



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

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

December 16, 2015  
Honolulu, Oahu

Defer Decision Making For  
Applications for New Ground Water Use Permits  
And  
Department of Hawaiian Home Lands Request for Mediation And  
Staff Request to Delegate Authority to Chair to Appoint a Mediator and Affirm the Chair's Authority to  
Extend Deadlines For  
The Following Competing Ground Water Use Permit Applications (GWUPAs):

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

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

APPLICANT:

Molokai Public Utilities, Inc.  
1003 Bishop Street Suite 1170  
Honolulu, HI 96813

Maui Department of Water Supply  
200 South High Street  
Wailuku HI 96793

Department of Hawaiian Home Lands  
P.O. Box 1879  
Honolulu HI 96805

SOURCE LANDOWNER:

Molokai Properties Ltd  
1003 Bishop Street, Suite 1170  
Honolulu, HI 96813

Molokai Properties Ltd.  
1003 Bishop Street, Suite 1170  
Honolulu, HI 96813

Department of Hawaiian Home Lands  
P.O. Box 1879  
Honolulu HI 96805

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

12/16/2015

B2

SUMMARY OF REQUEST:

The Department of Hawaiian Home Lands has requested mediation on the three competing Ground Water Use Permit Applications (GWUPAs). The goal of the mediation is to resolve issues caused by the three pending ground water applications for new use within the same Kualapuu Ground Water Management Area without the need to go through a contested case proceeding. Staff supports this step, and requests that the Commission defer decision making on all three ground water use applications and authorize the Chair to appoint a mediator for this purpose.

LOCATION MAP: See Exhibit 1

BACKGROUND:

- May 13, 1992            The Commission designated the island of Moloka`i as a Ground Water Management Area. Public notice published on July 15, 1992 indicated the effective date of designation to be on July 15, 1992, triggering a one-year filing period for existing water user to file applications for water use permits.
- March 9, 1993            Initial ground water use permit application (GWUPA) received from Moloka`i Irrigation System (MIS) and Moloka`i Ranch Ltd (MR - then landowner) for 10% of pumpage from Well #17 (Well No. 0901-001), the amount agreed by contract as that portion of total pumpage entering the MIS to be subtracted for system loss in the transport of Well #17 water to Mahana for use at the Kaluakoi Resort, owned by Kukui (Molokai), Inc. (KMI).
- Inquiries into the balance of the use of Well #17 uncovered the legal ownership difficulty for KMI in filing for the water use permit.
- June 9, 1993            The Maui Department of Water Supply (MDWS) filed a complete GWUPA for existing and foreseeable ground water use of 0.660 mgd from Well No. 0801-003.
- July 6, 1993            The Department of Hawaiian Home Lands (DHHL) filed a complete GWUPA for existing and foreseeable ground water use of 0.500 mgd from Well Nos. 0801-001 & 002).
- September 15, 1993    The Commission approved Ground Water Use Permit No. 267 (GWUP 267) to DHHL for existing ground water use of 0.367 mgd, and deferred new uses until all existing uses could be addressed or a water reservation for DHHL could be approved.
- March 14, 1995            At a regular Commission meeting, staff amended its recommendation for approval of uses from Well 17, reducing "existing uses" from 1.183 mgd to 0.871 mgd due to better information. The Commission approved Ground Water Use Permit GWUP 341 for 0.871 mgd as an interim "existing use" ground water use permit for KMI's reasonable-beneficial uses existing as of July 15, 1992. The Commission, consistent with its past practice in processing permit requests in newly-designated water management areas, the Commission deferred action on

KMI's application for proposed new water uses pending the establishment of all existing uses in the aquifer as of July 15, 1992.

Disagreement between applicant and staff concerning the basis for arriving at an estimate of "reasonable-beneficial use" for existing uses resulted in the Commission suspending enforcement of pumpage above the approved ground water use permit. The applicant was required to provide, within six months, calculations to support its request, information on non-potable alternatives for irrigation, and identification of means to eliminate or reduce wastage of filter backwash water from its water treatment facility.

At this same meeting, the Commission approved a ground water reservation to DHHL (GWUP 568) of 2.905 mgd from the Kualapuu Ground Water Management Area, with the effective date of amended Hawaii Administrative Rule (HAR 13-171-63) to be June 10, 1995.

- April 6, 1995 KMI filed a motion for reconsideration of the approved amount for their GWUP 341, seeking a larger amount to serve county-approved but unoccupied parcels.
- June 14, 1995 CWRM denied KMI's motion to reconsider, reaffirming the amount of 0.871 mgd. KMI appealed to the Second Circuit Court, which dismissed the appeal for lack of jurisdiction.
- July 13, 1995 KMI filed an appeal in Second Circuit Court challenging the approval of GWUP 341 and the denial of a Motion to Reconsider. On August 21, the Commission received notification that a similar appeal had been filed with the Hawaii Supreme Court. The Supreme Court dismissed the case for lack of appellate jurisdiction on September 6, and the Second Circuit Court dismissed it without prejudice on October 27, ruling that an existing use permit is not a final appealable decision.
- October 20, 1995 At a regular Commission meeting, staff recommended amending the interim ground water use permit GWUP 341, increasing the amount from 0.871 mgd to 1.046 mgd based on new information provided within the 6-month period from the March 14, 1995 action. Action was deferred pending a standing hearing for Sheila Polena Awai, who requested a contested case hearing.
- At this same meeting, the Commission approved MDWS GWUP 359 for 0.516 mgd.
- May 21, 1996 Following a hearing to determine standing, the Commission denied Ms. Awai's standing to request a contested case hearing and rejected staff's recommendation to amend the existing ground water use permit GWUP 341. The action reaffirmed the "existing use" amount of 0.871 mgd, set three conditions relating to the MPU system structure, including additional metering, and invited KMI to submit an application for proposed new uses (since July 1992). Prior to the close of the meeting, KMI requested a contested case hearing. Following this decision but before the close of this CWRM meeting, KMI attorney MacKinnon requested a

