

MINUTES
FOR THE MEETING OF THE
COMMISSION ON WATER RESOURCE MANAGEMENT

DATE: January 15, 2019
TIME: 10:00 am
PLACE: DLNR Board Room
Kalanimoku Bldg.

Chairperson Suzanne D. Case called the meeting of the Commission on Water Resource Management to order at 10:04 a.m.

The following were in attendance and/or excused:

MEMBERS: Ms. Suzanne Case, Mr. Kamana Beamer, Mr. Neil Hannahs,
Mr. Paul Meyer, Mr. Keith Kawaoka

STAFF: Dean Uyeno, Roy Hardy, Ryan Imata, Rebecca Alakai, Neal Fujii,
Malie Beach-Smith, Ayron Strauch, Queenie Komori,
Robert Chenet

EXCUSED: Mr. William Balfour, Jr., Mr. Michael Buck

COUNSEL: Julie China

OTHERS: Jonathan Scheuer, E. Halealoha Ayau, Tom Nance, Min Zhong,
Wei Yao, Ian Connolly, Alan Okamoto, Richard Ha, June Ha, Blue
Kaanehe, Ian Hirokawa, Leimana DaMate

All written testimonies submitted at the meeting are filed in the Commission office and are available for review by interested parties.

Chair – Read the standard statement of contested cases: If you have a legal interest that may be affected by a proposed action, you may have a right to administrative contested case hearing and an oral or written request for a contested case hearing must be made by the close of the public hearing or the vote. In either situation you have to, if you are requesting a contested case hearing you have to file or mail and postmark a written petition with the commission, not less than 10 days after the close of the meeting.

A. APPROVAL OF MINUTES

November 10, 2018 meeting

MOTION: (HANNAHS/MEYER)

To approve the minutes.

Commissioner Beamer recused because of absence from meeting.

UNANIMOUSLY APPROVED.

B. ACTION ITEMS

1. Oceanwide Resort Paradise HI LLC, Application for Ground Water Use, Well Construction and Pump Installation Permits, Atlantis 1, 2 and 3 wells (Well Nos. 3-2007-005, -006 & -007), TMK (1) 9-1-057:006, WUP No. 1082, New Industrial (saltwater aquarium and aquaventure) Use for 0.720 mgd, Makaīwa Ground Water Management Area, Oahu

PRESENTATION OF SUBMITTAL: Ryan Imata

Commissioner Meyer asked regarding the disposal of effluent water. Doesn't it make sense to consider any nutrient removal or disinfection that this effluent may have on the salty portion of the aquifer?

Mr. Imata – I haven't touched base with the Department of Health (DOH), that would be a requirement that the department might implement and something the applicant can address.

DOH Representative Kawaoka asked if the UIC permit had been applied for?

Mr. Imata said he didn't know and that the applicant can answer.

Commissioner Hannahs – this is for salt water aquarium, assuming that it would have fish inside the aquarium, do we have a way insuring that those fish were acquired in an appropriate way, where you've seen where aquarium fish acquisition have been a problem in some of our offshore communities. Do they have to demonstrate that with some kind of permit that the fish are acquired appropriately?

Mr. Imata didn't know; perhaps that's addressed in whatever approvals are required for the aquarium, but we were aware that that might be an issue so we forwarded our application to the Division of Aquatic Resources (DAR) and specifically to their aquarium fish staff and they haven't responded, but are aware of it.

Commissioner Beamer – is there anything specific in a permit, if this is for salt water, should the water use permit say that it's specific to salt water? If not, maybe that could be an amendment. Given some concerns from the Honolulu Board of Water Supply (HBWS), they want to ensure that.

Mr. Imata – what I can do is that in my recommendation, we can say that 0.72 mgd of salt water is in the submittal but not the permit itself.

Mr. Hardy – we could modify the recommendation to add special conditions.

Mr. Imata – could add condition #5 that water use is limited to salt water.

Commissioner Beamer – the second one, is it brine? Is this being converted to fresh water? Is the water being disposed of isn't brine? It's still just salt water? He encouraged staff to reach out for these kinds of questions ahead of time. If this were to get approved today, as the Commissioner feels like it falls into limbo and hope that DOH is talking stories. If you can reach out ahead of time and resolve some of these issues.

Mr. Tom Nance, consultant for the applicant. The UIC permit has been obtained a couple months ago and was filed at the same time as the water use permit. Regarding the quality question, we are going to filter it as it goes down; probably try to recommend chlorination, not because we need to purify the saline ground water, but simply to prolong the useful life of the well themselves. The disposal will be at deeper depths in the same salt water zone as the supply well we withdraw from.

Commissioner Beamer – so the salinity would be the same?

Mr. Nance – yes, there is no salt removal. The project requires salt water for the fish; it's just going to be filtered to get rid of organics that are filterable and put that water down in deeper disposal wells than the 3 supply wells.

Commissioner Beamer – do you have experience in engineering similar wells in parts of Hawaii that operate in this fashion.

Mr. Nance - Yes. – I did the salt water well at Disney, next door. People might feel that we might somehow influence the brackish water overlying the salt water. Couple things about Makaiwa Aquifer, it's brackish to saline everywhere there is no possibility of irrigation quality water even if it is at the end of beyond the Ewa Kunia Aquifer. The way we develop the well is we get into the salt water zone, we're monitoring the drilling process, brings liquid out of the hole; we track that salinity. Probably between 300 to 350 feet we will get into salt water. We keep on going down to a depth of half the yield. We video and find a gun barrel smooth section of the borehole that's in the salt water zone that can plug off and our annular space gets plugged also. So, we draw exclusively from the salt water zone. The proof is in the pumping. I've got salt water wells that I put in the early 90s in the South Kohala coast, Kona coast. It keeps pumping the same saline ground water. If it starts to get a little less saline it would then mean that we would be pulling brackish water from up above. I probably done about 25-30 of these saltwater wells in the state and they are all pumping salt water for decades.

