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BEFORE THE COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc.[1]	)	CCH-MO 97-1
	)	**INTERVENORS CAPARIDA AND KUAHUIA'S RESPONSE TO THE MARCH 2016 MINUTE ORDERD REGARDING THE POTENTIAL DISMISSAL OF THE CONTESTED CASE; EXHIBITS 1; CERTIFICATE OF SERVICE**

INTERVENORS CAPARIDA AND KUAHUIA'S RESPONSE TO THE MARCH 2016 MINUTE ORDERD REGARDING THE POTENTIAL DISMISSAL OF THE CONTESTED CASE

Intervenors Caparida and Kuahuia ask that the Commission dismiss and close this contested case. There is nothing left to do in this proceeding other than to deny the application submitted two decades ago, vacate the Commission's findings, and officially bring the contested case to an end.

I. BACKGROUND

The water use application in this case was initially filed by Kukui (Moloka'i) Inc. (**KMI**). According to the Commission's December 19, 2001 Findings of Fact, Conclusions of Law and Decision and Order, the contested case hearing involved the "issuance of a permit to withdraw

[1] Unfortunately, the Commission's minute order includes an inaccurate and inappropriate caption. The new groundwater use permit application is not and cannot be considered a part of this contested case.

water from Well #17 (Well No. 0901-01) for use at the Kaluako`i Resort (and its various properties) and Kukapu`u Town." It was captioned: "In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc."

While on appeal, Kaluakoi Land LLC (**KLLLC**) acquired the assets of KMI and substituted in its place. *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui*, 116 Hawai`i 481, 488 n.5, 174 P.3d 320, 327 n.5 (2007). Since then, neither KMI nor KLLLC has submitted anything to this commission.

After the Hawai`i Supreme Court's decision, this Commission issued a minute order on February 25, 2008 in which it asked the parties to address the scope and issues of this contested case. Neither KMI nor KLLLC responded. Instead, three new entities, Molokai Public Utilities Inc. (**MPU**), Kaluakoi Water LLC (**KWLLC**) and Molokai Properties Limited (**MPL**) – represented by the same attorneys – submitted responses on February 29, 2008. But they were not parties to the proceeding.

On March 10, 2008, the Commission issued another minute order. Footnote one required the applicants "to file a separate pleading setting forth who is the successor in interest to the permittee, Kukui (Molokai), Inc." No such separate pleading was ever filed. That order also required the submission of various memoranda by MPU, KWLLC and MPL. But MPU, KWLLC and MPL failed to submit anything in response to this minute order.

Instead, on May 27, 2008, MPL wrote a letter to the Commission in which it said: "This letter is to inform you that Molokai Public Utilities (MPU) does not intend to pursue this case on remand." Exhibit 1.

Despite repeated filings and pleas by the intervenors, the Commission did nothing for years.

In December 2012, August 2013, February 2014 and June 2014, MPL and MPU submitted new water use permit applications to the Commission. MPL and MPU did not bother to submit a copy of these applications to the intervenors or any other party to this contested case hearing. When the Native Hawaiian Legal Corporation, counsel for the intervenors, requested copies of these documents, the Commission's staff refused to provide a copy – until November 4, 2015 (when Linda Chow was asked to provide a copy). The Commission staff required that NHLC pay $91.50 for the documents related to the new applications.

II. DISCUSSION

The Commission should deny KMI's/KLLLC's application submitted two decades ago, vacate the Commission's findings, and officially bring the contested case to an end. First, KMI and KLLC waived their interests in this proceeding – as did MPL and MPU. Second, MPU and MPL's 2014 application must be treated as a new, separate application. Third, the public must have an opportunity to meaningfully participate in decision-making – which continuing the contested case would preclude. Fourth, if the contested case remains open, the Commission would improperly bind new participants to findings in violation of their right to meaningful participation. Finally, the 2001 findings are outdated.

A. The Applicant Has Waived All Interest in Its Application.

KMI and KLLLC abandoned all interest in their original application that is the subject of this contested case by failing to respond in any manner whatsoever to the 2008 minute orders. MPL and MPU, which have never had a recognized interest in this proceeding, expressly waived any interest they might have in this proceeding in the May 27, 2008 letter. None of the other entities have asked for – or received – permission from this Commission to appear as parties to this proceeding.

The contested case hearing in this matter was on KMI/KLLLC's application. The application was for:

(a) an entity that apparently no longer exists;

(b) an entity that abandoned all interest in this contested case proceeding eight years ago; and

(c) water uses that have long since ceased.