- contested case hearing on the decision and later submitted a written request as required.
- September 13, 1996 DHHL filed a new ground water use application for 0.394 mgd (GWUPA 448). Subsequent communications with DHHL tried to clarify whether the amounts requested were total demands or additional demands to be added to their existing GWUP 267 for 0.367 mgd. Communications indicated a wide range of answers, ranging from an “new” additional 0.133 mgd to 0.879 mgd.
- April 16, 1997 At a regular Commission meeting, the Commission recognized KMI’s standing and ordered a contested case hearing, CCH-MO97-1, for GWUP 341.
- September 25, 1997 DHHL filed a request amend its pending GWUPA 448 to modify its existing GWUP 267 an additional 0.2 mgd.
- September 26, 1997 The next day DHHL filed a second request to amend its pending GWUPA 448 to modify its existing GWUP 267 an additional 0.879 mgd. This request was also followed by a separate letter that noted the release of USGS Report 97-4176 that addressed regional effects of pumpage on water levels and coastal discharge.
- November 19, 1997 Molokai Ranch objected to DHHL’s new ground water use application as inconsistent with its position on the KMI’s GWUP 341 in the CCH-MO97-1.
- January 28, 1998 A public hearing was held on Molokai in response to Molokai Ranch’s objection to DHHL’s GWUPA 448. Staff’s submittal for consideration at the public hearing included a recommendation of denial without prejudice due to concerns about current evidence of well interference. DHHL indicated it would consider amending the application for a smaller amount. The hearing was not closed and continued on August 10, 1999.
- February 5, 1998 A letter from the Commission to DHHL noted that at the January 28 hearing, DHHL had proposed reducing their new use request from 0.88 to 0.21 mgd and asked if an increase of 0.2[1] could be accomplished without increasing chlorides above the EPA guideline of 250 mg/l. (June 18, 1998 - response)
- April 4, 1998 Staff faxed a request to DHHL to provide background information indicating steps anticipated to avoid a reliance on increased pumping from existing wells in order to avoid further localized upconing. Staff suggested a water development plan with a timeline for alternative source development.
- April 29, 1998 MDWS filed GWUPA 499 for additional amounts of water to modify their existing GWUP 359. Given the previous objections and expressed concerns, staff also deferred action on this request pending a timetable for alternative plans to avoid additional pumpage from the already stressed wellfield between DHHL and MDWS sources and the establishment of KMI’s existing uses as of the date of designation.

- June 18, 1998 DHHL response to the Commission's February 5, 1998 inquiry on increasing chlorides impacts from their GWUPA 448 and follow-up on reduced amended demands was to reduce the additional 0.367 mgd to 0.270 mgd above its existing use permit for a modified total of 0.637 mgd.
- August 10, 1999 Public hearing continued from January 28, 1998 held in Kaunakakai, Moloka'i. Well interference between MDWS and DHHL sources was discussed as was USGS model results for coastal discharge and difficulty in estimating probable impacts. DHHL announced through a memo to the Commission the approval of funds for a water development plan, including constructing a monitor well. At this continued hearing, KMI also requested a contested case hearing.
- March 15, 2000 The Commission directed DHHL, Molokai Ranch, and KMI to enter mediation prior to a contested case hearing on the DHHL GWUPA 448. The order was sent April 7, 2000. (See subsequent actions August 16, 2001 and February 13, 2002.)
- August 22, 2000 The Supreme Court issued its opinion in Waiahole I CCH.
- January 2001 KMI closed the Kaluakoi Hotel and Golf Course.
- August 7, 2001 MR reiterated its position on DHHL's GWUPA 448 citing inconsistencies between contested case and the pending application, but acknowledged broad understanding of issues about the aquifer. Consequently, MR withdrew its objection to DHHL's amended GWUPA 448.
- December 19, 2001 The Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order ("D&O") in contested case hearing CCH-MO97-1, issuing GWUP 610 for 1.018 mgd.
- January 2, 2002 GWUP 610 transferred from KMI to Kaluakoi Land, LLC, a subsidiary of Molokai Properties, Ltd (MPL), which is the parent company of Molokai Ranch and commonly called Molokai Ranch (MR). The transferred permit identification was GWUP 617. In June, work began on refurbishments to the irrigation system, and by August, the MR announced plans to reopen the golf course.
- January 17/18, 2002 The intervenors filed appeals from the Commission's D&O to the Hawaii Supreme Court.
- February 13, 2002 KMI withdrew its objection to DHHL's GWUPA 448.
- September 4, 2007 The State of Hawaii Department of Attorney General for the Department of Agriculture (DOA), in response to an inquiry from the Native Hawaiian Legal Corp. (NHLC) regarding MPL's continued use of the Molokai Irrigation System (MIS) managed by DOA, agreed that Chapter 343 is triggered in the matter of the MIS pipeline agreement and will be assisting DOA in getting MPL off the MIS until 343 is addressed.

- December 26, 2007 The Hawaii Supreme Court issued its opinion on the Commission's D&O for CCH-MO97-1, vacating GWUP 610 (& subsequent transfer to GWUP 617) and remanding the decision for further proceedings before the Commission.
- January 2, 2008 MPL, Kaluakoi Land, LLC, and MPU filed a motion to continue withdrawing water from Well 17, notwithstanding the Supreme Court's vacating of the authorizing permit to do so. Continuation was sought for drinking water, residences in Kaluakoi, Kualapuu Town, irrigation, the golf course, and the beach park, without specifying specific amounts.
- March 3, 2008 The Commission Chair Thielen held a status conference among the parties involved in the contested case hearing CCH-MO97-1 to review the status of the case upon remand. Parties agreed to a schedule for a motion and responses to continue withdrawals from the well, and discussed the scope of the remand and substitutions for intervenors.
- March 24, 2008 MPL announced that it was closing its operations and releasing its employees, offering to sell its assets to the DHHL.
- May 2, 2008 Intervenors filed motions to restrict uses from Well 17 to only reasonable beneficial public trust domestic water use as there was no valid GWUP.
- May 27, 2008 MPL announced that it did not intend to pursue the contested case CCH-MO97-1 on remand.
- June 5, 2008 The Public Utilities Commission (PUC) informed MPU, the purveyor of water service from Well 17 to the Kaluakoi domestic consumers/ratepayers, that it was obligated to maintain service until a third party was identified to continue the operations. It opened a docket to increase the rates paid by customers.
- November 9, 2009 Wai'ola O Molokai & MPU notified the Commission that they would assist DHHL's emergency situation and temporarily supply between 0.300 and 0.500 mgd for DHHL's needs until their pumps are repaired.
- September 23, 2010 The PUC approved a final rate increase for MPU. The Phase 2 rate increase was to be effective as of January 1, 2011.
- December 13, 2012 MPU filed an incomplete ground water use permit application, GWUPA 973 for Well 17. Staff identified issues to be resolved to make the application complete.
- August 12, 2013 MPU filed revised GWUPA 973 but staff deemed it incomplete.
- January 15, 2014 Staff sent letters to DHHL and MDWS requesting updates on plans for their new use and well sources (GWUPAs 448 & 499, respectively).
- February 11, 2014 MPU filed a third revised GWUPA 973, which staff again deemed incomplete.

