



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

for the meeting of the
COMMISSION ON WATER RESOURCE MANAGEMENT

August 17, 2015
Kona, Hawaii

Department of Hawaiian Home Lands
Request for Reservation of
3.398 Million Gallons per Day of Water from the
Keauhou Aquifer System Area, Kona, Hawaii

SUMMARY OF REQUEST:

Staff requests that the Commission on Water Resource Management (Commission) approve the request by the Department of Hawaiian Home Lands (DHHL) to reserve 3.398 million gallons per day (mgd) of ground water from the Keauhou Aquifer System Area for DHHL's existing and foreseeable future needs (Exhibit 1).

LOCATION: Keauhou Aquifer System Area (KASA), Kona, Hawaii (Exhibit 2).

DHHL WATER RESERVATION REQUEST:

On December 5, 2014, DHHL submitted via email the subject reservation request, dated November 24, 2014 (Exhibit 1). The purpose of the request is to establish an adequate reserve of water for current and foreseeable development and use of Hawaiian home lands in the KASA (see Exhibit 2 for location map).

DHHL currently holds 1,510 acres of land in the KASA. Breakdowns of the land use designations and planned uses are provided in Tables I and II of Exhibit 1, which also includes a project map. A total of 2,279 units are either existing or planned. DHHL plans include the development of four new wells, each having a capacity of 1 mgd, as well as appropriate storage and transmission to meet future needs. An additional 359 acres are in the process of being transferred to DHHL. Upon completion of the transfer, DHHL will own approximately 1,869 acres of land in Keauhou.

DHHL utilized the Domestic Consumption Guidelines in the County Water System Standards to estimate demand for residential, commercial, and industrial acreages. Agricultural demands were estimated to be 3,400 gallons per acre per day, based on the recommended duty for diversified agriculture established in the 2004 Agricultural Water Use and Development Plan. Water demands, totaling 3.728 mgd, are summarized in Table III of Exhibit 1. After subtracting out areas already constructed and those having water allocations, the unmet demand is 3.398 mgd.

LEGAL AUTHORITY:

The State Water Code provides for reservations of water in both designated and non-designated water management areas. In designated areas, water reservations may be made pursuant to §174C-49(d) Hawaii Revised Statutes (HRS), which states:

The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected.

Subchapter 6 includes Administrative Rule §13-171-60 that provides further guidance for water reservations in water management areas:

(a) As provided in HRS §174C-49(d), the commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary.

(b) The commission shall adopt within this subchapter specific reservations of water in water management areas in such quantities as are deemed necessary for purposes which are consistent with the public interest, including the provision of water for current and foreseeable development and use of Hawaiian home lands pursuant to section 221 of the Hawaiian Homes Commission Act and HRS §174C-101(a).

(c) Proceedings for the establishment of a reservation of water resources within a designated water management area by the commission may be initiated:

(1) Upon recommendation by the chairperson; or

(2) Upon written petition to the commission by any interested person with proper standing.

(d) Reserved water shall not be allocated from water management areas by the commission except upon application for a water use permit by the party, or parties, for whom the water was reserved.

(e) All reservations shall be subject to periodic review and revision in light of changed conditions.

Thus far, the Commission has only established three water reservations by rule in water management areas. All three are for DHHL. Hawaii Administrative Rules §§13-171-61 to 13-171-63 are shown in Exhibit 3 and summarized below in Table 1.

Table 1. Summary of Water Reservations in Water Management Areas

| Administrative Rule | Island | Water Management Area | Effective Date | Initial Reservation (mgd) | Current Reservation (mgd) |
|---------------------|---------|-----------------------|----------------|---------------------------|---------------------------|
| §13-171-61 | Oahu | Waipahu-Waiawa | 2/18/94 | 1.724 | 1.358 |
| §13-171-62 | Oahu | Waimanalo | 2/18/94 | 0.124 | 0.124 |
| §13-171-63 | Molokai | Kualapuu | 6/10/95 | 2.905 | 2.905 |

HRS §174C-101(a) also authorizes water reservations for DHHL, whether or not the area has been designated a water management area:

Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

While administrative rules have not yet been promulgated for this statutory provision, staff has been advised by legal counsel that, pursuant to this provision, the Commission may reserve water for DHHL statewide, whether or not the area has been designated as a water management area, in regular meetings under HRS §92. It is under this authority that staff is recommending the Commission reserve water for DHHL in the KASA, which has not been designated as a water management area.

IMPLICATIONS OF WATER RESERVATION:

Should the Commission approve this request; the water reservation will be documented in the Water Resource Protection Plan (WRPP), along with the prior approved water reservations. If in the future the KASA is designated as a water management area, staff will initiate review and rule-making pursuant to HRS §174C-49(d) HRS and Hawaii Administrative Rule §13-171-60(b). Staff is further recommending that the Commission clarify and direct that any water reservations made pursuant to HRS §174C-101(a), be incorporated in the calculation of authorized planned use, as defined in HRS §174C-3 & §174C-44(1) and corresponding HAR §13-171-2 & §13-171-7(1) for the respective aquifer system area.

The reservation is for ground water from the KASA and its aquifer resources therein.

