort out where they stand and how they want to proceed with that. And ultimately it comes down to us all exercising some precaution in how we proceed with final decisions.

Chair Case asked if Commissioner Buck had any ideas.

Commissioner Buck said he would like to hear from the testifiers again since he doesn't have the history of Molokai but he sensed there are some more opportunities that the formal model makes a lot more sense where open communications, the parties know what's going on as well as the community. I know that on Molokai the community's going to be very interested in whatever we do and I understand that once we form mediation the Commission doesn't even have a roll and I've heard in past mediations is you accept it or don't and don't screw this up and say yes. And I think we need to come up with effective models for mediation other than contested case hearing. So that's why I'm interested.

Commissioner Beamer wanted to add one caveat. "I completely agree with communities or parties with different interests, or different respective, getting together and discussing and trying to find common solutions. I do want to say this idea that we can avoid contested cases is just, we know we can't, the Supreme Court just let this body, not our body but the sister to this body know that, so I don't want to say in public if we can avoid contested cases that's just illegal."

Chair Case said she doesn't think anybody is avoiding, there is a contested case proceeding active on this.

Commissioner Buck said that there's always an option and by law it's always an option, we understand that. Sometimes the parties may hopefully there's some alternative ways that might get to a solution that they could handle much quicker and less expensive but it is always an option, it is the final decision, it's within the law and I understand that.

Commissioner Beamer again said he has concerns in public hearings for us to say that we're trying to avoid them.

Mr. Anthony added, and if you don't mind he would like to add to the conversation about mediation process and USGA involvement. "I don't know what that might look like and actually it's something I would want to shy away from. United States Geological Survey is within its mission we look to provide information to everybody equally at the same time. We don't want to be seeing as providing information to you and not to you. It's really sharing with everybody is the best way in which we can communicate our results."

#### **TESTIFIERS:**

1. David Frankel, Attorney for Native Hawaiian Legal Corporation represents Judy Caparida, Georgina Stanley Kuahuia, Wayde Lee, Walter Ritte, and Marsha Joy.

Mr. Frankel said there's a logic by which things can and should be done and that logic is not being followed here. So I want to give you what should have occurred first. There's an old contested case here that was remanded as referred to back to the Water Commission and we made it very clear to Linda (Chow, Deputy AG) and Jeff (Deputy Pearson) that whole contested case hearing need to be dismissed. The old application is done; Molokai Property is indicated so, you guys as a body, you need to dismiss it, and it's perplexing that that has not occurred yet. That's the first step that needs to occur. If you don't do that, it's going to be incredibly confusing; it is going to become a morass of paper. The second thing you need to do is address that our office filed a complaint with this Commission back in August 2012 regarding the illegal use of water. I don't know if by the ranch or its by Molokai Public Utility, the fact is right now every day for years, the water that they've been taking has been taken without any legal authority. And we've asked you to deal with that. You need to deal with that. You can't, --it's been incredibly frustrating for us to get this Commission's attention and now finally you have it on the agenda so we can ask you, please address this. The third thing then is whether mediation makes sense. And mediation does make sense but if for mediation to occur the scope of mediation has to be laid out. And right now it is entirely confusing as to the scope because you have this old contested case hearing and you got these new WUPAs (Water Use Permit Applications). Mr. Frankel said water use permit application. We need to be clear what the scope is.

Commissioner Beamer asked when they wrote a letter to the Commission December 2012.

Mr. Frankel said that it was a complaint.

Commission Beamer asked if it was reflected in this staff submittal timeline of events.

Mr. Frankel said he does not have a copy of the staff's submittal.

Roy Hardy and Deputy Pearson said it's a motion, not a complaint. There's a motion and a separate complaint, there's two different things that were filed. Chair Case instructed that they should make sure that's incorporated.

Mr. Frankel said the other problem with mediation is, he has tried to point out unsuccessfully, you can't technically set the mediation until the deadline for intervention of the contested case hearing is over. Because if we start mediation and the deadline to intervene is a month, or two months or three months later and someone on the last day intervenes, the entire mediation process is unfair to that person and you risk throwing all the good work out because this person never knew. You can't start this mediation process in two weeks, or three weeks or whatever you have to wait. I've tried to explain that but now the clock is ticking because your staff asked Hawaiian Home Lands to file a request for mediation, I think prematurely. So things are increasingly backwards.

Deputy AG Linda Chow wanted to clarify if he meant the deadline for to intervene in the application. You said the contested case hearing.

Mr. Frankel said, "Well, I guess I'm not distinguishing the two."

AG Deputy Chow asked because "Are we talking about the new application?"

Mr. Frankel said correct.

AG Deputy Chow said so it'll be the intervene in the new application.

Mr. Frankel said right, I think that's what you guys are talking about for the mediation, which is new application.

AG Deputy said yes.

Mr. Frankel it's extended to-

Deputy AG Chow said March.

Mr. Frankel said then you can't restart mediation until after March.

Mr. Frankel referred to what Chair Case said in our status conference in our other contested case hearing was, we should be talking informally, and I think that's fine. We can have informal talks not in the context of the formal mediation process. That makes sense. Finally, I think the comment on the Commission to ensure that as soon as possible all the parties and the staff and you folks have current information. So, for example, the application from Molokai Public Utilities does not include data from 2013, 14, 15. You folks should ask for that. You should ask for it today. Give us the data. Because there's no point in having mediation when they have data, one party has data and the rest of us don't. So please ask for that.

Mr. Frankel said they also believe that the environment impact statement needs to be completed. I don't know if you have a copy of our November 12, 2015 objections we filed with the Commission, it should be with the staff's submittal, but we point out that Molokai Property started in the (inaudible) but it's never been completed. That 343 process has to be completed before this Commission can make any decision regarding the water use permit application by Molokai Public Utilities. And finally, the Supreme Court made it clear, very clear that the applicant has to prove that their project will not have an adverse impact on traditional and customary practices. Given the Supreme Court's very clear ruling you would think the application itself would say something about that. It would contain some information. It's not there at all. So we're surprised and disappointed that the staff considered the application complete. Regardless, you folks need to insist; I guess when David Schulmeister comes up, that they provide the information, because without that information no decision can be made and mediation going to be relatively pointless. Again, we support the idea of talking, we support the idea of mediation but there's certain logic that needs to be followed, that's not being followed.

Chair Case asked Mr. Frankel what his end goal is in this whole process because obviously there is a lot of twists and turns in the various proceedings.

Mr. Frankel said his clients are primarily concerned about two things, one that there's sufficient water for Hawaiian Homestead because this goes to beneficiaries and they want to ensure they have adequate water, their decedents have adequate water and others have adequate water. And, they're concerned about the impact on the near shore waters and the impact on fisheries, etc. so, it's about ensuring sufficient water and as a corollary to that the misuse of water resources on things like golf courses, landscaping, etc., when there are higher priorities, water for beneficial of Hawaiian Home Land Trust farm, being able to successfully fish, etc.

Commissioner Starr said, the documentation that's been given to us Commissioners have been negligible or diminuent so I don't really know what has been filed by anyone, we're being asked to make a decision without seeing any of that. But one thing I did notice somewhere is that there's a reservation request from Department of Hawaiian Home Lands. I know I we recently granted one in Kona, some new ones have come in very recently and frankly I'm happy to see them stepping up

with that but what do you foresee should be the position in the process of dealing with the Department of Hawaiian Home Lands reservation request. How does that relate to everything else?

David Frankel answered, just so you know in the prior proceeding we worked very closely together with both Office of Hawaiian Affairs and the Department of Hawaiian Home Land, I believe Department of Hawaiian Home Lands is here, so I think we're supportive of the reservation request, we're supportive and recognize their need for water.

Commissioner Beamer stated that David Frankel mentioned that there was a request from our staff for you to enter into mediation after a long period of not sort of corresponding, if you can fill me in, what was that request or how did that -

Mr. Frankel said he didn't think he said that but knows that the staff asked Department of Hawaiian Home Land to make a request for mediation. We've been asking staff to deal with a whole bunch of issues for years and those issues have never been addressed. But we're happy to talk.

Commissioner Beamer said he might have misunderstood part of their presentation and reviewed, just so I'm clear, what you're saying is first the Commission needs to dismiss the previous contested case.

David: Yes, essentially.

Chair Case asked, will you anticipate you would participate in mediation.

Mr. Franklin said I think that's fair, we're going to want information; we feel we don't have good data. The United States Geological Survey study helped a lot but the 2013, 14, 15 data needs to be provided, etc. We would not participate.

Chair Case asked if he would participate in informal talks and in mediation, and sharing information and request information and that would all help move this process forward.

Charley Ice clarified that when the parties got together with status conference there was a consensus that they wanted to go to mediation first to see how far that would go. "I think that our staff has inquired with all of the parties, the agencies that might request this who might have applications in if they were going to submit this petition so I don't see anything irregular about that."

2. Kaleo Manuel, Acting Planning Program Manager for the Department of Hawaiian Home Lands, and Jonathan Scheuer, Consultant, who helps with a lot of their water issues, as well as Deputy Atty. General Matthew Dvonch, consul in this case. Mr. Manuel apologized that their Chair and Deputy have other things they are working on and asked them to attend today's meeting.

Jonathan Scheuer said it is a ridiculous and complex issue and unfortunate that there was not a staff briefing, ideally a long one on the island of Molokai. Just hearing the comments from commissioners today even the uncertainty whether or not Molokai ground water is designated shows that you are sort of hampered in your ability to make a good decision today so I would encourage you to try and as part of this process at some point not directly related to all of these matters just do an informational briefing on the history of this very complex issue and ideally hold it on the island of Molokai so the people who are most concerned about this can attend. And I'm not going to be able in this venue sort of try to clarify for you the many different complex legal and procedural thread that occurred today. But I am going to address three things for you. First, I'm going to speak to the

support of our mediation request. Secondly, I'm going to talk to you however that we have some significant concerns with the staff submittal as it was given to you in relationship to our mediation request and I'll address a couple of comments that have already been made during the discussion.

Jonathan Scheuer said, we, the Department, were asked by the Water Commission staff if they could submit a mediation request on this matter. As it has been said by all the people who have spoken so far, mediation that's generally a good idea, obviously procedural issues have to be handled properly but we certainly see some value in getting the parties to talk together. Depending on how, whether you feel that you're actually adequately briefed to make a decision today and if the procedural issues have been addressed, we would ask you to support the concept of moving the parties to mediation.