- June 30, 2014 MPU filed its fourth amended GWUPA 973.
- July 22, 2014 MPU filed additional clarifications to GWUPA 973. Staff had no further issues with the completeness of the application.
- March 17, 2015 Staff conducted a public outreach meeting on Moloka`i concerning its proposed update of the Water Resource Protection Plan. Both at the public outreach meeting and follow-up written comments, overwhelming concern was expressed by the community in addressing the current uses of Well 17, in getting a GWUPA accepted and moving forward toward resolving the issues remanded by the Supreme Court.
- October 12, 2015 Public notice was made accepting MPU, DHHL, and MDWS GWUPAs for new proposed uses and circulated for review. The deadline for objections was set for November 13, 2015.
- October 30, 2015 The Chair issued a Minute Order Setting a Status Conference for November 9, 2015 to discuss the scope, procedure, and deadlines applicable to the remanded case as rendered by the Supreme Court on December 26, 2007.
- November 11, 2015 Pursuant to HAR §13-167-26, the Chair issued a Minute Order extending the objection deadline for applications noticed on October 12 from November 13, 2015 to March 14, 2016, in view of the anticipated imminent delivery of a USGS report thought to provide information concerning impacts of pumping wells in the Kualapuu wellfield (Exhibit 2).
- December 4, 2015 DHHL filed a petition for mediation to discuss the three applications for the modified new ground water uses from the Kualapuu Ground Water Management Area. (Exhibit 3)

#### ANALYSIS/ISSUES:

##### Competing New Uses

Pursuant to HAR §13-171-16, Competing new water use permit applications. which states:

*"If two or more applications which otherwise comply with section 13-171-13 are pending for a quantity of water that is inadequate for both or all, or which for any other reason are in conflict, the commission shall first, seek to allocate water in such a manner as to accommodate both applications if possible; second, if mutual sharing is not possible, then the commission shall approve that application which best serves the public interest."*

The Commission is tasked to accommodate all three GWUPAs that are competing and have been shown to be in conflict with each other. They are competing because:

1. There is clear observed evidence of localized interference between these MDWS and DHHL wells affecting chlorides with less observed evidence of interference between those wells and MPU Well 17. This is one reason why the USGS modelling effort was initiated and continues to be funded by both DHHL and MDWS.
2. Given the historical background, there are serious disputes between the applicants, especially issues involving the continued use of Well 17.
3. Pending new requests 2.563 mgd seemingly exceed an available 1.176 mgd (see Exhibit 4). The three GWUPAs are modifications to existing GWUP amounts from existing sources and their totals and effects can be clarified by the table below to avoid some double counting with respect to DHHL’s reservation. However, all requests still cannot be accommodated as the sustainable yield would be exceeded by 0.234 mgd.

Kualapuu GWMA SY = 5

	GWUP		GWUPA	mgd				
	mgd			Existing	New	Total		
DHHL	267	0.367	448	0.367	0.270	0.637	1.247	*
	568	2.905	?			2.635	2.025	*
MDWS	269	0.036				0.036		
	359	0.516	499	0.516	0.384	0.900		
MPU			973		1.026	1.026		
Totals		3.824				5.234	5.234	*
Available SY mgd		1.176				-0.234	-0.234	*

\* Effect of DHHL Petition for mediation now claiming 0.880 mgd new use

DHHL and U.S. Geological Survey (USGS) Numerical Modeling

DHHL had contracted with The U.S. Geological Survey, Pacific Islands Water Science Center (USGS) to construct numerical model to evaluate ground water resources on Moloka’i from available data in 1992. The ground water modelling effort was completed in 1997 when the USGS published its report “Geohydrology and Numerical Simulation of the Ground-Water Flow System of Molokai, Hawaii, Water-Resources Investigation Report 97-4176”. The model estimated effects of proposed withdrawals on water levels and coastal leakage amounts. In 2001, the USGS published a report used to model to site their deep monitor well. In 2007, USGS published a third report, “Numerical Simulation of the Hydrologic Effects of Redistributed and Additional Ground-Water Withdrawal on Moloka`i, Hawaii, Scientific Investigations Report 2006-5177” using the same model to assist in understanding the future impact of new sources in redistributing and adding withdrawals from the Kualapuu Aquifer System Area. This study was prepared in cooperation with the MDWS and the Office of Hawaiian Affairs (OHA). Staff understands that the USGS, has currently calibrated a 3-D model and running various new scenarios to evaluate ground water behavior in response to different pumpage scenarios on the island. They are awaiting updated information from both DHHL and MDWS. This work should assist staff, applicants, and interested parties reach sound conclusions based on best information. Results are estimated to be done in early 2016 and possibly published by 2017.

Order to Extend Deadline to File Objections

Following the status conference on November 9, 2015 and based on the discussion and general consensus among the applicants and interested parties, the Chair, on November 11, 2015, issued an order (Exhibit 2) extending the objection deadline from November 13, 2015 to March 14, in view of the anticipated imminent delivery of a USGS report thought to provide information concerning impacts of pumping wells in the Kualapuu wellfield.

