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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT  
OF THE STATE OF HAWAII

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 Use by  
Molokai Public Utilities, LLC

CASE NO. CHH-MO-97-01

**BRIEF OF MOLOKAI PUBLIC  
UTILITIES, LLC EXPLAINING  
WHY THE CONTESTED CASE  
SHOULD NOT BE DISMISSED**

**EXHIBIT 1 – 5**

**CERTIFICATE OF SERVICE**

HEARING:

Date: April 19, 2016

Time: 1:00 p.m.

**BRIEF OF MOLOKAI PUBLIC UTILITIES, LLC EXPLAINING  
WHY THE CONTESTED CASE SHOULD NOT BE DISMISSED**

The Commission on Water Resource Management (the “Commission”) directed the parties to submit briefs addressing whether the proceeding in *In the Matter of the Contested Case Hearing on the Water Use Permit Application*, Case No. CHH-MO-97-0 (the “Contested Case”) should be dismissed or continued. The Hawai‘i Supreme Court previously answered that question when it remanded the Contested Case for further proceedings on a new use application to be filed by the applicant or

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its successor. In these further proceedings, the heart of which is the application filed by Molokai Public Utilities, LLC (“MPU”), the Commission has the benefit of the extensive record developed in the Contested Case and the dozens of findings and conclusions that the court did not disturb on appeal. In accordance with the court’s express direction, the Commission’s practice in this matter and in other proceedings and the interests of efficiency, the Contested Case should continue.

## I. BACKGROUND

In its ruling on appeal from the Commission’s Findings of Fact, Conclusions of Law and Decision and Order in the Contested Case (“**Final Decision and Order**”), the court “vacate[d] the Commission’s final decision and order filed on December 19, 2001, and remand[ed] for further proceeding consistent with this opinion.” *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc.*, 116 Hawai’i 481, 350, 174 P.3d, 320, 349 (2007). An order vacating and remanding does not end the litigation or result in the dismissal of the case. On the contrary, “the phrase ‘vacate and remand’ indicates the litigation continues in the court or agency in accordance with the appellate court’s instruction.” Haw. R. App. P. 35(e). Thus, in using the phrase “vacate and remand,” the court expressly directed the Commission to continue the Contested Case proceeding.

The court also discussed the process for the Contested Case on remand. Recall that the court held it was error for the Commission to consider Kukui (Molokai), Inc.’s (“KMI”) application as a “request for existing uses.” *In re Contested Case Hearing*, 116 Hawai’i at 501, 174 P.3d at 340 (2007). According to the court, the application should have been treated as a request for new uses. *Id.* Consistent with

this holding, the court instructed that “[i]f, on remand, KMI wishes to ‘revive’ these expired uses, it must apply for a permit under HRS § 174C-51 as the uses are now presumed abandoned.” *Id.*

In accordance with the court’s instruction, MPU, as the successor in interest to KMI, submitted its application under HRS § 174C-51. The Commission accepted the application as complete on October 12, 2015.

After accepting the application, the Commission notified the parties and the public as follows:

This application responds to the Supreme Court’s remand of the December 2007 Commission Decision & Order for further proceedings, requiring a new application to be filed for “new use” under HRS §174-49(a), Hawaii Water Code to “revive existing uses” as of the date of designation considered abandoned by untimely application submission. **This case will continue as a contested case hearing**, and parties previously involved in the contested case hearing culmination in the December 19, 2001 Decision & Order shall respond in writing of their intention to continue in the case or to withdraw.

Exhibit 1 (Public Notice) (emphasis added).

This notice is consistent with the Commission’s treatment of the Case following remand. Indeed, all of the Commission’s actions on remand have recognized that the Contested Case proceeding continues. *See, e.g.*, Exhibit 2 Minute Order re Status Conference (“During the course of the status conference the parties discussed . . . the hearing on remand on Molokai Properties’ Application for a Water Use Permit, as it may be amended, and the scope of the hearing on remand.”).

## II. ARGUMENT

Certain parties have lately concluded that they would be better served by having the Commission dismiss the Contested Case.<sup>1</sup> Their position is flawed for the following reasons.

First, dismissing the Contested Case would violate the court's express direction to continue the proceeding on remand. The Commission cannot disregard the court's order.

Second, dismissing the Contested Case would result in an immediately appealable order under HRS § 91-14. Piecemeal appeals will only complicate and delay a final resolution.

Third, dismissing the Contested Case would be inconsistent with the Commission's handling of the Contested Case to date, including the express notice to the parties and the public.

Fourth, dismissing the Contested Case would be inconsistent with the Commission's handling of other proceedings. On this point, particularly instructive

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<sup>1</sup> Although the parties have always disputed the scope of the proceedings on remand, no party previously called for the dismissal of the entire Contested Case. *See, e.g.*, Exhibit 3 (Intervenors' Joint Status Conference Statement, filed February 29, 2008) at 6 (explaining Intervenors' view of what the "the successors to KMI" would need to show to "meet its burden on remand"); Exhibit 4 (Intervenors' Joint Memorandum Regarding Scope of Hearing on Remand, filed May 2, 2008) (discussing scope of proceedings). Indeed, even when operations were previously suspended, Intervenors sought only *partial* dismissal of the application "to the extent that it requests water uses to support [applicant's] discontinued commercial operations." Exhibit 5 (Intervenors' Joint Motion to Partially Dismiss Molokai Properties' Petition for Water Use, filed May 2, 2008) at 4. Intervenors never sought to dismiss the application "for reasonable and beneficial uses for existing domestic purposes." *Id.* No action was taken on the motion for partial dismissal, and the Contested Case continued before the Commission. MPU has now proceeded with a new application, as the court directed. Accordingly, the motion to dismiss is moot.

are the procedures following the remands in *In the Matter of Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing* (“*Waiāhole*”), Case No. CCH-OA95-1. In *In re Water Use Permit Applications*, 94 Hawai‘i 97, 9 P.3d 409 (2000) (“*Waiāhole I*”), the Hawai‘i Supreme Court affirmed in part and vacated in part the Commission’s decision and remanded for further proceedings. 94 Hawai‘i at 111, 9 P.3d at 423. On remand, the Commission did not dismiss the contested case. Rather, the Commission reviewed the record of the first hearing, including all aspects of the decision that had been affirmed, and held additional hearings. Legal Framework, Findings of Fact, and Decision and Order of 12/28/01 (“*D&O II*”); *see also* Findings of Fact, Conclusions of Law, and Decision and Order of 7/13/06 (“*D&O III*”) (describing the Commission’s use of the same procedure following the court’s second remand and noting that there was “sufficient evidence in the existing record” to address several issues identified by the court).

In this continued contested case, there were changes to the applicants’ identities and uses. On subsequent appeal, the court affirmed the procedures followed by the Commission. For instance, the transfer and modification of a water use permit after the close of the initial contested case hearing was “properly put before the *Waiāhole I* remanded case hearing.” *In re Water Use Permit Applications*, 105 Hawai‘i 1, 7, 93 P.3d 643, 649 (2004) (“*Waiāhole II*”) (affirming the Commission’s determination that the transfer complied with the Water Code). Similarly, the

Commission correctly weighed the merits of the application of a ditch operator, which by the time of the remanded hearing had been replaced by a successor in interest, against the standards set forth in HRS § 174C-49(a). *See* D&O II, at 131–32; *Waiāhole I*, 94 Hawai‘i at 173, 9 P.3d at 485 (remanding to consider the allocation of water for system losses as the Commission would consider any other proposed use); *Waiāhole II*, 105 Haw. at 26, 93 P.3d at 668 (remanding for further findings and provisions regarding the application of HRS § 174C-49(a)). It was also appropriate to consider as part of the remanded hearing various revisions and changes to the applicants’ uses. This was true even for certain water use permits that had not been remanded. The applications for these permits continued as part of the contested case based on modified requests and the evidence introduced in the remanded hearing. D&O II, at 124 n.142; *id.* at 137 n.47; *Waiāhole II*, 105 Hawai‘i at 27, 93 P.3d at 669 (leaving these determinations undisturbed on appeal).

Finally, dismissing the Contested Case would deprive the Commission of the extensive record that has already been developed and thereby require relitigation dozens of findings and conclusions that were made in the Final Decision and Order and left undisturbed on appeal. This matter has been ongoing for more than 20 years and has already consumed substantial public and private resources. It is not in the interest of the Commission or the public to relitigate facts and issues that were not reversed on appeal.

### III. SCOPE OF THE CONTESTED CASE

The Commission also directed the parties to discuss “what issues should be part of this [C]ontested [C]ase if the [C]ontested [C]ase is continued.” All parties

previously agreed that MPU bears the burden of meeting the criteria for obtaining a water use permit for new uses as set forth in HRS § 174C-49(a). The Contested Case will decide those issues. To the extent the Commission has already issued findings and conclusions relevant to the considerations under section 174C-49(a), those findings and conclusions should be incorporated, as supplemented by any relevant new evidence.

#### IV. CONCLUSION

The Contested Case should continue. Although some parties perceive a tactical advantage in dismissing the Contested Case, acting on their suggestion would plunge the Commission into reversible error, delay the resolution of this matter and increase the public and private costs. The Commission had it right when it expressly informed the parties and the public that court had remanded the Final Decision and Order for further proceedings, that the court had required a new application to be filed for “new use” under HRS § 174-49(a) and that the Case will continue as a contested case hearing.

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

CADES SCHUTTE  
A Limited Liability Law Partnership



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DAVID SCHULMEISTER  
CALVERT G. CHIPCHASE  
TERI-ANN E.S. NAGATA  
Attorneys for Molokai Public Utilities, LLC

## PUBLIC NOTICE

### Application for Water Use Permit Kualapuu Ground Water Management Area, Molokai

The following application for water use permit has been received by the Commission on Water Resource Management and is hereby made public in accordance with Section 13-171, Hawaii Administrative Rules, "Designation and Regulation of Water Management Areas."

WUPA No. 00973      Well 17 (Well No. 4-0901-001)

Applicant:                      Molokai Public Utilities, Inc.  
                                        Attention: Mr. Clay Rumbaoa  
                                        1003 Bishop Street Suite 1170  
                                        Honolulu, HI 96813

Well Landowner:              Molokai Properties Ltd.  
                                        Attention: Mr. Clay Rumbaoa  
                                        Molokai Properties Ltd.  
                                        1003 Bishop Street, Suite 1170  
                                        Honolulu, HI 96813

Date Application Filed as Complete: October 12, 2015

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

Quantity Requested: 1.026 million gallons per day

New Use: MPU Private Public Water System

Place of Water Use: At Tax Map Key: (2) 5-1-003 to 008:various; (2) 5-2-028 to 029:various

**This application responds to the Supreme Court's remand of the December 2007 Commission Decision & Order for further proceedings, requiring a new application to be filed for "new use" under HRS §174-49(a), Hawaii Water Code to "revive existing uses" as of the date of designation considered abandoned by untimely application submission. This case will continue as a contested case hearing, and parties previously involved in the contested case hearing culmination in the December 19, 2001 Decision & Order shall respond in writing of their intention to continue in the case or to withdraw. Intervenors already admitted to the case in its previous proceedings do not need to file objections in order to continue their participation. New parties wishing to intervene should file their objections as indicated below.**

Written objections or comments on the above application may be filed by any person who has property interest in any land within the hydrologic unit of the source of water supply, any person who will be directly and immediately affected by the proposed water use, or any other interested person. Written objections shall: (1) state property or other interest in the matter (provide TMK information); (2) set forth questions of procedure, fact, law, or policy, to which objections are taken; and (3) state all grounds for objections to the proposed permit. Written objections must be received by November 13, 2015. Objections must be sent to 1) the Commission on Water Resource Management, P.O. Box 621, Honolulu, Hawaii 96809 and 2) the applicant at the above address.