Mr. Scheuer continued, but we do have really significant concerns about the staff's submittal and this really goes to the fact that particularly because the mediation process as described in the code does not involve the Commission itself we need to get really clear descriptions of what the scope of mediation is that was brought up by David Frankel earlier. The staff submittal kind of fails in that regard and a few important ways but one that is significant to us when the Water Commission staff noticed our after use permit application they indicated among the of the many things they noticed in the water use permit applications that they have asked us to update our application in January 2014 and they say Department of Hawaiian Home Lands never responded. It is just factually incorrect, on March 6, after we received that notice, 2014, Chairperson Masagatani sent a memorandum to then deputy director, Bill Tam, that explicitly laid out the reasons why we thought it was inappropriate at this time to move forward with our water use application for two reasons. One is we were waiting the outcome the US Geological Survey study that we funded, for two reasons, one, is we need to know what the effects of our pumping and we need to know to be able to comment on other people's water use permit applications what their effects of their pumping are on our rights. We also asked at that time that the water commission staff reconvene the Molokai Water Working Group which have been three times in existence, it started back in the day of Bill Paty, but has been reconvened two other times, specifically to try to have good informed discussions on the island of Molokai with relevant stake holders over how things should proceed. That letter was not only ignored by the staff it was incorrectly omitted from reference in our water use permit application and even under the extensive chronology of events that was given to you in your submittal, but it's not even mentioned. Its sort as if Department of Hawaiian Home Lands had checked out during this process and nothing could be further than the truth.

Our biggest concern about the staff submittal, and if nothing else you'll hear it from me, the staff in that first notice to us in January 2014 and in subsequent notices for these water use permit applications in this submittal continues to insist that Department of Hawaiian Home Lands is a competing user of water against Molokai Properties as well as the County. That is legally and factually incorrect. Department of Hawaiian Home Land's reservations in water uses are public trust uses of water that you have an obligation to uphold. It may be true that their wells are interfering with our wells but to suggest that we are competing with them and that you have to somehow balance our needs and our forty granted authorizations against proposed uses sort of ignores the entire history of the Waiola and the Kapui cases. And if you sense a little tension in my voice, it's just stunning to me after losing twice at the Supreme Court that the Commission staff would suggest, "oh well you guys are competing uses", well it's just clearly incorrect. You need to actually delete any suggestion of that.

Chair Case asked for a point of clarification, there are multiple public trustees, correct?

Mr. Scheuer agreed, "yes, there are."

Chair Case asked, so part of the analysis is what of them are public trust uses and what are other reasonable and beneficiary uses, is that right?

Mr. Scheuer said yes, if you're following the general court's direction in the long series of Supreme Court cases that directed this Commission on to do its duties you would first add up all the public trust uses of water in this area which would include domestic uses of the general public, not landscaping but water used inside your house, water used for the support of traditional and customary practices, the reservations and uses of the department of Hawaiian Home Lands and ecological use of water. You would then say, okay adding all those up is there anything to advocate in this aquifer what so ever. If there is something theoretically once you satisfied that minimum public trust needs which would include our water use permit drawing on the reservation then you would say, okay and potentially some of the counties uses are domestic needs to the general publics, we add those in, you come up with those figure maybe something's left, then you would have to weigh those commercial private interests against the added benefit to the public trust that would accrue by actually letting the public trust have that letter. That's actually how you're supposed to handle it not say oh, Department of Hawaiian Home Land and the County and a private company are competing for water use.

Commissioner Starr asked if there were some wording about Department of Hawaiian Home Land that was in the constitutional language that kind of set it apart.

Mr. Scheuer said even prior to the constitution the Hawaiian Home Commission Act makes clear what Department of Hawaiian Home Land's rights are that the people of the State of Hawaii by accepting by passing our constitution, by accepting statehood, by accepting the compact incorporate the Hawaiian Homes Commission act into our Constitution plus the courts have clarified that Department of Hawaiian Home Lands water uses are public trust uses of water and afforded and in this particular case a full panoply of constitutional protections. It would take any other public trust uses of water.

So this is in terms of staff the biggest one is their insistence in saying you're competitive with these other guys, no we're not. You take care of us first, along with other public trust uses, then if there's water left over you can consider these other water use permits. Particularly, the private commercial portions of this water use permits.

Mr. Scheuer reviewed, again, I want to highlight for you we thought in terms of informal practices and discussions of things we asked repeatedly of the staff start reconvene the Molokai Working Group and it's a good time, study coming up, get the group together, it's been many years, staff has provided let's just say inconsistent responses, yes we want to, no we don't want to, oh it's up to the County of Maui which the county is competing users so they should be the one to convene it. I want to highlight for you too and I touched on this now, when you talk about sustainable yields -

Chair Case asked if Maui County is a competing user but it depends on what the use is.

Mr. Scheuer responded, yes, they have wells in the aquifer but they shouldn't necessarily be the ones to convene the Molokai Water Working Group because they have skin in the game.

Chair Case wanted to make sure that she understands his language.

Mr. Scheuer said it's come out in some of the discussion when you talk about sustainable yield you need to keep in mind that sustainable yield is not calculated based on, okay we know there's sufficient water flowing to the coast and therefore you can pump everything else and in fact that's the



specific issue is litigated here. So you just can't take here's 5.0 and minus the wells, okay we're good or we're not good. You actually have to make the determination about the effect on the coast another 5.0 and depending on where the wells are its going to have a negative impact on near shore practices.

Commissioner Starr asked what would the mechanism for that?

Mr. Scheuer said the United States Geological Survey study specifically, and we're very fortunate to have the study at the point where we can start to do scenarios, if you put a well here what might be the effects on different areas, so hopefully that responsive to your question.

Chair Case said just to clarify, Mr. Anthony said that the study would articulate the effect in terms of quality and salinity, not the actual ecological affect. You need more expertise on that.

Mr. Scheuer said yes, you need further expertise than talk about what the affect is. Affects are on salinity for instance, limu along the coast, which is already on your guys' mainstream of procedural records on this matter. Our final problem we have with the staff submittal is that we hear that the procedural concerns that Mr. Frankel has brought up, we expect anybody whose intervene in the Kukui case and the Waiaole case is intervene again. The staff submittal does not make clear that at a minimum even if you don't completely bring in the Molokai Working Group that interveners need to be part of this mediation. They've been closely tracking this issue for many, many years and you just can't get Department of Hawaiian Home Land, Molokai Properties and the County in the room together with a mediator because there's other people who have clearly established standing in these general matters whose rights will be affected.

Jonathan Scheuer continued, the last thing I'll mention is that staff member, Charley Ice, said that there's a rumor that applications will change. It's not a rumor; we've stated more than once to the Water Commission staff in writing our application will change. What the Water Commission chose to notice was a ten year old application for water. We have a better sense of water existing in future needs are and we want the right and we need the right to update our application, especially in designs that's coming out in United States Geological Survey.

Matthew Dvonch stated that Jonathan (Scheuer) has done a very capable job in laying out Department of Hawaiian Home Lands case and wanted to address concerns about the process that has occurred here. Department of Hawaiian Home Land was likewise very concerned about the process and everything that seems to be coming all at once in a very rushed manner. The Department of Hawaiian Home Land use this petition of mediation the opportunity for mediation as a way to solve this issue as much as they can be solved without going through another ten year contest case process. We don't want it to be a rushed mediation process, we want the community to be involved, we want it to be procedurally correct and we don't want what happened last time to happen this time.

Chair Case asked, what happened last time.

Mr. Dvonch said we spent over a decade and nothing happened.

Chair Case said not too short and not too long.

Commissioner Starr said along that line his concept of what a contested case under HRS (Hawaii Revised Statutes) 91 changed radically when I was asked to be the presiding officer on a number of them several years ago. I had only thought that it was a way of resolving a dispute between A and B.

And I learned that it has another function that is often equally or more important which is to create a frame work and record of everything that is a part of the proceeding and there are mechanisms where all of the parties who are involved have their time to make their statements there's an opportunity to cross or rebut and it all is laid out in a transcript with extreme clarity and that's an important purpose and I feel that sometimes the Commission in trying to get stuff done and I don't fault the desire to move along but sometimes the Commission takes short steps out of creating the record and that perhaps rather than speeding things up it might cause a lengthy contested case later on because the record isn't there, the process isn't there. Here we're on a very fast track toward mediation without defining what's being mediated, whose being mediated, what stuff is left dangling before, and it makes me a little bit nervous and we'll also proceeding to do it without any record. How is it possible to move to a process of mediation but do it in a way that there is a record of what's going on and an opportunity and clarity, especially when the mediation process that I've seen in this Commission it's something that's done in top secret even the Commissioners didn't know what was going on and then Commissioners at the end are given fifteen minutes to approve or deny without having any idea what when on inside the box and the communities didn't even knew there was a box.

Mr. Dvovich thought Commission Starr is correct that the rule for the Water Commission states that the Commission is not a party to the mediation so by your very rules you cannot participate directly in the process. I think what's Department of Hawaiian Home Lands folks does not that the mediation itself is rushed but we understand that getting a mediation on the table is something that we want to do. How long the mediation actually takes, who is involved with that we want it to be inclusive process, not a rushed process so that if there is some kind of agreement between the parties to the mediation they can be brought to the Commission and you can evaluate it under the Water Code so you can do your duties and have as much information as possible. And I think that the way to do that is to include as many parties and as many sources of information as possible.

Commissioner Starr asked if he could lay it out more of the process of achieving that.

Mr. Dvovich said he thinks that what the Commission staff is concerned with is just getting the mediation on the table and there's some deadlines that they are concerned with that. But Jonathan Scheuer's suggestion about the Molokai Water Working Group is a very good one; United States Geological Survey is obviously willing to share its information with as many people who ask for it. I think that's a good start.

Commissioner Beamer said staff request says that you folks filed the request for general mediation but you folks were contacted prior and asked, I'm still trying to figure out the process part, because you said there's a lot of history, there was no briefing on this and so what was the empathise for the mediation?

Mr. Kaleo Manuel said there was a status conference that was held on November 9 and as Mr. Frankel had mentioned in that discussion there was discussion involved about potential mediation and parties participating in that but that request from one of those parties to the Commission would be needed kind of to initiate this mediation process so there was a request by Commission staff to our director to petition for mediation and we obliged and sent that. We agreed that mediation, in the legal and in the formal process and even informal processes because we have been trying to encourage the Molokai Water Working Group to get together for years and that hasn't happened. So whether formal or informal process in getting together at the table talking about solutions, identifying scenarios, that's one of the things we talked about as a working group the interveners sitting down with us as purveyors to look at what are future scenarios of well locations, of pumping scenarios of how we work together within this region and run those scenarios in the model, instead of just picking scenarios that we as agency isn't as purveyors think is appropriate and then the interveners not

agreeing with that. We were asked to formally submit kind of a petition for mediation and we obliged and went through that process, we think it's a good opportunity for us to get together and so that's the process that had occurred.

Chair Case asked if that's the technical method for getting to what the group agreed to.

Mr. Manuel said again he didn't participate in that, he was directed by Chair to do that but our counsel did attend the status conference. In that conversation, the parties at the table did talk about mediation as a potential -

Mr. Dvovich said, I'm going to clarify staff's comment that I don't think a consensus was reached to participation in mediation at the status conference but the subject was brought up and the parties seem to be interest in that.

Commissioner Starr asked to go on record that the fact that the status conference was held, that staff apparently made a request to the parties to submit a petition, none of the supporting paperwork or even that it was going on or the previous meetings with the deadlines and I still don't know what they are, because staff hasn't inform us of that. None of that was given to the Commission. We are completely and totally in the dark. I was shocked that this was even being discussed, or coming up, or if this is a very unusual type of action in the way this Commission is operating these days. It has changed radically and it seems that we commissioners are being put in the position of not knowing what's going on, there's no courtesy to inform us and then we might be in a position to rubber stamp it in the end. I think that's kind of unusual.