CONSISTENCY WITH THE HAWAII WATER PLAN (HWP):

The Hawaii Water Plan (HWP) is the State’s long-range water plan, and staff believes it is important that water reservations be consistent with, and have basis in, the HWP. The appropriate parts of the HWP that justify reservations are the County Water Use and Development Plans (WUDPs) and State Water Projects Plan (SWPP). Of the two, staff feels the appropriate HWP component in which to include full buildout demands is the County WUDP.

While Hawaii Administrative Rule §§13-170-32(b)(3) and 13-170-42(c), as well as the Commission’s Framework for Updating the Hawaii Water Plan, direct that a twenty-year projection period be considered for analysis purposes for the County WUDPs and the SWPP, respectively, it is important that the counties recognize the buildout needs of DHHL and give appropriate consideration to those needs as long-range plans for water development are developed. It is at the County WUDP planning stage that coordination of State water needs, including DHHL, and the needs of other use sectors (i.e., military, municipal, private, and agriculture) are integrated into a comprehensive resource development strategy and implementation plan.

The State Water Projects Plan (SWPP) is the component of the Hawaii Water Plan that documents the water needs of all State agencies, including DHHL, over a 20-year planning horizon. The Engineering Division of the Department of Land and Natural Resources is responsible for the development and updating of the SWPP. In addition to inventorying the existing and future water needs for State projects, through the SWPP, Engineering Division also promotes partnerships and cost sharing to coordinate water development projects and water infrastructure improvements of potentially competing State agencies. Based on the SWPP, Engineering Division pursues legislative funding to support new source development through Capital Improvement Project requests and allocates water credits to participating State agencies. Implementation of the SWPP in close coordination with the County Water Use and Development Plan is needed to ensure orderly authorization and development.

Initially adopted in 1990 and revised in 2003, a third revision of the SWPP is underway and near completion. Due to funding constraints, Engineering Division is focusing this SWPP update exclusively on DHHL. DHHL was selected because: 1) they are the largest landowner amongst State agencies and thus could have the most significant impact on water resource development and use, and 2) DHHL water needs are an identified public trust purpose and have priority under the State Constitution and Water Code.

A preliminary draft of the SWPP was made available to the Commission staff; the document has not yet been released for public review. In accordance with the requirements of the Statewide Framework for Updating the Hawaii Water Plan, a range of forecasts was developed (high, medium, and low) over the 20-year planning period. Water use unit rates, or duties, were kept constant, while development data (e.g., unit density rates for residential areas) were adjusted to achieve variability in demand projections. There is very little non-potable demand (i.e., agriculture) projected for DHHL lands in the KASA. The October 2014 SWPP Draft Report shows a range in 2031 projected potable water demand from a low of 1.818 mgd to a high of 3.375 mgd. The medium demand projection, on which source and infrastructure planning will be based, is 2.413 mgd.

More recently, Engineering Division has also received funding to update the SWPP for the West Hawaii area, as well as for a comprehensive statewide update. Therefore, there are currently three separate SWPP update efforts ongoing at this time, with the update for DHHL being the farthest along. The statewide update will incorporate the DHHL partial update as well as the regional update for West Hawaii in order to develop final comprehensive water development strategies that consider and coordinate the needs of all State water projects and plans.

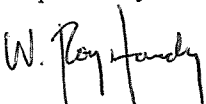
Due to the interest in the KASA petition to designate the area as a ground water management area, DHHL filed the petition for reservation request. Since then, the County of Hawaii and Commission staff have viewed the buildout projection as part of the authorized planned use criteria for designation analysis specified under HRS §§174C-3 and -44, and the County of Hawaii will include the 3.398 buildout projection in its update of the WUDP for the KASA (defined as the Keauhou ASYA in the WUDP). Therefore, combined with the proposed framework twenty-year projection in both the WUDP and SWPP, the proposed buildout water reservation in the County of Hawaii WUDP will be consistent with the HWP for the KASA for reservation purposes. This reservation promotes the Commission’s approach to managing the resource and protecting the public trust through the collaboration and consistency framework provided by the HWP.

RECOMMENDATION:

Staff recommends that the Commission:


1. Find the reservation request for 3.398 mgd from the Keauhou Aquifer System Area for the Department of Hawaiian Home Lands is consistent with the HWP,
2. Approve a water reservation for 3.398 mgd from the Keauhou Aquifer System Area for the Department of Hawaiian Home Lands, and
3. Direct that this water reservation, and all future reservations made pursuant to HRS §174C-101(a), be incorporated in the calculation of authorized planned use.

