

2016 APR -7 AM 9:21

DAVID KIMO FRANKEL 5791
DAVID KEITH KAUILA KOPPER 9374

NATIVE HAWAIIAN LEGAL CORPORATION
1164 Bishop Street, Suite 1205
Honolulu, Hawaii 96813
Telephone: (808) 521-2302

Attorneys for Intervenors Judy Caparida and Georgina Kuahuia

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.¹) INTERVENORS CAPARIDA AND
) KUAHUIA'S RESPONSE TO MOLOKAI
) PUBLIC UTILITIES LLC'S BRIEF;
) CERTIFICATE OF SERVICE

INTERVENORS CAPARIDA AND KUAHUIA'S RESPONSE TO MOLOKAI PUBLIC
UTILITIES LLC'S BRIEF

Intervenors Caparida and Kuahuia object to the brief filed by Moloka'i Public Utilities, LLC (MPU). It is not a party to this case and therefore has absolutely no right to file anything – or even appear on April 7 in this contested case proceeding. The applicant in **this** contested case hearing is Kaluakoi Land LLC (KLLLC), formerly Kukui (Moloka'i) Inc. (KMI). *See 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).² KLLLC could have responded to the Commission's minute order; MPU cannot.

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.

² Although Caparida and Kuahuia agree with the statement filed by the County of Maui Department of Water Supply, the County of Maui Department of Water Supply is also **not** a party to this contested case proceeding. The commission has not granted it intervenor status. It has no right to file anything in this contested case.

The Department of Hawaiian Home Lands and the Office of Hawaiian Affairs have provided this commission sound reasons for dismissing this contested case:

- (1) KMI failed to respond to this commission's February 25, 2008 minute order.
- (2) On May 27, 2008 MPU and Molokai Properties Limited (MPL) wrote a letter stating that MPU does not intend to pursue this case on remand. In so doing, MPL and MPU affirmatively abandoned the permit application.
- (3) MPU failed to serve any of the copies of its recent applications to any of the parties to this contested case hearing – demonstrating that the new application(s) are not part of the existing contested case proceeding.
- (4) The 1993 permit application is separate and distinct from the new permit application;
- (5) The legal criteria for evaluating KMI's 1993 application are different than the criteria for evaluating MPU's 2014 application.
- (6) Events subsequent to 1999 have rendered the old factual findings obsolete (including new rainfall data, abandoned uses, climate change and new studies).
- (7) New parties wish to be involved in the issues raised by the 2014 application (including, apparently Maui County).
- (8) The applicant still has not complied with HRS chapter 343.

In short, KMI's 1993 ground water use permit application is moot.

MPU – which is not a party to this contested case – argues that the Hawai'i Supreme Court's 2007 decision mandates that the contested case hearing conducted more than a decade ago remain open. MPU is wrong.

First, MPU abandoned and waived its right to a remanded contested case hearing when it

sent its May 27, 2008 letter and when the applicant failed to respond to this commission's February 25, 2008 minute order. Thus, regardless of what MPU thinks the Supreme Court ordered, its actions have made the old proceeding moot.

Second, MPU misreads the Hawai'i Supreme Court's decision. The Supreme Court did **not** say:

If, 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 and the new application shall be considered a part of this current contested case.

The Supreme Court did not order "further proceedings on a new use application" as MPU falsely claims. Neither did the Supreme Court order that the commission keep the contested case hearing open for nine years while the applicant ignores the commission's minute order and a new applicant disavows any interest in the proceeding. The Supreme Court was instead clear that a **new application** be filed, which necessarily results in new proceedings.

Third, no one asked that the proceedings in *Waiāhole* be dismissed.

Fourth, the situation in this case is nothing like what took place in the *Waiāhole* cases. The fundamental error committed in this case was the commission's treatment of the application as an existing use instead of a new use – subject to different legal standards. The *Waiāhole* cases did not involve new uses and did not involve applying completely different legal criteria on remand to a completely new application 15 years after the original contested case hearing.

Fifth, MPU does not understand the term "remand." A remanded proceeding can be quite short – terminating the proceeding as occurred after the Hawai'i Supreme Court remanded for further proceedings in the cases challenging: (1) SHPD's and the City's violation of HRS chapter 6E for the rail project, *Kaleikini v. Yoshioka*, 128 Hawai'i 53, 283 P.3d 60 (2012); (2) BLNR's granting of a conservation district use permit before holding a contested case hearing, *Kilakila 'O*

Haleakala v. Bd. of Land & Natural Res., 131 Hawai`i 193, 206, 317 P.3d 27, 40 (2013); and (3) the Hawai`i county planning commission's granting of a special management area use permit for Nansay's development at Kohanaiki, *Pub. Access Shoreline Haw. v. Hawai'i Cnty. Planning Comm'n*, 79 Hawai`i 425, 903 P.2d 1246 (1995). The remanded contested case here reconvened in 2008. But that proceeding is now pau.

Finally, MPU would suffer no prejudice whatsoever if the 1993 application along with the commission's findings and conclusions are dismissed, and the contested case is terminated. MPU's new application will be treated de novo, as a new application. If the commission does not do so, however, the intervenors and other members of the public would be greatly prejudiced. Intervenors Caparida and Kuahuia ask that the Commission to deny the application submitted two decades ago, vacate the commission's findings, and officially dismiss this contested case.

Dated: Honolulu, Hawai`i, April 7, 2016



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

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.,) CERTIFICATE OF SERVICE
)
)
_____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Original and seven (7) copies of Intervenor's Caparida and Kuahuia's Response to Moloka'i Public Utilities LLC's Brief was duly served on the following by electronic mail and hand delivery on April 7, 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:

LINDA L. W. CHOW
Department of the Attorney General
465 S. King Street
Honolulu, Hawai'i 96813
Attorney for Commission on Water Resource Management

ERNEST KIMOTO
KOALANI L. KAULUKUKUI
Office of Hawaiian Affairs
560 N. Nimitz Highway
Honolulu, Hawai'i 96817
Attorney for Office of Hawaiian Affairs

DAVID SCHULMEISTER
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813
Attorney for Moloka'i Public Utilities, LLC

PATRICK WONG
JENNIFER OANA
Department of the Corporation Counsel
200 High Street
Wailuku, Hawai'i 96793
Attorney for the County of Maui, Department of ter Supply

DIANE TAIRA
MATTHEW DVONCH
Department of the Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
Attorney for the Department of Hawaiian Home Lands

SHERRY P. BRODER
500 Ala Moana Boulevard, Suite 400
Honolulu, Hawai'i 96813

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



DAVID KIMO FRANKEL
DAVID KAUILA KOPPER
Attorneys for Intervenors
Judy Caparida and Georgina Kuahuia