Jonathan Scheuer said that just in case it's not clear if anybody reading the minutes or anybody is listening to this, Department of Hawaiian Home Land did respond to a staff request fairly recently to request mediation, but I want to be really clear for everybody that noticing of the water use permits and the restarting of these proceedings was a shock to us. We have been in communication with the staff and we assumed as it only seems logical that after spending years and hundreds of thousands of dollars on a study the would allow us to run scenarios and try to find a solution we were going to wait until that was available before any discussion of okay, how do we restart begins. But all we saw was all of a sudden here, we've noticed your old water use permit and noticed a new permit from Molokai Ranch, we've noticed an old water use permit from the County and hey, this has something to do with the Kukui case but we're not entirely procedurally sure. So we were just as surprised as perhaps some of you.

Commissioner Beamer said that this is really helpful as a Commissioner because I believe in the integrity of this Commission, and our duties under the public trust, even the Code, I believe in transparency and I'm a volunteer so nobody pays me a dollar or a cent, in fact I pay for things to get reimbursed to be here. So, I do also want to have it on record that we cancelled actually the November meeting and the deputy informed us that there's not a lot of work to get done and that's why we canceled the meeting. So when I got word that these things were happening on Molokai, equally, I was surprised as a Commissioner and I'll just leave it at that and we can have further conversations but I would expect that our roles as decision makers from the leadership of the Commission staff to help to inform us to make the best decisions we can possible and more transparency in communication with the Commission.

Commission Milton Pavao said there's been a lot of allegations about what staff has done and what staff has not done, I sure would like to hear from staff about answering some of the allegations about what you have done, what you have not done. We're only hearing one side; I'd like to hear two sides. You guys agree with what they are saying or can you -

Roy Hardy said what's in the submittal speaks for itself in the sense that the application that came in from Molokai Ranch was nearly complete for a year ago, for whatever reason we didn't move forward with it. And we had asked for updates for the other applications because it's been so long, this has been decades, not once but several times. I don't recall some of the things as far as responses to some of the requests; I don't think other staff recalls it either. It may be somewhere in the office but I don't think we have seen some of the responses. We haven't seen that documentation. It may exist; we'll look, we'll go back to look through the files again. And that's what we can say as factual what we know. The case is we had an application which was complete and was put on the side for over a year and administration changed and it's one of those things on our to do list or what are we going to do with this. There's an obligation to the process completed applications. I think there's opinions whether that application is complete enough, whether the applicant answered the questions well enough and that starts getting into the merits. I think of the application that's what we wanted to do was to try to bring it before the Commission on the merits and not just the one by Molokai Ranch. But then the others who are in the area. I think the other issue about competing uses, public trust, and I think part of it is we're not really clear what are all the public trust uses. We were assuming that Department of Water Supply is overseeing domestic uses, which are a public trust as well as does Molokai Ranch provide for some domestic uses. I think there's some other details and I don't want to get into now to try ferret out those things. But the easiest way would be to get all the parties together, all the applicants together and ask what your guys' plans are. The Molokai working group is probably a good place to start to get the community involved as well, but ultimately it's the applicants who have their own plans, they have to come up with what it is to present to this working group or to the Commission. So that was our intention to get this rolling.

Mr. Hardy continued, we do know that the ground water model that's been going on since 2008, which is a while. And it's our understanding that they were very close to finishing the calibration of the model, which is a big thing. We can't do these future scenarios without calibrating model. The model has to match the history that's out there before you can project into the future. Our understanding was that this was done and that they were waiting for the scenarios or the application information of new well locations to address the interference of the wells then we can get into the larger question of what the applications are really asking for because if you tally everything up it's over the sustainable yield. This is the simpler way that the Commission looks at things as far as withdrawing from the sustainable yield at five. The model will get into the localized effects and we understand that was pretty close to being done. So putting those things all together we thought it would be good way to kick start and get this thing rolling.

Chair Case mentioned that that's a very helpful response and she just wanted to make it clear that there's no bad intent here on anyone's part. There's a proceeding that has been going on for a very, very long time. It's complicated and as you can see there's a piece of it that has been sitting and our job is to make sure we're moving forward consistent with the law the status of the acceptance of that called for the status conference, that came out of the blue for people and we did not do a good job of communicating that in advance and we regret that. But there's no hidden agenda here, it's just how do we move forward with something everybody agrees that has been going on for a very long time.

Commissioner Pavao said this might be unusual but the main players are the staff and three water suppliers, would it be a good idea that the main players get together among themselves so that everybody's on the same page, so they can move forward efficiently? If staff could meet with Molokai Ranch, Water Supply and Hawaiian Homes and hash out the differences that you have because there seems to be that there are some differences. And if the four of you can come up with some common ground it would be a whole lot easier to move forward based on some common

ground that you have. Right now it seems like, he said this, he said that, she said this. It's kind of frustrating for us because we don't know who to believe.

Commissioner Beamer addressed Roy and said, thank you for that clarification and Commissioner Pavao in many ways I agree it's trying to see clarity and get the information we can have to make the best decision, so is there any reason like for the sense of urgency could we have a briefing, could the Commission get briefed on the history of this so we can better define the mediation and the roles and have more sort of knowledge in crafting what mediation might look like. Is there a sense of urgency on your folks part to get these things done immediately after sitting for X number of years or what.

Roy Hardy said he didn't think there's technically a sense of urgency other than part of it is we had this application sitting for a long time so being in a position of not doing anything also doesn't look too good.

Commissioner Pavao said, "you're trying to clean house right now".

Mr. Hardy agreed, trying to clean house. Also this was mentioned when we went to Molokai for the Water Resource Protection Plan what we heard from the community was hey, what's up with the application, what's up with Well 17. They're still using it, okay it's time to get back together and maybe in the sense we skipped a step in trying talk with all the parties again first, formally rather than just on paper. So, there's I guess an urgency to clean house but not an urgency to have to come to a conclusion right now. We do want to have the best information. Again, kick start this and if going through this mediation to get this information and to fully get the model presentable then I think it's worth it.

Deputy AG Linda Chow pointed out that there is actually a sense of urgency in that there is a time frame, a time limit, in which the Commission is supposed to make a decision on water use permit applications that have been accepted. So I think the mediation was a way to allow, to present a reason the Commission to defer decision making on the outstanding water use permit applications and to be able to push the deadline down the road so that it gives everybody an opportunity to get the necessary information and for the parties to actually be able to go through the mediation at the pace they need to without pushing up against the deadline that's in the Water Code.

Commissioner Starr said he objects to hearing this, "this is shibai to me", that some deadline was created, but it was created without the Commission being informed of it or taking action on it, so this deadline that was created it, I don't know who created it or why they created it, I certainly was not given notice of it. It forces us to act on making a decision of any kind. This is arbitrary and capricious. This is wrong.

Chair Case asked Deputy AG to clarify this. It is Chair's understanding that there are certain procedural matters that comes through the staff that when they meet the requirements, they accept an application and that triggers some legal review that have deadlines. The decision part on the substance comes before the Commission; but the staff has certain obligations to take certain steps under the code.

Commissioner Starr asked how to undo it, that's what he wants to know.

Deputy AG Chow said you can't undo it because the deadlines are in the Code. Once the permit is accepted and that's always been a staff decision to accept the permit application as complete, then within acceptance they have to publish a notice for objections and then the Commission is supposed to make a decision within a set number of days from the publication of the notice. So those deadlines

already exist in the code. And so, this is a way to stop those deadlines, basically, and not create a situation where somebody could argue that by default the permit is granted or that there was some kind of violation of the Code by anybody, so that is what is pushing this particular item forward right now.

Commissioner Starr said, this is crazy, it's the doomsday clock.

Chair Case said this is the process that is provided by the Code so what we're –

Commissioner Starr interrupted; I think this is a misreading of it to try to accomplish some nefarious end and I don't like it...

Chair Case said there is no nefarious intention here. The first thing that the submittal asked for was the authority to extend deadlines for objections as that's buying the time.

Deputy AG Chow agreed.

Chair Case added, to allow for us to start some discussion and that the urgency on the other hand that came up during the status conferences, we need to wait on this process long enough to get the critical information that the United States Geological Survey study does provide. So we're trying to work through this framework to buy us the breathing room to get the information that is essential to the discussion.

Commissioner Buck asked the Chair if we could hear from the other testifiers so maybe we can move on.

11:07 am - Chair Case called for a break.

11:26 am - Chair Case called the meeting to order and asked if there is anyone else who would like to testify on the matter item B2.

Sherry Broder represents the Office of Hawaiian Affairs, and said she has a few comments that it seems to her that the interveners should be included in any mediation cases. Water issues on Molokai has been going on for really almost 20 years now and maybe even longer and the interveners were involved in both of the cases that went to the Hawaii Supreme Court.

Chair Case asked who those people are.

Ms. Broder said they are the people represented by the Native Hawaiian Legal Corporation and Office of Hawaiian Affairs and interveners in both cases. I know the petition for mediation by Department of Hawaiian Home Land does recommend that the interveners be included in any mediation. I actually think it would really be important to include them because from what I heard today about the study that's being done, one of the issues that will have to be considered is the salinity of the water and how it will affect the near shore resources. And interveners represented the interest of the Native Hawaiians in traditional and customary rights so to be able to adequately evaluate how the uses are going to affect salinity in the near shore resources it makes sense to have the interveners involved because the users could come up with something that's agreeable to them but perhaps isn't really taking into full account the interveners and the interest of Native Hawaiian and traditional and customary rights. I'd also like to point out the Office of Hawaiian Affairs is one of the funders of this report. So the interest of the Office of Hawaiian Affairs has been very high and considering that they are one of the funders of the report that it would seem like they would be in a good position to be able to assist everybody and evaluating how water resources should be allocated

on Molokai. Ms. Broder continued that she does not want to be in the position of criticizing the staff again but she noted that there's no discussion in the staff submittal on the Hawaii Supreme Court cases and I think that it would be helpful to the Commission in terms of trying to decide what it is that's going to be recommended to go to mediation to have an idea of what the difference standards are that have already been specifically set in regards to water on Molokai in the Supreme Court cases. I think that the Legal Hawaiian Corporation complaint is troubling. They have filed a complaint quite a while ago already that water is being taken illegally and that of course that affects the salinity of water, is already affecting the near shore resources and so I would urge the Commission to have the staff look into that. I'm not saying that there's agreement or disagreement with what the Legal Hawaiian Corporation is saying but my understanding is their information is coming from the people of Molokai so I just think that it's something that should be a priority to follow up on and investigate. If that is true, what happens after that is there does that mean that in the water applications entity that's taking the water illegally, if someone is, does that reduce their usage in the future, do they have to make it up, is that what happens, especially in a case where water is scarce, and there isn't enough water for the people that want to use it. I'm not quite clear from what I heard this morning about the report. I'm clear that everybody really thinks that the report is really important and it's going to really help make the right kind of determinations because it will involve scientific and technical data that's really going to be used. But I wasn't sure since it's only going to be a preliminary report whether or not it's going to be available to the public. There a lot of interest in Molokai in the water, I think there's a general sense of dissatisfaction because there has been no follow-up on these issues and in terms of traditional and customary rights the community has to be involved.