Respectfully submitted,


 W. ROY HARDY
 Acting Deputy Director

- Exhibit 1 November 24, 2014 DHHL Request for Water Reservation
- Exhibit 2 Location map
- Exhibit 3 §§13-171-61 to 13-171-63 Hawaii Administrative Rules

APPROVED FOR SUBMITTAL:


 SUZANNE D. CASE
 Chairperson

NEIL ABERCROMBIE
GOVERNOR
STATE OF HAWAII



JOBIE M. K. MASAGATANI
CHAIRMAN
HAWAIIAN HOMES COMMISSION

DARRELL T. YOUNG
DEPUTY TO THE CHAIRMAN

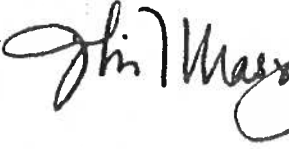
STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS

P O BOX 1879
HONOLULU, HAWAII 96805

November 24, 2014

MEMORANDUM

TO: The Honorable William J. Aila, Jr., Chairperson
Commission on Water Resource Management

FROM: Jobie M. K. Masagatani, Chairman
Hawaiian Homes Commission 

SUBJECT: Request for Water Reservation
of 3.398 Million Gallons Per Day of Water in the
Keauhou Aquifer System Area, Kona, Hawaii

At its November 17 and 18, 2014, meeting, the Hawaiian Homes Commission (HHC) unanimously approved item G-1 (attached), which authorized the Chairman to formally request a Water Reservation of 3.398 million gallons per day (MGD) in the Keauhou Aquifer System Area (ASA) from the Commission on Water Resource Management (CWRM). The purpose of this request is to adequately reserve water for current and foreseeable development and use of Hawaiian home lands in the Keauhou ASA, Kona, Hawaii, per the State Water Code §174C-101(a).

This memorandum serves as the formal request of the Department of Hawaiian Home Lands for a water reservation of 3.398 MGD in the Keauhou ASA.

We humbly ask CWRM to reserve, incorporate, and protect this adequate reserve of water for current and foreseeable development and use of Hawaiian home lands.

Enc.

c: David Kaapu, Commissioner - West Hawaii
Jim Du Pont, District Office Manager - West Hawaii

STATE OF HAWAII

DEPARTMENT OF HAWAIIAN HOME LANDS

NOVEMBER 17-18, 2014

To: Chairman and Members, Hawaiian Homes Commission
From: Kaleo Manuel, Acting Planning Program Manager
Subject: Authorize the Chairman to Request and Pursue a Water Reservation in Keauhou, Kona, Hawaii

RECOMMENDED MOTION/ACTION

That the Hawaiian Homes Commission (HHC) authorizes the Chairman to:

1. Formally request a Water Reservation of 3.398 MGD in the Keauhou Aquifer System Area (ASA) from the Commission on Water Resource Management (CWRM) to adequately reserve water for current and foreseeable development and use of Hawaiian home lands in the Keauhou ASA, Kona, Hawaii (State Water Code §174C-101(a));
2. Testify and participate in the water management area designation process on behalf of the Hawaiian Homes Commission specific to item 1 above; and
3. Take other actions as necessary to effectuate these requests.

DISCUSSION

WEST HAWAII ISLAND PLAN UPDATE - PLANNED LAND USES

The Department of Hawaiian Home Lands (DHHL) currently holds in trust approximately 1,500 acres of lands in the Keauhou ASA which comprise of approximately one percent of its lands holdings on the island of Hawaii. These lands were not part of the original trust inventory and were acquired from the Department of Land and Natural Resources (DLNR), Hawaii Housing and Finance Development Corporation (HHFDC) and Queen Liliuokalani Trust (QLT). Per the Hawaii Island Plan (HIP) approved by the HHC in 2002 and the West Hawaii Island Plan Update (WHIP) approved by the HHC in 2009, these lands have the following land use designations

based on a thorough land use analysis as well as intensive community engagement with beneficiaries.

TABLE I: LAND USE DESIGNATIONS

| LAND USE DESIGNATION | TOTAL ACRES |
|----------------------|-------------|
| Residential | 600 |
| Community Use | 30 |
| General Agriculture | 100 |
| Commercial | 667 |
| Industrial | 100 |
| Total | 1,497 |

Source: HIP 2002 & WHIP 2009

These land use designations utilized by the HHC are broad categories that can encompass multiple kinds of uses, as is appropriate for a statewide land use classification scheme. The designations allow for the fundamental trust purposes of developing homesteads while taking into account the characteristics of these lands (e.g. high slopes, no infrastructure, cultural and natural resources).

Since 2009, there have been very little changes to the overall planned land uses in the region. At full build out, over 2,000 residential homestead lots will be developed. Table II below and the attached maps (EXHIBIT A) details DHHL's Keauhou ASA lands in 4 distinct areas (Kalaoa, Honokohau, Kealakehe, and Keahuolu), their land use designations, approximate acreage, and existing and planned units.

TABLE II: PLANNED LAND USES

| AREA | LAND USE DESIGNATION | ACRES | EXISTING OR PLANNED UNITS |
|--------------|----------------------|-------|---------------------------|
| Kalaoa | Commercial | 384 | |
| Kalaoa | Industrial | 100 | |
| Kalaoa | General Ag | 100 | |
| Kalaoa | Residential | 130 | 283 units |
| Honokohau | Commercial | 200 | |
| Kealakehe 1 | Residential | 50 | 260 units |
| Kealakehe 2 | Residential | 50 | 256 units |
| Kealakehe 3 | Residential | 50 | 225 units |
| Kealakehe 4 | Residential | 55 | 220 units |
| Kealakehe 5 | Residential | 23 | 116 units |
| Kealakehe 6 | Community Use | 26 | |
| Kealakehe 6 | Commercial | 26 | |
| Kealakehe 7 | Residential | 11 | 61 units |
| Kealakehe 8 | Commercial | 34 | |
| Kealakehe 11 | Residential | 24 | 126 units |
| Kealakehe | Preserves | 97 | |
| Keahuolu | Residential | 140 | 732 units |
| Keahuolu | Community Use | 10 | |
| TOTAL | | 1,510 | 2,279 units |