COMMISSION ON WATER RESOURCE MANAGEMENT



JEFFREY T. PEARSON, P.E., Deputy Director for  
SUZANNE D. CASE, Chairperson

Dated: October 15, 2015

Publish in: The Maui News issues of October 23 & 30, 2015



COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing ) Case No. CCH-MO-97-1  
on the Water Use Permit Application Filed by )  
Kukui (Molokai), Inc., ) MINUTE ORDER RE: STATUS  
 ) CONFERENCE; CERTIFICATE OF  
 ) SERVICE  
 )  
\_\_\_\_\_ )

**MINUTE ORDER RE: STATUS CONFERENCE**

On March 3, 2008, a Status Conference was held in the Board of Land and Natural Resources' Conference Room. The Status Conference was attended by the Presiding Officer, Laura H. Thielen, via telephone; Linda Chow, Deputy Attorney General; Ken Kawahara, Deputy Director of the Commission on Water Resource Management; Kris Nakagawa, Esq. and Sandra Wilhide, Esq. representing the Applicants Molokai Public Utilities, Inc., Kaluakoi Water, LLC, and Molokai Properties Limited (hereinafter collectively referred to as "Molokai Properties")<sup>1</sup>; Alan Murakami, Esq. and Camille Kalama, Esq. representing Intervenors Judy Caparida and Georgina Kuahuia; Jon Van Dyke, Esq. representing Intervenor Office of Hawaiian Affairs; and Clayton L. Crowell, Esq. representing Intervenor Department of Hawaiian Home Lands (hereinafter collectively referred to as "Intervenors").

During the course of the status conference the parties discussed the procedure to address the Motion to Continue Water Withdrawals filed by Molokai Properties and the hearing on remand on Molokai Properties' Application for a Water Use Permit, as it may be amended, and the scope of the hearing on remand. Based on the oral and written statements presented by the parties and the discussion during the status conference, the following schedule and procedure

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<sup>1</sup> The Applicants are also required to file a separate pleading setting forth who is the successor in interest to the permittee, Kukui (Molokai), Inc. that will be the applicant on the amended permit application.

shall be applicable in this matter:

**A. Motion to Continue Water Withdrawals**

1. Applicant Molokai Properties will file a supplemental memorandum to its Motion to Continue Water Withdrawals which should address, at a minimum, the issues of water usage, including information regarding the current users of the water, the quantities currently being used, and whether waste is occurring, and its compliance with the eight (8) permit conditions previously imposed by the Commission on Water Resource Management ("Commission") on Applicant's predecessor in interest. Molokai Properties' supplemental memorandum shall be due no later than **Monday, June 2, 2008**.

2. Intervenor shall file a response to the Motion to Continue Water Withdrawals and supplemental memorandum by no later than **Thursday, July 17, 2008**.

3. No reply memorandum will be allowed at this time. In the event Molokai Properties deems it necessary to file a reply memorandum, it may file an ex parte motion requesting leave to file a reply memorandum within five days of the filing of Intervenor's response. The Intervenor shall have five days to file a response to the motion.

4. Oral argument on the Motion to Continue Water Withdrawals may be set by the Commission upon further order.

**B. Scope of the Hearing on Remand**

1. Intervenor shall file memoranda regarding their respective position on the scope of the hearing on remand. Intervenor should not discuss the criteria for issuance of a water use permit under §174C-49, Hawaii Revised Statutes (HRS) as it is assumed that the scope of the

hearing will include those issues.

The Intervenor's memoranda should address, at a minimum, the issues raised in their Status Conference Statement including the relation of the permit application to the water transportation and delivery system (the Molokai Irrigation System or "MIS"), whether an environmental assessment pursuant to chapter 343, HRS, is required for the continued use of the MIS prior to holding the hearing on remand, and whether surface water permits must also be considered and issued in connection with the issuance of any ground water permit for water taken from Well #17. Intervenor's memorandum shall be due no later than **Friday, May 2, 2008**.

2. Applicants Molokai Properties shall file a response to Intervenor's memoranda regarding the scope of the hearing on remand no later than **Monday, June 16, 2008**.

3. No reply memorandum will be allowed at this time. In the event Intervenor's deem it necessary to file a reply memorandum, it may file an ex parte motion requesting leave to file a reply memorandum within five days of the filing of Molokai Properties' response. Molokai Properties shall have five days to file a response to the motion.

4. Oral argument on the Motion to Continue Water Withdrawals may be set by the Commission upon further order.

**C.\* Motion to Substitute Intervenor's**

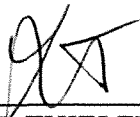
If Intervenor's would like to pursue their request to add or substitute parties in the remand hearing, they will be required to file a separate motion and memorandum on this issue. This motion and memorandum will be at the same time as their memorandum regarding the scope of the hearing, **Friday, May 2, 2008**. Any response or opposition to this motion will be due no

later than **Monday, June 16, 2008**. Reply memoranda will be by leave of the Commission according to the procedure set forth above.

**D.     Hearing on Remand**

The procedure regarding the further hearings on remand shall be decided pursuant to a further status conference once the above issues have been addressed by the Commission.

SO ORDERED this 16 day of March, 2008.

  
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LAURA H. THIELEN  
Presiding Officer

COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing	)	Case No. CCH-MO-97-1
on the Water Use Permit Application Filed by	)	
Kukui (Molokai), Inc.,	)	CERTIFICATE OF SERVICE
	)	
	)	
	)	

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and accurate copy of the foregoing document was duly served upon the following parties by U.S. First-class mail:

**ALAN MURAKAMI, ESQ.**  
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DATED: Honolulu, Hawaii, March 10, 2008.

Kathleen Oshiro

KATHLEEN OSHIRO

Secretary

Commission on Water Resource Management

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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing	) CCH-MO 97-1
on the Water Use Permit Application Filed	)
by Kukui (Molokai), Inc.	) INTERVENORS DEPARTMENT OF
	) HAWAIIAN HOME LANDS, THE
	) OFFICE OF HAWAIIAN AFFAIRS, AND
	) INDIVIDUAL INTERVENORS
	) CAPARIDA AND KUAHUIA'S JOINT
	) STATUS CONFERENCE STATEMENT;
	) CERTIFICATE OF SERVICE

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INTERVENORS DEPARTMENT OF HAWAIIAN HOME LANDS, THE OFFICE OF  
HAWAIIAN AFFAIRS, AND INDIVIDUAL INTERVENORS CAPARIDA AND  
KUAHUIA'S JOINT STATUS CONFERENCE STATEMENT

CERTIFICATE OF SERVICE

**INTERVENORS DEPARTMENT OF HAWAIIAN HOME LANDS, THE OFFICE OF  
HAWAIIAN AFFAIRS, AND INDIVIDUAL INTERVENORS CAPARIDA AND  
KUAHUIA'S JOINT STATUS CONFERENCE STATEMENT**

Pursuant to the Minute Order of the Commission on Water Resource Management ("Commission" or "CWRM"), dated February 25, 2008, the Department of Hawaiian Home Lands ("DHHL"), the Office of Hawaiian Affairs ("OHA"), and Individual Native Hawaiian Intervenors Caparida and Kuahuia's hereby submit their position regarding the scope of this case on remand from the Hawai'i Supreme Court:

The Supreme Court's decision vacated the Commission's Decision and Order to the extent that it granted Kukui (Molokai), Inc. (KMI), a permit for existing uses. KMI, or its successors, or any other party that seeks to apply for a permit for the disputed water must now apply for a "new use" rather than an "existing use," and must comply with the requirements of HRS sec. 174C-49, as described below.

The Supreme Court decision also reaffirmed and clarified a number of principles that the Commission must consider in discharging its public trust obligations on remand, including:

- The public trust doctrine is a fundamental principle of constitutional law in Hawaii.
- The public trust doctrine effectively prescribes a higher level of scrutiny for private commercial uses and the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust.
- Public trust purposes include the protection of waters in their natural state, domestic uses particularly for drinking water purposes, and the exercise of Native Hawaiian traditional and customary rights.
- Actions that impact on water reservations allocated to DHHL can be made only with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.

**Issues to Be Addressed on Remand**

Given the Supreme Court's ruling that KMI's permit application was untimely, the entire process of seeking a water permit must begin anew on remand. This time, however, the applicant will have to apply for a new use pursuant to HRS sec. 174C-49 rather than an existing



use, and thus will not have the benefit of the presumptions that favor claims for existing uses. The successors to KMI (who are apparently Molokai Public Utilities, Inc, Kaluakoi Water LLC, and Molokai Properties Limited) must therefore on remand establish that its proposed use of water:

- (1) Can be accommodated with the available water source;
- (2) Is a reasonable-beneficial use as defined in section 174C-3;
- (3) Will not interfere with any existing legal use of water;
- (4) Is consistent with the public interest;
- (5) Is consistent with state and county general plans and land use designations;
- (6) Is consistent with county land use plans and policies; and
- (7) Will not interfere with the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act.

In establishing the above criteria, the Commission must ensure that KMI carries its burden of proving that its claimed water allocation does not:

- (1) Interfere with the water needs of DHHL and that its uses of the water are reasonable and beneficial in light of the potential impact on the water needs of DHHL,
- (2) Negatively impact the exercise of Native Hawaiian customary and traditional rights,  
or
- (3) Arbitrarily ignore major changes in actual water uses, like the closure of the resort hotel, of which the Court was especially critical.

Furthermore, after the close of evidentiary hearings on this matter, the Hawai'i Supreme Court issued its decision in *In Re Water Use Permits*, 94 Haw. 97,173, 9 P.3d 409, 485 (2000) (*Waiahole I*) (holding that the designation of Windward Oahu as a ground water management

area subjects both ground and surface water diversions from the designated area to the statutory permit requirement). Hence, given the designation of Moloka'i as a water management area and the interrelationship between surface and ground water on Molokai, it would appear that any surface water diversion by Molokai Properties, Limited ("MPL") / Kaluakoi Water LLC ("KWLLC") would similarly be subject to a water use permit requirement. The clearest indication of the interrelationship between ground and surface water is the common reservoir at Pu'u Nana, where both Well #17 ground water and mountain source surface water is combined for later distribution to MPL's end users in both Maunaloa and Kaluakoi.

On September 4, 2007, the state attorney general's office issued an opinion letter stating that the renewal of a lease of space within the Moloka'i Irrigation System (MIS) must be preceded by the preparation of an adequate environmental assessment pursuant to HRS chapter 343. It may become appropriate to wait for the completion of this assessment before determining whether any permits for new water uses should be issued.