Request for Mediation

As provided under HAR §13-167-83 DHHL filed a request for general mediation (Exhibit 3), anticipating necessary discussion and clarification of impacts of new ground water pumping following the release of USGS's new ground water study. After accepting the petition for mediation, the Commission must allow affected state and county agencies 30 days from the filing of the petition to file position statements pursuant to HAR §13-167-84. This would make the deadline to file position statements January 3, 2016. Within 15 days of the filing of the position statement deadline a mediator must be appointed pursuant to HAR §13-167-86. Therefore, the deadline to appoint a mediator is January 18, 2016. The initial mediation session shall be held within 15 days after the appointment of the mediator. Mediation sessions shall be confidential and private, pursuant to HAR §13-167-88 to 90 and the Commission is not allowed to be a party to the mediation proceedings. The mediator must provide a written report with recommendations to the Commission within ten (10) days of the close of the mediation conference.

RECOMMENDATION:

That the Commission:

1. Affirm the authority of the Chair, pursuant to HAR §13-167-26, to extend deadlines for objections and to allow the mediation to commence after the USGS study is released. This will allow the parties a full opportunity try to mediate the issues raised by the three groundwater use applications, GWUPAs (448, 499 & 973).
2. Approve mediation as requested by the DHHL petition and delegate authority to the Chair to appoint a mediator, as allowed by HAR §13-167-83, to provide for proceeding with the understanding that the mediation will not commence until after the USGS study is released and the parties have an opportunity to review.
3. Pursuant to HAR §13-167-84, allow any affected state or county agency to file position papers within 30 days of the filing of the DHHL petition for mediation. The deadline for filing would be January 3, 2016.

4. Defer decision making on the three pending GWUPAs (448, 499, & 973) until after the March 14, 2016 extended deadline has passed and the mediator submits a written report containing recommendations to the Commission for its consideration.

Respectfully submitted,



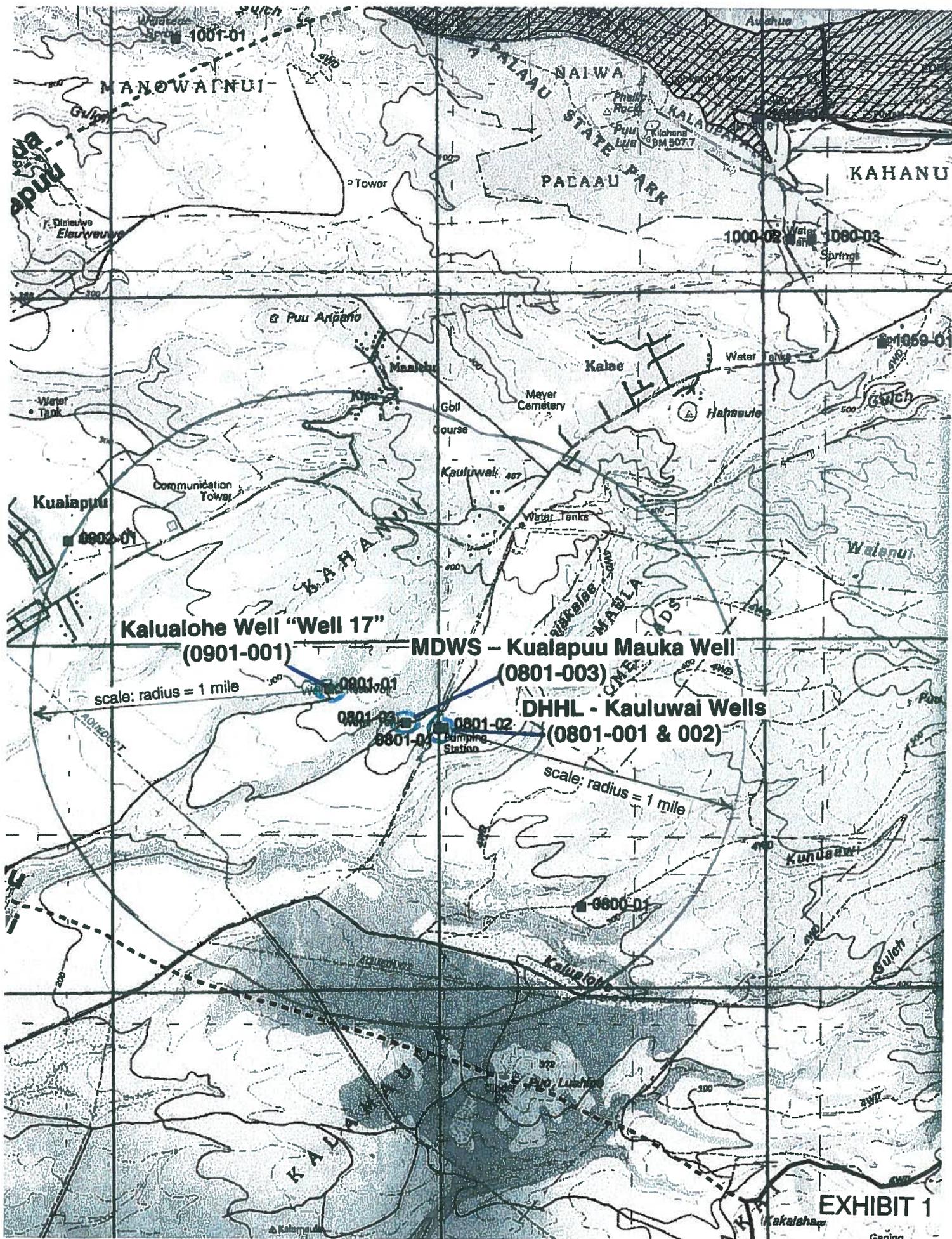
JEFFREY T. PEARSON, P.E.  
Deputy Director

- Exhibit(s):
- 1 (Location Map)
  - 2 (Chairperson Order)
  - 3 (DHHL Petition for mediation)
  - 4 (Kualapuu current and pending allocation tables)
  - 5 (Additional background information)

