



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

February 16, 2016
Honolulu, Hawaii

Approve the Terms of Reference for Mediation of the Complaint and
Petition for Declaratory Order Against Waste Filed By Po'ai Wai Ola and
West Kaua'i Watershed Alliance (through Earthjustice), Waimea, Kaua'i, Hawai'i

SUMMARY OF REQUEST:

Staff requests that the Commission on Water Resource Management (Commission) approve the Terms of Reference as proposed by the Mediator to initiate the mediation process to address the Complaint and Petition for Declaratory Order Against Waste (Waste Complaint) filed by Po'ai Wai Ola and West Kaua'i Watershed Alliance (through Earthjustice).

BACKGROUND:

On July 24, 2013, Po'ai Wai Ola and West Kaua'i Watershed Alliance, through their attorneys Earthjustice, filed 1) a Complaint for Dispute Resolution; 2) a Petition to Amend Interim Instream flow Standard; and 3) a Complaint and Petition for Declaratory Order Against Waste in the Waimea River and its tributaries, Waimea, Hawai'i (Complaint & Petition).

On May 27, 2014, the Commission entered into a Contract for Professional Services with Element Environmental, LLC to: 1) Provide project management services including coordination and meetings; 2) Conduct a literature search compiling the physical characteristics and historic records for the Kōke'e and Kekaha Ditch Irrigations Systems; 3) Conduct a physical condition survey of the existing irrigation infrastructure; 4) Prepare a water budget analysis including flow measurements, and estimations of seepage loss and water storage capacity; and 5) Prepare a report of findings to the Commission.

On November 25, 2014, the Commission staff, serving as intermediary, forwarded a fully executed copy of a right-of-entry agreement for Element Environmental, LLC, on behalf of the Commission, to conduct an assessment and investigation of the Kōke'e and Kekaha Ditch Irrigation Systems.

On February 18, 2015, Steve Spengler of Element Environmental, LLC provided a project update to the Commission including an overview of the physical conditions of the Kōke'e and Kekaha Ditch Irrigation Systems and preliminary findings of ditch flow measurements.

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On April 28, 2015, the Commission voted to conduct a limited site visit to view aspects of the Kōke'e and Kekaha ditch irrigation system. Sites visited on this trip included views of the augmented flow in the Kōke'e Stream, Pu'u Lua Reservoir, the Pu'u Moe ditch divide, the end of the Kōke'e ditch outflow and two views of the Kekaha Ditch. Public testimony was received at the beginning and end of the day, but not at each site location.

On May 11, 2015, the Commission sent a Request for Information Regarding and Related to Water Use and Request for Assistance with Monitoring Efforts to James Nakatani, Executive Director for the Agribusiness Development Corporation (ADC), and Landis Ignacio, Director for the Kekaha Agriculture Association (KAA). In addition to the request for information and assistance, the Commission asked if ADC and KAA were willing to participate in mediation for this matter, as provided for under Hawaii Revised Statutes (HRS) §174C-11 and Hawaii Administrative Rules (HAR) §13-167-23(d).

On June 3, 2015, the Commission received a letter from Deputy Attorney General Myra Kaichi, representing ADC, stating that ADC is willing to participate in mediation.

On June 5, 2015, the Commission received an email (with letter attached) from Douglas Codiga, of Schlack Ito LLC representing KAA, stating that KAA is willing to participate in mediation for this matter.

On June 23, 2015, the Commission received a letter from County Attorney Mauna Kea Trask, representing the County of Kaua'i, that, "although the County is not requesting to be admitted as a party to this proceeding at this time, the County does reserve the right to be admitted as a party in the future upon its request as further provided for in HRS §174C-11(c)".

Earthjustice, Kaua'i Island Utility Cooperative (KIUC), and Department of Hawaiian Home Lands (DHHL), through informal discussions with Commission staff, have also expressed an interest in mediation. However, the Commission staff and those named in the Petition, also recognize that mediation efforts may be contingent upon the information received from ADC and KAA, as requested in the Commission's letter dated May 11, 2015. Information is expected to be submitted on July 13, 2015 (July 11, 2015 is a Saturday) or sooner.