At the time that a renewed contested case is held to rule on any application for a new water use, such a contested case hearing, according to the Supreme Court's ruling, should consider the following issues:

- Whether the disparate treatment of the DHHL (0.21 mgd) and KMI's (82,000 g/day) requests to divert additional water from the Kualapu'u Aquifer is reasonable in light of its own staff's recommendation that KMI's well is contributing to the concentrated pumpage that provided the basis to deny DHHL's application and increased chloride readings in the DHHL wells?
- Whether KMI's successor can meet its legal burden of proving that the absence of other practicable alternatives to the water it has sought from the Kualapu'u Aquifer, a requirement that is intrinsic to the public trust?
- Whether (and how) the Commission determined that KMI's existing and proposed uses were reasonable-beneficial in spite of the potential increase in chloride concentration at the DHHL wells (i.e., clarification of COL #51)?
- Whether KMI's successor can meet its legal burden of proving that its actual water uses are reasonable and beneficial, taking into consideration the impact of the

closure of the resort-hotel (which remains closed) and the golf course (which has subsequently reopened)?

- Whether the Commission must simultaneously consider all uses of the surface water diversions of KMI's successor as part of the water use permit application in this proceeding, pursuant to the holding in *Waiahole I*, 94 Haw. at 173, 9 P.3d at 485.
- Whether the Commission must simultaneously consider the brackish water pumping of the Kakalahale well by KMI's successor to support its properties on the West End of Moloka'i as part of the water use permit application in this proceeding.
- Whether KMI's successor can meet its legal burden of demonstrating that the cumulative impact of existing and proposed diversions on trust purposes is subject to reasonable measures to mitigate any impact.
- Whether KMI's successor can meet its legal burden of demonstrating the absence of practicable mitigating measures, including the use of alternative water sources to the water it is seeking from the Kualapu'u Aquifer, including, but not limited to, desalination.

#### **MPL's Motion to Continue Water Withdrawals**

On January 2, 2008, the attorneys for Molokai Public Utilities, Inc, Kaluakoi Water LLC, and Molokai Properties Limited filed a motion with the Commission on Water Resource Management seeking permission to continue withdrawing water from the Kualapu'u Aquifer System through Well 17 (Well No. 0901-01), notwithstanding that the Hawaii Supreme Court vacated the water use permit that authorized such withdrawals. In their accompanying memo, these movants say that the uses for which they needed water included (without any details regarding the amounts needed) among other things, domestic (drinking water) and irrigation uses for the Kaluakoi Hotel, condominiums and other residences in Kaluakoi and Kualapu'u Town, a golf course, and a beach park. This listing is inconsistent with the Court's decision strong criticism of the Water Commission for failing to take note of the closure of the Hotel.

After this motion was filed, attorneys for DHHL, OHA, and the individual Native Hawaiians (collectively "Intervenors") determined that they needed details regarding the specific

current usage and allocation of water by the movants before they could properly respond to their motion. Intervenor recognizes that, in the interim, some accommodation is needed to respect existing domestic uses, so that no resident relying on water is denied a reasonable amount of use. Accordingly, Intervenor requested that the attorneys for the movants informally provide relevant information on all the proposed uses contemplated in the motion. However, thus far they have failed to provide the requested information regarding their water usage, and *decline to say whether or when they can provide the information*, supposedly because of the lack of metering and uncertainty of records. This position is entirely unacceptable. If this information cannot be obtained informally, DHHL, OHA, and the individual Native Hawaiian intervenors would respectfully request that the Commission compel movants to provide this information. Otherwise, Intervenor will have no way to rationally prepare its position on the reasonableness of the requested authority to release water, even for domestic uses. Intervenor will ask that this requested discovery be mandated BEFORE any deadline to respond is set by the Commission on the pending motion.

### Schedule

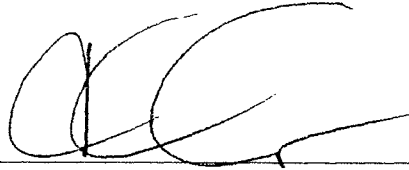
For the successors to KMI to properly meet its burden on remand, the Commission should require them to submit its proposal for water allocation and any and all related written expert reports establishing that the allocation is reasonable and beneficial. Intervenor should then be given sufficient time and opportunity to absorb and respond to KMI's proposal and reports. The opportunities for replies and surrebuttal should also be allowed. A schedule for these submissions and the hearings could be:

- March 1 – 31 – discovery of KWLLC's actual uses of water by intervenors
- April 15 – KWLLC's production of documents and responses to discovery requests
- May 15, 2008 - Presentation of written testimonies and exhibits by KWLLC
- Within 60 days - Submittal of responsive testimony and exhibits by Intervenor
- Within 30 days – Submittal of reply testimony and exhibits by KWLLC
- Within 30 days – Submittal of surrebuttal testimony and exhibits by Intervenor
- Hearings: mid to late October

**The Name of Applicant and Proceeding**

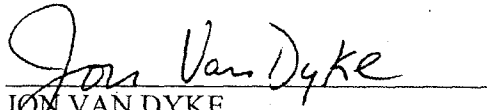
One final issue is whether the name of this matter should be changed, in light of the apparent fact that the business entity Kukui (Molokai), Inc. seems no longer to be involved. On February 20, 2002, Kaluakoi Land LLC moved the Hawai'i Supreme Court to substitute that entity for KMI. None of the Intervenors received any order granting that motion. On the other hand, Molokai Public Utilities, Inc, Kaluakoi Water LLC, and Molokai Properties Limited filed the most recent motion to continue water uses. The Applicant should clearly designate who is the formal applicant in this proceeding.

DATED: Honolulu, Hawaii, February 29, 2008.



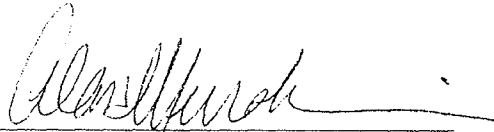
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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the	)	CCH-MO 97-1
Contested Case Hearing on the	)	
Water Use Permit Application	)	CERTIFICATE OF SERVICE
Filed by Kukui (Molokai), Inc.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties by electronic (e-mail) transmittal and U.S. Mail, postage prepaid, to their last known address:

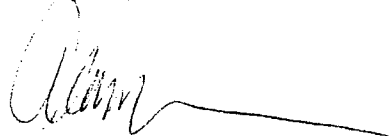
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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing	) CCH-MO 97-1
on the Water Use Permit Application Filed	)
by Kukui (Molokai), Inc.	) INTERVENORS DEPARTMENT OF
	) HAWAIIAN HOME LANDS, THE
	) OFFICE OF HAWAIIAN AFFAIRS, AND
	) INDIVIDUAL INTERVENORS
	) CAPARIDA AND KUAHUIA'S JOINT;
	) MEMORANDUM REGARDING SCOPE
	) OF HEARING ON REMAND;
	) CERTIFICATE OF SERVICE
	)

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**INTERVENORS DEPARTMENT OF HAWAIIAN HOME LANDS, THE OFFICE OF  
HAWAIIAN AFFAIRS, AND INDIVIDUAL INTERVENORS CAPARIDA AND  
KUAHUIA'S MEMORANDUM REGARDING SCOPE OF HEARING ON REMAND**

RECEIVED

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COMMISSION ON WATER  
RESOURCE MANAGEMENT

Pursuant to the Minute Order of the Commission on Water Resource Management (“Commission” or “CWRM”), dated March 10, 2008, the Department of Hawaiian Home Lands (“DHHL”), the Office of Hawaiian Affairs (“OHA”), and Individual Native Hawaiian Intervenor Caparida and Kuahuia’s hereby submit their position regarding the scope of this case on remand from the Hawai’i Supreme Court with respect to the following issues: (1) whether an environmental assessment is required prior to holding a hearing on remand for continued use of the Molokai Irrigation System and (2) whether a surface water permit must also be considered and issued in connection with any ground water permit for water taken from Well #17.

Molokai Public Utilities, Inc. (MPUI), Kaluakoi Water LLC (KWLLC), and Molokai Properties Limited (MPL) (collectively, Movants) in their permit application for new water uses and in their Motion to Continue Water Withdrawals Pending Remand Proceedings, filed January 2, 2008, seek permission to withdraw water from the Kualapu’u Aquifer System through Well #17.<sup>1</sup> Movants obtain water from two main sources: Well #17 in the Kualapu’u System, which uses the Moloka’i Irrigation System (MIS) to transport water to the West end of the island; and the Molokai Ranch Mountain Water System which uses a parallel but separate water line to transport water from Central Moloka’i to MPL’s properties on the West End. Water from both sources is combined in MPL’s reservoir at Pu’u Nana for distribution to its end users.

Since the status conference held on this matter on March 3, 2008, Applicant Molokai Properties Limited (MPL) has announced the closure of its Moloka’i operations. See, Molokai Properties, Ltd. Press Release dated March 24, 2008, attached as Exhibit “A”. Given the criticism by the Hawai’i Supreme Court of the failure of the CWRM to consider the impact on water use following the closure of the Kaluakoi Hotel, it is incumbent on the Commission to address now the impacts of the closure of MPL’s entire operations on Moloka’i on its proposed and existing water uses.

Currently, Movants have no permits to withdraw water from either water source. The Molokai Ranch Mountain Water System has diverted water from five to seven stream sources in Central Moloka’i for the past century without any permits, and these waters have been used to

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<sup>1</sup> On March 24, 2008, Molokai Properties Limited issued a press statement indicating that its commercial operations would be closing. Such closures may affect whether MPL continues to require Well #17 water for any use above and beyond reasonable domestic use and/or whether the withdrawals from the Mountain Surface Water System will be used exclusively to meet those needs. Intervenor is filing this memorandum in accordance with the briefing schedule, but, in light of the change in Movants’ business activities, are also filing a Motion to Dismiss Movants’ motion to continue their water usage.



supplement flow into the MIS, especially when Well #17 was down. Movants' water use permits that authorized withdrawals from Well #17 were vacated by the Hawai'i Supreme Court when it remanded this case to the Commission on Water Resources Management. In addition, Movants' historic lease of the MIS has expired and their continued use of the MIS to transport Well #17 water is unauthorized. Given these circumstances, Intervenor request that: (1) remand proceedings be deferred unless and until either the Department of Agriculture or Movants prepare an environmental assessment of the proposed lease space in the MIS; (2) any interim domestic water use prior to the preparation of an environmental assessment and/or an environmental impact statement related to the use of the MIS pursuant to HRS chapter 343 be strictly limited to what Applicant can demonstrate is reasonable beneficial; and (3) that the scope of the current remand proceedings include consideration and issuance of surface water permits for mountain water diversions in addition to groundwater diversions.