Chair Case said that we did hear that it takes another six months to get to the publications.

Ms. Broder said she understands that. Her concern is that will the preliminary information be able to be made available to the public so that although you are talking about mediation which would be private at the same time there's been suggestions to reconvene the Molokai Working Group which seems to be generally things people were interested in. So will they hold public hearings, I mean if we do the mediation how is it going to work to get public input which I think still needs to be done in the process and if we're going to get public input will we be allowed to utilize the preliminary report so that the public will have access to the information as well. I just wasn't sure procedurally if the United States Geological Survey said that the preliminary information can be utilized during the time of the mediation or do we have to wait until December 2016 or January 2017 before the public can have access to the information.

Commissioner Pavao asked Ms. Broder that she made a comment that water was taken illegally it's having an effect on the near shore waters, how is it affecting the near shore waters?

Sherry Broder said she never said that, there was a complaint that's been filed alleging that water has been taken illegally. She does not know if that complaint is correct or not so she was just urging the Commission look into the complaint but if it is accurate it could be that by reducing the amount of water.

Commissioner Pavao said he misunderstood what she was saying.

Chair Case asked if there were any other testimony.

Charley Ice wanted to offer an amendment and referred to the Staff Recommendation submittal on page 9 #2. The amendment is to strike all the words following that, beginning with "to provide for proceeding with the understanding that the mediation will not commence until after the United States

Geological Survey study is released and parties have an opportunity to review.” and insert “subject to Commission approval of the scope as recommended by a mediator and the parties.”

Recommendation: Amendment to 2. Approve mediation as requested by Department of Hawaiian Home Lands petition and delegate authority to the Chair to appoint a mediator, as allowed by HAR §13-167-83, subject to Commission and approval of the scope as recommended by a mediator and the parties.

Chair Case asked if the mediation petition include request to include the interveners as is.

Mr. Ice said it does, but not only the parties in the remanded case but proposed interveners who have an understanding for the new applications. Chair Case said maybe we should be clear who you are including in your request.

Commissioner Buck asked for clarification on the actual recommendation before we bring other people up. And then number 3 and 4 stay as is or are you deleting those?

Mr. Ice said 3 would stay as is and 4 would stay as is.

Chair Case said back in #1 we were going to suggest “allow the mediation to commence, and continue after the United States Geological Survey study is released. It had time to commence within the deadline required by the Code. It doesn’t have to wait until after the United States Geological Survey study is released to start but it can continue ahead of time after it’s been released so to be able to incorporate the data.

Commissioner Buck asked why on the amendment does the scope need to be approved by the mediator.

Mr. Ice said, no – recommended by mediator and the parties and subject to approval by the Commission. Commissioner Buck acknowledged and thanked Charley for the clarification.

Commissioner Starr said he feels very strongly that we should not approve the beginning of mediation until we very clearly define what is being mediated and by whom. I think to do otherwise is asking for anything we do, to be undone with prejudice. I think before we vote to mediation we need to be briefed and community be briefing on on Kukui, Molokai and Waiaola, we need to meet on Molokai, the United States Geological Survey study needs to be peer reviewed and published so that the community and us have access to it and we know that it’s not going to change because potential community members who have data on shoreline issues and fishing, or change in water use numbers would affect it. I think we need to start off with the Department of Hawaiian Home Lands request for a water reservation and possibly permit. My understanding is that it becomes a priority step in this. No documents of any kind have been provided to the Commission and that needs to change. I really think we need to stop and reboot and start the process again. I’m perfectly fine with the very first part of the wording which is to extend the deadlines for this and I don’t know what the mechanism is but I’m hearing that because of something that staff did it obligates the Commission to hand it over to mediation in a certain time frame and I really would like to come back at a new meeting and have that explained to us because I’ve never really heard of anything like that. I thought the Commission acts and the Commission did not act on creating any clock running or deadline. The old contested case hearing has to be either held or disposed of. I think we’ve all seen what happens when there’s a contested case that is not held and other process occurs instead. And that does not bode well. The complaint by the Native Hawaiian Legal Corporation 2012 for illegal use that must



be addressed and I think the mediation shouldn't begin until deadline to intervene has passed; new applications and they've been dealt with. Please, let's get it right and do it once.

Chair Case asked for other comments.

Charley Ice said he wanted to alert the Commission of the possibility come March 14, given what United States Geological Survey said about its timing and alluded to, I guess share all that information, that it may be in the interest of potential interveners to extend that deadline for comment and objection again so that there is an opportunity for those who might be interveners and who might qualify withstanding to participate in the mediation.

Commissioner Beamer said he wants to believe best case scenario so he supports the idea of trying to pick up something that's been sitting on the shelf for X number of years and get going on that. I don't feel like I have nearly enough information to approve mediation right now. There's several things, we already identified just in the staff submittal there are things that occurred in the timelines on both by acts Department of Hawaiian Home Lands as well as Native Hawaiian Legal Court that aren't even reflected here. I think on Ms. Broder's point sort of a summary about what the decisions the Supreme Court were regarding these cases would be very important for the Commission to understand as well as a briefing so that we can better, if we do decide to go into mediation or to assign the Chair the ability to hire a mediator we understand what we're getting in to. That is absolutely integral as our role as a Commissioner. If we have to extend the deadline because of these actions that happened on Molokai I think not everyone would be willing to vote on support of that. I feel no way right now could I support voting to approve a mediator at this point. I don't have nearly enough information. I feel like it would be incredibly unfulfilling of my duties as a Commissioner to do so.

Commissioner Buck asked what would the impacts of a denial of this item today on the Department of Hawaiian Home Lands request for mediation. Chair Case said there are two requests, one is two steps, one to extend the deadlines and the other is mediation. Commissioner Buck asked what the impacts would be. He agrees with other commissioners but there's a lot of unknown on the table and it makes it hard to make a decision but having them deny is a decision as well so he would like to know the impacts.

Deputy Jeff Pearson asked the Deputy AG Chow if she could answer that as related to the Administrative Rules.

Deputy AG Chow said basically the statute requires an application shall be acted upon within 90 calendar days and the application not requiring a hearing or within 180 days of an application requiring a hearing. I believe that falls within that category because of the objection that have already been filed to the applications. But the time periods that are set in the statute, if you do not approve the mediation.

Deputy Pearson said he's thinks the question is more on the recommendation to as far as the mediation.

Chair Case asked if they needed to extend deadlines today. Deputy AG Chow said they needed to take at least some action on the three pending applications whether the action is to defer or as suggested in #4, I think that might be adequate to fulfill the requirements of the statute that some action has been taken by the Commission on applications. As far as the mediation, you could defer #2 to further Commission hearing the question of mediation.

Commissioner Buck said we would have to reword #4 if the Commission is not comfortable approving mediation at this point and time, defer decision making on the three pending ground water use permit applications until after the Commission has further discussion on the scope of references for potential mediation, or something?

Deputy AG Chow suggested if the Commission defers action on the petition for mediation it could defer decision making on the applications until after the commission make the decision on the petition for mediation. So then it would basically tie everything together. It would allow for further discussion and briefing to the commission of both the historical background and legal background of this situation as well as to have a better discussion of the potential mediation and the potential issues in that mediation.

Commissioner Buck said then we would have to reword #4. Deputy AG Chow suggested it to say "Until after the March extended deadline has passed and the Commission make the decision on Department of Hawaiian Home Lands petition for mediation."

Commissioner Starr questioned counsel, we had testimony that the only reason the petition for mediation was filed was because our staff had told the Department of Hawaiian Home Lands to petition for mediation. So they did what staff was telling to do.

Chair Case stated that she didn't think this was quite accurate. The testimony was that there was a discussion and there was some general agreement that mediation would be a good idea and we needed a mechanism to do that. And so staff discussed that with Department of Hawaiian Home Lands and Department of Hawaiian Home Lands agreed to file the petition because that's the mechanism.

Deputy AG Chow said it was also the mechanism and the rule provision in the Department of Hawaiian Home Lands filed the petition under takes it under a special proceeding as opposed to mediation under the prior contested case because there's still the issue as raised by Mr. Frankel as to where or not the other contested case should in fact be dismissed. It was a way to basically separate out the mediation and that whole thing from the prior contested case. "I believe that's correct, right DHHL?"

Commissioner Pavao said he agreed with Commission Beamer and said he felt they need to be more briefed because he doesn't fully understand everything that's going on. However, based on what we heard on deadlines I certainly don't want the Commission or the staff in violation of anything. Commission Pavao asked Deputy AG Chow how can we make a motion so that at some time in the future we do get briefing however we approve something that staff will not be in violation.

Deputy AG Chow said to look at recommendation #4, the question is you can defer decision making, which there's an action on that application but you need to basically give some indication of what and when you're deferring it to, provide some trigger. So one suggestion had been it should be after the deadline for objection to be filed so you would know the scope of objections at that deadline. Another suggestion is until after the petition for mediation that was filed by Department of Hawaiian Home Lands is acted upon, you could at that time, if you agree to put it into mediation, you could then defer the deadline.

Commissioner Starr further asked since this is created a deadline that was triggered by Department of Hawaiian Home Lands's petition for mediation if, I have no idea if it's something that would be interested considering, they were to withdraw that petition to mediate I assume that would then cancel this kind of deadline.

Deputy AG Chow quickly said I'm sorry no, that's actually incorrect. The deadline was not triggered by the petition by Department of Hawaiian Home Lands it was in fact triggered by the application from MPU, Maui Public Utilities, for the ground water use permit.

Commissioner Starr said then it was Molokai Ranch that...

Deputy AG Chow said it was the acceptance of the application that had been pending. That's the actual deadline.

Commissioner Starr said if they were to meet on that and deny it then that would terminate that problem, right?

Deputy AG Chow said you could but it's not on the agenda for today.

Commissioner Starr said we could do that theoretically at a subsequent meeting and that's the monkey wrench in the works forcing us to act out that process.

Deputy AG Chow asked if he knew when the 90 day time runs. Roy Hardy said it was January 9.

Commissioner Starr asked if they would have time at their next meeting.

Chair Case asked if he wanted to deny that before we have the United States Geological Survey information.

Commissioner Starr said he doesn't think we could act affirmatively without that information. Chair Case said so that's the reason to extend the deadline. Commissioner Starr asked why we are being told we extend the deadline we have to approve mediation.

Commissioner Buck said he has a rewording for #4.

Defer decision making on the three pending GWUPs applications until after March 14, 2016, extended deadline and the Commission has acted on the DHHL request for mediation. I just sensed that that's as far as we are able to go with this meeting and I would not approve 1, 2 or 3.