Commissioner Beamer – in our ground water usage pumping, we didn't report salinity, right? But in these instances, we do?

Mr. Hardy – their report must show that it's above a certain amount [salinity] that qualifies it as saltwater.

Commissioner Hannahs – in all of these 25 other projects, have to had any problems? Is all done according to plan?

Mr. Nance– one of them has a slightly leaky casing. The wells that have been used are out at Ko Olina resort. The only problems per se are we pump salt water and pumps don't like salt water. it's not in the well itself it's in keeping the pumps alive, choosing the right energy keeping the pumps going.

Commissioner Hannahs – in an earlier question, do you know how they acquire fish for the tanks?

Mr. Nance - no.

Mr. Steve Connolly – the intention is to fish locally and to get permits locally using local fish company. The aquarium, we want to use local species and to showcase for education purposes in the aquarium and also do research. Everything will be done in accordance with government regulations.

Chair Case – just want to make sure that you know there are restrictions on fishing aquarium fish locally right now.

Mr. Connolly – the fish that we are looking for the fish and legislation are very small like fish for domestic aquariums. We are looking for bigger species to showcase in bigger tanks.

TESTIMONIES:

Mr. E. Halealoha Ayau – Department of Hawaiian Home Lands (DHHL) – Water use permit application for the Atlantis 1, 2 and 3 salt water wells do not include data and analysis to support statements that pumping will not interfere with the rights of DHHL and that there would be no impacts for the use of potable or brackish ground water, with pumping of 720,000 gpd of saline ground water from the Makaiwa Aquifer. Our statement of Makaiwa being within Waipahu Waiawa Aquifer notwithstanding, concern remains inability to assess whether the withdrawal of saline ground water in the Makaiwa Aquifer could potentially impact the ground water in the Waipahu Waiawa Aquifer. It is imperative for DHHL to err on the side of caution in order for sufficient information. For clarification, our comment that express that our rights in the Waipahu Waiawa Aquifer could potentially be impacted by the application because we were unsure, given the lack of information. Our objections are based on our duty under the DHHL water policy plan, to advocate for our water rights, given the inability to conduct proper review. We again raise the concern whether an application should be deemed complete in the absence of data and analysis to support the position of no interference. We encourage the applicant to consult with DHHL to facilitate the exchange of information for purposes of proper conduct of proper review with regards to potential impacts of DHHL's rights. Since we submitted the comment letter we received information and are satisfied that our concerns have been met and the concern that data and analysis should be included.

Chair Case – so more complete exchange of information with DHHL before doing a Commission submittal would help that.

Mr. Ayau – so with that additional information, the DHHL withdraws this objection.

MOTION: (BEAMER/HANNAHS)

To approve the submittal as amended to add recommendation number 5 to include the restriction to salt water use in the special conditions of the permit.

UNANIMOUSLY APPROVED AS AMENDED.

2. Request Imposing a Fine Against Landowners Richard Ha, Jr. and June Ha for Diverting Water Without a Permit as Required in HRS §174C-93 and HAR §13-168-32; Approve an After-the-Fact Stream Diversion Works Permit (SDWP.4722.6) Application for up to 9.0 mgd for Hydropower, Amend the Interim Instream Flow Standard for the Wai‘a‘ama Stream Subject to Special Conditions Including Completion of a Remediation Plan; Wai‘a‘ama and Waimā‘auou (Lonokaeho) Streams, Pepe‘ekeo, Hawai‘i, TMK: (3) 2-8-004:005

PRESENTATION OF SUBMITTAL: Rebecca Alakai

Commissioner Hannahs – With all this information on the flow of the stream, seems like we are backing into a 1.5 mgd standard and there is no data here to support that in this report. We are going to back into the big decision of the IFS (instream flow standard), the small decision whether we should levy out a \$1500 fine.

Ms. Alakai – The \$1500 fine is for the use of water and modification and diversion without a permit. The IIFS (interim instream flow standard) is a separate issue.

Commissioner Hannahs – We are setting it here without the normal data that we have when we set IFS.

Ms. Alakai- That would be a management decision. You can talk to Dean about that. All I can say is that we have other priorities in other watersheds and we don't have staff time to do a study on this.

Commissioner Meyer – Has the biota been done?

Ms. Alakai – The applicant did do a study on fish in the area. There was no study done on any TNC rights in the area. There was no public meeting on this.

Mr. Uyeno – Typically in a situation like this or in situations ideally, we would like to get the IFS set first but that can't be done in every case where we do have pending diversion applications before us so by their nature the IIFS are meant to be temporary in nature. How long the temporary nature can depend on the situation. This is an area we need to do further

study and set a better IFS in some future time. But for the interim this application needs to be addressed.

Commissioner Hannahs – I take it that it's not a matter that you didn't present data that you have, you don't have the data.

Mr. Uyeno – Ayron has done some stream flow measurements on historic records for this site as well as looking at prior surveys that have been done.

Dr. Ayron Strauch – I visited the site 3 or 4 times to measure flow and to assess habitat potential. Looking at the historic records in 1969 our Division of Fish and Game only found opae kala'ole, mountain shrimp. The stream was probably more heavily diverted at that time. In 1990 Division of Aquatic Resources (DAR) returned and also found *lentipes concolor* or o'opu alamoo. I only surveyed the reach where the diversion was located and I didn't find any native species in that reach. The stream is substrate in the reach where the diversion is located is bedrock dominated. It is a very large stream in terms of dimensions. Based on the basin characteristics there really isn't much ground water contributing to the flow. It's in a very wet place so most of the time there is a lot of flow because of all the runoff. The estimates of surface flow based on nearby gaging stations and data that were available and point measurements that I was able to make does demonstrate that there was a lot of water available. At the same time, when it stops raining, the river stops flowing. The four times I have been there, the one time there was less than 1 million gallons per day (mgd) in the stream. It was sunny that whole week and the river dried up. Based on the lack of ground water flowing in the stream the geometry of the stream channel and the estimates for the IFS, I do believe that it is important for native species. We just didn't find any in the reach where the dam was located. Therefore, the connectivity flow would be recommended to connect the lower reaches to the higher elevation reaches.