#### **I. HRS Chapter 343 Applies to Movant's Use of the MIS**

Movants' application for continued withdrawal of Well #17 water and their application for a groundwater permit is premature given the expiration of their lease of the MIS. Before Movants can obtain a new lease, an environmental assessment must be performed in accordance with HRS Chapter 343. The Deputy Attorney General for the Dept. of Agriculture issued an opinion stating that an environmental assessment pursuant to HRS chapter 343 is required prior to renegotiation of any lease with MPL for use of space in the state-owned MIS. *See* Letter of Myra Kaichi to Alan Murakami dated 9/7/07, attached as Exhibit "A." In this Opinion Letter, Ms. Kaichi explains that until the assessment is completed, MPL should be off the MIS and that her office "will be assisting the HDOA in getting Molokai Properties off the system as quickly as possible, until all environmental effects, if any, are sufficiently and properly addressed."

Hence, because Movants do not have a legally authorized means of transporting Well #17 water to water users in West Moloka'i, its motion and application for use of Well #17 should not be considered until such authorization is obtained. Because of the requirements for HRS chapter 343 review, it would be inappropriate for a sister agency of the state to proceed with active processing of a state water use permit, while mandated preliminary environmental reviews are still pending. Therefore, the CWRM should be deferring action on the proposed water use

permit just as the Department of Agriculture has deferred on further renegotiations involving the lease of space within the MIS by MPL.

**A. Background of the MIS**

The Molokai Irrigation System (MIS) was built primarily to service the Hawaiian homesteaders of Ho`olehua. As a result of the arrangement made to finance the project, the homesteaders enjoy a 2/3 preference to the water delivered by that system. Nevertheless, in recent years, the homesteaders have been in direct conflict and competition with Molokai Properties, Ltd. and its Kaluakoi Water LLC subsidiary, which is in charge of delivering water for MPL's end uses in Maunaloa and Kaluakoi. A crucial part of that water delivery system is its historic lease, now expired, of the MIS, in order to transmit its major domestic water source to these end uses.

Hawaiian homesteaders have a long history of involvement with the establishment of the Moloka'i Irrigation System (MIS). The very existence of the MIS is integrally related with the homesteaders. In 1921, the U.S. Congress passed the Hawaiian Homes Commission Act to set aside approximately 200,000 acres of ceded lands in the then-Territory of Hawai'i for the rehabilitation of the native Hawaiian population, by making available homestead tracts to eligible native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat 108. In Section 221(c) of the original version of the HHCA, Congress authorized the Department of Hawaiian Home Lands "to use, free of all charge, government-owned water not covered by any water license."

In May 1943, the territorial legislature passed Act 227 to establish a Molokai Water Board, initially the Hawaiian Homes Commission, to address the domestic and agricultural water needs of Moloka'i homesteaders. The Act gave homestead farmers preference to obtain water needed for agriculture before any other person or persons.

In June 1953, the legislature passed Act 245, establishing the Hawaii Irrigation Authority (HIA). The HIA assumed the functions of the HHC in dealing with the Molokai Water Board. Thereafter, in 1955, Congress authorized the construction of irrigation projects on Hawaiian Home Lands. For Moloka'i homestead lands, it enacted Joint Resolution 17 which amended HHCA Section 221(d) by clarifying the relationship between federal funding for irrigation on Moloka'i and the priorities to water of the Hawaiian homesteaders.

In that same year, under Act 164, the Territorial Legislature amended Chapter 317 of the Revised Laws of Hawaii 1945, giving the HHC and homestead lessees priority rights to two-

thirds of the water developed for irrigation and water utilization by the tunnel development extending to Waikolu Valley and ground water developed west of Waikolu Valley, upon actual need shown to the Authority. The Agriculture Standing Committee Report No. 469 stated that "the intent of the original Molokai irrigation and water utilization project was to develop and furnish all the water to lessees of Hawaiian Homes Commission lands." The report further stated that the purpose of the two-thirds allocation was "to reduce acreage assessments and to make it feasible as a self-sustaining project." The Senate Agriculture Standing Committee Report No. 466 explained that Section 221(d) had to be amended in order to allow for changes to be made or water supplied by a costly irrigation system, if built, stating that "[p]lans for the construction of any irrigation and water utilization project on Moloka'i, primarily serving the land of the Hawaiian homes commission have been under consideration for many years." With congressional approval, the above proposed amendments to Sections 220 and 221(d) became Act 399 on August 1, 1956. Subsequent legislatures never repealed or altered this grant of priority to two-thirds of this water transmitted in the MIS, even as changes to the administration of the system occurred. Thus, the Legislature originally intended to construct the MIS for Hawaiian homesteader farmers but amended it to enhance its practicality for both homestead and non-homestead farmers in the same service area.

On April 7, 1957, the Hawaii Irrigation Authority (HIA) was "renamed" the Hawaii Water Authority (HWA), expanding its responsibilities to include the study and inventory of all water resources. Congress, in transferring primary responsibility for the continuation of the operations of the homesteading program under the Hawai'i Admission Act of 1959, required the new State of Hawai'i to accept, as a condition of statehood, a compact to assume daily responsibility for the administration of the Hawaiian Homes Commission Act for the benefit of native Hawaiians. Pub. L. No. 86-3, § 5(b), 73 Stat. 4. The State of Hawai'i, in order to assure that the spirit of the HHCA was faithfully carried out, accepted the compact specifically as a provision within its new state constitution. Hawai'i Const. art. XII sec. 2 (1978).

In July 1961, Chapter 86 of RLH 1955 was amended to have DLNR administer the Molokai Irrigation and Water Utilization Project. The Legislature included this preference clause in this chapter. In the 1960's, federal funds under the Small Projects Reclamation Act were available for the construction of an irrigation project on Moloka'i to serve HHC Lessees. However, the Department of Interior (DOI) required that there had to be more "users" of the

proposed project than the homestead lessees in order for the project to be eligible for the Small Reclamation Projects Act money. Accordingly, state officials proposed a Molokai Small Farm Project to supplement the anticipated homestead lessee water users, by promoting the development of individual family farms raising truck crops to be irrigated and sold for the winter market on the West Coast.

In order to add more users to the proposed irrigation project, and to meet federal funding requirements, the State proposed exchanging state land in Waimanalo on Oahu for agricultural lands on Moloka'i in the designated service area of the irrigation project. The State appropriated \$1 million for the construction of the MIS Project contingent on the land exchange, so as to assure the securing of the federal money. To implement this plan, the State approved the exchange of 1,050 acres of land at Pala'au, Molokai (south of the Ho'olehua airport) for 243 acres of land of equivalent value at Waianae, Oahu. Ultimately, the initial design to serve the homestead farmers had to be supplemented with service to additional private farmers needed to secure federal funding to construct the system. However, the primary benefit of the MIS was to support Hawaiian homestead lessees.

The MIS is located on property owned by the State of Hawai'i. The construction of the Moloka'i Irrigation System was designed to tap water from Waikolu Valley on the north side of the island and transmit it to a reservoir for ultimate distribution to farmers in Ho'olehua, Moloka'i to support homestead farming. The Ranch extracts ground water from the Kualapu'u aquifer from its Well #17 which it needs to transmit some domestic water users in Kualapu'u, and ultimately to its commercial uses in support of its land developments, located in a separate aquifer overlying the West End of Moloka'i, some twenty miles away.

In 1976, the DLNR contracted with Molokai Properties, Ltd. (the Ranch) and its predecessors to allow them to use space within the MIS to supply subscribers who are private commercial water users on the West End of Moloka'i. This arrangement allows the Ranch to transmit its water from the East End of Kualapu'u to Mahana, where it is pumped to Maunaloa, and eventually to Kaluakoi for various water uses in that resort area. After various changes in administrative authority for the MIS, under Act 306 (SLH 1987), the Legislature transferred full authority for the operation and maintenance of the MIS to the DOA. The DOA is ultimately responsible for the operation of the MIS, which provides irrigation water to various subscribers who engage in farming in Ho'olehua, Moloka'i. In addition, the Ranch diverts surface water

from 5-7 stream sources on Moloka'i for commercial uses, which has been used in recent years to supplement the flow into the MIS, especially when Well #17 is down. All of these surface water sources can be directed into the MIS or transported by pipeline to end uses on Ranch properties located in West Moloka'i. The Ranch is negotiating a renewal of its lease of space within the MIS, which it uses in part to transport water extracted from its Well #17 and/or its surface water diversions. See La'au Point Final Environmental Impact Statement at pages 104-105.

**B. If MPL Cannot Legally Use the MIS to Transport Water Until It Completes an Environmental Assessment, Then It Should Not Be Allowed to Obtain a Water Use Permit to Authorize Use of That Same Water Any Sooner.**

HRS § 343-5(1) requires an environmental assessment whenever there is a proposed use by an agency of state lands, including Hawaiian Home Lands. See *Kepo'o v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005) (affirming that HRS ch. 343 applies to Hawaiian Home Lands). The proposal for a 25-year lease of space within a state-owned and operated irrigation water transmission system built on and supporting Hawaiian Homestead Land is a use of state land.

Under the initial 1976 lease, an environmental assessment was not required because the proposal and the Board of Land and Natural Resources approval predated enactment of HRS ch. 343. *Moloka'i Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 456, 629 P.2d 1134, 1138 (1981). But the Hawaii Supreme Court explained that "[w]e entertain no doubt that the pertinent statutory provisions would mandate the preparation of an EIS if Kaluakoi's application for 'rental of space' in the System's facilities were presented to the Board now." *Id.* at 466, 629 P.2d 1134, 1144. Accordingly, it is clear that courts will now require an environmental assessment.

The only possible exception to this requirement is contained in HAR 11-200-8(a)(1). This rule creates an exception to doing an environmental assessment so long as the proposed action authorizes the continued operation of existing structures, facilities, equipment, or topographical features and precludes any expansion or change of use beyond the previously-existing operation. However, this regulatory exception does not apply.

First, any contrary statutory requirement trumps an otherwise valid rule. A rule cannot supersede or alter a statute. Under HRS § 343-6(7), a rule can authorize an exemption to a requirement for an environmental assessment only where there is minimal or no significant effect on the environment. Without doubt, the transmission of all the water needed to support urban



development on the West End of Moloka'i does not constitute a minimal or insignificant effect on the environment. See *Moloka'i Homesteaders Coop. Ass'n v. Cobb*, 63 Haw. 453, 465, 629 P.2d 1134, 1143 (1981) (use of the System's facilities to transport water to Kaluakoi's development constituted a probable "significant effect").

Moreover, under *Confederated Tribes and Bands of the Yakima Indian Nation v. Federal Energy Regulatory Commission*, 746 F.2d 466, 475-477 (9<sup>th</sup> Cir. 1984), a court will likely conclude that the continuation of an existing water transmission system needs to be analyzed as if it were the initiation of the project. It cannot be analyzed as a continuation of the transmission, limited to assessment of the marginal difference in impacts before and after the most recent proposed lease is executed. Instead, it must incorporate the full environmental and cultural impacts of using the transmission system as if it was for the first time.

Additionally, the assessment must include examination of the secondary impacts of the proposed use of state lands. *Sierra Club vs. Department of Transportation*, 115 Haw. 299, 343; 167 P.3d 292, 336 (2007) (hereafter, "*Superferry*").