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE  
Chairperson



**Kalualohe Well "Well 17"**  
**(0901-001)**

**MDWS - Kualapuu Mauka Well**  
**(0801-003)**

**DHHL - Kauluwai Wells**  
**(0801-001 & 002)**

scale: radius = 1 mile

scale: radius = 1 mile

**EXHIBIT 1**

GeoInfo



COMMISSION ON WATER RESOURCE MANAGEMENT  
STATE OF HAWAII

In the Matter of the Applications of the )  
Molokai Public Utilities, Inc. (WUPA No. ) ORDER EXTENDING TIME FOR  
00973); Maui Department of Water Supply, ) WRITTEN OBJECTIONS OR COMMENTS  
County of Maui (WUPA No. 00499); and )  
Department of Hawaiian Home Lands )  
(WUPA No. 00448) for Water Use Permits )  
in the Kualapuu Aquifer System Area, )  
Kualapuu Ground Water Management Area, )  
Molokai, Hawaii )  
\_\_\_\_\_ )

ORDER EXTENDING TIME FOR WRITTEN OBJECTIONS OR COMMENTS

On October 23, 2015 and October 30, 2015, Public Notices were issued regarding receipt of applications for water use permits for new use within the Kualapuu Ground Water Management Area, Molokai, Hawaii, from the following applicants:

Molokai Public Utilities, Inc.  
Attention: Mr. Clay Rumbaoa  
1003 Bishop Street, Suite 1170  
Honolulu, Hawaii 96813  
Application No.: 00973  
Hydrologic Unit/Aquifer System Area: Kualapuu Aquifer System Area, Central Sector, Molokai  
Water Source: Well 17 (Well No. 4-0901-001), Tax Map Key (2) 5-2-012:029

Maui Department of Water Supply  
200 S. High Street, 5<sup>th</sup> Floor  
Wailuku, Hawaii 96793-2155  
Application No.: 00499  
Hydrologic Unit/Aquifer System Area: Kualapuu Aquifer System Area, Central Sector, Molokai  
Water Source: Kualapuu Mauka (Well No. 0801-003), Tax Map Key (2) 5-2-012:029

Department of Hawaiian Home Lands  
P.O. Box 1879  
Kapolei, Hawaii 96805  
Application No.: 00448  
Hydrologic Unit/Aquifer System Area: Kualapuu Aquifer System Area, Central Sector, Molokai  
Water Source: Kauluwai 1 & 2 (Well Nos. 4-0801-001 and 002), Tax Map Key (2) 5-2-010:007

The Public Notices indicated that written objections or comments on the above applications must be received by November 13, 2015. The Commission on Water Resource Management (CWRM) is aware that within the next couple of months the United States Geological Survey (USGS) is expected to

release a new report regarding water on Molokai that may affect the above listed applications, comments and objections to the applications, and the CWRM's evaluation of the applications. To afford all interested persons an opportunity to review the anticipated report by the USGS before having to submit objections or comments to the above applications, and pursuant to Hawaii Administrative Rule § 13-167-26, the time for submission of objections and comments to the above applications is hereby extended from November 13, 2015 to March 14, 2016. If any interested person has already filed objections or comments to any of the above applications, those objections or comments may be withdrawn, amended, or supplemented prior to the extended deadline. All other requirements stated in the original Public Notices shall continue to apply.

DATED: Honolulu, Hawaii, November 11, 2015.

  
\_\_\_\_\_  
SUZANNE D. CASE, Chairperson  
Commission on Water Resource Management

DAVID IGE  
GOVERNOR  
STATE OF HAWAII



JOBIE M. K. MASAGATANI  
CHAIRMAN  
HAWAIIAN HOME'S COMMISSION

WILLIAM AILA  
DEPUTY TO THE CHAIRMAN

STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879  
HONOLULU, HAWAII 96805

December 4, 2015

Suzanne Case, Esq., Chairperson  
Jeffrey T. Pearson, P.E., Deputy Director  
Commission on Water Resource Management  
P.O. Box 621  
Honolulu, Hawai'i 96809

Dear Chairperson Case and Deputy Pearson:

Subject: Petition for Mediation on Water Use Permit  
Applications 00973, 00499, and 00448

This letter serves as the Department of Hawaiian Home Lands' (DHHL) petition for mediation on Water Use Permit Applications 00973, 00499, and 00448, submitted by Molokai Public Utilities, Inc., the Maui Department of Water Supply, and DHHL, respectively (the WUPAs).<sup>1</sup> This petition is brought pursuant to section 13-167-83, Hawai'i Administrative Rules (HAR).<sup>2</sup>

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<sup>1</sup> In making this petition for mediation, DHHL is not waiving its right to submit comments regarding, object to, or request contested case hearings on any of the WUPAs being considered by the Commission. DHHL also does not waive its right to fully participate in CCH-MO97-01, should the Commission decide to recommence proceedings in that matter.

<sup>2</sup> HAR § 13-167-83 allows the Commission to commence mediation "prior to the initiation of formal proceedings upon the agreement of affected persons." Subsections (c) and (d) of the rule set out criteria for a petition for mediation, some of which are only applicable to situations in which contested case proceedings have already been initiated. Accordingly, this petition only addresses those criteria relevant to the situation at hand.

Suzanne Case, Esq., Chairperson  
Jeffrey T. Pearson, P.E., Deputy Director  
December 4, 2015  
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I. Summary of the WUPAs

The Commission on Water Resource Management (Commission) is currently considering three WUPAs affecting the Kualapu'u Aquifer. The WUPAs are summarized in the following table.

WUPA No.	Well Name/No.	Applicant	Water use in million gallons per day (mgd)
00973	Well 17/4-901-001	Moloka'i Public Utilities, Inc. (MPU)	1.026
00499	Kualapu'u Mauka/0801-003	Maui Department of Water Supply (MDWS)	0.900
00448	Kauluwai 1 & 2/4-801-001 & 002	DHHL	0.8795

There is also a contested case proceeding concerning a WUPA submitted by Kukui (Molokai), Inc. (the predecessor to MPU) that was remanded by the Hawaii Supreme Court in In re Contested Case Hearing on Water Use Permit Application by Kukui (Molokai), Inc., 116 Hawaii 481, 174 P.3d 320 (2007) (Kukui). The Commission has not set any deadlines in that contested case proceeding, and DHHL understands that the Commission wishes to resolve the matter without the need for further litigation.