Source: Village of Lai Opuu Water Master Plan 2006 & WHIP 2009

In October 2010, the Board of Land and Natural Resources (BLNR) approved the conveyance of an additional 359 acres of land in Kalaoa, Kona, Hawaii to DHHL. Once subdivided and officially transferred to DHHL, DHHL will own approximately 1,869 acres in the Keauhou ASA.

WATER POLICY PLAN

In July 2014, the HHC adopted a Water Policy Plan (WPP) to provide strategic, proactive, comprehensive and consistent guidance and direction to the HHC, DHHL staff, and beneficiaries on water related issues, actions, and decisions. This WPP was developed using existing legal authorities, previously approved policies and plans (e.g. General Plan 2002), and extensive beneficiary input and consultation in compliance with DHHL's Beneficiary Consultation Policy (2009).

The recommended motion/action is consistent with the vision, mission, values, and policies of the WPP. More specifically, by requesting and securing a water reservation in the Keauhou ASA, Goal 2 of the WPP is being implemented:

"Aggressively, proactively, consistently, and comprehensively advocate for the kuleana of the beneficiaries, the DHHL, and the HHC to water before all relevant agencies and entities."

KEALAKEHE REGIONAL PLAN

The Kealakehe Regional Plan was developed through a regional planning process with beneficiaries and approved by the HHC in 2009. Five (5) priority projects were identified as a result of this process for the Kealakehe region, and one of the five is specific to water: "North Kona Water Source Development and Storage."

The priority project focuses on working collaboratively with various stakeholders in the region to develop additional water sources in order to meet the needs of DHHL's Lai Opua lands and adjacent projects. It is estimated that four (4) additional wells each with a capacity of one million gallons/day, as well as appropriate storage and transmission, would need to be developed. Initial planning and design phases of the project were estimated at \$14.4 million.

WATER USE - TOTAL WATER DEMAND & EXISTING ALLOCATIONS

Utilizing DHHL's planned land uses and designations, water demands for the 1,510 acres of DHHL's lands in the Keauhou ASA can be calculated using water system standards average gallon per day consumption per unit or acre (gdp/acre or gdp/unit). The total water demands are detailed in Table III below.

Tied to the acquisition of the lands in the Keauhou ASA, DHHL received 392 water credit allocations (5/8" residential meters calculated at an average of 400 gpd) as part of a transfer agreement with HHFDC and a tri-party agreement between Hawaii Electric Light Company and the Department of Water Supply (DWS). These water credits and their use is detailed in TABLE IV below.

The remaining balance of DHHL's 221 water credits is being applied to Village 4 of Lai Opuu. The lot plan for Village 4 was reconfigured (decreased) to stay within the 221 remaining water credits, which at one time was planned for 251 lots.

To summarize, approximately 3.398 MGD (Million Gallons/Day) of water is still needed for full build out of DHHL lands in the Keauhou ASA.

TABLE III. DHHL WATER DEMAND FOR LANDS IN KEAHUOU ASA

| AREA | LAND USE DESIGNATION | ACRES | WATER SYSTEM STANDARDS DEMANDS | EXISTING OR PLANNED UNITS OR ACRES | TOTAL WATER DEMAND (MGD) |
|--------------|----------------------|-------|--------------------------------|------------------------------------|--------------------------|
| Kalaoa | Commercial | 384 | 3,000 gpd/acre | 384 acres | 1.152 |
| Kalaoa | Industrial | 100 | 4,000 gpd/acre | 100 acres | 0.400 |
| Kalaoa** | General Ag | 100 | 3,400 gpd/acre | 100 acres | 0.340 |
| Kalaoa | Residential | 130 | 400 gpd/unit | 283 units | 0.113 |
| Honokohau | Commercial | 200 | 3,000 gpd/acre | 200 acres | 0.600 |
| Kealakehe 1 | Residential | 50 | 400 gpd/unit | 260 units | 0.104 |
| Kealakehe 2 | Residential | 50 | 400 gpd/unit | 256 units | 0.102 |
| Kealakehe 3* | Residential | 50 | 400 gpd/unit | 225 units | 0.090 |
| Kealakehe 4* | Residential | 55 | 400 gpd/unit | 220 units | 0.088 |
| Kealakehe 5* | Residential | 23 | 400 gpd/unit | 116 units | 0.046 |
| Kealakehe 6* | Community Use | 26 | 4,000 gpd/acre | 26 acres | 0.104 |
| Kealakehe 6 | Commercial | 26 | 3,000 gpd/acre | 26 acres | 0.078 |
| Kealakehe 7 | Residential | 11 | 400 gpd/unit | 61 units | 0.024 |
| Kealakehe 8 | Commercial | 34 | 3,000 gpd/acre | 34 acres | 0.102 |
| Kealakehe 11 | Residential | 24 | 400 gpd/unit | 126 units | 0.050 |
| Kealakehe* | Preserves | 97 | | 97 acres | 0.002 |
| Keahuolu | Residential | 140 | 400 gpd/unit | 732 units | 0.293 |
| Keahuolu | Community Use | 10 | 4,000 gpd/acre | 10 acres | 0.040 |
| TOTAL | | 1,510 | | 2,279 units | 3.728 |

Sources: Update of State Water Projects Plan (underway), Village of Lai Opua Water Master Plan 2006, WHIP 2009, Special Report #2 Water Resources Hawaii Island 2012

*These areas have water allocations or are already constructed.