Third, HAR 11-200-8(a) requires the agency purporting to invoke the above exception to consult with other agencies. At a minimum, the Department of Agriculture (DOA) would have to consult with the CWRM and the DHHL before attempting to invoke this exception. The DOA is without legal authority to unconditionally agree to exempt the MIS from an environmental assessment, because an assessment has never been done and because the proposed use competes with uses by native Hawaiian homesteaders. In light of the State's trust duties to DHHL beneficiaries, DOA cannot invoke an exception if it fails to consult with DHHL.

Because of these principles, as explained above, the Deputy Attorney General for the Dept. of Agriculture explained in an Opinion Letter that an environmental assessment is required prior to renegotiation of any lease with MPL for use of space in the state-owned MIS. See Letter of Myra Kaichi to Alan Murakami dated 9/7/07, attached hereto as Exhibit "A." Ms. Kaichi's Letter explained that until the assessment is completed, MPL should be off the MIS and that her office "will be assisting the HDOA in getting Molokai Properties off the system as quickly as possible, until all environmental effects, if any, are sufficiently and properly addressed."

Justice Nakayama has made it abundantly clear that an agency must defer any state action until an environmental review pursuant to HRS chapter 343 is completed:

The main thrust of HEPA is to require agencies to consider the environmental effects of projects **before action is taken**. It does so by providing a procedural mechanism to review environmental concerns. *HRS* § 343-1 (1993). The legislature explained that HEPA provides an "environmental review process [that] will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions." *HRS* § 343-1. One of the procedural tools of HEPA is an EA, which is used to determine circumstances under which a particular action will have a significant effect on the environment. *HRS* § 343-2 (Supp. 2001). If the EA concludes that a significant impact is expected, an Environmental Impact Statement (EIS), among other things, must be prepared. *HRS* § 343-2; *HRS* § 343-5(b). If no significant effect is expected, the agency submits a draft EA that must be available for public comment and review. *HRS* § 343-5(b). ("Whenever an agency proposes an action in subsection (a), . . . that agency shall prepare an environmental assessment for such action **at the earliest practicable time** to determine whether an environmental impact statement shall be required.

*Superferry*, 115 Haw. at 327; 167 P.3d at 320, citing *Sierra Club v. Hawai'i Tourism Auth.*, 100 Haw. 242, 266-67, 59 P.3d 877, 901-02 (Nakayama, J., concurring) (alterations in original) (footnotes omitted) (emphasis added). Thus, before any action is taken by a state agency, it must engage in an environmental assessment, when one is required, so its decision-making may be better informed.

The Hawaii Supreme Court indicated three decades ago that the MIS lease renewal triggers *HRS* chapter 343 review, and probably an EIS, which must precede the issuance of the lease. *Moloka'i Homesteaders Coop. Ass'n*, 63 Haw. at 466, 629 P.2d at 1144. That legal obligation does not change when the use of a resource regulated by a second agency is implicated utilizing the same public irrigation system.

Accordingly, without performing an environmental assessment prior to renegotiating its lease with the Department of Agriculture, MPL cannot legally transport its water from Well #17 through the MIS to the West End of Moloka'i, and may not use it before the lease is issued. The same principle established under *Moloka'i Homesteaders Coop. Assn.* and *Superferry* applies with similar force where the same water to be transported through the MIS must be authorized under a water use permit under *HRS* chapter 174C. In both instances, *HRS* 343 is designed to require agencies "to consider the environmental effects of projects before action is taken," whether to issue a lease or approve a water use permit. *Superferry*, 115 Haw. at 326; 167 P.3d at 319. In both instances, the EA or EIS is intended to "alert decision makers to significant

environmental effects which may result from the implementation of certain actions." *Id.* at 327, 167 P.3d at 320, citing HRS § 343-1. In order to provide that disclosure effectively, an EA must be provided "at the earliest practicable time to determine whether an environmental impact statement shall be required." *Id.*

Alternatively, if MPL has no authority to transmit its water from Well #17 to Mahana through the MIS, then it is premature for it to be seeking a water use permit from the CWRM. Without that present legal ability to transmit the water for which it is seeking this permit, the CWRM should defer action on the permit application, since MPL legally cannot get the water to its end uses in the first place. It would be illogical to authorize the transportation of water without the means to achieve that result.

The CWRM should refuse to hold hearings on this permit application until a proper lease is executed, following compliance with HRS chapter 343, or until MPL builds its own separate pipeline to transport its water to point west on Moloka'i. If any water needed for domestic purposes is required pending the outcome of the HRS chapter 343 review, it should be allowed only upon a strict showing that such use is reasonable beneficial and neither wasteful nor for any commercial purpose previously undertaken by MPL.

## **II. Surface Water Permits Should be Issued and Considered in Conjunction with Groundwater Permits in Order to Protect Moloka'i's Public Trust Water Resources**

The relationship between surface and groundwater is well recognized. On Moloka'i, it is agreed that underlying the entire island is a freshwater lens, with freshwater also impounded by dikes elsewhere on the island. Moloka'i has been divided into four general hydrogeologic areas: West, Central, Northeast, and Southeast. Molokai Properties Limited's Mountain Water System and its Well # 17 draw water from the Central Molokai area. The Molokai Ranch Mountain Water System primarily serves the Maunaloa area, the Industrial Park, and the Molokai Ranch irrigation system. At various times, the Mountain Water System has substituted for Well #17 shortages and during times of drought it has been supplemented by Well #17 water. The Mountain Water System diverts water from 5-7 streams in the upper Kawela and Kamakou watersheds. Molokai Properties and its predecessors have never obtained a permit to divert the Central Moloka'i surface water which is transported twenty miles away to the West at Pu'u Nana where it is combined with Well # 17 water and treated to potable standards. Both the



interrelationship between the surface and groundwater resources as well as their combined use as water sources for MPL necessitate the consideration and permitting of surface water diversions in determining the quantity of water required by MPL for reasonable use.

#### **Background of the Molokai Ranch Mountain Water System**

MPL's Mountain Water System has been in place for nearly a century and yields as much as 1,200,000 gpd and as low as 65,000 gpd with an average yield of 500,000 gpd. *See* Letter by Harold Edwards, Molokai Ranch to Rae M. Loui, Deputy Director CWRM dated 5/14/1997; *see also*, La'au Point Final Environmental Impact Statement at page 105. Surface water in the Mountain Water System is transported to Pu'u Nana where it is combined with water from Well #17 that has been transported through the MIS, withdrawn at the Mahana pumping station, and pumped to a reservoir at Pu'u Nana for treatment. *Id.*

The Mountain Water System has connections to the MIS at Kalama'ula and, if there is excess in the system it can and has been delivered to the MIS and stored in the MIS reservoir. MPL has violated the terms of its Well # 17 permit in the past and transferred raw water from the Kaluako'i System to the Mountain System to compensate for shortages during a drought. Letter to Peter Young by Harold Edwards, Molokai Properties Limited dated 11/22/2004. MPL has also used its Mountain Water System to compensate when Well # 17 water was unavailable.

#### **B. MPL's Surface Water Diversions Through Its Mountain Water System Must Be Taken into Account in Any Determination of the Quantity of Groundwater MPL Requires for "Reasonable-Beneficial" Use in Order to Protect Public Trust Resources**

The State of Hawaii is duty-bound to take the public trust into account in the planning and allocation of water resources. In Hawai'i, the public trust extends beyond navigable waters to include "all water resources, unlimited by any surface-ground distinction." *In re Water Use Permits (Waiahole I)*, 94 Hawai'i 97, 133-35, 9 P.3d 409, 445-47 (2000). The Hawai'i Supreme Court has long recognized that in protecting the State's water resources trust, under the Hawai'i Constitution Article XI, Section 1 and Article XI, Section 7, the State has a duty to ensure the continued availability and existence of its water resources for present and future generations. MPL's application for a groundwater use permit for Well # 17 requires the planning and allocation of water resources for which the Commission on Water Resources Management must

take into account MPL's use of surface water if it is to fulfill its duty to protect the public trust resources of Moloka'i.

The designation of an area for water management involves different criteria depending on whether it is for groundwater or surface water. However, the Hawai'i Supreme Court has declined to hold to such distinctions where there is a relationship between the water sources at issue. As the Supreme Court noted in *Waiahole I*, it disagreed with the Commission's decision in that case that it lacked jurisdiction "to permit or otherwise regulate surface water diversions from Kahana stream," citing the absence of a surface water management area designation. 94 Hawai'i at 173, 9 P.3d at 485. There, the court noted that the Commission was under an "affirmative duty under the public trust and statutory instream use protection scheme to investigate, consider, and protect the public interest in the flow of Kahana Stream." *Id.* The Court also noted that the Commission had considered a petition to designate Windward Oahu as a surface water management area but declined to do so at the time "based on a staff recommendation that 'designation of ground water protects surface waters and is essentially comparable to designation of surface water in the [Windward Oahu] aquifer systems.'" *Id.* The Supreme Court further stated that

The Commission's rationale would apply to any surface water diversion from windward watersheds; *taken to its extreme, it would allow anyone to evade the permit requirement by simply diverting the same water from above, rather than below, the ground.* Although the Code presumes the prior designation of a water management area in its permit requirement, see HRS § 174C-48 (1993), and prescribes different criteria for the designation of surface and ground water management areas, see HRS §§ 174C-44, -45 (1993 & Supp. 1999), these provisions should not be construed so rigidly as to create an absurdity, or worse yet, to circumvent the Commission's constitutional and statutory obligations. The Commission recognized the integrated nature of the waters collected by the ditch in its present decision. See also HAR § 3-169-20(3) ("Recognition shall be given to the natural interrelationship between surface and ground waters."). This court has similarly looked beyond artificial surface-ground distinctions with the understanding that "all waters are part of a natural watercourse . . . constituting a part of the whole body of moving water." *Reppun*, 65 Haw. at 555, 656 P.2d at 73 (citation omitted); see also *supra* Part III.B.3.a.

*Id.* (emphasis added). The Court then held that, because there was a direct relationship between groundwater and surface water in that case, the designation of Windward Oahu as a ground water management area subjected both ground and surface water diversions from the designated area to the statutory permit requirement.

On May 13, 1992, a staff recommendation to the Commission determined that “to protect the natural water resources...all aquifer systems in Molokai’s West and Central aquifer sectors...be designated as water management areas for ground-water regulation.” See Recommendation of Rae Loui dated 5/13/1992. That day, the Commission designated the entire island of Moloka’i as a groundwater management area. See Public Notice by William W. Paty, Molokai Ground Water Management Area Designation, dated 6/25/1992. The Commission should consider Moloka’i’s designation as a groundwater management area as subjecting both ground and surface water diversions from the designated area to the statutory permit requirement because (1) there is a relationship between the water sources at issue and (2) surface water is a public trust resource that must be taken into account in the planning and allocation of Moloka’i’s groundwater.