II. DHHL's Interest in This Matter

DHHL has a substantial interest in this matter. DHHL controls over 25,000 acres of land on the island of Moloka'i, including two wells to draw water from the Kualapu'u Aquifer (Well Nos. 4-0801-001 & 002). DHHL also has a reservation of 2.905 mgd for the Kualapu'u Aquifer. See HAR § 13-171-63. Not only is DHHL the applicant under one of the WUPAs being considered by the Commission, but the Commission's actions regarding the three WUPAs will almost certainly affect DHHL's water reservation and its ability to deliver water to its native Hawaiian homestead lessees and lands now and in the future.

Suzanne Case, Esq., Chairperson  
Jeffrey T. Pearson, P.E., Deputy Director  
December 4, 2015  
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Despite its compelling right to the water requested under its WUPA, DHHL desires to engage in mediation with MPU, MDWS, and other interested parties in an effort to resolve this matter without engaging in a protracted contested case hearing and an inevitable appeal.<sup>3</sup>

a. DHHL's constitutional and statutory right to water

It is well-settled that DHHL's water reservation is by definition a public trust use afforded the full panoply of constitutional protections enjoyed by other public trust uses of water. See Kukui at 491, 174 P.3d at 330. DHHL's use of water from its reservation would therefore be entitled to those same constitutional protections.

The Hawai'i Supreme Court has held that the Commission must take DHHL's reservation into account when planning and allocating water resources, "and to protect it whenever feasible," insofar as its status as a public trust resources renders it "superior to the prevailing private interests in the resources at any given time." In re Wai'ola O Molokai, Inc., 103 Hawai'i 401, 429, 83 P.3d 664, 692 (2004). Accordingly, the Commission must apply a "higher level of scrutiny" to proposed private commercial uses of water where public trust uses will be impacted. Id.

Not only is DHHL's water reservation (and any use of water from that reservation) protected by the public trust doctrine, but the Hawai'i Supreme Court has held that the Commission itself must take a proactive role in protecting DHHL's interests:

...the Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it," but instead must take the

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<sup>3</sup> It is DHHL's understanding that the Commission typically pays for the mediator in these situations. DHHL expects that the Commission will do the same if mediation is approved in this matter.

Suzanne Case, Esq., Chairperson  
Jeffrey T. Pearson, P.E., Deputy Director  
December 4, 2015  
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initiative in considering, protecting, and advancing the public rights in the resource at every available stage of the planning and decisionmaking process...In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

Id. at 162, 9 P.3d at 474. Given the higher level of scrutiny the Commission must apply to private commercial uses of water and the Commission's role in protecting public trust uses at every stage of the decision making process, DHHL's WUPA cannot be held to the same standard as the WUPA submitted other parties, nor can the Commission place the burden on DHHL to show that its use of water is a "reasonable-beneficial use" under section 174C-49, Hawai'i Revised Statutes (HRS). In short, the Commission cannot evaluate DHHL's and MPU's WUPAs as if there are on equal footing.

b. Nature and extent of DHHL's interest in this matter

DHHL's WUPA requests 0.8795 mgd from the Kualapu'u Aquifer.<sup>4</sup> The Commission's consideration of DHHL's WUPA along with the WUPAs submitted by MPU and MDWS gives DHHL a direct interest in this matter.

DHHL also seeks to protect its 2.905 mgd reservation in the aquifer. Although the Commission has determined the sustainable yield of the Kualapu'u Aquifer to be 5.0 mgd, it has never been established that the aquifer can support a developable yield of 5.0 mgd. As such, the WUPAs submitted by MPU and MDWS may affect DHHL's ability to use the water reserved to it without impairing the aquifer. DHHL's interests in its water use and its water reservation differ from the other parties to this

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<sup>4</sup> Since DHHL's WUPA was submitted in 1996, DHHL anticipates that it will need to amend its WUPA to account for the change in its water needs and other issues over the past 19 years.

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matter because DHHL is the only entity that can represent its class of native Hawaiian beneficiaries.

DHHL also has a general interest in protecting the health of the Kualapu'u Aquifer. As the Commission is aware, water is the lifeblood of DHHL's homesteading program. Providing a fresh and consistent flow of water to its native Hawaiian lessees and lands is among DHHL's highest priorities. DHHL has a significant interest in ensuring that the Kualapu'u Aquifer can continue to provide that water for its lessees and their descendants.

c. DHHL's disagreements and grievances in this matter

DHHL has submitted timely comments on and objections to the noticed WUPAs referenced herein, delivered by mail to the Commission and the applicants. DHHL here incorporates into this petition by reference that letter. That letter describes in part DHHL's disagreements and grievances regarding these WUPAs.

III. The US Geological Survey Study

As the Commission is aware, the United States Geological Survey (USGS) is performing a groundwater recharge and availability study for much of the island of Moloka'i, including the Kualapu'u Aquifer. Specifically, the study will allow the estimation of the effect of additional groundwater withdrawal on salinity and water levels in nearby existing wells, including the wells owned by MPU, MDWS, and DHHL. USGS anticipates that this study will be completed in a form by the end of this month that will allow the funding parties to test different pumping scenarios. The results of the study will undoubtedly assist CWRM, a funding party, in determining the effect of water withdrawal from the aquifer.

DHHL suggests that no mediation in this matter take place until after the USGS study has been released and after the funding parties for the study have had an adequate opportunity to utilize it. Mediation will likely not be productive if the parties have not had an opportunity to consider the USGS study.

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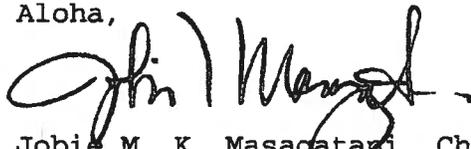
IV. Other Parties to the Mediation

Along with MPU and MDWS, DHHL requests that the intervenors in the Kukui contested case proceedings (the Office of Hawaiian Affairs [OHA] and the individual intervenors represented by the Native Hawaiian Legal Corporation) be allowed to participate in any mediation concerning the three WUPAs. The water uses requested by MPU and MDWS may have a significant impact on the traditional and customary practices of Hawaiians on the island of Moloka'i. These interests were ably represented by OHA and the individual intervenors in the Kukui contested case matter, and their participation in a mediation on the three pending WUPAs would be helpful in clarifying the issues faced by all of the stakeholders.