Commissioner Starr: Okay.

Deputy AG Chow said actually you need to approve one (1) because that's the extension of the deadline for objections to the application and actually all the parties agreed that deadline should be extended.

Chair Case, so we would drop the last phrase of the first sentence. Actually just stop it to extend the deadline for

Deputy AG Chow said for objections period. Chair Case included, and drop the last three lines of #1. And drop #2 for now? Deputy AG Chow said and #3 goes with #2.

Chair Case recapped that we would be deferring #2 and #3 which is the decision on mediation and we would be affirming the authority of the Chair to extend the deadline for objections and deferring decision making on the three pending ground water use permit applications until after the March 14 deadline has passed and the commission has acted on the DHHL petition for mediation.

Commissioner Starr asked for a short recess so someone can write that out then the Commission could proceed.

Commissioner Pavao said Commissioner Buck had suggested the language, but Commissioner Buck didn't trust his wording.

Commissioner Starr again requested a recess to get it right.

Chair Case restated the amended recommendation.

Recommendation: To affirm the authority of the Chair, pursuant to HAR 13-167-26, to extend the deadlines for objections. Then after #4.

Commissioner Buck clarified full stop after objections.

Chair Case continued: Defer decision on #2 and #3, and on #4 defer decision making on three pending ground water use applications (448, 499 & 973) until after the March 14, 2016, extended deadline has passed and the Commission has acted on DHHL request for mediation.

**Amended Recommendations:**

1. Affirm the authority of the Chair, pursuant to HAR §13-167-26, to extend deadlines for objections.
2. Defer decision on mediation as requested by the DHHL petition.
3. Defer decision to allow any affected state or county agency to file position papers within 30 days of the filing of the DHHL petition for mediation.
4. Defer decision making on the three pending ground water use permit applications until after the March 14, 2016 extended deadline has passed and the commission has acted on the DHHL request for mediation.

**FYI: voted again on page 31**

**MOTION: (Pavao/Buck)**

To approve staff's amended recommendations.

UNANIMOUSLY APPROVED

Commissioner Pavao asked that staff provide at the next meeting to please provide the Commission a briefing so they will be a little bit more knowledgeable on what's going on.

Commissioner Starr added, and correspondence and any papers filed in the name of the commission we should be copied with.

Commissioner Balfour feels they need to have that report at the next meeting and strongly suggest they get together again because they have far more questions than they have answers and as a body they need the answers not the questions.

Charley Ice said he's happy to provide essential briefing information; we need to know what that is.

Commissioner Buck said at the least electronic versions of the Supreme Court records and any analysis that staff might want to put on pertaining to the discussions we had today would be a good step.

Mr. Ice said we're talking about briefing about mediation.

Commissioner Pavao said he wasn't referring to mediation he was referring to history and what has happened on Molokai so they could understand what the problem is.

Charley Ice said they are planning to brief the Commission but it wouldn't be right away, but not sure if it will be by January.

Commissioner Balfour said they need the "salient parts" we don't need minutia. We have way too much minutia to begin with, just bullet points. Commissioner feels he is flying blind and doesn't feel good about it.

Commissioner Starr wants to know what there's contested case hearings that were never acted upon. That's a biggie. How about complaints that were filed about illegal use of water that pertains to the case that we never been told that they've been filed and exists? If it's that concern is it relevant they should send us the document and if staff feels it's less relevant they should tell us it exists or a letter was received and if we want more detail we can request it but at least there's some record that that happened. I'm very bothered by having all the correspondence being sent to the Commission but not us not being made privy to us or even being made privy to what the Commission staff commits us to do or send out on our behalf. So we need to know what's going on.

Charley Ice: bear in mind that the motion that was being discussed was made to the hearing officer and since that is all passed now I very much would like to have the Commission try to kind of reset that button because I think that's a legitimate question about impartial motion to partially dismiss the application so I know that's unfinished business and it's one of those things that needs to get wrapped into this one way or another.

Commissioner Starr said okay, but just let us know what stuff is in play.

Chair Case said the Supreme Court cases and what are the information on the current proceedings, including the items of the other permits we heard today.

Commission Starr said there's also the issue that they are not receiving any notice of what is coming in and nor will they receive that in the future. I'm not hearing staff say that we will be kept informed of what they do in our name or what comes in from parties or other people in relationship to it so it creates a feeling of confusion and it could lead to distrust if we don't cure it so we need to get better at this and I'm not hearing anything from staff saying that they understand this and are will to change their procedure on this.

Deputy Director Jeff Pearson responded with, earlier the chair said there is no ill intent. I appreciate her saying that. Others have spoken about transparency; I am doing my best to be transparent. I also, the statement that came out about the minute order came out of the blue, I take full credit for that, blame for that, that was an error. I am trying to kick start this process so in my eagerness I moved quicker than I should have on this process. I think there's a lot of items out there that need to be resolved and I was trying to get going and get these resolved. So I apologize to all the Commissioners right now, for creating – I didn't create this mess, I just restarted this mess. (laughter) I was even trying to get a laugh out of that one so I do apologize to the Commissioners for

the state we are in right now. Moving forward it's great to share information with the Commissioners but there's a lot of minutia that would be a little difficult to be sharing all the process and procedure that we go through and any issue that we go through. So I don't think we can meet your request to the degree you want Commissioner Starr because there's too many pieces of paper that come through and I don't intend to have the staff submit every piece of paper to the Commissioners. So we will do our best to weigh what we think is of interest and what needs to be given to the commissioners so they have knowledge of the process that we're doing. Again, there's no ill intent, there's no nefarious action, I think that's kind of a poor term. We're all here to work for the public trust and do what's right for the community. I don't want to promote a negative communication or negative issues between us here. That's the last thing I want to do. I'm here to work with you, I'm here to help you, I'd like to think you're here for the same reasons. So staff is doing a darn good job, I think they work hard, they're overworked, I'm not going to make excuses. In the submittal there is a rundown about three or four pages, understandably it's not all there and I hear things have been missed but I mean we're talking dates back from 1992, eight pages. There's going to be things that are missed. The intent here is not to include every detail or to try to give the Commissioners an understanding of what's going on and to get going on this mediation and in a way try to have the contested case set aside enough and move forward on the process of the mediation and leave the contested case behind. I realize that you need to have information on the contested case; I'm not trying to be naïve. I'll stop there and say one more time, I apologize to the commissioners if you feel like we've been not transparent enough and I'll work harder towards being so.

Commissioner Pavao said he appreciate Deputy Pearson coming out and making an explanation and really appreciate the fact that you are trying to clean house. I think that's great. Good leadership, you need to stuff like that, just be a little bit more slow. Thank you. I think you're doing a great job. I appreciate the fact that you appreciate your staff. That's quite important. Thank you.

Commissioner Beamer said he doesn't expect the minutia, well construction permit, engineering standards are not anything I desire to see, but bringing back a case that sat in the Supreme Court and was overturned twice, starting that process again, that's a little different. Maybe in the pass if the Commission staff was going out to another island and conducting hearings, or even doing presentations, it's just good as a commissioner to know, hey, the commission staff is on Molokai, the commission staff going to Kauai and just have a sense of what we're trying to accomplish there then and obviously something of this magnitude would require a briefing, none of us were on the commission when this was addressed and so it's not, in no way am I trying to critic you or attack you, and I hope that we can work together and get better and also support the staff entirely, I can't imagine what it's like to go through transitions in leadership and style and Commissioner so excuse us for that, but I do have to live up to the integrity that I think I accepted when I got into this role.

Deputy Pearson: understood. Thank you.

Commissioner Starr: and I appreciate Mr. Pearson comments and they're well taken and well expressed. Please understand that when anything of consequence comes in or goes out or being premeditated for action on the commission's behalf, let us know and we can work together and we can express concern or help make sure it's done in a way that it's not going to cause no humbug and headaches down the road. If we can move together with process I think we all want the same basic thing. But to be able to do it so that's it's done once so it doesn't need to bounced back off the courts in five years, so we can accomplish something we can be proud of that is going require a feeling of team work and you can make that happen and I think you're find that we are participants and cheerleaders and really can work together instead of being at odds.

Chair Case said there's a motion, seconded it, any further discussion?  
FYI: Vote taken on page 28.

Charley Ice added he didn't think there's any way for this not to be very awkward. My own history of this goes to being water program manager at DHHL so I've been looking at this for about 30 years. I appreciate the light you brought to this and I appreciate the people who have testified today because I think we have a much result as a chance to being able to open this up and that was our intent.

**3. Delegation of Authority to the Chairperson to Hire a Mediator for the Complaint and Petition for Declaratory Order Against Waste Filed By Po'ai Wai Ola and West Kaua'i Watershed Alliance (through Earthjustice), Waimea, Kaua'i, Hawai'i**

STAFF PRESENTATION by Dean Uyeno

Dean Uyeno, Stream Protection and Management Program Manager, explained that the submittal is to request the Commission to delegate authority to the Chairperson to hire a mediator to address the complaint and petition for Declaratory Order against Waste filed by Po'ai wai Ola and West Kaua'i Watershed Alliance through Earthjustice. We are also requesting that the Commission find the expenditure of State funds for this effort be exempt from Chapter 343 for preparation of an environmental assessment.

You folks are fairly well versed in the background. I would like to skip ahead to our August 11 Commission meeting where the issue was discussed and it was suggested that no action be taken at the time but rather that the commission asked the parties to move forward in a meaningful discussion and report back to the Commission on its progress.

So we held two meetings, September 14 and October 6 with Earthjustice, Agribusiness Development Corporation (ADC), Kekaha Agriculture Association (KAA), Department of Hawaiian Home Lands (DHHL) and Kaua'i Island Utility Cooperative (KIUC), to begin to discuss mediation and specific issues. One of the outcomes of the meetings was to get more information in particular Department of Hawaiian Home Lands and Agribusiness Development Corporation and Kekaha Agriculture Association, so two letters went out on September 24.

On September 30 as noted you folks had the site visits, we did receive a response from KAA on October 28 which is included in Exhibit 7. We did hold two workshops as well, with the hydrologists from the various organizations and I think they made good progress on agreeing to some values to use and that would serve as our baseline as we move forward in the mediation process.

On November 26, we received from DHHL a response to our letter; additionally we received a petition for reservation for surface water of 33.145 million gallons per day from Koke'e and Kekaha Ditch systems which is included as Exhibit 9 in your submittal packet.

Per Hawaii Revised Statutes §174C-10 provides for dispute resolution as well as the administrative rules 13-167-23D provides for resolution through mediation. This is a very complex matter in Waimea and Kekaha. There are a lot of issues that have been raised and a lot of information that's out there so we're hoping that mediation will form this opportunity and kind of container to put that information in and at least identify work towards resolution on some of these issues.

As far as funding, we're expecting that the effort won't exceed \$40,000 based on Na Wai Eha mediation that took place. It will be coming from the Commission's FY 2016 budget. As for the environmental Chapter 343 review because we are expending state funds this triggers the need for an EA however, under the DLNR exception Class 10, No. 2 Contracts for professional services and others, that are exempt from Hawaii Revised Statutes Chapter 103D. One thing I want to note for the record, the procurement of mediation services is exempt from Chapter 103D Hawaii Revised Statutes procurement code, the chapter reference will change pursuant to Chapter 3-120-4B Exhibit A, which is Exhibit No. 10.