First, the Mountain Water System and Well # 17 water are interrelated both by the hydrogeology of the island and by virtue of MPL’s transportation and distribution system. In terms of hydrogeology, although a complete picture of Molokai’s aquifer systems is not fully known at this time, it is understood that “nearly all of Molokai is underlain by a low-lying (basal) ground-water lens.” See Letter by William Meyer, District Chief of the U.S. Geological Survey, Water Resources Division to Loretta Barsamian dated August 31, 1995. The Molokai Ranch Mountain Water system collects water from five-to-seven stream intakes in Central Moloka’i for use in Central and West Moloka’i. Well # 17 also withdraws water from the Central Moloka’i for use in West Moloka’i. Even though more than one “aquifer system” has been identified in Central Moloka’i, the water sources are withdrawn from the same region, unlike the MIS water taken from Northeast Moloka’i. Therefore, because surface and groundwater diverted from the same region are likely interrelated, the Commission should consider both surface and groundwater sources in the same permitting process to fulfill its duty in managing and protecting public trust water resources.

Second, MPL’s surface and groundwater diversions have been combined and at times used interchangeably, thus necessitating joint regulation of the two sources. At various times, surface water from the Mountain Water System has been used to fulfill a shortage in well water supply, and the opposite has also taken place, in violation of MPL’s permit conditions. See Letter to Peter Young by Harold Edwards, Molokai Properties Limited, dated 11/22/2004. MPL has also received approval to combine raw water from Well # 17 with raw mountain water at

Pu`u Nana as long as it is metered and used analogously to its inputs and outputs in the MIS system to ensure that Well #17 water was not used for unauthorized purposes. *See* Letter by Dean Nakano to MPL, dated 3/14/05. In its Final Environmental Statement for La`au Point, page 106 (now withdrawn), MPL stated that it “plans to retain its current 1,500,000 gpd of safe drinking water: 1,018,000 gpd from Well #17 and 500,000 gpd from the Molokai Ranch Mountain System.” MPL plans to continue its use of unpermitted surface water *in conjunction* with regulated Well #17 water to supply its customers. Therefore, because there is a relationship between the surface and groundwater sources currently being used by MPL which at this time are both unpermitted, surface water use must be considered and permitted in the planning and allocation of Well # 17 water permitting.

Based on the foregoing, the scope of proceedings on remand must include a consideration and permitting of MPL’s Mountain Water System diversions in order to protect public trust resources in the planning and allocation of MPL’s ground water because both sources fall within the designated management area and they are interrelated.

### **III. New Developments Since Remand**

Additional circumstances make it even more advisable to hold further hearings on any proposed water use than what is currently actually needed for present reasonable domestic water use by current subscribers of the MPL water system.

- Since the Kaichi opinion was issued, MPL has announced it is closing all operations, although it is unclear what it intends to do about pursuing its plans to develop the La`au Point subdivision. *See* Press Release of MPL, dated March 24, 2008, attached hereto. The resulting closures of the Molokai Lodge, Kaupoa Beach Villas Campground, the Kaluakoi Golf Course, Maunaloa Tri-plex and Maunaloa Gas Station demand a reconsideration of the proposed new uses of water in MPL’s application.
- Additionally, MPL has offered to sell its Well #17 to the DHHL. If this proposed sale confirms that MPL is not building any new subdivision, then the scope of the contested case hearings on remand is vastly reduced. If MPL is also abandoning its La`au Point subdivision project, then it is left with only legitimately claiming actual uses for the domestic water being supplied to its existing condominiums, subdivision lots and residences in Maunaloa and Kualapu`u.

Given these circumstances, even if the CWRM were to hold any hearings, MPL is in no position to be proposing any water uses beyond those needed for current and actual uses. The CWRM should order that the contested case hearing be limited in scope to existing uses that are reasonable under HRS § 174C-49, even if it orders the continuation of the remand hearing.

#### IV. CONCLUSION

At this time, Movants have no permits to divert surface or groundwater, nor do they have authorization to transport diverted groundwater. Until Movants secure such authorization by completing an environmental assessment and renewing its lease of the MIS system, any permit for use of that water should be deferred. Any hearings that do take place should consider all sources of water withdrawals in determining permissible water use. Given these circumstances, Intervenor request that: (1) remand proceedings be deferred unless and until either the Department of Agriculture or Movants prepare an environmental assessment of the proposed lease space in the MIS; (2) any interim domestic water use prior to the preparation of an environmental assessment and/or an environmental impact statement related to the use of the MIS pursuant to HRS chapter 343 be strictly limited to what Applicant can demonstrate is reasonable beneficial; and (3) that the scope of the current remand proceedings include consideration and issuance of surface water permits for mountain water diversions in addition to groundwater diversions.

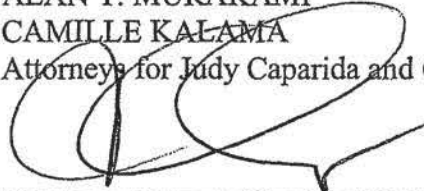
DATED: Honolulu, Hawai'i, May 2, 2008.



ALAN T. MURAKAMI

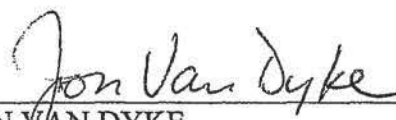
CAMILLE KALAMA

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Attorney for Department of Hawaiian Home Lands



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Attorney for Office of Hawaiian Affairs



BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the	)	CCH-MO 97-1
Contested Case Hearing on the	)	
Water Use Permit Application	)	CERTIFICATE OF SERVICE
Filed by Kukui (Molokai), Inc.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties by electronic (e-mail) transmittal and U.S. Mail, postage prepaid, to their last known address:

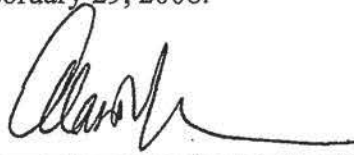
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DATED: Honolulu, Hawai'i, February 29, 2008.



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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing	) CCH-MO 97-1
on the Water Use Permit Application Filed	)
by Kukui (Molokai), Inc.	)
	) INTERVENORS DEPARTMENT OF
	) HAWAIIAN HOME LANDS, THE
	) OFFICE OF HAWAIIAN AFFAIRS, AND
	) INDIVIDUAL INTERVENORS
	) CAPARIDA AND KUAHUIA'S JOINT
	) MOTION TO PARTIALLY DISMISS
	) MOLOKA'I PROPERTIES' PETITION
	) FOR WATER USE; MEMORANDUM IN
	) SUPPORT OF MOTION;
	) DECLARATION OF ALAN T.
	) MURAKAMI; EXHIBITS "A" AND "B";
	) CERTIFICATE OF SERVICE

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COMMISSION ON WATER  
RESOURCE MANAGEMENT

**INTERVENORS DEPARTMENT OF HAWAIIAN HOME LANDS,  
THE OFFICE OF HAWAIIAN AFFAIRS, AND INDIVIDUAL INTERVENORS  
CAPARIDA AND KUAHUIA'S JOINT MOTION TO DISMISS IN PART MOLOKAI  
PROPERTIES, LIMITED'S APPLICATION FOR WATER USE PERMIT**

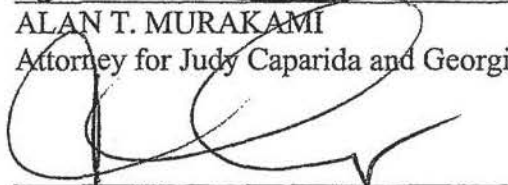
The Department of Hawaiian Home Lands ("DHHL"), the Office of Hawaiian Affairs ("OHA"), and Individual Native Hawaiian Intervenors Caparida and Kuahuia's hereby move to dismiss in part Molokai Public Utilities, Inc., Kaluakoi Water LLC, and Molokai Properties Limited's (hereafter, collectively, Movants) Application for Water Use originally filed by Kukui (Molokai), Inc. Intervenors seek dismissal of Movants' application to the extent that Movants seek water withdrawals over and above the amount necessary for reasonable domestic use and require Movants to revise their application to reflect its actual uses in light of its announced closures of its business operations.

Intervenors do **not** object to Movants' continued reasonable beneficial domestic use but request that the Commission require Movants to carry their burden of proving that the continued withdrawals are actual and reasonable under public trust principles. In satisfying their burden, Intervenors request that the Commission require Movants to provide reports of metered uses to the Commission and make such reports available to all parties.

DATED: Honolulu, Hawaii, May 2, 2008.



ALAN T. MURAKAMI  
Attorney for Judy Caparida and Georgina Kuahuia



CLAYTON L. CROWELL  
Deputy Attorney General  
Attorney for Department of Hawaiian Home Lands



JON VAN DYKE  
Attorney for Office of Hawaiian Affairs



BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing ) CCH-MO 97-1  
on the Water Use Permit Application Filed )  
by Kukui (Molokai), Inc. ) **MEMORANDUM IN SUPPORT OF**  
 ) **MOTION**  
 )  
\_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF MOTION**

**INTRODUCTION**

Molokai Properties Limited recently announced the closure of major operations on the island of Moloka'i in the midst of current proceedings in this action. This closure directly impacts major aspects of MPL's pending request for a water use permit covering the very uses impacted by this closure.

Despite attempts to informally clarify the consequences of the closure, MPL and KWLLC have simply continued to proceed with no further update of the impact of this closure on these proceedings. In the interest of economy and the convenience of the parties, and to narrow the issues for any necessary hearings, Intervenor urge that this Commission proactively order dismissal of those parts of the application of MPL and KWLLC for a water use permit seeking authority to use water in support of any activity other than reasonable and beneficial uses for existing domestic purposes.

**Undisputed Changed Circumstances Require the Dismissal of Part of the Application for Water Use Permit by MPL and KWLLC.**

One of the central holdings of the Hawai'i Supreme Court concerned the failure of the CWRM to account for undisputed changes in the demand for water inherent in the shutdown of the golf course and hotel during the pendency of the contested case hearings. As the Court noted:

... we cannot say that the closure of the hotel and golf course would have no impact on KMI's proposed uses in light of the Commission's findings and conclusions pursuant to the "reasonable-beneficial use" standard as set forth in HRS § 174C-49 and defined in HRS § 174C-3. Accordingly, the Commission's and KMI's reliance on HRS § 174C-58(4) is misplaced. Because the Commission failed to consider whether and to what extent the closure of the hotel and golf course would have on KMI's proposed uses

when it made its proposed use allocation decision, we vacate the Commission's Decision and Order to the extent that it grants KMI a permit for proposed uses, and remand the matter for further proceedings.

In the Matter of the Contested Case Hearing on the Water Use Permit Application filed by Kukui (Molokai), Inc., 174 P.3d 320, 345; 116 Haw. 481, 506 (2007) (*KMI*).

Similarly, in this instance, MPL has publicly announced the closure of its entire operation on Moloka'i. See Molokai Properties, Ltd. Press Release dated March 24, 2008, attached hereto as Exhibit "A." This closure covers a variety of land uses, all of which implicate the use of water – "the Molokai Lodge, the Kaupoa Beach Village, the Kaluakoi Golf Course, the Maunaloa gas station, the Maunaloa Tri-Plex theatre, cattle raising, and the company's substantial maintenance operations." *Id.* Each of these end uses of water must be reevaluated in light of "the 'reasonable-beneficial use' standard as set forth in HRS § 174C-49 and defined in HRS § 174C-3."<sup>1</sup> *KMI*, 174 P.3d at 345; 116 Haw at 506.