In a nutshell, because the old KMI/KLLLC application is no longer pending – and no one believes that this Commission should be considering it – the contested case hearing on it needs to end.

B. MPU's Application Is An Entirely New Applications.

In 2014, MPU submitted an entirely new application for the same well. The new application by MPU is separate and apart from the application in this case. A new proceeding must commence on that application.

MPU and MPL never provided a copy of their most recent application to the intervenors. If MPU and MPL believed that their new application was part of the existing contested case proceeding, they would have served a copy on the intervenors. They never did. In fact, the Commission itself refused to provide the intervenors a copy until November 4, 2015. If the new application was a continuation of this contested case, all the documents filed by MPU and MPL should have been provided long ago. Thus, both MPU/MPL and the Commission's actions demonstrate that they believe that the new application is an entirely new and separate matter.

C. Consideration of the New Application Within the Context of the Existing Contested Case Hearing Would Chill Meaningful Public Participation.

The legislature and the Hawai`i Supreme Court have repeatedly emphasized the importance of public participation in decision-making. "Governmental agencies exist to aid the people in the

formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." HRS § 92-1. *See also* HRS §§ 226-3, 343-1, 344-4(10)(B) and 634F. One of the objectives of HRS Chapter 205A is to "stimulate . . . participation in coastal management." HRS § 205A-2(b)(8)(A). One of the policies is to "promote public involvement in coastal zone management processes." HRS § 205A-2(c)(8)(A). "The legislative history of the CZMA indicates that the legislature desired to facilitate public participation in the decision-making process." *Sandy Beach Defense Fund v. City Council of Honolulu*, 70 Haw. 361, 381, 773 P.2d 250, 263 (1989); *See also*, *In Re Water Use Permit Applications*, 94 Hawai`i 97, 143, 9 P.3d 409, 455 (2000) (stressing the importance of decision-making "with a level of openness"). These legal principles are binding on the Commission.

The submission of an application nearly two decades after an application is first filed should be an occasion at which all members of the public can provide comments. In fact, HRS § 174C-52 requires public involvement. Substantive public involvement is precluded, however, if the new application is a continuation of a contested case hearing that has lasted two decades – through no fault of any member of the public. The public's ability to testify and provide pertinent information to the Commission in the middle of a contested case hearing is constrained by HRS chapter 91. In other words, if the Commission does not end the existing contested case hearing, the public's ability to meaningfully participate in decision-making will be severely constrained – which is inconsistent with the principles articulated in HRS §§ 205A-2(b)(8)(A), 205A-2(c)(8)(A), 226-3, 92-1, 343-1, 344-4(10)(B) and 634F.

D. The 2001 Findings Would Improperly Bind New Participants.

MPU and MPL wish to keep this contested case hearing open so that they can improperly

rely on the findings of fact and conclusions of law issued in "In the Matter of the Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai), Inc." for KMI and KLLLC's new application.

The findings made in 2001 in this case should not and cannot bind those individuals who were not parties to the 1998-2001 contested case proceeding. "The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai`i. 376, 363 P.3d 224 (2015). "However, while a fair trial in a fair tribunal is a basic requirement of due process, giving a person a day in court does not alone mean that a process is fair." *Id.* (internal citations and quotations omitted).

There are new parties who object to MPU and MPL's new application that were not parties to this contested case. On November 6, 2015, Wayde Lee requested a contested case hearing on MPU and MPL's new application (see page 3 of Intervenors Caparida and Kuahuia's Status Conference Statement); he was not a party in this proceeding. Walter Ritte, Leimamo Kuahuia and Marshal Joy, who have already filed objections, also will want to participate in a contested case hearing. It would offend all notions of fairness if these new parties were bound to a record they were not able to challenge and which was a part of in a separate proceeding on a separate application by a separate entity nearly two decades ago. *Mauna Kea*, 136 Hawai`i at 391, 363 P.3d at 239 (holding that contested case hearing procedures are "designed to ensure that the record is fully developed and subjected to adversarial testing before a decision is made"). These new parties, and any other interested members of the public, would not be able to meaningfully participate in a proceeding in which the facts have already been decided without their participation.

E. The 2001 Findings Are Outdated

The findings made in 2001 made based on evidence submitted between 1998-2001 no longer have relevance. Circumstances have changed immensely since 2001. First, the actual uses of the west end of Moloka`i have changed dramatically since then. Second, the state of Hawai`i now recognizes that global warming is an accepted scientific fact. Third, rainfall has diminished. Fourth, the United States Geological Service has conducted new analyses that were not available nearly two decades ago. The Hawai`i Supreme Court considered an analogous situation when considering the proposed development at Kuilima/Turtle Bay. The court observed that

> ignoring the implicit time condition dictated by the anticipated life of the project upon which an original EIS has been based would allow unlimited delays and, in turn, permit possible resulting negative impacts on the environment to go unchecked. In other words, allowing an outdated EIS to "remain valid in perpetuity" directly undermines HEPA's purpose.

