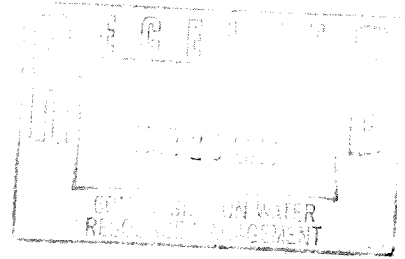


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LANDS



BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing  
on the Water Use Permit Application  
Originally Filed by Kukui (Molokai), Inc.,  
Now Refiled as a New Ground Water Use by  
Molokai Public Utilities, LLC

Case No. CCH-MO-97-01

INTERVENOR DEPARTMENT OF  
HAWAIIAN HOME LANDS' INITIAL  
BRIEF REGARDING THE POTENTIAL  
DISMISSAL OF THE CONTESTED  
CASE; CERTIFICATE OF SERVICE

Hearing

Date: April 19, 2016

Time: 1:00 p.m.

INTERVENOR DEPARTMENT OF HAWAIIAN  
HOME LANDS' INITIAL BRIEF REGARDING THE  
POTENTIAL DISMISSAL OF THE CONTESTED CASE

Pursuant to the Minute Order Regarding the Potential Dismissal of the Contested Case issued by the Commission on Water Resource Management (Commission) on March 7, 2016, the Department of Hawaiian Home Lands (DHHL) submits this initial brief.

I. Background

This contested case initially concerned an application by Kukui (Molokai), Inc. (KMI), a subsidiary of Molokai Properties Limited, for a ground water use permit for existing use of 2 million gallons per day (mgd) from Well 17 in the Kualapu‘u Aquifer System Area. DHHL, the Office of Hawaiian Affairs (OHA), and two Native Hawaiian individuals intervened and objected to KMI’s permit application on numerous grounds.

In 2001, the Commission granted KMI an existing use permit for 936,000 gallons per day and a new use permit for an additional 82,000 gallons per day. On appeal, KMI’s permits were invalidated 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) on the following grounds, among others: (1) the Commission failed to adequately scrutinize KMI’s request to divert water from Well 17; (2) the Commission erred in denying DHHL’s request to increase pumpage from its well due to concerns about whether such increased pumpage would affect chloride levels in the well field, while simultaneously approving KMI’s request for new uses where those same concerns were present; (3) the Commission impermissibly placed the burden on DHHL to prove that KMI’s requested uses would negatively impact the water quality at DHHL’s own well site; and (4) the Commission erred by considering KMI’s application as a late filing for existing uses, instead of requiring KMI to apply for a new use permit under section 174C-49, Hawaii Revised Statutes (HRS). The case was remanded to the Commission for further proceedings.

On June 30, 2014, Molokai Public Utilities, Inc. (MPU), another subsidiary of Molokai Properties Limited, filed an application for ground water use permit for new use that seeks to draw 1,026,518 gallons per day from Well 17. The Commission apparently incorporated MPU’s

permit application into this contested case, is treating it as superseding KMI's 1993 permit application, and now asks the parties for briefing on the issue of whether the KMI contested case should be dismissed.

## II. KMI Abandoned Its Application

After the Hawaii Supreme Court issued its decision in Kukui, the Commission issued an order on February 25, 2008 requiring the parties to address the scope of the issues on remand. KMI did not submit a response. Instead, MPU, Kaluakoi Water LLC, and Molokai Properties Limited (MPL), submitted responses purportedly on behalf of KMI's interest in the case.

On May 27, 2008, MPL wrote a letter to the Commission stating that "Molokai Public Utilities (MPU) does not intend to pursue this case on remand." To the extent that MPU could have assumed KMI's interest in this matter absent a formal substitution of parties, it affirmatively abandoned its permit application when it submitted its May 27, 2008 letter to the Commission. Indeed, MPU's behavior in this matter signals its belief that its recent application for ground water use permit for new uses is outside the scope of the KMI contested case. No copies of the application were served on the parties to the KMI contested case, nor did the Commission offer MPU's application to the intervenor parties until requested. MPU's new permit application (along with old permit applications by DHHL and the Maui Department of Water Supply) has been proceeding along the public comment track that is required of any new water use permit application.

Given MPU's affirmative abandonment of the Kukui remand, and its actions regarding its new permit application, the instant contested case should be terminated.