"Under the public trust [doctrine] and the [Water] Code, permit applicants have the burden of justifying their proposed uses in light of protected public rights in the resource." *In Re Water Use Permit Applications (Waiahole I)*, 94 Haw. 97, 160, 9 P.3d 409, 472 (2000). In addition, despite uncertainties in the permitting system, "applicants must still demonstrate their actual needs," and the propriety of diverting water from public trust resources to satisfy those needs. *Id.* at 162, 9 P.3d at 474.

The Commission must view this requirement in a proactive way:

... 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 initiative in considering, protecting, and advancing public rights in the resource at every 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.* 94 Haw. at 143, 9 P.3d at 455 (citations omitted). Accordingly, it should not be sitting back merely reacting to adversaries, but taking an affirmative stance on important issues dealing with

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<sup>1</sup> "Reasonable-beneficial use" is defined as "the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and public interest." HRS § 174C-3 (1993).

the protection of the resource.

In this instance, MPL's admissions require the dismissal of its Petition for Water Use to the extent that it requests water use to support the above-mentioned non-domestic water use activities. There should be no dispute that MPL/KWLLC may not apply for these terminated uses under any circumstances. Moreover, its admissions undisputedly implicate revisions of the actual uses it is making of the domestic water for which it still applies. Therefore, in addition to dismissing the Petition in part, the Commission should compel MPL to revise its petition to objectively justify its actual proposed uses, eliminating any uses requested to support the above commercial activities, which can neither be "actual" nor "reasonable beneficial" under the required criteria pursuant to HRS § 174C-49.

In addition, MPL has offered to sell its Well #17. It has made one proposal to the DHHL, which was not accepted. *See* Letter from P. Nicholas to M. Kane, dated 2/28/08, attached hereto as Exhibit "B." Specifically, MPL made "an offer ... to the Department of Hawaiian Homelands (DHHL) to sell the assets and associated infrastructure of MPL's potable well at Kualapu'u known as Well 17." *Id.* This offer reveals a step just short of withdrawing the petition currently before the CWRM, except for existing reasonable beneficial domestic water use by current subscribers in the MPL service areas in Kualapu'u, Maunaloa and Kaluakoi. This existence of this offer reinforces the need to compel MPL to amend its petition to reflect reality and MPL's true plans for water use on Moloka'i. The public trust doctrine demands no less of an "initiative" from this Commission. 94 Haw. at 143, 9 P.3d at 455.

MPL should be frank and honest about its intentions to apply for a water use permit, rather than waste the parties' time in unnecessary proceedings clouded by uncertainty and the failure to forthrightly disclose one's true intentions to use water on the island. The Commission should also act for the economy and the convenience of the parties, all of whom stand to invest significant time and expense in preparing for their cases during this remand hearing. Therefore, Intervenor urge, at this early stage of remand hearings, that this Commission order dismissal of those parts of the application of MPL and KWLLC for a water use permit seeking authority to use water in support of any terminated commercial activity. Such an affirmative stance is not only rational in light of changed circumstances, but consistent "with a level of openness, diligence, and foresight commensurate with the high priority these rights" command. *Id.*

Furthermore, consistent with its proactive role, the Commission should require Movants

to provide reports of metered uses to the Commission and make such reports available to all parties prior to any contested case hearing so Intervenor may respond to any described uses. Without this information, the Commission is likely to have an incomplete record of the information it needs to make a studious decision on the request for water.

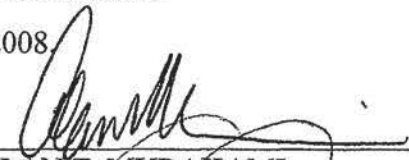
Intervenor note that Movants' announced closures took place after the March 3, 2008 status conference at which time a schedule for submissions was established. Intervenor do not waive any right to respond to Movants' Motion for Continued Use Filed January 2, 2008 and are deferring our responses until after the Movants' June 2, 2008 deadline to submit further briefing to clarify its actual uses.

By narrowing consideration of issues to only those reasonable and beneficial uses for existing domestic purposes, the Commission can approach its management and regulatory duties over the public trust resources of the Kualapu'u aquifer by "considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process." *Id.*

## CONCLUSION

Intervenor request a Commission order to (1) dismiss in part MPL's Petition for Water Use Permit to the extent that it request water uses to support its discontinued commercial operations and (2) compel modification of MPL's Petition to reflect only existing domestic water uses which are reasonable beneficial and not wasteful, to reflect the new reality after its public announcement to close commercial operations on Moloka'i.

DATED: Honolulu, Hawai'i, May 2, 2008

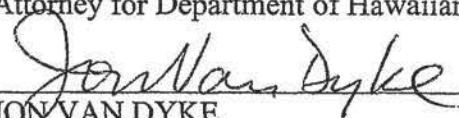


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CLAYTON L. CROWELL  
Deputy Attorney General  
Attorney for Department of Hawaiian Home Lands



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JON VAN DYKE  
Attorney for Office of Hawaiian Affairs

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing ) CCH-MO 97-1  
on the Water Use Permit Application Filed )  
by Kukui (Molokai), Inc. ) **DECLARATION OF ALAN T.**  
 ) **MURAKAMI**  
 )  
\_\_\_\_\_ )

**DECLARATION OF ALAN T. MURAKAMI**

I, ALAN T. MURAKAMI, hereby declare under penalty of perjury:

1. I am counsel for Intervenor Appellants Judy Caparida and Georgina Kuahuia in this remand.

2. Attached hereto as Exhibit "A" is a true and correct copy of a press release I received by email announcing Molokai Properties Limited's (MPL) closure of the majority of its operations on March 24, 2008.

3. Attached as Exhibit "B" is a true and accurate copy of a letter I received by email, signed by Peter Nicholas to Micah Kane, containing terms for an offer to sell MPL's interest in well 17 on Moloka'i to the Department of Hawaiian Home Lands.

4. Due to the rapidly changing factual circumstances in this case, I am informed and believe that my clients fear that there is potential for additional waste of excess water withdrawn at current levels over and above reasonable domestic use unless this commission takes a proactive and affirmative role in curbing any potential for waste.

I declare under penalty of perjury that the foregoing statements are true and correct, to the best of my knowledge, information, and belief.

DATED: Honolulu, Hawaii, May 2, 2008.

  
\_\_\_\_\_  
Alan T. Murakami



March 24, 2008

## PRESS RELEASE

(For Immediate Publication)

Molokai Properties Limited is to shutdown its operations on Molokai at the end of March.

The Company will lay-off more than 120 staff on the island over the following 60 days.

Company CEO Peter Nicholas said that staff had been advised of the company's position at employee meetings on Molokai and in Honolulu today.

He said that MPL (better known as Molokai Ranch) intends to "mothball" the company's assets on its 60,000+ acre property on Molokai.

"The decision is purely a business one," said Mr. Nicholas.

"For the past five years MPL has been working with Molokai community leaders and community members on developing and implementing a Master Plan for MPL's property and the future of Molokai.

"Unacceptable delays caused by continued opposition to every aspect of the Master Plan means we are unable to fund continued normal company operations," he said.

Operations to be shut will be the Molokai Lodge, the Kaupoa Beach Village, the Kaluakoi Golf Course, the Maunaloa gas station, the Maunaloa Tri-Plex theatre, cattle-rearing, and the company's substantial maintenance operations.

As well as shutting these operations, MPL will close all access to its property indefinitely, said Mr. Nicholas.

Molokai Properties Limited dba Molokai Ranch • 745 Fort Street Mail • Suite 800 • Honolulu, Hawaii  
96813 •

Telephone 808.531.0158 • Facsimile 808.521.2279

**EXHIBIT "A"**



-2-

"We deeply regret to have taken this step as the main impact will be on our loyal employees," he said.

"This will also be a bitter blow to Plan supporters, whose main interests in supporting the Master Plan have been a sustained economic future for Molokai."

"However, as we have mentioned on many occasions, without the prospect of an economic future for the company that results from the implementation of all facets of the Master Plan, we are unable to continue to bear large losses from continuing these operations," he said.



P.A. Nicholas  
Chief Executive Officer





Date: March 24, 2008

To: Employees of Molokai Properties Limited

This memo is to inform you that today Molokai Properties Limited will be announcing the closure of the majority of its operation. The last full day of normal operations will be April 5, 2008. Employees at The Lodge and Beach Village, Kaluakoi Golf Course as well as other departments will be impacted.

All employees have been given 60 days' notice of termination of employment. Employees will be expected to work during this notification period. The plan for the next 60 days is:

1. Maintain normal operations from today until April 5 at which time the company will shut the Lodge, Beach Village, and Kaluakoi Golf Course.
2. Some operations may shut earlier if normal operations are unable to be maintained.
3. After April 5, the task will switch to preparing the majority of the assets for mothballing and preparing the entire property for closure.
4. Those employees not willing to remain can elect to leave and Section 24 of the contract bargaining agreement on separation pay will be effective for those who qualify.
5. After the 60-day period, we will have a phase-down period where a small number of employees will be asked to remain on our payroll to continue the shut-down process for the month of June.
6. After June, the company intends to continue to employ a minimal number of staff to maintain the property.

Bumping rights will exist for Union positions remaining for the "shut-down team" and "go-forward team" based on qualifications for the positions.

The 60-day notification period is the required period of notice pursuant to the Worker Adjustment and Retraining Notification Act: 29 U.S.C. § 2101 ("WARN Act") and the Dislocated Workers Act, Chapter 334B, Hawaii Revised Statutes ("DWA"). The provisions of the WARN Act and the DWA allow the company to either pay-off the workers or continue offering work during the 60 day period. However we intend to offer employees work during this period.

Obviously this has been a difficult decision for the company and will have a major impact on our employees and the island of Molokai. The planned action is expected to be a permanent layoff.

If you experience a layoff you may be entitled to a dislocated worker allowance within the meaning of the DWA; provided, however, that you receive a determination of eligibility for unemployment compensation benefits from the State of Hawaii Department of Labor and Industrial Relations.

The dislocated worker allowance is a supplement to the unemployment compensation benefit you receive. It will be equal to the difference between your average weekly wage and the weekly unemployment compensation benefits received by you over a maximum period of four (4) weeks. Please note, however, that your dislocated worker allowance will be decreased by the amount of any severance pay benefits you receive under the collective bargaining agreement.

If you have any questions as to how your employment and benefits will be affected or have concerns regarding the information in this notice, please do not hesitate to contact me at 534-9504 or Malia Kino at 660-2351.



Peter Nicholas



Molokai  
Properties  
Limited

RECEIVED FEB 22 2008

February 7, 2008

Mr. Micah Kane  
Chairman  
Department of Hawaiian Homelands  
P O Box 1879  
Honolulu, Hawaii 96805

Dear Micah,

Re: Well 17

This letter outlines an offer by Molokai Properties Limited to the Department of Hawaiian Homelands (DHHL) to sell the assets and associated infrastructure of MPL's potable well at Kualapu'u known as Well 17.

MPL sees this as an opportunity for DHHL to gain access to the additional capacity of Well 17. USGS has indicated that Well 17 can pump an additional 500,000 gpd without harm to the aquifer.