**This is a non-potable water demand

TABLE IV: EXISTING WATER ALLOCATIONS (WATER CREDITS)

| Villages of Lalopua | Water Credits | Reference | Notes |
|--|---------------|--|--|
| DHHL Available Water Allocation as of 8/31/10 | | | |
| Water Credits per HHFDC Transfer Agreement | 241 | Transfer Agreement between HHFDC & DHHL dated 12/30/04 | |
| Water Commitments Tri-Party Agreement | 151 | Tri-Party Agmtt between HELCO, Water Board, & DHHL dated 8/28/04 | |
| Assign one (1) credit to TMK: 7-4-21: 005 (Aupala Preserve) | (1) | Meter No. 0082640326, Acct No. 007-87500004-10 | In service |
| Assign one (1) credit to TMK: 7-4-20: 006 (Lesser Aupaka Preserve) | (1) | Meter No. 0085830010, Acct No. 007-87500006-10 | In service |
| Reserve 117 credits for Lalopua Village 5 | (117) | Subdivision Application No. SUB-05-000171 | Under construction; first service expected 12/10 |
| One (1) credit to Uluhi Preserve; TMK: 7-4-21: 011 | (1) | SUB -05-000806, DHHL letter dated 8/30/10 | To be constructed; service expected 8/10 |
| One (1) credit to Village 4 parcel; TMK: 7-4-21: 012 | (1) | SUB -05-000805, DHHL letter dated 8/30/10 | DHHL requests that service be deferred |
| One (1) credit to Village 2 parcel; TMK: 7-4-21: 015 | (1) | SUB -05-000808, DHHL letter dated 8/30/10 | DHHL requests that service be deferred |
| One (1) credit to Archaeological Preserve; TMK: 7-4-21: 016 | (1) | DHHL letter dated 8/31/10 | To be constructed; service expected 8/10 |
| 18 credits to TMK: 7-4-20: 003 (Lalopua 2028 Community Center, Ph.1) | (18) | Memo to DWS dated 12/11/09, DWS Letter dated 2/11/10 | To be constructed; service expected 2011 |
| One (1) credit for TMK: 7-4-21: 023; future Commercial Center | (1) | SUB -05-000866 (subdivision of former Village 6) | DHHL requests that service be deferred |
| 31 credits to TMK: 7-4-21: 022 (Kamehameha Schools Pre-school) | (31) | Memo to DWS dated 4/8/10 | To be constructed; service expected 2011 |
| BALANCE = | 221 | | |

*Note: DHHL is currently reimbursing HHFDC \$1.7 million/year for infrastructure investments they developed in Lai Opua, Hawaii, Lealii, Maui, and Waiahole, Oahu, including water infrastructure, so the water credits DHHL received, is being paid for by DHHL.

LEGAL AUTHORITIES

There are a number of established legal authorities that empower the HHC to direct its chairman to secure water in the manner that is recommended.

As a general background, the State of Hawaii has the obligation as a fiduciary to fulfill the enumerated purposes of the Hawaiian Homes Commission Act (HHCA) of 1920, including "Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible" HHCA §101(b)(4).

The Admission Act of 1959 §4 adopts the HHCA as a provision of the Constitution of the State of Hawaii. The Admission Act §5(b) and §5(f) reaffirms the obligation of the State of Hawaii to manage the lands and fulfill the purposes of the HHCA, as part of a compact with the United States accepted as a condition for admission into the Union.

The Hawaii State Constitution Article XII Sections 1 through 4 further defines the State of Hawaii's responsibilities to carry out and fulfill the purposes of the HHCA. It is important to note that Article XII, Section 2 of the State Constitution specifies:

"The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out."

There are numerous legal provisions in state law that effectuates the broad mandate to provide "adequate amounts of water and supporting infrastructure." In this particular instance being considered by the HHC, two legal provisions are particularly relevant: the rights to reservations of water for DHHL under the state Water Code, and the status that DHHL uses of water and reservations for the future use of water are protected "Public Trust" uses of water under Hawaii law.

DHHL WATER RESERVATIONS

The State Water Code (HRS 174C) is the guiding framework for the management and allocation of water in the islands. The Code fulfills the provisions of the State Constitution that relate to water, in particular Sections 1

and 7 of Article XI, which respectively enumerate that "All public natural resources are held in trust by the State for the benefit of the people," and that there shall be a "water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources."