### III. The Issues Regarding KMI's Application Are No Longer Relevant

This contested case should also be terminated for the simple reason that the issues and facts surrounding KMI's 1993 application are no longer relevant to MPU's 2014 application. For example, the Commission evaluated most of KMI's application under HRS § 174C-50, the existing uses standard. This standard is relatively lax, only requiring the applicant to show that its existing uses are "reasonable and beneficial." However, the Kukui court ruled that because KMI's application was filed after the deadline for existing use applications, the Commission must evaluate any new application under more demanding standard for new uses.<sup>1</sup> This will require the Commission to determine not only that MPU's new uses are reasonable-beneficial, but also that they: (1) can be accommodated with the available water source; (2) will not interfere with any existing legal uses of water; (3) are consistent with the public interest; (4) are consistent with state and county general plans and land use designations; (5) are consistent with county land use plans and policies; and (6) will not interfere with the rights of DHHL. This undertaking will be wholly different from the one applied to the Commission's consideration of KMI's application.

Furthermore, in determining that KMI was entitled to a water use permit in 2001, the Commission made many findings of fact concerning KMI's existing and proposed uses, as well as the effects those uses would have on the Kualapu'u Aquifer. Almost twenty years have passed since KMI's application was evaluated by the Commission. The parties' understanding of the Kualapu'u Aquifer, and the effect that pumping from Well 17 has on other wells in the aquifer and the nearshore environment, will soon be greatly enhanced by the forthcoming United

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<sup>1</sup> Not only will the Commission have to evaluate MPU's application under a more exacting standard, it will have to evaluate an application that is fundamentally different from the one KMI presented. Many of the "existing" uses requested by KMI were for activities that have long since ceased, including operation of a hotel and golf course.

States Geological Survey study. This Commission should not be burdened with outdated findings of fact made at a time when the Kualapu‘u Aquifer was poorly understood. By way of illustration, the Commission issued the following finding of fact for KMI’s application:

There are springs located throughout the shoreline, and these springs create a nursery habitat of indeterminate size. It is impossible to determine what the precise effect will be if the freshwater is reduced by a certain amount, because you don't know which [part of the] springs the reduction is going to affect.

See FOF No. 149 (bracketed material in original). This finding of fact is very likely to be rendered obsolete by the USGS study on the effect of pumpage from the Kualapu‘u Aquifer on the nearshore environment. The existing record in this contested case is replete with findings of fact that will be undermined by the newer and more accurate data that USGS will be providing.<sup>2</sup>

It makes little sense for the Commission to continue with the fiction that MPU’s 2014 permit application bears sufficient resemblance to KMI’s 1993 application to be considered part of the “remand” of this matter, either in terms of the proposed uses MPU is seeking, or the effect that such uses would have on the aquifer.<sup>3</sup> The Commission and the parties (including MPU) would be much better served by starting with a new contested case

#### IV. Conclusion

Given that MPU abandoned its claims on the Kukui remand, and considering the vastly increased understanding the parties will have about the Kualapu‘u Aquifer as a result of the

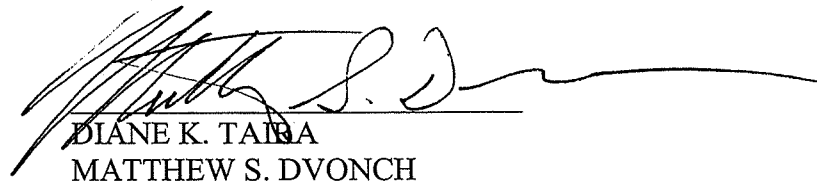
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<sup>2</sup> DHHL also anticipates that new evidence will be presented to the Commission on the role of climate change and decreased rainfall on the health of the aquifer. This new evidence will further undermine the findings of fact made by the Commission in 2001.

<sup>3</sup> It is also worth noting that allowing a substitution of parties without any valid reason is one of the bases for which KMI’s permit was voided by the Kukui court. MPU is not mentioned at all in KMI’s permit application, and the Commission should not allow it to be substituted as a party in the remand proceedings.

USGS study, this Commission should not be hamstrung by the outdated and incomplete findings of fact and conclusions of law made in 2001. Folding MPU's application into the KMI contested case proceedings would lead to confusion and an increased likelihood of mistakes that could result in further appeals. It is in the best interest of all parties, including the Commission, to start a new contested case in order to build a complete record based on the best information available today.<sup>4</sup> DHHL requests that the Commission terminate this contested case.

DATED: Honolulu, Hawai'i, March 24, 2016.



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<sup>4</sup> It is DHHL's understanding that a demand for a contested case regarding MPU's application has already been made by an individual represented by the Native Hawaiian Legal Corporation.

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CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing document was served upon the following parties by email and U.S. Mail, postage prepaid, addressed as follows:

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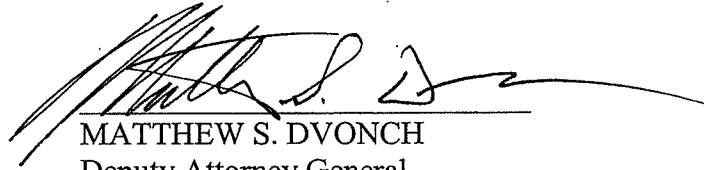
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