Commissioner Hannahs – Do you feel the 1.5 does that?

Dr. Strauch – It's a good starting place. There is no perfect number at this point but I think we put 1.5 mgd in the stream and evaluate it.

Commissioner Beamer – How are we measuring for the IIFS?

Dr. Strauch – At the moment, I am only making point measurements. Going into the stream and measuring the flow. We can put in a monitoring station if necessary or do point measurements, especially after the modifications and diversions are made. It would be important to follow up with point measurements. If we want to monitor continuously, we can.

Commissioner Hannahs – Are the reporting requirements you are imposing upon the applicant going to be helpful in this regard with providing information that will help us be better informed?

Dr. Strauch – Definitely. Every diverter should report how much they are taking out of the stream. This was a case where we weren't quite sure if the structure was designed or optimistic of how much water was available. When I first looked at the 9 mgd, I thought it was a lot. I was just in the stream with 1 mgd but I've also seen when there is 20-30 mgd in the stream. I think reporting will help us move forward especially once we get 1.5 mgd in the stream to determine how much is available.

Commissioner Hannahs – That may have been more geared to our desire to produce renewable energy than what the stream can support. How is this question whether there should be a lease for the water? I recognize that some of decisions are within DLNR. Shouldn't we be able to answer that to our applicants. Why is this different from KIUC; they need water for hydro, they need a lease to do it.

Ms. Alakai – This diversion is on private property.

Mr. Uyeno– The property boundary runs down the middle of the stream channel. So, this old sugar plantation diversion goes across the stream channel. It is on both state and private properties. Land Division had no objections.

Ms. Alakai – We have discussed that issues with the AGs office. They said it's not an issue but if it does become an issue, Mr. Ha can cut the wall on his side of the property and it's no longer touching the state wall, on the state's half of the stream. The diversion is located on private property. If the diversion was located on state land it would need a lease.

Chair Case – The diversion is across the whole stream. The intake is on private property and not on state land. If it was, that would be a Land issue.

Commissioner Hannahs – I realize these archaic systems are complicated. We want to be consistent as possible.

Ms. Alakai – We are consistent; intake is on private property.

Commissioner Hannahs – So we would treat everyone this way.

Ms. Alakai – KIUC was different; they were on state property. They were an industrial use of water, hydropower. This is hydropower for ag use on ag land. It is consistent with Chapter 205. This is not an industrial use. They don't feed HELCO. It is electricity for ag operations. This is not an industrial use which would require industrial zoning on property. This is consistent with Chapter 205. I don't know where DHHL says that it's a private use of water for commercial purpose.

Chair Case – An ag use is commercial.

Ms. Alakai – Yes, it is. Chapter 205 says commercial ag is consistent with permissible use on ag land.

Chair Case – It's been a permissible use for a hundred years. But it is a public trust resource.

Commissioner Beamer – Isn't the water lease for the water? He is confused on the location of the intake if it is on state or private. We are talking about the lease of the water. Wouldn't that be consistent with the leasing of water?

Ms. Alakai – Land Division could answer.

Deputy AG Julie China – This is a way bigger picture considering the amount of land that was in ag for 100 years, 200 years. The issue of water leases is currently being debated and discussed amongst ourselves and Land Division. Because one we say all use of water needs water lease, we would have to start going through island by island or the entire state doing water leases. It's going to be big policy/legal problem. I think Land Division has their interpretation of it, but we have been discussing it actively with them.

Commissioner Meyer – Appreciate developing the topic and analysis of minimum components and the mitigation components. Large violations did not occur. It's not a repeat violation. No evidence of significant impact, good faith effort to remedy, the start of reporting monthly use, no evidence of significant damage, no multiple repeat violations. That is very helpful in terms of gaging the gravity of the situation, the appropriateness of penalty. From my perspective, given those mitigating factors or your analysis I think it's a step in the right direction. You are stepping back prior to the penalty amount which is down from \$5000 to \$1000. That is helpful. Do you have any thoughts in that respect, given your analysis of mitigation in retrospect or do you still think you want to alter the recommendation?

Ms. Alakai answered to go with recommendation.

Chair Case – Doesn't seem like an intentional disregard situation. If you have a use that has been going on for a hundred years and hasn't changed, ag use to dormant to hydro for ag use. The remediation is going to cost a chunk. The remediation will give us flow in the stream. \$1000 is still under the old rule. A full fine for something that doesn't seem to have bad intent.

Ms. Alakai – Property can be bought and you see that there is a structure on your property,.

Commissioner Hannahs - The admin rules characterize the minimum fine, not the full fine, but the minimum fine.

Ms. Alakai – It's up to \$1,000. Staff doesn't have the authority to make changes, but the commission has the authority to change the amount.

Commissioner Beamer – I have questions about the wetted pathway and do we have any models on total flows or what is happening in the streams over time.

Dr. Strauch – We have limited data available, but I took the stream gaging stations from the nearest stations. Based on characteristics, basically preempting the large scale statewide USGS study that is going to be doing the same thing to develop low flow statistics and estimated median and low flows for this location. It doesn't tell us anything about change over time.