Our proposal, in broad terms, is as follows:

- DHHL purchases Well 17 and its assets as well as the necessary land owned by MPL on which the Well and associated infrastructure such as pump equipment, spares, and access road etc, is located. We would anticipate this area of land would be no more than between 10 and 20 acres.
- DHHL would also purchase the pipeline between Well 17 and the MIS system and an easement corridor that would allow DHHL to access the pipeline for future supply of water to its constituents.
- The purchase price would reflect a discounted value of the assets and would be subject to negotiation.
- MPL would encourage and assist any current staff employed by MPL to service and operate Well 17 to transfer to DHHL's employment.
- DHHL would execute a long-term contract with MPL to provide a maximum of 1.018 mgd for MPL's use. The actual amount to be determined by CWRM.

Mr. Micah Kane Ltr

February 7, 2008

Page 2

- As the new owner of Well 17, DHHL would need to join in any application by MPL to CWRM for MPL's allocation up to a maximum of 1.018 mgd. MPL would support any simultaneous or future application by DHHL for additional potable water from Well 17.
- DHHL would also agree to supply MPL with its allocated water at cost.

We believe that under this arrangement there are many opportunities for MPL and the Department to form a closer working relationship.

For example, discussions should take place on the potential for DHHL to take control of the transmission of water from Well 17 to the boundary of MPL's property at Pu'unana. This may enable, at some future time, the Department to use the current infrastructure for supply of its constituents in Ho'olehua.

As the Well 17 allocation is currently under consideration by the State Water Commission, I would ask that you consider this offer with some urgency and revert to me on whether you have a serious interest in taking the matter forward.

Yours truly,



Peter Nicholas  
President & CEO

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the	)	CCH-MO 97-1
Contested Case Hearing on the	)	
Water Use Permit Application	)	CERTIFICATE OF SERVICE
Filed by Kukui (Molokai), Inc.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties by electronic (e-mail) transmittal and U.S. Mail, postage prepaid, to their last known address:


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Attorneys for Commission on Water Resource Management

DATED: Honolulu, Hawai'i, May 2, 2008.

  
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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAII

In the Matter of the Contested Case Hearing	) CCH-MO 97-1
on the Water Use Permit Application Filed	)
by Kukui (Molokai), Inc.	)
	) <b>ERRATA TO INTERVENORS</b>
	) <b>DEPARTMENT OF HAWAIIAN HOME</b>
	) <b>LANDS, THE OFFICE OF HAWAIIAN</b>
	) <b>AFFAIRS, AND INDIVIDUAL</b>
	) <b>INTERVENORS CAPARIDA AND</b>
	) <b>KUAHUIA'S JOINT MEMORANDUM</b>
	) <b>REGARDING SCOPE OF HEARING ON</b>
	) <b>REMAND FILED MAY 2, 2008;</b>
	) <b>EXHIBITS "A" AND "B";</b>
	) <b>CERTIFICATE OF SERVICE</b>

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**ERRATA TO INTERVENORS DEPARTMENT OF HAWAIIAN HOME LANDS,  
THE OFFICE OF HAWAIIAN AFFAIRS, AND INDIVIDUAL INTERVENORS  
CAPARIDA AND KUAHUIA'S JOINT MEMORANDUM REGARDING SCOPE  
OF HEARING ON REMAND, FILED MAY 2, 2008**

Intervenors Department of Hawaiian Home Lands ("DHHL"), the Office of Hawaiian Affairs ("OHA"), and Individual Native Hawaiian Intervenors Caparida and Kuahuia, through their undersigned counsel, hereby submit their Errata to their Joint Memorandum Regarding Scope of Hearing on Remand, filed on May 2, 2008.

The attached Exhibits "A" and "B" are added to said Memorandum and the Letter of Myra Kaichi to Alan Murakami dated 9/7/07, referenced on pages 3 and 8 are corrected to be Exhibit "B" and not Exhibit "A" as indicated in the Memorandum. Exhibit "A" is Molokai Properties, Ltd. Press Release dated March 24, 2008.

DATED: Honolulu, Hawai'i, May 2, 2008.

A handwritten signature in dark ink, appearing to read 'Alan T. Murakami', is written over a horizontal line.

ALAN T. MURAKAMI  
CAMILLE KALAMA

Attorneys for Judy Caparida and Georgina Kuahuia





March 24, 2008

## PRESS RELEASE

(For Immediate Publication)

Molokai Properties Limited is to shutdown its operations on Molokai at the end of March.

The Company will lay-off more than 120 staff on the island over the following 60 days.

Company CEO Peter Nicholas said that staff had been advised of the company's position at employee meetings on Molokai and in Honolulu today.

He said that MPL (better known as Molokai Ranch) intends to "mothball" the company's assets on its 60,000+ acre property on Molokai.

"The decision is purely a business one," said Mr. Nicholas.

"For the past five years MPL has been working with Molokai community leaders and community members on developing and implementing a Master Plan for MPL's property and the future of Molokai.

"Unacceptable delays caused by continued opposition to every aspect of the Master Plan means we are unable to fund continued normal company operations," he said.

Operations to be shut will be the Molokai Lodge, the Kaupoa Beach Village, the Kaluakoi Golf Course, the Maunaloa gas station, the Maunaloa Tri-Plex theatre, catfish-rearing, and the company's substantial maintenance operations.

As well as shutting these operations, MPL will close all access to its property indefinitely, said Mr. Nicholas.

Molokai Properties Limited dba Molokai Ranch • 745 Fort Street Mall • Suite 600 • Honolulu, Hawaii  
96813 •

Telephone 808 531 0158 • Facsimile 808 521 2279


**EXHIBIT "A"**

-2-

"We deeply regret to have taken this step as the main impact will be on our loyal employees," he said.

"This will also be a bitter blow to Plan supporters, whose main interests in supporting the Master Plan have been a sustained economic future for Molokai."

"However, as we have mentioned on many occasions, without the prospect of an economic future for the company that results from the implementation of all facets of the Master Plan, we are unable to continue to bear large losses from continuing these operations," he said.



P.A. Nicholas  
Chief Executive Officer



Date: March 24, 2008

To: Employees of Molokai Properties Limited

This memo is to inform you that today Molokai Properties Limited will be announcing the closure of the majority of its operation. The last full day of normal operations will be April 5, 2008. Employees at The Lodge and Beach Village, Kaluakoi Golf Course as well as other departments will be impacted.

All employees have been given 60 days' notice of termination of employment. Employees will be expected to work during this notification period. The plan for the next 60 days is:

1. Maintain normal operations from today until April 5 at which time the company will shut the Lodge, Beach Village, and Kaluakoi Golf Course.
2. Some operations may shut earlier if normal operations are unable to be maintained.
3. After April 5, the task will switch to preparing the majority of the assets for mothballing and preparing the entire property for closure.
4. Those employees not willing to remain can elect to leave and Section 24 of the contract bargaining agreement on separation pay will be effective for those who qualify.
5. After the 60-day period, we will have a phase-down period where a small number of employees will be asked to remain on our payroll to continue the shut-down process for the month of June.
6. After June, the company intends to continue to employ a minimal number of staff to maintain the property.

Bumping rights will exist for Union positions remaining for the "shut-down team" and "go-forward team" based on qualifications for the positions.

The 60-day notification period is the required period of notice pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 ("WARN Act") and the Dislocated Workers Act, Chapter 394B, Hawaii Revised Statutes ("DWA"). The provisions of the WARN Act and the DWA allow the company to either pay-off the workers or continue offering work during the 60 day period. However we intend to offer employees work during this period.

Obviously this has been a difficult decision for the company and will have a major impact on our employees and the island of Molokai. The planned action is expected to be a permanent layoff.

If you experience a layoff you may be entitled to a dislocated worker allowance within the meaning of the DWA; provided, however, that you receive a determination of eligibility for unemployment compensation benefits from the State of Hawaii Department of Labor and Industrial Relations.

The dislocated worker allowance is a supplement to the unemployment compensation benefit you receive. It will be equal to the difference between your average weekly wage and the weekly unemployment compensation benefits received by you over a maximum period of four (4) weeks. Please note, however, that your dislocated worker allowance will be decreased by the amount of any severance pay benefits you receive under the collective bargaining agreement.

If you have any questions as to how your employment and benefits will be affected or have concerns regarding the information in this notice, please do not hesitate to contact me at 534-9504 or Malia Kino at 860-2851.



Peter Nicholas

LINDA LINGLE  
GOVERNOR



MARK J. BENNETT  
ATTORNEY GENERAL

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(808) 586-1205 (fax)

September 4, 2007

Alan T. Murakami, Esq.  
Native Hawaiian Legal Corporation  
1164 Bishop Street, Suite 1205  
Honolulu, Hawaii 96813

Dear Mr. Murakami:

Re: Proposed Use of Molokai Irrigation System

As we briefly discussed over the phone, your letter dated July 9, 2007 has been forwarded to this office for review. Thank you for granting us this extension of time within which to reply.

We have reviewed the authorities cited in your letter. We have also reviewed the decision in Sierra Club v. Dept. of Transportation, State of Hawaii, et al., filed on Friday, August 31, 2007. While we may not agree with all of your legal analyses in reaching your conclusion, we agree that Chapter 343, Hawaii Revised Statutes, is triggered in the matter of the Molokai Irrigation System pipeline agreement. The Hawaii Department of Agriculture has already been apprised of our opinion on this matter.

Accordingly, we will be advising the Department of Agriculture on the procedures to be followed, and of all notices which must be given, throughout the process. We look forward to your and your clients' participation and input in this process. In the meantime, we will be assisting the HDOA in getting Molokai Properties off the system as quickly as possible, until all environmental effects, if any, are sufficiently and properly addressed.

If there are any further legal matters to discuss concerning the State's administration and operation of the Molokai Irrigation System, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Myra M. Kaichi".

Myra M. Kaichi  
Deputy Attorney General

cc: Sandra Lee Kunimoto

**EXHIBIT "B"**

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the	)	CCH-MO 97-1
Contested Case Hearing on the	)	
Water Use Permit Application	)	CERTIFICATE OF SERVICE
Filed by Kukui (Molokai), Inc.	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following parties by electronic (e-mail) transmittal and U.S. Mail, postage prepaid, to their last known address:

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Attorneys for Commission on Water Resource Management

DATED: Honolulu, Hawai'i, May 2, 2008.



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JON VAN DYKE

Attorneys for Intervenor

Judy Caparida and Georgina Kuahuia

Department of Hawaiian Home Lands

Office of Hawaiian Affairs

BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT  
OF THE STATE OF HAWAII

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 Use by  
Molokai Public Utilities, LLC,

CASE NO. CHH-MO-97-01

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, a true and accurate copy of the foregoing document was served upon the following parties at the addresses shown:

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Commission on Water Resource  
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DATED: Honolulu, Hawai'i, March 24, 2016.

CADES SCHUTTE  
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Calvert Chipchase", written over a horizontal line.

DAVID SCHULMEISTER  
CALVERT G. CHIPCHASE  
TERI-ANN E.S. NAGATA  
Attorneys for Molokai Public Utilities, LLC