In the Water Code, the commitment to protect DHHL's future water needs is to be executed in significant part through the creation of "reservations" of water. "Reservations" are water held by CWRM for future uses. Reservations are an identified purpose of the water resources trust and may not be used or interfered with by other parties. "Reservations" of water are discussed in Parts IV and IX of the Code.

Part IV of the Water Code, "REGULATION OF WATER USE," deals with CWRM duties related to the establishment of water management areas and permitting in those areas. HRS §174C-49 addresses permitting in water management areas, and subsection (d) notes that:

"The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary. Such reservations shall be subject to periodic review and revision in the light of changed conditions; provided that all presently existing legal uses of water shall be protected."

Under the authority of this part of the Code, the Commission established administrative rules for reserving water in designated areas, codified as HAR §13-171-60. This rule specifically calls out in part (b):

"The commission shall adopt within this subchapter specific reservations of water in water management areas in such quantities as are deemed necessary for purposes which are consistent with the public interest, including the provision of water for current and foreseeable development and use of Hawaiian home lands pursuant to section 221 of the Hawaiian Homes Commission Act and HRS §174C-101(a)."

Thus reservations of water can and should be made for DHHL in designated water management areas by rule making as described in HAR §13-171-60. Such reservations have been made by the Commission for water management areas on Oahu and Molokai.

Part IX of the Code, "NATIVE HAWAIIAN WATER RIGHTS", addresses water rights under the HHCA, revenue from water licenses, traditional and customary rights, and appurtenant rights. HRS §174C-101(a) provides that:

"Provisions of this chapter shall not be construed to amend or modify rights or entitlements to water as provided for by the Hawaiian Homes Commission Act, 1920, as amended, and by chapters 167 and 168, relating to the Molokai irrigation system. Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act."

To be "consistent with other legal requirements and authority," under the direction of this section, reservations of water can and should continue to be made for DHHL in designated water management areas by rule making as described in HAR §13-171-60.

Outside of designated water management areas, however, it is clear that this section of the Code requires the Commission to provide "adequate reserves of water" for the uses of water in Section 221 of the HHCA as well. The section is also broad in terms of what decisions by the Commission should incorporate reservations. There are many "applicable" decisions made by the Commission that affect DHHL and its needs for water for present and future use.

With that point noted, however, two other issues are clear. First, the Water Commission has never reserved water for DHHL outside of a Water Management Area since their creation in 1987. Second, even if the Commission were to reserve water as a matter of policy in their decision making, there are no clear mechanisms

to enforce DHHL's reservations when they are not passed by the administrative rule making process provided for in designated water management areas.

DHHL WATER USES & RESERVATIONS ARE "PUBLIC TRUST" USES OF WATER

In addition to the provisions for reserving water under the State Water Code for DHHL's future uses, a number of Hawaii Supreme Court Cases have clarified that DHHL's water uses and reservations are a "Public Trust" use of water.

In Hawaii law, all water is considered to be a Public Trust resource, meaning it is not held as private property but is held in trust for the benefit of the public. The origins of the Public Trust in Hawaii water law include Kingdom Law, common law, and relevant state constitutional provisions. In water law in particular, the Hawaii Supreme Court has provided extensive guidance as to what Public Trust uses of water are, and how they should be protected (especially in the Waiahole, Kukui O Molokai, Wai Ola, and Kauai Springs cases).

The Public Trust uses of water enumerated by the Court are the maintenance of waters in their natural state, the protection of domestic water use (meaning the use of water by individuals in their homes), the protection of water in the exercise of Native Hawaiian and traditional and customary rights, and the existing and future uses of water under Section 221 of the HHCA, where those future uses of water are covered by reservations of water under the State Water Code.

The significance of being a Public Trust use of water is that there is supposed to be, any time the CWRM or another agency makes a decision affecting water, a presumption in favor of public trust uses of water. In addition, if there is a private commercial use of water proposed that is competitive with a Public Trust use of water, the decision-making agency is supposed to apply a "high level of scrutiny" to the request. Furthermore, as described by the Hawaii Supreme Court in the 2014 Kauai Springs case,

"Applicants have the burden to justify the proposed water use in light of the trust purposes.

a. Permit applicants must demonstrate their actual needs and the propriety of draining water from public streams to satisfy those needs.

b. The applicant must demonstrate the absence of a practicable alternative water source.

c. If there is a reasonable allegation of harm to public trust purposes, then the applicant must demonstrate that there is no harm in fact or that the requested use is nevertheless reasonable and beneficial.

d. If the impact is found to be reasonable and beneficial, the applicant must implement reasonable measures to mitigate the cumulative impact of existing and proposed diversions on trust purposes, if the proposed use is to be approved."

Just as it is not clear that the Water Commission has any legal mechanism to enforce reservations of water for the DHHL in an area not designated as a water management area (even if such reservations had been made), it is similarly not clear that the Commission, when issuing permits in undesignated areas, has a mechanism to require the analyses described by the Court in Kauai Springs. Similarly, the County Boards of Water Supply, which make most on-the-ground allocation decisions for water meters, and do so without any Water Commission guidance in undesignated areas, do not seem to have any mechanisms in place for undertaking this analysis.