Chair Case – Regarding the remediation, I thought I heard some flexibility and the location of it. Is that right? Is it going to be basically above the intake? If you are not sure about going upstream, do you have to go through the intake?

Dr. Strauch – The structure is about 3-1/2 to 4 feet tall concrete wall that crosses the stream channel. There is a big square opening and another square opening. If you look at Photo B, Exhibit 2. The concrete wall, on the right-hand side, there is water spilling over, and there is also the intake along the left bank. The part where the water is spilling back into the stream, basically where that white arrow is pointing through, I recommend building a wetted path there and biota will be able to climb up through and access the flow upstream.

Chair Case – Where is that in the recommendation?

Ms. Alakai – We referred to it as a structure to allow 1.5 mgd to stay in the stream.

Chair Case – Read recommendation 3 and stated that there is general language and some communication between you and the applicant about how to make that work for little fishes to swim upstream?

Commissioner Meyer – Question to the applicant – What is the expected uses for the hydropower? We are looking at 2-3 million since last October. Is that a repeatable pattern or is usage going to get to 9 mgd?

Ms. Alakai – This is now known that he has only reported twice.

Commissioner Beamer – Do we have estimates for any total flow?

Dr. Strauch – A couple of times that I have measured it was a high flow day and was 25 mgds and a low flow day was less than 1 mgd. These streams are really flashy along the Hamakua coast. Whenever it stops raining, the flow drops. There are a lot of large rainfall events.

DOH Representative Kawaoka - On the permit, is there a period of time?

Ms. Alakai – Technically this is a construction permit so it's a 2-year period to construct. It's not a water use permit, this is a construction permit. You can use the water until something changes.

DOH Representative Kawaoka – Is there a permit to operate after that?

Ms. Alakai – No.

Dr. Strauch – It's not a water management area.

DOH Representative Kawaoka – Because of the uncertainties of the data or lack of data, is there anything in the permit conditions that if you do have additional data, you could amend the permit to reflect that?

Ms. Alakai – We could put that in the recommendation that instream flow standards can change. That wasn't the discussion that if 1.5 mgd is not enough, we can come back and change.

Mr. Uyeno – In the standard permit conditions, exhibit 3, number 2 is subject to IFS.

Commissioner Hannahs – Will we be free to change those standards?

Ms. Alakai – Yes.

DOH Representative Kawaoka – Is the remediation plan part of the permit conditions?

Ms. Alakai – Yes, that is in the recommendation, structure, to be approved by staff within 6 months.

DOH Representative Kawaoka – Will that be a submittal in the permit conditions?

Ms. Alakai – No, it would be an administrative ruling, discussed and reviewed by staff. If you want this to be revisited, then the language should be to approve by the Commission.

DOH Representative Kawaoka – Asked for verification to make sure they did complete the remediation plan, after construction. What we do at DOH is have that as part of the remediation corrective action. I don't know about the urgency, if you want them to do it right away or is there a period where they can do it.

Ms. Alakai – I reworded it to 6 months to complete the remediation plan.

Chair Case – Requested to walk through the comment letter from OHA, Kai Markell. Want to make sure that we have adequately considered cultural resources under Ka Pa'akai. So, what he says is that there is information in the Kipuka database that he found and that we didn't.

Ms. Alakai – We looked it up and we didn't see anything.

Chair Case – It might be that we need some time with them to learn what the Kipuka database has to offer that we are missing. Under item 3, historic site, historic complex along the shoreline, so that would be makai of this diversion. Kepa Maly got a study, a site that is on the boundary Waima'anao Gulch. That is the scenario on the coastline and unlikely to be

affected by basically what we have here which is an improvement in the instream flow standard. We have a reference to lauhala weaving in the area which again probably something we should note in our submittal. We need to understand what he is finding, and we are not. Boundary certificate states that the boundary runs the boundary of the ahupua'a runs along the auwai. That's information on the area and I think what we are doing is improving the instream flow standard and otherwise not changing anything. Burials and ki'i were found along the coastal area 100 years ago. That's an important site. Aquatic resources, he said, are based on antiquated assessments and data and I think Ayron said that he has been there recently and has incorporated his findings into this decision, although not outlined in the submittal but given testimony. Then there is a plethora of ocean resources, again, important, but not likely to be affected by basically would be a slight decrease in the amount of water coming out of one ahupua'a to the ocean and slight increase in the other.

Ms. Alakai – I also asked Leimana DaMate to come to this meeting to discuss how we can have better communication with the Ka Pa'akai functions. She is available to speak to that if you want to ask her. Our discussion was to make our application better. The burden is on the applicant to determine these things and not commission staff. She suggested that we put her office number on our application and the applicant can call her and she would direct them to the appropriate representative in that area to go over T&C (Traditional & Customary) issues.

Chair Case – Asked the Commission if they had any thoughts on how to include this process?

Commissioner Hannahs – Notwithstanding the burden on the applicant to produce the information, we have to review it. And if your review is going to look at the Kipuka data base, then if OHA can offer some kind of training to you and any members of our staff on how to look at that and understand beyond the boundaries of that data base that might be out there, especially if it is region specific, it seems like we are better prepared to conduct our review. I'm sure I can look at that data base and see things in one way and Dr. Beamer can see a whole more because of his background and training in doing that research. I think you are opening the door for training for our staff. The data base would be very useful and help us look at this in more informed lens.

Commissioner Beamer – I think we do our best, the Commission, and certainly on the applicant to show traditional and customary rights. But it is definitely part of the public trust that falls under us. Sometimes I think we might need another body on the staff to actually look at traditional and customary rights from surface to ground water and help equalize and give us a full conception of what is happening.

Chair Case – If you set up a training like this, I would be interested in attending.

Ms. Alakai – I think if we can improve our application and recent discussions with Leimana, that might be one step, there might be more.