On August 11, 2015, the Commission discussed an approach to mediation in this matter. Following the discussion, Chair Case suggested that no action be taken on the agenda item (Item C8), but rather that the Commission asks the parties to move forward in a meaningful discussion and report back on its progress.

On September 14 and October 6, 2015, Commission staff met with Earthjustice, ADC, KAA, DHHL, and KIUC, to begin discussions on mediation and identify specific issues to be addressed.

On September 24, 2015, the Commission sent a memo to DHHL requesting additional information on all current water users on DHHL lands that receive water from the Kokee Ditch System and a list of future water use demand projections.

On September 30, 2015, the Commission sent a letter to ADC and KAA requesting additional information on: 1) Estimates of water use by Sunrise Capital, Inc. other licensees receiving water

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from KAA; 2) Water use data not submitted by Pioneer Hi-Bred for calendar years 2013 and 2014; and 3) Amount of electricity produced by KAA which is subsequently used by KAA and/or sold to KIUC.

On October 20 and 21, 2015, the Commission conducted a Limited Meeting of various sites in West Kaua'i to view portions of the Kōke'e and Kekaha Ditch Irrigation Systems, including stream diversions, transfer ditches, hydroelectric power plants, water end-users, and associated infrastructure.

On October 28, 2015, the Commission received a response from KAA to the September 30, 2015 request for information.

On November 6 and December 4, 2015, Commission staff hosted a working group meeting of hydrologists representing Earthjustice, KAA, and KIUC. The objective of the meeting was to seek agreement on the estimation of natural streamflow rates and the availability of water upstream of existing diversions. This information would serve as a baseline, or starting point, for further discussions as part of mediation.

On November 26, 2015, the Commission received a response from DHHL to the September 24, 2015 request for information. Concurrently, on November 27, 2015, through the Chair's Office, the Commission received from DHHL a Petition for Reservation of Surface Water of 33.145 Million Gallons Per Day originating from the watershed of, and tributary to, the Waimea River and diverted by the Kōke'e and Kekaha Ditch Systems (including water originating in Waiakoali, Kawaikōi, Kauaikinana, and Kōke'e Streams and other tributaries of the Waimea River) for use in the Waimea, Kaua'i Hawaiian Home Lands.

On December 16, 2015, the Commission approved the staff submittal for the Delegation of Authority to the Chairperson to Hire a Mediator for the Complaint and Petition, authorized the Chairperson to enter into a mediation services contract to conduct the mediation and expend up to \$40,000, and determined that the mediation work is exempt from preparing an Environmental Assessment.

ANALYSIS/ISSUES:

The Commission staff, through information from its contracted investigator, several site visits and meetings with those named in the Petition, believe that mediation is a viable option to help address both the Waste Complaint and Petition. There are a multitude of complex and interrelated issues between the Kekaha and Kōke'e Ditch Irrigation Systems, the Mānā Plain, and the towns of Waimea and Kekaha. Those named in the Petition include Earthjustice, ADC, KAA, and Department of Hawaiian Home Lands.

HRS §174C-10 provides for dispute resolution as follows:

§174C-10 Dispute resolution. The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been

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designated as a water management area under this chapter. The final decision on any matter shall be made by the commission.

HRS §174C-11(e) provides that, "In order to facilitate dispute resolution, the commission may employ mediation methods where practicable including the use of masters."

HAR §13-167-23(d) provides for dispute resolution as follows:

§13-167-23 Dispute resolution. (a) The commission shall have jurisdiction statewide to hear any dispute regarding water resource protection, water permits, or constitutionally or otherwise legally protected water interests, or where there is insufficient water to meet competing needs for water, whether or not the area involved has been designated as a water management area under this title. The final decision on any matter shall be made by the commission.