**RECOMMENDATION:**

Staff recommends that the Commission:

1. Delegate authority to the Chairperson to hire a mediator to address the complaint and Petition for the Declaratory Order Against Waste filed by Po'ai Wai Ola and West Kaua'i Watershed Alliance through Earthjustice.
2. Authorize the Chairperson to enter into a mediation services contract to conduct the mediation and expend up to \$40,000 for this purpose.
3. Find and determine that the proposed mediation work is exempt from preparing an EA.

Commissioner Beamer said, you just lost me when you went into Chapter 3-120 #10, I was just wondering, is that the procurement policy that we're exempt from having to –

Mr. Uyeno said, correct, there's a list of services that are exempt from Chapter 103D in procurement code.

Commissioner Beamer asked so we're allowed to just pick an individual.

Mr. Uyeno said, correct, we don't have to go through the normal consultant selection process.

Commissioner Starr said he's glad to say this moving forward and I compliment staff on diligence with this. Going through it I kind of got to one point and something I read kind of knocked my socks off, which was the petition for reservation for 33.145 million gallons per day by DHHL. I know, you know, I've been among those pestering them to do that process and you know I think it's good that they're looking at that and but that's a very, very big number and I'm just trying to grasp in my head how that works. I understand that in the breakdown of it, I believe 18 million gallons a day and I think another two (2) million gallons a day is for use for lo'i kalo and for two different areas which is I assume means that it's not really use but you know it's kind of like for the way the lo'is that I've been involved with it's kind of a different kind of use because you only borrow and stewardship requires that water be kept pristine and put back to other use. I'm trying to understand whether that means that the way it's going to happen changes the watershed or whether a lot of it would have ended up where it would've ended up which is certainly the Waimea River that wants to have more water in it but I don't know if it's going to end up there, or Mana Plain and I also don't know whether this kind of stops everything and we have to first look at the DHHL petition for reservation or whether that gets folded into the mediation or whether that's something we deal with afterwards, which considering the numbers might not be all that easy, so I pass this back to you Dean.

Mr. Uyeno said the Commission staff is looking at moving forward with the instream flow process so hopefully March of next year we'll be taking that to the community for review. Our assessment



report will be taken to the community for review to gather up if there's any more information that the community may have to add to that report and then after that time we will come back to you folks with the recommendation. So, this reservation could be taken up as both a part of the mediation as well as the instream flow standard effort. The instream flow standard will try to identify how much water should remain in the stream and with that what remainder will either go to DHHL or shared among the users or however it plays out. It's all intertwined, so it will have to be considered on both ends.

Deputy Pearson asked Mr. Uyeno to discuss how you're working on the values for the instream flow standards right now?

Mr. Uyeno said the process they've been using since they looked at the petition to amend the instream flow standards for East Maui has been, using a modified instream flow standards assessment process. The administrative rules prescribe that if we were going to do a petition to amend an interim instream flow standard we could do it right away, we could do it tomorrow. It's that interim, that immediate. To do a permanent instream flow standard it's a lot more rigorous process, we need to go to public hearing, there's a lot of timelines that you need to follow. What we did back in 2006, I believe, was take to the Commission then a modified process whereby the staff will compile all the information into a report, we'll give that to the public, hold a public fact gathering meeting, amend the report as needed, and then prepare a recommendation to the Commission. So, it's not a full blown public hearing process but the public has an opportunity to weigh in at that time. The instream flow standard assessment report that we prepare, I don't know if you recall those ten boxes and the hydrology at the beginning, but back when we first started the public fails to realize that a lot of streams don't have hydrologic data, so that's the first thing we need to do. A lot of effort goes into preparing that. But then there's also these ten other boxes, nine of which are instream uses including everything from recreation, traditional and customary, water quality, providing for downstream users. So we take them into account against the offstream uses or non-instream uses, agriculture, commercial and those sorts of things. All that gets wrapped up in this report, the staff digests it, prepares a recommendation for you folks. Our goal is to give you folks numbers to discuss. In East Maui we gave you folks one number. I think moving forward we'll try to give you a range so that you would have more of a menu to choose from, be able to pick and choose. If we tradeoff this what's going to happen here, what would be the resulting instream flow standard?

Commissioner Starr followed up with, it's a long process and it needs to be but you mentioned that it's possible that over the course of this and maybe sooner rather than later if there's a mediation process and all the parties are willing to get together and there's a meeting of the minds, could we come out with an interim recommendation for an IIFS for some of these streams that would allow some water to get back in the streams or until the Waimea River or for use for lo'i - whatever the parties agree to do and then that be brought back to us as an interim measure which could be implemented while the rest of the process goes on.

Mr. Uyeno, you mean for the IFS. Commissioner Starr corrected it to IFS. Mr. Uyeno replied, correct, I think that's a possibility.

Commissioner Buck said thank you, and he supports the intent for this. I'm all for mediation but he feels there's should be specific terms of reference for the mediation so the mediation process has the highest chance of success. We've been to two different field trips, four public meetings; no one has ever asked the Commission what they think about the terms of reference for the mediation. I have a lot of specific ideas. We do not want to micromanage the mediation process but the best chance of success if the Commission has input in the terms of reference and then the people participating in the

mediation kind of know a little about what the Commission has in mind and then when it comes back to us it has a higher chance of success. I know the complaint was both for IIFS as well as Waste, but is the mediation is supposed to do both. Commissioner Starr just gave a hybrid. I think it's critical to ensure the success of mediation that the staff when they come forward with a mediation request that they outline some terms of reference. That would only help the process. I have some specific terms of reference that I could recommend but unless we have that discussion, the chance of the - this is a big issue, there's ancillary issues needing to have the Kokee ditch maintained so DHHL can get its water. There's issues with KUIC and the electric use of water for hydropower that is really ancillary but could play a huge amount. So at this point your request is really broad, and it doesn't provide the information to potential participants in the mediation or what they should be talking about and it's never asked the Commission which we spent an enormous amount of time on Kauai and public meetings and in the field, what do we think. I'm all for the mediation process, I have some other recommendations but I just think we need to tighten that up and that would improve the success of the product.

Dean Uyeno explained that the groups that got together in the two meetings, we discussed specific issues that were raised throughout the process, I think everyone came into the agreement on at least what some of the main issues were and for example, the Kahauo sluice gate's waste and really the point of reference should be the complaint that was filed by Earthjustice on behalf of their clients. But the other issues that have been raised are coming into play and when they do, there's other potential solutions that are out there that can be found to address the complaint as well as these other integrated issues.

Commissioner Buck asked if there's a big picture of all the global settlement, how do we move from this 100 year old water ditch system to something that adheres to the public trust as well as specific the complaint on waste and the interim flow standards. What is the mediation scope, what is it we're asking them to mediate over?

Mr. Uyeno said that first and foremost is to try to resolve the issues that are raised in the complaint. Which largely focused on deterioration of the ditch, Kaha sluice gate, sanitation issues, but through getting involved in this issue we found that, yeah there's other issues, Mana Plain, the reservoirs, the DHHL issue. Mediation is going to hopefully combine all those things and seek a common solution.

Chair Case is sure that Commissioner Buck's point is that if you were to outline a draft scope of work and bring it back to the Commission for approval then we have a common understanding of what the mediation is going to address, is that what you're looking for? Commissioner Buck said yes. Chair Case said she thinks this is a good suggestion.

Commissioner Starr asked if we have a month that staff can start doing that and maybe the parties can jot something down too and present it and Commissioners –

Chair Case completed Commissioner Starr's sentence with, can send some comments in.

Deputy Pearson said reported that in the two meetings that were held prior to the August 11 meeting, there were all the parties and complainants there and narrowed it down to four scope items that were discussed there. The agenda has the general scoping items that were discussed at that meeting. I'm not saying that it's conclusive of all the items that's going to be discussed, but kind of the point of the meeting to come to some agreement on what to mediate on, not that there was an agreement at the meeting itself but it was agreement on topics to discuss for mediation.

Commissioner Pavao asked what kind clarification. The mediation can only address what's in the complaint, right?

Deputy Pearson: No, I wouldn't think so.

Commissioner Pavao, wouldn't mediation have to address what's in the complaint filed by two groups? How can you have a mediation that goes beyond the scope of the complaint?

Commissioner Buck said he thinks the mediation can, if we approve the mediation we can set up whatever scope of terms of reference we want.

Commissioner Pavao said then we are not addressing the mediation to the complaint.

Chair Case said the recommendation is to hire a mediation to address the complaint.

Commissioner Buck said just hearing that there are other issues that you're hoping to address in the mediation.

Commissioner Starr said he thinks we as a Commission are obligated to address all of the requirements that are in 174C.

Commissioner Pavao said he agrees with Commissioner Starr but asked how can you go over and beyond what's in the complaint. Then you're making up stuff, you got to address the complaint.

Dean Uyeno said he was trying to elude to was that with the complaint perhaps by addressing one thing it's triggering another. When we first got the complaint we we're aware of the breadth of issues that the community out there have. And they're all inter-related, they're intertwined around the river so, I don't know, would putting it down on paper confine it so much that if one thing triggers something else that goes outside the bounds of that scope, can it be addressed through the mediation. Or could it be more organic and allow us to, well okay if we correct this but this happens can we then find a solution for that.

Commissioner Pavao said he kind of looks at it as the primary thing right there that you're trying to resolve is the complaint. So you're going to mediate for whatever they complained about. To me, you cannot go beyond that scope and mediate something that's not in the complaint. That's wrong.

Chair Case asked what the Deputy AG thought about this.

Deputy AG Colin Lau said he thinks Dean Uyeno eluded to certain of the issues that are in the complaint have complexity that seem to indicate that other issues not specifically in the complaint are related to it so that you can't deal with one without dealing without the other.

Commissioner Pavao said, "it has to be related though".

Deputy AG Lau said, to the extent it would have to be.

Commissioner Pavao said he can understand if that's related, definitely. But you cannot go make up something and mediate that.

Chair Case said the two basic issues are waste and instream flow. There's a lot in the whole system that we saw, that very much relates to those two questions.

Commissioner Beamer asked Mr. Uyeno and reference the submittal, page 4, says by letter ADC and KAA have expressed willingness to participate in mediation. Do we also have commitments from these other parties from Earthjustice who's representing Po'ai Wai Ola? I just didn't see it spelled out.

Mr. Uyeno explained that the reasons why those are in there is because when they sent the data request to ADC and KAA, in that letter we specifically asked for a response and their willingness to participate. We didn't do that with the other organizations. They have been participating in the meetings.