Commissioner Hannahs – Dean has reached out to OHA which is part of our outreach.

Chair Case – I am comfortable with basically having discussed this testimony as part of the submittal evaluation and I think we can think of some way to improve the process by which we get input from OHA but also how we do the research that we get to supplement whatever the applicant comes up with. If the applicant says there is nothing in the area, and there is something in the area, what is the check?

Commissioner Beamer – Actually the supreme court said no, it is our duty to be that check. Back to the wetted pathway. We estimated 1.5 mgd. I'm mostly thinking about some kind of amendment 1.5 for insuring a wetted pathway or something that might help, given that this does feel like a more expedited IIFS process, I'd like to see something that insures that. What do you think?

Dr. Strauch – May be putting in a time line that follow up with an evaluation that we come to the Commission and say either this did or did not work. Can this work?

Commissioner Beamer – Yes, I think that could work. Say something in the submittal to ask the applicant to come back and update on the remediation plan.

Commissioner Hannahs – What confuse me on page 8 of the staff submittal on any flexibility we have on setting or levying the fine, the amount. You say minimum component, finding a violation of \$5,000 per incident, etc. This leads me to believe that \$5,000 is the minimum.

Ms. Alakai – It is up to \$5,000.

Commissioner Hannahs – It doesn't say that. When you look at the language here, it leads me to that conclusion.

Chair Case – The submittal should be amended to say up to \$1,000.

Ms. Alakai made note of this.

Ms. Leimana DaMate – When Rebecca talked to me fairly recently, I was able to call the families on the Pepe'okeo and as far as Honomu to see if we could find any of the generation of families from that place because when the sugar plantations closed down and before they actually closed down, the Native Hawaiian people were already starting to disperse along the coastline. The population became primarily different ethnic groups. The family in Honomu, Kailimai family. They are generational from that area. They intermarried along the coastline. They said that area was used for la'au lapa'au because of the topography and how the land slopes. You couldn't do really mahi'ai because the areas that did that, the sugar plantations took those areas. So, they did practice la'au lapa'au. I asked them if they used any of the medicinal, the medicines, taken from plants along the streams. They said there were areas, but you needed to know what kind of plants to look for so it's easy to see how it would be missed by people who were not aware. And the Hawaiian kupuna and the kahu who did the la'au lapa'au never said. It was kept within

their families. So, I just want to share that there are practices there or were and it still continues on but it's used by practitioners in the different ahupua'a along the coast. I've asked them to continue to give me whatever kind of information. I don't have all the contact information for you from the individual families. I do have a couple; I am going to turn it over to the Water Commission so that we can at least start discussions. I did mention Dr. Beamer's name as a Water Commissioner because the Beamer name is very much respected on Moku o Keawe. There is a very strong possibility that they will open up to this Commissioner more than they would open up to OHA.

Commissioner Hannahs – Is there anything about this action, this use, that would give you concern about the ability of practitioners to do what they want to do.

Ms. DaMate – To be very honest, Commissioner, I didn't get into that part. I was more concerned on the identification on the practices that were done along the streams, going into the ocean. I can focus more on that when I talk to them.

Commissioner Hannahs – If we are going to set some future point on IFS, your contacts there are very relevant to Ayron's analysis.

Ms. DaMate – Yes, it is a different focus than the OHA. I have so much respect for OHA. We can work together; we always welcome that.

Commissioner Beamer made a motion to move into Executive Session.

Chair Case read – In order to consult with our attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities, a motion was made to move into Executive Session.

BEAMER/HANNAHS

To move into Executive Session

UNANIMOUSLY APPROVED TO MOVE INTO EXECUTIVE SESSION

At 11:21 am the Commission moved into Executive Session to discuss their legal options and consult with their attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities and liabilities.

At 11:36 am the Commission returned from Executive Session.

Commissioner Beamer made a disclosure. I was President, CEO of Kohala Center of which Mr. Richard Ha was on our Board of Directors. I am no longer in that position. I have been out for about 3 years and I did, in my private capacity see the diversion with Richard.

Commissioner Hannahs – Likewise, I've seen the diversion at your invitation during my Kamehameha days.

TESTIMONY BY APPLICANT: Alan Okamoto, Attorney for Richard Ha

We have seen the Commission and staff report. We feel the staff report is complete and is accurate. It turned out that there was not a plantation permit for the diversion weir. We went through that. We checked with the Brewer archive records in Papaikou. It's not there; it was a mistake. Mr. Ha can speak to how the whole project came into place, how it related to his banana operations, later the tomato. The property is now under lease to the Lau Ola people, the medical marijuana people. The anticipated use of the electrical power will be for that operation on that 40-acre site. This facility does not generate any power to HELCO; they don't want it. When we don't generate enough power to service the 40 acres, it cuts off. That limits water use, to some extent. As your staff indicated the Wai'a'ama stream is very variable as far as its flow. There are times when no power is generated for this system.

Chair Case – Is the water used for irrigation?

Mr. Okamoto – No. The land known irrigation use as far as we can tell is when Brewer still owned the land. The Ha's have not been using it for irrigation. We would note that Hawaiian Homes have submitted their comments about the T&C rights. I will acknowledge that I am the one who prepared this application and I would have done a better job. The fact remains, as your staff report shows, this land has been under sugar cultivation for a long time. The Brewer people came in during the early 1900s and the diversion structure as far as we can tell was built sometime before 1930. But the land itself is part of the old plantation before bureau bought it. The conditions as we know them on this site, it was plantation land for really long time. Since Mr. Ha started farming banana in Pepekeo before he bought this land has a back history and he can speak somewhat to what he knows about uses in the area, both on this property and elsewhere. From what he explained to me, there was more significant use associated with Alia Stream, the next stream over. We can understand concerns. He can address whatever he knows about the uses. He does not go back 100 years, so we can't talk about that. We simply do not have much knowledge about any traditional rights exercised on this property or in relation to that stream. I heard Leimana testify about lauhala in the area. As far as I know there are no lauhala plants on the property but we understand the significance of that kind of practice in the community. As far as the penalty is concerned, that is entirely up to the Commission. We will rely on you to look at what is developed in the record and make a decision. As I said, we did not register. That is not right. He asked Mr. Ha to briefly explain how the hydro plant came into play and how that related to your farming.