V. Conclusion

DHHL believes that mediation is a prudent first step in dealing with the three WUPAs under consideration by the Commission. It is DHHL's hope that its interests and the interests of all stakeholders in this matter can be met without engaging in another round of protracted contested case proceedings and appeals.

Aloha,



Jobie M. K. Masagatani, Chair  
Hawaiian Homes Commission

Cc: Maui Department of Water Supply  
200 S. High Street, 5<sup>th</sup> Floor  
Wailuku, Hawai'i 96793

Molokai Public Utilities, Inc.  
Attention: Mr. Clay Rumbaoa  
1003 Bishop Street, Suite 1170  
Honolulu, Hawai'i 96813

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Office of Hawaiian Affairs  
560 N. Nimitz Hwy, Suite 200  
Honolulu, Hawai'i 96817

Native Hawaiian Legal Corporation  
1164 Bishop Street, Suite 1205  
Honolulu, Hawai'i 96813

**EXHIBIT 4 - KUALAPUU CURRENT AND PENDING ALLOCATION TABLES**



WUPA No	Well No.	Applicant	Well Name	mgd	Received	Accept
<b>Aquifer System: 40203 Kualapuu</b>						
448	4-0801-001	Department of Hawaiian Home Lands, Oahu (Main), DHHL	Kauluwai 1	0.637	09/13/1996	09/19/1997
448	4-0801-002	Department of Hawaiian Home Lands, Oahu (Main), DHHL	Kauluwai 2		09/13/1996	09/19/1997
499	4-0801-003	Maui Department of Water Supply, MDWS	Kualapuu Mauka	0.900	04/29/1998	10/12/2015
973	4-0901-001	Molokai Public Utilities, Inc., MPU	Well 17	1.026	12/13/2012	10/12/2015
				<b>3 WUPAs totalling 2.563</b>		

Number of Wells: 4



Report Parameters	
Island:	Molokai
Applicant or Source Landowner:	All
Well # (Prefix):	All
Date:	All
Aquifer:	40203 Kualapuu
TMK:	All
Aquifer Type:	All
Water Quality:	All
Not:	None
Proposed Use:	All

WUP = Water Use Permit, 12-MAV = 12 month moving average, Diff = WUP-12-MAV, mgd = million gallons per day

**Island of Molokai**

**Aquifer System Ground Water Management Area: 40203 Kualapuu**  
**Sustainable Yield (mgd): 5**

WUP No	Approved	Permittee	Well No	Well Name	WUP (mgd)
267	09/15/1993	Department of Hawaiian Home Lands, Molokai, DHHL	4-0801-001	Kauluwai 1	0.367
			4-0801-002	Kauluwai 2	
269	09/15/1993	Maui Department of Water Supply, MDWS	4-1059-001	Waikalae Tunnel	0.036
359	10/20/1995	Maui Department of Water Supply, MDWS	4-0801-003	Kualapuu Mauka	0.516
568	03/14/1995	Department of Hawaiian Home Lands, Molokai, DHHL		RESERVATION	2.905

Summary for Kualapuu (5 detail records)

Total: 3.824  
 SY Available: 1.176

## EXHIBIT 5 - ADDITIONAL BACKGROUND INFORMATION

- July 15, 1992 Effective date of designation of Moloka`i as a Ground Water Management Area, requiring all ground water users to apply, within one year, for ground water use permits for such uses existing as of the designation date. Once these "existing legal uses" were recognized, as required by the Water Code, consideration of "proposed uses" (since July 1992) was to follow.
- June 8, 1993 The GWUPA for the use of Well #17 was accepted by Commission staff as timely for the July 15 deadline, but considered incomplete pending further information coming from KMI.
- October 1993 Ownership of the Well 17 site was transferred from MR to KMI.
- December 15, 1993 KMI filed an amended water use permit application for 2.0 mgd from Well 17 for existing ground water use, citing the delayed transfer of properties as just cause for the late filing (the Commission accepted this explanation). Staff accepted the amendment as part of the original timely application by MIS/MR, but considered it incomplete as it still did not fully account for the requested amount.
- April 14, 1994 Staff recommended approval of 1.275 mgd for "existing use" of Well 17 by KMI. Action was deferred pending a standing determination of Matthew Adolpho, Jr., who requested and filed a timely request for a contested case hearing.
- September 15, 1994 CWRM denied standing to Matthew Adolpho, Jr.. Staff amended its recommendation for approval, due to additional new information, reducing it from 1.275 mgd to 1.183 mgd for "existing use". New requests for a contested case hearing were made orally and the Attorney General opined that the opportunity to request a contested case hearing does not extend to a meeting rescheduled solely for the purpose of determining standing on the first request. Action was again deferred.  
Throughout this period, efforts were made to clarify information provided by KMI as to what uses were in existence as of July 15, 1992.
- June 10, 1995 The DHHL water reservation of 2.905 mgd from Kualapuu GWMA became effective.
- June 22, 1995 In compliance with Special Condition 2b of their approved water use permit for Well #17, KMI submitted monthly water readings from Well 17 for the period July 1991 through June 1992 to support their request for an increased existing use allocation. The Commission staff asked KMI to provide additional

information on previously unclaimed uses as well as an explanation of high use at some of the Papohaku Ranchland Lots.