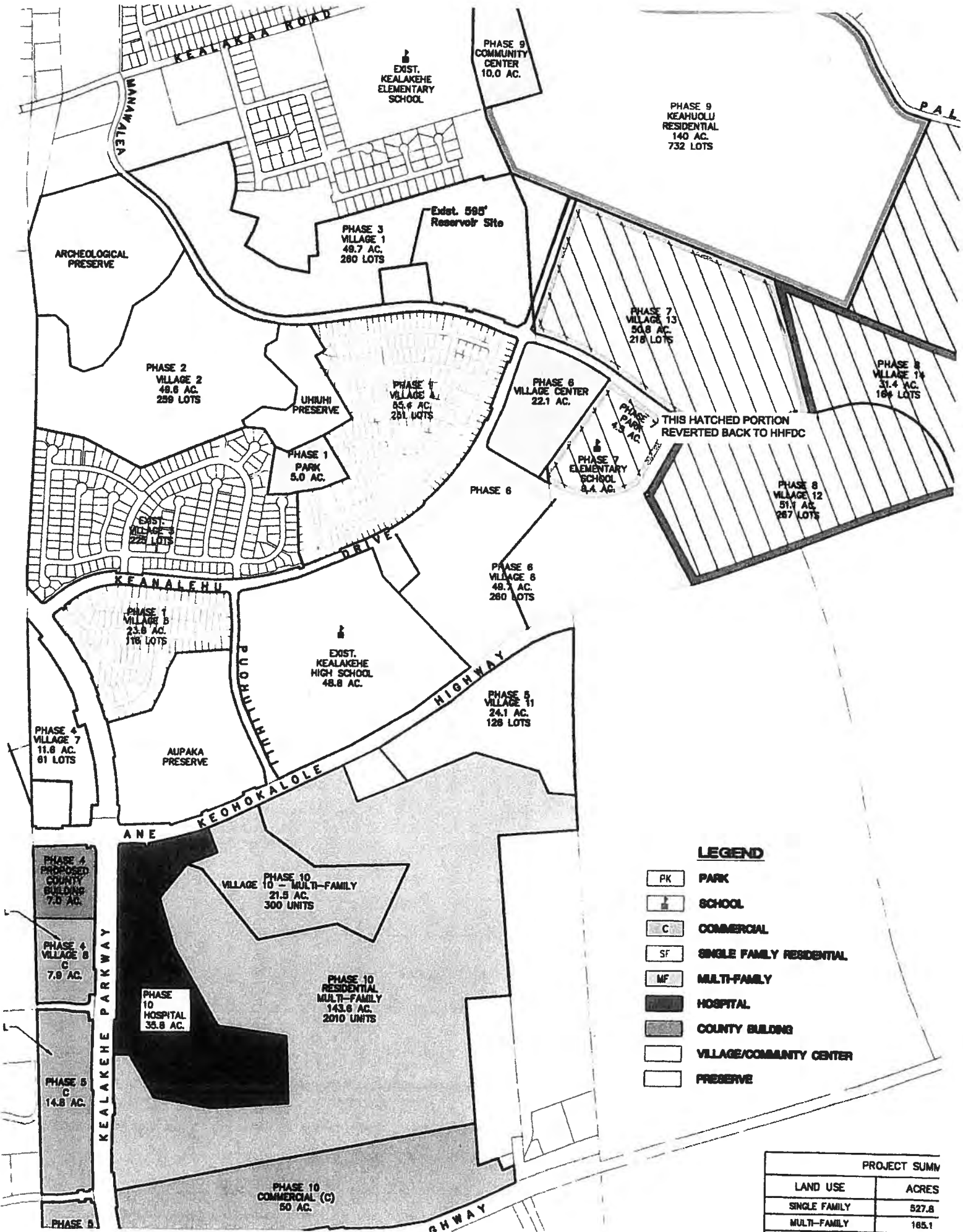
RECOMMENDATION

Staff respectfully requests that the Hawaiian Homes Commission approve the recommended motion/action based on the following considerations:

1. To secure adequate reserves of water for current and foreseeable planned development and use of Hawaiian home lands in the Keauhou ASA, Kona, Hawaii as set forth in section 221 of the Hawaiian Homes Commission Act;
2. To ensure that in our testimony, DHHL seeks confirmation or assurance from CWRM that DHHL's reservations will be protected in a non-designated

water management area to the same standard as it would in a designated water management area;

3. To ensure that DHHL and the State of Hawaii will provide adequate amounts of water and supporting infrastructure, in partnership with others, so that homestead lands will be usable and accessible; and
4. To initiate the process to ensure that water is available for planned purposes of the HHCA at Keauhou ASA, Kona, Hawaii, as articulated in the HHC-approved HIP 2002 and WHIP 2009.