Mr. Ha apologized for not having gone through the whole process. It's not that we were trying to avoid it, we didn't know. When we first heard, we started doing the research, going back into the archives. This basically shocked us. We are trying to do the right thing. I want to mention about the overview of the streams in the area. On the property we own, there is Wai'a'ama on the Hilo side. There is Alia in the middle and Makea. Alia originates at a spring. That is what the plantation used primarily. They had the diversion go from Wai'a'ama to join into Alia and Makea to join into Alia. If you go back to the great Mahele, Alia is where you have kuleana lands around Alia. If you look at the land, it makes sense because you can plant taro along. On the side of Wai'a'ama there is only 2 kuleana

properties; not Hawaiian names so I don't know what to make of that. When I tried to assess the impact, I also know that Wai'a'ama is an interesting name, because where do you get 'a'ama crabs in fresh water. The reason it was named that was because there was a battle and warriors were stuck on the cliff. It told me that it was too steep for normal uses back in the old days. From that standpoint, I thought it was okay. That's all I know. The reason I got into using the hydro water was because in 2007 the electric price going up. We started to look around and decided we had to do something. That's why we started to consider the flume coming into the property could generate electricity. If the price is going up, that would help us. It did because when it was running, our bill was \$10 to \$11,000 per month for electricity. When it was running it would get down to about \$2,000. At a certain point we wouldn't generate any more because it had to have a certain amount going through to even run. In the future, we have this medical cannabis operation. It was rated to 100 kw, our system. They'll use more than 500 almost 1,000. They could use everything we could generate. That is pretty much the basics.

Commissioner Hannahs – So Wai'a'ama is abraided stream? It's one then it divides and comes back together as one again?

Mr. Ha – No, Wai'a'ama goes straight down. There's that flume that the plantation made and used.

Commissioner Hannahs – So you take from Wai'a'ama and after the hydro and not using anything for irrigation, you deposit back into Waimā'auou?

Mr. Ha – Actually, it's Lonokaeho. Just guessing, it depends on what map you are looking at. Waimā'auou is the stretch we know for sure. Lonokaeho that comes down.

Mr. Okamoto – It created a lot of confusion on our part. They know Pepe'ekeo stretches to Lonokaeho. If you look at the tax map, it has that name. I checked the old RM Towill maps from the 70s and 80s and it's using Lonokaeho. I assume the local people told the surveyor this is what the stream is called. USGS uses the other name.

Commissioner Beamer – In this proposal there is a remediation plan so potentially a wetted pathway would help aquatic species, biology, keep connectivity from the stream because that is important for the spawning cycles. Are you in support of the remediation plan in keeping the stream pathway wet.

Commissioner Hannahs – You can do some simple things like drill a hole through the dam and engineering can figure out how much that is.

Mr. Ha – When we talked to our consultant, he said it is simple to do that.

Commissioner Meyer – You indicated that the medical marijuana operation is not complete yet; it would be further developed and electrical consumption over the reuse would be higher than it is today. What do you anticipate the flow of the hydro average would be monthly?

Mr. Ha – When it is at full capacity, 9 million. There will still be five times more that could be used.

Commissioner Meyer – You would think if the water is in the stream and the flow is there, you would use up to 9 mgd, potentially.

Ha – Yes.

Commissioner Hannahs – Lau Ola is the leasee; so this is in your name? You are taking responsibility for the diversion as well as the ongoing reporting and remediation, etc. and you will sell the power to Lau Ola?

Mr. Okamoto – Yes. Lau Ola wishes to purchase the 40 acres but the Has will still be responsible for the hydro plant diversion. That is going to remain with the Has. There will be a power purchase agreement that has to be worked out.

Commissioner Hannahs – Our side will want to make sure the resources are taken care of and their side is motivated to have as much energy as possible to offset their cost of operation. That may be at the expense of the stream. Currently, we talking to you that is equitably concerned about the resources as well as the economic opportunity. If they are sitting across the table, they are more driven by the economics to reduce their cost of operation.

Mr. Okamoto – Yes, but we have to abide by the IFS, so that's all they are going to get. We can't provide more than that. We have to comply with that standard and then deal with them.

Mr. Ha – We will be responsible for the maintenance for the whole system? Constantly looking, clean the screen once a week. So, we are always up there looking at it, walking up and down.

DOH Representative Kawaoka – To Mr. Ha. When did you acquire the property? Were you leasing the property?

Mr. Ha – We bought it back in the 90s.

DOH Representative Kawaoka – When did you start banana farming in that area?

Mr. Ha – A few years before we bought the property.

DOH Representative Kawaoka – Once you acquired the property did you do anything physically with the stream? The power plant came later.

Mr. Ha – This was the result of going to the HECO conference in 2007. The first thing we did was come back here to put legislation in to allow farmers to get low interest loans from DOA (Department of Agriculture) for renewable energy projects.

DOH Representative Kawaoka – So up to that point you did not do anything physically to the stream (diversion)?

Mr. Ha – No.

DOH Representative Kawaoka – Because of the power plant, did you do anything physically to the stream?

