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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
Originally Filed by Kukui (Molokai), Inc.,
Now Refiled as a New Ground Water Use by
Molokai Public Utilities, LLC

Case No. CCH-MO-97-01

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

Hearing

Date: April 19, 2016

Time: 1:00 p.m.

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

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

I. MPU Abandoned Its Claims On Remand

In arguing that the KMI contested case should be continued, Molokai Public Utilities (MPU) ignores its own conduct regarding the remand from the Hawaii Supreme Court. To the extent that it can be considered a proper successor in interest to KMI, MPU affirmatively abandoned its claims on remand through its May 27, 2008 letter to the Commission on Water Resource Management (Commission).¹ The contested case should have ended at that time.

Instead, the Commission chose to incorporate MPU's application for new uses into the KMI contested case and apparently intends to add the County of Maui Department of Water Supply as a party. In doing so, it appears that the Commission is trying to follow two incompatible courses of action: (1) consider MPU's new application and the old and out of date permit applications from DHHL and MDWS along the public comment track required for all water use permit applications, and (2) make a determination on the MPU, DHHL, and MDWS applications in the context of the existing contested case. It is unclear how the Commission intends to do both of these things, especially since there has been no request for a contested case with respect to DHHL's or MDWS' permit applications.

The Commission should do what it should have done in 2008 when MPU abandoned its claims on remand: dismiss the existing contested case and consider the various water use permit applications as it normally would. This would allow the public to have input on the various applications while preserving the rights of the applicants (and other interested parties) to request contested case hearings if they are aggrieved by the Commission's ultimate decisions.

¹ It is not clear to DHHL how MPU came to be a party to this contested case in the first place. The Commission did not issue an order substituting MPU for KMI's interest in the case, nor has MPU asked it to do so.

II. The Evidence And Testimony In The KMI Contested Case Are Obsolete

Aside from the practical problems of continuing the existing contested case with the addition of the DHHL and MDWS permit applications, the evidence and testimony presented to the Commission back in the late 1990s is of little utility today. As discussed in DHHL's initial brief, MPU's new application differs significantly from the application submitted by KMI in 1993. The amount of water requested is different, the proposed uses are different, and the standard under which the Commission must scrutinize MPU's application is much more stringent than that applied to KMI's application. Most of KMI's application concerned existing uses, which is subject to the relatively lax "reasonable-beneficial" standard. The entirety of MPU's application, on the other hand, must be reviewed under the far more stringent standard for new uses. This alone necessitates all new evidence and testimony for the Commission's consideration. It makes little sense to bog down the Commission in the morass of existing evidence that is no longer relevant to MPU's application.

In addition, the parties' understanding of the Kualapu'u Aquifer will be greatly enhanced by the upcoming United States Geological Survey's model. The Commission was forced to confess ignorance of many of the effects that pumping from Well 17 will have on the aquifer and the nearshore environment when it considered KMI's application. The USGS model will finally allow the parties and the Commission to understand how pumping from any given existing well will affect other existing wells, proposed wells, the health of the aquifer, and the discharge of water to the nearshore environment. This information will be invaluable in considering the various applications and will render much of the evidence presented in the KMI contested case irrelevant.

III. DHHL and MDWS Would Be Prejudiced By A Contested Case Incorporating The Old Record

MPU argues that dismissing this contested case would “deprive the Commission of the extensive record that has already been developed” and would require relitigation of “dozens of findings and conclusions that were made in the Final Decision and Order and left undisturbed on appeal.” Given the Commission’s apparent desire to incorporate DHHL’s and MDWS’ water use permit applications into this contested case, maintaining all of the existing evidence and testimony would substantially prejudice both DHHL and MDWS.²

Incorporating DHHL’s permit application into the existing contested case poses a serious evidentiary concern. The original contested case’s scope was limited to consideration of KMI’s permit application, and DHHL intervened from the perspective of protecting its 2.905 million gallon per day reservation in the Kualapu‘u Aquifer. The evidence and testimony presented by DHHL related solely to how KMI had not met its burden under HRS §§ 174C-49 and 50.

Now, however, the Commission has indicated that it may expand the contested case to include consideration of DHHL’s and MDWS’ old permit applications. This means that DHHL will need to approach the contested case from a much different perspective, one that seeks to protect its reservation in the Kualapu‘u Aquifer from both MPU’s and MDWS’ requests for water, as well as fights for DHHL’s right to water allocation under its own permit application. While DHHL has the ability to introduce new evidence to support its position, it has a very

² The Commission’s October 30, 2015 Minute Order Setting Status Conference asked the parties to brief the Commission on the possible addition of MDWS to the existing contested case. No such briefing was asked of the parties concerning DHHL’s own water use permit application. DHHL can only assume that the Commission intends to include DHHL’s own permit application in this contested case proceeding.

limited ability to cross-examine witnesses that testified in the original contested case.³ Had DHHL's permit application been the subject of the original contested case, it would have undoubtedly approached the case from a different angle and would have asked different questions of both its own witnesses and KMI's witnesses. Many of those witnesses are now either unavailable or cannot be meaningfully cross-examined because of the length of time that has passed since their testimony was taken.

Like DHHL, MDWS will be at a significant disadvantage in this contested case (assuming it is made a valid party) because it did not have any opportunity to cross-examine witnesses in the original contested case or present rebuttal witnesses and evidence. MDWS will have to live with a record that it did not help to develop in any way. This is not an appropriate way to run a contested case. If the Commission wishes to consider all three water use permit applications, it should dismiss this contested case, allow the public comment portion to proceed, and take up a new contested case if and when one is requested by the applicants or other interested parties.

IV. Conclusion

It is in the best interest of all parties, including the Commission, to consider the various water use permit applications as is required under the Water Code and start a new contested case if and when one is requested in order to build a complete record based on the best information available today. Incorporating DHHL's and MDWS' permit applications into the existing contested case with the existing record would substantially prejudice both parties because they

³ HRS § 91-10 gives each party to a contested case the right to cross-examine witnesses "as may be required for a full and true disclosure of the facts..." and the right to submit rebuttal evidence.

will not have an opportunity to fully cross-examine witnesses who testified in the original contested case.

DATED: Honolulu, Hawai'i, April 7, 2016.



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CERTIFICATE OF SERVICE

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I certify that a copy of the foregoing document was served upon the following parties on
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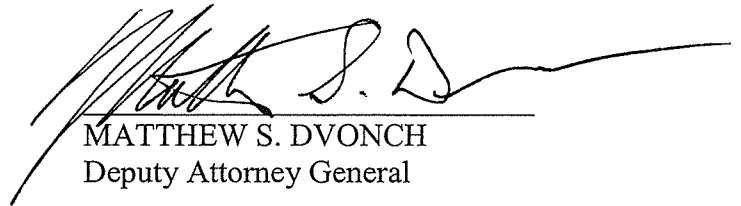
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DATED: Honolulu, Hawai'i, April 7, 2016.



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