- September 15, 1995 Commission staff conducted another preliminary field investigation, reporting a fourth unmetered existing water use for golf course irrigation from the effluent mixing pond. A site visit to the Papohaku Ranchlands subdivision identified 39 of 324 lots in use. Commission staff requested that KMI amend its application for Well #17 to include the three metered existing uses and four unmetered existing uses of the well not previously claimed on the application.
- September 18, 1995 The Commission received a letter from D. Scott MacKinnon, attorney for KMI, providing information in a timely response to conditions of the interim water use permit. A second letter dated September 21, 1995 provided still further information, reiterated KMI's position that Commission staff had failed to adequately account for particular claimed uses, and acknowledged three unmetered uses of the well existing as of July 15, 1992.
- December 29, 1995 The Commission received a letter from KMI attorney MacKinnon providing updated information concerning uses by MR from unmetered interconnections with the MPU system, the subsequent closing of certain connections and metering of others, notice of the completion of a pipeline routing all filter backwash to the golf course effluent pond, and an updated schedule of water uses for the period beginning June 1992.
- June 5, 1996 Staff recommended that the Commission deny standing to KMI for a contested case hearing as untimely. The Commission deferred action for a legal opinion as to whether the request was timely, and whether an applicant could request a contested case hearing.
- April 1, 1997 The Attorney General responded to the Commission's request for legal opinion on KMI's standing to request a contested case hearing, stating that a contested case hearing is required for modifications to GWUP 341.
- April 24, 1997 Chairperson Michael D. Wilson appointed Peter Adler as hearing officer. On May 20, 1997, the Commission found no conflict of interest, as alleged by contesting parties, and confirmed Adler's appointment.
- April 30, 1997 A public notice of a contested case hearing was published in the Honolulu Advertiser and the Moloka'i Advertiser-News, announcing a May 30, 1997 deadline to apply to be intervening parties. Next day, May 1, the announcement was published in the Moloka'i Dispatch.

- March 4, 1998 CWRM sent a Notice of Overpumpage to DHHL, noting that the 12-MAV had exceeded their GWUP 267 allocation of 0.367 mgd for 399 days. The notice also mentioned the need be reporting water levels, temperatures, and chlorides in compliance with their permit.
- June 3, 1998 Hearing Officer Adler held a hearing at the Civic Center on Moloka`i to determine standing to intervene in the contested case hearing.
- June 24, 1998 Prehearing conference #1 identified protocols for motions, subpoenas, and evidence, a schedule for preliminary motions, opening briefs and responsive briefs, and opening arguments.
- June 26, 1998 Minute Order Number 2 (Attachment A) confirmed attorneys representing parties and the prehearing motion schedule, identified the issues to be addressed in the case, and confirmed the burden of proof for meeting the requirements of the Water Use Permit on the applicant (KMI).
- July 15, 1998 The Commission denied the late entry of the Office of Hawaiian Affairs (OHA) into KMI contested case for Well 17.
- July 21, 1998 Staff sent MDWS a notice that they were overpumping their existing use GWUP 359. This was subsequently followed by similar letters October 26, 2001 and March 4, 2002.
- August 26, 1998 The Commission reconsidered its denial of entry to OHA, allowing them to be admitted.
- September 16, 1998 Hearing Officer Adler issued Order Number 1 (Attachment B), admitting as parties to the contested case Kukui (Moloka`i), Inc., the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, and individuals Judy Caparida, Georgina Kuahuia, and Sarah Sykes.
- September 16, 1998 Order #2 ruled on seven motions brought by parties, concerning admission of testimony from another case, continuance pending county decision, applicability of statute and federal principle to this case, and summary denial of the ground water use permit.
- October 2, 1998 KMI's opening brief modified its original application by reducing its requested allocation to the amount of its metered 12-MAV withdrawal from Well #17 as of July 15, 1992, which KMI calculated as totaling 1.205 mgd.

- November 23, 1998 The Contested Case Hearing convened in the conference room of the Moloka`i Irrigation System office in Ho`olehua, Moloka`i. Testimony was presented over the course of eight days (Nov. 23 to 25, and 30, and Dec. 1 and 7 to 9, 1998) in Ho`olehua, and three days (Dec. 2, 11, & 15, 1998) in Honolulu at the Kalanimoku Building. Closing arguments were heard in Honolulu on December 31, 1998.
- January 26, 1999 Minute Order #9 set a February 26, 1999 deadline for proposed Findings of Fact, Conclusions of Law, and Decision and Order.
- February 22, 1999 Minute Order #10 granted a request from Alan Murakami (representing Caparida and Kuahuia), with agreement from the other parties, to have the deadline extended from February 26, 1999 to March 12, 1999.
- May 15, 2000 The Commission issued its Proposed Findings of Fact, Conclusions of Law, and Decision & Order on the KMI Well 17 Contested Case CCH-MO97-1.
- September 25, 2001 Minute Order #13 set the date for the Commission to hear oral arguments on the written exceptions for 9:00 a.m., Wednesday, October 17, 2001, at the Department of Hawaiian Home Lands, Molokai District Office, Kalamaula, Moloka`i.
- October 15, 2001 Intervenors Sykes, Caparida, and Kuahuia, by facsimile, moved for: (1) a reopening of the record in this docket to receive recent material information on the ground water uses being made by KMI; and (2) a continuance of the October 17, 2001 hearing until this information can be incorporated by the parties in their arguments for the Commission's consideration of the new data. The Chairperson and presiding officer, Gilbert Coloma-Agaran, scheduled the motion as a non-hearing motion and provided the parties the following schedule:
1. Memorandum in Opposition must be filed and served no later than Tuesday, October 23, 2001.
  2. Response to Memorandum in Opposition must be filed and served no later than Friday, October 26, 2001.
- October 17, 2001 Chairperson Gilbert Coloma-Agaran, and commissioners Robert Girald, Brian Nishida, and Herbert M. Richards, Jr. heard oral arguments on the written exceptions to the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order at Kalamaula, Moloka`i. Joel D. Kam represented KMI, Alan Murakami represented Intervenors Caparida and Kuahuia, Clayton Lee Crowell represented the Department of Hawaiian Home Lands, and Jon Van Dyke represented the Office of Hawaiian Affairs.
- October 23, 2001 KMI filed a Memorandum in Opposition to the October 15, 2001 motion to reopen the case.

- October 26, 2001      Based on Alan Murakami's phone call representing that KMI had no objection to his request for an extension, the deadline to file responses to the Memorandum in Opposition was extended to October 30, 2001.
- October 30, 2001      Intervenors Caparida and Kuahuia filed responses to KMI's Memorandum in Opposition.
- November 2, 2001      Intervenor Sykes filed a further memorandum in support of her motion.
- December 2001      Brierly Investments, parent of Molokai Ranch, announced plans to purchase Kaluakoi Resort, to be completed by early 2002.