Mr. Ha – No. Where we capture the water, there is 200 feet down from the intake. We called someone from CWRM to come look and see if ok. The person basically told me, we should be good because you are not in the stream. The flume is out of the stream, running on the side.

DOH Representative Kawaoka – So what was there before you acquired, is still the same?

Mr. Ha – Yes.

TESTIMONIES:

Dr. Jonathan Lekeke Scheuer – consultant to DHHL on water issues. Appreciate the questions that you have asked staff as well as testimony from the applicant and their counsel. I just to address a few things that have come up in the submittal and related to the discussion and hopefully assist in your consideration of the staff's proposal. First of all, I want to be clear on this. Your staff suggested that DHHL has no property interest in this matter because of the lack of physical nexus related to that property. That is not actually a requirement. DHHL's water rights are much more expansive than that. Particularly in this area, you should be aware that Hawaii State Constitution Article XII, Section 1 provides that 30% of old water licenses, the revenues from those water licenses goes to Native Hawaiian rehabilitation fund of DHHL. If DLNR is acting in total, now just the Water Commission, that's not issuing a license that is required, that revenue is not coming to DHHL. That is part of a significant concern the department has and obviously what the stream diversion looks like and how much water is diverting will affect what the license would be like and what revenue might come with it. We believe HRS 171-58 and given the minimum physical nature of this diversion, going across state lands would require a license under that. I want to be really clear, what I understand that the SCAP was sent to the Land Division and they can clarify this. Staff was asked if they had a problem with this permit. The response from the Land Division was that they didn't have a problem with this permit being issued, but your staff interpreted that to say 171-58 doesn't apply. Those are two separate analyses and the later analysis was not asked. That is a critical point. Want to address four main things. First thing is 171-58, second is the Ka Pa'akai analysis. The problem is you're spending so much time on what should be a relatively simple thing. The first error is that it

is the applicant's burden to provide information and it should be when you say no or none, that really should be the moment when application should be returned to the applicant and say that isn't a sufficient level of analysis for us as water commissioners to be able to do your job. I think it's telling the staff has done some additional, in the submittal, analysis of what is going on, but relying on 1969 stream study. To claim that we put the application online for 30 days and we didn't hear from anyone so there must be no T&C impacts is probably not the level of duty required under Ka Pa'akai. Probably even more critical when the staff talks about the Ka Pa'akai analysis in the submittal, they look at just the physical site. Obviously in the case of the stream, you're changing what happens downstream, you have to look for and try and identify any valued resources that may be affected by the proposed development. If you know the Ka Pa'akai case at all it was that it was affecting mauka to Makai flow by practitioners and the resources. You have to look at the entire landscape even though one side might be good. Want to note circular logic in how you are going to deal with it. The submittal says you are setting IFS at 1.5. In case there is any practices that show up then we will change the IFS. There might be the lack of some practices because the stream has been totally diverted and if you don't have part of the IFS analysis is actually to look at traditional customary practices. He looked at stream methodology in this limited analysis here. You are supposed to look at all, stream methodology and geometry as well as any practices in the area, hydrologic characteristics in relation to each other to set the IFS. The third thing, you set a standard for doing IFS on your own volition. You were challenged by some people after setting IFS in West Maui saying you guys didn't do it right. That process was upheld. You had an IFSAR, an Instream Flow Standard Assessment Report, done before making an analysis. In this case, there is nothing to rely on. An oral report at the board table is not the same level as an analysis to set the IFS. Finally, I want to note, the staff submittal says that the action does not trigger an environmental assessment pursuant to HRS Chapter 343. This doesn't provide any analysis if this is the case. First of all, the most basic trigger for having to do with 343 analysis, an EA or EIS is the use of state lands. The staff submittal says that it is using state lands. Part of the diversion works is on state lands. And even if you say you are going to remove the part that is on state lands, state waters which you control state lands, the Umberger case where DLNR said aquarium fish collecting doesn't trigger 343. The Hawaii Supreme Court said the meaning of lands in Chapter 171 that is key to interpreting this includes state waters. There is a use of state waters that is going to affect the issuance of this but there is no 343 compliance. Finally, lastly as somebody representing people on getting fines from this Commission, not advocating for a higher or lower fine, staff interpretation in the submittal that this was a single instance, was probably inaccurate. The specific administrative rule says that any person that violates the provision of this chapter or any permit condition or fails to comply with in order Commission may be subject to a fine imposed by the Commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense each day continuance is a separate violation. That is normally when staff has done violation analysis they say this is the day they started, they inform the applicant, that's exactly what the staff tried to do against the Dueys. They said ok there was these multiple days violations that was going on and how the fine was calculated. This is just a fine point, not trying to advocate for this. The submittal says the stream works, diversion works, was modified. The applicant said that was not the case. But the submittal says the

stream diversion works was modified and additional water was taken that has been in past practice of the Water Commission, two separate violations, not a single violation.

Commissioner Hannahs – Do you have some guidance on Ka Pa‘akai analysis to help our application process, maybe a little bit more leading in a sense of helping people who are neophytes in this to know how to go about this rather than some summary, check the box, get us in this situation. Can we be helpful in a sense pointing to the right sources.

Dr. Scheuer – I think there are two parts. There is definitely guides in working with Leimana DaMate and DLNR staff would be one avenue as well as working with the attorney general’s office for providing some background for applicants that is needed but I will also say very respectfully, this has been a consistent issue with the staff of the Water Commission. I’m not sure there is a full appreciation of what is required for applicants. When you get an application, not just this one, it just says none. I’m not sure at what point the staff says it’s a complete application.

Commissioner Hannahs – To see change in this area, from when you started testifying 25 years ago to today is enormous. I think to update our forms and systems will reflect our advancement in our knowledge and the accessibility of this commission of our traditional knowledge.