Kalaoa

Kalaoa

Kealakehe







Honokohau

Keahuolu

Kailua

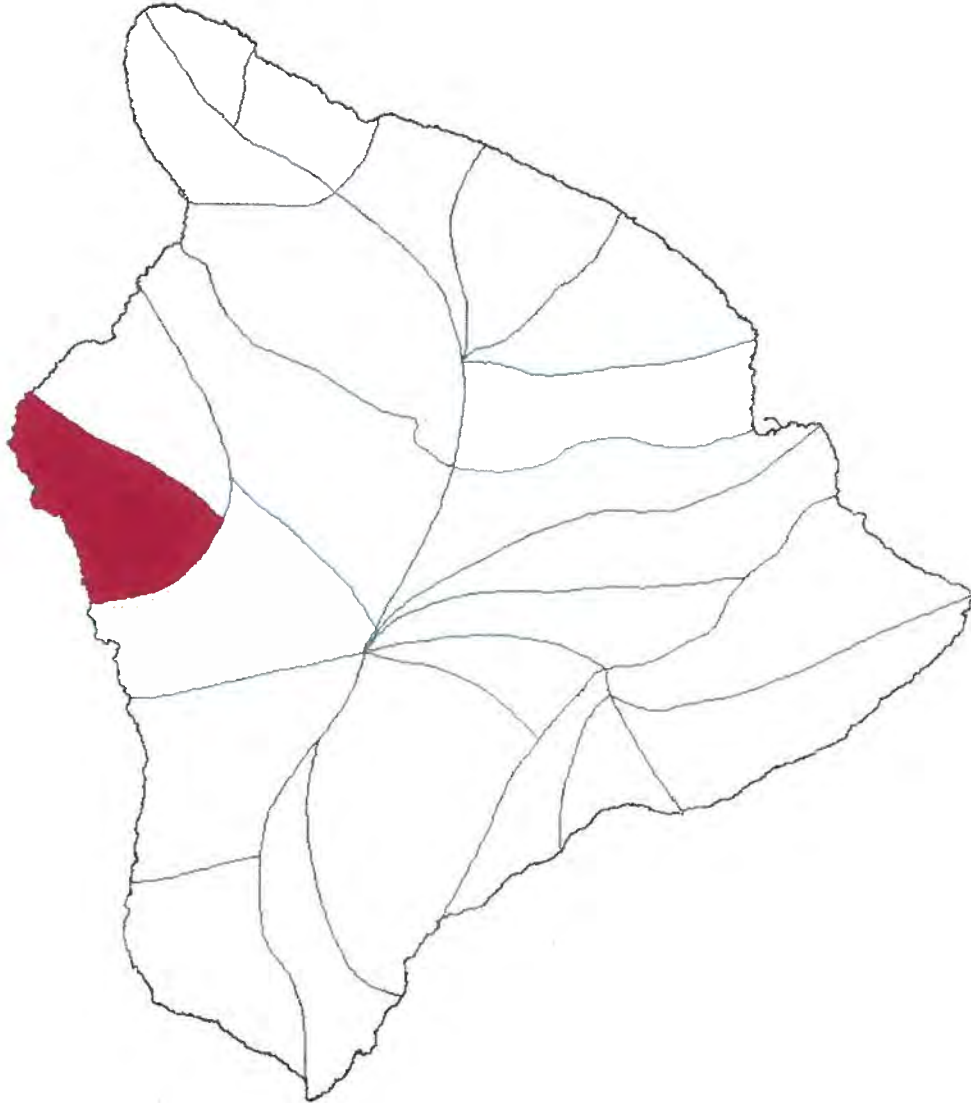
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Legend

-  Proposed Critical Habitat Preserves
- DHHL Land Use Designation**
-  Commercial
-  Community Use
-  General Agriculture
-  Industrial
-  Residential



KEAUHOU AQUIFER SYSTEM AREA, KONA, HAWAII



§13-171-61 Department of Hawaiian home lands reservation for Honolulu and Leeward Oahu. The commission hereby reserves 1.724 million gallons per day of ground water from state lands in the Waipahu-Waiawa aquifer system for use in the Papakolea, Nanakuli, and Waianae-Lualualei Hawaiian homestead areas. This amount shall be in excess of the existing uses of water on Hawaiian home lands as of the effective date of this rule. [Eff. Feb. 18, 1994] (Auth: HRS §§174C-49(d), 174C-101(a)) (Imp: HRS §§174C-49(d), 174C-101(a), HHCA §221)

§13-171-62 Department of Hawaiian home lands reservation for Windward Oahu. The commission hereby reserves 0.124 million gallons per day of ground water from state lands in the Waimanalo aquifer system for use in the Waimanalo Hawaiian homestead area. This amount shall be in excess of the existing uses of water on Hawaiian home lands as of the effective date of this rule. [Eff. Feb. 18, 1994] (Auth: HRS §§174C-49(d), 174C-101(a)) (Imp: HRS §§174C-49(d), 174C-101(a), HHCA §221)

§13-171-63 Department of Hawaiian home lands reservation for Kualapuu, Molokai. The commission hereby reserves 2.905 million gallons per day of ground water from state lands in the Kualapuu aquifer system for use on Hawaiian home lands on Molokai. This amount shall be in excess of the existing uses of water on Hawaiian home lands as of the effective date of this rule. [Eff. June 10, 1995] (Auth: HRS §§174C-49(d), 174C-101(a)) (Imp: HRS §§174C-49(d), 174C-101(a), HHCA §221)