(b) Pursuant to its authority to resolve disputes regarding water, the commission may accept for consideration and decision:

- (1) cases or controversies referred to it by a court; or
- (2) questions certified to it by a court.

(c) To resolve disputes properly before it, the commission shall have all the powers necessary and proper to effectuate its decisions and orders and grant relief consistent with law.

(d) In order to facilitate dispute resolutions, the commission may employ the use of special hearing officers or special masters for the purposes of mediation, fact finding, and/or arbitration.

At its December 16, 2015 meeting, the Commission authorized the Chairperson to enter into a mediation services contract to conduct the mediation. However, there was also discussion amongst the Commissioners that terms of reference be defined to help scope and guide the mediation process.

The Commission staff has been in contact with mediator Robert Alm of the Collaborative Leaders Network. Mr. Alm had preliminary discussions with each of the current participants in the process and drafted a Terms of Reference document (Exhibit 1) for review and approval by the Commission.

ENVIRONMENTAL REVIEW CHAPTER 343, HAWAII REVISED STATUTES

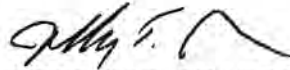
Under §343-5(a), HRS, an Environmental Assessment (EA) is not triggered by the proposed action.

RECOMMENDATION:

Staff recommends that the Commission:

1. Approve the Terms of Reference as proposed by the Mediator to initiate the mediation process to address the Complaint and Petition for Declaratory Order Against Waste filed by Po'ai Wai Ola and West Kaua'i Watershed Alliance (through Earthjustice).

Respectfully submitted,



JEFFREY T. PEARSON, P.E.
Deputy Director

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

KAUA'I MEDIATION TERMS OF REFERENCE

Objective: Finding outcomes that comport with the purposes of the State Water Code and provide for the greatest possible resolution of the various community and environmental interests involved.

Key Participants: Po'ai Wai Ola/West Kaua'i Watershed Alliance
Kekaha Agriculture Association
Agribusiness Development Corporation, State of Hawaii
Department of Hawaiian Homes Lands
Kauai Island Utility Cooperative

Other Interested Entities: County of Kaua'i
State Parks Division, DLNR
Pacific Missile Range Facility, U.S. Dept. of Defense
Kikiaola Land Company

Work Plan:

1. The mediator will secure the agreement of the Commission on Water Resource Management (CWRM) to undertake the mediation process and the scope and framework for that process.
2. The mediator will seek input from the other interested entities to determine their concerns and needs, and how best they might be addressed.
3. The mediator will meet with the parties in group and individual sessions, as appropriate, in order to share information including scientific and technical studies on the water resource and water systems involved, to clarify areas of misunderstanding, to determine what the real interests of each party are, and as much as possible to align as many interests as possible, at all times comporting with the State Water Code.
4. The following issues will be covered in the mediation based on the original complaint filed by Po'ai Wai Ola:
 - a. Waste
 - b. Interim In-Stream Flow Standards
 - c. Metering

The mediation may also include the following issues:

- d. Agricultural Uses, including DHHL pastoral leases
- e. Hydro Power Uses
- f. Recreational Uses, including game management
- g. Environmental Issues
- h. Flood Control
- i. Water System Preservation and Maintenance
- j. Hawaiian Home Lands Homestead Leases

5. The mediation will be under an initial six month time limit, subject to extension by the CWRM if progress is being made. If at any time, the mediator finds that the parties are no longer acting in good faith, he may notify the CWRM and discontinue the process.
6. The actual discussions and negotiations in the mediation, and especially offers of settlement, will be kept confidential by the parties and by the mediator. (Sections 658H-4 and 658H-7, Hawaii Revised Statutes.)
7. Any proposed settlement will be submitted by the mediator to the CWRM for approval. The mediator will answer questions about it subject to the confidentiality provisions above. CWRM may vote to accept or reject the proposed settlement only in its entirety. If rejected the settlement and its terms will remain confidential and shall not be discussed by the parties or by CWRM members or staff.

Submitted by:
Robert Alm,
Collaborative Leaders Network
Mediator