Dr. Scheuer – With credit to working with the Water Commission staff we have an accurate number for DHHL which contact information is listed on water use permits where DHHL rights are clearly.

Commissioner Beamer – You mention standing regarding if a water license isn’t being issued DHHL isn’t collecting revenue off of that. There is a very limited number of water leases. Is this something, do you have some guidance where DHHL is going to be exploring these issues around water lease licenses?

Dr. Scheuer – DHHL has been actively and productively working with the Land Division staff on the existing licenses. We were on Maui last night. We had a very good beneficiary consultation meeting standing shoulder to shoulder with the Land Division, Mahi Pono and Alexander & Baldwin talking to our beneficiaries about how much water should be reserved for DHHL. Situations like this, it gets more interesting where clearly there is diversion works on state lands. At a minimum to us would trigger the need for a license, much less the fact that obviously it should be incredibly clear to anyone in this room that no water is held in Hawai‘i as private property, but it is held by the State so you are licensing or leasing the water not actually the physical use of the streambed necessarily. That is the key issue. Obviously for DHHL that represents a very significant loss of revenue as those licenses are not pursued.

Mr. Ian Hirokawa, with DLNR Land Division. I just want to come up and clarify the context of our comments. There seems to be some potential confusion. Our “no objections” is limited to the matter that is before the Commission today and the stream channel after-the-fact permit and the IIFS. We are not at all saying that the applicants are exempt from a

water lease. To the extent our comments caused confusion, we do apologize. Ultimately, I think if the Commission were to approve this and the diversion continues, then we will have to have a more in-depth discussion amongst CWRM, AGs, DHHL on the correct way to proceed with this under 171-58.

Commissioner Hannahs asked staff – What is our position on this being as it differentiated from the Duey fine that was brought forth in terms of calculation of daily infraction, continuing infraction rather than a one-time thing. The Duey matter ended up very differently than you recommended but how you look at these things, what is your standard for determining it's a one-time thing versus a daily.

Mr. Uyeno – In this case and similar ones before, the clarification that we've received from the AG's office is that a permit is a one-time action. If it were in a water management area and there was a water use permit that will be noted as a continuing offense. In this case where it an issuance of a construction permit and not having gotten that permit to modify the diversions structure itself or the other structures, then it is a one-time violation.

Commissioner Meyer – You're comfortable that's a bright line?

Mr. Uyeno – It's clearer now.

Mr. Roy Hardy, Ground Water Branch Chief – However, there is a policy that has been used a long time with former Commissions about getting to that question about whether its continuing or a one-time fine. In the past what we have done in policy, we still have it. It wasn't attached to this submittal is basically giving the applicants a chance to come clean. Whatever it is, if it is an after the fact permit, we give them the notice. If they comply, this has been the case, they work with staff, then it goes down to a one or one day fine. However, there have been in the past where applicants have not complied. In bad faith, we ask, they don't respond. In those cases, then the timeline with that notice goes up. It is really important with that notice. It tells them, please comply within 30 days. Any warning after that, they it may kick in with these daily fines because now it is questionable as to when the fine starts. The overall approach getting between one day and continuing fines is part of the Commission's policy.

Commissioner Meyer – Whether it's one time or multiple days duration assessment, they are subject to the question of mitigation for good faith.

Mr. Hardy – It's harder to do which makes it difficult but to get to the question of 13 versus 1 and the mitigation is another component.

Chair Case asked for a motion.

Commissioner Meyer suggested reducing the penalty in half, making the total amount to \$1,000, by virtue of the mitigation issues which staff raised. Seems fair than fining the full amount.

Commissioner Beamer – I'd like to add that we be updated on the remediation when it's half way and then ask if it is completed so that the commission can be updated on if in fact this IIFS is protecting stream biology.

Mr. Uyeno – Once remediation action is done, then update?

Beamer – I could maybe, when it is half way and a final to get an assessment. I'm sure there will be a planning phase, selecting best for the species, and how we are going to modify the diversion, when it's completed. Maybe in that time frame that would allow us to gather other sets of data.

Hannahs – So the five recommendations of staff are putting forth subject to changing the fine level from \$5,000 to \$1,000 as orally corrected by staff, change it to \$500.

Chair Case/Commissioner Meyer – Yes. That is a suggestion.

DOH Representative Kawaoka – The admin fee is fixed, so it is a \$1,000 total?

Chair Case – Yes.

Chair Case – And another condition of reporting back once the planning phase is completed. Report on the plan and report when it is completed.

Commissioner Hannahs – It says here shall be developed in consultation with and subject to final approval by Commission staff, at least a report on it, not necessarily the approval of the plan. Report on the plan to the Commission.

Commissioner Meyer – Maybe if we want an after the fact analysis of the IIFS, it should be 6 months into the plan after the remediation is in place.

Chair Case – So we are adding 6 – report back to the Commission upon Commission staff approval of the remediation plan and report back to the Commission a year after the remediation is complete with a quick assessment of any observations about the stream condition.

Commissioner Hannahs – My thought is remediation will consist of adding a structure at the diversion intake to keep at least 1.5 mgd in the stream. Is there a way we could strengthen that or tie it to whatever IFS we set which at this point we set at 1.5, but that may change. Will the condition of the use create any resistance to increasing that standard when we give it a thorough review that Ayron normally provides.

MOTION: (MEYER/HANNAHS)

To approve the submittal as amended.

UNANIMOUSLY APPROVED AS AMENDED.

C. NEXT COMMISSION MEETINGS (TENTATIVE)

February 19, 2019 (Tuesday)

March 19, 2019 (Tuesday)

This meeting was adjourned at 12:17 pm.

Respectfully submitted,



FAITH CHING
Secretary

APPROVED AS SUBMITTED:



DEAN D. UYENO
Acting Deputy Director