Mr. Uyeno said from the last meeting on October 6, when we discussed the scope of mediation, the four points that were discussed were:

- a) Was to reduce or eliminate the use of water in the Kahauo sluice gate. And as you folks observed this was actually done there, it was open for a foot and it was down to less than an inch.
- b) Re-start or reduce the amount of water diverted for Waiakoali and Kawaikoi streams.
- c) Monitoring of water use by users of the Kokee and Kekaha ditch systems.
- d) Restoration or release of water at points along Waimea River, e.g. Waimea, hydropower power plant, to provide for continuous flows.

Commissioner Starr asked if there's anything about restoring flows specifically to Waimea River.

Mr. Uyeno said the restoration for release of water at points along the river, recognizing that the IFS would be the long-term.

Mr. Uyeno replied and I think recognizing that IFS would be the long term.

Commissioner Starr asked what about DHHL petition and needs of them.

Mr. Uyeno, of... I think that certainly be a part of it, we didn't have the reservation at the time.

Commissioner Starr, "shouldn't that be added into it?" Mr. Uyeno, okay. Chair Case noted that the DHHL information came in later.

Chair Case asked to hear from the parties.

David Henkin, Earthjustice, addressed Commissioner Pavao's concern raised about what the outer limits of what the scope of the mediation could be. First of all, it is up to the Commission to determine scope. What's before the Commission is both the complaint with respect to waste and the petition with respect to the instream flow standard. So that does encompass a lot of issues. It doesn't encompass every issue that has to do with Waimea River, but it's beyond the complaint, Kauhao gulch or the specific things, what request the Commission to revise the instream flow standard. I think that is pretty broad in terms of what is encompassed in what we put before the Commission. I can't claim to be an expert in Commission practice but I'll be surprised as we learn new information, as we all learning new information here, when we brought this initially we were led to believe that KAA's main claim for the water was for agriculture use, that has morphed into the main claim being

for power generation. Because they can't justify the diversion based on agricultural use but now they say they need to do that for the power stations. We didn't know that when we filed the petition two years ago, you didn't know that, I suggest staff didn't know that, so I'd like to think that we would have an opportunity to amend our complaint or petition if need be to conform to the facts that come up in the course of this meeting. But I think that what we submitted back in July 2013 is broad enough to encompass the issues that we've been talking about. I would like to very much thank both the Commission for being vigorous for pursuing this petition and complaint which we've been concerned with languishing since 2013 but certainly in 2015 we started to focus on it in earnest and I'd also like to also thank staff for moving this forward. And I mention this in context of the current agenda item because there's an upside and a downside to having a very broad mediation authorization. If it's so broad, let's just say let the parties mediate these huge issues. And it's going to be very difficult for this Commission to know if the mediation is going to be productive. Where is it specific items about which the parties are asked to either reach agreement or come back and confess that they can't reach agreement? Then you'll know if we're making any progress. I guess related to that we had item B2 before this which I think presents a very different procedural setting from what we have in this item.

In B2 you had the issue of contested case and a very long history. Here we don't have a contested case, yet, we have a petition and complaint before the Commission for action and I think the mediation is an opportunity to see if there's are issues that are necessary building blocks to the ultimate resolution of this very broad topic that the parties can reach agreement on. And we haven't discussed this in mediation but we have discussed the issue of how do we create an opportunity for this Commission to have an adequate record to make decisions. Because we can't simply come in with a mediation agreement and have you rubber stamp it but if we didn't have mediation presumably how this would process either we would file a motion and other parties would oppose or the staff might make a recommendation and various parties might request contested on it and you all would have that process we're very familiar with. Through the mediation if the parties as discussed, there's been a couple of meetings of hydrologists. They've been sitting down trying to see if they can reach agreement based on the existing data that exists for these various streams, reach agreement on what is a reasonable understanding of the natural flow of the stream is. As you can imagine, that could take weeks and weeks of contested case when people putting on these same experts and having them spar with each other because everyone's pushing for their most extreme view of reality or hopefully, at least on that issue the hydrologist can say, well, this is a reasonable understanding of the data because unfortunately even scientific data is subject to interpretation and dispute. So our hope is that with respect to that issue if that is one of the charges for mediation is can the parties reach agreement on how much water is there. And if we did reach agreement and it seems like its hopefully moving in that direction, the staff could give a submittal that has the data attached to it the analyses to which those people participating in the mediation have agreed to and when it's presented for your adoption no one asks for a contested case and we get to move on to the next issue. I agree with Dean (Uyeno) accurately reflected the topics that the parties at these various meetings in September and October agreed are worth talking about to see if we can reach agreement. Can we reach agreement about restoring flows to Waikoali and Kawaikoi at the head water at Koke'e. Everyone agreed that they would talk about it. No one agreed that it would actually be resolved. So our request is that there be a process for identifying specific topics that we think are appropriate for mediation, the parties have done that and whether the Commission is prepared to ratify those topics today, it's certainly up to you. We've identified specific topics that we think are discrete enough that we can know if we are making any progress. I think that some of the bigger issues like in the twenty-first century is it consistent with the public trust to divert Waimea River to run through century old hydro-technology. We now have learned with a KAA submittal from October that two-thirds of that power is sold. Is that the public trust here? I doubt that we are going to reach agreement for mediation and that will ultimately be the Commission's task. So to summarize, I think we need

specific topics, I think we need to be kept on a very short leash to either reach agreement or confess that we can't because the status quo is the diversion of almost all of the river at certain points and all the head water streams. So the status quo is unacceptable to Po'ai Wai Ola and I think to large segments of the Waimea community, but the mediation provides an opportunity to see if we can reach an agreement on can we restore or reduce, what would be the technical fixes to the diversions, can we immediately rather than waiting for final instream flow standard get continuous flow throughout Waimea River, is that something that the parties can agree so the staff can present it so that it's without dispute, adopted by the Commission if you find favor?

So in summary I think it's important that there be specific topics, and that there be deadlines, and reporting, and do not expect us to solve the whole thing in mediation and come back to us in six years and see if you've done it. We don't want to go into that sort of black box because that's not going to move it forward. There was from item B2 an amendment that was proposed that the Commission approve the mediation and then topics be brought back to you for your consideration and deliberation. We would prefer that you not defer this matter until next month to try to determine those topics because first we need to know if you think mediation is a good idea here that would allow the staff then to make arrangements to the mediator, it's the holiday season, it's going to take a while for us to get initial mediation meeting with everyone's schedule and all that. So rather than waiting to the end of January which is your next meeting to determine whether there will be mediation, we respectfully suggest the board approve the mediation perhaps with this opportunity to set deadlines and specific topics.

Commissioner Starr asked Mr. Henkin if the board was to approve the mediation and the Chair would go on our behalf and hire the mediator and kind of get a basic framework in place and then a month from now we were to add some guidelines on confining the structure of the mediation would that sound workable to you and would you be willing to, give us a list of some of the constraints you think would be relevant.

Mr. Henkin responded, yes, absolutely. And I think that maybe given the complexity of this issue and many topics that might be susceptible to mediation, our suggestion would be that the Commission approve the mediation, create that framework, allow the framework to be in place and some initial meetings to be set. And then at a subsequent meeting might say the first set of topics that we want you to try to mediate are the following and we want the report back by a date to know if you succeeded. And it may be that we find out after the first set of topics we're not getting anywhere and therefore that was a nice try but we need to go the old school way and bring motions or make recommendations for contested cases. Or that the various interested parties here have managed to find a rapport so that we might be more ambitious and there might be another set of topics that we didn't think right now would be achievable but maybe they are. Obviously things like DHHL's reservation and how that feeds into the ultimate instream flow standard, I wouldn't recommend that as being the topic for the first meeting and maybe it will never be an appropriate topic for mediation as opposed to some other decision making process but I say rather than limit it to just the first set of topics, let's try it out if it's a good way to move forward, and if it is then maybe we can be more ambitious.

Commissioner Buck asked who should be the parties to the mediation or only the three or four players or do you think that's appropriate.

Mr. Henkin responded, well, I think again we're benefited here by not being in a setting where there's already hasn't been a contested case asked for. So that's why I tried to address that general concern on the onset that which is anything that is non-binding mediation is not going to be binding certainly on the Commission, not going to be binding on anyone really. But the idea is if we can

reach accord than that would allow for various staff recommendations to come before this Commission and at least you'd know that the people who filed the petition are clients and the people who operate the ditch and the people on the land aren't going to be disputing it. I don't want to presume to say who should sit at the table, I'm just going to say the truism that the more interest that are at the table, the less likely we're going to reach some consensus. There has been some natural winnowing with folks who make clear that they have an interest but I would defer to the Commission to decide who should be in that.

Jonathan Scheuer, consultant to Department of Hawaiian Home Lands, and Natasha Baldauf, outside counsel on this particular matter, we support the idea of narrowing given some greater direction as to the scope of mediation in this matter. We want to be a party in the mediation because we think we have specific rights that are inextricably intertwined in the waste complaint and the related matters that seem to be at the core of the mediation. The one thing we would say is that we don't think, we submitted the reservation request so we'll be very clear what we believe after very thoughtful determination our needs are for both consumptive and non-consumptive uses of water in the area and that can certainly inform the parties during the mediation of these other issues as to the broad expectations that the department has but we're not expecting to mediate our reservation request. We don't think that's actually even possible. It's incumbent upon the Commission to rule on our reservation request it's not something that's subject to mediation.

Clayton Kubo, life-long resident of Waimea, Kauai, said he's not with Earthjustice guys, not with whatever the name. Yes, there's a lot of scenarios that is going into that Waimea River scenario and in a way where 33 point what was that again, your guys' finding? I wonder if the Kokee ditch system can even handle that much volume going down to Pu'u 'Opae.

Jonathan Scheaur responded that the reservation request is for both the Kokee and Kekaha ditches not all of that 33 is from the Kokee ditch.

Mr. Kubo continued that he is speaking on behalf of himself and his family that live Waimea. When the water backs up – you guys heard this story already, I no need tell you guys. You guys when actually see Waiakoali stream. How much water was flowing out past the diversion? I think maybe one-eighth of a percent maybe, maybe one-sixteenth even. Almost 100% was diverted to the Kokee ditch system, that one Waiakoali. And you guys went to see Kawaikoi. Maybe another almost 100% was diverted. It's not like somebody is coming over here and trying to plead their case, you guys went to see with your guys own eyes. And when the Kekaha ditch system went back online, meaning the black pipe siphon as soon as that bugga went online that Waimea River went close, very fast. So again prone to flooding. Menehune Road, Alawai Road, all prone to flooding. So much sediment in the river has been building up for many years now because not enough flow again. Not enough flow. And I said this in Waimea Neighborhood Center when they took the black pipe siphon offline. Not one time I needed to call or did I go down to the river mouth and open up the river mouth because prone to flooding. Any questions? I hope you guys going to do something about this issue. Then maybe us in Waimea we not going need to worry. And I understand that water is a public trust and you guys cannot, cannot deny a native, not only one human being but those fishes that is in those streams. So look at it from that perspective because it seems like get too much hands in this matter of the water but it's all about the money. Like he said, yeah, KAA went from this to that, meaning the hydro cause they selling 'em to the who? The utility company right? It's all about the money again. So, I'm hopeful that you guys going dig deep down in your guys hearts and try and understand this problem that we're having on the west side of Kaua'i. I hope so. Thank you guys very much.