Unite Here! Local 5 v. City & Cnty. of Honolulu, 123 Hawai`i 150, 179, 231 P.3d 423, 452 (2010). The Court criticized the Department of Planning and Permitting's (DPP) approach:

> For the DPP to assume that conditions would not have changed over twenty years is unreasonable, especially given the "new" evidence with respect to traffic, monk seals, and green sea turtles, discussed *supra.* Thus, it cannot be said that "the agency has taken a 'hard look' at [the] environmental factors." Given the unreasonable and seemingly cursory consideration of whether a SEIS was warranted, we hold that the DPP's decision that one was not required was "arbitrary and capricious."

Id. at 181, 231 P.3d at 454. While that decision was made pursuant to a different statutory scheme, the court's ruling is instructive: it is unwise to rely on conclusions reached two decades ago. It is also common sense. (Of course, nothing precludes parties from presenting the same evidence that they used 15 years ago if they wish.)

III. CONCLUSION

The Commission should deny KMI and KLLLC's application submitted two decades ago, vacate the Commission's findings, and officially bring the contested case to an end.

Dated: Honolulu, Hawai`i, March 16, 2016

David Kimo Frankel
David Keith Kauila Kopper
Attorneys for Judy Caparida and Georgina Kuahuia

EXHIBIT 1

MPL Molokai Properties Limited

RECEIVED

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May 27, 2008

Ms. Laura Thielen, Chairperson
Mr. Ken Kawahara, Deputy Director
Commission on Water Resource Management
P. O. Box 621
Honolulu, Hawaii 96809

Re: CCH-MO-97-1: Kukui (Molokai), Inc. Remand Proceedings

Dear Chairperson Thielen and Mr. Kawahara:

This letter is to inform you that Molokai Public Utilities (MPU) does not intend to continue to pursue this case on remand. As has been discussed with staff and the PUC, MPU has been operating at a significant loss for several years and is essentially insolvent.

Losses incurred include:

	Operating Loss	Net Loss
FY 2003	$223,000	$227,000
FY 2004	$ 38,000	$41,000
FY 2005	$101,000	$184,000
FY 2006	$214,000	$337,000
FY 2007	$470,000	$607,000
YTD April 2008	$427,000	$546,000

As a result of this insolvency we do not have the resources to pursue this very expensive remand proceeding. In addition, as a result of Molokai Properties Limited's decision to shut down operations, Molokai Properties Limited and its subsidiaries are only very minor users of water.

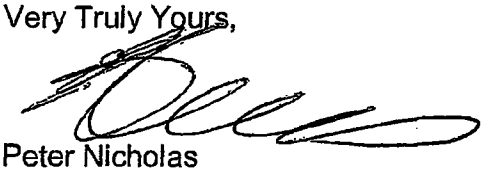
We are actively seeking a new owner for MPU that will have the resources to continue operation and hopefully, they will be capable of resolving this matter. However, as previously stated, we cannot actively pursue this matter before the Commission.

Molokai Properties Limited dba Molokai Ranch • 745 Fort Street Mall • Suite 600 • Honolulu, Hawaii 96813 •
Telephone 808.531.0158 • Facsimile 808.521.2279

EXHIBIT 1

If you have any questions you contact our attorney, Yvonne Izu at 526-2888.

Very Truly Yours,



Peter Nicholas

Cc: Linda Chow, Deputy Attorney General
Lee Crowell, Deputy Attorney General (DHHL)
Alan Murakami, NHLC
Jon Van Dyke (OHA)
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COMMISSION ON WATER RESOURCE MANAGEMENT

STATE OF HAWAI'I

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Original and seven (7) copies of Intervenors Caparida and Kuahuia's Response to the March 2016 Minute Order Regarding the Potential Dismissal of the Contested Case was duly served on the following by electronic mail and hand delivery on March 24, 2016.

Department of Land and Natural Resources
Commission on Water Resources Management
Attn: Kathy Yoda
1151 Punchbowl St., Room 227
Honolulu, HI 96813
Email: kathy.s.yoda@hawaii.gov

The undersigned hereby certifies that a copy of the foregoing document was served upon the following parties by U.S. Mail, postage prepaid, to their last known address:

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

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