Commission Starr said he perceives as what's happening here is as a Commission, as staff and some of the parties here are trying to move as fast as possible to try to deal with instream flow standard which is the key to what you are talking about for the river and the streams. I think it's moving faster than this kind of thing has ever moved. Does this make you happy?

Mr. Kubo replied, well, I hope so. The day I get word that hey man, now we getting 30 million gallons flow in the Waimea River then that might make me say, I going pay for one round trip ticket and come and thank you guys face to face. Commissioner Starr said we'll hold you to that.

Commissioner Beamer asked why Mr. Kubo was not with the Po'ai Wai Ola.

Mr. Kubo explained, when they when sought an attorney I guess and Earthjustice got involved, me I didn't know nothing about that, nothing.

Commissioner Beamer: Okay, okay.

Mr. Kubo asked, you representing the taro farmers right? Mainly them guys. It's a group of people that includes the taro farmers.

Commissioner Starr told Mr. Kubo that he should talk stories with him outside.

Mr. Kubo said he lives the lower side. And he hope you saw – you got the pictures right?

Wendell Kabuton, Waimea Valley, Clayton Kubo's neighbor, said Mr. Kubo brought up the issue and problem about the river. Mr. Kabuton said Mr. Kubo goes down and shovels the sand by himself. There's equipment that can do it but nobody does it. Mr. Kabuton said his issue is with the seed company siphoning all the water. According to the information that I have tried to dig up is that they never formally applied to the Commission and thereby bypassed the process by executive order creating ADC and they just transferred the water rights from the plantation to the seed companies, therefore they bypassed the Commission. They never turned in any information about what they raising, whether they're cleaning up the water before putting it back into the system because there's a lot of poison being put back into the ocean with the effects from the state study at the harbor that they had to dredge the harbor because the sand builds up. When they were going to dredge the harbor it was full of toxic pesticides that could not be put back on the side of the ocean to deal with the erosion. There's been studies with 55 thousands sea urchin. I looked at the seashells, thousands and thousands dead. When there's heavy rain, lot of fish dead on the beaches. But nobody goes to check it all out. They can swim so it's not like they drowned. Something killed them. So my concern is how come they can keep taking water without paying one cent. I got to pay water bill every month whether I'm on Kauai or not. So that's my concern about water usage. That it has to be fair. They have to apply and review what they using the water for, how much water they going to be taking, what are their future plans because the KIUC proposed plan is also making accommodations for water to be given to the seed companies if they need down the road. They're taking more water away from the river, away from the local farming operations that cannot come into existence because no more water, because they don't have water rights. And they have to abide like everybody else but these guys never abide. ADC gave them permission that's like bypassing the whole Commission you were talking about earlier. How can they bypass the Commission? They cannot bypass the Commission, they not supposed to. Who created ADC and why is it still in existence? You know, they manage the system the water going out all over the place, just leakage to the basic system that's supposed to be going back into the Waimea River, and I'm pretty sure you guys saw some of it, but there's open pipes, ditch systems going Kalalau side, wasted. Anyway, that's my opinion.

Commissioner Buck made a motion to approve Item B3 with one amendment:



2. That the Commission approve the scope in terms of reference of the mediation process after consultation with the mediation participants.

So we would expect that at a future meeting that the staff would come up for an approval for the scope of reference after having some time to talk to the mediation participants.

Commissioner Starr seconded the motion.

Commissioner Pavao asked Commissioner Buck to repeat that amendment.

Commissioner Buck said this would be a new #2, 2 would be 3 and 3 would be 4. That the Commission approve the scope in terms of reference of the mediation process after consultation with the mediation participants. So they will come back to us and say who they expect to be part of the mediation process and what are some of the scope in terms of references which I hope they would include deadline and priorities.

Commissioner Pavao: Who would come back to us, the staff or the participants?

Commissioner Buck: The staff would come back to us for approval of the terms of reference of this mediation process after they have a chance to talk to the people that would be included in the mediation.

Chair Case: So in other words similar to our prior discussion we're actually going to go ahead and start this process, hire a mediator under the general concept that we got for the specific scope of work, you guys would flush out any more detail and then bring it back, hopefully soon, at a future meeting.

Commissioner Starr asked if this is workable, kind of the timeframe and process you're envisioning?

Dean Uyeno said as long as you're not assuming we're going to come back in January. As soon as we get a mediator on board and get through the contracting process. Commissioner Starr asked if Mr. Uyeno thought it would probably be February. Mr. Uyeno: At least.

Chair Case said that would be true anyway right because you're going to go through a contracting process based on the framework you guys have preliminarily talked about but with some process for amending that to update it with further input from the Commission.

Mr. Uyeno: Assuming all parties can get together and assuming also that we'll be a part of the mediation process. Which I think the parties have pretty much agreed to this, asked for our participation I think as more of a technical resource. Normally, like in Na Wai Eha, we would not be privy to the mediation with the parties. And that's a separate case where that was a contested case hearing, I think in this case the parties have asked us to be involved.

Commissioner Buck: I think some of the suggestions of Mr. Henkin about some of low-hanging fruit and some specific timetables, easy ones first; I think all those have some great potential.

Mr. Uyeno said the first meeting with the mediator should be able to identify the issues and count the timeframe and set meeting dates.

Commissioner Beamer said, as you guys are preparing that scope I would also, like Commissioner Buck mentioned, prefer that shorter timeline with a few low-hanging fruit, like Mr. Henkin said, if

it's fruitful to have the mediation if things are progressing versus kind of have an update within a few months and then decide versus fix everything and then we wait two years or year and a half.

Commissioner Buck said it could almost be a rolling mediation process where that we keep knocking off things that deal with the waste issue understanding the IIFS is complicated and that it takes longer and might be a public process so I think we have an opportunity on Kauai because I think all the parties are acting in good faith and we don't have a whole legal record of conflict, a model. It could be a model for future issues.

Mr. Beamer said he thinks some of the low-hanging fruit was the waste issue, the stream connectivity. We saw diversions that weren't even being used I mean there was that one thing that we went up and we were, what is that? Well, that was a mistake. Stuff just sitting in the stream. I mean those kinds of things I think could be.

Commissioner Starr said that perhaps we could even start to do some spot IIFS work. Has either Schlack Ito or KAA expressed that this is a direction that they are willing to participate in.

Commissioner Buck: Yes, they did send a letter already.

**MOTION: (Buck/Starr)**

To approve amended recommendations.

UNANIMOUSLY APPROVED

**4. Authorize the Chairperson to Enter into a Contract for Goods and Services Provide for Maintenance and Further Enhancement of the Commission on Water Resource Management's Water Resource Information Management System**

STAFF PRESENTATION by Dean Uyeno

Dean Uyeno wanted to make an amendment to the recommendation and add No. 2 Find the proposed project exempt from Chapter 343 for preparing an EA.

Mr. Uyeno: To provide a brief history, in 2008 we transitioned into this new data base system that we use on a daily basis. The project was essentially completed in 2012 with the Army Corp as a partner, we continue to make corrections or fix bugs in the system as well as to make further enhancements. One of the things this would do is to: 1) provide for maintenance, one year of computer support software maintenance, and 2) enhancement to the data base system WRIMS. So the addition of data fields and tables and development of search queries and reports, basic functional adjustments and so on, and so forth.

So this project is exempt from an EA pursuant to Department of Land and Natural Resources Class 10, Purchase of Supplies, Equipment, Materials, Motor Vehicles, Boats, and Services. It is also exempt from procurement from the procurement code Chapter 3-120, HAR, Exemption Number 12. Staff is requesting that you authorize up to \$75,000 to contract with a consultant to provide maintenance support and further enhancements to WRIMS.

**RECOMMENDATION:**

Staff recommends:

1. That the commission authorize the chairperson to enter into a Contract for Goods and Services, not to exceed \$75,000, to provide for maintenance and further enhancements to the Commission's Water Resource Information Management System;
2. Find and determine that the proposed Contract for Goods and Services is exempt from preparing an EA.

Commissioner Pavao asked if there was an IT person on staff.

Mr. Uyeno said yes, in the past she has met with Oceanit so she can do some basic modifications. Her main focus right now, a lot of it, is interacting with Engineering Division, which we've piggy backed onto their servers, there's been a lot of getting the hardware up to par as well as making infrastructure improvements. Our focus now hopefully as she goes on, it's really complicated, programming language and so she's picking it up now little by little and as time goes on she'll be able to make more corrections.

Commissioner Pavao asked if isn't some of this some of the responsibility of the previous consultant to come and fix.

Dean Uyeno said we're going with the same consultant. It's the annual maintenance, number one. But because the way the procurement code for contract for goods and services you basically have to come back every year. We can only cut a one year contract. Commissioner Pavao asked if you're going to use the same consultant. Mr. Uyeno: Correct. Commissioner Pavao said now we can make it cheaper and easier.

Commissioner Balfour commented that the State has a very, very poor track record on dealing with consultants who do computers and electronics and all the new bells and whistles and baubles and bangles and I look at this and I remember I was on the board when we went through this thing the first time. It was a long protracted process and I think we ended up having to kick in money at least one time, more than the original amount. I happen to know the person and principals and I like them very much but it just galls me that we have to spend \$75,000 to figure out what we're doing and what we're not doing, it just goes on and on. I think it's like the Eveready bunny, you keep feeding, keep feeding, keep feeding. For a non-technical type person sum total of my technicality it rings, I can answer it and I can dial out. And I've gotten along very, very well and another month, for 84 years with this so you know I look with the jaundice eyes sometimes with all this stuff that nobody can figure out. What did we spend on the Health Care Connector? It can just go on.

Commissioner Starr requested that in a future meeting they get an update and demonstration of the functionality. We did that a couple of times in previous years. So, two meetings from now, whenever it works.

**MOTION: (Buck/Pavao)**

To approve staff amended recommendations.

UNANIMOUSLY APPROVED

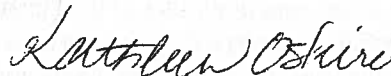
Commissioner Buck reported that he took the tour of the Red Hill facility this week and took advantage of that. He still thinks it's a huge issue that the Commission has not weighed in, the final AAOC and the scope of work. He drafted a letter last November that he went through the process as a Commission we could actually represent, it didn't make it on the agenda this month but I do think the Commission needs to weigh in on the final AAOC, we are the, I think it's in play so I would hope

at least a draft letter would show up in January so we have a chance as a Commission be able to discuss.

Commissioner Beamer said he wasn't sure if they heard regarding Kona the presentation of the tradition and customary rights or the packet that was handed out, we never had a briefing or anything on it. And I think it's something that should come up as well.

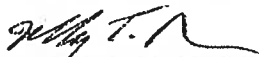
The meeting was adjourned at 1:15 p.m.

Respectfully submitted,



Kathleen Oshiro  
Secretary

APPROVED AS SUBMITTED:



JEFFREY T. PEARSON, P.E.  
Deputy Director